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The Ambiguous Nature of Copyright Users' Rights

*Pascale Chapdelaine**

In this article, I investigate the nature of exceptions to copyright infringement or users' rights as they are laid out in Canada's Copyright Act and in copyright jurisprudence, as well as through their interaction with contracts and technological protection measures [TPMs]. What is the significance of the Supreme Court of Canada characterization of exceptions as users' rights? Are exceptions to copyright infringement rights or privileges? Are they mandatory? While copyright users' rights and interests have triggered interest and debate amongst scholars, relatively less attention has been given to defining their precise nature, and on the consequences of the main characteristics of exceptions to copyright infringement on copyright law and policy. I begin my analysis with four exceptions to copyright infringement that were added to the Copyright Act in 2012 (i.e., the non-commercial user-generated content, the reproduction for private purposes, the later listening or viewing and the backup copies exceptions to copyright infringement) with a particular focus on their relevance for consumers and their relation to pre-existing users' rights. I examine the interplay between the users' rights set out in the Copyright Act and how they can be altered or overridden by non-negotiated standard end-user agreements and TPMs. To this end, I refer to a sample of non-negotiated standard terms of use for the online distribution of books, musical recordings and films. I investigate the nature of exceptions to copyright infringement, including through Hohfeld's theory of jural correlatives. I look at the policy considerations behind these questions and conclude my article by reflecting on the damaging effects of the uncertain nature of users' rights on the coherence and, ultimately, the legitimacy of copyright law.

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Dans cet article, l’auteure examine la nature des exceptions à la violation du droit d’auteur ou aux droits d’usage tels qu’ils sont énoncés dans la Loi sur le droit d’auteur du Canada et dans la jurisprudence sur le droit d’auteur, ainsi que dans leurs interactions avec les contrats et les mesures de protection technologiques. Quelle est la signification de la caractérisation, par la Cour suprême du Canada, des exceptions comme étant des droits d’usage? Les exceptions aux droits d’auteur sont-elles des droits ou des privilèges? Sont-elles de caractère obligatoire? Alors que les droits et les intérêts des usagers d’œuvres protégées ont suscité de l’attention et engendré des débats académiques, moins d’intérêt a été accordé à la définition de leur nature précise et aux conséquences des principales caractéristiques des exceptions à la violation du droit d’auteur sur le droit et politiques relatifs au droit d’auteur. L’auteure commence son analyse avec quatre exceptions à la violation du droit d’auteur qui ont été ajoutées à la Loi sur le droit d’auteur en 2012 (c.-à-d., les exceptions à la violation du droit d’auteur relatives au contenu non commercial généré par les utilisateurs, à la reproduction à des fins privées, à l’écoute ou au visionnement en différé, et aux copies de sauvegarde) avec une attention particulière à leur pertinence pour les consommateurs et leur relation avec les droits d’usage préexistants. Elle examine l’interaction entre les droits d’usage établis dans la Loi sur le droit d’auteur et la façon dont ils peuvent être modifiés ou remplacés par des ententes standards non négociées des utilisateurs finaux et des mesures de protection technologiques. À cette fin, l’auteure fait référence à un échantillonnage de conditions d’utilisation standards non négociées pour la distribution en ligne de livres, d’enregistrements musicaux et de films. Elle enquête sur la nature des exceptions à la violation du droit d’auteur, notamment au moyen de la théorie de Hohfeld sur les corrélations juridiques. Elle examine les considérations politiques derrière ces questions et conclut son article par une réflexion sur les effets néfastes de la nature incertaine des droits d’usage sur la cohérence et aussi la légitimité des lois et politiques en matière de droit d’auteur.

