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Securing the Future of Copyright Users' Rights in Canada

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Article abstract

The Copyright Act includes a set of copyright infringement exceptions that permit the unauthorized use of copyrighted works in order to serve public interest objectives. The Supreme Court of Canada liberally interpreted these exceptions as "users' rights" by relying on the purpose of the Act, understood as a balance between the authors' right to be rewarded for their works and the public interest in the dissemination and use of works. The utility of copyright balance to safeguard users' rights is uncertain. The Act does not explicitly adopt "balance" as a purpose. National and international copyright law traditionally recognize the users' side in the copyright law balance in copyright exceptions and limitations. And, in copyright law discourse, different stakeholders propose and defend conflicting forms of balance. Therefore, the paper argues that a human rights-based approach to copyright exceptions is more persuasive in justifying their interpretation as users' rights. Copyright users' rights mirror the content of the human rights to participate in culture, education, and freedom of expression, which Canada is obliged to implement as a State Party to the International Covenant on Economic, Social and Cultural Rights and International Covenant on Civil and Political Rights. The proposed approach would align the discourse with key elements of Canadian jurisprudence: (1) human rights as reinforcers of the rule of law; (2) international human rights law as an interpretive tool for Canadian courts; and (3) the need to interpret Canadian legislation in a manner that does not breach international obligations.

Securing the Future of Copyright Users' Rights in Canada

Saleh Al-Sharieh[*]

The Copyright Act *includes a set of copyright infringement exceptions that permit the unauthorized use of copyrighted works in order to serve public interest objectives. The Supreme Court of Canada liberally interpreted these exceptions as "users' rights" by relying on the purpose of the* Act, *understood as a balance between the authors' right to be rewarded for their works and the public interest in the dissemination and use of works. The utility of copyright balance to safeguard users' rights is uncertain. The* Act *does not explicitly adopt "balance" as a purpose. National and international copyright law traditionally recognize the users' side in the copyright law balance in copyright exceptions and limitations. And, in copyright law discourse, different stakeholders propose and defend conflicting forms of balance. Therefore, the paper argues that a human rights-based approach to copyright exceptions is more persuasive in justifying their interpretation as users' rights. Copyright users' rights mirror the content of the human rights to participate in culture, education, and freedom of expression, which Canada is obliged to implement as a State Party to the* International Covenant on Economic, Social and Cultural Rights and International Covenant on Civil and Political Rights. *The proposed approach would align the discourse with key elements of Canadian jurisprudence: (1) human rights as reinforcers of the rule of law; (2) international human rights law as an interpretive tool for Canadian courts; and (3) the need to interpret Canadian legislation in a manner that does not breach international obligations.*

La Loi sur le droit d'auteur inclut une série d'exceptions à la violation du droit d'auteur qui permettent l'utilisation sans autorisation d'œuvres protégées par le droit d'auteur pour atteindre des objectifs d'intérêt public. La Cour suprême du Canada a interprété largement ces exceptions comme étant des « droits d'utilisateur » en s'appuyant sur l'objectif de la Loi, considéré comme étant l'équilibre entre le droit des auteurs de tirer profit de leurs œuvres et l'intérêt public dans la diffusion et l'utilisation de ces œuvres. L'utilité de l'équilibre en matière de droit d'auteur dans la protection des droits des utilisateurs est incertaine. La Loi n'adopte pas explicitement l'objectif de l'« équilibre ». Le droit national et international en matière de droit d'auteur reconnaît traditionnellement le point de vue des utilisateurs dans cet équilibre sous forme d'exceptions et de restrictions au droit d'auteur. Également, dans les discussions sur le droit d'auteur, divers intéressés proposent et défendent des formes contradictoires d'équilibre. En conséquence, l'article soutient qu'une conception des exceptions au droit d'auteur qui est fondée sur les droits de la personne justifie de façon plus persuasive qu'on les interprète comme des droits d'utilisateurs. Les droits des utilisateurs d'œuvres protégées par le droit d'auteur reflètent le contenu des droits humains de participer à la culture, à l'éducation et à la liberté d'expression, que le Canada a l'obligation d'appliquer en tant qu'État partie du Pacte

international relatif aux droits économiques, sociaux et culturels et du Pacte international relatif aux droits civils et politiques. L'approche proposée harmoniserait le discours avec les éléments clés de la jurisprudence canadienne : 1) les droits de la personne comme remparts de la primauté du droit; 2) le droit international en matière de droits de la personne comme outil d'interprétation pour les tribunaux du Canada; 3) le besoin d'interpréter la législation canadienne de manière à ne pas violer les obligations internationales.

I. INTRODUCTION

The *Copyright Act*[1] is the source of copyright protection in Canada.[2] It grants authors a bundle of exclusive economic rights over their copyrighted works ("works") to create their market.[3] The *Act* limits the duration of authors' economic rights.[4] It also subjects them to exceptions that serve interconnected public interest objectives by allowing users to use works without the permission of the copyright holders, subject to specific conditions.[5] Copyright exceptions are "an integral part"[6] of Canadian copyright law and a requirement for the existence of a rich public domain.[7] In *CCH*, the Supreme Court of Canada [SCC] held that "Canada's *Copyright Act* sets out the rights and obligations of both copyright owners and users"[8] and that copyright exceptions are "users rights"[9] necessary "to maintain the proper balance between the rights of a copyright owner and users' interests"[10] and hence "must not be interpreted restrictively."[11] Subsequent SCC decisions have reiterated that copyright exceptions are users' rights.[12]

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1 *Copyright Act*, RSC 1985, c C-42 [*Copyright Act*].

2 *Compo Co. v Blue Crest Music Inc*, [1980] 1 SCR 357 at 373, 105 DLR (3d) 249.

3 *Copyright Act*, *supra* note 1, s 3(1); William M Landes & Richard A Posner, "An Economic Analysis of Copyright Law" (1989) 18 J Leg Stud 325 at 328. Under s 14.1 of the *Act*, authors also have moral rights.

4 *Copyright Act*, *supra* note 1, s 6.

5 Teresa Scassa, "Interests in the Balance" in Michael Geist, ed, *In the Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005) 41 at 59 [Scassa, "Interests in the Balance"]; Martin Senftleben, "The International Three-Step Test: A Model Provision for EC Fair Use Legislation" (2010) 1 JIPITEC 67 at 67.

6 *CCH Canadian Ltd v Law Society of Upper Canada*, 2004 SCC 13 at para 48, [2004] 1 SCR 339 [*CCH*]. Accord *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36 at para 11, [2012] 2 SCR 326 [*SOCAN v Bell*].

7 *Théberge v Galerie d'Art du Petit Champlain Inc.*, 2002 SCC 34 at para 32, [2002] 2 SCR 336 [*Théberge*]; *SOCAN v Bell*, *supra* note 6 at para 10.

8 *CCH*, *supra* note 6 at para 11.

9 *Ibid* at para 12.

10 *Ibid* at para 48.

11 *Ibid*.

12 See *SOCAN v Bell*, *supra* note 6 at para 11; *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37 at para 22, [2012] 2 SCR 345 [*Alberta (Education)*].

The concept "users' rights" does not appear in the *Act*. Thus, the SCC's characterisation of copyright exceptions as users' rights has generated different reactions by the copyright law community in Canada. Creator and publisher groups warned that a literal use of the term—users' rights—"would substantially curtail copyright holders' rights and permit extensive copying on behalf of others"[13] and so it must be understood merely as "a metaphor to express the importance of user interests."[14] In contrast, public domain advocates welcomed the SCC's formulation of copyright exceptions as users' rights and many copyright law scholars wrote in support of it.[15]

The future of users' rights in Canada is uncertain. Lower courts may rely on the exact wording of the *Act* to interpret copyright exceptions restrictively.[16] The centrality of balancing in Canadian copyright law "cannot change the express terms of the *Copyright Act*,"[17] and invoking copyright balance to justify users' rights comes with shortcomings including its contentious meaning in copyright law discourse. Not surprisingly, therefore, creator and publisher groups attempted to convince the SCC to reconsider its approach to users' rights.[18]

The purpose of this paper is to highlight the human rights nature of users' rights in order to: 1) reveal the linkage between users' rights and the *Canadian Charter of Rights and Freedoms*;[19] 2) prove that users' "rights" must have a literal, not a metaphorical, meaning in copyright law; and 3) secure users' rights against any inadvertent downgrading by courts in light of the volatility of the copyright balance basis of

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13 Canadian Publishers' Council, The Association of Canadian Publishers, and The Canadian Educational Resources Council, *Memorandum of Argument*, online: scribd <https://www.scribd.com/document/73790862/CPC-SCC-Interveners-Memorandum> at para 25.

14 *Ibid*. See also Barry Sookman, "Copyright Reform for Canada: What Should We Do?, Copyright Consultations Submission" (2009) 2:2 OHRLP 73 at 88 (arguing that "[i]t is conceptually wrong to suggest that copyright law confers on users affirmative rights to access and use works or to exercise 'rights' such as a right of fair dealing").

15 See e.g. Teresa Scassa, "Users' Rights in the Balance: Recent Developments in Copyright Law at the Supreme Court of Canada" (2005) 22 CIPR 133; Abraham Drassinower "Taking User Rights Seriously" in Geist, *Public Interest, supra* note 5, 462; David Vaver, "User Rights" (2013) 25 IPJ 105 [Vaver, "User Rights"]; Myra J Tawfik, "International Copyright Law and 'Fair Dealing' as a 'User Right'" (2005) e-Copyright Bulletin 1; Michael Geist, "The Canadian Copyright Story: How Canada Improbably Became the World Leader on Users' Rights in Copyright Law" in Ruth L Okediji, ed, *Copyright Law in an Age of Limitations and Exceptions* (New York: Cambridge University Press, 2017) 169.

16 See e.g. *The Canadian Copyright Licensing Agency ("Access Copyright") v York University*, 2017 FC 669 and *United Airlines, Inc v Cooperstock*, 2017 FC 616. See also Michael Geist, "Ignoring the Supreme Court: Federal Court Judge Hands Access Copyright Fair Dealing Victory" (13 July 2017), Michael Geist (blog), online: <http://www.michaelgeist.ca/2017/07/ignoring-supreme-court-trial-judge-hands-access-copyright-fair-dealing-victory/>; Carys Craig, "The Changing Face of Fair Dealing in Canadian Copyright Law: A Proposal for Legislative Reform" in Geist, *supra* note 5, 437 at 438 [Craig, "Fair Dealing"]

17 *Canadian Broadcasting Corp. v SODRAC 2003 Inc.*, 2015 SCC 57 [2015] 3 SCR 615 at para 51 [*CBC v SODRAC*].

18 See Michael Geist, "Introduction" in Michael Geist, ed, *The Copyright Pentalogy: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (Ottawa: University of Ottawa Press, 2013) iii.

19 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, [*Charter*]. Section 52(1) of the *Constitution Act*, 1982, provides: ("The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect").

users' rights.[20] The SCC jurisprudence on users' rights echoes the human rights nature of users' entitlements over works by virtue of their right to participate in culture,[21] which is interdependent with the human right to education[22] and freedom of expression.[23] These "users' human rights" are interdependent and interrelated with authors' moral and material interests in international human rights law.[24] Accordingly, the Canadian Parliament is invited to resolve the ambiguity surrounding the nature of users' entitlements over works by amending the *Act* to refer to them explicitly as users' rights.[25] Meanwhile, Canadian courts have a compelling reason to become vocal about the human right nature of these rights and benefit from their interpretation in international human rights law when determining their content and contours.[26]

The paper has 6 sections. Following this introduction, Section II discusses the limitations of the copyright balance approach to users' rights. Section III unfolds the human rights law basis of users' rights. Section IV discusses the extent to which the SCC's fair dealing jurisprudence echoes users' human rights to participate in culture, freedom of expression, and education, and analyses the role that international human rights law can play in influencing the status of users' rights under Canadian copyright law. Section V explains the interdependence between users' human rights and authors' moral and material interests in international human rights law. Section VI is a conclusion.

