

Copyright User Rights and Access to Justice  
University of Windsor, May 2017

# Globalizing User Rights-Talk: Of Copyright Limits and Rhetorical Risks



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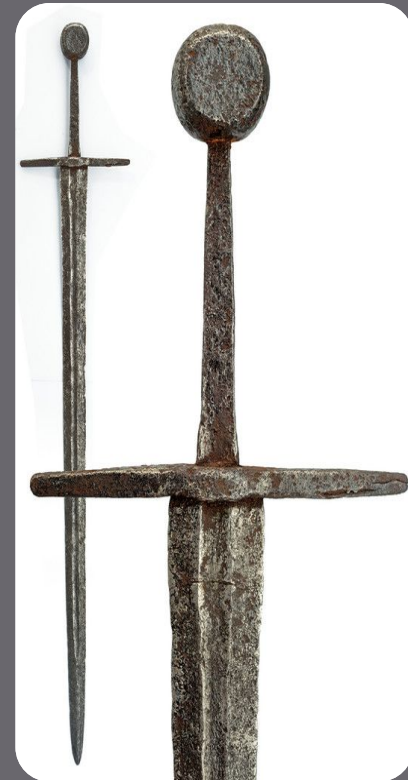
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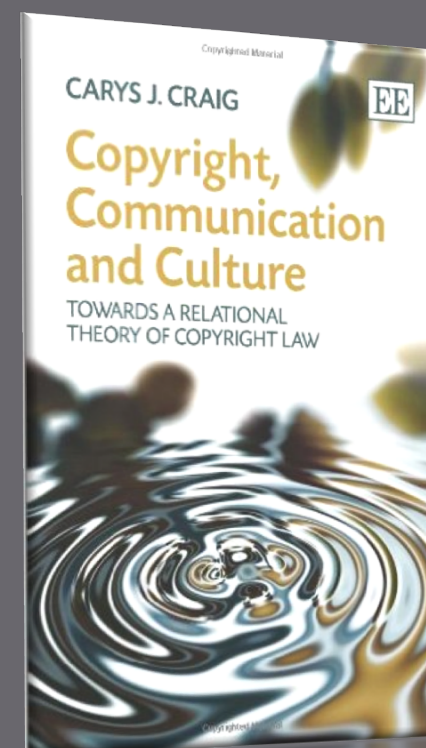
The concept of “user rights” is a double-edged sword that must be wielded carefully if public interest advocates are to avoid self-inflicted injury.



When copyright is cast in natural or individualistic rights-based terms:

“The inevitable result is the widening of copyright protection and the undermining of the public interest...

- Copyright attaches to an ever-increasing pool of ‘creations’;...
- Defences to infringement are given increasingly restrictive interpretations.”

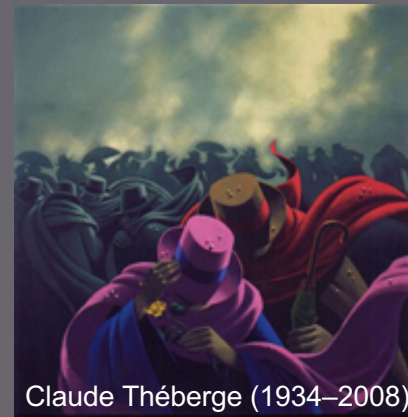




# *Théberge v. Galerie d'Art du Petit Champlain Inc., 2002 SCC*



- Copyright law should achieve “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.”
- “The proper balance ... lies not only in recognizing the creator’s rights but in giving due weight to their limited nature.”



Claude Théberge (1934–2008)



# The public interest in the proper utilization of works

“Excessive control by holders of copyrights may unduly limit the ability of the public domain to incorporate and embellish creative innovation in the long-term interest of society as a whole, or create practical obstacles to proper utilization.”



Claude Théberge  
(1934–2008)



# The Role of Fair Dealing

**CCH (SCC):** “[T]he FD exception, like other exceptions in the CRA, is a user’s right. In order to maintain the proper balance..., it must not be interpreted restrictively. As Professor Vaver has explained, ‘User rights are not just loopholes. Both owner rights and user rights should therefore be given the fair and balanced reading the befits remedial legislation’.”





