Copyright User Rights and Access to Justice Symposium

May 18-19 2017

University of Windsor
Faculty of Law

Freed Orman Centre
400 Huron Church Road
Windsor, ON N9C 2J9

(entrance located on North end of Assumption Hall)

Conference Synopsis

In *CCH Canadian Ltd. v Law Society of Upper Canada*, 2004 SCC 13, the Supreme Court of Canada stated that exceptions to copyright infringement such as fair dealing are "user rights". More than a decade later, where do we stand in Canada and elsewhere with respect to copyright user rights? What is the nature of copyright user rights and why does it matter? What does a historical perspective on copyright law and policy bring to our understanding of user rights? How may the law respond to constant technological changes as they redefine the rules of engagement between copyright holders, users and the public? Does the copyright regulatory framework give rise to access to justice constraints for copyright users that deserve particular attention? What remedies do users have against copyright holders and their distributors blocking their access to lawful uses of copyright works?

This conference will approach these issues from an international, multi-jurisdictional and interdisciplinary perspective, through copyright theory, as well as human rights, property, contracts, remedies, social justice and access to justice theories, ask how international conventions address (or fail to address) the rights and interests of users; how historically, copyright law and policy were tied to access to learning and what light might this shed on the present; the extent to which copyright law facilitates or hampers its most commonly stated objective to incent the creation and dissemination of copyright works, particularly in a world of digitized works and locks; and what remedies or reform need to be put in place.

CONFERENCE AGENDA

Thursday May 18, 2017

9:00-9:15 am: **Registration**

9:30 am: **Introductory Remarks**

9:45 am: **The evolution of copyright user rights**
David Vaver, Emeritus Professor of Intellectual Property & Information Technology Law, University of Oxford, Emeritus Fellow of St Peter's College, Oxford, and former Director of the Oxford Intellectual Property Research Centre, Osgoode Hall Law School (Canada)

10:15 am: **Break**

10:30 am: **Panel I Critical Approaches to Copyright User Rights**

Carys Craig, Associate Dean (Research & Institutional Relations), Associate Professor, Osgoode Hall Law School, **"Relying on (User) Rights-Talk: On Copyright Limits and Rhetorical Risks."**

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

Ariel Katz, Associate Professor, Innovation Chair – Electronic Commerce Faculty of Law, University of Toronto, **"On the Partial (In)Alienability of Users' Rights"**

12:30-1:45 pm **Lunch**

1:45 pm **Panel II: Copyright User Rights and Access to Knowledge**

Myra Tawfik, Professor, University of Windsor, Faculty of Law (Canada), **"Encouraging Literacy and Learning: The 'Learner' at the Origins of Copyright Law in Canada"**

Ruth Okediji, William L. Prosser Professor of Law, University of Minnesota (US), **"Fair Use and its Institutions - Towards a Theory of Access to Knowledge"**

Arul Scaria, Assistant Professor of Law, National Law University, Delhi and Co-Director Centre for Innovation, IP and Competition, **"Photocopy Shop Judgment: An Attempt to Strike a Balance between the Rights of Users and Producers of Knowledge Goods?"**

3:15-3:30pm **Break**

3:30 pm **Bita Amani,** Associate Professor, Queen's University and **Mark Swartz,** Copyright Specialist, Queen's University, **"Cultivating Copyright Custodians for the Digital Age: Law, Libraries, & the Public Interest in Lending (Obsolete Formats)"**

Uchenna Felicia Ugwu, PhD Student, University of Ottawa, **"Reconciling the Right to Learn with Copyright Protection in the Digital Age: Limitations of Contemporary Copyright Treaties"**

5:00 pm **End of sessions**

6:30pm **Cocktail and dinner-**
Wilistead Manor, 1899 Niagara St, Windsor, ON N8Y 1K3

Friday May 19, 2017

10:00 am **Panel III: Copyright User Rights and Human Rights**

Saleh Al-Sharieh, Postdoctoral Researcher, University of Groningen, **"Securing the Future of Users' Rights in Canada"**

Amy Lai, PhD Candidate, University of British Columbia, **"The Natural Right to Parody: Assessing the Parody/Satire Exceptions in Canadian Copyright Law'**

Meera Nair, Copyright Officer, Northern Alberta Institute of Technology, "**Fair dealing: equal under the law and inviolate in contract"**