1. INTRODUCTION

Recent developments in Canada and worldwide, signal a greater consideration for the interests of users in copyright law and policy.¹ As copyright progressively

¹ *Copyright Modernization Act*, S.C. 2012, c. 20 [CMA], Preamble, states, with respect to the exclusive rights of copyright holders, that “some limitations on those rights exist to further enhance users’ access to copyright works or other subject-matter.” References to copyright consumers’ concerns and interests were part of the Government of Canada’s consultations with the public and communications in the latest copyright reform initiatives. See Government of Canada official website archives on Bill C-32, *An Act to amend the Copyright Act*, 3rd Session, 40th Parl., 2010 (1st reading June 2, 2010): “*Copyright Modernization Act Background*,” online: <http://balancedcopyright.gc.ca/eic/site/crp-prda.nsf/eng/h_rp01151.html>. See also Government of Canada official website on the adoption of Bill C-11, *An Act to Amend the Copyright Act*, 1st Sess., 41st Parl., 2011 (assented to June 29, 2012): “*Copyright*

expanded in subject matter, duration and scope,² exceptions to copyright infringement are becoming an increasingly important legal vehicle to address competing interests between copyright holders and users, as exacerbated by constantly evolving technologies. In *CCH Canadian Ltd. v. Law Society of Upper Canada* [*CCH*],³ the Supreme Court characterized exceptions to copyright holders' exclusive rights as *users' rights*, and not mere loop holes in Canada's *Copyright Act* [*CCA*].⁴ In 2012, the Supreme Court reaffirmed the status of exceptions to copyright infringement as *users' rights* in three judgments that allowed the court to further clarify their nature and scope.⁵ In the same year, the *CCA* was amended significantly, in-

Modernization Act Backgrounders," online: <http://balancedcopyright.gc.ca/eic/site/crp-prda.nsf/eng/h_rp01237.html>.

² Copyright has expanded in subject matter, duration and scope through legislative amendments in Canada and other jurisdictions worldwide, as well as in international conventions. For a brief summary of the successive amendments to Canada's *Copyright Act*, R.S.C. 1985, c. C-42, and in relation to international conventions, see: Government of Canada, Canadian Heritage, "History of Copyright in Canada", online: <<http://www.canadianheritage.gc.ca/eng/1274383301385/1274443077996>>. In the U.S., the progressive expansion of copyright has been widely commented upon. For example, see Jessica Litman, *Digital Copyright* (Amherst: Prometheus Books 2001). At the international level, since its adoption in 1886, the *Berne Convention for the Protection of Literary and Artistic Works*, 828 U.N.T.S. 221, September 9, 1886 [*Berne Convention*] has gone through many revisions to augment the protection of the exclusive rights of copyright holders: revisions were made in 1908 (in Berlin) in 1928 (Rome), in 1948 (Brussels), in 1967 (Stockholm) and in 1971 (Paris). Other amendments were made in 1979: World Intellectual Property Organization, *Berne Convention for the Protection of Literary and Artistic Works*, online: <http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html>. Any subsequent international agreements adopted under the *Berne Convention*, such as the *WIPO Internet Treaties* of 1996 (i.e., the *WIPO Copyright Treaty*, 20 December 1996, WO033EN, online: <http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html#P8_189> [*WCT*]; *WIPO Performances and Phonograms Treaty*, 20 December 1996, WO034EN, online: <http://www.wipo.int/treaties/en/ip/wppt/trtdocs_wo034.html> [*WPPT*]) must secure greater protection for copyright holders: *Berne Convention*, art. 20. The *Agreement on the Trade Related Aspects of Intellectual Property Law*, *Marrakesh Agreement Establishing the World Trade Organization*, Annex 1C, Apr. 15, 1994, 1869 U.N.T.S. 29, 33 I.L.M. 1197 (1994) [*TRIPS*] Part II, 1, Part III, creates minimum standard obligations for the protection and enforcement of intellectual property rights, including copyright.

³ 2004 SCC 13.

⁴ *Supra* note 2.

⁵ *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36 [*Bell Canada*]; *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37 [*Alberta*], and *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, 2012 SCC 68 [*CRTC*].

cluding through the addition of new exceptions to copyright infringement or users' rights.⁶

In this article, I investigate the nature of exceptions to copyright infringement as they are laid out in the *CCA* and in copyright jurisprudence, as well as through the interaction between these exceptions or users' rights, contracts, and technological protection measures [TPMs]. What is the significance of the Supreme Court of Canada characterization of exceptions as *users' rights*? Are they mandatory? Does the Supreme Court jurisprudence elevate the enumerated exceptions to copyright infringement in the *CCA* to a higher level of protection than the *unnamed* permitted acts of copyright users, *i.e.*, those acts that have traditionally fallen outside the scope of the exclusive rights of copyright holders?⁷ How can Canada be informed by and inform other jurisdictions on the nature of exceptions to copyright infringement?