“Under s. 29 of the Copyright Act, fair dealing for the purpose of research or private study does not infringe copyright. ‘Research’ must be given a large and liberal interpretation in order to *ensure that users’ rights are not unduly constrained.*”

# Court Affirms “User Rights”

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- *Alberta v Access Copyright*: “[F]air dealing is a “user’s right”, and the relevant perspective...is that of the user.”
- *Bell v SOCAN*: “This is consistent with the Court’s approach in *CCH*, where it described fair dealing as a ‘user’s right.’”
- Reference re Broadcasting (SCC 2012): [The CR Act] provides **user rights such as fair dealing** that enable the general public to access protected material.”





# The Significance of Semantics

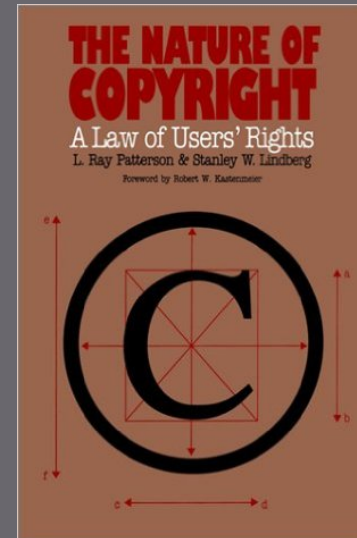
- Confusion about the legal ontology of copyright “limits,” “exceptions,” “exemptions,” “defenses,” “user rights.”
- How we conceptualize the “privileges” or “freedoms” of users to engage with copyright protected works has a direct bearing on how we define those lawful uses with respect to:
  - Availability; Scope; Burden of Proof; Conditionality; Effectiveness, etc.



# User Rights in the US

- Patterson & Lindberg's 1991 book: CR as “a law of users' rights” based on interrelation with the First Amendment.
- Bateman v. Mnemonics 1996, Birch J:
  - “Although the traditional approach is to view ‘fair use’ as an affirmative defense...it is better viewed as a right granted by the Copyright Act of 1976.

Suntrust Bank v. Houghton (2001): “Fair use should be considered an affirmative *right*.”



# Lenz v Universal Music

“Given that §107 expressly authorizes fair use, labeling it as an affirmative defense that excuses conduct is a misnomer”.

Because §107 both empowers” and “formally approves” the use of copyrighted material if the use constitutes fair use, fair use is “authorized by the law...” See §108(f)(4) (“Nothing in this section in any way affects the *right* of fair use as provided by section 107.”)



BIG WIN FOR FAIR USE

# User Rights in Israel

- *Football Association Premier League Ltd.v. John Doe* (2009): Justice Agmon-Gonen's judgment endorsed view that (US-based) fair use was now a "user's right".
- On appeal (2012), Supreme Court explicitly rejected user rights approach – simply a defence.
- In *Telran Ltd. V. Charlton Comm.* (2013) Permitted use constitutes a “right” that is granted to the user.
- Reaffirmed in [Safecom v Raviv](#) (2013)



# Australian Productivity Commission Report

## Key Points:

### A fairer system of user rights:

- Introducing the principles–based fair use exception as Australia’s system of user rights, would go some way to redress the imbalance between copyright holders, consumers and intermediate users.



# The Need for “User Rights”

- “The growing significance of users in the creative ecosystem...raise[s] the need to develop a user-rights approach to copyright law [which should be] understood in the context of civil liberties.” (Niva Elkin-Koren)
- “In light of international developments involving copyright holders’ rights, it seems very important to ensure that the rights of users are clearly internationally enshrined as well.” (Margaret Ann Wilkison)



But...

Is there a price to pay  
for repackaging the  
public interest in the  
rhetorical wrapping of  
“user rights”?

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# What's Wrong with Rights?

