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Globalizing User Rights-Talk: On Copyright Limits and Rhetorical Risks

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GLOBALIZING USER RIGHTS-TALK: ON COPYRIGHT LIMITS AND RHETORICAL RISKS

CARYS J. CRAIG*

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Around the world, the focus of copyright policy reform debates is shifting from the protection of copyright owners’ rights towards defining their appropriate limits. There is, however, a great deal of confusion about the legal ontology of copyright “limits,” “exceptions,” “exemptions,” “defenses,” and “user rights.” While the choice of terminology may seem to be a matter of mere semantics, how we describe and conceptualize lawful uses within our copyright system has a direct bearing on how we delimit and define the scope of the owner’s control. Taking seriously the role of rhetoric in shaping law and policy, this Paper critically examines the recent embrace of the language of “users’ rights” to frame fair use, fair dealing, and other non-infringing acts. This terminology has been adopted to varying degrees by courts in Canada, Israel, and the United States and is increasingly employed by public interest advocates and policy-makers at the domestic and international level. In this Paper, I ask whether the rise of “user rights,” thus cast, is a positive development that will help to rein in some of copyright’s excesses, advancing the cause of content users and the public at large—or whether it is, perhaps, something of a false friend. Drawing on lessons from critical legal theory, I caution that “rights” may be a double-edged sword with the potential to undermine or obstruct the public interests, social values, and relationships that should inform copyright’s development in the digital age. As a rhetorical tool, “user rights” should therefore be wielded carefully if public interest advocates are to avoid self-inflicted injury.

I. INTRODUCTION

Until recently, the international copyright system had been directed, almost exclusively, at ensuring a baseline level of protection across the globe for the rights of authors and copyright owners.¹ The predictable result of this policy preoccupation has been

1. See World Intellectual Property Organization Copyright Treaty, Dec. 20, 1996, 36 I.L.M. 65 [hereinafter WIPO Copyright Treaty]; World Intellectual



the continuous strengthening or “ratcheting up” of owners’ rights.² The coming into force, in 2016, of the Marrakesh Treaty,³ which requires Contracting Parties to enact specific exceptions to copyright, was therefore hailed as a “transformational moment in international copyright law.”⁴ The focus appears to be shifting from the rights of copyright owners to the rights of users of copyright-protected works. The Development Agenda, adopted in 2007 by the World Intellectual Property Organization, provided a mandate and impetus for this international policy shift, emphasizing the importance of flexibilities, exceptions, and limitations in intellectual property norm-setting and recognizing the benefits of a rich and accessible public domain.⁵

Property Organization Performances and Phonograms Treaty, Dec. 20, 1996, 36 I.L.M. 76 [hereinafter WIPO Performances and Phonograms Treaty]; Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, 1869 U.N.T.S. 299 [hereinafter TRIPS Agreement]; Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 828 U.N.T.S. 221 [hereinafter Berne Convention].

2. Susan Sell, *The Global IP Upward Ratchet, Anti-Counterfeiting and Piracy Enforcement Efforts: The State of Play*, PIJIP RESEARCH PAPER SERIES 1, 1-4 (Oct. 1, 2010) (detailing how intellectual property maximalists have sought to increase intellectual property protection and enforcement after the 1994 WTO TRIPS negotiations); see also PETER DRAHOS, *THE GLOBAL RATCHET FOR INTELLECTUAL PROPERTY RIGHTS: WHY IT FAILS AS POLICY AND WHAT SHOULD BE DONE ABOUT IT* 1-5 (2003), https://www.anu.edu.au/fellows/pdrahos/reports/pdfs/2003_globalipratchet.pdf (explaining that the main global intellectual property frameworks’ key is “giving to subsequent users of technology a set of core ‘use’ rights”); PETER DRAHOS & JOHN BRAITHWAITE, *INFORMATION FEUDALISM: WHO OWNS THE KNOWLEDGE ECONOMY?* (2002); SUSAN SELL, *PRIVATE LAW, PUBLIC POWER: THE GLOBALIZATION OF INTELLECTUAL PROPERTY RIGHTS* (2003); see generally James Boyle, *A Manifesto on WIPO and the Future of Intellectual Property*, 2004 DUKE L. & TECH. REV. 1 (2004) (explaining errors arising from the owner-centric nature of the international IP regime); Pamela Samuelson, *The US Digital Agenda at WIPO*, 37 Va. J. Int’l L. 369 (1997) (detailing U.S. positions opposed to owner-centric intellectual property law); Alan Story, *Burn Berne: Why the Leading International Copyright Convention Must be Repealed*, 40 HOUS. L. REV. 763 (2003) (describing fundamental problems with the Berne Convention).

3. *The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled*, June 28, 2013, 52 I.L.M. 1309 [hereinafter Marrakesh VIP Treaty].

4. Margaret Ann Wilkinson, *International Copyright: Marrakesh and the Future of Users’ Rights Exceptions*, in *GLOBAL GOVERNANCE OF INTELLECTUAL PROPERTY IN THE 21ST CENTURY* 107, 107-27 (Mark Perry ed., 2016).

5. World Intellectual Property Organization [WIPO], *The 45 Adopted Recommendations Under the WIPO Development Agenda*, ¶¶ 16, 22 (2007) [hereinafter WIPO Development Agenda].

Meanwhile, the realpolitik of the international economic order cautions against unbridled optimism in this regard.⁶ The “multi-million dollar circus needed to produce the [Marrakesh] Treaty,” as well as the still sputtering negotiations over a Draft Treaty on Copyright Limitations and Exceptions for Libraries and Archives, speaks to both the urgency and the obstacles at play in the tentative turn to user rights.⁷ Provoked in part by a period of rapid technological development, there can be little doubt that copyright limitations and exceptions are emerging as one of the most critical and controversial areas of copyright reform, both nationally and internationally.⁸ As Paul Goldstein predicts: “No corner of copyright law promises to be more vexed—or consequential—over the next quarter-century than exceptions and limitations.”⁹

It is unfortunate, then, that there exists a great deal of confusion about how to understand and position copyright “limits,” “exceptions,” “exemptions,” and “defenses” within the overall copyright scheme. This is not simply a matter of semantics; it has more to do with legal ontology than mere terminology, in the sense that the very nature of the “thing” is at issue. Moreover, how we conceptualize the “privileges,” “liberties,” or “rights” 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 to members of the public: an “exception” to an established right may be narrowly drawn as a matter of principle; the burden of making out a “defense” 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 may be enforced against others who

6. See Jerome H. Reichman, *The Limits of “Limitations and Exceptions” in Copyright Law*, in *COPYRIGHT LAW IN AN AGE OF LIMITATIONS AND EXCEPTIONS* 292, 302 (Ruth L. Okediji ed., 2017).

7. *Id.* at 302.

8. See RUTH L. OKEDIJI, *Reframing International Copyright Limitations and Exceptions as Development Policy*, in *COPYRIGHT LAW IN AN AGE OF LIMITATIONS AND EXCEPTIONS* 429, 432 (2017) (questioning whether current intellectual property law’s understanding of limitations and exceptions actually helps developing-states).

9. Paul Goldstein, *Reviews and Endorsements*, (reviewing *COPYRIGHT LAW IN AN AGE OF LIMITATIONS AND EXCEPTIONS*) (last visited July 8, 2017), <http://www.cambridge.org/ca/academic/subjects/law/intellectual-property/copyright-law-age-limitations-and-exceptions?format=HB&isbn=9781107132375#theogtb8WzHQLJ7r.97>.

would encroach upon it, including the rights-bearing copyright owner. But more than this, the legal language we choose comes loaded with its own rhetorical force and, in our public discourse and legal imagination, few if any words can hold more power than the claim to “right.”

Perhaps for this reason, it has become increasingly common for public interest and public domain advocates in the intellectual property arena to articulate the need for copyright limitations and exceptions in terms that evoke the user’s “right” to use a protected work or elements of it.¹⁰ To date, the language of “users’ rights” has found its greatest formal endorsement in Canada, where the Supreme Court has repeatedly affirmed that fair dealing and other copyright exceptions are “users’ rights” and must be interpreted as such.¹¹ Amongst those of us who have advocated in favor of greater freedom for fair and lawful uses of copyright-protected works, the Supreme Court of Canada’s decision to bequeath upon a rarely accepted defense the label of “right” was hailed as a great victory for users and the public.¹² It seemed to represent a hard-fought win against the

10. See, e.g., *Global Network on Copyright User Rights*, INFO JUSTICE, <http://infojustice.org/flexible-use> (last visited July 8, 2017) (describing the Global Network on Copyright User Rights, a group coordinated by the American University Washington College of Law Program on Information Justice and Intellectual Property, focusing on “the publications of research and provision of technical assistance to explain how adopting more open, flexible and general user rights . . . can promote social and economic interests”).

11. See, e.g., *Alberta v. Canadian Copyright Licensing Agency*, [2012] 2 S.C.R. 345 (Can.); *Soc’y of Composers, Authors and Music Publishers of Can. v. Bell Can.*, [2012] 2 S.C.R. 326 (Can.); *CCH Canadian v. Law Soc’y of Upper Can.*, [2004] 1 S.C.R. 339 (Can.).

12. See, e.g., Carys Craig, *The Changing Face of Fair Dealing in Canadian Copyright Law: A Proposal for Legislative Reform*, in *IN THE PUBLIC INTEREST: THE FUTURE OF CANADIAN COPYRIGHT LAW*, 437, 452 (Michael Geist ed., 2005) (attributing the Canadian Supreme Court’s restrictive interpretation of fair dealing to the identification of a sole intended beneficiary); Abraham Drassinower, *Taking User Rights Seriously*, in *IN THE PUBLIC INTEREST: THE FUTURE OF CANADIAN COPYRIGHT LAW*, 462, 477 (Geist ed., 2005) (noting the necessity of rejecting a sweat-of-the-brow originality standard for a skill and judgment standard when reforming Canadian copyright law); Graham Reynolds, *Towards a Right to Engage in the Fair Transformative Use of Copyright-Protected Expression*, in *FROM RADICAL EXTREMISM TO BALANCED COPYRIGHT: CANADIAN COPYRIGHT AND THE DIGITAL AGENDA* 395, 397 (Michael Geist ed., 2010); Myra J. Tawfik, *The Supreme Court of Canada and the “Fair Dealing Trilogy:” Elaborating a Doctrine of User Rights Under Canadian Copyright Law*, 51 *ALTA. L. REV.* 191,

overwhelming forces that had advanced the cause of copyright owners and corporate interests in the battle over the new technological terrain (albeit in a case involving the distinctly twentieth-century technology of photocopiers and fax machines).¹³ The judicial acknowledgment that unauthorized users of works had “rights” to assert in the face of infringement claims was quite simply a game-changer for Canadian copyright law.¹⁴ Prior to this, Canada’s courts had acknowledged the “rights” only of plaintiff copyright owners, against which the mere “interests” of defendants—and the public at large—had typically paled. Fair dealing had correspondingly been relegated to a marginal exception, available in theory but never in practice affording a defense to a prima facie infringement.¹⁵ The recognition of user rights thus dramatically corrected Canada’s traditionally owner-centric regime as it was adjusted to the new digital century. It seemed to retrieve the individual user from the rhetoric of authorship rewards and economic incentives that had, for so long, threatened to obscure her.

At this moment in time, it is fair to say that “virtually every other country in the world has less clearly enshrined users’ rights than has Canadian law: no one else’s courts (or legislators) explicitly express the exceptions to the rights of rights-holders to be users’ rights.”¹⁶ Commentators in jurisdictions where exceptions to copyright infringement remain narrow and comparably ineffectual might reasonably look upon the Canadian example with something like envy.¹⁷ Even those who hail from jurisdictions where fair use is

191-92 (2013); David Vaver, *Copyright Defenses as User Rights*, 60 J. COPYRIGHT SOC’Y U.S.A. 661, 667-68 (2013) (describing the impact of the seminal case *CCH Canadian* on balancing user’s rights). *But see* Pascale Chapdelaine, *The Ambiguous Nature of Copyright Users’ Rights*, 26 INTELL. PROP. J. 1, 5 (2013) (cautioning against the damaging effects of the uncertain nature of users’ rights on the coherence and legitimacy of copyright law).

13. Vaver, *supra* note 12, at 667.

14. *Id.*

15. *See* Craig, *supra* note 12, at 452; Carys J. Craig, *Digital Locks and the Fate of Fair Dealing in Canada: In Pursuit of ‘Prescriptive Parallelism’*, 13 J. WORLD INTELL. PROP. 503 (2010).

16. Margaret Ann Wilkinson, *Copyright Users’ Rights in International Law*, 60 L. PUBLICATIONS 9, 10 (2014), <http://ir.lib.uwo.ca/lawpub/84>.

But see infra Section II.D. (discussing the growing status of user rights in comparative and international contexts).

17. *See, e.g.*, Alexandra Sims, *The Case for Fair Use in New Zealand*, 24 INT’L

flexible and capable of expansive application in service of social goals¹⁸ find good cause to wish for a similar judicial utterance.¹⁹ Advocates interested in globalizing fair use and safeguarding copyright limitations and exceptions at the international level may also see the potential of asserting “user rights” to advance their cause in the global arena.²⁰ But before we rush to conclude that the idea of “users’ rights” is a shining beacon, guiding copyright inexorably towards its public policy goals, we should ask: Are there any risks, any potential downsides, associated with this rhetoric of “user rights,” even (or especially) for those who hold most dear the very interests newly cloaked in “rights?” Is this purely a triumph for the public interest; galvanizing users, validating their demands, and constraining copyright’s corrosive expansion? Or, is there a price to pay for repackaging the public interest in the rhetorical wrapping of “user rights?”

In seeking to answer this question, I begin by describing, in Part II, the traditional role of rights-based reasoning in our copyright system as a justification for the broad protection of authors and owners. I point to the ways in which the rhetoric of rights has typically been wielded to achieve outcomes that fail to serve the

J.L. INFO. TECH. 176, 176-202 (2016); Hoachen Sun, *Fair Use as a Collective User Right*, 90 N.C. L. REV. 125, 178-87 (2011) (“By giving judicial recognition to the idea of fair dealing as a user’s right, rather than a defense, the Supreme Court of Canada expressly embraced a broad-based approach to interpreting the scope of the fair dealing doctrine in order to protect the public interest.”).

18. See, e.g., 17 U.S.C. § 107 (2012) (creating an open, flexible, and general fair use defense); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579-80 (1994) (referring to the “fair use doctrine’s guarantee of breathing space within the confines of copyright . . . [flowing from] the need simultaneously to protect copyrighted material and to allow others to build upon it”).

19. See Niva Elkin-Koren, *The New Frontiers of User Rights*, 32 AM. U. INT’L L. REV. 1, 42 (2016) (arguing that a user rights approach to fair use may offer a more robust safeguarding of users’ liberties in the digital ecosystem); Lior Zemer, *Authors and Users: Lessons from Outre-Mer*, 25 INTELL. PROP. J. 231, 263-67 (2013).

20. See, e.g., Wilkinson, *Copyright Users’ Rights*, *supra* note 16, at 12 (arguing that the protections for libraries and archives can best be advanced by enshrining user rights in an international copyright instrument); Thomas Riis & Jens Hemmingsen Schovsbo, *Users’ Rights: Reconstructing Copyright Policy on Utilitarian Grounds*, 29 EUR. INTELL. PROP. REV. 1 (2007) (proposing the enactment of concrete rules recognizing users’ rights at the national and international level in order to counter-balance the proprietary logic of the current copyright system).

purposes of the copyright system by privileging private entitlement over the public interest. I then chart the rise of countervailing “users’ rights” in Canada, in particular, and the role that they have played in ostensibly recalibrating the so-called copyright balance. The discussion then turns to the status of user rights in comparative and international contexts, and their growing prevalence in copyright policy and law-making globally. Part III warns of some of the ways in which the idea of “users’ rights” might, somewhat counter-intuitively, obstruct efforts to advance the interests of users and the public in and through the copyright system. Part IV looks beyond the copyright context, asking the more general question: “[W]hat is wrong with rights?”²¹ Briefly sketching out some of the core “rights critiques” offered by critical legal scholars over the past few decades, I present some reasons for skepticism about the capacity of rights to remedy inequalities and rectify power imbalances. Turning to Feminist and Critical Race Theory, however, I consider whether there may, nonetheless, be good reasons to embrace rights-talk, if not as an ideological commitment, then as a strategic tool. In Part V, I conclude with some thoughts about how these lessons from the landscape of legal theory might helpfully extend into the realm of copyright law—informing efforts to expand copyright limitations and exceptions in pursuit of globalized fair use.

Ultimately, I argue that the language of “user rights” has an important role to play in advancing the public interest—albeit primarily a pragmatic one. There is a risk, however, to embracing “user rights” without problematizing the traditional conception of “right” and refining our rhetoric. The inherently individualizing and obfuscatory nature of right-based reasoning—whether employed in respect of authors, owners or users—has the potential to obscure the public interests, social values, and relationships that should inform copyright’s development in the digital age. At the same time, the escalation of rights rhetoric in the copyright debate threatens to compound rather than to contest the moral or proprietary claims to right made of behalf of copyright owners. The concept of “user rights,” then, is potentially a double-edged sword that should be wielded carefully if public interest advocates are to avoid a self-

21. See *infra* Part IV (outlining objections raised by the school of Critical Legal Studies).

inflicted injury.

II. RIGHTS RHETORIC IN COPYRIGHT DISCOURSE

A. THE RISE OF AUTHORS' "RIGHTS"

The language of rights has long played an important role in our copyright system. As many leading copyright scholars have demonstrated, the idea of the author's right to own that which he creates through his intellectual effort permeates the foundations of copyright law.²² While it was not always thus,²³ the inception of the modern common law copyright regime with the enactment of the Statute of Anne,²⁴ and the subsequent "battle of the booksellers" that played out in the courts, solidified the notion of the author as right-bearer, and copyright as his natural entitlement.²⁵ Though arguably conceived as a pragmatic means to disrupt the London booksellers'

22. See Lawrence C. Becker, *Deserving to Own Intellectual Property*, 68 CHI.-KENT. L. REV. 609, 610-11 (1993) (describing Hegel's interpretation of property); PETER DRAHOS, *A PHILOSOPHY OF INTELLECTUAL PROPERTY* 1, 120 (1996); Frank H. Easterbrook, *Intellectual Property is Still Property*, 13 HARV. J.L. & PUB. POL'Y 108, 110 (1990); Richard Epstein, *Liberty Versus Property - Cracks in the Foundation of Copyright Law*, 42 SAN DIEGO L. REV. 1, 2-3 (2005); Wendy J. Gordon, *A Property RIGHT in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1593 (1993) (highlighting the permeation of language relating to copyright in Lockean theory); Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 287 (1988) (noting that, throughout history, Americans have been obsessed with the idea of property, starting with the Pilgrims); Tom Palmer, *Are Patents and Copyrights Morally Justified?: The Philosophy of Property Rights and Ideal Objects*, 13 HARV. J.L. & PUB. POL'Y 817, 820 (1990) (detailing the Utilitarian theory of property).

23. See MARILYN RANDALL, *PRAGMATIC PLAGIARISM: AUTHORSHIP, PROFIT, AND POWER* 67-68 (2001) (explaining that the idea of plagiarism is a relatively new concept, as ancient tradition regarded it as the passing down of stories and ideas).

24. Copyright Act 1710, 8 Ann. c. 19 (Eng.).

25. See, e.g., LYMAN RAY PATTERSON, *COPYRIGHT IN HISTORICAL PERSPECTIVE* 11 (1968) (explaining that "the problem of authors' rights did not become a significant issue until the eighteenth century, and then only because the booksellers made it so in an effort to perpetuate their monopoly after the Statute of Anne."); also *Millar v. Taylor*, [1769] 98 Eng. Rep. 201 (KB) (finding that a common law interest in the work vested in the author as a matter of natural justice); *Donaldson v. Beckett*, [1774] 98 Eng. Rep. 257 (HL) (ruling that authors had no common law interest in their works post publication).

monopoly under the Stationers' Charter, and justified as a route by which to encourage public learning, the Statute of Anne placed the exclusive right to copy in the hands of the author.²⁶ Upon expiration of the temporary monopoly established under the statute, a series of cases brought by publishers before the courts sought to establish the author's natural (though assignable) right to own his work—the fruits of his labor—as property.²⁷ The argument was ultimately rejected by a majority of the House of Lords, but the rhetoric of rights stuck fast within the public consciousness and the legal imagination.²⁸ Converging with the philosophical rise of enlightenment values of possessive individualism, and the practical growth of a literate public and a market economy, the idea of the author's right to own his work took root and flourished inside the greenhouse glass of copyright law.²⁹

Over the course of the nineteenth and twentieth centuries, the rights of the author-owner rose to dominate the jurisprudence of the British courts (and, by extension, those of colonial Canada), and to shape the legal doctrine that defined the subject and scope of copyright.³⁰ In the common law world, at least, the continued commitment to this notion of the author's right found its rationale in the Lockean labor-acquisition theory.³¹ Regarded through this theoretical lens, the author is the worthy intellectual laborer, deserving to reap what he has sown, while the user is the thief or trespasser who seeks to benefit from the author's pains.³² Such a

26. See Patterson, *supra* note 25, at 14 (describing the Statute of Anne as a “trade regulation device” that was misconstrued as providing for an author's right).