12:00-1:15pm	**Lunch**
1:15 pm	**Panel IV Copyright User Rights, Enforcement and Reparation**
	Séverine Dusollier, Professor, SciencesPo, Ecole de Droit (France) **"Users' rights in copyright as inclusive rights: a model for enforceability and sustainability of privileged uses of works"**
	Pascale Chapdelaine, Associate Professor, University of Windsor, Faculty of Law, **"Copyright Users: Rights without Remedies?"**
2:45 pm	**Concluding remarks**
3:00pm	**Conference ends**

ABSTRACTS

Al Sareh, Saleh, Postdoctoral Researcher, University of Groningen, **"Securing the Future of Users' Rights in Canada"**

In *Théberge v Galerie d'Art du Petit Champlain Inc*,[1] the Supreme Court of Canada (SCC) reinterpreted the purpose of the Copyright Act.[2] Writing for the majority of the Court, Justice Binnie held that "[t]he Copyright Act is usually presented as 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 ..."[3] After *Théberge*, the SCC released decisions affirming balance as a purpose of the Copyright Act and elaborating its elements.[4] Accordingly, in *CCH*, it held that "fair dealing exception, like other exceptions in the Copyright Act , is a user's right."[5] The concept of "users' rights" does not appear in the Copyright Act, Berne Convention, or TRIPS. Instead, the SCC reasoned its new approach to fair dealing, and other copyright exceptions, on the ground that users' rights are necessary to "maintain the proper balance"[6] under the Copyright Act.

The future of users' rights in Canada is uncertain: they are still copyright infringement exceptions in the Copyright Act even after an amendment to the Copyright Act subsequent to *CCH*. Moreover, although courts have often invoked the balance metaphor to convey legitimacy on the process and outcome of their adjudication on human rights and freedoms, invoking balance as a justification of users' rights comes with the shortcomings associated with this metaphor.[7] Furthermore, after *CCH*, there have been, and will be, attempts to convince the SCC to reconsider its approach to users' rights in Canada. Therefore, the purpose of this submission is to unfold the human rights nature of users' rights.

The enjoyment of arts and the benefits of science is intrinsic to human dignity. Article 27(1) of the Universal Declaration of Human Rights[8] proclaims that "[e]veryone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits". Similarly, article 15(1) of the International Covenant on

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[1] [2002] 2 S.C.R. 336 [*Théberge*].

[2] The first interpretation of the purpose of the Copyright Act was in *Bishop v. Stevens*, [1990] 2 S.C.R. 467.

[3] *Théberge*, para.30.

[4] E.g. *CCH Canadian Ltd. v Law Society of Upper Canada*, 2004 SCC 13 (*CCH*); *Euro-Excellence Inc. v Kraft Canada Inc.*, 2007 SCC 37, [2007] 3 SCR 20; *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36; *Robertson v Thomson Corp*, 2006 SCC 43; *Alberta (Education) v Canadian Copyright Licensing Agency* 2012 SCC 37.

[5] *CCH*, para 48.

[6] *CCH*, para 48.

[7] See e.g. Paul W. Kahn, "The Court, the Community and the Judicial Balance: The Jurisprudence of Justice Powell" (1987) 97 Yale LJ 1; Ronald Dworkin, "The Threat to Patriotism", New York Review of Books 49:3 (28 February 2002) 44.

[8] Universal Declaration of Human Rights, GA Res 217 (III), UNGAOR, 3d Sess, UN Doc A/810 (1948) (UDHR).

Economic, Social and Cultural Rights[9] recognizes everyone's right: "a. [t]o take part in cultural life; b. [t]o enjoy the benefits of scientific progress and its applications." Examining the drafting history of these two articles and relevant interpretations by international human rights law bodies, the submission will argue that: First, framing copyright exceptions as users' rights derives its support from the human right to culture: the human right to culture entitles individuals to access, use, and share culture including intellectual works protected by copyright. Second, the human right to culture is limited by authors' moral and material interests in international human rights law, which do not necessarily coincide with copyright. The importance and weight of users' rights in culture, arts, and science must not be measured by the extent to which they trump or are trumped by authors' moral and material interests. Both sets of rights are indivisible, interdependent, interrelated, and mutually enforcing. Hence, copyright law and judicial interpretation must give due weight to this inherent coexistence.

