

5-30-2018

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Pascale Chapdelaine  
*University of Windsor*

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## Recommended Citation

Chapdelaine, Pascale. (2018). Copyright User Rights and Access to Justice (Introduction). *Windsor Yearbook of Access to Justice*, 35, 1-10.

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## Copyright User Rights and Access to Justice

Pascale Chapdelaine\*

What are copyright user rights? And what insights may an access to justice perspective bring to our understanding of their nature, place in current law and policy, and beyond? These were the main themes of the Symposium hosted by the Faculty of Law at the University of Windsor on May 18 and 19, 2017.<sup>1</sup> The Symposium gathered faculty, post-doctoral and doctoral students, and members of the broader academic and legal community from around the world.

Copyright user rights have gained increased attention in the last decades in copyright law literature worldwide.<sup>2</sup> In Canada, there has been a greater focus on the rights of users of copyright works since the 2004 judgement *CCH Canadian Ltd. v Law Society of Upper Canada*, [CCH],<sup>3</sup> where the Supreme Court held that exceptions to copyright infringement were not mere loopholes in the *Copyright Act*,<sup>4</sup> they were “user rights.”<sup>5</sup>

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\* Associate Professor, Faculty of Law at the University of Windsor.

<sup>1</sup> University of Windsor Faculty of Law, “Copyright User Rights and Access to Justice Symposium” (18-19 May 2017) conference agenda and abstract, online: <<http://www.uwindsor.ca/law/754/conference-copyright-user-rights>>.

<sup>2</sup> See e.g. L Ray Patterson & Stanley W Lindberg, *The Nature of Copyright: A Law of Users' Rights* (Athens, GA: University of Georgia Press, 1991); Joseph P Liu, “Copyright Law’s Theory of the Consumer” (2003) 44 Boston College L Rev 397; Julie E Cohen, “The Place of the User in Copyright Law” (2005) 74 Fordham L Rev 347; Robert Burrell & Allison Coleman, *Copyright Exceptions: The Digital Impact* (Cambridge, UK: Cambridge University Press, 2005); Joseph P. Liu, ‘Enabling Copyright Consumers’ (2007) 22 BTLJ 1099; P Bernt Hugenholtz, & Ruth L Okediji, “Conceiving an International Instrument on Limitations and Exceptions to Copyright” (6 May 2008), online: Open Society Foundation <<http://www.opensocietyfoundations.org/reports/conceiving-international-instrument-limitations-and-exceptions-copyright>>; Niva Elkin-Koren “The New Frontiers of User Rights” (2016) 32 Am U Int’l L Rev 1; Niva Elkin-Koren, “Copyright in a Digital Ecosystem, a User Rights Approach” in RL Okediji, ed, *Copyright Law in an Age of Limitations and Exceptions* (New York: Cambridge University Press, 2017) 132.

<sup>3</sup> 2004 SCC 13 [CCH].

<sup>4</sup> RSC, 1985, c C-42.admin

<sup>5</sup> *CCH*, *ibid* at para 48. See e.g. Daniel Gervais, “Canadian Copyright Law Post-CCH” (2004) 18 IPJ 131; Myra J Tawfik, “International Copyright Law and Fair Dealing as a User Right” (April-June 2005) UNESCO Copyright Bulletin, online: <[http://portal.unesco.org/culture/en/ev.phpURL\\_ID=27422&URL\\_DO=DO\\_TOPIC&-URL\\_SECTION=201.html](http://portal.unesco.org/culture/en/ev.phpURL_ID=27422&URL_DO=DO_TOPIC&-URL_SECTION=201.html)>; Myra J Tawfik, “International Copyright Law: W[h]ither User Rights?” in Michael Geist, ed, *In the Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005) 66; Abraham Drassinower “Taking User Rights Seriously”, in Geist, *ibid* 462 ; Theresa Scassa, “Users’ Rights in the Balance: Recent Developments in Copyright law at the Supreme Court of Canada” (2005) 22 CIPR 133; Carys J Craig, “The Changing Face of Fair Dealing in Canadian Copyright Law: A Proposal for Legislative Reform”, in Geist, *Public Interest*, *supra* note 6, 437; Giuseppina D’Agostino, “Healing Fair Dealing? A Comparative Copyright Analysis of Canadian Fair Dealing to UK Fair Dealing and US Fair Use” (2008) 53 McGill LJ 309 at 357; Carys Craig, *Copyright, Communication and Culture, Towards a Relational Theory of Copyright Law* (Cheltenham, UK: Edward Elgar, 2011) at 155-202, in particular at 168, 170-174, 179; Ariel Katz, “Fair Use 2.0: The Rebirth of Fair Dealing in Canada” in Michael Geist, ed, *The Copyright Pentology, How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (Ottawa: University of Ottawa Press, 2013) at 93; David Vaver, “Copyright Defenses as User Rights” (2013) 60:4 J Copyright Soc’y USA 661. Pascale