27. RONAN DEAZELEY, ON THE ORIGIN OF THE RIGHT TO COPY: CHARTING THE MOVEMENT OF COPYRIGHT LAW IN EIGHTEENTH-CENTURY BRITAIN (1696-1775) 31-50 (2004).

28. See Patterson, *supra* note 25, at 15 (arguing that it was in fact the overruled *Millar v. Taylor* decision, *supra* note 26, that had the greatest effect upon copyright doctrine, “firmly fix[ing] the idea of copyright as an author's right.”)

29. See MARK ROSE, AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT (1993); Mark Rose, *The Author as Proprietor: Donaldson v Becket and the Genealogy of Modern Authorship*, 23 REPRESENTATIONS 51 (1988).

30. Patterson, *supra* note 25, at 4-7.

31. See JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 10-19 (1690) (establishing the labor-acquisition theory).

32. See Carys J. Craig, *Locke, Labour and Limiting the Author's Right: A Warning Against a Lockean Approach to Copyright Law*, 28 QUEEN'S L.J. 1 (2002) (describing Lockean theory's role in broadening the scope of author's rights); *Hogg v. Scott*, [1874] 18 L.R. 763, 485 (CH) (“[T]he defendant is not at

rights-based account of copyright had the effect of expanding the scope of protection available to “authors,” lowering the threshold for protection in order to ensure that labor, effort, and expense did not go unrewarded.³³ Thus, the protection of transcribed speeches, laboriously compiled telephone directories, betting coupons, and tax forms was justified as necessary for preventing the misappropriation of labor.³⁴ Over the same period, a similar logic guaranteed the continued expansion of protectable subject matter (from books to maps and charts to artistic, musical, and dramatic works) as well as the expanded duration of authors’ rights (from fourteen years plus a further fourteen upon renewal to the life of the author plus fifty years beyond his death).³⁵

From early in the life of the modern copyright system, the rights-based reasoning of the courts shifted copyright away from the social goals that it was conceived to serve,³⁶ and caused it to become, instead, a body of law focused overwhelmingly on the protection of the (intellectual) property and private interests of owners. It is to this end that rights rhetoric has traditionally been deployed in the copyright context—that is, to the benefit of owners and the undeniable detriment of users. In light of such concerns, I have argued elsewhere against an individual rights-based account of the copyright system in general, and more specifically, against the use of rights rhetoric to justify the powers granted to authors by copyright law.³⁷ The deontological claim that authors naturally have rights over

liberty to use or avail himself of the labour which the plaintiff has been at for the purpose of producing his work, that is, in fact, merely to take away the result of another man’s labour, or, in other words, his property.”)

33. Craig, *supra* note 32, at 12-15.

34. See e.g., *Ladbroke Ltd. v. William Hill Ltd.*, [1964] 1 ALL ER 465 (HL) (differentiating between material that requires intellectual work and those that are banal); *Walter v. Lane*, [1900] 83 L.T. 289 (HL); *Kelly v Morris*, [1866] 14 L.T. 222 (CH); *MacMillan & Co. v. Cooper*, (1923) 40 T.L.R. 186 (India).

35. See Stef van Gompel, *Copyright Formalities and the Reasons for Their Decline in Nineteenth Century Europe*, in PRIVILEGE AND PROPERTY: ESSAYS ON THE HISTORY OF COPYRIGHT 157, 191 (Ronan Deazley, Martin Kretschmer & Lionel Bently eds., 2010) (contrasting the English fixed terms of right to the unknown terms for other European countries).

36. See generally DEAZELEY, *supra* note 27 (discussing the underlying public purposes of the Statute of Anne).

37. See CARYS J CRAIG, *COPYRIGHT, COMMUNICATION & CULTURE: TOWARDS A RELATIONAL THEORY OF COPYRIGHT LAW* (2011) (proposing a teleological justification for the copyright system that supports protecting works of authorship

their works casts copyright as a legal structure designed primarily or exclusively to recognize and protect authors' independently existing rights as a matter of justice or entitlement. The private powers granted by law thus appear to be self-evident, requiring no further justification, while the public interests at stake become, at best, a matter of secondary concern. As the following discussion reveals, when authorial right is a baseline assumption, copyright exceptions or limitations are inevitably viewed with suspicion, manifesting as prima facie unjust encroachments upon the natural entitlement of the worthy, rights-bearing author.

B. THE DEMISE OF FAIR DEALING

The traditional rights-based approach to copyright justifies and nurtures the tendency to afford always greater protection against more uses of the work, such that almost any unauthorized use amounts to unlawful trespass and infringement.³⁸ More specifically, over the course of the twentieth century, in the Anglo-Canadian law, rights-based reasoning was employed to limit the scope and availability of exceptions to infringement, diminishing the importance of fair uses of protected works, reducing fair dealing to a narrow and exceptional defense, and essentially marginalizing the interests of users and the public almost to the point of irrelevance. A detailed review of the British and Canadian fair dealing provisions and jurisprudence is beyond the scope of this project,³⁹ but the claim is neither new nor controversial. There is a clear connection between the commitment to protecting authors' rights as a matter of entitlement and the limited scope available for successfully asserting a defense to an infringement claim.

By the early nineteenth century, the fair use or fair dealing defense

only because, and to the extent that, such protection encourages dialogic participation in a cultural process of creativity and exchange.)

38. *Id.* at 85-97 (arguing that the individualist rights-based account of copyright invokes the powerful normative force of natural law in support of author's claim, inevitably resulting in the widening of copyright protection contrary to its public purposes.)

39. *See id.*; Guiseppina D'Agostino, *Healing Fair Dealing?: A Comparative Copyright Analysis of Canada's Fair Dealing to U.K. Fair Dealing and U.S. Fair Use*, 53 MCGILL L. REV. 309, 327 (2008) (emphasizing that an analysis of the Canadian Supreme Court's interpretation must include an understanding of Parliament's policy objectives).

developed by the courts had begun to resemble its modern form.⁴⁰ Although the initial development of a concept of fair use was somewhat piecemeal, the early cases suggest that fair uses were judicially recognized because they involved “originality on the part of the . . . user as manifested in a new work that also promoted the progress of science and thereby benefited the public.”⁴¹ That such uses were beyond the scope of the copyright owner’s exclusive domain was at least partly in appreciation of the intellectual effort expended by the user in the creation of a cognizably ‘new work;’ but the primary rationale for allowing such uses seems to have been the public benefit afforded by this ‘newness’—the value of the defendant’s contribution to knowledge and encouragement of learning.⁴² Indeed, a finding of ‘piracy’ was largely reserved for the cases where no obvious public interest was being served by the defendant’s copying.⁴³ Courts were able to resolve copyright disputes without the kind of absolutism typical of a rights-based approach; instead, the concepts of fair abridgment, fair use, and legitimate taking permitted the nuanced application of copyright in a way that cohered with the recognized social goals of the copyright system.⁴⁴

40. *Macklin v. Richardson*, [1770] 27 Eng. Rep. 451 (CH); *Dodsley v. Kinnersley*, [1761] 27 Eng. Rep. 270 (CH); *Tonson v. Walker*, [1752] 36 Eng. Rep. 1017 (App.); *Gyles v. Wilcox*, [1740] 27 Eng. Rep. 682 (CH) (holding that real and fair abridgments may be called a new book); see generally ISABELLA ALEXANDER, *COPYRIGHT LAW AND THE PUBLIC INTEREST IN THE NINETEENTH CENTURY* (2010).

41. WILLIAM F. PATRY, *THE FAIR USE PRIVILEGE IN COPYRIGHT LAW* 18 (2d ed. 1995).

42. See, e.g., *Scott v. Stanford*, [1867] 16 L.T. 51 (L.R. Eq.); *D’Alamaine v. Boosey*, [1835] 160 Eng. Rep. 117 (L.R. Exch.); *Martin v. Wright*, [1833] 58 Eng. Rep. 605 (L.R. Eq.) (holding that a person may copy and publish literature if annotated and in connection to his own research); *Mawman v. Tegg*, [1826] 38 Eng. Rep. 380 (CH).

43. See, e.g., *Lewis v. Fullarton*, [1839] 48 Eng. Rep. 1080 (CH) (rejecting a fair use defence on the basis that the defendant had expended “no other labour . . . than in copying the work”); *Roworth v. Wilkes*, [1807] 170 Eng. Rep. 889 (KB) (finding infringement where the defendant’s work simply involved “communication of the same knowledge”); see generally Kathy Bowrey, *On Clarifying the Role of Originality and Fair Use in 19th Century UK Jurisprudence: Appreciating “the Humble Grey Which Emerges as the Result of Long Controversy,”* in *THE COMMON LAW OF INTELLECTUAL PROPERTY: ESSAYS IN HONOUR OF PROF. DAVID VAVER* 45 (Lionel Bently, Giuseppina D’Agostino & Catherine Ng eds., 2010).

44. See Kylie Pappalardo & Brian Fitzgerald, *Copyright, Fair Use and the*

Of course, in an environment where the copyright owner's right was limited to the reproduction of a literary work as such, copyright control was the exception and fair use of a work was the norm.⁴⁵ In that context, the idea that users and the public possessed a general right to deal fairly with the work—in the absence of narrow right explicitly granted to the copyright owner—was simply assumed.⁴⁶ As copyright steadily expanded to provide ever stronger rights over more works, however, the equitable principle of fair use correspondingly took root and flourished, becoming an established part of the British and Commonwealth copyright law until the turn of the twentieth century.⁴⁷ As late as 1915, shortly after fair dealing was statutorily enacted in the U.K. Copyright Act of 1911, the authoritative treatise writer, W.A. Copinger, made reference to “the rights of the fair user” that had long been enjoyed under the law.⁴⁸ Although the 1911 Act enumerated specific purposes for which a dealing might be fair (private study, research, criticism, review, or newspaper summary),⁴⁹ it was Copinger's assumption that

Australian Constitution, in COPYRIGHT PERSPECTIVES: PAST, PRESENT AND PROSPECT 125-64 (Brian Fitzgerald & John Gilchrist eds., 2015) (arguing that, consistent with the historical development of copyright and fair use, the productive or fair use of a protected work is not, by definition, an infringing copy capable of regulation by the copyright system).

45. Pamela Samuelson, *Justifications for Copyright Limits and Exceptions*, in COPYRIGHT LAW IN AN AGE OF LIMITATIONS AND EXCEPTIONS 12, 16-17 (Ruth L. Okediji ed., 2017).

46. See *id.* at 12-59 (noting that, “[w]hen rights were narrow, it was unnecessary to create exceptions to limit those rights . . . [but] as legislatures expanded authorial rights . . . the need to create limits on the exclusive rights became apparent); Videotape: Copyright User Rights and Access to Justice: Q&A with Professor David Vaver, (May 18, 2017), <https://ctl2.uwindsor.ca/vidlinks/FF05B3B16B91BBE2.html>.

47. Pappalardo & Fitzgerald, *supra* note 44, at 125-64; see also Ariel Katz, *Fair Use 2.0: The Rebirth of Fair Dealing in Canada*, in THE COPYRIGHT PENTAGONY: HOW THE SUPREME COURT OF CANADA SHOOK THE FOUNDATIONS OF CANADIAN COPYRIGHT LAW 93, 101-02 (Michael Geist ed., 2013)(arguing that the widely perceived distinction between U.S.-style open-ended fair use and fair dealing is a myth).

48. WALTER ARTHUR COPINGER, THE LAW OF COPYRIGHT, IN WORKS OF LITERATURE, ART, ARCHITECTURE, PHOTOGRAPHY, MUSIC AND THE DRAMA: INCLUDING CHAPTERS ON MECHANICAL CONTRIVANCES AND CINEMATOGRAPHS 144 (5th ed. 1915).

49. Copyright Act 1911, 1 & 2 Geo. 5 c. 46, § 2(1)(i) (Eng.) (establishing that “any fair dealing with any work for the purposes of private study, research,

established user rights to deal fairly with work, which “has always been . . . permitted”⁵⁰ for other purposes, were not intended to be cut down by the new law.

As it happened, the introduction of these statutorily limited fair dealing purposes did precipitate a steady shift away from an equitable principle of fair use and towards a restrictive fair dealing defense.⁵¹ The Act was met by the courts with an increasing formalism in statutory interpretation, and the conceptual elevation of private property and contractual rights over the public interest considerations that had previously prevailed.⁵² The judiciary that had been so active in developing fair use subsequently proved active in reining it in.⁵³ Gradually there developed a more restrictive view of fair dealing as necessarily confined to the list of statutorily approved purposes which should themselves be narrowly construed as exceptional.⁵⁴ As part of the same process, courts increasingly adopted a bifurcated approach to assessing liability; determining whether a use was substantial and prima facie infringement before assessing the availability of a fair dealing defense.⁵⁵ Put differently, the courts would first establish the existence of owner’s right and its violation and only then ask whether a defense might be made out. Increasingly, any minimally substantial use was regarded as an incursion onto the property rights of the owner which could be excused only in a limited number of specific circumstances.⁵⁶ The user’s historical right to deal fairly for any purpose was reduced to a minimally permitted encroachment on the owner’s exclusive domain.

criticism, review or newspaper summary” would not constitute an infringement of copyright).

50. COPINGER, *supra* note 48, at 144.

51. Copyright Act 1911, c. 46, § 2(1)(i).

52. Robert Burrell, *Reining in Copyright Law: Is Fair Use the Answer?*, 2001 INTELL. PROP. Q. 361 (2001).

53. *Id.*

54. See, e.g., *Hawkes & Son Ltd. v. Paramount Film Service Ltd.*, [1934] 50 T.L.R. 315 (CH); *British Oxygen Co. v. Liquid Air Ltd.*, [1925] 133 L.T. 282 (CH); Alexandra Sims, *Strangling Their Creation: The Courts’ Treatment of Fair Dealing in Copyright Law Since 1911*, 2010 INTELL. PROP. Q. 192 (2010).

55. See *Hawkes & Son Ltd.*, at 602 (detailing Lord Hamworth M.R.’s assertion of substantial taking by asking whether the part taken “is so slender that it would be impossible to recognize it”); *Johnstone v. Bernard Jones Publication*, [1938] 159 L.T. 15 (CH).

56. See *Hawkes & Son Ltd.*, at 315.

According to Burrell, the judicially developed fair dealing defense had been no more than a necessary limit on the massive expansion of copyright that took place, largely at the hands of the same judiciary, since the enactment of the Statute of Anne.⁵⁷ From this perspective, the subsequent cases that dramatically narrowed the Fair Use principle “look much less like an attempt to step back from an overly broad judicially created exception and much more like a further extension of owners’ rights.”⁵⁸ While the perception of copyright as the author/owner’s proprietary right grew throughout the latter part of the nineteenth and much of the twentieth century, the Fair Use doctrine found itself on increasingly uncertain footing. The resultant fair dealing defense, thus, came to reflect little more than “a reluctant but necessary concession to users”⁵⁹ on which it was unwise for anyone to rely.

Throughout the twentieth century, the fair dealing defense suffered a similar fate before the Canadian courts.⁶⁰ It was bound too tightly to the same strict statutory language and unable to escape the prevalent assumption that use of another’s work without permission was *de facto* unfair.⁶¹ The tendency amongst Canadian courts was to reject the fair dealing defense because the use was necessarily unfair,⁶² or because it was not for an enumerated purpose.⁶³ But perhaps the most striking example of the restrictive

57. Burrell, *supra* note 52, at 367-73.

58. *Id.* at 367.

59. See Melissa de Zwart, *A Historical Analysis of the Birth of Fair Dealing and Fair Use: Lessons for the Digital Age*, 2007 INTELL. PROP. Q. 60, 90 (2007).

60. Katz, *supra* note 47, at 101-02.

61. *Id.*

62. *E.g.*, *R. v. James Lorimer & Co.*, [1984] 1 F.C. 1065, 1075 (Can. C.A.) (finding the defendant’s abridgement of a government report to be unfair because the defence requires “some dealing with the work other than simply condensing it into an abridged version.”); *Zamacois v. Douville*, [1943] 2 D.L.R. 257, 284-85 (Can. Ex. Ct.) (denying fair dealing because “a critic cannot, without being guilty of infringement, reproduce in full, without the author’s permission, the work which he criticizes.”); *B.W. Int’l Inc. v. Thomson Canada Ltd.*, [1996] 137 D.L.R. 4th 398, 409 (Can. Ont. Gen. Div.) (holding that the publication of a leaked work cannot be fair).

63. *E.g.*, *Hager v. ECW Press Ltd.*, [1999] 2 F.C. 287, 304 (Can. Fed. Ct.) (finding that a biography was not a work of research because “the use contemplated by private study and research is not one in which the copied work is communicated to the public.”); *Boudreau v. Lin*, [1997] 150 D.L.R. 4th 324, 331 (Can. Ont. Gen. Div.) (holding that a university’s copying and sale of course

interpretation of enumerated purposes is found in *Cie Générale des Etablissement Michelin-Michelin & Cie. v. C.A.W. –Canada*⁶⁴ which held that the defendants’ parody of a corporate logo could not be included within the category of “criticism.”⁶⁵ Justice Teitlebaum emphasized throughout his reasons that the objectives of copyright law are “[t]he protection of authors and ensuring that they are recompensed for their creative energies and works.”⁶⁶ Rejecting the defendants’ free speech argument, Justice Teitlebaum reasoned:

In the balance of interest and rights, if the Defendants have no right to use the Plaintiff’s [work], they have a multitude of other means for expressing their views. However, if the Plaintiff loses its right to control the use of its copyright, there is little left to the Plaintiff’s right of private property.⁶⁷

It was held that the users had no right to use the plaintiff’s work; their constitutional right to free expression could extend no further than the boundaries of the plaintiff’s property.⁶⁸ I have argued elsewhere that the Michelin court’s commitment to the idea of copyright as the owner’s property right caused it to reify the boundaries of the corporation’s exclusive domain and overlook the social values at stake in the defendant’s political use of the plaintiff’s logo/work. The elevation of the plaintiff’s right justified prohibiting the defendant’s speech, and disregarded the transformative and expressive nature of the defendant’s downstream use.⁶⁹ The defendant Union’s claim of right to fair dealing and free expression simply ceded to the copyright owner’s right.⁷⁰

materials was not for the purposes of “private study” because the materials were distributed to all members of a class).

64. [1996] 71 C.P.R. 3d 348 (Can. Fed. Ct.).

65. *Id.* at 381.

66. *Id.* at 376-77 (defining the objectives of the Act as being to protect “the interests of authors and copyright holders”).

67. *Id.* at 377.

68. *Id.* at 376.

69. See generally Carys J. Craig, *Putting the Community in Communication: Dissolving the Conflict Between Freedom of Expression and Copyright*, 56 U. TORONTO L.J. 75, 83-84, 93 (2006) [Craig, *Putting the Community in Communication*] (reviewing Canadian copyright cases and law).

70. See *id.* at 82. See also Jane Bailey, *Deflating the Michelin Man in IN THE PUBLIC INTEREST: THE FUTURE OF CANADIAN COPYRIGHT LAW* (Michael Geist ed. 2005); Bitu Amani, *Copyright and Freedom of Expression: Fair Dealing Between Work and Play in DYNAMIC FAIR DEALING: CREATING CANADIAN CULTURE ONLINE* (Rosemary J. Coombe, Darren Wershler and Martin Zellinger eds. 2013);

This brings us to the landmark case of *CCH Canadian Ltd. v. Law Soc'y of Upper Can.*⁷¹ The defendant, the Great Library of Osgoode Hall, argued that its photocopy service was provided for the purpose of research or private study. The plaintiff publishers responded that it is the purpose only of the person dealing with the work (the library staff member) that is relevant—not the purposes of the researchers for whom copies were made.⁷² At first instance, Justice Gibson agreed:

The copying by the defendant . . . was not for a purpose within the ambit of fair dealing notwithstanding that the ultimate use by the requester of the photocopying might itself be within the ambit of fair dealing . . . I am satisfied that the fair dealing exception should be strictly construed.⁷³

As the foregoing would suggest, this judgment was characteristic of the narrow confines within which the fair dealing defense had been drawn,⁷⁴ reflecting the overarching concern in Canada's copyright tradition with the protection of author's rights. The claim that fair dealing should be subject to strict construction—a claim peppered throughout the Anglo-Canadian jurisprudence on fair dealing prior to *CCH*—flows from the conviction that fair dealing is exceptional and antithetical to the normative presupposition of the copyright system; namely, that the author has the right to exclusive control over the work. Indeed, Justice Gibson began his analysis by stating:

The object and purpose of the Copyright Act is to benefit authors, albeit that in benefiting authors, it is capable of having a substantially broader-based public benefit through the encouragement of disclosure of works for the advancement of learning or, as in this case, the wider

Graham J. Reynolds, *Moving Past Michelin: Towards Judicial Reconsideration of the Intersection of Copyright and the Charter Right to Freedom of Expression* (2017) 30 INTELLECTUAL PROPERTY JOURNAL (Forthcoming).