Amani, Bita, Associate Professor, Queen's University and **Mark Swartz,** Copyright Specialist, Queen's University, **"Cultivating Copyright Custodians for the Digital Age: Law, Libraries, & the Public Interest in Lending (Obsolete Formats)"**

In 2004, the Supreme Court of Canada famously decided that the provision for fair dealing in Canada was not simply a defence to a claim of copyright infringement but an integral and constitutive part of the Canadian regulatory landscape as provided for by federal copyright legislation. *CCH*[10] has since become ubiquitous as the authority for users' rights in Canada. It is typically cited for two main propositions arising from the Supreme Court of Canada's pronouncements in the case: the test for originality and the six factors for determining whether dealing for an allowable purposes is in fact fair. Seldom is it emphasized that *CCH* Contrary to any inclination towards conflation, the interests of authors and owners are not always aligned and so part of the purpose of this paper is to consider how works come to be obsolete and the historical role of libraries, also knowledge intermediaries, in provision of access to works that may (and often did given publication costs) become obsolete. Early libraries had an archival function. A more recent history shows that libraries have enjoyed a privileged and sacrosanct role in society, acting as a third party intermediary between creative works and consumers of such works, generally as a public good. To this end, we begin by exploring the historical role of libraries and the history of the special status that libraries, archives, and museums hold in the Canadian Copyright Act. Libraries have long served as custodians of knowledge and information goods, providing access to such goods and thereby, effectively, encouraging engagement in community.

We proceed to examine how technological and social shifts have put the traditional custodial role of libraries under increasing strain and the implications this has on their core mandate. Shifts in technology are always disruptive to business models and law's established relations. Technological changes have resulted in both rapid shifts in formats and in legal relations: holdings have given way to electronic subscriptions, property to licence, and collections to co-

[9] International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3, Can TS 1976 No 46.

[10] CCH Canadian Ltd. *v.* Law Society of Upper Canada, [2004] 1 S.C.R. 339, 2004 SCC 13.

ordinated archives, seeking to preserve the relics of a prior age before digital and digitization. In these changing times, the role of the library and librarians has been up for renegotiation and redefinition, by society and even the institutions that house them. In this paper, we will explore what is a significant, if only temporary, problem in the evolution of libraries as they transition to meet the market demands of the digital age. We argue that the role of the library remains, in its essence, the same. We examine the Canadian Copyright Act to assess the legal treatment of lending obsolete formats which, we will argue, (pre)serves the public interest, and demands necessary and coordinated strategies amongst libraries to be given effect as part of their mandate, advancing their role as historical information intermediaries and custodians of copyright works (as artefacts) for the digital age. After considering the potential proliferation of obsolete formats, its implications for library holdings and lending practices, this paper's analysis comes to rest with the law, and the invitation it continues to offer for cultivating copyright custodians.

was significantly a *library use* case. That a library use case would raise public interest considerations significantly shaping the outcome of legal interpretation for fair dealing, the most inclusive provision for user rights captured in the Canadian Copyright Act,[11] may be expected. It seems not to have attracted too extensive a scrutiny in its subsequent treatments, however. Yet, this has served users well in so far as it has allowed the scope of fair dealing to dynamically evolve in Canadian law into more than a robust exception that a reading narrowed and encumbered by the specific facts might otherwise allow for, particularly in a commercial use case. Commercial use remains an issue that often attracts a significant degree of contention because there are divergent stakeholder interests in the determination of whether dealing traverses the threshold of what's fair. CCH tells us that the "s. 29 fair dealing exception is always available. Simply put, a library can always attempt to prove that its dealings with a copyrighted work are fair under s. 29 of the *Copyright Act*."[12] Indeed, "[i]t is only if a library were unable to make out the fair dealing exception…that it would need to turn to s.30.2 of the *Copyright Act* to prove that it qualified for the library exception." That a library related case was critical in the development of user rights in Canada also highlights the important and special role that libraries continue to hold in the law and in our society as stewards of the public interest in access to knowledge and knowledge goods.