To some commentators, this made Canada the champion of the “rights of users to balance copyright.”<sup>6</sup>

Perhaps not surprisingly especially given the Supreme Court of Canada characterization of the matter, “copyright users’ rights” are mostly understood as exceptions to copyright infringement as found for the most part in copyright law statutes (e.g., fair dealing or fair use, exception for educational institutions, etc.). The papers presented at the Symposium generally reflect that view of copyright users’ rights.<sup>7</sup> What tends to be neglected in the discussion of user rights are the entitlements of users resulting from their personal property rights in the copy of a copyright work they own, or increasingly, their contractual rights to access copyright works through a service.<sup>8</sup> Thus copyright user rights comprise personal property, contract rights, exceptions to copyright infringement and the complex interaction between the three.<sup>9</sup>

What has also been less explicit in the academic literature is the interaction between the rights of users to copyright works and broader questions of access to justice, the latter having been one of the institutional pillars of research and teaching of Windsor Law since its creation in 1968. It is at this juncture of Canada’s unique position on the rights of users in copyright law, and Windsor Law’s particular attention to access to justice and transnationalism, that scholars met in the Canada-US border city of Windsor in May 2017, to imagine what the future of copyright user rights should be.

The present issue of *The Windsor Yearbook of Access to Justice / Recueil annuel de Windsor d’accès à la justice [WYAJ/RAWAJ]* contains three selected pieces by Saleh Al-Sharieh,<sup>10</sup> Amy Lai,<sup>11</sup> and Bob Tarantino<sup>12</sup> that were presented at the Symposium. Before introducing these three works and their contribution to the literature on copyright user rights and access to justice, it is worthwhile to situate these pieces within the broader themes that were discussed at the Symposium.

In an introductory discussion with David Vaver,<sup>13</sup> whom I humorously presented as the “father” of copyright user rights in Canada (the Supreme Court having cited Vaver’s work when it declared in *CCH* that exceptions to copyright infringement are “users’ rights”),<sup>14</sup> Vaver was quick to respond that he viewed himself more as a “midwife” who nurtured the concept of copyright user rights along to ensure that it

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Chapdelaine, “The Ambiguous Nature of Copyright Users’ Rights” (2013) 26 IPJ 1 [Chapdelaine, “Ambiguous Nature”]; Myra Tawfik, “The Supreme Court of Canada and the ‘Fair Dealing Trilogy’: Elaborating a doctrine of User Rights under Canadian Copyright Law” (2013) 51 Alb L Rev 191; Pascale Chapdelaine, *Copyright User Rights, Contracts, and the Erosion of Property* (Oxford University Press, 2017) [Chapdelaine, *Copyright User Rights*]; Carys J Craig “Globalizing User Rights-Talk: on Copyright Limits and Rhetorical Risks” (2017) 33 Am U Intl L Rev 1 [Craig, “Globalizing”]; Michael Geist, “The Canadian Copyright Story: How Canada Improbably Became the World Leader on Users’ Rights in Copyright Law” in Okediji, *supra* note 2, 169.

<sup>6</sup> See D’Agostino, *ibid* at 357.

<sup>7</sup> See *infra*, on the discussion of each paper presented at the Symposium.

<sup>8</sup> See Chapdelaine, *Copyright User Rights*, *supra* note 5 at 13-32.

<sup>9</sup> *Ibid*.

<sup>10</sup> Saleh Al-Sharieh, “Securing the Future of Copyright Users’ Rights in Canada”, (2018) 35 Windsor YB Access Just 11.