71. [2004] 1 S.C.R. 339 (Can.).

72. *Id.* at 385.

73. *Id.* at 403.

74. *Contra* Allen v. Toronto Star Newspapers Ltd., [1997], 36 O.R. 3d 201 (Can. Ont. Gen. Div.) (finding that the reproduction of a photograph was fair dealing for the purposes of news reporting because the entire work was copied); Allen v. Toronto Star Newspapers Ltd., [1995], 26 O.R. 3d 208 (Can. Ont. Gen. Div.) (noting that there was no substantial reproduction of the plaintiff's work).

dissemination of law.⁷⁵

This was in line with the Supreme Court's earlier insistence, in the 1990 decision of *Bishop v. Stevens*, that the "single object" of the Copyright Act was "the benefit of authors of all kinds."⁷⁶ Notably, the Court in that case had similarly insisted upon a narrow reading of the statutory exceptions available to users in the Act.⁷⁷ Once again, where copyright was regarded as solely or even primarily aimed at protecting the rights of the author/owner, the user's claim to fair dealing lost out to the copyright owner's right of exclusive control.

The powers conferred on authors to control their works have steadily strengthened in scope and form owing, at least in part, to the persistent presence of rights-based reasoning and rhetoric in the Anglo common law tradition. While twentieth-century Canada offers a compelling example, similar patterns emerged in different contexts around the globe at both the domestic and the international level.⁷⁸ Wherever one looks, it seems clear that deontological explanations for copyright law, framed in natural rights rhetoric and loaded with presumptions of moral entitlement, inevitably support the expansive protection of copyright and circumscribe the uses that might lawfully be made of works that fall within the perceived scope of the author's right. What is also apparent, however, is that the continual expansion of copyright owners' rights has met with growing attention to the burdens that copyright law places on members of the public, both as consumers and as citizens. Over time, and with more or less success,

75. *CCH Canadian v. Law Soc'y of Upper Can.*, 1 S.C.R. at 388.

76. [1990] 2 S.C.R. 467 (Can.) (citing Performing Right Society, Ltd. v. Hammond's Bradford Brewery Co., [1934] 1 Ch. 121, 127 (C.A.)).

77. *Id.* at 480-81 ("an implied exception . . . is all the more unlikely . . . in light of the detailed and explicit exemptions in [the Act]"); see also *Michelin v. CAW – Can.*, [1996] 71 C.P.R. 3d 348, 381 (Can. Fed. Ct.).

78. See Justice Laddie, *Copyright: Over-Strength, Over-Regulated, Over-Rated?*, 18 EUR. INTEL. PROP. REV. 253, 259 (1996) (arguing that the narrow confines of the U.K.'s fair dealing defense reflects "a complacent certainty that wider copyright protection is morally and economically justified"); Neil Netanel, *Israeli Fair Use from an American Perspective*, in *CREATING RIGHTS: READINGS IN COPYRIGHT LAW* (Michael Birnhack & Guy Pessach eds., 2009) (describing the "market approach" to fair use discernable in some U.S. case law, wherein fair use is regarded as a narrow, anomalous exception to the copyright holder's exclusive and broad proprietary rights); Pappalardo & Fitzgerald, *supra* note 44 (describing the historical development of fair use in the Australian context); Sims, *supra* note 17, at 178 (arguing for expanded fair use in the New Zealand context).

copyright limits, exceptions and defenses have thus evolved, “typically [to temper] the reach of these broad rights.”⁷⁹ By the turn of the twenty-first century, with the proliferation of digital technologies, the public’s new creative and consumptive capabilities had come head-to-head with content owners’ greater capacity to control access, use, and sharing. As Niva Elkin-Koren explains, “[t]he rise of user rights is linked to fundamental changes in the creative ecosystem that pull in [these] opposite directions.”⁸⁰ It is to the emergence of “user rights” that we now turn, picking up the trail in Canada where the Supreme Court issued, in 2004, what remains as “one of the strongest pro-user rights decisions from any high court in the world.”⁸¹

C. THE RISE OF USER RIGHTS IN CANADA

In order to understand how such a dramatic change in the fate of fair dealing could play out against the Canadian jurisprudential backdrop described above, we must first take note of the Supreme Court judgment released shortly after Justice Gibson’s lower court ruling in *CCH*; the pivotal case of *Théberge v. Galerie d’Art du Petit Champlain Inc.*⁸² Meera Nair explains the relevance of that case for user rights and the public domain:

It has been only in the new millennium that the rights of the public began to gain attention. In this regard, *CCH Canadian* was not the watershed moment; that distinction was earned two years earlier in [*Théberge*]. Even though the case had nothing to do with fair dealing, Justice Binnie, writing for the majority, decisively placed owners’ rights in service of the vitality of the public domain, and made particular mention of the role of exceptions.⁸³

In *Théberge*, the Supreme Court articulated, for the first time, the idea that copyright is not primarily for the benefit of authors but is

79. Samuelson, *Justifications for Copyright Limits*, *supra* note 45, at 1.

80. Niva Elkin-Koren, *Copyright in a Digital Ecosystem: A User-Rights Approach*, in *COPYRIGHT IN AN AGE OF LIMITATIONS AND EXCEPTIONS* 132, 135 (Ruth L. Okediji ed., 2015).

81. Michael Geist, *Low Tech Case Has High Impact*, (Mar. 21, 2004), <http://www.michaelgeist.ca/2004/03/low-tech-case-has-high-tech-impact/>.

82. [2002] 2 S.C.R. 336 (Can.).

83. Meera Nair, *CCH Canadian: Ten Years Later*, *FAIR DUTY* (Feb. 25, 2014, 6:37 AM), <https://fairduty.wordpress.com/2014/02/25/ten-years-later/>.

rather 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;” stating that “[t]he proper balance among these and other public policy objectives lies not only in recognizing the creator’s rights but in giving due weight to their limited nature.”⁸⁴ While the so-called *Théberge* Balance was portrayed by the Court as merely describing how copyright is “usually presented,” in truth it represented a seismic shift in the copyright landscape.⁸⁵ Suddenly, the public interest had weight on the justice scales of copyright—perhaps even a weight equal to that of the creator’s right. What had previously been an ownership right, subject only to narrow and exceptional limitations, became a right that had to be weighed against a variety of other interests and public policy objectives.

As Nair implies, most importantly for our purposes, the limits to which the author’s rights are subject—the public interests that circumscribe the author’s claim—are given a positive dimension in the following passage from the case:

Excessive control by holders of copyrights and other forms of intellectual property may unduly limit the ability of the public domain to incorporate and embellish creative innovation in the long-term interests of society as a whole, or create practical obstacles to proper utilization. This is reflected in the exceptions to copyright infringement . . . which seek to protect the public domain in traditional ways such as fair dealing[.]⁸⁶

Cast in this light, fair dealing and other exceptions are not encroachments upon the creator’s rights but rather prevent the encroachment of creators’ rights into the public domain. Exceptions remove copyright-created obstacles to the proper use of works. With that, the Canadian stage was set for the entrance of users’ rights.

Following *Théberge*, the Federal Court of Appeal ruled in the *CCH* case, citing the need for balance and refusing to subject the fair dealing provisions to the traditionally narrow interpretation dominant

84. *Théberge v. Galerie d’Art du Petit Champlain Inc.*, 2 S.C.R. at 355.

85. Meera Nair, *Fairness of Use: Different Journeys*, in *THE COPYRIGHT PENTAGONY: HOW THE SUPREME COURT OF CANADA SHOOK THE FOUNDATIONS OF CANADIAN COPYRIGHT LAW* 235, 235 (Michael Geist ed. 2013).

86. *Théberge v. Galerie d’Art du Petit Champlain Inc.*, 2 S.C.R. at 356.

in Canadian courts.⁸⁷ Rather than casting fair dealing as a limited derogation from the norms of copyright law, Justice Linden explained that “user rights are not just loopholes” and are therefore deserving of a “fair and balanced reading.”⁸⁸ The majority rejected Justice Gibson’s position that merely facilitating research was not research per se,⁸⁹ and building on the multifactorial U.S. Fair Use Test,⁹⁰ provided a principled survey of the “malleable” factors relevant to assessing fairness.⁹¹

The resurrection of public interest played a similarly pivotal role and was “given added thrust”⁹² in the Supreme Court’s ruling in *CCH*. Writing for a unanimous court, Chief Justice McLaughlin endorsed the statement that “user rights are not just loopholes.”⁹³ She stated that “research,” as an enumerated fair dealing purpose, “must be given a large and liberal interpretation in order to ensure that users’ rights are not unduly constrained.”⁹⁴ The court’s new concern with the public purposes of the Copyright Act demanded renewed focus on the user of copyrighted material and the uses to which protected works may freely be put. Adopting the multi-factor enquiry and engaging in a careful analysis of the interests in the balance at each stage, the court set the tone for an entirely different approach to fair dealing and other exceptions, bestowed with the title of “users’

87. *CCH Canadian v. Law Soc’y of Upper Can.*, 1 S.C.R. at 384 (holding that the trial judge erred in law when he stated that exceptions to infringement must be “strictly construed,” because an overly restrictive interpretation of the exemptions contained in the Act would be inconsistent with the mandate of copyright law to harmonize owners’ rights with legitimate public interests).

88. *Id.* (quoting *DAVID VAVER, COPYRIGHT LAW 171 (2000)*)

89. *Id.* at 387 (“In essence the Law Society can vicariously claim an individual end user’s fair dealing exemption, and step into the shoes of its patron.”).

90. *See* 17 U.S.C. § 107 (enumerating an inclusive list of four factors to be considered in determining whether a use is fair: “(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work”).

91. *CCH Canadian v. Law Soc’y of Upper Can.*, 1 S.C.R. at 342 (assessing the purpose, nature, and amount of the dealing, the nature of the work, the likely effect of the dealing, and the availability of alternatives to the dealing).

92. *Nair*, *supra* note 83.

93. *CCH Canadian v. Law Soc’y of Upper Can.*, 1 S.C.R. at 364.

94. *Id.* at 342.

rights” as copyright marched into the digital age (where cases would soon take judges far beyond the comfort zone of library photocopiers and case digests).⁹⁵

The adoption of the language of “user rights” is arguably the most striking manifestation of the inclusion of the public as a primary beneficiary of the copyright system whose interests therefore factor directly into the copyright “balance.” The broad reading of fair dealing that this entailed reflects the evolving role of users in Canadian copyright policy. As Drassinower explains: “the defence of fair dealing . . . is to be understood and deployed not negatively, as a mere exception, but rather positively, as a user right integral to copyright law.”⁹⁶ The copyright holder’s interest in excluding others from its work has always benefited from the label of “right;” consequently, when owners’ rights have appeared to conflict with users’ interests in dealing with the protected work, the owners’ rights have readily prevailed. When the abstract concept of the public interest found more concrete expression in the form of users’ rights, its fate within the fair dealing analysis suddenly seemed brighter—and its weight on copyright’s balancing scales heavier. As Vaver writes: “If the Copyright Act is to balance the activities of owners and users honestly, it must balance similar entities. Balancing rights against exceptions starts off with the scales biased towards rights and against exceptions.”⁹⁷

The *CCH* fair dealing ruling proved to be, not an outlier but, an initial indicator of a fundamental and sustained shift in the way that Canadian courts approach exceptions and defenses to copyright infringement. In 2012, the Supreme Court heard five copyright cases together, all of which involved appeals from decisions of the Copyright Board responsible for setting and approving licenses and tariff for collective societies.⁹⁸ Two of these cases—*Bell v. Society of*

95. *Id.*

96. Drassinower, *supra* note 12, at 467.

97. David Vaver, *User Rights*, 25 INTELL. PROP. J. 105, 109 (2013).

98. See generally THE COPYRIGHT PENTAGON: HOW THE SUPREME COURT OF CANADA SHOOK THE FOUNDATIONS OF CANADIAN COPYRIGHT LAW (Michael Geist ed. 2013) (discussing issues raised by the five copyright decisions particularly, fair dealing, user rights, and the technology-neutral approach to copyright law).

*Composers, Authors, and Music Publishers of Canada*⁹⁹ and *Alberta v. Canadian Copyright Licensing Agency*¹⁰⁰—directly addressed the interpretation and application of the fair dealing provisions post-*CCH*. It was argued before the court that the decision to characterize fair dealing as a “user’s right” had been in error and misconstrued the nature of defenses within the copyright regime.¹⁰¹ Rather than retreating from this assertion of fair dealing as a user right, however, the Supreme Court took the opportunity to reiterate the rights-based nature of fair dealing within copyright,¹⁰² and to accord a correspondingly large and liberal interpretation to the statutory wording of the defense.

Thus, in *Bell*, which concerned the streaming of samples of musical works to consumers, Justice Abella found the activity to be consumer “research” and the communication by the online distributor to be “facilitating” such research.¹⁰³ Taking the perspective of the user/consumer rather than the online-service provider when assessing the purpose of the dealing, Justice Abella explained: “This is consistent with the Court’s approach in *CCH*, where it described fair dealing as a ‘user’s right.’”¹⁰⁴ In *Alberta*, a case that concerned the fraught question of educational copying by teachers for classroom use, the court again restated the rights-based nature of the defendant’s claim: “[F]air dealing is a “‘user’s right’, and the relevant perspective when considering whether the dealing is for an allowable purpose . . . is that of the user.”¹⁰⁵ With this in mind, the court reasoned that the student/user who is engaged in research and public study shares a “symbiotic purpose” with the teacher/copier who may therefore benefit from the fair dealing defense.¹⁰⁶ The

99. 2 S.C.R. at 326.

100. 2 S.C.R. at 345.

101. See *Soc’y of Composers, Authors and Music Publishers of Can.*, 2 S.C.R. at 335.

102. *Id.* at 333 (“*CCH* confirmed that users’ rights are an essential part of furthering the public interest objectives of the Copyright Act. One of the tools employed to achieve the proper balance between protection and access in the Act is the concept of fair dealing, which allows users to engage in some activities that might otherwise amount to copyright infringement.”).

103. *Id.* at 334-35.

104. *Id.* at 338.

105. *Alberta*, 2 S.C.R. at 360.

106. *Id.* at 361.

nature of fair dealing as a user right demanded a “large and liberal” reading of the statutory defense.¹⁰⁷ The constraints imposed on the scope of fair dealing by the Copyright Board were therefore found to be unreasonable. Many of the copies for which remuneration was sought were within the realm of the user’s right to deal fairly with works for research and private study.

Another 2012 case before the court addressed a broadcasting regulatory regime that allowed broadcasters to control the simultaneous retransmission of local television signals. Because the Copyright Act contains an exception for such signals,¹⁰⁸ which the court understood to be a “user’s right” and, therefore, “beyond the owner’s control,”¹⁰⁹ it was held that the regulatory regime was *ultra vires*. Allowing the value for signal regime would “upset the aim of the Copyright Act to effect an appropriate ‘balance’” between authors’ and users’ rights.¹¹⁰ The court described the copyright system in the following terms:

The Copyright Act is concerned both with encouraging creativity and providing reasonable access to the fruits of creative endeavor. These objectives are furthered by a carefully balanced scheme that creates exclusive economic rights for different categories of copyright[.] It also provides user rights such as fair dealing and specific exemptions that enable the general public or specific classes of users to access protected material under certain conditions.¹¹¹

As Myra Tawfik has argued, the court’s recognition of users’ rights “to access” certain protected material effects a subtle but meaningful development in the judicial conceptualization of defenses and their role in the copyright scheme: “[S]peaking in terms of ‘access’ centers the discussion more squarely on the individual’s engagement as a user within the legislative scheme in the sense that access is provided to someone.”¹¹² “Framed in terms of balance, what

107. *Id.* at 359-60.

108. Copyright Act, R.S.C. 1985, c C-42, ¶ 31 (Can.).

109. Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168, [2012] 3 S.C.R. 489, ¶ 58 (Can.); see *Alberta*, 2 S.C.R. at 370.

110. Reference re Broadcasting Regulatory Policy CRTC 2010-167, 2 S.C.R. ¶ 67.

111. *Id.* ¶ 36.

112. Tawfik, *supra* note 12, at 198.

this means is that the rights of the copyright holder to protection must be weighed against the user's right of access."¹¹³ This in turn suggests growing appreciation of the importance of access to intellectual works as foundational, both within the copyright system and within democratic culture more broadly.¹¹⁴ In Tawfik's terms, the "Canadian cases represent 'a welcome affirmation of individuality [of users] within the larger international and comparative copyright contexts.'"¹¹⁵

The Canadian copyright context thus provides an illustrative example of the apparent power of the concept of users' rights to actively shift the balance between owners and users in the copyright system, strengthening users' demands to constrain copyright (including by resisting the expansion of owner rights into new technological contexts). It is sufficient, I hope, to convince the reader that what might be considered merely semantic (the recognition of a "user right") can in fact be a powerful legal tool that reaps practical results for users of copyright works and for the public interest in general. As noted at the outset, however, this is not only a Canadian story. While it may be said that "the Supreme Court of Canada has charted a decidedly Canadian approach to surveying the boundary between copyright protection and a 'robustly cultured and intellectual public domain,'"¹¹⁶ the trajectory of users' rights in Canadian jurisprudence could equally be regarded as indicative of a larger transnational shift in our understanding of copyright law and the interests at stake. As the next section explains, the Canadian example does not simply result in, but also reflects, a growing recognition of users as individual rights-bearers within the copyright regime writ large.

D. THE COMPARATIVE AND INTERNATIONAL TRAJECTORY OF USERS' RIGHTS

It is widely agreed that the most open and expansive approach to

113. *Id.*

114. See Laura J. Murray, *Copyright Talk: Patterns and Pitfalls in Canadian Policy Discourses*, in *IN THE PUBLIC INTEREST: THE FUTURE OF CANADIAN COPYRIGHT LAW* 15, 39 (Michael Geist ed. 2005) (arguing that a culture of public intellectual domains is sustained through access).

115. Tawfik, *supra* note 12, at 200.

116. *Id.*

copyright exceptions can be found in the U.S. doctrine of fair use.¹¹⁷ Without statutory limits as to the possible purposes for which fair use can be found, the fair use defense is flexible in its application and potentially broad in its scope. Fair use owes its origin to the British fair abridgement cases,¹¹⁸ but did not suffer the fate of fair dealing post-1911, continuing its judicial evolution up to and beyond its codification in 1976. Given the U.S. constitutional scheme wherein copyright's purpose is explicitly "to promote the progress of science and the useful arts,"¹¹⁹ the defense has also been somewhat less vulnerable than in the Commonwealth context to the rigid enforcement and prioritization of owners' proprietary rights. In weighing the various factors for consideration in assessing the fairness of a use,¹²⁰ it is common for courts to invoke the rights and interests of the author or owner but also those of the user and public at large; typically with a view to copyright's constitutional purpose.¹²¹ As such, the extent to which a use transforms a protected work—adding new meaning or purpose—has become a key factor in determining the lawfulness of a use.¹²² Since 2005, as Neil Netanel

117. See 17 U.S.C. § 107.

118. Matthew Sag, *The Pre-History of Fair Use*, 76 BROOK. L. REV. 1371, 1373 (2011).

119. U.S. CONST. art. 1, § 8, cl. 8.

120. See *CCH Canadian v. Law Soc'y of Upper Can.*, 1 S.C.R. at 342.

121. See Pamela Samuelson, *Possible Futures of Fair Use*, 90 WASH. L. REV. 815, 857 (2015) (describing a variety of policy-relevant "clusters" of fair use cases, including: free speech and expression uses, authorship-promoting uses, and uses that promote learning).

122. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. at 579; Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990) (suggesting that, when considering the purpose of a use, courts should ask: "[D]id the use fulfill the objective of copyright law to stimulate creativity for public illumination?"); see generally Amy Adler, *Fair Use and the Future of Art*, 91 N.Y.U. L. REV. 559, 625-26 (2016) (disputing the capacity of the transformativeness test to advance rather than stifle artistic creativity); Laura A. Heymann, *Everything Is Transformative: Fair Use and Reader Response*, 31 COLUM. J.L. & ARTS 445, 447 (2008) (arguing that assessing transformativity with a view to reader response, and not only authorial intent, changes the scope of transformative fair use); Samuelson, *Possible Futures of Fair Use*, *supra* note 121, at 817-18 (asserting that the influence of *Campbell* and its progeny may yet extend well beyond the current doctrine of transformative use); Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 537 (2004) (arguing that the emphasis on transformation has limited awareness of the free speech considerations implicated by simple copying).

has shown, the “transformative use” approach has come to dominate the U.S. case law: “[This] paradigm views fair use as integral to copyright’s purpose of promoting widespread dissemination of creative expression, not a disfavored exception to copyright holders’ exclusive rights.”¹²³ Framed as such, fair use is closely tied to the free speech rights of users, ensuring copyright’s purpose as an “engine of free expression” by acting as a “built-in free speech safeguard.”¹²⁴ When U.S. courts and commentators invoke the idea of fair use as a matter of right, it is typically framed with the constitutional right of free speech or freedom of the press in mind.¹²⁵

It should be stressed, if only in passing, that fair use is not always or consistently accorded an expansive interpretation in the U.S. courts, notwithstanding its potential breadth. Indeed, its application is notoriously unpredictable, and courts, in their consideration of the relevant factors, often seem guided by underlying normative commitments to copyright as a moral entitlement or an economic right of the author/owner.¹²⁶ They are also, of course, vulnerable to

123. Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715, 736 (2011).