While copyright users' rights have triggered interest and debate amongst scholars,⁸ relatively little attention has been given to defining their precise nature

⁶ *CMA*, *supra* note 1. Most provisions of the *CMA* came into force on November 7 2012: SI/2012-85 November 7, 2012. See the discussion on the exceptions to copyright infringement introduced by the *CMA* in Part 2.

⁷ The traditional permitted acts include the unlimited right to play, view, read, perform in a private setting, listen to the work, and transfer the owned copy of the copyright work to another person: see the discussion in Part 2 of this article.

⁸ For example see: L. Ray Patterson & Stanley W. Lindberg, *The Nature of Copyright: A Law of Users Rights* (Athens, Georgia: University of Georgia Press, 1991); Julie E. Cohen, "The place of the User in Copyright Law" (2005) 74 *Fordham L. Rev.* 347; Joseph P. Liu, "Copyright Law's Theory of the Consumer" (2003) 44 *B.C.L. Rev.* 397; Niva Elkin-Koren, "Making Room for Consumers Under the DMCA" (2007) 22 *Berkeley Tech. L. J.* 1119; Deborah Tussey, "From Fan Sites to File Sharing: Personal Use in Cyberspace" (2001) 35 *Ga. L. Rev.* 1129; Giuseppina D'Agostino, "Healing Fair Dealing? A Comparative Copyright Analysis of Canadian Fair Dealing to UK Fair Dealing and US Fair Use" (2008) 53 *McGill L.J.* 309; Myra J. Tawfik, "International Copyright Law and Fair Dealing as a User Right" (2005) *UNESCO Copyright Bulletin*, online: <http://portal.unesco.org/culture/en/ev.php-URL_ID=27422&URL_DO=DO_TOPIC&URL_SECTION=201.html>; Abraham Drassinower "Taking User Rights Seriously", in Michael Geist, ed., *In the Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005) 462; Daniel Gervais, "Canadian Copyright Law Post-CCH" (2004) 18 *I.P.J.* 131; Myra J. Tawfik, "International Copyright Law: W[h]iter User Rights?", in Michael Geist, ed., *In the Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005) 66; Theresa Scassa, "Users' Rights in the Balance: Recent Developments in Copyright law at the Supreme Court of Canada" (2005) 22 *C.I.P.J.* 133; Carys J. Craig, "The Changing Face of Fair Dealing in Canadian Copyright Law: A Proposal for Legislative Reform", in Michael Geist, ed., *In the Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005); Abraham Drassinower, "Exceptions properly so-called" in Ysolde Gendreau & Abraham Drassinower, *Langues et droit d'auteur/Language and Copyright* (Cowansville, Que.: Yvon Blais, 2009) 217; Ariel Katz, "Fair Use 2.0: The Rebirth of Fair Dealing in Canada" in Michael Geist, ed., *The Copyright Pentology, How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (Ottawa: University of Ottawa Press, 2013) 93; Antonina Bakardjieva Engelbrekt, "Accommodating

and reflecting on the consequences of their interaction with contracts and TPMs.⁹ By this exercise, I seek to enlighten the debate on the place of users in copyright law, with a particular attention to the rights and interests of individual consumers, by emphasizing the growing importance of exceptions to copyright infringement as a vehicle to promote their interests, while providing a cautionary tale through significant shortcomings to achieve this goal.

In Part 2, I analyze four exceptions to copyright infringement that were added to the *CCA* in 2012, with a particular focus on their relevance for consumers and their relation to pre-existing users' rights, as well as to the traditional powers and privileges attributed to the ownership of copies of copyright works. In Part 3, I analyze the interplay between the users' rights set out in the *CCA* and how they may be altered or overridden by non-negotiated standard end-user agreements and TPMs. To this end, I refer to selected non-negotiated standard end-user agreements for the online distribution of books, musical recordings, and films.¹⁰ In Part 4, I investigate the nature of exceptions to copyright infringement: are they rights or privileges? Are they mandatory? I conclude in Part 5 by reflecting on the damaging effects of the uncertain nature of users' rights to the coherence and, ultimately, the legitimacy of copyright law and policy.