<sup>11</sup> Amy Lai, “The Natural Right to Parody: Assessing the (Potential) Parody/Satire Dichotomies in American and Canadian Copyright Laws” (2018) 35 Windsor YB Access Just 69.

<sup>12</sup> Bob Tarantino, “Calvinball: Users’ Rights, Public Choice Theory and Rules Mutable Game” (2018) 35 Windsor YB Access Just 40.

<sup>13</sup> Professor, Osgoode Hall Law School, Emeritus Professor of Intellectual Property & Information Technology Law, University of Oxford, Emeritus Fellow of St Peter’s College Oxford.

<sup>14</sup> *CCH*, *supra* note 3, para 48.

thrived.<sup>15</sup> Vaver emphasized how the language of “rights” when referring to copyright user entitlements is important. For instance, any attempt to strike a balance between owners’ rights and users’ entitlements inevitably tilts in favour of copyright owners if what they are set against are mere user “indulgences” or “exceptions to copyright infringement.”<sup>16</sup>

For some time, Vaver thought the reference to user entitlements as “exceptions” was somewhat odd. For him, it was important to rectify what he viewed as an appropriation of language in the copyright owners’ camp that distorted what copyright law is all about.<sup>17</sup> For Vaver, there is indeed no point for the law to secure “authors’ rights” without duly taking into account the recipients to whom authors communicate their works. Thus to equip those recipients with “rights” (which have several meanings beyond property entitlements as they are ascribed to copyright owners) is to depict copyright in a way that is closer to its true nature.<sup>18</sup>

Carys Craig<sup>19</sup> further set the stage by warning us against user rights rhetoric with respect to copyright users, as it tends to narrow the focus to copyright holders and user entitlements.<sup>20</sup> For Craig, rights talk is potentially “inhospitable to the very consideration that ought to inform copyright law” by missing out on the broader dimension of social creativity, culture and a vibrant public domain.<sup>21</sup> At the same time, Craig recognized the intrinsic power of the language of rights as possibly enabling social change for the benefit of users of copyright works.<sup>22</sup>

Meera Nair<sup>23</sup> explored a somewhat provocative idea: i.e., whether a comparison with the evolution of equality rights and Aboriginal claims under the Canadian constitution, could provide analytical tools to help mediate the competing interests of copyright holders and users (such as when copyright holders’ contract terms conflict with exceptions to copyright infringement, concluding that the latter should prevail).<sup>24</sup> In doing so, Nair did not go as far as stating that copyright or fair dealing (as a user right) have the stature of constitutionally protected rights.

Several papers presented at the Symposium made a closer rapprochement between copyright user rights and human rights, and also international development, including two pieces published in this issue of the WYAJ/RWJ that will be discussed further below.<sup>25</sup> Among this group, some of the presenters looked at user rights from the perspective of access to knowledge, education, and social and economic development.

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<sup>15</sup> David Vaver, “The Evolution of Copyright User Rights, Q&A with Professor David Vaver” (18 May 2017) online: University of Windsor <<http://www.lteclab.com/evolution-copyright-user-rights-q-professor-david-vaver/>>.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*

<sup>19</sup> Associate Dean (Research & Institutional Relations), and Associate Professor at Osgoode Hall Law School.

<sup>20</sup> Craig, “Globalizing”, *supra* note 5.

<sup>21</sup> *Ibid* at 62-64, 69,73.

<sup>22</sup> *Ibid.*

<sup>23</sup> Copyright Officer, Northern Alberta Institute of Technology.

<sup>24</sup> Meera Nair, “Fair dealing; equal under the law and inviolate in contract”, U. of Windsor Faculty of Law, *supra* note 1.

<sup>25</sup> Al-Sharieh, *supra* note 10; Lai, *supra* note 11.

Ruth Okediji<sup>26</sup> discussed how current international copyright law is misaligned with the enabling conditions for economic development, in particular the need to increase access to knowledge.<sup>27</sup> Okediji invited us to rethink limitations and exceptions to copyright infringement, for instance, by introducing an exception to copyright infringement for educational institutions at the international level, while strengthening existing limitations and exceptions that promote the public interest.<sup>28</sup> In a similar vein, Uchenna Felicia Ugwu<sup>29</sup> discussed existing shortcomings in current international copyright treaties to advance the human right to education.<sup>30</sup> Ugwu proposed ways by which developing countries could take fuller advantage of the flexibilities found in intellectual property international conventions to better serve the human right to learn, with particular attention to the digital environment.