124. *Eldred v. Ashcroft*, 537 U.S. 186, 219, 221 (2003) (citing *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985)).

125. *See, e.g.*, NEIL WEINSTOCK NETANEL, COPYRIGHT’S PARADOX 63 (2008) (providing a thoughtful account of copyright and fair use as being explicitly grounded in First Amendment values); L. RAY PATTERSON & STANLEY W. LINDBERG, THE NATURE OF COPYRIGHT: A LAW OF USERS’ RIGHTS 123-24 (1991); Malla Pollack, *A Listener’s Free Speech, A Reader’s Copyright*, 35 HOFSTRA L. REV. 1457, 1460 (2007); Tushnet, *supra* note 122, at 587, 589-90 (explaining the connections between fair use and free speech under the First Amendment).

126. *See, e.g.*, *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985) (quoting *Iowa State Univ. Research Found., Inc. v. Am. Broad. Cos. Inc.*, 621 F.2d 57, 61 (2d Cir. 1980)) (“The fair use doctrine is not a license for corporate theft, empowering a court to ignore a copyright whenever it determines the underlying work contains material of possible public importance.”); *Worldwide Church of God v. Phila. Church of God*, 227 F.3d 1110, 1115 (9th Cir. 2000) (holding that the not-for-profit reproduction of an out-of-print book for religious and educational purposes was not fair use); *Suntrust Bank v. Houghton Mifflin Co.*, 136 F. Supp. 2d 1357, 1369 (N.D. Ga. 2001), *rev’d* 268 F.3d 1257(11th Cir. 2001) (describing Alice Randall’s radical retelling of Margaret Mitchell’s *Gone with the Wind* from the perspective of a slave as “unabated piracy”); *see generally*, Neil W. Netanel, *Why has Copyright Expanded? Analysis and Critique*, in 6 NEW DIRECTIONS IN COPYRIGHT LAW 3, 13-14 (Fiona Macmillan ed., 2007) (arguing, on the basis of these and other examples, that lower courts have been receptive to private property and piracy rhetoric and thus have narrowly interpreted exceptions

the typical judicial ailments of result-based reasoning, ideological bias, and ad hocery.¹²⁷ For many years, a persistent “market-centred approach” to fair use led courts to view it as “an anomalous exception to the copyright owner’s exclusive rights, applicable only in cases of irremediable market failure.”¹²⁸ In this context, the force of fair use was frequently undermined by an undue emphasis on the commercial purpose of a use or the effect on the market of the plaintiff’s work.¹²⁹ Even with an explicitly instrumental vision of copyright’s purpose, the economic incentive rationale slides easily into economic reward, then desert, such that protection of the owner’s right effectively becomes the end in itself.¹³⁰

Arguably, even now, the full force of fair use in the U.S. courts remains constrained by its categorization as an affirmative defense,¹³¹

to copyright holder’s rights).

127. See Ann Bartow, *Fair Use and the Fairer Sex: Gender, Feminism, and Copyright Law*, 14 AM. U. J. GENDER SOC. POL’Y & L. 551, 566-68 (2006) (providing an interesting perspective on ideological bias at work in fair use); Andrew Gildea, *Raw Materials and the Creative Process*, 104 GEO. L.J. 355, 394-96 (2016); Netanel, *Making Sense of Fair Use*, *supra* note 123, at 718 (noting that it would be absurd to expect some pristine standard of legal reasoning in fair use cases that no other area of law can provide); Rebecca Tushnet, *My Fair Ladies: Sex, Gender, and Fair Use in Copyright*, 15 AM. U. J. GENDER SOC. POL’Y & L. 273, 295-300 (2007).

128. Netanel, *Making Sense of Fair Use*, *supra* note 123, at 734.

129. See John Tehranian, *Et Tu, Fair Use? The Triumph of Natural-Law Copyright*, 38 U.C. DAVIS L. REV. 465, 500-03 (2005) (arguing that the courts’ approach to fairness and, in particular, the emphasis on the fourth factor privileges the inherent property interests of authors in the fruits of their labor over the utilitarian goal of progress in the arts).

130. See *Eldred v. Ashcroft*, 537 U.S. at 219, n. 18 (2003) (“As we have explained, ‘[t]he economic philosophy behind the [Copyright] [C]ause . . . is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors’ . . . [r]ewarding authors for their creative labor and ‘promot[ing] . . . [p]rogress’ are thus complementary; as James Madison observed, in copyright ‘[t]he public good fully coincides . . . with the claims . . . of individuals’ . . . [c]opyright law serves public ends by providing individuals with an incentive to pursue private ones.”); see generally Jeremy Waldron, *From Authors to Copiers: Individual Rights and Social Values in Intellectual Property*, 68 CHI.-KENT L. REV. 841, 850 (1993) (describing “the tendency to develop robust doctrines of individual moral entitlement even within the social policy framework”).

131. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. at 590 (citing *Harper & Row*, 471 U. S. at 561); H.R. Rep. No. 102-836, at 3 (1992); see also *Cambridge Univ. Press v. Patton*, 769 F.3d 1232, 1237 (11th Cir. 2014).

such that the burden falls on the defendant to make out fair use (rather than a plaintiff bearing the burden of establishing both prima facie infringement and the absence of fair use).¹³² Ned Snow contends that, as originally inherited from the English courts, fair use was readily conceived of as a matter of right:

Like their English counterparts, courts in the U.S. treated the principles of fair use as definitional to the issue of infringement: fair-use principles determined . . . the scope of a copyright holder's rights. As definitional to infringement, fair use implied that the user held a presumptive right to use the copyrighted expression absent a showing otherwise.¹³³

Indeed, in his authoritative 1847 treatise, George Ticknor Curtis described as “one of the great tasks of jurisprudence” administering copyright law in a manner that did not curtail “the right to a fair use by any writer of all that has been recorded by previous authors.”¹³⁴ According to Snow, the idea of fair use as a right receded over the course of the twentieth century as U.S. courts shifted the burden of proof away from the plaintiff (to prove that a defendant's use was unfair),¹³⁵ onto the defendant (to prove the fairness of the use).¹³⁶ With that mistake, contends Snow, fair use was changed “from a right of speech to an excuse for infringement.”¹³⁷ The shifting burden

132. See Lydia Pallas Loren, *Fair Use: An Affirmative Defense?*, 90 WASH. L. REV. 685, 688-91 (2015) (arguing that courts could and should shift the burden to the plaintiff in fair use cases); Samuelson, *Possible Futures of Fair Use*, *supra* note 121, at 854, n. 259 (arguing that *Campbell* erred in asserting that fair use was an affirmative defense but noting that this has not unduly burdened defendants asserting fair use in practice); Ned Snow, *The Forgotten Right of Fair Use*, 62 CASE W. RES. L. REV. 135, 153 (2012) (acknowledging that where the burden of proof lies may not significantly affect the fair use analysis if approached as a matter of law but noting that the burden was very relevant in the past when fair use was more commonly treated as an issue of fact).

133. Snow, *supra* note 132, at 144.

134. GEORGE TICKNOR CURTIS, A TREATISE ON THE LAW OF COPYRIGHT 237 (1847); Snow, *supra* note 132, at n. 82.

135. See, e.g., *Simms v. Stanton*, 75 F. 6, 13 (N.D. Cal. 1896) (ruling for the defendant-user on the basis that the copyright holder had failed to satisfy his burden of proving that the use was unfair); Snow, *supra* note 132, at 152.

136. Snow, *supra* note 132, at 155-56 (tracing the “paradigm shift” to an unsubstantiated statement by Richard DeWolf in his treatise AN OUTLINE OF COPYRIGHT LAW 143 (1925) that fair use was a “use technically forbidden by the law, but allowed as reasonable and customary on the theory that the author must have foreseen it and tacitly consented to it”).

137. *Id.* at 137.

of proof was itself the natural consequence of a more fundamental paradigm shift by which fair use, as widely conceived, morphed from a non-infringing use beyond the scope of the owner's right into a technical infringement excusable only on an exceptional basis.¹³⁸

Even an affirmative defense can be a matter of right, however,¹³⁹ and certain U.S. commentators and judges have argued that fair use is properly understood as such. In *Bateman v. Mnemonics*, Judge Birch wrote: "Although the traditional approach is to view 'fair use' as an affirmative defense, this writer, speaking only for himself, is of the opinion that it is better viewed as a right granted by the Copyright Act of 1976."¹⁴⁰ More recently, in *Lenz v Universal Music Corp.*, the Ninth Circuit Court of Appeals agreed with Justice Birch's characterization of fair use, writing: "even if . . . fair use is classified as an 'affirmative defense,' [it] is uniquely situated in copyright law so as to be treated differently than traditional affirmative defenses."¹⁴¹ Casting fair use not as an excusable infringement but as a non-infringing use authorized by law, the court cited in support Section 108(f)(4) of the Copyright Act, which refers to the "the right of fair use as provided by section 107."¹⁴² On the basis of the Ninth Circuit ruling in *Lenz*, it can now be argued that "the ability to make fair use of works without permission from the rights-holder is an affirmative right that is central to copyright law."¹⁴³

138. Oren Bracha, *The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright*, 118 YALE L.J. 186, 229 (2009) (arguing that the foundational articulation of fair use in the United States, by Justice Story in *Folsom v. Marsh*, 9 F. Cas. 342, 345 (C.C.D. Mass. 1841), had already introduced the notion that all uses were presumptively unfair unless found to be fair).

139. See Haochen Sun, *Fair Use as a Collective User Right*, 90 N.C. L. REV. 125, 145-46 (2011) (analogizing the assertion of fair use as an affirmative defense to self-defense). I am grateful to Peter Jaszi for an illuminating discussion on this point.

140. 79 F.3d 1532, 1542 n.22 (11th Cir. 1996).

141. 815 F.3d 1145, 1153 (9th Cir. 2016).

142. 17 U.S.C.A. § 108(f)(4) (West 2017) ("Nothing in this section in any way affects the right of fair use as provided by section 107.").

143. Brief of Amici Curiae Electronic Frontier Foundation and Public Knowledge in Support of Defendant-Cross-Appellant and Affirmance at 15-16, *Oracle Am., Inc., v. Google Inc.*, 750 F.3d 1339 (Fed. Cir. 2014) (No. 17-1118) (arguing that "[i]n reality, and as the Ninth Circuit has expressly concluded [in *Lenz*], the ability to make fair use of works without permission from the rightsholder is an affirmative right that is central to copyright law").

It remains fair to say, however, that, on the whole, “the conceptualization of fair use as a user right has . . . been little judicially recognized in the United States.”¹⁴⁴ David Vaver, Niva Elkin-Koren and others¹⁴⁵ argue in favor of a more explicit embrace of “user rights” as such—that is, beyond the general sense that fair use is undergirded by the user’s individual right of free speech.¹⁴⁶ Pamela Samuelson writes:

[I]nsofar as fair use is the mechanism by which First Amendment interests of second comers can be vindicated, one would think that just as speakers have First Amendment rights, they should have fair use rights, at least as to critical commentary. The Canadian Supreme Court has endorsed the view that its copyright law’s fair dealing provision creates ‘user rights,’ so perhaps U.S. courts should follow that high court’s lead.¹⁴⁷

In Israel, meanwhile, where a fair use defense modelled on Section 107 of the U.S. Copyright Act was adopted in 2007,¹⁴⁸ attention has similarly turned to the question of whether fair use constitutes a user right. In 2009, in the case of *Football Association Premier League Ltd v. Anonymous*, Justice Agmon-Gonen opined that the new statutory fair use provision had established a “user right,” and represented a new balance between authors’ rights and users’ rights in favor of users.¹⁴⁹ On appeal, the Supreme Court rejected this position outright, explaining that fair use should, rather,

144. David Vaver, *Copyright Defenses as User Rights*, 60 J. COPYRIGHT SOC’Y U.S. 661, 667 (2013).

145. Hugh Breakey, *User’s Rights and the Public Domain*, 3 INTELL. PROP. Q. 312, 323 (2010); Elkin-Koren, *supra* note 19, at 42; Vaver, *supra* note 144, at 667; see Drassinower, *supra* note 12, at 479.

146. See Sun, *supra* note 139, at 146 (observing that “what undergirds the fair use defense . . . is the need to protect the user’s own individual rights, such as the rights of education and freedom of expression.”).

147. Samuelson, *Possible Futures of Fair Use*, *supra* note 121, at 857.

148. Copyright Act, 2007, 5768-2008, § 19 (Isr.) (permitting fair use for purposes such as private study, research, criticism, review, journalistic reporting, quotation, or instruction and examination by an educational institution); see Orit Fischman Afori, *An Open Standard “Fair Use” Doctrine: A Welcome Israeli Initiative*, 30 EUR. INTELL. PROP. REV. 85, 85 (2008); Guy Pessach, *The New Israeli Copyright Act – A Case-Study in Reverse Comparative Law*, 41 INT’L REV. INTELL. PROP. COMPETITION L. 187, 189-90 (2010); Lior Zemer, *Copyright Departures: The Fall of the Last Imperial Copyright Dominion and the Case of Fair Use*, 60 DEPAUL L. REV. 1051, 1068 (2011).

149. Lital Helman, *Session IV: Fair Use and Other Exceptions*, 40 COLUM. J.L. & ARTS 395, 399 (2017).

be understood simply as a legal defense.¹⁵⁰ In the subsequent case of *Telran Ltd. v Charlton Communications*,¹⁵¹ however, the Court questioned the defense approach taken in Premier League by noting that fair use is not merely a technical defense to infringement but a permissible use under the Act. It proceeded to characterize a permitted use as a “right” that is granted to the user — an approach that was later reaffirmed by the court in *Safecom Ltd. v. Raviv*.¹⁵² While Israel is rapidly charting its own course in the development of fair use jurisprudence, it will offer a fascinating case study on the coalescence of a fair dealing history built on the British 1911 Act, a statutory move to an open and flexible fair use defense mirroring the U.S. model, and, at least potentially, a users’ rights approach drawn from the Canadian example.¹⁵³

As other nations around the world contemplate making a similar move from the British imperial fair dealing law to a U.S.-like fair use defense,¹⁵⁴ the language of “user rights” is increasingly invoked.¹⁵⁵ In

150. Elkin-Koren, *Copyright in a Digital Ecosystem*, *supra* note 80, at 157.

151. CA 9183/11 *Telran Commc’ns Ltd. v. Charlton Ltd.* (2013) (Isr.); *see* Elkin-Koren, *Copyright in a Digital Ecosystem*, *supra* note 80, at 157.

152. CA 7996/11 *Safecom Ltd. v. Raviv* 18 (2013) (Isr.) (accepting the position adopted in *Telran* that a permitted use constitutes a right granted to the user).

153. *See, e.g.*, Niva Elkin-Koren & Orit Fischman-Afori, *Rulifying Fair Use*, 59 ARIZ. L. REV. 161, 180 (2017) (examining the judicial ‘rulification’ of fair use by the Israeli courts following the enactment of the 2007 Copyright Act). *See generally* Zemer, *supra* note 19, at 263, 267 (evaluating the normative evolution of copyright in Israel).

154. Copyright Act 1987, § 13(2)(a), amended by Act A1420 2012 (Malay.) (amending to permit fair dealing for an inclusive and open-ended list of purposes); An Act Amending Certain Provisions of Republic Act No. 8293, Otherwise Known as the “Intellectual Property Code of the Philippines”, and for Other Purposes, Rep. Act No. 103721, § 185 (2012) (Phil.); Copyright Act, 2006, § 35-36 (Sing.) (incorporating a 2006 amendment with a fair dealing provision allowing the identification of privileged uses on the basis of multiple factors); [Copyright Act], Act No. 432, Jan. 28, 1957, amended by Act No. 12137, Dec. 30, 2013, art. 35(3) (S. Kor.) (exempting fair use, among other things, for reporting, criticism, education, and research); Copyright Act, 2016, § 65 (Taiwan); *see* JONATHAN BAND & JONATHAN GERAFFI, *THE FAIR USE/FAIR DEALING HANDBOOK 1* (2013); Christophe Geiger, Daniel J. Gervais & Martin Senftleben, *Understanding the “Three-step Test”*, in *INTERNATIONAL INTELLECTUAL PROPERTY* 167, 187 (Daniel J. Gervais ed., 2015).

155. *See* Graeme B. Dinwoodie & Rochelle C. Dreyfuss, *An International Acquis: Integrating Regimes and Restoring Balance*, in *INTERNATIONAL INTELLECTUAL PROPERTY*, 121, 159 (Daniel J. Gervais ed., 2015).

Australia, for example, where no fewer than six government inquiries and reviews over the past two decades have recommended the adoption of fair use,¹⁵⁶ the most recent Productivity Commission Report reiterated the recommendation, explicitly framing it as a matter of user rights.¹⁵⁷ Among the summary of key points appears the following: “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.”¹⁵⁸

In South Africa, where intellectual property law reform is an ongoing project, attention has focused on proposed amendments to the Copyright Act to create new exceptions for users.¹⁵⁹ Reporting for Intellectual Property Watch on a workshop to discuss the revised Draft Copyright Amendment Bill of 2015,¹⁶⁰ Linda Daniels, explained: “Expanding such user rights in South Africa in a core purpose of the revision . . . [including] expanding rights to use copyrighted works for education, libraries and to provide access for people with disabilities.”¹⁶¹ Sean Flynn has argued that “South Africa’s law in many respects fails to provide typical user rights that exist in other countries,” and hailed the draft bill as presenting a “key opportunity” to support both the expansion and the exercise of “user rights.”¹⁶² In addition to new exceptions for particular uses, the draft bill includes an open-ended (although circumscribed) fair use exception that borrows in large part from the wording of Section 107

156. AUSTL. L. REFORM COMMISSION, COPYRIGHT AND THE DIGITAL ECONOMY 61-64 (2013).

157. AUSTL. GOV’T PRODUCTIVITY COMMISSION, INTELLECTUAL PROPERTY ARRANGEMENTS: PRODUCTIVITY COMMISSION INQUIRY REPORT 165 (2016).

158. *Id.* at 165.

159. Copyright Amendment Bill No. 646 of 2015 ¶ 14 (S. Afr.) (establishing general exceptions from the protection of copyright for fair use).

160. *Id.*

161. Linda Daniels, *Panels Present Importance of Fair Use in South Africa’s Draft Copyright Amendment*, INTELL. PROP. WATCH, Jan. 13, 2017, <https://www.ip-watch.org/2017/01/13/panels-present-importance-fair-use-south-africas-draft-copyright-amendment/>.

162. See Sean Flynn, *Copyright Legal and Practical Reform for the South African Film Industry*, 16 AFR. J. INFO. & COMM. 38, 41, 46 (2015); Sean Flynn, *Academic Comments: South African Copyright Amendment Bill, 2015*, INFOJUSTICE (Sept. 17, 2015), <http://infojustice.org/archives/35003>.

of the U.S. Copyright Act.¹⁶³ Presently, South Africa remains a fair dealing jurisdiction,¹⁶⁴ but domestic commentators seem increasingly inclined to advance the position that fair dealing is a right and not merely a defense.¹⁶⁵ Tanya Pistorius, for example, argues that “the general purpose of copyright exceptions and limitations is to balance the public’s right to access copyright works and the economic rights of copyright owners.”¹⁶⁶ Her view is endorsed by Van der Walt and du Bois.¹⁶⁷

In Ireland, the Copyright Review Committee Report of 2013¹⁶⁸ recommended the adoption of a “specifically Irish version” of fair use that would be open and flexible but closely tied to existing exceptions.¹⁶⁹ Particularly interesting, for our purposes, was the

163. South Africa Copyright Act 98 of 1978 (with 2015 Proposed Amendments in red/strike out) § 12A(2), (4)-(6) (adding Section 12A(2): “(2) Notwithstanding any provision of this Act, fair use of work for purposes *such as* criticism, comment, news reporting, judicial proceedings, professional advice, teaching which may include, making multiple copies for classroom use, scholarship or research is not an infringement of copyright” (emphasis added). A new subsection (5) would set out factors for determining fairness, importing the four U.S. factors for consideration. Additional factors in paragraph 5(d) and subsection 6 could, however, significantly limit the availability of fair use in certain cases where, e.g., the whole work is used, the source or author are not mentioned, or when use is made for commercial gain. *See also* 17 U.S.C. § 107.