- Rights as Trumps
- Rights as Baselines
- Rights as Weights on a Scale

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# “What’s wrong with rights?”



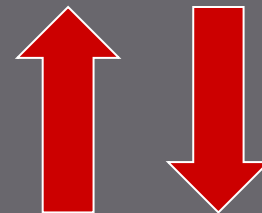
## METAPHORICAL BALANCING ACTS

Owners,  
creators

Users,  
the public

Commensurate  
Weights  
to be Traded Off

= ZERO SUM



# The Politics of Balancing

[O]nce the case requires a balancing of conflicting rights claims, it is implausible that it is the rights themselves, rather than the 'subjective' or 'political' commitments of the judges, that are deciding the outcome.



Duncan Kennedy

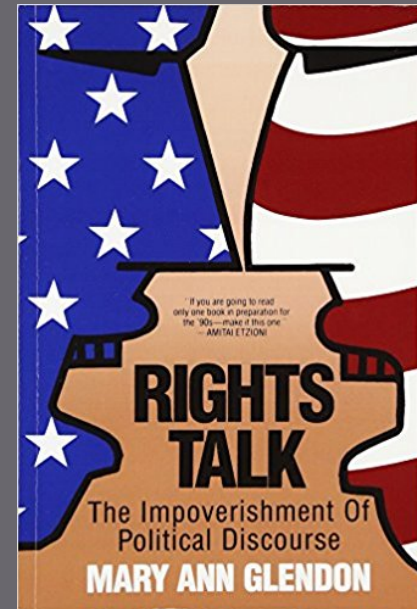


# Rights-Talk

## The Impoverishment of Political Discourse



“Just as our stark rights vocabulary receives subtle amplification from its encoded image of the lone rights-bearer, our weak vocabulary of responsibility is rendered fainter still by our underdeveloped notion of human sociality.”

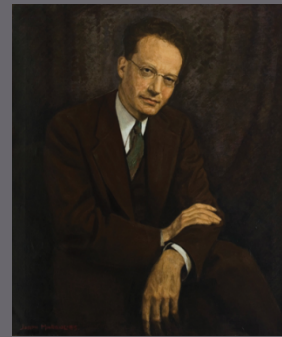


Mary Ann Glendon



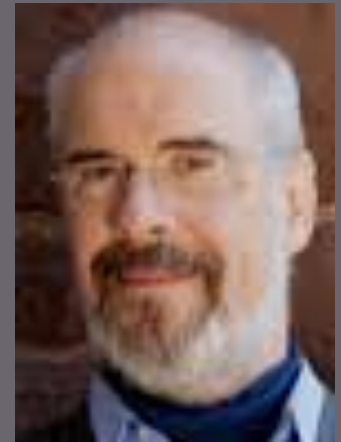
# The Realists' Politics of Law

- “There will be a right if, and only if, the court finds for the plaintiff... What the court cites as the *reason* for the decision—the existence of a right—is, in fact, only the result.” (Mensch)
- “Legal arguments couched in these terms are necessarily circular since they are themselves creations of law”  
(Felix Cohen, *Transcendental Nonsense & the Functional Approach*)



# The CLS Critique of Rights

- “Rights-based political discourse presuppose[s] a basic distinction between rights argument and other kinds of normative argument. The point of an appeal to a right...is that it *can't be reduced* to a mere ‘value judgment’ that one outcome is better than another. ...Rights reasoning, in short, allows you to be right about your value judgments.”



Duncan Kennedy,  
*The Critique of  
Rights in CLS*

# Positive Group Identity (Users)

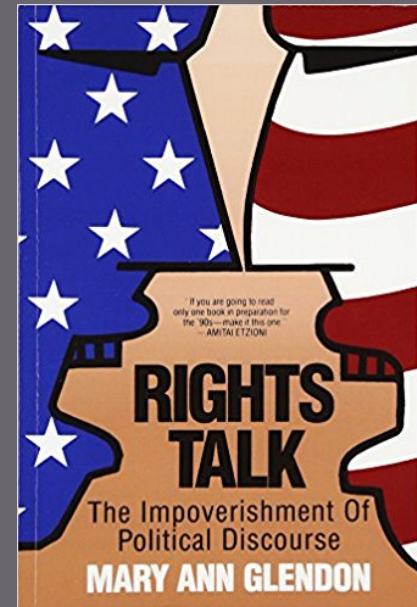


“When groups are in the process of formation, coming to see themselves as having something in common that is a positive rather than a negative identity, the language of rights provides a flexible vehicle for formulating interests and demands. New groups can enter the discourse of American politics with the expectation that they will at least be understood...”