II. USERS' RIGHTS AS THE OFFSPRING OF COPYRIGHT BALANCE

As a general rule, any person who exercises any of the exclusive rights of the author without her or his permission infringes copyright.[27] However, the *Act* exempts from this rule specific unauthorised uses of the works by any person, such as fair dealing,[28] and specific unauthorised uses by specific users, such as the reproduction of works in alternate format by persons with perceptual disabilities.[29] Each of these exceptions is subject to conditions. For instance, in the case of fair dealing: 1) the unauthorised dealing of the work must be for the purpose of research, private study, education, parody or satire, criticism or review,

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20 See Graeme Dinwoodie, "The WIPO Copyright Treaty: A Transition to the Future of International Copyright Lawmaking?" (2010) 57(4) Case W Res L Rev 751 at 753 (arguing that in copyright law balance is used "too glibly").

21 *Universal Declaration of Human Rights*, GA Res 217 (III), UNGAOR, 3d Sess, UN Doc A/810 (1948), art 27(1) [*UDHR*]; *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3, Can TS 1976 No 46, art 15(1)(a)-(b) [*ICESCR*].

22 *UDHR*, *supra* note 21, art 26; *ICESCR*, *supra* note 21, art 13.

23 *UDHR*, *supra* note 21, art 19; *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, Can TS 1976 No 47 [*ICCPR*], art 19.

24 *UDHR*, *supra* note 21, art 27(2); *ICESCR*, *supra* note 21, art 15(1)(c).

25 *Copyright Act*, *supra* note 1, s 92 provides for its mandatory review by a parliamentary committee to be established for this purpose every five years. The next review is due in 2017.

26 See Lea Shaver & Caterina Sganga, "The Right to Take Part in Cultural Life: On Copyright and Human Rights" (2010) 27 Wis Int'l L J 637 at 661-662.

27 *Copyright Act*, *supra* note 1, s 27(1).

28 *Ibid*, s 29.

29 *Ibid*, s 32.

or news reporting;[30] 2) the dealing must be fair;[31] and 3) in the case of news reporting and criticism or review, the source and the author, if mentioned in the source, must be acknowledged.[32] While fair dealing does not give rise to any compensation to the author whose work is used, some copyright exceptions, such as private copying, are attached to a compensation scheme.[33]

In *Théberge*, the SCC explained the importance of copyright exceptions in enriching the public domain: "[e]xcessive 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."[34] The SCC also identified the purpose of the *Act* as "a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect, and obtaining a just reward for the creator (or, more accurately, to prevent someone other than the creator from appropriating whatever benefits may be generated)."[35] Since *Théberge*, the SCC has repeatedly held that balance is the purpose of the *Act*,[36] identified more of its elements,[37] and relied upon it to treat copyright exceptions as users' rights.[38] In *CCH*, the SCC held: "[t]he fair dealing exception, like other exceptions in the *Copyright Act*, is a user's right. In order to maintain the proper balance between the rights of a copyright owner and users' interests, it must not be interpreted restrictively."[39]

If users' rights are to have a literal rather than a metaphorical meaning, they need more normative support than that they derive from the necessary balance between the public interest in works and authors' right to a just reward. Recognising the limited nature of authors' rights is as old as the modern national copyright law, so is the idea of fairly managing (or balancing) the inherent tension between authors (or

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30 *Ibid*, s 29.

31 *Ibid*, s 29.

32 *Ibid*, s 29(1)-(2). For a discussion of fair dealing under Canadian copyright law see Daniel Gervais, "Fair Use, Fair Dealing, Fair Principles: Efforts To Conceptualize Exceptions and Limitations To Copyright" (2010) 57 J Copyright Soc'y USA 499; Craig, "Fair Dealing", *supra* note 16; Ariel Katz, "Fair Use 2.0: The Rebirth of Fair Dealing in Canada" in Geist, *Copyright Pentalogy*, *supra* note 18, 93; Michael Geist, "Fairness Found: How Canada Quietly Shifted from Fair Dealing to Fair Use" in Geist, *Copyright Pentalogy*, *supra* note 18, 157; Giuseppina D'Agostino, "Healing Fair Dealing? A Comparative Copyright Analysis of Canada's Fair Dealing to U.K. Fair Dealing and U.S. Fair Use" (2008) 53 McGill LJ 309.

33 See e.g. *Copyright Act*, *supra* note 1, Part VIII.

34 *Théberge*, *supra* note 7 at para 32. See also M William Krasilovsky, "Observations on Public Domain" (1967) 14 Bull Copyright Soc'y USA 205 at 205 (describing the public domain as "the other side of the coin of copyright").

35 *Théberge*, *supra* note 7 at para 30.

36 See e.g. *Robertson v Thomson Corp*, 2 SCR 363 at para 69, [2006] 2 SCR 363 [Justice Abella (dissenting in part on the cross-appeal)]; *CCH*, *supra* note 6 at para 10; *Society of Composers, Authors and Music Publishers of Canada v Canadian Association of Internet Service Providers*, 2004 SCC 45, [2004] 2 SCR 427 [*SOCAN*]; *SOCAN v Bell*, *supra* note 6 at para 8.

37 See e.g. *CCH*, *supra* note 6 at para 24 & 25 (adopting the author's non-trivial and non-mechanical skill and judgment standard of originality). But see Abraham Drassinower, "From Distribution to Dialogue: Remarks on the Concept of Balance in Copyright Law" (2009) 34 J Corp L 991 at 995-997 (criticizing the reliance on balance to formulate the originality standard in *CCH*).

38 See *CCH*, *supra* note 6 at para 12; *SOCAN v Bell*, *supra* note 6 at para 11; *Alberta* (*Education*), *supra* note 12 at para 22.

39 *CCH*, *supra* note 6 at para 48.

their assignees) and users of works.[40] In Canada, as in many other jurisdictions, this balance has statutorily taken the formula of copyright protection accompanied by exceptions and limitations.[41] In *Théberge*, the SCC clearly departed from its earlier decision in *Bishop v Stevens*,[42] in which it held that the *Act* ''was passed with a single object, namely, the benefit of authors of all kinds, whether the works were literary, dramatic or musical."[43] In doing so, the SCC "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."[44] The SCC explicitly acknowledged the traditional formula of balance: it identified as an element of balance "recognizing the creator's rights"[45] and "giving due weight to their limited nature,"[46] which is "reflected in the exceptions to copyright infringement […], which seek to protect the public domain ..."[47] In *CCH*, the SCC did not explain why the balance struck in the *Act*, and represented by the formula of copyright along with exceptions and limitations, became out-dated. It is understandable that new technological developments increased users' need to access and use works and, at the same time, created some barriers for such uses, such as when the works are protected by technological protection measures [TPMs].[48] Yet, the latest amendment to the *Act* in 2012[49] updated the copyright law balance by introducing new copyright exceptions, not users' rights.[50]

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40 See *An Act for the Encouragement of Learning, by vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein Mentioned*, 1710 (UK), 8 Anne c 19; *Sayre v Moore* (1785), 1 East 361 at 362 (Lord Mansfield, CJ); Christophe Geiger, Jonathan Griffiths & Reto M. Hilty, "Declaration on a Balanced Interpretation of the 'Three-Step Test' in Copyright Law" (2008) 39:6 Intl Rev Intellectual Property & Copyright L 707 at 709; United States, The Committee on Commerce, *Digital Millennium Copyright Act of 1998* (HR Rep No 105-551(II)) at 26; Pamela Samuelson, "Does Information Really Have to be Licensed?", Communications of the ACM 41:9 (September 1998) 15 at 15; Daniel J Gervais, "Making Copyright Whole: A Principled Approach to Copyright Exceptions and Limitations" (2008) 5:1&2 UOLTJ 1 at 12 [Gervais, "Making Copyright Whole"].

41 Daniel J Gervais, "The Purpose of Copyright Law in Canada" (2005) 2 UOLTJ 315 at 320-321.

42 [1990] 2 SCR 467.

43 *Ibid* at 478.

44 *SOCAN v Bell*, *supra* note 6 at para 9. See also Vaver, "User Rights", *supra* note 15 at 107 (noting that *Théberge* was the turning point at which the SCC started to reject the "author-centric dogma"). Nevertheless, before *Théberge*, Canadian copyright policies and scholarship often emphasized the importance of copyright balance. See e.g. Beverley McLachlin, "Intellectual Property—What's it All About?" in GF Henderson, ed, *Trade-Marks Law of Canada* (Scarborough, ON: Carswell, 1993) 391 at 397.

45 *Théberge, supra* note 7 at para 31.

46 *Ibid*.

47 *Ibid* at para 32.

48 Elizabeth F Judge & Saleh Al-Sharieh, "Join the Club: The Implications of the Anti-Counterfeiting Trade Agreement's Enforcement Measures for Canadian Copyright Law" (2012) 49 Alta L Rev 677 at 733-734.

49 *Copyright Modernization Act*, SC 2012, c 20.

50 See "Speech from the Throne to open the First Session Forty First Parliament of Canada" (3 June 2011), online: Parliament of Canada <https://lop.parl.ca/ParlInfo/Documents/ThroneSpeech/41-1-e.html> (promising to amend the *Act* by a "legislation that balances the needs of creators and users"); Teresa Scassa, "Acknowledging Copyright's Illegitimate Offspring: User-Generated Content and Canadian Copyright Law" in Geist, *Copyright Pentalogy*, *supra* note 18, 431 at 435 (arguing that "the UGC exception is part of the legislative balance aimed at achieving the public policy objectives underlying copyright law").

Canada is a State Party to the international copyright instruments that refer to the notion of balance, such as the *Agreement on Trade-Related Aspects of Intellectual Property Rights* [*TRIPS*],[51] *WIPO Copyright Treaty* [*WCT*][52] and *WIPO Performances and Phonograms Treaty* [*WPPT*].[53] *TRIPS* lists as one of its objectives the contribution to a "balance between rights and obligations"[54] and the preambles to the *WCT* and the *WPPT* acknowledge "the need to maintain a balance between the rights of authors [and the rights of performers and producers of phonograms] and the larger public interest, particularly education, research and access to information..."[55] The predominant understanding of balance in these instruments revolves around the formula of copyright protection, on the one hand, and copyright exceptions and limitations, on the other.[56] In international copyright law, the *Berne Convention for the Protection of Literary and Artistic Works* first adopted this formula.[57] This proves, Professor Daniel Gervais argues, that balance was "very present to the minds of"[58] the drafters of the Convention.[59] Similarly, Professor Graeme Dinwoodie argues that the *Berne Convention* has "plenty of room for balance"[60] for a number of reasons including its flexible provisions allowing its States Parties to enjoy a high level of flexibility in designing balanced copyright laws through copyright exceptions and limitations.[61] *TRIPS* did not depart from the *Berne Convention*'s formula of balance—copyright along with exceptions—[62] although referring to balance in its objectives gives the impression that *TRIPS* has a new formula of balance that gives users stronger claims over copyrighted works.[63] Also, the traditional formula of balance is the same in the *WCT*. Professor Pamela Samuelson argues that the *WCT*'s recognition of balance in the preamble and the copyright exceptions and limitations in article 10 of the *WCT* are an "endorsement of balancing principles in copyright law."[64]

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51 *Agreement on Trade-Related Aspects of Intellectual Property Rights*, 15 April 1994, *Marrakesh Agreement Establishing the World Trade Organization* (*WTO*), Annex 1C, 1869 UNTS 299, 33 ILM 1197 [*TRIPS*].

52 *WIPO Copyright Treaty*, 20 December 1996, 36 ILM 65 [*WCT*].