164. Copyright Act 98 of 1978 § 12 (S. Afr.) (laying out South Africa’s law that copyright will not be infringed by fair dealing).

165. AJ van der Walt & M. du Bois, *The Importance of the Commons in the Context of Intellectual Property*, 24 STELLENBOSCH L. REV. 31, 47 (2013).

166. T. Pistorius, *Copyright Law*, in LAW OF INTELLECTUAL PROPERTY IN SOUTH AFRICA 143, 211 (H.B. Klopper et al. eds., 2011).

167. Van der Walt & du Bois, *supra* note 166, at 47 (describing Pistorius’ position as: “[C]orrespond[ing] exactly with the general purpose of the public domain in the sense that intellectual property rights should be construed and developed in such a way that intellectual property works would still be readily accessible to the public and available for future creative use”); *accord* Pamela Andanda, *Copyright Law and Online Journalism: A South African Perspective on Fair Use and Reasonable Media Practice*, 6 QUEEN MARY J. INTELL. PROP. 411, 413-14 (2016).

168. COPYRIGHT REVIEW COMMITTEE FOR THE DEPARTMENT OF JOBS, ENTERPRISE, AND INNOVATION, MODERNISING COPYRIGHT 176-77 (2013).

169. The Copyright and Related Rights Act (Act No. 28/2000), §§ 50(4), 221(2) (Ir.) (proposing to change the phrasing “fair dealing means” to “fair dealing includes,” thereby creating the flexibility for additional uses to fall within the ambit of the defense as technologies evolve). *See also* COPYRIGHT REVIEW COMMITTEE FOR THE DEPARTMENT OF JOBS, ENTERPRISE, AND INNOVATION, *supra* note 168, at 9, 68-69 (explaining that anti-circumvention provisions would

proposed definition of “lawful user” to be applied to the specific context of exceptions under the heading of fair dealing: “In this Part, “lawful user” means a person who, whether under a license to undertake any act restricted by the copyright in the work or otherwise, *has a right to use the work*, and “lawful use” shall be construed accordingly.”¹⁷⁰ Indeed, the full package of proposed copyright exceptions and safeguards for lawful users (which did not ultimately progress into law) was remarkably consistent with a broad and positive conception of users’ rights to make use of protected works for permitted purposes.

In India, minor and still restrictive, additions were made to the statutory fair dealing provisions by the Copyright (Amendment) Act of 2012.¹⁷¹ But it was arguably the Supreme Court of Canada’s fair dealing reasons in the *Alberta* case¹⁷² that provided the basis for a game-changing ruling in the Delhi University photocopying case,¹⁷³

explicitly not prevent permitted acts under the proposed amendments while a mechanism would allow lawful users to request access, imposing on the copyright owner a statutory duty to comply); *id.* at 62 (justifying the addition of an open-ended fair dealing defence for “for the purposes of caricature, parody, pastiche, or satire, or for similar purposes”); *id.* at 63 (recommending the introduction of an exception for non-commercial user-generated content based on the Canadian example); *id.* at 85-86 (explaining a proposed fair dealing exception for “content-mining”); *id.* at 13 (describing the recommendation that any contract term which *unfairly* purports to restrict an exception permitted by the Act should be void).

170. COPYRIGHT REVIEW COMMITTEE FOR THE DEPARTMENT OF JOBS, ENTERPRISE, AND INNOVATION, *supra* note 168, at 61 (emphasis added).

171. Copyright (Amendment) Act, No. 27 of 2012, para. 32 (India); see Abhai Pandey, *Inside Views: The Indian Copyright (Amendment) Act, 2012 and its Functioning So Far*, INTELL. PROP. WATCH (Oct. 23, 2014), <https://www.ip-watch.org/2014/10/23/the-indian-copyright-amendment-act-2012-and-its-functioning-so-far/>.

172. *Alberta v. Canadian Copyright Licensing Agency*, 2 S.C.R. at 345. See Petition of the Society for Promoting Educational Access and Knowledge, 5-6, <https://spicyip.com/docs/DU%20Photocopying%20case/Application-for-Intervention-SPEAK.pdf> (citing the Supreme Court of Canada in support of the proposition that “copyright exceptions ought to be construed more as ‘rights’ or ‘entitlements’ accruing in favour of users such as educational institutions and not as ‘limited exceptions.’”); see also *Univ. of Oxford v. Rameshwari Photocopy Servs.*, (2016) RFA(OS) 81, para. 7-10, 69 (declining to regard the Canadian fair dealing case as persuasive authority given the specific requirements of the relevant Indian provision).

173. *Rameshwari Photocopy Servs.*, RFA(OS) 81, para. 75-80 (ruling in favour of the university and the photocopy service by finding no copyright infringement in the activities questioned by the publishers in view of the educational use

which upheld a broad interpretation of the educational use exception. The High Court described its interpretation of the provision as “a right conferred on a person to use the work of another without any compensation.”¹⁷⁴ In an op-ed entitled *Why Students Need the Right to Copy*, Shamnad Basheer explained the rights at stake in the litigation over India’s educational use exception:

These exceptions reflect a clear Parliamentary intention to exempt core aspects of education from the private sphere of copyright infringement. Eviscerating these exceptions at the behest of publishers will strike at the very heart of our constitutional guarantee of a fundamental right to education for all. In fact, copyright scholars have begun labelling these exceptions as “rights” accruing in favor of beneficiaries such as students. In *CCH Canadian Ltd. v. Law Society of Upper Canada*, the Supreme Court of Canada endorsed this sentiment noting that: “. . . The fair dealing exception, like other exceptions in the Copyright Act, is a user’s right . . . it must not be interpreted restrictively.”¹⁷⁵

In short, it seems clear that, around the world, as forces mount to safeguard copyright limits and expand exceptions in the digital age, they find a foothold in the idea of user rights.

At the level of international lawmaking, admittedly, the language of copyright “limits and exceptions” (L&E) persists. Cast as such, of course, L&E can be readily misrepresented as antithetical to the international legal order — undesirable derogations from the normative quest to harmonize robust intellectual property protections.¹⁷⁶ This perception of L&E as only narrowly permissible and broadly frowned upon is reinforced by the tenacious Three-Step Test.¹⁷⁷ Originally articulated in the Berne Convention, the Three-

exception under section 52(1)(i) of the Copyright Act of 1957).

174. *Id.* para. 76-77 (noting that the education exception was like the “brilliant beating” drum permitted at times to mute the sounds of other provisions of the Act for the purposes of the statute’s overall harmony).

175. Shamnad Basheer, *Why Students Need the Right to Copy*, HINDU (June 13, 2016, 4:48 AM), <http://www.thehindu.com/opinion/op-ed/why-students-need-the-right-to-copy/article4654452.ece>; see also Lawrence Liang, *Exceptions and Limitations in Indian Copyright Law for Education: An Assessment*, 3 LAW & DEV. REV. 196, 218 (2010) (arguing for greater exceptions and limitations to address the needs of developing countries in general and with respect to the Indian constitutional right to education in particular).

176. See Liang, *supra* note 175, at 219-20.

177. *Id.* at 219 (explaining the Three-Step Test which is a general formula applied to determine the legality of copyright exceptions and limitations).

Step Test is now an international constraint on nations' capacity to lawfully enact new and flexible copyright exceptions.¹⁷⁸ Recent efforts to reimagine the meaning and application of the Three-Step Test are important and welcome interventions in the international IP narrative. The argument can be made that the Three-Step Test, properly conceived (or radically reconceived, depending on one's perspective), should advance the cause of proportionality and balance within the system.¹⁷⁹ What this debate reveals is the fundamental error of constructing a lopsided international copyright regime wherein only owners have rights worthy of protection.¹⁸⁰ Recent developments suggest that this, too, may be changing.¹⁸¹ The successful coming into force of the Marrakesh Treaty¹⁸² as well as, more broadly, the traction gained by the Access to Knowledge movement,¹⁸³ reflect efforts to re-contextualize copyright exceptions

178. Berne Convention, *supra* note 1, at 293 (articulating that permitted exemptions from copyright infringement must meet a three factor test: "(1) There is a certain special case or use; (2) that does not conflict with a normal exploitation of a work; and (3) that does not unreasonably prejudice the legitimate interests of the author."); *see also* Marrakesh Agreement Establishing the World Trade Organization, Annex 1C Agreement on Trade-Related Aspects of Intellectual Property Rights art. 1, 9, 13, Apr. 15, 1994, 1867 U.N.T.S. 154; WIPO Copyright Treaty, *supra* note 1, art. 10; WIPO Performances and Phonograms Treaty, *supra* note 1, art. 16.

179. *See* MARTIN SENFTLEBEN, COPYRIGHT, LIMITATIONS AND THE THREE-STEP TEST: AN ANALYSIS OF THE THREE-STEP TEST IN INTERNATIONAL AND EC COPYRIGHT LAW 295 (2004); Geiger, Gervais & Senftleben, *supra* note 154, at 189; Christophe Geiger et al., *Declaration: A Balanced Interpretation of the "Three-Step Test" in Copyright Law*, 1 J. INTELL. PROP. INFO. TECH. & ELECTRIC COM. L. 119, 120-21 (2010); Martin Senftleben, *The International Three-Step Test: A Model Provision for EC Fair Use Legislation*, 1 J. INTELL. PROP. INFO. TECH. & ELECTRIC COM. L. 67, 77-78 (2010).

180. *See* RUTH L. OKEDIJI, THE INTERNATIONAL COPYRIGHT SYSTEM: LIMITATIONS, EXCEPTIONS, AND PUBLIC INTEREST CONSIDERATIONS FOR DEVELOPING COUNTRIES ix (2006) (arguing that "the concept of the public interest in international intellectual property regulation focused disproportionately on just one aspect of the public interest, namely securing the optimal provision of knowledge goods by granting exclusive rights to authors and inventors").

181. Marrakesh VIP Treaty, *supra* note 1; Amy Kapczynski, *Access to Knowledge: A Conceptual Genealogy*, in ACCESS TO KNOWLEDGE IN THE AGE OF INTELLECTUAL PROPERTY 17, 41-42 (Gaëlle Krikorian & Amy Kapczynski ed., 2010).

182. Marrakesh VIP Treaty, *supra* note 1.

183. *See* SARAH BANNERMAN, INTERNATIONAL COPYRIGHT & ACCESS TO KNOWLEDGE 120-22 (2016); Kapczynski, *supra* note 181, at 41-42.

in the realm of rights.¹⁸⁴ As WIPO (albeit belatedly and slowly) responds to the challenge of reorienting the international copyright system towards development goals,¹⁸⁵ international treaty-making efforts in the realm of “copyright limitations and exceptions”¹⁸⁶ are taking on growing importance. As bilateral, plurilateral, and regional agreements continue to ratchet up protection for copyright owners and industries, the need for a positively articulated account of L&Es also takes on growing urgency.¹⁸⁷ Our understanding and

184. See, e.g., Farida Shaheed (Special Rapporteur in the Field of Cultural Rights), *Copyright Policy and the Right to Science and Culture*, U.N. Doc. A/HRC/28/57, para. 94 (Dec. 24, 2014) (recognizing the significance of copyright limitations and exceptions and the fundamental human right of access to science and culture); Tim Wilson (Human Rights Commissioner), *Senate Inquiry into the Copyright Amendment (Online Infringement) Bill 2015*, AUSTRALIAN HUM. RTS. COMMISSION (Apr. 15, 2015) (warning that, in the absence of an adequate fair use defense, respecting copyright can unreasonably restrict the right to freedom of expression); Geiger et al., *supra* note 179, at 121 (declaring that the Three-Step-Test, which restricts states’ enactment of copyright, should be interpreted in a manner that respects the interests deriving from human rights and fundamental freedoms); Kevin Smith, *Copyright, Open Access and Human Rights*, SCHOLARLY COMMUNICATIONS @ DUKE (Mar. 13, 2015), <http://blogs.library.duke.edu/scholcomm/2015/03/13/copyright-open-access-and-human-rights> (“[I]ntellectual property laws are in tension with the fundamental human right of access to science and culture.”).

185. See Boyle, *supra* note 2, at 3-6 (calling for national and international intellectual property laws that promote the balance between rights and the public domain).

186. World Intellectual Prop. Org. [WIPO], *Limitations and Exceptions*, <http://www.wipo.int/copyright/en/limitations> (last visited Jul. 9, 2017) (Due to the development of new technologies and the ever-increasing worldwide use of the Internet, it has been considered that the . . . balance between various stakeholders’ interests needs to be recalibrated. Limitations and exceptions is an issue considered in the agenda of the WIPO Standing Committee for Copyright and Related Rights (SCCR) and, recently, its debate has been focused mainly on three groups of beneficiaries or activities in relation to exceptions and limitations – on educational activities, on libraries and archives and on disabled persons, particularly visually impaired persons.).

187. See Matthew Rimmer, *Back to the Future: The Digital Millennium Copyright Act and the Trans-Pacific Partnership*, LAWS (forthcoming 2017); Peter Yu, *The RCEP and Trans-Pacific Intellectual Property Norms*, 50 VAND. J. TRANSNAT’L L. (forthcoming 2017) (manuscript at 2-3) (noting the importance of the Trans-Pacific Partnership (TPP) and the Regional Comprehensive Economic Partnership (RCEP), currently being negotiated among Australia, China, India, Japan, New Zealand, South Korea, and the ten members of the Association of Southeast Asian Nations, to regional trade and investment agreements); Timothy Vollmer, *Dozens of organizations call on European Parliament to redouble efforts*

presentation of the nature and role of such “exceptions” is therefore becoming a critical point of departure for the future of the international copyright regime.¹⁸⁸

Tawfik argues that the full implications of the Supreme Court of Canada’s endorsement of user rights should extend well beyond the Canadian context:

The principles articulated by the Court should also resonate among all who are concerned that copyright policy at the international level has resulted in a continuous strengthening of the copyright owner’s interest to the exclusion of other public policy objectives including access to information and the preservation of a flourishing public domain.¹⁸⁹

Based on the Canadian experience, it might reasonably be concluded that advocates for expanding and entrenching copyright limitations and exceptions internationally would do well to line up behind the concept of “user rights.”¹⁹⁰ This could be true on a jurisdiction-by-jurisdiction basis, but also at the international level, where a commitment to user rights as such could both validate and mandate national domestic efforts to recalibrate copyright’s balance

for progressive copyright changes, CREATIVE COMMONS (June 2, 2017), <https://creativecommons.org/2017/06/02/dozens-organizations-call-european-parliament-redouble-efforts-progressive-copyright-changes> (outlining the concerns raised by Creative Commons and sixty organizations in an open letter to European lawmakers, calling on “Parliament and Council to spearhead crucial changes that promote creativity and business opportunities, enable research and education, and protect user rights in the digital market”).

188. See Margot E. Kaminski & Shlomit Yanisky-Ravid, *The Marrakesh Treaty for Visually Impaired Persons: Why a Treaty was Preferable to Soft Law*, 75 U. PITT. L. REV. 255, 280-82 (2014) (describing the relationship between the “hard law” treaty approach taken by WIPO and the recognition of “users rights”); see also Aaron Scheinwald, Note, *Who Could Possibly be Against a Treaty for the Blind?*, 22 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 455, 487-90 (2012) (“The weight of the ‘gateway drug’ argument is grounded in the fear that the proposed treaty is the ‘thin edge of the wedge’ to the users’ rights movement.”). Cf. Silke von Lewinski, *WIPO’s Discussions on Exceptions and Limitations, in Particular in Favour of Visually Impaired Persons*, 225 REVUE INTERNATIONALE DU DROIT D’AUTEUR 53, 163-65 (2010) (opposing the solution of a binding international treaty and suggesting that solutions instead be found at a national level).

189. Myra J. Tawfik, *International Copyright Law and ‘Fair Dealing’ as a ‘User Right’*, UNITED NATIONS EDUCATIONAL, SCIENTIFIC, AND CULTURAL ORGANIZATION (UNESCO) E-COPYRIGHT BULLET., Apr.-June 2005, at 6-7 [hereinafter Tawfik, *International Copyright Law and ‘Fair Dealing’*].

190. *Id.* at 14-15.

to the benefit of users and the public.¹⁹¹ Currently, such efforts must withstand accusations that they contravene the Three-Step Test and international obligations, while the steady expansion of owner rights meets no such barrier in our international copyright regime.¹⁹² As such, as Margaret-Ann Wilkinson observes, “even for Canadians . . . in light of the international developments involving copyright holders’ rights it seems very important to ensure that the rights of users are clearly internationally enshrined as well.”¹⁹³ The concern is that, without some formal textual instantiation of user rights in the international regime, future governments in pursuit of external trade-related goals may be pressured to derogate from established domestic protections for users.¹⁹⁴ The international recognition of “users rights,” it seems reasonable to assert, might provide a more reliable shield for users against the incursion of copyright.¹⁹⁵

The discussion that follows does not seek to dispute or undermine the significance of developments in the Canadian copyright law around the judicial and broad endorsement of “user rights,” nor does it advocate against the assertion of user rights internationally. Indeed, it takes as its premise that there is a pressing need to develop global copyright norms around copyright limits and exceptions—norms that can be “effectively translated into a credible system that appropriately values author and users rights.”¹⁹⁶ However, In what follows, I will caution against the attractive assumption that “rights” are all users need in order to cure the ills of an over-expansive

191. *See id.* at 7-8.

192. *See* Myra Tawfik, *International Copyright Law: W[h]ither User Rights?*, in *IN THE PUBLIC INTEREST: THE FUTURE OF CANADIAN COPYRIGHT LAW* 66, 77-78 (Geist ed., 2005) (“[T]he three-step test does not undermine the discretion enjoyed by national legislatures to enact limitations and exceptions so long as they remain consistent with the Berne Convention and conform to the objectives the test was formulated to achieve.”).

193. Wilkinson, *supra* note 16, at 10.

194. *See id.* (noting that, if user rights are not so enshrined, “future Canadian governments [may] be pressured by future international trade possibilities to use legislative power to derogate from the level of users’ rights protection that is currently in place in Canadian law”).

195. *See id.* at 10, 13.

196. P. BERNT HUGENHOLTZ & RUTH L. OKEDIJI, *CONCEIVING AN INTERNATIONAL INSTRUMENT ON LIMITATIONS AND EXCEPTIONS TO COPYRIGHT* 50 (2008), https://www.ivir.nl/publicaties/download/limitations_exceptions_copyright.pdf.

copyright system. Rights can only do so much; and in some respects, I will suggest, blind reliance upon the rhetoric of rights could do more harm than good to the overarching cause of advancing the public interest and protecting the public domain.

III. THE ROLE AND RISKS OF USERS' RIGHTS

As we have seen, the ruling of the Supreme Court of Canada in *Théberge*¹⁹⁷ produced a shift away from the owner-centric approach to copyright that had characterized Anglo-Canadian jurisprudence. It did not, however, produce a departure from rights-based reasoning.¹⁹⁸ The *Théberge* decision acknowledged the role of the public in copyright policy, but nevertheless invoked natural rights-based language to explain the nature of the “balance” sought “[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 (or more accurately, to prevent someone other than the creator from appropriating whatever benefits may be generated).”¹⁹⁹

The balance requires that we first “recogniz[e] the creator’s rights.”²⁰⁰ It should be no surprise, then, that the *Théberge* balance has since been explained in distinctly Lockean language: “The person who sows must be allowed to reap what is sown, but the harvest must ensure that society is not denied some benefit from the crops.”²⁰¹ Courts purporting to implement the *Théberge* copyright

197. *Théberge v. Galerie d’Art du Petit Champlain Inc.*, [2002] 2 S.C.R. 336, 361-63 (Can.) (rejecting the argument that the ink-transfer process constituted an infringement of a copyright owner’s economic rights because there was no “reproduction without multiplication” of the total number of copies).

198. *Id.* at 337-38.

199. *Id.* at 355.

200. *Id.* (“The proper balance . . . lies *not only in recognizing the creator’s rights* but in giving due weight to their limited nature.”) (*emphasis added*); see *CCH Canadian v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339, paras. 10, 23 (Can.) (*quoting Théberge*, [2002] 2 S.C.R. 336, paras. 30-31) (asserting that one objective of the Copyright Act is to obtain “a just reward for the creator”). From a Lockean perspective, the concept of a “just reward” would amount to a “right,” and generally, it is likely to be understood in this way. The language of “just reward” is therefore likely to permit the continued prevalence of a Lockean approach to copyright.

201. *CCH Canadian Ltd. v. Law Soc’y of Upper Canada*, [2002] CAF 187, para. 23 (Can.); see Teresa Scassa, *Interests in the Balance, in* IN THE PUBLIC INTEREST:

balance can still be guided by a conviction that “to deprive authors of the fruits of their labour is unjust.”²⁰² There is, in other words, nothing inherent in the idea of a balanced copyright system or a public interest purpose that necessarily disrupts the rights-based rationale for copyright ownership.