In this paper, we dedicate our examination and treatment to the library exception in order to explore its potentiality for the digital age, independent of the fair dealing provisions. In examining the statutory allowances made for libraries within the *Act*, we give particular attention to the provision for obsolete formats set out in paragraph 30.1(c) of the *Copyright Act* as we see the challenge of obsolete formats as one likely to proliferate in the short term, even while possibly extinguishing itself in the long run. Copyright owners are, effectively, information intermediaries; they can exert considerable, if not exclusive, control on users' access to information and content by controlling the material form of the expressive work.

[11] R.S.C. 1985, c. C-42.

[12] Ibid, para 49.

Craig, Carys, Associate Dean (Research & Institutional Relations), Associate Professor, Osgoode Hall Law School, **"Relying on (User) Rights-Talk: On Copyright Limits and Rhetorical Risks."**

There exists, within copyright law, a great deal of confusion about the legal ontology of copyright "limits," "exceptions," "exemptions," "defenses," and "user rights." How we conceptualize the "privileges" or "freedoms" of users to engage with copyright protected works has a direct bearing on how we define the scope of those lawful uses and their availability: an exception to an established right may be narrowly drawn as a matter of principle; the burden of making out a defence may be placed squarely on the shoulders of the defendant; the privilege to use may be subject to specific and onerous conditions; the right to use, presumably, may be enforced against others who would encroach upon it, including the rights-bearing copyright owner. With this in mind, it has become increasingly common for public interest and public domain advocates to articulate the need for copyright limits, exceptions and defenses in terms that evoke the user's "right" to use a protected work or elements of it. To date, the language of "users' rights" has found its greatest endorsement in Canada, where the Supreme Court has repeatedly affirmed that fair dealing and other copyright exceptions are "users' rights," and must be interpreted and applied as such. While fair use in the US courts remains stubbornly situated as an affirmative defense, US scholars, activists and even judges have argued that it is better understood as a right of the user. In Israel, meanwhile, the Supreme Court initially rejected the argument that the new statutory fair use defense was a "user right," but has since described permitted uses as "rights" granted to the user. At the international level, the language of copyright "limits and exceptions" persists, but developments such as the Marrakesh Treaty and, more broadly, the Access to Knowledge movement, reflect efforts to push copyright exceptions into the realm of (human) rights. I have argued elsewhere that broader freedoms for users and stricter limits to the reach of copyright are essential to copyright's purpose—and so to its legitimacy. If the language of "user rights" can expand exceptions and constrain the copyright owner's control, surely it must be embraced as a political tool to ballast the public interest. I have also argued, however, against the prevalence of "rights rhetoric" in the copyright context, which has been wielded throughout copyright's history to expand the scope of the owner's control, and to relegate the public interest to a secondary concern. My paper explores this tension: how can we employ the rhetorical wrapping of "user rights" to advance a public interest vision of the copyright system while hoping to resist or unsettle a rights-based paradigm for copyright per se? I warn that there is a risk to embracing "user rights" without problematizing the traditional conception of "right" in the copyright context. The individualizing and obfuscatory role of right-based reasoning has the potential to obstruct the public interests, social values and relationships that should inform copyright's development in the digital age. The concept of "user rights", then, is a double-edged sword that must be wielded carefully if public interest advocates are to avoid self-inflicted injury.

Chapdelaine, Pascale, Associate Professor, University of Windsor, Faculty of Law, **"Copyright Users: Rights without Remedies?"**

This paper highlights the lack if not absence of remedies users have to assert their claims against restrictive uses imposed by copyright holders on copyright works, a void that has been largely overlooked by the copyright literature. It discusses some of the root causes that may explain this important gap in the law and the access to justice issues that the absence of copyright user remedies engenders. The paper maps out what copyright user remedies could look like, while

suggesting tools to deal with an ever technological environment that alters how copyright users interact with copyright works. The paper paves the way toward a greater substantiation of the Supreme Court of Canada's pronouncement in *CCH Canadian Ltd. v Law Society of Upper Canada*, 2004 SCC 13 that: "User rights are not just loopholes. Both owner rights and user rights should therefore be given the fair and balanced reading that befits remedial legislation." (citing Professor David Vaver).