Pursuing the theme of access to knowledge and education, Arul Scaria<sup>31</sup> explored the ramifications of the decision of the High Court of Delhi in *Chancellor, Masters & Scholars of the University of Oxford & others v. Rameshwari Photocopy Services*.<sup>32</sup> In that judgment, the High Court held that the photocopy service activity of selling to students course packs based on syllabi prescribed by the University (with extracts from books published by the publishers) and the University practice of bringing books to the photocopy service for preparing those course packs, did not infringe the copyrights of the publishers. The Court held that such practices fell within the educational use exception under Indian copyright law. Scaria took an international and multijurisdictional approach to query whether that decision is in tune with the rights and exceptions in Indian copyright law and the extent to which the Court sought to strike a balance between the rights of users and producers of knowledge goods through this judgment.

Myra J. Tawfik<sup>33</sup> offered an historical perspective on access to knowledge and copyright law that brought us back to pre-Confederation Canada.<sup>34</sup> Tawfik explained how copyright was tied to education policy and 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.”<sup>35</sup> Yet Tawfik’s research during this period has led her to observe the limits of copyright law toward achieving this greater public policy end. For instance, there is no evidence of a growth in the variety and availability of locally authored schoolbooks (or other books for that matter). To the extent there was growth, it seemed to have been more directly tied to education policy

<sup>26</sup> Jeremiah Smith Jr, Professor of Law at Harvard Law School and Co-Director of the Berkman Klein Center.

<sup>27</sup> Ruth Okediji, “Reframing International Copyright Limitations and Exceptions as Development Policy”, University of Windsor Faculty of Law, *supra* note 1.

<sup>28</sup> See *ibid* at 429.

<sup>29</sup> Ph.D. Candidate, University of Ottawa, Faculty of Law.

<sup>30</sup> Uchenna Felicia Ugwu, “Reconciling the Right to Learn with Copyright Protection in the Digital Age: Limitations of Contemporary Copyright Treaties”, University of Windsor Faculty of Law, *supra* note 1.

<sup>31</sup> Assistant Professor of Law and Co-Director of the Centre for Innovation, Intellectual Property and Competition (CIIPC), National Law University, Delhi.

<sup>32</sup> [2016] RFA(OS) 81/2016, *The Chancellor, Masters & Scholars of University of Oxford and Ors vs Rameshwari Photocopy Services & Ors*; Arul Scaria, “Photocopy Shop Judgment: An Attempt to Strike a Balance between the Rights of Users and Producers of Knowledge Goods?”, University of Windsor Faculty of Law, *supra* note 1.

<sup>33</sup> EPICentre Professor of Intellectual Property Commercialization and Strategy, Faculty of Law at University of Windsor.

<sup>34</sup> Myra J Tawfik, “Encouraging Literacy and Learning: The ‘Learner’ at the Origins of Copyright Law in Canada”, University of Windsor Faculty of Law, *supra* note 1.

<sup>35</sup> *Ibid*.

rather than copyright.<sup>36</sup> Tawfik asked whether we could gain any insights from the historical record and apply them to current copyright law and policy as it relates to the interests of the ‘learner’.

Bitá Amani<sup>37</sup> and Mark Swartz<sup>38</sup> looked at how libraries and archives have held historically a special status in the *Copyright Act*, as custodians of and access providers to knowledge and information goods.<sup>39</sup> As new technologies impact on the dissemination and retention of works (holdings giving way to electronic subscriptions, personal property to licences, and collections to coordinated archives), the role of libraries and archives is up for renegotiation and redefinition.<sup>40</sup> Amani and Swartz argued that the historic role of libraries and archives remains unchanged. In that light, they explored the specific exceptions to copyright infringement in the *Copyright Act* that relate to libraries and archives, and in particular the one relating to obsolete formats.<sup>41</sup> Amani and Swartz described how a broader interpretation of this and other exceptions to copyright infringement of libraries and archives beyond user rights associated with the preservation of works, was critical to maintain the crucial role of libraries and archives. We must continue to allow libraries and archives to act as information intermediaries and as enablers of the dissemination of knowledge and culture.<sup>42</sup>