53 *WIPO Performances and Phonograms Treaty*, 20 December 1996, 36 ILM 76 [*WPPT*].

54 *TRIPS*, *supra* note 51, art 7.

55 *WCT*, *supra* note 52, Preamble; *WPPT*, *supra* note 53, Preamble.

56 See e.g. *TRIPS*, *supra* note 51, art 13: ("Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder").

57 *Berne Convention for the Protection of Literary and Artistic Works*, 9 September 1886, revised in Paris on 24 July 1971, 828 UNTS 221 [*Berne Convention*].

58 Gervais, "Making Copyright Whole", *supra* note 40 at 4.

59 *Ibid*.

60 Dinwoodie, *supra* note 20 at 756.

61 *Ibid*. See also *Berne Convention*, *supra* note 57, art 9(2) (authorizing national law to permit the reproduction of works "provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.")

62 See e.g. *TRIPS*, *supra* note 51, art 13.

63 *Ibid*, art 7. See also Peter K Yu, "The Objectives and Principles of the TRIPS Agreement" 46(4) Hous L Rev 979 (discussing the role of the objectives of *TRIPS* in creating balance in international copyright law).

64 Pamela Samuelson, "The U.S. Digital Agenda at WIPO" (1997) 37 Va J Int'l L 369 at 436.

The excessive use of the notion of balance in copyright law discourse by different groups defending conflicting interests undermines its utility.[65] For instance, officials of the World Trade Organization [WTO] described *TRIPS* as a treaty that strikes the right balance between the different interests it regulates.[66] However, many scholars criticised it as being author-oriented, or imbalanced.[67] Furthermore, creator and publisher groups that lobbied for introducing the *Anti-Counterfeiting Trade Agreement* [*ACTA*][68] had argued that piracy and the weak enforcement of copyright weakened copyright balance. On the other hand, many viewed *ACTA* as an anti-balance treaty.[69] Here in Canada, creator and publisher groups tried to convince the SCC to reverse its approach to users' rights in *CCH*, arguing that it tilted the copyright balance towards users at the expense of the copyright holders.[70] This is consistent with the view that the concept of balance has recently taken the form of "cutting back on exclusive rights."[71]

Courts usually apply balance as a judicial methodology when adjudicating tensions between different rights, especially human rights.[72] In doing so, courts merely interpret the scope of the litigants' rights in a way consistent with the original weight attributed to them in the relevant statute(s).[73] Proponents of balance as a judicial methodology argue that it is consistent with this rule and other "notions of rational decision making."[74] On the other hand, one critique of this methodology is that "it fails to provide

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65 See Robert Burrell & Allison Coleman, *Copyright Exceptions: The Digital Impact* (Cambridge: Cambridge University Press, 2005) at 191.

66 See e.g. Pascal Lamy, former WTO Director-General, "The TRIPs Agreement 10 Years on" (Conclusions delivered at the International Conference on the 10th Anniversary of the WTO TRIPs, 24 June 2004), online: European Commission <http://trade.ec.europa.eu/doclib/docs/2004/june/tradoc_117787.pdf>.

67 See e.g. See Rochelle Cooper Dreyfuss, "TRIPS-Round II: Should Users Strike Back? (2004) 71 U Chicago L Rev 21 at 21; Peter M Gerhart, "Why Lawmaking for Global Intellectual Property is Unbalanced" (2000) 22:7 Eur IP Rev 309 at 309; James Boyle, "A Manifesto on WIPO and the Future of Intellectual Property" (2004) 9 Duke L & Tech Rev at 3-4.

68 *Anti-Counterfeiting Trade Agreement*, 3 December 2010, 50 ILM 243 (opened for signature 1 May 1 2011) [*ACTA*].

69 See e.g. Council for TRIPS, Minutes of Meeting (Held on 8-9 June 2010) IP/C/M/63, online: WTO <https://docs.wto.org/dol2fe/Pages/FE_Search/.../87682/.../IP/C/M63.pdf> at para 256 (China's representative statement).

70 See "Factum Submitted by Access Copyright to the Supreme Court of Canada" (2012), online: Supreme Court of Canada<http://www.scc-csc.ca/factums-memoires/33888/FM020_Respondent_Canadian-Copyright-Licensing-Agency-Operating-as-Access-Copyright.pdf>.

> In *CCH* this Court raised expectations when it held that fair dealing is a "user's right". Those raised expectations have led users like the appellants to ask that the right be clarified and made more predictable. However, this should not come at the expense of upsetting the balance between users' and creators' rights under the Act.

See also Scassa, "Interests in the Balance", *supra* note 5 at 45-46 (arguing that frequent referencing of the principle of balance "reveals a lack of certainty as to both the precise interests in the balance and the rationale for balancing them").

71 Jane C Ginsburg, "'European Copyright Code' - Back to First Principles (with Some Additional Detail)" (2011) 58 J Copyright Soc'y USA 265 at 267.

72 See T Alexander Aleinkoff, "Constitutional Law in the Age of Balancing" (1987) 96 Yale LJ 943 at 944; Jacco Bomhoff, "Balancing, the Global and the Local: Judicial Balancing as a Problematic Topic in Comparative (Constitutional) Law" (2008) 31 Hastings Int'l & Comp L Rev 555 at 555.

73 The Honourable Justice Frank Iacobucci, "'Reconciling Rights' The Supreme Court of Canada's Approach to Competing Charter Rights" (2003) 20 Sup Ct L Rev (2d) 137 at 140.

74 Aleinkoff, *supra* note 72 at 944.

principled explanations for results and, therefore, is open to the charge that it usurps the functions of the political institutions of government."[75]

Changing the scope of the entitlements of authors or users to establish copyright balance anew should be the task of the Parliament, not courts, in order to achieve certainty and predictability in copyright law. The Supreme Court of the United States explained in its discussion of the task of determining the appropriate scope of copyright and patent that:

> [b]ecause this task involves a difficult balance between the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other hand, our patent and copyright statutes have been amended repeatedly.[76]

In the same vein, the SCC was clear that balancing the interests of the authors and users of works "cannot change the express terms of the *Copyright Act*."[77] Indeed, a court that moves from adjusting the balance struck in a statute to establish balance anew, by assigning new values to the interests regulated by the statute, assumes a legislative role.[78] Arguably, this is acceptable when done for the sake of fulfilling fundamental principles connected to the rule of law.[79] Madame McLachlin CJ agrees with Lord Cooke on urging courts "to assume their role in protecting certain fundamental principles as essential to the rule of law and the expression of democratic will, even if these 'deep rights' were not in written form."[80] For the Chief Justice, fundamental principles that "can prevail over laws and executive action" originate from, at least, three sources: "customary usage; inferences from written constitutional principles; and the norms set out or implied in international legal instruments to which the state has adhered."[81] The protection of human rights is a fundamental principle because it is a component of the rule of law and requirement of both treaty and customary international law.[82]

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75 Paul W Kahn, "The Court, the Community and the Judicial Balance: The Jurisprudence of Justice Powell" (1987) 97 Yale LJ 1 at 1.

76 *Sony Corp. of Am. v Universal City Studios, Inc.,* 464 US 417, 429 (1984).

77 *CBC v SODRAC*, *supra* note 17 at para 51.

78 See *R v Nova Scotia Pharmaceutical Society*, [1992] 2 SCR 606 at 641, 1992 CanLII 72 (SCC) (writing for the court, Gonthier J stated: "I fail to see a difference in kind between general provisions where the judiciary would assume part of the legislative role and 'mechanical' provisions where the judiciary would simply apply the law. The judiciary always has a mediating role in the actualization of law, although the extent of this role may vary").

79 The rule of law is "a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights and standards." United Nations (UN) Security Council, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General*, UN Doc. S/2004/616, (23 August 2004) at para 6.

80 The Rt Hon Beverley McLachlin, "Unwritten Constitutional Principles: What Is Going On?" (2006) 4 NZJPIL at 148 [McLachlin CJ, "Unwritten Constitutional Principles"]. See also Robert Justin Lipkin, "We Are All Judicial Activists Now" (2008) 77 U Cin L Rev 181 at 197 (arguing that "when the legislature fails, it is the Court's role to save the day - the Court must remedy legislative constitutional failure").

81 McLachlin CJ, "Unwritten Constitutional Principles" *supra* note 80 at 156.

82 See European Commission for Democracy through Law (Venice Commission), *Report on the Rule of Law- Adopted by the Venice Commission at the 86th Plenary Session*, (Venice, 25-26 March 2011) at para 41 (listing the respect for

The next section argues that international human rights law can lend the necessary support to the SCC's characterisation of copyright exceptions as users' rights.

III. USERS' RIGHTS AS HUMAN RIGHTS

Canada is a State Party to the *ICESCR* and *ICCPR*. It has a duty to respect, protect, and implement the rights and freedoms they articulate.[83] International human rights law does not have effect in Canada unless it is implemented by a legislative act.[84] Yet, the Government of Canada cited the *Act* as one of the vehicles by which it endeavours to "strike a fair balance between the rights of creators to receive remuneration for use of their works and the needs of users to have reasonable access to these works" under international human rights law.[85] In addition, the SCC emphasized "[t]he important role of international human rights law as an aid in interpreting domestic law."[86] This means the protection of the rights of authors and users of works in international human rights law can influence the interpretation of the provisions of the *Act*. In fact, the SCC's formulation of copyright exceptions as users' rights, and its liberal interpretations of fair dealing, echoes their role in implementing the international human right to participate in culture, which is interdependent with the human right to education and freedom of expression.

A. The Human Right to Participate in Culture

Article 27(1) the *UDHR* proclaims that "[e]veryone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits."[87] Similarly,

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human rights as one of the rule of law elements). According to the World Conference on Human Rights, Vienna Declaration and Programme of Action, UN Doc A/CONF.157/23, (1993) at para 5: ("All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis"). This negates the false hierarchy between civil and political rights, on the one hand, and economic, social and cultural rights, on the other.

83 See *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331, 8 ILM 679 [*VCLT*], art 26: ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith"),; *Charter of the United Nations*, 26 June 1945, Can TS 1945 No 7, art 56 (establishing a duty to respect and observe human rights). As a declaration from the General Assembly of the UN, the *UDHR* itself is not legally binding. However, most of its rights and freedoms have attained the status of international customary law and therefore are binding upon States. See Commission on Human Rights, *Report on the Human Rights Situation in the Islamic Republic of Iran by the Special Representative of the Commission, Mr. Reynaldo Galindo Pohl, Appointed Pursuant to Resolution 1986/41*, UNESCOR, 43rd Sess, UN Doc E/CN.4/1987/23, (1987) 1 at para 22; John P Humphrey, "The Universal Declaration of Human Rights: Its History, Impact and Juridical Character" in Bertrand G Ramcharan, ed, *Human Rights: Thirty Years after the Universal Declaration* (The Hague: Martinus Nijhoff, 1979) 21 at 37.

84 *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 69, 1999 CanLII 699 (SCC) [*Baker*]. For a discussion of this issue, see also Amissi M Manirabona & François Crépeau, "Enhancing the Implementation of Human Rights Treaties in Canadian Law: The Need for a National Monitoring Body" (2012) 1:1 Can J Hum Rts 25.

85 Economic and Social Council, *Implementation of the International Covenant on Economic, Social and Cultural Rights: Third periodic reports submitted by States parties under articles 16 and 17 of the Covenant: (Canada)*, UN Doc E/1994/104/Add, (17-20 January 1998) at para 431.

86 *Baker*, *supra* note 84 at para 70.

87 *UDHR*, *supra* note 21.

article 15(1) of the *ICESCR* recognizes everyone's right: "a. [t]o take part in cultural life; b. [t]o enjoy the benefits of scientific progress and its applications."[88] The human right to participate in culture gives everyone the right to access, use, and share culture including works, the subject matter of copyright.