Dusollier, Séverine, Professor, Sciences Po, Ecole de Droit (France), **"Users' rights in copyright as inclusive rights: a model for enforceability and sustainability of privileged uses of works"**

Despite the recent discourses on the necessary balances in copyright law, a prominent role is still given to the property right of the copyright owners, users' rights or privileges being only considered as exceptions or limitations to that principle. That follows the central role property assumes in our legal regimes, and the key rule of exclusivity that characterizes property and intellectual property. Exclusivity is defined as the power to exclude others from the use of a resource and to individually control its use. For there is not counterpart to exclusivity in our legal regimes, no legal concept is apt to describe situations of 'inclusivity' where a resource is collectively shared and no one has the power to exclude others from its use. Users' rights in copyright are a perfect example of so-defined inclusive situations lacking any enforceability or legal remedies, failing a legal concept of inclusive right. This paper proposes a new legal figure of inclusive right and applies it to three situations of users' rights in copyright: (1) copyright exceptions, (2) the right of the public to use public domain works, (3) the right of the licensees in copyleft licenses. In those three case studies, the objective of the 'inclusive right' would be to endow the entitlement of the user to benefit from the work with enforceability and legal remedies enabling the sustainability of the use.

Katz, Ariel, Associate Professor, Innovation Chair – Electronic Commerce
Faculty of Law, University of Toronto, **"On the Partial (In)Alienability of Users' Rights"**

Copyright law is often presented as a "carefully balanced scheme"[13] 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".[14]

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.

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[13] 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.

[14] 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.

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.

Lai, Amy, PhD Candidate, University of British Columbia, **"The Natural Right to Parody: Assessing the Parody/Satire Exceptions in Canadian Copyright Law'**

Do the New Parody/Satire Exceptions in Canada's Copyright Modernization Act adequately protect users' right to freedom of expression while stimulating innovation in the creative sector? My paper, which will be taken from a condensed version of a chapter of my on-going dissertation, will consists of two parts. The first part will take a philosophical approach to the right to parody. By drawing upon John Locke and Emmanuel Kant, it will argue that not only copyright, but the right to create parodies out of copyrighted works is a natural, universal right. Moreover, by emphasizing the priority of speech rights over property rights, it will also argue that parodies should be broadly defined to include both "target" parodies and "weapon" parodies and encompass works that target the originals and those that comment on something or someone else. Accordingly, in considering whether a parodic work is fair and legal, the most determinative factor should be whether it competes with the original work by serving as its substitute in the market.

The second part of the paper will consists of legal analysis. It will assess the new parody/satire exceptions in Canada's copyright law, which seems to indicate that satirical works will easily pass the fair dealing analysis in Canadian courts. To date there have been no cases testing this law, and such optimism is understandable. The paper will nonetheless argue that a broadened, adequately defined parody exception that includes both "target" and "weapon" parodies is preferable to the dual parody/satire exceptions. Because neither parody nor satire is defined in the statute, Canadian courts will likely reference American court decisions in defining them, considering that they have done so in ruling on numerous copyright claims. Yet American courts have adhered to a parody/satire dichotomy and usually do not consider works falling in the "satire" category to be fair use. Although parody and satire are both fair dealing exceptions, Canadian courts may be influenced by American decisions and treat "satire" as inferior to

"parody". At the second stage of the fair dealing analysis, courts therefore may determine that works that fall in the "satire" category but would not otherwise compete with the original work in the market do not pass the second stage of fair dealing analysis. Two of the fair dealing factors - amount of the use and alternatives to the use – may facilitate this reasoning. As a result, many valuable works will be suppressed. To lessen this risk and to safeguard the users' right to freedom of expression, a broadened parody exception is preferable to the current parody/satire exceptions.

Nair, Meera, Copyright Officer, Northern Alberta Institute of Technology, **"Fair dealing; equal under the law and inviolate in contract"**

Over the past fifteen years, decisions of Courts and actions of the Federal Government have brought in a series of modest changes to the system of copyright in Canada. These incremental steps have coalesced into the achievement of a definitive position: that to support its underlying purpose, copyright is, and must necessarily remain, a set of limited rights. Such an achievement is simultaneously over and underwhelming. In a world governed by the perception that copyright is absolute, it is no small accomplishment to consistently articulate the legitimacy of curbing copyright's claim to sweeping powers. At the same time, a bare statement of fact seems hardly worthy of plaudits.

Despite the enviable recognition from above, implementation of user rights remains hampered by lack of support from below. A particularly thorny issue is whether a facet of copyright's limits, namely the realm of exceptions which accompany the grant of copyright, may be set aside through a contractual agreement between two parties? Proponents of the sanctity of contract immediately and vehemently argue, *yes*. In reality, most questions pertaining to law must first be answered as, *it depends*. Facts and circumstances are germane to the validity of any proposition.