Other presenters focused on the private law aspects of copyright, including the relationship between copyright law and contracts, and the remedies copyright users may have against copyright holders’ restraining uses they reasonably expect they could make. Ariel Katz<sup>43</sup> reminded us that the question whether contract terms may override exceptions to copyright infringement when the copyright statute is silent is unsettled.<sup>44</sup> Rather than treating exceptions as inalienable or alienable, Katz invited us to consider the third alternative of partial (in)alienability as a more satisfactory solution to mediate between competing rights and interests of copyright holders and users. It may be justified in some cases to allow for the private reordering of exceptions to copyright infringement between copyright holders and users, while the same should be prohibited in others as expanding copyright holders’ rights beyond what copyright law justifies.<sup>45</sup> In the latter case, Katz queried whether contractual restraints should be merely unenforceable or whether there should be other consequences or remedies against copyright holders seeking to enforce these restrictions on copyright user freedoms.

Two speakers, including myself, mused about the remedies (or lack thereof) that copyright users might have against copyright holders restricting seemingly legitimate uses of copyright works. Séverine Dusollier<sup>46</sup> astutely observed that in spite of willingness and discourse to balance competing interests in copyright law, users will keep running up against copyright holders’ stronghold of property rights which

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<sup>36</sup> *Ibid.*

<sup>37</sup> Associate Professor, Faculty of Law Queen’s University.

<sup>38</sup> Copyright Specialist, Queen’s University Library.

<sup>39</sup> Bitá Amani & Mark Swartz, “Cultivating Copyright Custodians for the Digital Age: Law, Libraries, & the Public Interest in Lending (Obsolete Formats)”, University of Windsor Faculty of Law, *supra* note 1.

<sup>40</sup> *Ibid.*

<sup>41</sup> *Copyright Act*, *supra* note 4, s 30.1(1) (c).

<sup>42</sup> *Ibid.*

<sup>43</sup> Associate Professor, University of Toronto Faculty of Law, Innovation Chair in Electronic Commerce.

<sup>44</sup> Ariel Katz, “On the Partial (In)Alienability of Users’ Rights”, University of Windsor Faculty of Law, *supra* note 1.

<sup>45</sup> *Ibid.*

<sup>46</sup> Professor, Sciences Po, Ecole de droit.

in our current legal system is characterized by the power to exclude.<sup>47</sup> There is no equivalent legal concept for situations of inclusiveness for resources that are shared collectively where no one has the power to exclude others from their use.<sup>48</sup> Dusollier explained how users' rights in copyright are a perfect example of so-defined inclusive situations lacking any enforceability or legal remedies. Dusollier articulated how a novel concept of "inclusive right" might apply to copyright exceptions, the right to use public domain works, and the right of the licensees in copyleft licenses. The end goal of the "inclusive right" would be to empower the user with enforceability and legal remedies to preserve the legitimate use of the copyright work.

For my part, I asked what an access to justice perspective may bring to the current lack of remedies for copyright users when they are constrained in seemingly legitimate uses of copyright works.<sup>49</sup> There is some value in looking at remedies as one means to further elucidate the controversial nature and scope of copyright user rights. At the same time an access to justice perspective on rights and remedies suggests that such an approach may be too limitative when looking at the position of potential claimants in a legal system.<sup>50</sup> Access to justice invites us to look elsewhere, e.g. at substantive structural deficiencies of copyright user rights. I proposed an analytical framework towards achieving greater "justice for users" both in the realm of public law (e.g. ensuring copyright law compliance with fundamental rights, in particular freedom of expression) and private law (e.g. greater acknowledgement of personal property rights in copies of copyright works).<sup>51</sup>

