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.