Copyright is accepted without question as a right; fair dealing has been acknowledged as having that same stature through our highest court's designation of fair dealing as a user's right. Yet begrudging token acceptance, or continued dismissal,[15] is a still-too-frequent reaction to the dialogue of user rights. The impediment to unreserved recognition of user rights appears to be the uncomfortable realization that by extending rights to include fair dealing, copyright loses its supremacy. A reaction that might feel familiar to every minority group which has sought to: (i) be granted the same stature as that of the ruling majority; and (ii) be treated with equal respect thereafter. As an academic exercise, is there a connection between Canada's particular history of equality rights and fair dealing? And if so, how might past discussion of the expansion of equality rights in Canada inform the co-existence of fair dealing and copyright?

With an eye to forestall confusion as to the aim of this paper, it must be emphasized that this author is not stating that copyright or user right has the stature of a constitutionally protected right. Nor does she suggest that the challenges felt by those caught within the copyright /user right debate are in any way on par with past and present diminishment of people suffering from

[15] For example, "In the leading case, *CCH Canadian v. Law Society of Upper Canada* [citation omitted], fair dealing ceased to be a mere defence and was newly deemed by the SCC to be a 'user right' — whatever that means;" see Richard Owen, "How to really support Canadian culture: Heritage and the copyright brief," (July 2016) *Commentary*, MacDonald-Laurier Institute online: <http://www.macdonaldlaurier.ca/files/pdf/MLICommentaryOwens_web.pdf>.

discrimination by gender, ethnicity or identity. What is sought is a mode of analysis with which to develop a productive co-existence of copyright and user right.

Exploration begins in Section II through broad consideration of the apolitical purpose of copyright, shaped as that is by a subtle yet pervasive theme of multiculturalism that has come to be prized in Canadian culture.[16] The section concludes with the pre-eminence of the public domain, and the role of exceptions towards maximizing the public domain. Section III looks to alternative conceptions of ownership and property that better suit the communal nature of the public domain. In particular, the perspective of First Nations' people, where ownership is construed through the relationships of belonging and sharing, is more apropos than the impersonal, alienability framework of Western property law.

Some may question the wisdom of this choice of perspective; arguably, the challenges that First Nations people continue to face with respect to asserting control and use of their landed domains illustrate that the aboriginal paradigm of ownership as belonging is not well received. Nevertheless, there is merit to recognizing that aboriginal approaches to property have more in common with the creative process than the Western ideals of solitary genius and alienable property rights.

Drawing from prior Supreme Court explorations of aboriginal rights, Section IV proposes a model of analysis to determine how either copyright or user right may be limited, when the two are in conflict. (That rights are limited should come as no surprise to Canadians, what is necessary is a means to determine when one right must give way to another.) With model in hand, the author evaluates an imagined dispute between contractual terms governing use of resources and application of fair dealing, to the conclusion that fair dealing must take priority.

Okediji, Ruth, William L. Prosser Professor of Law, University of Minnesota (US)
"Fair Use and its Institutions - Towards a Theory of Access to Knowledge"

The paper will explore the implications of the growing role limitations and exceptions in international copyright law, exploring in particular the normative impact of the distribution right in the digital copyright space. While limitations to the reproduction right appear largely settled, the distribution right has only recently become the focus of policy and legal action, particularly in the digital arena. My paper explores the incipient jurisprudence of the distribution right and highlights its significant role in mediating access to knowledge in a global economy. The paper then suggests some prospects for reform of the scope of the distribution right in light of recent emphasis on distributive justice in international copyright law.

Scaria, Arul, Assistant Professor of Law, National Law University, Delhi and Co-Director Centre for Innovation, IP and Competition, **"Photocopy Shop Judgment: An Attempt to Strike a Balance between the Rights of Users and Producers of Knowledge Goods?"**

[16] Raymond Williams described *culture* as one of the most complicated words in the English language; "… a culture is not only a body of intellectual and imaginative work; it is also and essentially a whole way of life." Raymond Williams, *Culture and Society* (Hammondsworth: Penguin, 1968) at 312.