Rather than an instrument of broader social good, the copyright system remains tethered, in this account, to authorial claims of right, necessarily limiting the power of the public interest to define and delimit the copyright owner’s claim.²⁰³ Individual rights are not subject to—and so will not cede to—the interests of the public at large.²⁰⁴ But they may be limited by the competing rights of others.²⁰⁵ Herein lies the power and the appeal of “user rights”: the concept of the user’s right has provided much needed ballast for users in the

THE FUTURE OF CANADIAN COPYRIGHT LAW 41, 44 (Geist ed., 2005) (citing *CCH Canadian Ltd.*, para. 23) (describing the use of this Lockean approach as “an awkward amalgamation” of utilitarian and natural rights models).

202. *Robertson v. Thomson Corp.*, 2004 CarswellOnt 4015, para. 51 (Can. Ont. C.A.) (WL).

203. See *Childress v. Taylor*, 945 F.2d 500, 507 (2d Cir. 1991) (guarding against “spurious claims by those who might otherwise try to *share the fruits of the efforts* of a sole author”) (emphasis added); *Harper & Row, Inc. v. Nation Enter.*, 471 U.S. 539, 546 (1985) (“The rights conferred by copyright are designed to assure contributors to the store of knowledge a *fair return for their labors.*”) (emphasis added); *Triangle Publ’n v. Knight-Ridder Newspapers*, 626 F.2d 1171, 1174 (5th Cir. 1980) (describing fair use as a balance between “the author’s right to compensation for his work” and the “public’s interest in the widest possible dissemination of ideas and information”); *Wainwright Sec., Inc. v. Wall St. Transcript Corp.*, 558 F.2d 91, 96 (2d Cir. 1977) (displaying concern for protecting the creator’s “substantial investment of time, money and labor”); *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (“*sacrificial days* devoted to such creative activities *deserve rewards* commensurate with the services rendered”) (emphasis added); *Int’l News Service v. Associated Press*, 248 U.S. 215, 236-40 (1918) (declaring that when two parties seek to profit in the same field using the same material, that material is “quasi property” attempting to “reap where it has not sown” constitutes “appropriating to itself the harvest of those who have sown”); *Wheaton v. Peters*, 33 U.S. 591, 669-70 (1834) (Thompson, J., dissenting) (“The great principle on which the author’s rights rests, is, that it is the fruit or production of his own labour, and which may, by the labour of the faculties of the mind, establish a right of property.”).

204. See *Wheaton*, 33 U.S. at 669-70 (Thompson, J., dissenting) (arguing that authors have a claim of right “founded upon the soundest principles of justice, equity and public policy”).

205. *CCH Canadian Ltd.*, [2002] CAF 187, paras. 12-13 (users’ rights).



balancing act that courts are now asked to perform.²⁰⁶

A. THE PROBLEM WITH THE COPYRIGHT BALANCE

The label of right, as we have seen, proves useful in ensuring that the interests of users are not simply set aside in the face of the owner's claim.²⁰⁷ Rather, with the label of right appended, the interests of the user are sufficiently weighted on the proverbial copyright scale to effectively limit the rights of authors.²⁰⁸ There are risks, however, that come with subscribing to this notional balancing of creator and user rights. As Laura Murray has argued, "the metaphor of balance has its limits because it posits users and creators as distinct entities placed on either side of a fulcrum."²⁰⁹ Thus conceptualized, users and creators have opposing interests at play in what is essentially a zero-sum game: what is good for the creator (more protection) is bad for the user (less freedom to use); and what is good for the user (freedom to use) is bad for the creator (less protection).²¹⁰

The flaw in this vision is twofold. First, creators and users occupy separate categories while in fact, of course, all creators are users, and all users are creators.²¹¹ Second, the rights of individuals in each category are presumed to be at odds with one another, while the operative assumption justifying copyright is that the interests of creators and users should align in the encouragement and

206. *Id.*

207. See Laura J. Murray, *Protecting Ourselves to Death: Canada, Copyright and the Internet*, 9 FIRST MONDAY, No.10, Oct. 4, 2004, at 8, <http://firstmonday.org/ojs/index.php/fm/article/view/1179/1099> [hereinafter Murray, *Protecting Ourselves to Death*] (describing copyright as a system comprised of many individual rights-holders whose interests are served).

208. *Id.*

209. *Id.* at 9.

210. See *id.* at 8-9 (stressing the need for balance in copyright law).

211. Cf. Julie Cohen, *The Place of the User in Copyright Law*, 74 FORDHAM L. REV. 347, 348 (2005) (offering a situated and contextual account of the various roles of the user in the copyright context by stating, "I do not intend to argue that copyright is, as some have asserted, 'a law of users' rights.' I am happy to agree that copyright is first and foremost a law of authors' rights, and that having some such law is, in general, a good idea. That statement, however, doesn't end the discussion; it begins it. A theory of authors' rights must be informed by a theory of the user as well.").

dissemination of works.²¹² The complexity of the stakeholder interests necessarily at play in the copyright system (the diverse interests of authors, owners, users, and the wider public) may be helpfully simplified by the binary scales on which they are forced to compete, but they are also flattened to the point of fiction.²¹³ To make invisible the complex relationships implicated by the processes of creative cultural exchange is to remove the dimension in which we can perceive what is truly at stake.²¹⁴ Shared and divergent values, competing and complimentary interests, shifting roles and relationships—these are all reduced to commensurate weights to be traded off against one another.

The problem is not unique to copyright, but rather is inherent to the over-simplifying and complexity-concealing notion of balance that is increasingly prevalent in our liberal legal imagination. Julian Sanchez puts his finger on the problem:

Perhaps the most obvious problem with balancing metaphors is that they suggest a relationship that is always, by necessity, zero sum: If one side rises, the other must fall in exact proportion . . .

In my own area of study, the familiar trope of ‘balancing privacy and security’ is a source of constant frustration to privacy advocates, because while there are clearly sometimes tradeoffs between the two, it often seems that the zero-sum rhetoric of ‘balancing’ leads people to view them as always in conflict.²¹⁵

As Kim Weatherall has noted, the “subtle influence of framing”²¹⁶ such policy questions as balancing acts is just as powerful—and, it is implied, just as unsatisfactory—in the copyright domain.²¹⁷ The presentation of users’ rights as inherently in conflict with creators’ rights reinforces a fundamentally flawed understanding of the latter:

212. See generally Julien Sanchez, *The Trouble with “Balance” Metaphors*, JULIAN SANCHEZ (Feb. 4, 2011), <http://www.juliansanchez.com/2011/02/04/the-trouble-with-balance-metaphors/> (discussing the effect of using the “zero-sum rhetoric of balancing” on people’s perception of the relationship between the two values being ‘balanced’).

213. *Id.*

214. *Id.*

215. *Id.*

216. Kimberlee Weatherall (@kim_Weatherall), TWITTER (Feb. 12, 2016, 6:35 PM), https://twitter.com/kim_weatherall/status/698334636368236544.

217. *Id.*

the zero-sum balancing act suggests that the rights of copyright owners exist in spite of, and in constant tension with, the rights of those who would use their works.²¹⁸ Within this frame, it becomes impossible to see the rights of creators as existing through the public's interest in the work rather than against it. In turn, then, the frame brings into sharp relief the creators' rights as individual entitlements—ends in themselves—independent of the rights of users or the interests of the public at large.²¹⁹ This is not a baseline assumption compatible with strong users' rights, broad fair dealing, or an expansive public domain.

In addition to creating the unhelpful illusion of an inevitable trade-off between creators and users as distinct entities, the metaphor of balancing rights serves to conceal the inadequacy of our analytic reasoning. Sanchez' critique is also apt in this regard:

[O]ften the imaginary scales conjured by balancing talk conceal the fact that we don't have a clear sense of what [the] shared dimension is supposed to be, what single quantity is supposed to serve as our standard for comparing such heterogeneous goods . . .

This may be why so many legal opinions employing 'balancing tests' feel so thin, and so many arguments about where to 'strike the right balance' between competing values founder. The metaphor assumes a lot of analytic background work that hasn't actually been done—and conceals the fact that it still needs to be.²²⁰

The balance metaphor in the copyright domain masks the reality that we have no agreed upon "shared dimension"—no uniform measure against which to weigh the heterogeneous interests and incommensurable considerations that we are haphazardly tossing onto the copyright scale.²²¹ Balancing analyses are necessarily based on value judgments about the relative importance of rights and interests.²²² Whether a balance can be said to have been struck depends only on the relative weight that the decision-maker

218. Sanchez, *supra* note 212.

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

attributes to the interests that she puts in the balance; as such, the balancing exercise can be no more than a subjective evaluation of who and what should prevail.²²³ Without the masking metaphor, this much would at least be clear. So too would be the shortcomings of our “analytic background work”: what are the multiple diverse and overlapping values captured within the monolithic idea of the author’s right or the public interest? What is the single standard against which we should measure the competing rights and interests of authors and users, owners, and the public (progress, utility, justice, equality, democracy, self-fulfillment, agency, cultural creativity, the social good)? Recourse to the self-rationalizing rhetoric of balance simply side-steps the analytical inquiry essential to purpose-oriented lawmaking.

Notwithstanding the flaws inherent in the metaphor of balance, it is nothing short of ubiquitous in today’s liberal legal order.²²⁴ With so many stakeholder claims at play in the copyright context, resistance to the frame of balance may be futile.²²⁵ Indeed, if the alternative to a “balanced” regime is one aimed only or primarily at the protection of copyright owners, resisting the balancing rhetoric would also be self-defeating for anyone hoping to advance the interests of users and the public.²²⁶ If we are prepared to embrace the metaphor of balance on such logic—and assuming that authors’ “rights” are already and will remain on the metaphorical scale—it seems reasonable to conclude that users will be better off with “rights” on the scale than mere “interests.” As Frederick Schauer reminds us with regard to the balancing of rights and interests: “When rights are on one side of the equation, there is a presumption in favour of the right[.]”²²⁷ Rights, in other words, have “a thumb on

223. *Id.*

224. Iddo Porat, *From Interest-Based Balancing to Rights-Based Balancing: Two Models of Balancing in the Early Days of American Constitutional Balancing*, SOCIAL SCIENCE RESEARCH NETWORK (SSRN), at 42 (Sept. 13, 2007), <http://ssrn.com/abstract=1012592>.

225. *See id.* (asserting that balancing tests “have become inseparable from, and a leading characteristic of, the global post-WWII phenomenon of a rights culture and of constitutionalism”).

226. *Cf. id.* at 41-42 (providing examples of individuals leading the balancing effort internationally).

227. Frederick Schauer, *Proportionality and the Question of Weight*, in PROPORTIONALITY AND THE RULE OF LAW: RIGHTS, JUSTIFICATION, REASONING

the scale” in their favor.²²⁸

There are, however, a few more cautionary notes to sound about the conceptual move from a rights-interests balance to a rights-rights balance in the copyright context.

B. THE PROBLEM WITH USERS' RIGHTS AS BALLAST IN THE BALANCE

Relying on user rights as ballast on the public side of the copyright balance could potentially overwhelm—and perhaps ultimately displace—the weight of the public interest as such. While the public interest was a critical consideration in the Supreme Court of Canada's *CCH* ruling and featured prominently in the Court's articulation of copyright's balance, the recognition of user rights has potentially precipitated a move towards rights-based balancing in copyright law.²²⁹

Iddo Porat explains the shift from interest-based to rights-based balancing, in connection with American constitutional jurisprudence, as the move from “early balancing,” which was progressive and anti-formalist, to “modern balancing” wherein rights are preferred over policy.²³⁰ Oliver Wendell Holmes, for example, is identified as one of the leaders of the early balancing methodology in American jurisprudence. He resisted the idea of judges logically deducing answers from conceptions of absolute right in favor of recognizing judges' duty to “[weigh] considerations of social advantage.”²³¹ In

173, 178 (Grant Huscroft, Bradley W. Miller & Grégoire Webber eds., 2014). Indeed, others may suggest that the mere non-rights-based interests cannot override or delimit the right at all. For further discussion of this important question, see generally Alan Gewirth, *Are There Any Absolute Rights?*, 31 PHIL. Q. 1, 2 (1981) (comparing the ideas of absolute rights and overrideable rights) and Judith Jarvis Thomson, *Some Ruminations on Rights*, 19 ARIZ. L. REV. 45, 51-52 (1977) (introducing the idea that rights are stringent in many cases and may be “overrideable”).

228. Porat, *supra* note 224, at 43.

229. *CCH Canadian Ltd. v. Law Soc'y of Upper Canada*, [2002] CAF 187, paras. 23-24, 48, 70 (Can.) (describing the copyright balance in terms that reference the “public interest,” “society's interest” and “users' interests,” but injecting the user's “right” into the balance to boost “user's interests” when addressing the scope and availability of fair dealing as a defence).

230. Porat, *supra* note 224, at 4-27.

230. Porat, *supra* note 224, at 4-27.

231. OLIVER WENDELL HOLMES, *The Path of Law*, in COLLECTED LEGAL

Hudson County Water Co. v. McCarter, Justice Holmes wrote: “All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded[.]”²³² Property rights, in this case, were to be balanced against conflicting interests.²³³ Porat argues that balancing in this sense was a reaction against the pro-rights traits of Classicist constitutional jurisprudence, “lowering absolute rights to the status of balanceable interests” and “rejecting a right-based or natural rights-based, automatic preference for the right over the interest.”²³⁴ The constitutional Classicists had, in Roscoe Pound’s words, relied on “an individualist conception of justice, which exaggerate[d] the importance of property and of contract [and] exaggerate[d] private right at the expense of public right.”²³⁵ Early balancing tests thus resisted the formalism of this strong rights jurisprudence, employing interest-based balancing to assess the relative worth and importance of competing social interests rather than privileging the individual interests masquerading behind the claim of right.²³⁶

Porat proceeds to explain how, with the rise of civil and political rights, the Progressive movement famously split over the position of rights, and therefore over the nature of judicial balancing.²³⁷ A new type of “modern balancing” arose, consistent with the pro-rights rhetoric and adapted to be rights-based; it “gave rights a preferred position in the balancing process.”²³⁸ Porat charts the rise and fall of the modern balancing approach in tandem with shifting values around judicial activism, but notes that balancing rhetoric is once again on the rise in US constitutional law: “The boundaries between the two types of balancing may have been blurred somewhat, but one can still identify today balancing that comes hand in hand with policy-oriented and interest-based argumentation, and balancing that

PAPERS 167, 183-84 (1920).

232. *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 355 (1908).

233. *Id.* at 355-57.

234. Porat, *supra* note 224, at 16.

235. *Id.* at 15 (citing MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 33, 34 (1992)).

236. *Id.*

237. *Id.* at 16.

238. *Id.* at 30-31.

comes hand in hand with a strong rhetoric of rights.”²³⁹

In the copyright context, my first concern with the insertion of “users’ rights” onto the metaphorical balancing scales is the possibility that, rather than disrupting the notion of the author’s right and using balancing to reveal the interest-based nature of authors’ rights claims, the copyright balance will come to look more like a rights-based balance in which formal rights compete on a scale that purports to weigh them objectively and prioritize them accordingly. The risk is that we lose our sense of the balancing mechanism as “a tool for maximizing social interests, and for demystifying a heightened rights rhetoric, which is . . . a cover-up for moral and political predispositions.”²⁴⁰ With the shift to rights-based balancing, the real disruptive capacity of a policy-oriented copyright balance could be significantly weakened.

With respect to the balancing metaphor as such, Porat identifies a further conceptual tension at play in the deployment of balance, which seems closely tied to whether it is interest-based or rights-based, pragmatist or formalist in nature.²⁴¹ The balance itself may be defined differently depending on how the balancing act is conceived: if the weighing scales metaphor simply suggests an exercise in comparing relative values, the act of balancing looks like an intuitive and subjective process of evaluation and comparison; if the scale metaphor alludes to finding the actual weight of two or more objects, then the act of balancing appears more like a purportedly exact, scientific and objective exercise in measurement.²⁴² Paul Kahn explains: “The metaphor [of balancing] is ambiguous. It describes both a process of measuring competing interests to determine which is ‘weightier’ and a particular substantive outcome characterized as a ‘balance’ of competing interests.”²⁴³ If rights have an ostensibly objective measure, and the weightier right will win, the rights-based balance ceases to look like a judicial exercise in the evaluation and comparison of possible outcomes and more like a formalistic

239. *Id.* at 40.

240. Porat, *supra* note 224 at 40-41.

241. *Id.* at 8-9 (exploring a concept of balancing that “raises the issue of the relationship between balancing and anti-formalism”).

242. *Id.* at 8-9.

243. *Id.* at 9 n.37 (citing Paul W. Kahn, *The Court, the Community and the Judicial Balance: The Jurisprudence of Justice Powell*, 97 YALE L.J. 1, 3 (1987)).

determination of the objective value of competing rights.²⁴⁴ In the copyright context, the latter approach is more likely to produce an assessment of the relative importance of protecting owners' rights over users' rights, rather than permitting a careful comparison of the social and economic advantages or disadvantages of privileging one party's interests over the other in a particular context.

Finally, it should be noted that with the addition of users' rights onto the copyright's metaphorical scale, there is a risk that the individualized owner-versus-user balance subsumes (or even supplants) the author-versus-public balance.²⁴⁵ The individualization of interests accompanies the more formalist rights-rhetoric, with the possible result that broader community-based interests will come to weigh less or even to be knocked off the scale. With the shift from interest-based to rights-based balancing there occurs a shift from community-oriented to individual-oriented analysis—and with this shift, the public purposes of the copyright system are at risk of receding from view.²⁴⁶

Laura Murray implicitly captures this concern and more when she worries about supplanting the concept of “fair dealing” with the idea of a “user right:”

[T]he Supreme Court elevated fair dealing to the status of a ‘user’s right.’ And yet, is not ‘user’s right’ a less capacious and more constraining category than ‘fair dealing’? ‘User’ puts the action in a combative light (user vs. creator/owner), and ‘right’ contains us within an individual rights discourse. Dealing . . . is relational and process based; use seems terminal and finite and individual. Fairness is a discourse of practice; right is a discourse of law. . . . [A]s a term [fair dealing] is more alive in our culture than user’s rights are.²⁴⁷

From the perspective of the copyright minimalist, keen to restrain copyright and to ensure a broad scope for fair and lawful uses of copyright protected works, it makes perfect sense that the rise of user rights in the Canadian case law should look like a cause for celebration. Certainly, the rulings of the Supreme Court of Canada

244. *Id.*

245. Laura Murray, *Deal with It*, in *DYNAMIC FAIR DEALING: CREATING CANADIAN CULTURE ONLINE* 349, 350-53 (Rosemary J. Coombe et al. eds., 2014).

246. *Id.* at 349-51.

247. *Id.* at 351.

have solidified the notion that users and the public have rights in relation to intellectual works.²⁴⁸ Moreover, that notion has since been employed to good effect in rulings that have typically safeguarded a reasonably large and liberal fair dealing defense and engaged in a careful, comparative balancing exercise to keep copyright claims in check.²⁴⁹ Indeed, it is important to note that the Supreme Court of Canada's articulation of the user right kept the broader public interest very much in view, casting user rights as one means by which to further copyright's public interest ends.²⁵⁰

There are, however, reasons to be cautious about the rise of users' rights rhetoric even for those who applaud these developments in favor of users. We should be wary of the framing analysis that asks us to balance owners' rights against users' rights because, to summarize, the balancing metaphor risks: wrongly separating creators and owners from users and the public, when in fact the same people (all of us) occupy these various roles; establishing a zero-sum equation whereby a gain on one side wrongly appears to be a loss on the other, with the political consequences that follow; reinforcing a more formalist, rights-based understanding of the copyright system that displaces an interest-based evaluation of competing claims; and reducing shared community goals and public interests into individualized claims of right, thereby threatening to obscure the

248. Michael Geist, *Copyright Users' Rights in Canada Hits Ten: The Tenth Anniversary of the CCH Decision*, <http://canliiconnects.org/en/commentaries/27511> (last visited Sept. 19, 2017).

249. *Id.* See also *supra* Section II. C. (describing cases in Canada that have endorsed the language of "user rights"). But see *United Airlines, Inc. v. Cooperstock*, 2017 FC 616, para. 111 (acknowledging the "importance of balance between the rights of creators or authors and those of users" but going on to reject a fair dealing defence for a critical parody); *Canadian Copyright Licensing Agency v. York University*, 2017 FC 669, para. 251 (stating that 'fair dealing' is a positive user right," but going on to find that the University's Fair Dealing Guidelines did not satisfy the requirements of fair dealing for the purposes of education, research or private study).