2. ACTS COPYRIGHT USERS MAY PERFORM WITHOUT THE AUTHORIZATION OF COPYRIGHT HOLDERS

Copyright consumers and other users may not perform acts that are exclusively reserved to copyright holders¹¹ unless they obtain their authorization or unless the *CCA* explicitly permits copyright users to perform those acts. In Canada, *copyright* means the sole right to produce or reproduce the work in any material form, to perform the work in public, to publish the work, and other exclusive rights with respect to performers' performance, sound recordings and communication signals.¹² Copyright also includes a non-exhaustive list of specific acts such as the exclusive right to communicate a dramatic or musical work to the public, or to rent a computer program or a sound recording embedding a musical work.¹³

the interests of the copyright consumer: New institutional dynamics in the wake of the infocore directive" in Antonina Bakardjieva Engelbrekt, *et al.*, eds., *Särtryck ur Festskrift till Marianne Levin* (Norstedts Juridik: 2008); Jens Schovsbo, "Integrating Consumer Rights into Copyright law: From the European Perspective" (2008) 31 J. Cons. Policy 393; Peter Rott, "Download of Copyright-Protected Internet Content and the Role of (Consumer) Contract Law" (2008) 31 J. Consum. Policy 441; European Parliament, DG for Internal Policies, Policies Department: Citizens' Rights and Constitutional Affairs, "The Relations Between Copyright Law And Consumers' Rights From A European Perspective" by Séverine Dusollier (2010).

⁹ The effects of the introduction of TPMs on the copyright framework continue to trigger interest and debate: see the discussion on TPMs in Part 3.(b), below.

¹⁰ See my review of selected non-negotiated standard end-user agreements in Part 3.(c), below.

¹¹ *CCA*, *supra* note 2, ss. 3, 15, 18, 21, 26.

¹² *CCA*, *supra* note 2, ss. 2, 3, 15, 16, 18, 21, 26.

¹³ *CCA*, *supra* note 2, s. 3.

Outside the acts exclusively reserved to copyright holders, ownership in copies of copyright works has been traditionally viewed as conferring unlimited powers and privileges to use the copy in any other manner, including the unlimited right to play, view, read, perform in a private setting and listen to the work, as well as to transfer ownership in the copies.¹⁴ Through the combination of various factors, the traditional unlimited privileges and powers to play, view, read, listen to, and transfer commercial copies of copyright works are under increased pressure, especially with respect to commercial copies distributed online with no physical supporting medium.¹⁵

In addition to the unlimited powers and privileges to use the copy in any manner that is not specifically reserved to copyright holders, the *CCA* enumerates exceptions to copyright infringement that allow certain copyright users to perform specific acts for specific purposes in specific circumstances.¹⁶ In this part, I investigate the scope of four exceptions to copyright infringement particularly relevant to copyright consumers that were added to the *CCA* in 2012, *i.e.*, the non-commercial user-generated content, the reproduction for private purposes, the later listening or viewing and the backup copies exceptions to copyright infringement.¹⁷ In addition to these exceptions, the following exceptions or limitations to copyright holders' exclusive rights are also relevant to an analysis of copyright consumers' rights to commercial copies of copyright works: the non-substantial part doctrine,¹⁸ the pri-

¹⁴ *Théberge v. Galerie d'Art du Petit Champlain inc.*, 2002 SCC 34 [*Théberge*] at para. 31, Binnie J. for the majority: "Once an authorized copy of a work is sold to a member of the public, it is generally for the purchaser, not the author, to determine what happens to it." See also Joseph P. Liu, "Owning Digital Copies: Copyright Law and the Incidents of Copy Ownership" (2001) 42 *Wm. & Mary L. Rev.* 1245 at 1287.

¹⁵ Those factors include the scope of the exclusive right to authorize the reproduction and the distribution of a work (as well as its exhaustion) and the effect of TPMs and of non-negotiated standard end-user agreements for commercial copies of copyright works. See the discussion in Parts 3.(b) and 3.(c) of this article.

¹⁶ *CCA*, *supra* note 2, ss. 29–32.3, enumerates exceptions to copyright infringement that includes fair dealing, exceptions applying to educational institutions, library, archives and museums, computer programs, and ephemeral recordings.

¹⁷ *CMA*, *supra* note 1.