1. Works as a Component of Culture

Culture does not have a unified meaning,[89] but works explicitly or impliedly fall within one of its definitions.[90] In 1871, Sir Edward Burnett Tylor defined culture as a "complex whole which includes knowledge, belief, art, morals, law, custom, and any other capabilities and habits acquired by man as a member of society."[91] Knowledge, belief and art aptly comprise works and the latter are clear embodiments and expressions of humans' capabilities. Also, the United Nations Educational, Scientific and Cultural Organization [UNESCO] includes works in its definition of culture as "the set of distinctive spiritual, material, intellectual and emotional features of a society or a social group, and that it encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs."[92] Moreover, in *General Comment No. 21*,[93] the Committee on Economic, Social and Cultural Rights [CESCR] explained that "culture" within the meaning of article 15(1)(a) encompasses:

> [W]ays of life, language, oral and written literature, music and song, non-verbal communication, religion or belief systems, rites and ceremonies, sport and games, methods of production or technology, natural and man-made environments, food, clothing and shelter and the arts, customs and traditions through which individuals, groups of individuals and communities express their humanity and the meaning they give to their existence, and build their world view representing their encounter with the external forces affecting their lives... .[94]

This definition of culture is both source-neutral and format-neutral. A work is part of culture whether it is oral, written or visual; whether it is digital or in print; and whether it is produced by a natural or legal person, individual or group of individuals, community, or machine.[95]

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88 *ICESCR*, *supra* note 21.

89 See Tzen Wong, Molly Torsen & Claudia Fernandini, "Cultural Diversity and the Arts: Contemporary Challenges for Copyright Law" in Tzen Wong & Graham Dutfield, eds, *Intellectual Property and Human Development: Current Trends and Future Scenarios* (Cambridge: Cambridge University Press, 2010) 279 at 280.

90 For a comprehensive review of the definitions of culture see Alfred Kroeber & Clyde Kluckhohn, *Culture: A Critical Review of Concepts and Definitions* (Milwood, NY: Kraus Reprint, 1978).

91 Sir Edward Burnett Tylor, *Primitive Culture: Research into the Development of Mythology, Philosophy, Religion, Art, and Custom* (London: John Murray, 1871) vol 1 at 1.

92 *UNESCO Universal Declaration on Cultural Diversity*, UNESCO Res 25, UNESCOOR, 31st Sess, UN Doc 31 C/25, 2001) 1, pmbl.

93 Committee on Economic, Social and Cultural Rights, *General Comment No 21: Right of Everyone to Take Part in Cultural Life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights)*, UNESCOR, 43rd Sess, UN Doc E/C.12/GC/21, (2009) [*General Comment No 21*].

94 *Ibid* at para 13.

95 Works also come within the definition of "cultural content" and "cultural expressions" under the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, 20 October 2005, 2440 UNTS 311. Article 4(2)

In addition to being part of culture referred to in paragraph (a) of article 15(1) of the *ICESCR*, some works could qualify as an object of protection under paragraph (b) of article 15(1). Although paragraph (b) seems to speak about inventions rather than literary or artistic expressions,[96] the steps to achieve a given application of scientific progress or advancement, the process of its operation, and its useful functional uses are usually described in literary works. Therefore, enjoying the benefits of scientific progress and its applications inevitably requires a set of entitlements over accompanying documentation, such as manuals and industrial drawings.[97]

2. Entitlements

Together, article 27(1) of the *UDHR* and article 15(1)(a)-(b) of the *ICESCR* grant everyone the right to participate in cultural life, enjoy arts, and share in the benefits of scientific advancement. The exact content and scope of this right has remained until recently underdeveloped, especially in the context of the protection and enjoyment of works.[98] Nonetheless, in *General Comment No. 21*, the CESCR identified three components of it: "(a) participation in, (b) access to, and (c) contribution to cultural life."[99] Collectively, these components grant users the right to access works, the right to use works to produce new works, and the right to share works with others.

First, the right to access works exists in both the participation and access components of the right to participate in culture. The participation component covers, *inter alia,* everyone's right to "seek and develop cultural knowledge and expressions and to share them with others, as well as to act creatively and take part in creative activity."[100] The Oxford Dictionary defines "seek" as the "attempt or desire to obtain or achieve,"[101] defines knowledge as "the sum of what is known,"[102] and defines "expression" as "the

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defines cultural content as: ("the symbolic meaning, artistic dimension and cultural values that originate from or express cultural identities," and article 4(3) defines cultural expressions as "those expressions that result from the creativity of individuals, groups and societies, and that have cultural content").

96 See UNESCO, *The Right to Enjoy the Benefits of Scientific Progress and its Applications*: *Outcome of the Experts' Meeting held on 16-17 July 2009 in Venice, Italy* (Paris: UNESCO, 2009) at para 12(a) [*Venice Statement*] (noting that the right in article 15(1)(b) "is applicable to all fields of science and its applications").

97 Most corporations assert their copyright over pamphlets and brochures accompanying their innovation even when it is patent-protected. See Elizabeth F Judge & Daniel J Gervais, *Intellectual Property: The Law in Canada*, 2d ed (Toronto: Carswell, 2011) at 1125-1185 (discussing overlap of intellectual property protection).

98 William A Schabas, "Study of the Right to Enjoy the Benefits of Scientific and Technological Progress and its Applications" in Yvonne Donders & Vladimir Volodin, eds, *Human Rights in Education, Science, and Culture: Legal Developments and Challenges* (Burlington, VT: Ashgate, 2007) 273 at 274.

99 *General Comment No. 21*, *supra* note 93 at para 15.

100 *Ibid* at para 15(a). See also *Recommendation on Participation by the People at Large in Cultural Life and their Contribution to It*, UNESCOOR, 19th Sess, Res 4.126, (1976) Annex I 29 at para I.2(b) ["UNESCO *Recommendation*"] (defining the right to participate in culture as "the concrete opportunities guaranteed for all-groups or individuals-to express themselves freely, to communicate, act, and engage in creative activities with a view to the full development of their personalities, a harmonious life and the cultural progress of society").

101 *Oxford Dictionary of English*, 3d, *sub verbo* "seek". According to the *VCLT*, *supra* note 83, art 31.1: ("[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose").

102 *Oxford Dictionary of English*, 3d, *sub verbo* "knowledge".

action of making known one's thoughts or feelings."[103] Since works are primary mediums in which cultural knowledge and expressions are stored or reflected, obtaining or achieving cultural knowledge and expressions is inseparable from access—defined as "the right or opportunity to use or benefit from something"[104]—to these works, whether literary, scientific, or artistic. As explained by the General Conference of UNESCO, access to culture refers to "the concrete opportunities available to everyone, in particular through the creation of the appropriate socio-economic conditions, for freely obtaining information, training, knowledge and understanding, and for enjoying cultural values and cultural property."[105] All the more so, the "access to" component of the right to participate in cultural life gives users the rights, amongst other things: first, "to know and understand [their] own culture and that of others through education and information;"[106] second, "to follow a way of life associated with the use of cultural goods and resources;"[107] and third, "to benefit from the cultural heritage and the creation of other individuals and communities."[108]

Human beings naturally seek knowledge in order to achieve "the capacity for self-improvement."[109] For this quest, Jean Jacques Rousseau argues, people gave up the state of equality that had characterized the state of nature and took a path toward slavery, as seeking knowledge is one of the occasions in which humans are interdependent and not self-sufficient.[110] Humans' need for knowledge in modern societies is self-evident and their interdependence with regard to its creation and use is inevitable—a pair of circumstances that will generate inequality according to Rousseau. Thus, providing for users' rights to access, use, and share works, along with authors' human rights over their intellectual creations, which are articulated in Article 27(2) of the *UDHR* and Article 15(1)(c) of the *ICESCR*, is an attempt by international human rights law to restore (or guarantee) the just order in the ecosystem of knowledge creation, use, and distribution.

Second, the right of users to use and build upon existing works to create new works rests under the participation component of the right to participate in cultural life. Users' right to "develop cultural knowledge and expressions"[111] entails the right to use them for the purpose of producing further works or improving the existing ones. To develop is to "grow or cause to grow and become more mature, advanced, or elaborate."[112] Thus, developing cultural knowledge and expressions intrinsically implies a process whereby users make changes to existing works to improve them or transform them into new works. As

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103 *Oxford Dictionary of English*, 3d, *sub verbo* "expression".
104 *Oxford Dictionary of English*, 3d, *sub verbo* "access".
105 UNESCO *Recommendation*, *supra* note 100 at para I.2(a).
106 *General Comment No. 21*, *supra* note 93 at para 15(b).
107 *Ibid*.
108 *Ibid*.
109 Jean Jacques Rousseau, *Discourse on Inequality*, translated by GDH Cole (Whitefish, MT: Kessinger, 2004) at 29-30. See also Alfred L. Brophy, "The Law Book in Colonial America", Book Review of *A History of the Book in America: The Colonial Book in the Atlantic World* by David Hall & Hugh Amory, eds, (2003) 51 Buff L Rev 1119 at 1119, n 3 (emphasizing the importance of access to knowledge for the purpose of self-improvement).
110 Rousseau, *supra* note 109 at 45-47. For further discussion of this point, see Kevin Currie-Knight, "Rival Visions: J.J. Rousseau and T.H. Huxley on the Nature (or Nurture) of Inequality and What It Means for Education" (2011) 42 Philosophical Studies in Education 25 at 27.
111 *General Comment No. 21*, *supra* note 93 at para 15(b).
112 *Oxford Dictionary of English*, 3d, *sub verbo* "develop".

culture becomes more infused with digital content, the reciprocal relationship between creation and use of intellectual works becomes more conspicuous and marks a remarkable shift of the emphasis from the "read-only culture"[113] to the "read and write culture."[114] In the "read-only culture", the use of works takes the traditional forms of reading and quoting, whereas in the "read and write culture" it extends to take another interface in which people, in addition; mix words, images, videos or sounds to produce new works and share them using digital networks. [115]

Third, users have the right to "share" with others whatever works they have accessed or further developed by virtue of their rights to access and use works. Users receive this right first from the participation component of the right to participate in culture, which provides for the right to "share" cultural knowledge and expressions with others.[116] Further, they receive it from the "contribution to cultural life" component, which gives everyone the right "to be involved in creating the spiritual, material, intellectual and emotional expressions of the community"[117] and "to take part in the development of the community to which a person belongs."[118] The right to share works complements and facilitates the rights to access and use them. It corresponds to people's tendency to share knowledge given its non-rival nature.[119] It is essential for enabling innovation in the information economy.[120] It also normatively promotes new socio-economic models for knowledge production, such as "common-based peer production,"[121] and knowledge sharing, such as in free software,[122] and Creative Commons [CC] licensing.[123] These models are a reaction to the dissatisfaction with the exclusive-rights approach toward

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113 Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (New York: Penguin Press, 2004) at 37 [Lessig, *Free Culture*].

114 *Ibid*.

115 Lawrence Lessig, *Remix: Making Art and Commerce Thrive in the Hybrid Economy* (New York: Penguin Press, 2008) at 69.

116 See *General Comment No. 21*, *supra* note 93 at para 15(a).

117 *Ibid* at para 15(c).

118 *Ibid*.

119 See Yochai Benkler, "Free as the Air to the Common Use: First Amendment Constraints on Enclosure of the Public Domain" 74 (1999) NYU L Rev 354 at 424.

120 See WIPO, General Assembly, *Proposal by Argentina and Brazil for the Establishment of a Development Agenda for WIPO*, WIPO GA, 31 st (15th Extraordinary) Sess, WO/GA/31/11, (2004) at 3.