250. *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, [2012] 2 S.C.R. 326, paras. 9-11 (Can.) ("*Théberge* reflected a move away from an earlier, author-centric view which focused on the exclusive right of authors and copyright owners to control how their works were used in the marketplace . . . [It] focused attention instead on the importance copyright plays in promoting the public interest . . . *CCH* confirmed that users' rights are an essential part of furthering the public interest objectives of the Copyright Act.").

very social values and interests that justify the copyright system.²⁵¹ And so, at this critical juncture in the development of copyright law, as we struggle with the extension and enforcement of copyright law in new technological contexts at a global scale, it may be wise to ask ourselves whether “users’ rights” hold the key to restraining copyright—or if our reliance on users’ rights will only, ultimately, strengthen copyright’s overreaching grasp. A handful of small victories and some carefully circumscribed concessions for rights-bearing users could come at the cost of reinforcing a rights-based copyright regime, shifting the recognized purpose of the copyright system towards the protection of individual rights rather than the encouragement of authorship for the benefit of society as a whole. If rights-based reasoning has always, thus far, justified the incessant expansion of copyright’s domain, might we, in our eagerness to stand behind the user’s right, unwittingly be inviting more of the same?

IV. BEYOND COPYRIGHT: WHAT’S WRONG WITH RIGHTS?

As I have suggested, the conceptual and strategic risks associated with the escalation of rights rhetoric in copyright law are not alien to other fields of law, from privacy to contract to constitutional theory. The concerns I have sketched above resonate with longstanding debate in legal and political theory around the way that “rights” have been deployed in our liberal legal order, and to whose advantage. While the legal history and scholarship here is vast, my purpose in this section is only to outline some core objections to the rise of rights most closely associated with the school of Critical Legal Studies.²⁵² We will then briefly consider how these rights critiques have been both acknowledged and refuted in the feminist and critical race schools of thought, wherein activists and theorists faced a familiar dilemma: how to leverage rights claims to advance equality without succumbing to the totalizing logic of liberal rights and its flaws.²⁵³

251. Murray, *Protecting Ourselves to Death*, *supra* note 207.

252. See *infra* Section III.A.

253. See *infra* Section III.B.



A. THE RIGHTS CRITIQUE: REIFICATION AND RHETORIC

The rise of the anti-formalist interest-balancing approach described above was attributed in large part to Oliver Wendell Holmes, who was, of course, a leading voice in the American Legal Realist movement.²⁵⁴ The Realists sought to reveal the fallacy of judicial rule-bound formalism, insisting instead that every case involving conflicting claims of right could be resolved only by making a political and moral choice about which claim to privilege.²⁵⁵ Simply put, all law is policy.²⁵⁶ Rights were a central target of the realist critique: “There will be a right if, and only if, the court finds for the plaintiff or declares the statute unconstitutional. What the court cites as the reason for the decision—the existence of a right—is, in fact, only the result.”²⁵⁷

Fast-forward to the last quarter of the twentieth century, and the Realist torch was carried forth by Critical Legal Scholars under the banner of Critical Legal Studies (CLS).²⁵⁸ The critique of liberalism was one of the unifying standpoints of CLS, and core to this was the contention that liberalism’s claim “to resolve the persistent and systematic conflict between individual and social interests through the mechanism of objective rules . . . [and] procedural justice is

254. See, e.g., Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897) (stating, “I think that the judges themselves have failed adequately to recognize their duty of weighing considerations of social advantage”).

255. Friedrich Kessler, *Theoretic Bases of Law*, 9 U. CHI. L. REV. 98, 109 (1941).

256. See, e.g., Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 820 (1935); J. Stuart Russell, *The Critical Legal Studies Challenge to Contemporary Mainstream Legal Philosophy*, 18 OTTAWA L. REV. 1, 6 n. 26 (1986).

257. Elizabeth Mensch, *The History of Mainstream Legal Thought*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 1, 33 (David Kairys ed., 1998).

258. See generally Alan Hunt, *The Theory of Critical Legal Studies*, 6 OXFORD J. LEGAL STUD. 1, 43-45 (1986) (stating “the emergence of critical legal studies is the most important intellectual development in the field of legal studies since the rise of Realism” and noting that CLS scholars diverged on the extent to which they perceived their projects as building on the Realists’ legacy); see also Allan C. Hutchinson & Patrick J. Monahan, *Law Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought*, 36 STAN. L. REV. 199, 199 (1984) (describing the movement as “a full-frontal assault on the edifice of modern jurisprudence”); Russell, *supra* note 256, at 1 (describing CLS as having “unleashed the most profound challenge to contemporary mainstream Western legal philosophy since Legal Realism swept the United States”).

inherently flawed.”²⁵⁹ Ultimately, they suggested that the law’s mediation between conflicting interests can offer only a pragmatic response to social conflict, producing “a set of results which reflects the unequal distribution of power and resources whilst claiming to act in the name of a set of universal social values.”²⁶⁰

Like the Realists before them, the CLS scholars took a radical political stance aimed at delegitimizing liberal legal theory by exposing the “received ideals” and presuppositions that informed judicial decision-making.²⁶¹ Central to this assault on deductive legal logic was the critique of rights.²⁶² Duncan Kennedy, a leading proponent of the so-called Frankfurt school, presents the critique by providing an account of the role of rights in American legal consciousness, how one might come to “lose faith in the coherence of rights discourse,” and why one might critique rights in spite of the “unpleasantness” of doing so.²⁶³ The critique is far richer and more compelling than I can do justice to here,²⁶⁴ but for our purposes I mean to pull out a few insights that may move the analysis along. Kennedy describes how, against the background of a nostalgic reinterpretation of the triumphant 1960s, the liberal left embraced rights and rights-rhetoric, while the CLS critique of rights appeared politically perverse.²⁶⁵ Rights came to play the powerful role, in

259. Hunt, *supra* note 258, at 5.

260. *Id.*

261. Russell, *supra* note 256, at 7.

262. See, e.g., Duncan Kennedy, *The Critique of Rights in Critical Legal Studies*, in LEFT LEGALISM / LEFT CRITIQUE 178, 178 (Wendy Brown & Janet Halley eds., 2002); Peter Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 TEX. L. REV. 1563, 1581 (1984); Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387, 390 (1984); Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1363 (1984); Mark Tushnet, *The Critique of Rights*, 47 SMU L. REV. 23 (1993); see generally, *The Critique of Rights*, BRIDGE: CRITICAL PERSPECTIVES ON RIGHTS, <https://cyber.harvard.edu/bridge/CriticalTheory/rights.htm> (last visited Jul. 16, 2017).

263. Kennedy, *supra* note 262, at 178-79.

264. Robin L. West, *Tragic Rights: The Rights Critique in the Age of Obama*, 53 WM & MARY L. REV. 713, 715 (2011) (describing the critique as “one of the most vibrant, important, counterintuitive, challenging set of ideas that emerged from the legal academy over the course of the last quarter of the twentieth century”), quoted in Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L.J. 2176, 2187 (2012).

265. Kennedy, *supra* note 262, at 182.

political discourse, of mediating between factual (objective, scientific) judgments and value judgments (subjective preferences):

[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, the reason for making it, 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, rather than just stating 'preferences.'²⁶⁶

This role for rights depends on the idea, first, that rights are 'universal' insofar as they derive from needs, values or preferences that everyone shares or ought to share; and second, that they are 'factoid' in the sense that they exist as entities in legal reasoning- the recognition of which leads ineluctably to particular rules or conclusions.²⁶⁷ Together, these attributes permit rights to mediate between the interests of particular groups in society and the interests of the whole, Kennedy explains:

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, if they can fit themselves to this template.²⁶⁸

The effect is that rights mediate not only between facts and values, but also between law and politics.²⁶⁹ Legal rules that recognize accepted rights appear non-partisan, transcending the left-right divide.²⁷⁰ The result is an "empowerment effect"²⁷¹ sought and embraced by both the left and the right, allowing both camps to claim "correctness" and rationality in their legal arguments. Rights talk, as a discourse, invokes a set of presuppositions about law, legal reasoning and reality (objective truth) upon which those who use it can now rely.

The role played by rights-discourse, as described by Kennedy,

266. *Id.* at 184-85.

267. *Id.* at 185.

268. *Id.* at 188.

269. *Id.* at 190.

270. *Id.* at 189.

271. Kennedy, *supra* note 262, at 189.

captures quite perfectly, I believe, the role that has been played by rights discourse in the copyright domain.²⁷² Our copyright system had, at least from the mid-eighteenth century onwards, been built upon a foundational perception of a “natural right” of authors—what Kennedy might call “an existing outside right”—whose “existence” does not appear to depend on legal enactment, but which has been translated into positive law.²⁷³ In fact, as Martha Woodmansee has argued, the recognition of this apparently pre-existing right was itself “the product of the rise in the eighteenth century of a new group of individuals: writers who sought to earn their livelihood from the sale of their writings.”²⁷⁴

Over the course of the twentieth century, with the rise of a formalist British judiciary committed to upholding private rights, the abstract demands of the public interest became secondary or peripheral to law’s task.²⁷⁵ Users of copyright protected works did not constitute a cohesive group with shared needs and interests, but rather were cognizable primarily as sole defendants before the courts, individual wrong-doers and free-riders whose private actions invaded the established rights of authors and copyright owners.²⁷⁶ What has now happened in the twenty-first century—no doubt attributable in large part to the rapid evolution of network technologies, combined with the intrusion of copyright norms into the daily lives of average citizens—is the rise of users as a group “having something in common that is a positive rather than a negative identity[.]”²⁷⁷ Rather than a diverse array of individualized infringers, users have emerged as a galvanized community with shared interests, demanding recognition and protection.²⁷⁸ What naturally follows, as Kennedy

272. *Id.* at 187-89.

273. *Id.* at 186-87. *See supra* Section II.A.

274. Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the “Author”*, 17 EIGHTEENTH-CENTURY STUDIES 425, 426 (1984).

275. *Id.* at 438.

276. *Id.*

277. Kennedy, *supra* note 262, at 188.

278. *See* Michael Geist, *The Canadian Copyright Story: How Canada Improbably Became the World Leader on Users’ Rights in Copyright Law*, in COPYRIGHT LAW IN AN AGE OF LIMITATIONS AND EXCEPTIONS 169 (Ruth L. Okediji ed. 2017); *see, e.g.*, Michael Nelson, *Battles over Digital Copyright (SOPA and ACTA) and the Rise of “Exo-Politics”*, EUROPEAN INSTITUTE: EUROPEAN AFFAIRS (April 2012), <https://www.europeaninstitute.org/index.php/147-european->

describes, is the turn to rights-talk as a “vehicle for formulating interests and demands” in a way that will “fit” with the current legal and political discourse.²⁷⁹

By employing the rhetoric of rights, the interests of users who wish to deal freely and lawfully with protected works cannot be reduced to mere personal preferences, nor can the demands of would-be users be dismissed as self-serving preferences. If established, user rights can assume the role of legal entities (“factoids”) necessitating certain objectively correct conclusions about what constitutes a lawful dealing.²⁸⁰ Users’ claims fit the template of other copyright claims, readily understood and deserving of equal recognition. Normative claims about what users should be permitted to do freely, and the limits to which copyright claims ought to be subject, metamorphose into a different kind of proposition about the obligation of owners and law-makers to respect rights.²⁸¹ In these various ways, it is undoubtedly “meaningful” to speak of legal rights with reference to fair dealing and other copyright exceptions. Kennedy explains, in general terms: “The appeal to a rule cast in the form of a right, or to a value understood to be represented by a right, may produce the experience of closure: given this legalized right, you can’t think of a good reason why the plaintiff shouldn’t lose the case.”²⁸²

Similarly, we might reason, given the users’ right to deal fairly with the work for the purposes of research or private study, there was no good reason in cases such as CCH, Bell, or Alberta for the plaintiff copyright owner or collective not to lose the case.²⁸³ Recognition of the user’s right could foreclose the issue without the need for further justification or debate. The point that we might take

affairs/ea-april-2012/1561-battles-over-digital-copyright-sopa-and-acta-and-the-rise-of-exo-politics (offering, by way of example, the successful mass political protests launched against the U.S. Stop Online Piracy Act and against the Anti-Counterfeiting Trade Agreement).

279. Kennedy, *supra* note 262, at 188.

280. *Id.* at 188-89.

281. *Id.* at 194-95.

282. *Id.* at 195.

283. CCH Canadian v. Law Society of Upper Canada, 1 S.C.R. 339, paras. 88-90 (Can.); Society of Composers, Authors & Music Publishers of Canada v. Bell Canada, 2 S.C.R. 326, paras. 49-50 (Can.); Alberta v. Canadian Copyright Licensing Agency, 2 S.C.R. 345, ¶¶ 37-38 (Can.).

from the CLS critique of rights, however, is that the assertion of a user right is really no different in nature than the assertion of any other normative argument based on politics, morality, or subjective values about what ought to be—that is, arguments about what uses of protected works ought to be permitted.²⁸⁴

If legal argument is open-textured and indeterminate, so too is the legal process of defining what the user right actually “is.” Whether photocopying law reports for lawyers, streaming 30 seconds of a musical work, or distributing photocopied book chapters to students “is” the exercise of a “user right” depends whether it is judged to be fair dealing for a lawful purpose.²⁸⁵ The circularity of the logic should be apparent: an activity is not fair dealing because it is a user’s right; it is only said to be a user’s right if it is adjudged to be fair dealing.²⁸⁶ The judicial decision to regard any particular activity as fair dealing is no more or less objectively rational or correct just because the legal question has been reframed as a question about whether the activity is or is not a matter of right.

The indeterminacy of the user right means that the right is doing less work than we might think: if the right does not determine the outcome of a particular case, it merely translates the court’s conclusion into rights-talk.²⁸⁷ The CLS “indeterminacy thesis” also suggests that the power of the recognized right to truly act as a bulwark against subsequent change is more limited than we might hope or realize:²⁸⁸ the right is not, after all, a stable entity that can be reliably passed from one use or user to the next.²⁸⁹ While the invocation of user rights might appear to substantively ground an expansive interpretation of the fair dealing defense in one case, the very same rhetorical lip-service to rights might accompany a narrow

284. *CCH Canadian v. Law Society of Upper Canada*, 1 S.C.R. 339, paras. 48 (Can.).

285. *Id.*

286. *Id.*

287. *Id.*

288. *Cf.* ROBIN WEST, *NORMATIVE JURISPRUDENCE: AN INTRODUCTION* 126 (2011); Butler, *supra* note 264, at 2188 (discussing West’s description of the indeterminacy thesis by noting “the articulation of an interest as a ‘right’ by no means creates an unmoveable bulwark against change, interference, or recalibration of the protection of the various interests . . . toward which it so desperately strives”).

289. Butler, *supra* note 264, at 2188.

interpretation in the next.²⁹⁰ Ultimately, rights-talk is just that. As Mark Tushnet explains, “[t]o some extent the critique of rights serves as a simple caution against overestimating the significance of legal victories.”²⁹¹

Courts’ reliance upon the metaphorical copyright “balance” to reconcile conflicting rights-claims only emphasizes the point that legal arguments about rights reduce down to policy arguments about what ought to be.²⁹² Balancing tests, Kennedy asserts, “render rights argument indistinguishable from open-ended policy discourse[.]”²⁹³ The internal critique of rights, he explains,

reduces legal rights reasoning to policy reasoning by showing that it is necessary to balance one side’s asserted right against the other side’s . . . [W]hat determines the balance is not a chain of reasoning from a right or even from two rights, but a third procedure, one that in fact involves considering open-textured arguments from morality, social welfare, expectations, and institutional competence and administrability.²⁹⁴

As we have seen, rights arguments have significant meaning and effect in copyright law, and have traditionally been wielded to the benefit of owners, whose claims to right have lent “closure” and a sense of objective correctness to rulings in favor of the owner/plaintiff claiming infringement.²⁹⁵ The claim of countervailing user rights is no less meaningful, and may similarly bring closure and objective correctness to rulings in the user/defendant’s favor. The ostensibly depoliticizing and empowering nature of the claim to right has much to offer users, and can be asserted as a means of recalibrating the metaphorical balancing scales of copyright justice to produce greater equilibrium.²⁹⁶ But the critique of rights outlined here undermines the rational basis for regarding rights arguments as essentially different from any other normative argument that might be made in defense of the user. At the moment when we resort to “balancing” a user’s right against a conflicting owner’s right, we

290. See, e.g. *United Airlines, Inc. v. Cooperstock*, 2017 FC 616; *Canadian Copyright Licensing Agency v. York University*, 2017 FC 669.

291. Mark Tushnet, *The Critique of Rights*, 47 SMU L. REV. 23, 25 (1994).

292. Kennedy, *supra* note 262, at 197.

293. *Id.*

294. *Id.* at 196.

295. *Id.* at 199.

296. *Id.* at 196-97.

could just as well argue that the user's activity ought to constitute non-infringing fair dealing on general moral, political or utilitarian grounds.²⁹⁷ The point becomes clearer when we insert the relevant copyright claims into the following passage by Kennedy:

The upshot . . . is that the advocates confront the judge with two plausible but contradictory chains of rights reasoning, one proceeding from the plaintiff's right [to exclusive control over the copyright work] and the other from the defendant's [right to use the work fairly]. Yes, the [copyright owner has exclusive] rights, but the [user has user rights] . . . Sometimes the judge more or less arbitrarily endorses one side over the other; sometimes she throws in the towel and balances. The lesson . . . is that the question involved cannot be resolved without resort to policy, which in turn makes the resolution open to ideological influence . . . [O]nce it is shown that 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.²⁹⁸

The problem, according to Critical Legal Scholars, is not only that rights are indeterminate, but also that they are potentially "regressive."²⁹⁹ "Winning" a right in a court case may not advance a political goal, but worse, it might actually impede a political goal.³⁰⁰ In the copyright context, the concern is that the judicial embrace of user rights will actually backfire to slow our progress towards a fairer copyright regime.³⁰¹ As Laura Murray has warned, within the frame of a user right, what can constitute a relevant use suddenly seems more terminal and finite and individual;³⁰² the breadth of what

297. *Id.*

298. Kennedy, *supra* note 262, at 198.

299. Butler, *supra* note 264, at 2189 (explaining that some theorists posit that rights may hinder advancement "because rights are individual, rather than about the welfare of groups").

300. *Cp.* Butler, *supra* note 264, at 2189 (citing Tushnet, *supra* note 291, at 23 (explaining that "In its weakest version, the critique of rights argues that there is no necessary connection between winning legal victories and advancing political goals; in a somewhat stronger version it argues that, more frequently than most lawyers think, winning legal victories either does not advance political goals or actually impedes them. In the strongest and most implausible version the critique of rights argues that winning legal victories almost never advances political goals.")).

301. *Cf.* Murray, *supra* note 245, at 351.

302. *Id.*

is fair constricts to what can be claimed within the scope of the individual user's right.³⁰³ As the battle between dueling rights-claims takes hold, efforts will be made to constrict that right to its baseline requirements. At the same time, the claim that users' rights are duly recognized within the copyright system will produce "a narrative of legitimation," a language for concluding that the system is fair, objective and unbiased.³⁰⁴ (In reality, of course, copyright limitations and exceptions as currently defined can do little to off-set the sheer scope of copyright protection or to hold at bay the powerful forces that demand it.)

If we are content to baldly assert users' rights as shorthand to get us where we want to go, we risk reducing larger normative claims about the necessary limits of copyright protection down to bare propositions about individual entitlements and duties.³⁰⁵ The reliance on rights rhetoric therefore threatens to impoverish our discourse around the public interest and the social values at stake in the copyright context. The work of another prominent US critic of rights, Mary Ann Glendon, is revealing in this regard. In a powerful attack on America's "shallow rights talk,"³⁰⁶ Glendon decries the resort to "mere assertion over reason-giving,"³⁰⁷ arguing: "Our rights talk, in its absoluteness, promotes unrealistic expectations, heightens social conflict, and inhibits dialogue that might lead toward consensus, accommodation, or at least the discovery of common ground."³⁰⁸ Perhaps, in the absence of lurking rights claims, we might be freed up to genuinely turn our minds to the question of how much copyright protection is really necessary and justified in furtherance of our shared social goals. Instead, we clamor to have our rights

303. *Id.*

304. *Cf.* Butler, *supra* note 264, at 2189; Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758, 775; *see generally* Alan D. Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978).

305. MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 172 (1991).

306. *Id.*

307. *Id.* at 14 (explaining that the current rights talk creates an "inhospitable" environment, and its narrow nature stops assistance to "the process of self-correcting learning").

308. *Id.*

recognized by and protected against one another.³⁰⁹ While the stated objectives of our copyright system require a teleological lens, claims to right focus on origins and present-day entitlements.³¹⁰ In terms that ring true in today's copyright climate, Glendon warns against the "present-mindedness"³¹¹ of rights talk as an obstacle to genuine communication and public deliberation.

Also resonant in the copyright context is Glendon's critique of rights talk as missing a "dimension of sociality."³¹² Remarking on the "relentless individuality" of our rights rhetoric, she warns that "our stark rights vocabulary receives subtle amplification from its encoded image of the lone rights-bearer[.]"³¹³ If rights talk is inhospitable to the social dimension of personhood, relationships and communities, then it is inhospitable to the very considerations that ought to inform our copyright law; authorship, after all, is a communicative act with an inherently inter-personal dimension.³¹⁴ Both the purposes and the limits of copyright protection can be appreciated only with a view to the social value of creativity and culture, and the importance of a vibrant public domain.³¹⁵

In sum, Glendon's contends, "[o]ur rights-laden discourse . . . easily accommodates the economic, the immediate, and the personal dimensions of a problem, while it regularly neglects the moral, the long-term, and the social implications."³¹⁶ If this is indeed to be the

309. Sun, *supra* note 139, at 164-65.

310. Alina N. Boyte, *Finding Copyright's Core Content*, 10 U. ST. THOMAS L.J. 774, 774 (2012).

311. GLENDON, *supra* note 305, at 182.

312. *Id.* at 109.