Preparation and dissemination of course packs have been subject to copyright litigation in many jurisdictions. The decision of the High Court of Delhi in the Chancellor, Masters & Scholars of the University of Oxford & others v. Rameshwari Photocopy Services and another is one of the most recent and important decisions in this area. This judgment is resulting from a litigation initiated in the year 2012 by some of the major publishers like Oxford University Press and Cambridge University Press. According to those publishers, their rights under copyright law have been violated by University of Delhi and a small scale photocopy service operating within the premises of the University. The photocopy service in question has been selling to students course packs based on syllabi prescribed by the University. Some of those course packs had extracts from books published by the publishers who initiated the litigation. According to the publishers, apart from providing space on campus for the photocopy service, University libraries were also issuing books to the photocopy service for preparing those course packs, thereby contributing to infringement. The single bench of the High Court has ruled in favour of the University and the photocopy service, clarifying that there was no copyright infringement in the activities questioned by the publishers, in view of the educational use exception under Indian copyright law. The judgment has been appealed before the division bench of the High Court. This paper aims to explore two important questions in this context – first, whether the judgment of the single bench of the High Court is in tune with the rights and exceptions provided Indian copyright law; and second, whether the Court has attempted to strike a balance between the rights of users and producers of knowledge goods through this judgment? While the paper explores the issue of balance in the context of copyright law in India, it will be analysing the approaches taken in other jurisdictions and the relevant international treaties, particularly the question of compliance with the threestep test provided under Berne Convention and TRIPS Agreement.

Tarantino, Bob, 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.

Tawfik, Myra, Professor, University of Windsor, Faculty of Law (Canada)**, "Encouraging Literacy and Learning: The 'Learner' at the Origins of Copyright Law in Canada"**

In pre-confederation Canada, copyright was tied to education policy and therefore to the 'learner'. Raising literacy levels and encouraging learning were at the heart of stated legislative policy. Indeed, access to affordable didactic books remained an integral part of Canadian copyright policy throughout the 19th century. This paper will provide a critical assessment of the law's impact on 'learners' as the first copyright 'users'. It will study this question from a multidisciplinary perspective, tying my research to the scholarship of book history in relation to the impact of copyright on readers and the reading public. The records demonstrate that copyright law was only ever an imperfect means to this greater public policy end. Can the historical record offer any insights upon which to critically assess current domestic and international copyright laws and practices in relation to user rights and the interests of the 'learner'?

Ugwu, Uchenna Felicia, PhD Student, University of Ottawa **"Reconciling the Right to Learn with Copyright Protection in the Digital Age: Limitations of Contemporary Copyright Treaties"**

Currently, the world is in an information era, where a lot of information is made available on the internet, through digital databases and by means of information and communication technologies (ICT). In a digital age, ensuring access to such technologies plays an essential role in achieving the human right to learn, as is acknowledged in various international regulations. Yet, because access to technology is also subject to exclusive intellectual property rights (IPRs) like copyrights, such rights may hinder access to technological knowledge and the right to learn. However, making content available is insufficient; content must be made available in an accessible, affordable manner that can be utilized for effectively advancing human rights.

In attaining the right to learn, it will be important to identify how to balance IPRs and the human right to learn, in such a manner as to ensure minimum interference with access to knowledge. For example the use of Open Source software to ensure access to digital educational material and the right to learn must be reconciled with the existence of digital right management (DRM). One of the legal instruments important in effecting such balancing is the institution of limitations and exceptions to the exclusive rights of copyright owners, within trade and intellectual property (IP) related regulations.

This paper analyses issues in the following steps: Firstly, a review of previous literature is conducted, to understand the importance of exceptions to copyright in facilitating access to knowledge, and the human right to learn. Secondly, doctrinal examination will be made of the

provisions of contemporary international IP treaties, specifically the WTO-TRIPS Agreement, the WIPO Copyright treaty, and the Berne Convention, the WCT and the WPPT; to identify the exceptions they provide for the human right to learn. Thirdly, critical analysis will be made of the scope, limitations, overlaps and effectiveness of these exceptions, to identify how suitable they are for advancing access to digital learning materials, especially amongst the poor and neediest. Suggestions are then made as to how countries can advance the right to learn, by fully utilizing such exceptions, without contravening the limits of IP law. Relevant jurisprudence in which such exceptions have been considered will also be reviewed.