121 Yochai Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (New Haven, CT: Yale University Press, 2006) at 9. See also Steven A. Hetcher, "Hume's Penguin, or, Yochai Benkler and the Nature of Peer Production" (2009) 11 Vand J Ent & Tech L 963 (examining Benkler's theory of peer production); Steven Hetcher, User-Generated Content and the Future of Copyright: Part One—Investiture of Ownership (2008) 10 Vand J Ent & Tech L 863 (discussing the phenomenon of user-generated content and its copyright law issues).

122 The GNU Operating System's web page defines "free software" as "software that respects users' freedom and community. Roughly, the users have the freedom to run, copy, distribute, study, change and improve the software. With these freedoms, the users (both individually and collectively) control the program and what it does for them." "What is Free Software?", online: <http://www.gnu.org/philosophy/free-sw.html>. Free software is one of the applications of the common-based peer production model. See Yochai Benkler, "Coase's Penguin, or, Linux and the Nature of the Firm" (2002) 112 Yale LJ 369.

123 The creative commons' webpage defines "creative commons licensing" as "a simple, standardized way to give the public permission to share and use your creative work—on conditions of your choice. CC licenses let you easily change your copyright terms from the default of 'all rights reserved' to 'some rights reserved'." "What is Creative Commons?", online: Creative Commons <http://creativecommons.org/about>. See also Lawrence Lessig, "The Creative Commons"

works, which emphasizes rights holders' control and discourages knowledge sharing.[124] They facilitate the sharing and distribution of works,[125] thus giving effect to new paradigms viewing knowledge as a "commons—a resource shared by a group of people that is subject to social dilemmas."[126]

Users' rights to access, use, and share works are important pillars in the architecture of "free culture", in which culture and its development are free from the strict control of the cultural industry,[127] free from the requirement of permissions before accessing, using, and sharing its elements,[128] and free in that individuals can "add or mix as they see fit"[129] in building upon works.[130] Free culture uses the tools of copyright and contract law to implement the said freedoms. At the same time, users' human right to participate in culture can provide these freedoms with an important normative ground. This ground is necessary, given some scholars' concern that open content models may negatively impact the economic interests of copyright collective societies to an extent that causes a tension between those societies and authors to the detriment of the human rights of both authors and users.[131]

In article 27(1) of the *UDHR* and article 15(1)(a)-(b) of the *ICESCR*, the rights belong to "everyone": a natural person, group of individuals, or community.[132] Consequently, legal persons do not benefit from these rights. Both articles emerged from the recognition of the importance of the enjoyment of works for the dignity and full development of the personality of the human being,[133] and legal persons have neither dignity nor human personality to be developed by using works. Admittedly, this adversely impacts the role of the cultural industry in enriching culture.

The human right to participate in culture is interdependent with the right to education and freedom of expression.

(2003) 55 Fla L Rev 763 at 764 (referring to creative commons as public domain and arguing that it is a "lawyer-free zone" of knowledge that everyone can use and enrich).

124 Julie E Cohen, "Lochner in Cyberspace: The New Economic Orthodoxy of 'Rights Management'" (1998) 97 Mich L Rev 462 at 530, n 258. See also David Vaver, "Intellectual Property: The State of the Art" (2001) 32 VUWLR 1 at 17 (warning intellectual property owners that their demand for strong protection may backfire and that "possessing a right does not mean that it is a good idea to enforce it always, and to the hilt").

125 See David Bollier, "The Growth of the Commons Paradigm" in Charlotte Hess & Elinor Ostrom, eds, *Understanding Knowledge as a Commons: From Theory to Practice* (Cambridge, MA: MIT Press, 2007) 27 at 37.

126 Charlotte Hess & Elinor Ostrom, "Introduction: An Overview of the Knowledge Commons" in Hess & Ostrom, *ibid* 1 at 1.

127 See Lessig, *Free Culture*, *supra* note 113 at 94.

128 *Ibid* at 99.

129 *Ibid* at 106.

130 *Ibid*.

131 See e.g. Laurence R Helfer, "Collective Management of Copyrights and Human Rights: An Uneasy Alliance Revisited" in Daniel Gervais, ed, *Collective Management of Copyright and Related Rights*, 2d ed (Alphen aan den Rijn: Kluwer Law International, 2010) 75 at 97-98.

132 See *General Comment No. 21*, *supra* note 93 at para 9.

133 By virtue of article 22 of the *UDHR*, *supra* note 21, all of the economic, social, and cultural rights of the individual are "indispensable for his dignity and the free development of his personality." See also Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (Philadelphia: University of Pennsylvania Press, 1999) at 219 (noting the linkage between users' rights under article 27(1) of the *UDHR* and the human right to personal development).

B. The Human Right to Education

The *UDHR* gives everyone the right to education in article 26.[134] It makes education in elementary (primary) stages both free of charge and compulsory, and it requires the availability of technical and professional education as well as equal accessibility to higher education.[135] Article 26 states the purpose of the human right to education as the achievement of the full development of the human personality and the promotion, understanding, and respect of human rights.[136] In addition, it gives parents a "prior right"[137] to make a choice with respect to their children's education. The human right to education is also enshrined and elaborated in articles 13 and 14 of the *ICESCR*.[138] Notably, article 13 of the *ICESCR* adds three objectives to the human right to education: developing the "sense of dignity"[139] of the human personality, enabling participation in a free society, and promoting tolerance and understanding amongst nations and all different groups.[140]

Education is in itself a human right and an essential tool for the realization of other human rights, such as the human right to an adequate standard of living and a wide range of democratic rights.[141] The CESCR describes it as "one of the joys and rewards of human existence."[142] Due to a historical bias against economic, social and cultural rights — and accompanying arguments relating to their justiciability and positive nature — not all States have treated the human right to education equally. For instance, the US Constitution does not protect the right to education.[143] Likewise, the *Charter* does not have an express provision on education, except with respect to minority language education,[144] although the SCC emphasized the importance of education for society.[145] On the other hand, many national Constitutions protect the human right to, at least, primary education.[146]

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134 *UDHR*, *supra* note 21.
135 *Ibid*, art 26(1).
136 *Ibid*.
137 *Ibid*, art 26(3).
138 *ICESCR*, *supra* note 21, arts 13-14.
139 *Ibid*, art 13.
140 *Ibid*.
141 See Committee on Economic, Social and Cultural Rights, *General Comment No. 13: The Right to Education (Art. 13 of the Covenant)*, UNESCOR, 21st Sess, UN Doc E/C.12/1999/10, (1999) at para 1 [*General Comment No. 13*].
142 *Ibid* at para 1.
143 *San Antonio Independent School District v Rodriguez*, 411 US 1 at 34 (1973).
144 *Charter*, *supra* note 19, s 23.
145 *The Queen v Jones*, [1986] 2 SCR 284 at para 22, 31 DLR (4th) 569. However, provinces have statutory laws that impliedly or explicitly provide some rights relating to education. Further, some scholars argue that the right to education could be Charter-protected based on section 7 or section 15 of the *Charter*. See e.g. A Wayne MacKay & Gordon Krinke, "Education as a Basic Human Right: A Response to Special Education and the Charter" (1987) 2 CJLS 73.
146 E.g., *Constitution of Ireland*, 1937, art 42; *Constitution of India*, 1949, art 21A; *Constitution of Italy*, 1947, art 34; *Constitution of the Republic of South Africa*, Act 108 of 1996, s 29.

The human right to education has "interrelated and essential features"[147] summarized in the so-called "4-A scheme"[148]; namely availability, accessibility, acceptability and adaptability.[149] Availability refers to the existence of an adequate and quality educational system that provides appropriate material infrastructure and human resources for the educational operation.[150] Accessibility means that educational institutions and programs are available to everyone without discrimination on any ground (non-discrimination), they are physically within reach to everyone, and they are free for primary education and shall be "progressively free"[151] for secondary and higher education.[152] Acceptability means that education is of good quality and is relevant and appropriate to a student's culture.[153] Finally, adaptability means that education is responsive to students' needs in light of continuous social and cultural changes.[154] The 4A elements are relevant to education in all its levels: primary, secondary, higher, and fundamental.[155]

The human right to participate in culture—comprising the rights to access, use, and share works—is inherently connected with the human right to education. Education will not be available when students lack access to works, such as books, journals, or computer programs, nor will it be accessible when these educational materials are unaffordable or their communication electronically in the course of distance learning is prohibited. The human right to education will not achieve acceptability or adaptability when works are not available in the relevant language of the students or in a format accessible by students with special needs. The *Convention on the Rights of the Child* [*CRC*][156] explicitly requires that educational and vocational information, material, and guidance be available and accessible by children.[157] Books, journals, computer programs, art, and other teaching materials, along with the means of their communication, such as the internet, radio, or television, form the main channels of information and knowledge necessary for a

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147 *General Comment No. 13*, *supra* note 141 at para 6.

148 Commission on Human Rights, *Economic, Social and Cultural Rights: Preliminary Report of the Special Rapporteur on the Right to Education, Ms. Katarina Tomasevski, Submitted in accordance with Commission on Human Rights Resolution 1998/33*, ESCOR, 55th Sess, UN Doc E/CN.4/1999/49 (1999) at para 50 [*Preliminary Report of the Special Rapporteur on the Right to Education*].

149 See *General Comment No. 13*, *supra* note 141 at para 6; *Preliminary Report of the Special Rapporteur on the Right to Education*, *supra* note 148 at paras 50-74.

150 See *General Comment No. 13*, *supra* note 141 at para 6(a).

151 *Ibid* at para 6(b).

152 *Ibid*.

153 *Ibid* at para 6(c).

154 *Ibid* at para 6(d).

155 *Ibid* paras 6, 8, 11, 17, & 21.

156 *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3, 28 ILM 1456 [*CRC*].

157 *Ibid*, arts 17 & 28(1)(c).

good quality learning environment.[158] Therefore, "[c]lose contact with contemporary technological and scientific knowledge should be possible at every level of education."[159]

The relation between the human right to education and the human right to participate in culture stems from the function of education as a channel "through which individuals and communities pass on their values, religion, customs, language and other cultural references."[160] In Europe, while the *European Convention on Human Rights* [*ECHR*][161] does not include a general provision on the right to participate in culture, the European Court of Human Rights (ECtHR) touched upon the role of education in streaming culture through its interpretation of the concept as referred to in article 2 of the *Protocol No.1 of the ECHR*,[162] noting that education is "the whole process whereby, in any society, adults endeavour to transmit their beliefs, culture and other values to the young."[163] Similarly, earlier in 1954, the Supreme Court of the United States unanimously stated in *Brown v Board of Education of Topeka*,[164] a case that banned school segregation, that education is "a principal instrument in awakening the child to cultural values."[165]

Fulfilling the human right to education is costly and the State bears an important share of its cost; however, the cost for affording works is magnified by the effect of copyright. Arguably, the *Act* respects and protects the human right to education by articulating both fair dealing and other education-specific exceptions that allow access, use, and sharing of works for educational purposes without the permission of rights holders.[166] Thus, treating these exceptions as users' rights by the SCC serves the human right to participate in culture and the human right to education, both of which are interrelated and interdependent with freedom of expression.

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158 Committee on the Rights of the Child, *CRC General Comment No. 1: The Aims of Education*, 17 April 2001, UN doc CRC/GC/2001/1, Annex IX, (2001) at para 22; *World Declaration on Education For All: Meeting Basic Learning Needs* (Jomtien, Thailand, 1990), online: UNESCO <http://www.unesco.org/education/wef/enconf/jomtien%20declaration-%20eng.shtm>, arts V & VI [*World Declaration on Education*]. See also Committee on the Rights of the Child, *General Comment No. 16 (2013): On State Obligations Regarding the Impact of the Business Sector on Children's Rights* (15 March 2013, Advance Unedited Version) at para 58(d) (recommending the allocation of budgets for supporting the "production and dissemination of children's books, magazines, and papers; [and] various formal and non-formal artistic expressions for children").