¹⁸ Since the enactment of Canada's first copyright act, the *Copyright Act, 1921*, S.C. 1921, c. 24, s. 3(1), copyright has been delineated by the exclusive right to produce or reproduce, perform in public or publish (if the work is unpublished) the whole or a *substantial part* of the copyright work (*CCA*, *supra* note 2, s. 3(1)). As a result, consumers may make any reproduction, performance in public, or publication of a *non-substantial part* of copyright works without the authorization of the copyright holders. Acts performed on non-substantial parts of copyright works are outside the realm of copyright holders' exclusive rights and can be performed without compensation to copyright holders and without infringing copyright: See David Vaver, *Copyright Law* (Toronto: Irwin Law Inc., 2000) [Vaver, *Copyright Law 2000*] at 143ff.; McKeown, *Fox on Canadian Law of Copyright and Industrial Designs*, 4th ed. (Toronto: Thomson, Carswell: 2003) ch. 21 at 14ff.

vate copying regime,¹⁹ the fair dealing provisions,²⁰ the computer programs and technological process exceptions,²¹ and the exhaustion of the exclusive right to distribute copies of copyright works embedded in a physical object, or the first sale

¹⁹ The private copying regime is an exception to copyright infringement that allows consumers to reproduce for the private use of the person who makes the copy, sound recordings and certain copyright works embodied in sound recordings (more precisely: a musical work embodied in a sound recording, a performer performance of a musical work embodied in sound recording, or a sound recording in which a musical work, or a performer's performance of a musical work is embodied: *CCA, supra* note 2, s. 80(1)), onto an "audio recording medium" as it is defined in *CCA, ibid.*, s. 79. The approved tariff for private copying for the year 2011: *Private Copying Tariff, 2011* (Copyright Board of Canada, December 18, 2010), online: <<http://www.cb-cda.gc.ca/tariffs-tarifs/certified-homologues/copying-copie-e.html>>, s. 2, defines "blank audio recording medium" as "(a) a recording medium, regardless of its material form, onto which a sound recording may be reproduced, that is of a kind ordinarily used by individual consumers for that purpose and on which no sounds have ever been fixed, including recordable compact discs (CD-R, CD-RW, CD-R Audio, CD-RW Audio); and (b) any medium prescribed by regulations pursuant to sections 79 and 87 of the *Act*; (*support audio vierge*)." This permitted use applies to one portion of copyright works purchased by consumers, *i.e.*, sound recordings of musical works (including performers' performance of musical works) and does not apply to other works protected by copyright.

²⁰ *CCA, supra* note 2, ss. 29–29.2. Fair dealing is an exception to copyright infringement under which users can perform acts with copyright works without the authorization of copyright holders for the enumerated purposes of research, private study, criticism, review, news reporting, and the recently introduced purposes of education, parody, or satire, provided that the dealing is fair. In *CCH, supra* note 3 at paras. 53*ff.*, the Supreme Court in a unanimous judgment by Chief Justice McLachlin, enumerated a non-exhaustive list of six factors that should guide courts and adjudicators on the factual assessment of whether the dealing with a copyright work was fair. The six factors are: (1) the purpose of the dealing, *i.e.*, making "an objective assessment of the user/defendant's real purpose or motive in using the copyrighted work;" (*ibid.* at para. 54) (2) the character of the dealing, *i.e.*, how the work is dealt with (*e.g.*, widespread distribution versus limited copies for private use (*ibid.* at para. 55); (3) the amount of the dealing, *i.e.*, both the amount of the work taken and the importance of the work (*ibid.* at para. 56); (4) alternatives to the dealing, *e.g.*, the existence of a non-copyright work and whether the dealing was reasonably necessary to achieve the ultimate purpose (*ibid.* at para. 57); (5) the nature of the work, *e.g.*, whether the work was published or whether it was confidential (*ibid.* at para. 58); and (6) the effect of the dealing on the work, *i.e.*, "if the reproduced work is likely to compete with the market of the original work," an important but not the most important factor to consider (*ibid.* at para. 59).