Preoccupations around access to justice have evolved to encompass a broad range of issues. Long gone are the days when access to justice was primarily associated with allowing increased access to courts. In "Access to Justice in Canada Today: Scope, Scale and Ambitions," Roderick A. Macdonald identified and summarized five predominant "waves" of access to justice that reflect a move away from those narrower conceptions linking access to justice deficits to a lack of access to courts.<sup>52</sup> Among those waves, I opined that the third, fourth and fifth waves of access to justice were interesting ways to look at the deficiencies of copyright user rights. In particular, the third wave called "demystifying law" reflects on systematic processes and frameworks that perpetrate inequalities between various (minority) groups within society, and looks at societal norms that may impede taking action to correct a wrong.<sup>53</sup> This wave includes legal reform at the substantive level (e.g., family property law, child welfare).<sup>54</sup> Thus the weakness of copyright

<sup>47</sup> Séverine Dusollier "Users' rights in copyright as inclusive rights: a model for enforceability and sustainability of privileged uses of works", University of Windsor Faculty of Law, *supra* note 1.

<sup>48</sup> *Ibid.*

<sup>49</sup> See Pascale Chapdelaine, "Copyright Users: Rights without Remedies? an Access to Justice Perspective", University of Windsor Faculty of Law, *supra* note 1.

<sup>50</sup> *Ibid.*

<sup>51</sup> See Pascale Chapdelaine, "Copyright User Rights and Remedies an Access to Justice Perspective", forthcoming.

<sup>52</sup> Roderick A Macdonald, "Access to Justice in Canada Today: Scope, Scale and Ambitions", in Julia Bass, WA Bogart & FH Zemans, eds, *Access to Justice for a New Century – The Way Forward* (Toronto: Law Society of Upper Canada, 2005) 19.

<sup>53</sup> On the broader contextualization of the issues involved in access to justice, see Constance Backhouse, "What is Access to Justice" in Bass, Bogart & Zemans, *supra* note 55, 113. On how societal norms influence decisions to have wrong corrected and to take legal action, see David M Engle "The Oven Bird's Song: Insiders, Outsiders, and Personal Injuries in an American Community" (1984) 18 *Law & Soc'y Rev.* 551.

<sup>54</sup> Macdonald, *supra* note 52 at 21-22.

user remedies is both a symptom and consequence of the weakness of copyright user rights which cannot be fixed until we recognize stronger copyright user rights at a substantive level.<sup>55</sup>

Breaking access to justice into its components, “access” evokes approaching or entering, and accessibility includes the ability to influence.<sup>56</sup> “Justice” comprises fairness, and in the legal and political sphere it typically means the “exercise of authority and maintenance of rights.”<sup>57</sup> Fairness encompasses procedures, access and the substantive rules that define the exercise of authority.<sup>58</sup> A broader view toward improving access to justice beyond access to courts looks at “formal and informal justice mechanisms and improving the justice quality of daily life.”<sup>59</sup>

Seeking greater access to justice for copyright users is not about disregarding the rights of authors and copyright holders. It has more to do with reallocating privileges and powers among these groups in a way that is better aligned with copyright’s core declared instrumental objective to incent the creation and dissemination of works,<sup>60</sup> or in a US context, to “promote the progress of science and useful arts.”<sup>61</sup>

It is in the context of these Symposium discussions on copyright user rights and conceptions of access to justice briefly summarized here that three papers led to the three articles published in this issue of the WYAJ/RAWAJ. The three articles address copyright user rights from a broader public law and policy perspective (e.g. by looking at the legislative reform process, or the application of human rights to user rights), while not neglecting the private law dimension of copyright holders and user rights to copyright works (e.g. looking at the limitations that copyright, as property, imposes on user rights).

In “Securing the Future of Copyright Users’ Rights in Canada”, Saleh Al-Sharieh<sup>62</sup> raises doubt about the adequacy of the balancing act exercise between copyright holders’ and users’ rights and interests (an interpretative tool that has been applied by the Supreme Court of Canada) to properly safeguard exceptions to copyright infringement [Al-Sharieh, “Securing Copyright Users’ Rights”].<sup>63</sup> Al-Sharieh posits that international human rights offer a more coherent and convincing justification for the Supreme Court characterization of exceptions to copyright infringement as “user rights”<sup>64</sup> than the concept of

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<sup>55</sup> Chapdelaine, *supra* note 51.

<sup>56</sup> Yash Ghai & Jill Cottrell, “The rule of law and access to justice” in Y Ghai & J Cottrell *Marginalized Communities and Access to Justice* (New York: Routledge-Cavendish, 2010) 1 at 3.