313. *Id.* at 109, 143 ("Our overblown rights rhetoric and our vision of the rights-bearer as an autonomous individual channel our thoughts away from what we have in common and focus them on what separates us. They draw us away from participation in public life and point us toward the maximization of private satisfactions.").

314. Carys J. Craig, *Symposium: Reconstructing the Author-Self: Some Feminist Lessons for Copyright Law*, 15 AM. U. J. GENDER SOC. POL'Y & L. 207, 219 (2007) [hereinafter Craig, *Symposium*].

315. See generally CRAIG, COPYRIGHT, COMMUNICATION & CULTURE, *supra* note 37.

316. GLENDON, *supra* note 305, at 171; see also LAURA J. MURRAY ET AL., PUTTING INTELLECTUAL PROPERTY IN ITS PLACE: RIGHTS DISCOURSE, CREATIVE LABOR, AND THE EVERYDAY 14-15 (2014) (commenting, aptly, "we think the same could be said of popular Intellectual Property Rights discourses").

nature of our rights-laden copyright discourse, we will neglect the very considerations that ought to be informing the development of our copyright system.

Even if we accept these critiques of rights as sound and pertinent, however, we may find it hard to shake the sense that the rhetoric of user rights is both necessary and desirable if we are to effectively restrain copyright and augment the scope for free and lawful use of protected works.³¹⁷ The assertion of rights, as Glendon reminds us, is usually a sign of a breakdown in a relationship;³¹⁸ and so it may be in the copyright context, where the needs, capacities and desires of users have been subordinated for so long to the demands and dictates of owners. We might argue, then, that our situation demands recourse—or indeed resort—to user rights. The determination of whose right prevails in the so-called copyright balance may well be subject to the whims or political commitments of the judges, but why not play the game? There is, in copyright, as in other areas, a good politically pragmatic argument for critiquing the critique of rights—not because it is wrong, perhaps, but because it is unhelpful or even harmful to the cause.³¹⁹ It is to this “critique of the critique” that we now briefly turn.

B. RESORTING TO RIGHTS: POLITICAL PRAGMATISM

The argument at the heart of the “critique of the critique” of rights is that the choice of target is, strategically, a poor one—and, politically, a dangerous one.³²⁰ Why pull the rug out from under the feet of rights that can be leveraged to advance your political goals? Should we not choose our targets in a way that avoids disarming, demoralizing, or further disempowering those who share our values and ideological goals? So what if the power of rights is purely rhetorical? Why would we not deliberately harness and strategically deploy that power for all it’s worth?

317. Craig, *Symposium*, *supra* note 314, at 267-68.

318. GLENDON, *supra* note 305, at 175.

319. Stan J. Liebowitz, *A Critique of Copyright Criticisms*, 22 GEO. MASON L. REV. 943, 958 (2007).

320. Craig, *Putting the Community in Communication*, *supra* note 69, at 114 (arguing that the *Michelin* approach to “copyright and freedom of expression” is unhelpful to human rights and “social goals,” ultimately delegitimizing the copyright system).

Thus, feminist and critical race theorists (CRT) largely resisted the CLS critique of rights, decrying the deconstruction of rights by the predominantly white, male Critical Legal Scholars even while sympathizing with their fundamental rights-skepticism.³²¹ While few feminists or critical race theorists are blind to the conceptual failings of liberal legal reasoning or the shifting and political nature of ‘rights’ as such, most are unwilling to give them up, and usually for good reason.³²² As Kennedy acknowledges, “the notion is that rights rhetoric is or at least once was effective, and we would be giving that up by losing faith in rights.”³²³ Or perhaps worse, “if ‘we’ lose our faith in rights rhetoric but ‘they’ don’t, then they will gain an advantage over us. . . . ‘Giving up’ rights would be like a professional athlete giving up steroids when all her competitors were still wedded to them.”³²⁴ In the copyright context, to back away from user rights while leaving the author’s claim to right intact would only perpetuate existing inequalities within the copyright system and further obstruct the attainment of its public purposes.³²⁵

Whereas CLS (and its postmodernist offshoots) sought to disaggregate the concept of ‘right,’ many feminist and CRT scholars contended that this move overlooked the historical potential of rights in the real lives and lived experiences of women and racialized minorities.³²⁶ Feminist scholar Martha Minow defended the use of rights while largely accepting the CLS critique:

Rights discourse, like any language, 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

321. Mark Tushnet, *The Critique of Rights*, 47 SMU L. REV. 23, 25 (1994) (noting that CLS scholars were not deaf to these critiques: “Does not the critique of rights implicitly, and to some extent explicitly, deprive progressives of a tool—rights arguments that has proved useful? Does not it implicitly, and to some extent explicitly, criticize advocates for pursuing what seemed to them the only reasonable course available under circumstances of severe inequality?”).

322. Craig, *Symposium*, *supra* note 314, at 239.

323. Kennedy, *supra* note 262, at 216-17.

324. *Id.* at 217.

325. Sun, *supra* note 17, at 146-47.

326. GLENDON, *supra* note 305 (stressing that feminist scholars have also mounted powerful critiques of liberal rights-talk, often objecting less to the fictional and obfuscatory quality of rights claims and more to the fundamental individualizing and antagonistic nature of rights-rhetoric as well as the absence of any sufficient recognition of countervailing responsibilities and obligations).

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.³²⁷

Kimberlé Crenshaw, a leading voice in the critical race scholarship, also wrote about the gains that have been made through the invocation of rights, even while acknowledging their risks and limits:

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[.]³²⁸

Perhaps the most powerful example, however, of this uneasy but essential compromise is found in Patricia Williams' work, in which she explores her personal discomfort with the CLS critique in spite of the "many good reasons for abandoning a system of rights which are premised on inequality and helplessness[.]"³²⁹ She explains why many black scholars remain committed to the pursuit of rights, "even if what CLS scholars say about rights—that they are contradictory, indeterminate, reified and marginally decisive in social behavior—is so."³³⁰ Without idealizing the importance of rights, and recognizing that they are "often selectively invoked to draw boundaries, to isolate, and to limit,"³³¹ Williams insisted that "the subtlety of rights' real instability . . . does not render unusable their persona of stability."³³² Rather, 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.³³³

While CLS seek to unmask rights mythology to reveal its powerlessness, the CRT perspective invites the historically excluded

327. MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* 306-07 (1990).

328. KIMBERLÉ CRENSHAW, *Race, Reform and Retrenchment in CRITICAL RACE THEORY: THE KEY WRITINGS THAT INFORMED THE MOVEMENT* 118-119 (1995).

329. Patricia Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 404 (1987).

330. *Id.*

331. *Id.* at 405.

332. *Id.*

333. *Id.* at 410.

and disempowered to “don the mask” and put its magical power to good ends.³³⁴ Williams evocatively celebrated the “immense alchemical fire” it took for blacks to kindle rights into something real, to give them “life where there was none before.”³³⁵ She insists that there is, in this sense, the possibility of a “dual consciousness” with which the historically disadvantaged can see and leverage the political potential of rights while still perceiving their lack of objective foundation and analytic determinacy.³³⁶

Reflecting on William’s approach, Angela Harris proposes that there is strength to be gained from embracing this dilemma.³³⁷ The task is to “live in the tension itself.”³³⁸ For Harris, this suggests two aspirations for a “jurisprudence of reconstruction”:³³⁹ sophistication about the legal subject (the situated, intersectional self);³⁴⁰ and disenchantment around the romantic faith in modernism and liberal rights.³⁴¹ Rather than a romantic belief in equality and rights, the focus shifts to the process of empowerment and struggle, and the continual task of reconstruction.³⁴²

There are, of course, crucial differences in nature and scope between constitutional rights asserted by women and racialized people in the demand for equality and dignity, and the copyright and user rights claims under discussion here.³⁴³ The right to be free from

334. *See id.* at 430-31.

335. *Id.* at 404 (“To say that blacks never really believed in rights is true; yet it is also true that blacks believed in them so much and so hard that we gave them life . . . we held onto them, put the hope of them into our wombs, mothered them and not the notion of them . . . this was not the dry process of reification . . . but its opposite . . . resurrection.”).

336. *Id.*

337. Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CALIF. L. REV. 741, 743 (1994).

338. *Id.* at 744.

339. *Id.* (arguing that “jurisprudence of reconstruction” refers to the task of “continually rebuil[ding] modernism in light of the modernist critique” and referring to “living in ‘dissensus’” as “a commitment to modernism and a willingness to criticize, even reject, its basic assumptions”)

340. *Id.* at 767-78 (presenting a more nuanced and expansive explanation of what is meant by “sophistication”).

341. *See id.* at 778-84.

342. *Id.*

343. Williams, *supra* note 329, at 401-05 (noting that there exists a discourse boundary, drawn by different lived experiences, that changes the relationship one has to the idea of rights; not meaning to imply an equal or comparable sense of

state-sanctioned violence, for example, is not in the same realm as the right to be free to copy.³⁴⁴ It is worth emphasizing, however, that racial and gender inequalities permeate copyright law as they do any other area of our law and society. The availability of copyright protection and fair use can have significant and disproportionately harmful effects for creators and users “from the margins,” silencing critique, undermining the value of creative contributions, and ultimately denying equal participation in our cultural dialogue.³⁴⁵ There are, then, real and not only rhetorical connections between the assertion of users’ rights in copyright contexts—the freedom to challenge meanings, upset symbols, transform works, to speak and to be heard—and the persistent realities of inequality to which our copyright system contributes (in particular, through the subordination of some voices for the valorization, amplification and economic

disempowerment on behalf of those who belong in the shifting category of users of copyright protected works).

344. For an excellent discussion of liberal rights and racialized experiences of policing in America, see Ekow Yankah, *The Failure of Rights in Racial Justice* 14 JERUSALEM REV. LEGAL STUD. 192, 193, 200 (2016), <https://doi.org/10.1093/jrls/jlw012> (arguing that “only a philosophical shift from focusing on individual rights . . . gives hope in addressing questions of racial equality” and confronting head on the political challenge posed by the rights critique by saying, “I realize my criticism of contemporary liberalism’s rights-focused myopia may be unconvincing to some, even raising hackles, . . . given the breadth of theories that travel under the name liberalism . . . [but] the focus on individual rights obscures racialized criminal law and policing.”)

345. See e.g., Olufunmilayo B. Arewa, *From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context*, 84 N.C. L. REV. 547 (2006); K.J. Greene, “Copynorms,” *Black Cultural Production, and the Debate over African-American Reparations*, 25 CARDOZO ARTS & ENT. L.J. 1179 (2008); K.J. Greene, *Copyright, Culture & Black Music: A Legacy of Unequal Protection*, 21 HASTINGS COMM. & ENT. L.J. 339, 358-59 (1999); K.J. Greene, *Intellectual Property at the Intersection of Race and Gender: Lady Sings the Blues*, 16 AM. U. J. GENDER SOC. POL’Y & L. 365 (2008) [hereinafter Greene, *Intellectual Property*]; see also BOATEMA BOATNEG, *THE COPYRIGHT THING DOESN’T WORK HERE: ADINKRA AND KENTE CLOTH AND INTELLECTUAL PROPERTY IN GHANA* (2011); Ann Bartow, *Fair Use and the Fairer Sex: Gender, Feminism, and Copyright Law*, 14 AM. U. J. GENDER SOC. POL’Y & L. 551, 552, 559-64 (2006); Malla Pollak, *Towards a Feminist Theory of the Public Domain, or Rejecting the Gendered Scope of United States Copyrightable and Patentable Subject Matter*, 12 WM. & MARY J. WOMEN & L. 603 (2006); see generally IRENE CALBOLI & SRIVIDHYA RAGAVAN EDS., *DIVERSITY IN INTELLECTUAL PROPERTY: IDENTITIES, INTERESTS, AND INTERSECTIONS* (2015); John Tehranian, *Towards a Critical IP Theory: Copyright, Consecration, and Control*, 2012 BYU L. REV. 1233.

benefit of others).³⁴⁶

As we tackle the question of user rights, then, it should come as no surprise that there are helpful lessons to be drawn from the feminist and critical race scholars' stance on rights.³⁴⁷ Feminist and CRT critique of CLS's attack on rights-based reasoning opens up political and conceptual space for a kind of "dual consciousness" on the part of advocates of users' rights in the copyright context.³⁴⁸ The proposition would be that users and the public—whose needs and interests have been marginalized in the face of owners' individual rights claims—may perceive the inherent flaws of rights-based reasoning in the copyright system while nonetheless seeking to identify and enforce countervailing rights. User communities can don the mask or the sheep's clothing of rights to issue a rhetorical rallying cry, mobilizing the public and demanding mutual recognition within the copyright system.³⁴⁹

Perhaps it is a similar combination of sophistication and disenchantment to which we should aspire in the copyright context. The reconstruction of copyright for the digital age requires sophistication about the nature of the author/user, and the intersectionality³⁵⁰ of our own selfhood: in different contexts, moments in time and relationships, we are all authors, users, creators, borrowers, producers, consumers, citizens, private individuals and members of the public. It also demands disenchantment; we should set aside our romantic vision of authorship and originality, as well as our faith in modernist ideals of radical individuality and transcendent rights.³⁵¹ Strength can be drawn from embracing the tension inherent in the simultaneous commitment to, and skepticism of, a rights-based copyright system. The focus can shift to the process of empowering users and reconstructing copyright in service

346. Greene, *Intellectual Property*, *supra* note 345, at 366.

347. *Id.* at 385 (describing how black women artists have "been impacted by the IP system" comparably to indigenous peoples and how IP has been "central to racial subordination," offering helpful insights to "guide reforms to the IP system").

348. Williams, *supra* note 329, at 414.

349. *Id.* at 431-32.

350. See Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 166-67.

351. Harris, *supra* note 337, at 778.

of the public interest.

The question to be answered is ultimately a strategic one that takes into account the way that rights are experienced in this context: Will the “enervating effect of rights talk”³⁵² advance the interests and meet the needs of users and the public, or will it do more harm than good? While the dominant ideology of copyright law remains one of possessive individualism and modernist enlightenment values, it may make sense to harness its logic to protect downstream authors and users.³⁵³ If the “vocabulary of rights” speaks to the establishment, then it seems wise to use it.³⁵⁴ We should, however, heed Glendon’s plea to tone down the “American rights dialect” and “refine our rhetoric.”³⁵⁵ The real task will be to ensure that the rights discourse employed in the name of the public interest is capable of communicating concepts of responsibility, sociality and future-looking teleology, for these are vital to understanding both why we have copyright and why copyright has limits. It may still be possible for us to reclaim and reimagine rights in the copyright realm in a way that fundamentally reshapes the system for the benefit of us all.³⁵⁶

V. CONCLUSION

To be skeptical about the language of user rights is not to be against user rights within the copyright system. Whether or not to invoke the rhetoric of user rights is not a question about whether libraries should be permitted to make copies for patrons, or teachers

352. Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 HARV. C.R.-C.L. L. REV. 301, 305 (1987).

353. Greene, *Intellectual Property*, *supra* note 345, at 385.

354. Boyte, *supra* note 320, at 774-75.

355. See GLENDON, *supra* note 305, at 171.

356. Carys J. Craig, *Technological Neutrality: Recalibrating Copyright in the Information Age*, 17 THEORETICAL INQUIRIES L. 601, 625-31 (2016) (sketching out a “relational rights” approach that would ask how different available versions of the copyright interest could structure the relationships between affected parties differently to better foster the social values at stake, such as supporting creativity and dissemination, furthering progress of the arts, protecting free expression, and promoting a vibrant public domain); *see also* JENNIFER NEDELSKY, LAW’S RELATIONS: A RELATIONAL THEORY OF SELF, AUTONOMY, AND LAW 235 (2011) (explaining the meaning of and motivation for a “relational” approach to legal rights in general); Sun, *supra* note 17, at 145-47 (advancing a compelling argument that fair use should be recognized not as an individual right but as a “collective right held by the public”).

for their students, and so on. (They should.) Nor is it to query whether flexible fair use provisions should replace fair dealing, or international treaties should require parties to enact adequate exceptions. (They should.) It is, rather, a question about the discourse through which we want to conduct the argument about the appropriate limits of copyright.

There is scope, certainly, for the assertion of user rights as a way to formulate demands for a fair use defense, for example, while “being conscious of the critique of the whole enterprise, sensing the shiftiness of the sand beneath one’s feet.”³⁵⁷ But there is also a risk to shoring up the enterprise—in this case, the rights-based copyright model—at precisely the spot where we know the ground is unstable for the users and public interest advocates trying to take a stand.

The danger, I have suggested, is that we firmly tie our position—on the need for a strong public domain, the importance of the public interest, the centrality of fair use and the importance of recognizing copyright’s limits—to the vindication of individual rights as the defining logic of copyright law.³⁵⁸ Rather than defusing the authors’ rights claim as obfuscatory legal fiction that masks political interests, we simply “see” that right and “raise” our own on behalf of the user. For those of us who have argued against the use of rights-based reasoning to advance the cause of an ever-expanding copyright monopoly, there is surely “something ‘weakening’ or ‘undermining’” about the fact that we are using exactly the rhetoric we had sought to discredit.³⁵⁹ And for those of us committed to the notion that copyright is simply a regulatory tool to achieve a desired social end (the encouragement of learning or creativity, or the progress of the arts), it is surely a step backwards to endorse a “balance” between owners’ and users’ “rights.”³⁶⁰

By tying up public interest objectives in the discourse of rights and counter-rights, balances and trumps, we risk losing sight of—even losing the ability to credibly articulate—objections to copyright’s over-reach in terms that are community-oriented, functional and value-driven. Rather than appealing to the need to encourage cultural

357. Kennedy, *supra* note 262, at 190.

358. Craig, *Putting the Community in Communication*, *supra* note 69, at 114.

359. Kennedy, *supra* note 262, at 204-05.

360. Sun, *supra* note 17, at 152.

creativity, advance participatory democracy and development goals, enhance education and enjoyment of the arts, we risk reducing these overarching political and social objectives to the clashing of individual rights.³⁶¹ Rather than asking what laws in a particular country, or what outcome in a particular case, would best align with and advance the public purposes of our copyright system, we might limit ourselves to asking whose individual right should prevail.

There is no doubt, however, that in the context of an international copyright regime dominated by corporate concerns over the protection of intellectual property rights, “the very idea that users of copyright works should have ‘rights’ is decidedly empowering.”³⁶² User rights may still be the most effective tool at our disposal to advance the interests of users of protected works and the public in general in the face of the powerful rights-based claims of authors and corporate owners. After all, “user rights” seem to have conquered more ground for the public domain in Canada, at least, than abstract ideas about the public interest or warnings about the dangers of over-protection ever have before.³⁶³ Acknowledging that disputes about the scope of control over intellectual works typically and increasingly find their articulation in claims of rights (whether to property or free speech, copyright or users’ rights), perhaps our energies are better spent debating “not whether but how the language of rights will be used.”³⁶⁴ Ultimately, as Jennifer Nedelsky asserts, rights are just “a particular institutional and rhetorical means of expressing, contesting, and implementing . . . values.”³⁶⁵ In efforts to globalize fair use or to safeguard and strengthen L&Es in our international copyright system, we should employ whatever

361. Cf. Sun, *supra* note 17, at 144-45 (arguing with respect to US courts’ interpretation of fair use that “the individual right-based approach . . . has caused direct and indirect harms to public interests in free speech, democratic participation, and cultural development”).

362. Tawfik, *International Copyright Law and ‘Fair Dealing’*, *supra* note 189, at 7.

363. *But see* Tushnet, *supra* note 291 and Kennedy, *supra* note 292 (describing recent case law in Canada’s lower courts that has shown, consistent with Tushnet’s caution, that the ongoing significance of such legal victories ought not to be over-emphasized. The political fight for a fair copyright law that leaves room for expressive and educational uses of protected works is ongoing.).

364. Cf. NEDELSKY, *supra* note 356, at 235.

365. *Id.* at 241.

rhetorical means will best communicate, to the relevant audience, the social values at stake when copyright overreaches.

My hope is that the turn towards user rights-talk will prove to be effective in articulating and advancing a fairer copyright regime around the globe. But there remains cause for caution: to simply rely on the abstract assertion of user rights as the vehicle to drive the public interest and to restrain copyright's reach could be to sacrifice a "functional approach" for "transcendental nonsense"³⁶⁶—perhaps advancing immediate political aims, but potentially undermining larger social goals by reducing them to yet another individual rights-claim clumsily thrown onto copyright's (illusory) balancing scales.

366. Cf. Cohen, *supra* note 256, at 847-49.

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