159 *World Declaration on Education*, *supra* note 158, art VIII(2). See also UNESCO, *A Human Rights-Based Approach to Education for All* (UNESCO: Paris, 2007) at 56 (stressing that the supply of books and equipment is a "fundamental prerequisite of education").

160 *General comment No. 21*, *supra* note 93 at para 2.

161 *ETS 5; 213 UNTS 221* [*ECHR*].

162 See *Case of Campbell and Cosans v The United Kingdom* (1982), 48 ECHR (Ser A) 1, 4 EHRR 293.

163 *Ibid* at para 33.

164 *Brown v Board of Education of Topeka*, 347 US 483 (1954).

165 *Ibid* at 493.

166 *Copyright Act*, *supra* note 1, s 29 & s 29.4.

C. Freedom of Expression

Freedom of expression is a cornerstone in the legal and political structure of all free and democratic societies.[167] It is a gate for "seeking and attaining the truth"[168] and a guarantee for "the diversity in forms of individual self-fulfilment and human flourishing."[169] The *UDHR* and *ICCPR* secure this freedom to everyone and define it to include the right to "hold opinions without interference" and to "seek, receive and impart information and ideas."[170]

The right to seek, receive, and impart ideas is an integral part of the right to participate in culture, which supports users' rights to access, use, and share works.[171] The participation component of the right to participate in culture, like freedom of expression, grants users the right to "seek" cultural knowledge and expression.[172] More explicitly, the access component of the right to participate in culture provides everyone with the right "to learn about forms of expression and dissemination through any technical medium of information or communication."[173] At the same time, this is also a component of freedom of expression, which includes "the expression and receipt of communications of every form of idea and opinion capable of transmission to others."[174] The interdependence between the right to participate in culture and freedom of expression also appears in the CESCR's interpretation of States' obligations toward the human right to participate in culture in article 15(1)(a) of the *ICESCR* to include, *inter alia*, "the right to seek, receive and impart information and ideas of all kinds and forms including art forms, regardless of frontiers of any kind."[175] The CESCR explained that this right "implies the right of all persons to have access to, and to participate in, varied information exchanges, and to have access to cultural goods and services, understood as vectors of identity, values and meaning."[176] In short, the human right to participate in culture and freedom of expression share, among other things, the objective of entitling humans to access and share works in any form. Nonetheless, according to article 19(3)(a) of the *ICCPR*, the human right to "seek, receive, and impart information and ideas" may be subject to "certain restrictions,"[177] provided that they are prescribed by law and "necessary"[178] for, *inter alia*, the "respect of the rights or reputations of others."[179] The protection of authors' moral and material interests by means of exclusive rights may fit under this category of exceptions; however, this does not negate the human rights nature of users' rights over works.

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167 Human Rights Committee (HR Committee), *General Comment No. 34: Article 19: Freedoms of Opinion and Expression*, 102nd Sess, UN Doc CCPR/C/GC/34, (2011) at para 2 [*General Comment No. 34*]; *RWDSU v Dolphin Delivery Ltd.*, [1986] 2 SCR 573 at 583, 33 DLR (4th) 174.

168 *Irwin Toy Ltd. v Quebec (Attorney General)*, [1989] 1 SCR 927 at 976, 58 DLR (4th) 577 [*Irwin Toy*].

169 *Ibid*.

170 *UDHR*, *supra* note 21, art 19; *ICCPR*, *supra* note 23, art 19.

171 See *General Comment No. 21*, *supra* note 93 at para 15(a)-(c.)

172 See *ibid* at para 15(a).

173 *Ibid* at para 15(b).

174 *General Comment No. 34*, *supra* note 167 at para 11.

175 *General Comment No. 21*, *supra* note 93 at para 49(b).

176 *Ibid* at para 49(b), citing *UNESCO Universal Declaration on Cultural Diversity*, UNESCO Res 25, UNESCOOR, 31st Sess, UN Doc 31 C/25, 2001) at para 8.

177 *ICCPR*, *supra* note 23.

178 *Ibid*.

179 *Ibid*.

For example, under article 10(1) of the *ECHR*, freedom of expression includes the right to "receive and impart information and ideas without interference by public authority and regardless of frontiers."[180] However, article 10(2) allows the possibility of restricting freedom of expression if the restrictions "are prescribed by law and are necessary in a democratic society... for the protection of the rights and freedoms of others."[181] The interaction between users' freedom of expression as a justification for reproducing others' works and the limits imposed by copyright upon this freedom came under the scrutiny of the ECtHR. In *Ashby Donald and others v France,*[182] the ECtHR held that the applicants' copyright-infringing dissemination of photographs for free or in exchange for remuneration fell within the ambit of article 10 of *ECHR*.[183] Thus, the convictions against them by the French courts constituted interference with their rights under article 10.[184] However, this did not amount to a violation of these rights since the interference was both prescribed by law and necessary in a free and democratic society for the protection of others' rights.[185] The Court affirmed that copyright was property protected under article 1 of *Protocol No. 1*[186] and that national courts had a wide margin of appreciation when they balanced it with freedom of expression.[187] The ECtHR also considered the commercial nature of the use of the photographs by the applicants as another factor to allow the national courts a wide margin of appreciation.[188] Similarly, in *Neij v Sweden*,[189] the ECtHR held that running a website facilitating sharing of works, including those protected by copyright, benefited from the protection of article 10 of the *ECHR* and therefore the applicants' copyright infringement convictions interfered with their freedom of expression."[190] However, the ECtHR held that such interference was justified. Amongst the factors it considered to reach this conclusion was that the distributed materials did not amount to "political expression and debate."[191]

In Canada, freedom of expression under the *Charter*[192] failed to justify users' unauthorized use of copyrighted works beyond the boundaries delineated in the *Act*. For example, in *R v James Lorimer & Co.*,[193] involving an infringement claim against a publisher that had abridged a seven-volume governmental report into one volume, the Federal Court of Appeal rejected the defendants' freedom of expression defense, as the abridged work included "[s]o little of [their] own thought, belief, opinion and

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180 *ECHR*, *supra* note 161, art 10(1).
181 *Ibid*, art 10(2).
182 *Donald v France* (36769/08) 10 January 2013, online: ECtHR <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115845> [*Donald v France*], English translation available at (2014) 45(3) IIC 354.
183 *Ibid* at para 34.
184 *Ibid*.
185 *Ibid* at paras 36-42.
186 *Ibid* at para 40.
187 *Ibid* at paras 40-41.
188 *Ibid* at paras 39-41.
189 *Neij v Sweden*, 56 EHRR SE19.
190 *Ibid* at para 30.
191 *Ibid* at para 36.
192 *Charter*, *supra* note 19, s 2(b).
193 [1984] 1 FC 1065 at 1079, 77 CPR (2d) 262 (FCA).

expression."[194] In another case,[195] involving the unauthorized distribution of materials carrying a business logo—Michelin Man—in a union drive, the Federal Court held that "[t]he *Charter* does not confer the right to use private property—the plaintiff's copyright—in the service of freedom of expression,"[196] and that copyright "minimally impairs the defendants' right of free expression by the very well-tailored structure of the *Copyright Act* with its list of exceptions."[197]

This approach presumed that the idea/expression dichotomy and infringement exceptions automatically balanced authors' exclusive rights under the *Act* against users' freedom of expression under the *Charter*.[198] It meant that courts would disregard, at the outset, freedom of expression defenses in copyright infringement cases.[199] The substantial misappropriation of others' expressions is an important standard to determine copyright infringement, but it should not automatically abrogate the freedom of expression analysis under constitutional law in copyright infringement cases.[200] The assumption that parliaments have already weighed in users' freedom of expression in the bundle of rights and exceptions embodied in copyright statutes in advance excuses courts from identifying instances, not envisaged by statutory copyright exceptions, where copyright may encroach upon freedom of expression.[201]

IV. COPYRIGHT USERS' RIGHTS: THE ECHO OF HUMAN RIGHTS

The list of copyright exceptions in the *Act* serves, among other interests and values, the human right to participate in culture, the human right to education, and freedom of expression.[202] For instance, the linkage between the purposes of fair dealing and human rights is intuitive. By engaging in news reporting, criticism, review, satire or parody, one is both practicing his or her freedom of expression and serving others' freedom of expression.[203] Similarly, as explained earlier, research, private study, and education fall under the big umbrella of the human right to education and are necessary vehicles for the fulfilment of other human rights, including freedom of expression and the right to participate in culture.

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194 *Ibid* at 1079.

195 *Compagnie Générale des Établissements Michelin-Michelin & Cie v National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada)*, [1997] 2 FC 306, 71 CPR (3d) 348 (FC TD).

196 *Ibid* at 362.

197 *Ibid* at 381. See also *Eldred v Ashcroft*, 537 US 186 (2003) (considering copyright exceptions and limitations as "built-in First Amendment accommodations").

198 See Ysolde Gendreau, "Copyright and Freedom of Expression in Canada" in Paul Torremans, ed, *Copyright and Human Rights: Freedom of Expression, Intellectual Property, Privacy* (The Hague: Kluwer Law International, 2004) 21 at 31; Carys J. Craig, "Putting the Community in Communication: Dissolving the Conflict between Freedom of Expression and Copyright" (2006) 56 UTLJ 75 at 78.

199 *Ibid* at 81.

200 Eric Barendt, *Freedom of Speech*, 2nd ed (Oxford: Oxford University Press, 2007) at 250; Neil W. Netanel, "Locating Copyright within the First Amendment Skein" (2001) 54 Stan L Rev 1.

201 Barendt, *Freedom of Speech*, *supra* note 200 at 250.

202 International human rights law bodies recognize the role of copyright exceptions and limitations in making available and accessible intellectual works. See e.g. Committee on the Rights of the Child, *General Comment No. 17 (2013): The Right of the Child to Rest, Leisure, Play, Recreational Activities, Cultural Life and the Arts (Article 31)*, 62d Sess, UN Doc CRC/C/GC/17, (2013) 1 at para 22.

203 See Neil Weinstock Netanel, "Asserting Copyright's Democratic Principles in the Global Arena" (1998) 51 Vand L Rev 217 at 303 (arguing that a news exception is mandated by international free speech law).

In addition to fair dealing, the *Act* includes exceptions necessary for implementing a wide set of users' human rights. These include, for instance, the exception allowing the reproduction of works in non-commercial user-generated content [UGC],[204] exceptions permitting reproduction for the purpose of facilitating archives' and museums' tasks in preserving culture,[205] exceptions permitting the use of works by educational institutions,[206] and exceptions for the reproduction of works in alternate format for persons with perceptual disabilities.[207]

The SCC's liberal interpretation of fair dealing, and generally its treatment of copyright exceptions as users' rights, is infused with the content of the human right to participate in culture, freedom of expression, and the human right to education.[208] In *CCH*, the SCC gave research "a large and liberal interpretation in order to ensure that users' rights are not unduly constrained"[209] and, as a result, did not limit it to non-commercial or private uses.[210] Accordingly, the SCC found the research done by lawyers for commercial purposes to fall within the meaning of research for the purpose of section 29.[211] In the same way, the SCC liberally defined research in *SOCAN v Bell* to include not only research for "creative purposes"[212] but also research for the purposes of the "dissemination of works"[213] and "private study."[214] This liberal interpretation captured "many activities that do not demand the establishment of new facts or conclusions."[215] The SCC rejected restricting the meaning of research to "creating something new,"[216] which could have imported the transformation factor of the United States fair use analysis into the analysis of fair dealing and thus could have limited the benefits of fair dealing to authors only.[217] The SCC's approach resonates with the focus of Article 27(1) of the *UDHR* and Article 15(1)(a)-(b) of the *ICESCR*

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204 *Copyright Act*, *supra* note 1, s 29.21.

205 *Ibid*, ss 30.1, 30.4, 30.5.