<sup>57</sup> *Ibid.*

<sup>58</sup> *Ibid.* For a brief overview of different meanings access to justice, see: Lola Akin Ojelabi, “Improving Access to Justice Through Alternative Dispute Resolution: the Role of Community Legal Centres in Victoria, Australia” (Research Report, Faculty of Law and Management, La Trobe University, 2010) at 10-13.

<sup>59</sup> Australia, Attorney General Department, *Access to Justice Task force, A Strategic Framework for Access to Justice in the Federal Justice System*, (Attorney General Department, 2009) at 4.

<sup>60</sup> In the Canadian context, a leading judgment by the Supreme Court stating the objectives of copyright is *Théberge v Galerie d’art du petit Champlain Inc.*, 2002 SCC 34 at para 30.

<sup>61</sup> US Constitution, art 1 s 8 (conferring to Congress the power “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”).

<sup>62</sup> Senior Researcher and member of the Security, Technology and e-Privacy Research Group (STeP) at the University of Groningen Faculty of Law.

<sup>63</sup> Saleh Al-Sharieh, *supra* note 10.

<sup>64</sup> *CCH*, *supra* note 3 at para 48. The Supreme Court has reiterated that exceptions to copyright infringement are user rights in subsequent judgments: *Society of Composers Authors and Music Publishers of Canada v Bell Canada*, 2012 SCC 36 at para 11; *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37 at para 22;



balance. In doing so, Al-Sharieh refers to a specific aspect of user rights, i.e. statutory exceptions to copyright infringement, and seeks to demonstrate the public law/fundamental rights dimension that withstands their existence. This approach falls under the third wave of access to justice movement and literature - “demystification of law”, by arguing that greater justice for copyright users will be achieved by substantiating their stature through fundamental rights.<sup>65</sup>

In “The Natural Right to Parody: Assessing the (Potential) Parody/Satire Dichotomies in American and Canadian Copyright Laws,” Amy Lai<sup>66</sup> proposes a comparative analysis to substantiate the newly introduced *Copyright Act* exception to copyright infringement of fair dealing for the purpose of parody or satire [Lai, “Natural Right to Parody”].<sup>67</sup> Lai posits the parody or satire exception to copyright infringement as a user right which, similar to Al-Sharieh's conception,<sup>68</sup> finds its roots in the human right to freedom of expression, which Lai describes as a natural right.<sup>69</sup> While also focusing on one aspect of user rights, i.e. exceptions to copyright infringement through a public law lens, Lai grounds her analysis in natural rights theory to describe the private property rights of copyright holders to their works. While copyright holders’ property rights are limited by the natural right to freedom of expression of users, users’ right to use copyright works is also limited: it should not compete with the property rights of copyright holders in their works and derivatives in the market.<sup>70</sup> For Lai, greater justice for users will be achieved through a “third wave” conception of access to justice, e.g., by substantiating the stature of users’ rights to parody or satire a copyright work as a natural right grounded in the human right to freedom of expression.<sup>71</sup>

In “Calvinball: Users’ Rights, Public Choice Theory and Rules Mutable Game”, Bob Tarantino<sup>72</sup> invites us to look at copyright law reform in Canada and the behaviour of its main constituents through the “rules mutable game” [Tarantino, “Users’ Rights and Rules Mutable Game”].<sup>73</sup> As a descriptive metaphor of a game where players can change the rules as it is being played, Tarantino looks at how it may enhance our understanding of the legislative reform process in ways that the well-established public choice theory may not.<sup>74</sup> For instance, while public choice theory helps us understand why copyright users may be often left at a disadvantage by the copyright game, the rules mutable game metaphor tells us why copyright users should sometimes win the game. As games impart an element of fairness, the game metaphor performs a normative function; when one player has a systematic advantage (one may think here of copyright holders) and abuses it to the detriment of other participants (one may think about copyright

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*Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, 2012 SCC 68 at paras 56ff.

<sup>65</sup> MacDonald, *supra* note 52.

<sup>66</sup> Patent technical specialist at Shimizu Patent Office.

<sup>67</sup> Lai, *supra* note 11.

<sup>68</sup> Al-Sharieh, *supra* note 10.