²¹ *CCA, supra* note 2, ss. 30.6, 30.61, 30.71. The permitted acts revolve around technical issues that are specific to computer programs and to uses that are deemed essential to their proper enjoyment: conversion from one computer language to another and adaptation of the computer program to address interoperability issues, so long as such acts are performed for the consumer or user's own purposes. The *CMA, supra* note 1, introduced another exception to copyright infringement (*i.e.*, *CCA, supra* note 2, s. 30.71) which allows copyright users to reproduce any works, only to the extent that the reproduction is temporary and essential to a "technological process" and that it facilitates a use that does not infringe copyright.

doctrine.²² I have discussed elsewhere the nature and scope of these additional exceptions to copyright infringement, as well as their merit and shortcomings with respect to consumers' uses of commercial copies of copyright works.²³ I will refer to these additional exceptions as they relate to the four exceptions to copyright infringement that I discuss here, and in my analysis on the nature and scope of users' rights in the *CCA* further below.²⁴

The four new exceptions to copyright infringement that I examine in this article allow individual users²⁵ to perform certain acts for defined purposes without copyright holders' authorization.²⁶ The four new exceptions allow acts to be performed on substantial parts of copyright works.²⁷ They co-exist with the fair dealing provisions and may be invoked with these provisions, to the extent that they are applicable.²⁸ The scope of the four new exceptions to copyright infringement permits acts that fall within and beyond the allowable purposes of fair dealing.²⁹ Each of the permitted acts thereunder may fulfill the requirement of fairness under the second step of the fair dealing analysis, although it does not need to be established. The acts need to fall within specific purposes and uses and fulfill other conditions.³⁰ The exception to copyright infringement that pertains to reproduction for

²² In Canada, the exclusive distribution right and its exhaustion were introduced in 2012 by the *CMA*, *supra* note 1, which amended the *CCA*, *supra* note 2, ss. 3, 15 and 18. In the U.S., see 17 U.S.C. §109 (a). The doctrine is known as the first sale doctrine in the U.S. and as the principle of exhaustion in other jurisdictions. This is the rule by which once the first sale of physical objects embodying copyright works (such as a book, DVD, or a music CD) has occurred with the authorization of the copyright holder, they cannot dictate the fate of subsequent transfers of that object. The exhaustion or first sale doctrine can be invoked only by lawful owners of copies of copyright works and not by licensees, borrowers or people who otherwise access copies of copyright works. It restricts copyright holders' exclusive distribution right and does not apply to other exclusive rights, *e.g.*, the right to reproduce the work or to communicate the work to the public by telecommunication.

²³ Pascale Chapdelaine, *The Copyright Consumers' Bargain, Defining the Rights to Commercial Copies of Copyright Works* (Doctor of Philosophy Thesis, York University Graduate Program in Law, 2013) [unpublished] at 53–75, 83–90.

²⁴ See the discussion in Part 4, below.

²⁵ Three of the four new user provisions apply to "individuals": *CCA*, *supra* note 2, ss. 29.21–29.23, while one applies to persons, which includes natural and physical persons: *ibid.*, s. 29.24.

²⁶ *CCA*, *supra* note 2, ss. 29.21–29.24.

²⁷ *I.e.*, users who perform acts on non-substantial parts do not infringe copyright and do not need to invoke an exception to copyright infringement: see *supra* note 18.

²⁸ *CCH*, *supra* note 3 at para. 49.

²⁹ For example, the acts authorized under the non-commercial user-generated content: *CCA*, *supra* note 2, s. 29.21, may or may not fall under the purpose of parody or satire under the fair dealing provisions (*ibid.*, s. 29). The reproduction for private purposes (*ibid.*, s. 29.22) or the later viewing or listening exception (*ibid.*, s. 29.23) may or may not fall under the purpose of research or private study in the fair dealing provision (*ibid.*, s. 29).

³⁰ *CCA*, *supra* note 2, ss. 29.21–29.24.

private purposes³¹ is subject to the application of the private copying regime.³² The four new exceptions to copyright infringement do not require remunerating copyright holders, similarly to acts performed on a non-substantial part of the work or acts that are fair dealing, and unlike the private copying regime.³³

Most consumers would be surprised to find out that prior to the entry into force of the amendments to the *CCA* in 2012, adding the four new exceptions to copyright infringement, they were either not allowed to or it was unclear whether they could upload on YouTube their own performance incorporating a latest hit, they could copy their favourite musical recordings on their iPods, or record broadcasts for later viewing.³⁴ These mundane acts have formed part of the everyday life of most copyright consumers for some time now. With multiple technological tools that enhance the overall experience and convenience of the use of copyright works, lawful consumers may reasonably expect that they are allowed to apply these capabilities through the acts they perform on copies of copyright works.