206 *Ibid*, ss 29.4, 29.5.

207 *Ibid*, s 32.(1). Some copyright exceptions serve technical purposes only. See e.g. *Copyright Act*, *supra* note 1, s 30.71 (the exception on temporary reproductions for technological processes).

208 See Graham Reynolds, "The Limits of Statutory Interpretation: Towards Explicit Engagement, by the Supreme Court of Canada, with the Charter Right to Freedom of Expression in the Context of Copyright" (2016) 41 Queen's LJ 455 at 475 (arguing that the SCC's liberal interpretations of fair dealing "have resulted in a significant degree of space being preserved within which non-copyright owning parties may express themselves using copyrighted works"); Richard J Peltz, "Global Warming Trend? The Creeping Indulgence of Fair Use in International Copyright Law" (2009) 17 Tex Intell Prop LJ 267 at 281 (arguing that the SCC's understanding of fair dealing as a user's right "is reminiscent of the constitutional spirit that animates the U.S. fair use doctrine").

209 *CCH*, *supra* note 6 at para 51.

210 *Ibid*.

211 *Ibid*.

212 *SOCAN v Bell*, *supra* note 6 at para 21.

213 *Ibid*.

214 *Ibid*.

215 *Ibid* at para 22.

216 *Ibid* at para 23.

217 *Ibid* at paras 24-26. See also Abraham Drassinower, "Authorship as Public Address: On the Specificity of Copyright vis-à-vis Patent and Trade-mark" (2008) Mich St L Rev 199 at 210, n 32 (arguing that the transformative factor in the US fair use analysis "calls for the defendant's engagement as an author"); Rebecca Tushnet, "Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It" (2004) 114 Yale LJ 535 at 537 (arguing that emphasizing the transformation factor in the fair use analysis excludes non-transformative uses from the ambit of fair use even if they have significant importance for society and freedom of expression).

on the use, enjoyment, and consumption of works, rather than on their role in enabling the production of new works.[218] Consequently, it held that allowing users to listen to thirty to ninety second previews of musical works available on the websites of online music providers before making a purchase was for the purpose of "research" within the meaning of section 29.[219]

Interpreted liberally by the SCC in *SOCAN v Bell*, research covers a great deal of the content of the human right to participate in culture as interpreted by the CESCR, including its freedom of expression component. Holding that the dissemination of works per se falls within the meaning of research is consistent with the substance of freedom of expression, which incorporates "the right to seek, receive and impart information and ideas of all kinds regardless of frontiers."[220] The SCC's decision in *CCH* also emphasized the importance of the dissemination of works, unless confidential: "if a work has not been published, the dealing may be more fair in that its reproduction with acknowledgement could lead to a wider public dissemination of the work — one of the goals of copyright law."[221]

In *Alberta (Education)*, the SCC impliedly supported the human right to education, freedom of expression, and the right to participate in culture when it held that "photocopies made by a teacher and provided to primary and secondary school students are an essential element in the research and private study undertaken by those students."[222] It rejected the characterization of students' usage in the classroom of photocopies made for them by teachers as "non-private study"[223] and held that "the word 'private' in 'private study' should not be understood as requiring users to view copyrighted works in splendid isolation. Studying and learning are essentially personal endeavours, whether they are engaged in with others or in solitude."[224]

In short, the SCC's treatment of copyright exceptions as users' rights and liberal interpretation of fair dealing in *CCH*, *SOCAN v Bell*, and *Alberta (Education)* echo the title and nature of users' rights over works in international human rights law. As Professor David Vaver explains:

> It may not just be the Charter that is affecting how the Supreme Court views copyright today. International human rights law may be playing its part, too. When Abella J. spoke in *SOCAN v. Bell*--the music preview (or more accurately music pre-hearing) case--of the role of user rights as being "to achieve the proper balance between protection and access" in the *Copyright Act*, … she was partly reflecting how international human rights law treats intellectual property rights. To reflect human rights fully, however, she would have reversed the order of her statement, to say that user rights reflect the proper balance

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218 On the drafting history of article 27 of the *UDHR* and article 15 of the *ICESCR* see generally Morsink, *supra* note 133; Committee on Economic, Social and Cultural Rights, *Implementation of the International Covenant on Economic, Social and Cultural Rights: Drafting History of the Article 15(1)(c) of the International Covenant on Economic, Social and Cultural Rights*, Background Paper submitted by Maria Green, International Anti-Poverty, Law Center, New York, NY, USA, UNESCOR, 24th Sess, UN Doc E/C.12/2000/15, (2000) 1.

219 *SOCAN v Bell*, *supra* note 6 at para 49.

220 *General Comment No. 34*, *supra* note 167 at para 11.

221 *CCH*, *supra* note 6 at para 58.

222 *Alberta (Education)*, *supra* note 12 at para 25.

223 *Ibid* at para 26.

224 *Ibid* at para 27.

> between, first, access and, second, protection. That is how both the *Universal Declaration of Human Rights* of 1948 and the *International Covenant on Economic, Social and Cultural Rights* of 1966 prioritize access and intellectual property.[225]

The SCC jurisprudence on users' rights did not refer to international human rights law explicitly, but this is not surprising.[226] First of all, in general, the *Charter* does not explicitly protect economic, social and cultural rights, although the SCC left the possibility open for interpreting some of these rights to fall under section 7, which grants everyone "the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."[227] Second, the SCC emphasized that "to the extent this Court has recognized a "*Charter* values" interpretive principle, such principle can only receive application in circumstances of genuine ambiguity, i.e., where a statutory provision is subject to differing, but equally plausible, interpretations."[228] Third, despite the early codification of the rights of authors and users in article 27 of the *UDHR* and article 15 of *ICESCR*, these two sets of rights were amongst the least developed human rights,[229] and, for a long time, international intellectual property law, a main source of Canada's intellectual property law, and international human rights law were "strangers."[230]

Today, however, there are compelling reasons to look at the different interests regulated by copyright law, and intellectual property law in general, through an international human rights law lens. The impact of intellectual property law on human rights and freedoms is well known,[231] and international human rights

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225 Vaver, "User Rights", *supra* note 15 at 109.

226 See Lea Shaver, "The Right to Science and Culture" (2009) 1 Wis L Rev 121 at 179 (arguing that courts "may be persuaded by human rights appeals in arguments, yet frame their decisions on less controversial grounds").

227 See *Charter, supra* note 19, s 7. See also *Irwin Toy*, *supra* note 168 at 1003-1004 (declining to rule on whether economic rights fall within the protection of section 7 of the *Charter*). See also Martha Jackman & Bruce Porter, "Socio-Economic Rights Under the Canadian Charter" in Malcolm Langford, ed, *Social Rights Jurisprudence Emerging Trends in International and Comparative Law* (Cambridge, NY: Cambridge University Press, 2009) 209 at 212 (arguing that both section 7 (on the security of the person right) and section 15 (on equality rights) of the *Charter* may "include most, if not all, components of the rights contained in the ICESCR").

228 *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42 at para 62, [2002] 2 SCR 559 [emphasis in original]. See also Reynolds, *supra* note 208 at 459-460 (arguing that the SCC did not explicitly refer to freedom of expression under the *Charter* in its copyright jurisprudence because: 1) the SCC meant to protect users' freedom of expression adequately by formulating copyright exceptions as users' rights and interpreting them liberally; 2) it was guided by the limitation provided in *Bell ExpressVu Limited Partnership v Rex*; and 3) it assumed that the *Act* internally addressed users' freedom of expression.)

229 See Audrey R Chapman, "A Human Rights Perspective on Intellectual Property, Scientific Progress, and Access to the Benefits of Science" (paper delivered at the Panel Discussion to commemorate the 50th Anniversary of the Universal Declaration of Human Rights, Geneva, 9 November 1998), online: WIPO <http://www.wipo.int/tk/en/hr/paneldiscussion/program/index.html> at 3.

230 See Laurence R Helfer, "Human Rights and Intellectual Property: Conflict or Coexistence?" (2003) 5 Minn Intell Prop Rev 47 at 47.

231 See e.g. The Sub-Commission on the Promotion and Protection of Human Rights, *Resolution 2001/21: Intellectual Property and Human Rights*, UNESCOR, 53d Sess, UN Doc E/CN.4/Sub.2/2001/L.11/Add.2, (2001) 12; Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, *The Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights: Report of the High Commissioner*, UNESCOR, 52d Sess, UN Doc E/CN.4/Sub.2/2001/13, (2001) 1; Commission on Intellectual Property Rights, *Report of the*

law plays a role in shaping intellectual property law.[232] Moreover, the historical bias against economic, social and cultural rights is no longer sustainable.[233] Here in Canada, the SCC's formulation of copyright exceptions as users' rights has made Canadian copyright law more than ever closer to international human rights law. Therefore, an amendment to the *Act* that explicitly refers to copyright exceptions as users' rights and embodies their content under human rights law would be timely to end the uncertainty regarding their nature, label, and scope.[234] Until then, Canadian courts have a new incentive to continue embracing users' rights, become explicit about their human rights nature, and interpret them accordingly.[235] In

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Commission on Intellectual Property Rights: Integrating Intellectual Property Rights and Development Policy (London: Commission on Intellectual Property Rights, 2002); Peter Straub, "Farmers in the IP Wrench—How Patents on Gene-Modified Crops Violate the Right to Food in Developing Countries" (2006) 29 Hastings Int'l & Comp L Rev 187; Michael Blakeney, *Intellectual Property Rights and Food Security* (Wallingford, UK: CABI, 2009); Human Rights Council, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social And Cultural Rights, Including the Right to Development, Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, Anand Grover, UNGAOR, 11th Sess, UN Doc A/HRC/11/12, (2009) 1; Philippe Cullet, "Patents and Medicines: The Relationship between TRIPS and the Human Right to Health" (2003) 79(1) International Affairs 139; Manuela Cameiro da Cunha, "International Bodies and Traditional Knowledge" in Sophia Twarog & Promila Kapoor, eds, *Protecting and Promoting Traditional Knowledge: Systems, National Experiences and International Dimensions* (Geneva: United Nations Publications, 2004) 91; P Bernt Hugenholtz, "Copyright and Freedom of Expression in Europe" in Rochelle Cooper Dreyfuss, Diane Leenheer Zimmerman & Harry First, eds, *Expanding the Boundaries of Intellectual Property: Innovation Policy for the Knowledge Society* (Oxford: Oxford University Press, 2001) 343; Human Rights Council, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, Frank La Rue, UNGAOR, 17th Sess, UN DOC A/HRC/17/27, (2011) 1.

232 See e.g. *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled*, (adopted on 27 June 2013), online: WIPO <http://www.wipo.int/treaties/en/ip/marrakesh/> at Preamble (referring to "the principles of non-discrimination, equal opportunity, accessibility and full and effective participation and inclusion in society, proclaimed in the Universal Declaration of Human Rights and the United Nations Convention on the Rights of Persons with Disabilities").

233 See Philip Alston, "U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy" (1990) 84 AJIL 365 at 375 (arguing that "with the sole exception of the United States, all the Western democracies have accepted the validity and equal importance of economic, social and cultural human rights, at least in principle"); Christophe Geiger, "Implementing Intellectual Property Provisions in Human Rights Instruments: Towards a New Social Contract for the Protection of Intangibles" in Christophe Geiger, ed, *Research Handbook on Human Rights and Intellectual Property* (Cheltenham, UK: Edward Elgar, 2015) 661 (noting that more than forty national constitutions reflect the protection of the rights of authors and users in the *UDHR* and *ICESCR*).