# Rights-Talk (Glendon)

- “Mere assertion over reason-giving”
- “Impoverishment of political discourse”
- “Illusion of absoluteness”
- “Present-mindedness”

→ “Our rights talk... in its relentless individualism, fosters a climate that is inhospitable to society’s losers, and systematically disadvantages [certain people and groups]”

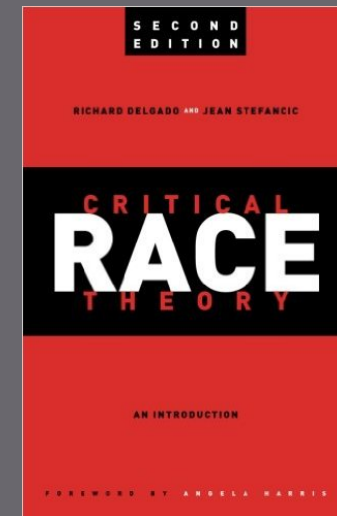




# CRT's Suspicion of Rights

Particularly some of the older, more radical CRT scholars...believe that moral and legal rights are apt to do the right holder much less good than we like to think. In our system, rights are almost always procedural rather than substantive. Moreover, rights are said to be alienating. They separate people from each other rather than encouraging them to form close, respectful communities.”

Delgado & Stefancic



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[The critique of liberalism] raises the possibility that the 'rights' 'won'...are only chimeras, partial makeshift concessions whose principal function is to preserve the intellectual as well as social stability of the dominant order.”



Robert A. Williams Jr. *Taking Rights Aggressively*

# A Feminist Critique of the Critique

“Rights discourse...may mislead, seduce, falsely console, or wrongly inflame.  
...Yet, I wonder sometimes who I am helping and who I am hurting by criticizing rights. It turns out to be helpful, useful, and maybe even essential to be able to couch a request as a claim of rights... There is something too valuable in the aspiration of rights...to abandon the rhetoric of rights.”



Martha Minow

# CRT Critique of the Critique

“Rights have been important. They may have legitimated racial inequality, but they have also been the means by which oppressed groups have secured entry as formal equals into the dominant order....

...Challenges and demands made from outside the institutional logic would have accomplished little.”



Kimberley  
Crenshaw

# CRT Critique of the Critique

- “[R]ights’ real instability...does not render unusable their persona of stability.”
- The “vocabulary of rights” speaks to the establishment that holds the keys to social change—change that can be argued for “in the sheep’s clothing” of rights.



Patricia Williams



# Strength in the Tension

“Williams suggests that African American ambivalence about legal rights led not to paralysis but to alchemy: the transformation of a society. Williams' account suggests two aspirations for a contemporary jurisprudence of reconstruction: *sophistication and disenchantment.*”

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### Foreword: The Jurisprudence of Reconstruction



Angela P. Harris†





# In the copyright context...

- Users and the public—whose needs and interests have historically been marginalized in the face of owners' individual rights claims—may perceive and acknowledge the inherent flaws of rights-based reasoning in copyright while nonetheless seeking to identify and enforce countervailing rights.



# Refining Copyright's Rights Rhetoric?

Sophistication + Disenchantment = ?

1. Reject rights rhetoric; re-prioritize the “public interest” and copyright’s social goals/values;
2. Just assert “rights” anyway – don the mask;
3. Refine our rights rhetoric, adding in ideas of responsibility, sociality, teleology  
(Re-imagining rights in relational terms)

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