<sup>69</sup> Lai, *supra* note 11 at 70.

<sup>70</sup> *Ibid.*

<sup>71</sup> MacDonald, *supra* note 52.

<sup>72</sup> Counsel at Dentons Canada LLP, PhD Candidate, Osgoode Hall Law School.

<sup>73</sup> Tarantino, *supra* note 12.

<sup>74</sup> *Ibid.*

users) “the ethical propriety of the activity becomes unstable” putting at stake the viability of playing the game itself.<sup>75</sup>

Tarantino’s observations that copyright users are “quicksilver” (i.e., attempts to pin down who they are is “doomed to frustration”, as the concept of the user “seems to apply to every possible stakeholder who is subject to copyright”)<sup>76</sup> and that their claims are diffuse and of little potential gain if taken individually (compared to the stakes involved for copyright holder claims)<sup>77</sup> are at the heart of the access to justice deficit that characterizes copyright users. This reality about copyright users is reminiscent of the fourth wave of access to justice movement and literature that is preoccupied with processes to involve the public (here copyright users) in law-making bodies and legislative reform processes.<sup>78</sup> There is also a direct connection between access to justice preoccupations more broadly defined and the concept of fairness, which is also the normative metric embedded in the rules mutable game metaphor as applied by Tarantino to the copyright legislative reform process.<sup>79</sup> The rules mutable game metaphor brings in sharper focus the fact that the copyright holder players may win more frequently and that the arbiter (the legislator) may not be entirely neutral and fair as they invigilate the game.<sup>80</sup>

Each of Al-Sharieh, Lai, and Tarantino point to the precariousness of the relatively nascent concept of copyright user rights, both by their diagnostic and their prescription. For Al-Sharieh, the *Copyright Act* needs to be amended to explicitly refer to exceptions to copyright infringement as “user rights” to reflect more accurately their connection to human rights.<sup>81</sup> For her part, Lai seeks to give a solid start to the newly introduced *Copyright Act* exception to copyright infringement of fair dealing for the purpose of parody and satire, by qualifying it as a natural right, and by recommending a broad interpretation of this user right to generously account for its freedom of expression dimension.<sup>82</sup>

Last but not least, as Canada embarks on its next copyright legislative reform,<sup>83</sup> Tarantino warns that the advances made by copyright users in the last major Canadian copyright legislative reform in 2012<sup>84</sup> (among others through the addition of new exceptions to copyright infringement), are not what they may seem (e.g. with the introduction of technological protection measures significantly curtailing the application of those exceptions) and that they may be provisional.<sup>85</sup> Tarantino’s use of the rules mutable game metaphor provides a new perspective on copyright reform that invites some introspection on how the players should play the game and how they are bound by some norm of fairness, ultimately for the sake of preserving the enterprise itself, the copyright regime.

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<sup>75</sup> *Ibid.*

<sup>76</sup> *Ibid.*

<sup>77</sup> *Ibid.*

<sup>78</sup> MacDonald, *supra* note 52.

<sup>79</sup> Ghai & Cottrell, *supra* note 56 (on the concept of fairness being closely connected to access to justice considerations).

<sup>80</sup> Tarantino, *supra* note 12.

<sup>81</sup> Al-Sharieh, *supra* note 10.

<sup>82</sup> Lai, *supra* note 11.

<sup>83</sup> Innovation, Science and Economic Development Canada, News Release, “Parliament to undertake review of the *Copyright Act*, (14 December 2017), online: <[https://www.canada.ca/en/innovation-science-economic-development/news/2017/12/parliament\\_to\\_undertakereviewofthecopyrightact.html](https://www.canada.ca/en/innovation-science-economic-development/news/2017/12/parliament_to_undertakereviewofthecopyrightact.html)>.

<sup>84</sup> *Copyright Modernization Act*, SC 2012, c 20.

<sup>85</sup> Tarantino, *supra* note 12.

The alloy made of copyright user rights and preoccupations of access to justice discussed at the Symposium, and as further illustrated in the three articles introduced here, unequivocally connects copyright law and policy to the broader societal goal of ensuring adequate access to knowledge. By the same token, it serves as a strong reminder of copyright law and policy subservience to human rights law.

*Bonne lecture!*