234 See Gervais, "Making Copyright Whole", *supra* note 40 at 14 (arguing that "human rights, in providing a teleological framework for exceptions, can also guide courts in interpreting whether a particular use should be covered by an unclear exception, and assist policy makers in designing new exceptions"); Christophe Geiger, "Taking the Right to Culture Seriously: Time to Rethink Copyright Law" in Christophe Geiger, ed, *Intellectual Property and Access to Science and Culture: Convergence or Conflict?* (CEIPI/ ICTSD publication series on "Global Perspectives and Challenges for the Intellectual Property System", Issue 3) (Geneva/Strasbourg: International Centre for Trade and Sustainable Development (ICTSD)/Center for International Intellectual Property Studies (CEIPI), 2016) 84 at 84 (arguing that facilitating access to culture should be one of the main goals of copyright law).

235 See Marcelo Thompson, "Property Enforcement or Retrogressive Measure? Copyright Reform in Canada and the Human Right of Access to Knowledge" (2007) 4:1&2 UOLTJ 163 at 241 (arguing that the SCC should explicitly acknowledge the relation between Canadian copyright law and the right to access to knowledge in international human rights law).

interpreting the provisions of the *Act*, Canadian courts need to consider "[t]he important role of international human rights law as an aid in interpreting domestic law"[236] and "presume that legislation is intended to comply with Canada's obligations under international instruments."[237]

V. THE INTERRELATION BETWEEN USERS' HUMAN RIGHTS AND AUTHORS' MORAL AND MATERIAL INTERESTS

The protection of authors' moral and material interests resulting from their intellectual works stems from both article 27(2) of the *UDHR*, stating that "[e]veryone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author,"[238] and article 15(1)(c) of the *ICESCR*, which recognizes the right of everyone "[t]o benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."[239] The pillars of this protection are a human author and a scientific, literary or artistic work. Authors' moral and material interests protect the "personal link"[240] between authors and their works.[241] The author can be an individual or a group of individuals, but cannot be a legal person.[242] Although the articles use the term "everyone" in referring to authors, which ostensibly includes legal persons,[243] the drafters "appeared to be thinking almost exclusively of authors as individuals."[244] The production of works conveys on an individual the necessary quality of being an author. Article 27(2) of the *UDHR* and article 15(1)(c) of the *ICESCR* provide authors with special protection, whereas most of the provisions of the *UDHR* and *ICESCR* apply to all individuals without distinction of any kind.

The two articles entitle authors to the protection of their moral and material interests in works. An author has the right to be recognized as the creator of the work and to object to its distortion or derogatory

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236 *Baker*, *supra* note 84 at para 70.

237 *Ordon Estate v. Grail*, [1998] 3 SCR 437 at para 137.

238 *UDHR*, *supra* note 21.

239 *ICESCR*, *supra* note 21. Authors' moral and material interests also receive support from authors' freedom of expression (art 19 of the *ICCPR* and art 19 of the *UDHR*) and human right to property (art 17 of the *UDHR*). See e.g. *Harper & Row Publishers, Inc. v Nation Enterprises*, 471 US 539 (1985) at 558 (describing copyright as "a marketable right to the use of one's expression"); *Melnychuk v Ukraine*, No. 28743/03, [2005] IX ECHR 397 at 407 (holding that intellectual property falls within the meaning of property under Article 1 of Protocol No. 1 to the *ECHR*).

240 Committee on Economic, Social and Cultural Rights, *General Comment No. 17 (2005): The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from any Scientific, Literary or Artistic Production of which He or She Is the Author (Article 15, Paragraph 1(C), of the Covenant*, UNESCOR, 35th Sess, UN Doc E/C.12/GC/17, (2006) at para 2 [*General Comment No. 17*].

241 *Ibid*.

242 *Ibid*.

243 Legal persons do not benefit from the protection provided by the UN human rights instruments. See e.g. UN Human Rights Committee, *General Comment No. 31 [80], The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 80th Sess, UN Doc CCPR/C/21/Rev.1/Add.13, (2004); Human Rights Committee, *A Newspaper Publishing Company v Trinidad and Tobago, Communication No. 360/1989*, 36th Sess, UN Doc CCPR/C/36/D/360/1989, (1989). On the other hand, the ECtHR accepted corporations' arguments that their commercial advertising falls within the ambit of freedom of expression under article 10 of *ECHR*. See e.g. *Autronic AG v Switzerland* (1990) 178 ECHR (Ser A) 23, 12 EHRR 485.

244 Green, *supra* note 218 at para 45.

modification,[245] because works are "expressions of the personality of their creator."[246] In addition, authors have the right to generate economic benefits from their works. States may implement this right by various means, including one-time payments and exclusive rights (copyright) allowing authors to exploit their works for a limited period of time.[247] The protection of authors' material interests must be "effective,"[248] in that it is capable of "enabling authors to enjoy an adequate standard of living."[249] At the same time, States must ensure that the protection does not "unjustifiably limit other people's enjoyment of their rights under the [*ICESCR*]."[250]

Evaluating the true impact of users' human rights on authors' moral and material interests requires acknowledging that an exclusive right regime is only one model for giving effect to authors' moral and material interests. Where conflicts arise between this model and users' human rights, it is because existing exclusive rights regimes might go beyond the scope of authors' rights in human rights law.[251] Furthermore, the effect of authors' use of existing works in decreasing the costs of producing new works should be counted in the impact analysis along with the positive or negative impact that users' human rights may have on the market for works. Users' human rights—like authors' human rights—are not absolute. They do not privilege anyone "to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized in the [*ICESCR*],"[252] including authors' human rights.[253] Both sets of rights are *de facto* interdependent,[254] although the models of their implementation can maintain or disturb their interdependence.

The success of new knowledge production and dissemination models, such as GPL licenses, Creative Commons, and Wikipedia, indicates that a significant number of authors, whether writers, musicians, or software programmers, believe that the respect of their moral and material interests, even when in the form of exclusive rights, does not necessarily require upsetting users' human rights.[255] By the same token, users'

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245 *General Comment No. 17*, *supra* note 240 at para 13.

246 *Ibid* at para 14. But see *ibid*, para 2 (noting that authors' moral and material interests "[do] not necessarily coincide" with copyright, given the nature of the beneficiaries of authors' moral and material interests and the duration and scope of their entitlements).

247 *Ibid* at para 16.

248 *Ibid* at para 10.

249 *Ibid* at para 16.

250 *Ibid* at para 11.

251 *Venice Statement*, *supra* note 96 at para 10.

252 *General Comment No. 21*, *supra* note 93 at para 20.

253 See Aurora Plomer, "The Human Rights Paradox: Intellectual Property Rights and Rights of Access to Science" (2013) 35 Hum Rts Q 143 at 150 (arguing that article 27 of the *UDHR* and article 15 of the *ICESCR* "require a balance to be struck between individual rights and public rights of access to science"). See also Saleh Al-Sharieh, "Toward a Human Rights Method for Measuring International Copyright Law's Compliance with International Human Rights Law" (2016) 32(82) Utrecht J Int Eur Law 5 (arguing that a human rights balance between authors' and users' rights has the following rules: 1) authors' and users' human rights are limited; 2) they do not exist in a hierarchy; 3) they are indivisible from and interdependent with the whole body of human rights).

254 *General Comment No. 21*, *supra* note 93 at para 1.

255 See Ashley West, "Little Victories: Promoting Artistic Progress through the Enforcement of Creative Commons Attribution and Share-Alike Licenses" (2009) 36 Fla St UL Rev 903 at 910 (noting the positive impact of CC licensing on online music production and publishing). Authors can use copyright law to enforce CC or GPL licenses. See e.g. *Robert Jacobsen v Matthew Katzer and Kamind Associates, Inc.* 535 F (3d) 1373 (Fed Cir 2008).

human rights do not necessarily result in depriving authors of their moral and material interests. Authors can still benefit from these interests while users fairly enjoy works.[256]

In Canada, users' rights are subject to limitations designed to safeguard authors' rights against economic prejudice. For instance, some users' rights apply only when a mechanism for remunerating authors is already in place.[257] Moreover, the second step in the fair dealing analysis is the determination of the "fairness" element. The SCC identified six factors that aid in the finding of fairness: "(1) the purpose of the dealing; (2) the character of the dealing; (3) the amount of the dealing; (4) alternatives to the dealing; (5) the nature of the work; and (6) the effect of the dealing on the work."[258] The analysis of the last factor will consider questions such as whether the reproduction of the work will compete with the work in the market,[259] which may make the dealing unfair.[260] However, the SCC explained that "[a]lthough the effect of the dealing on the market of the copyright owner is an important factor, it is neither the only factor nor the most important factor that a court must consider in deciding if the dealing is fair."[261] A full human rights-approach to authors' and users' rights perhaps requires revisiting, amongst other aspects in Canadian copyright law, the weight given to this factor. To reiterate, the ability to achieve an adequate standard of living is a requirement of the effective protection of authors' material interests in international human rights law.

VI. CONCLUSION

The *Act* does not disclose its purpose. It provides authors with exclusive economic and moral rights. It also addresses the public interest in the dissemination and use of works through copyright exceptions and limitations. However, in recent years, the SCC has repeatedly interpreted the purpose of the *Act* as to achieve a balance between authors' rights and the public interest in the dissemination and use of works.

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256 See Steve Weber, *The Success of Open Source* (Cambridge, MA: Harvard University Press, 2004) (discussing the success of open source and showing how this success is guided by economic principles); Josh Lerner & Jean Tirole, "Some Simple Economics of Open Source" (2002) 50 J Industrial Econ 197 at 199, 230 (arguing the open source model can be explained by economic frameworks and can coexist with firms' software commercial activities); James Boyle, *The Public Domain: Enclosing the Commons of the Mind* (New Haven, CT: Yale University Press, 2008) at 195 (arguing that open content licensing calls for reassessing not overlooking the economic logic of copyright). But see Mikko I Mustonen, "Economics of Creative Commons" (October 2010), online: SSRN <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1702285> (finding that CC licensing increases the distribution cost of intellectual works, increases the value of publicity of the authors, and decreases authors' revenue).

257 See *Copyright Act*, *supra* note 1, s 30.3 (permitting an education institution, library, archive, or museum to reproduce works using a machine installed on its premises only when a royalty agreement for the reproduction has been reached with a collective society or the copyright holder); s 32(3) (permitting the making of copies of a work in alternate format for persons with perceptual disabilities only when such copies are not commercially available); & s 29.21(a)-(d) (permitting the use of existing works to produce user-generated content when the use is for non-commercial purposes, does not substantially impact the economic exploitation of the work, and appropriately acknowledges the source and the name of the author).

258 *CCH*, *supra* note 6 at para 53.

259 *Ibid* at para 59; *Alberta (Education)*, *supra* note 12 at para 33.

260 See *CCH*, *supra* note 6 at para 59; *Alberta (Education)*, *supra* note 12 at para 33.

261 *CCH*, *supra* note 6 at para 59.

The SCC has also relied upon this purpose to characterize copyright exceptions as users' rights and to interpret them liberally.

Relying on the notion of balance to change the label and weight of copyright exceptions in Canadian copyright law is problematic. Establishing copyright law balance in national and international copyright law has traditionally revolved around copyright protection, on the one hand, and copyright exceptions and limitations, on the other. Equally important, balance can be a route for courts to assume a legislative function in violation of the separation of powers doctrine,[262] which the SCC described as one of the "essential features of our constitution."[263] Balance alone may not justify this violation, despite its long history in copyright law. A human rights-based approach might make it easier for Canadian courts to continue recognizing copyright exceptions as users' rights, particularly if interpreted in alignment with established *Charter* jurisprudence. This, in turn, would bring Canadian copyright law closer to the international regime of human rights, which currently recognizes users' rights as logical extensions to the rights to participate in culture, freedom of expression, and education. In an increasingly globalized legal and business environment, such an alignment might not only be an incontestable necessity, but an essential means of protecting users' rights.

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[262] Kahn, *supra* note 75 at 1.

[263] *Operation Dismantle v The Queen*, [1985] 1 SCR 441 at para 104.