By adding the four new exceptions to copyright infringement, Parliament took steps toward a formal recognition of the place and interests of individual copyright users more than it had ever done before. The amendments to the *CCA* in 2012 introduced three new permitted uses without the authorization of copyright holders that only apply to individuals,³⁵ and a fourth that applies to a *person*.³⁶ While the majority of limitations on copyright holders' exclusive rights or users' rights either apply to all categories of users, as in the case of fair dealing,³⁷ or specifically apply to institutional users,³⁸ the *CCA* singles out more than ever before³⁹ a group of individuals that are to be likened to consumers as defined in consumer protection laws.⁴⁰ The commercial versus non-commercial dichotomy, a defining factor by

³¹ *Ibid.*, s. 29.22.

³² *Ibid.*, s. 29.22(3).

³³ *CCA*, *supra* note 2, ss. 3, 29–29.2, 79–87.

³⁴ *CCA*, *supra* note 2, ss. 29.21–29.24.

³⁵ *CCA*, *supra* note 2, s. 29.21: “Non-commercial user-generated content,” s. 29.22: “Reproduction for private purposes,” s. 29.23: “Fixing signals and recording programs for later listening or viewing.”

³⁶ *CCA*, *supra* note 2, s. 29.24: “Backup copies.”

³⁷ *CCA*, *supra* note 2, ss. 29–29.2.

³⁸ Or person acting under their authority, such as “educational institutions”: *CCA*, *supra* note 2, ss. 29.4*ff.* or “libraries, archives and museums,” s. 30.1*ff.*

³⁹ Prior to the entry into force of the *CMA*, *supra* note 1, there was one reference to “consumers” under the private copying regime provisions: *CCA*, *supra* note 2, ss. 79*ff.*

⁴⁰ *I.e.*, Canadian provincial and territorial consumer protection laws share similar definitions of consumers. See, for example: *Consumer Protection Act*, S.O. 2002, c. C-30, Sched. A, s. 1, [*OCPA*]: “consumer” means an individual acting for personal, family, or household purposes and does not include a person who is acting for business purposes; *Consumer Protection Act*, R.S.Q., c. P-40.1, [*QCPA*] s. 1(e): “consumer” means a natural person, except a merchant who obtains goods or services for the purposes of his business.” This definition covers purchases that are primarily or accessorially related to the merchant’s business: Nicole L’Heureux, *Droit de la consommation*, 5^{ème} édition (Cowansville, Que.: Yvon Blais, 2000) at 34. See also U.S. UCC §2-103 c) (2004); the

which to determine the identity of consumers in consumer protection law, is present only to a limited extent in the four new user provisions and the CCA.⁴¹ The extent to which the four new user provisions are aptly called users' rights is another matter which I explore below in this article⁴² and so is the extent to which they fulfill copyright consumers' needs and expectations within the objectives of copyright law. With these general considerations in mind, I will briefly introduce the distinguishing features of each of the four new exceptions to copyright infringement.

various European directives regulating consumer transactions define "consumer" as "any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession," with some minor variances: EC, *Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts*, [1993] OJ L 95/04 at 29 [*Directive 93/13/EEC*], art. 2(b); EC, *Parliament and Council Directive 97/7/EC of 20 May 1997 on the protection of consumers in respect of distance contracts*, [1997] O.J. L144/19, art. 2(2) (which will be repealed by EU, *Directive 2011/83/EU*, as of June 13, 2014); EC, *Parliament and Council Directive 1999/44/EC of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees*, [1999] O J L 171, art 1, 2. (a); EC, *Council and Parliament Directive 2011/83/EU of 22 November 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council*, [2011] OJ L 304/64 [*Directive 2011/83/EU*], art. 2 (1) which applies to contracts concluded after June 13, 2014 (art. 28 (2)). In the U.K., see the *Unfair Contract Terms Act 1977* (U.K.), c. 50, s. 12, definition of "dealing as a consumer."

⁴¹ Until recently, the commercial versus non-commercial purpose distinction was present only to a limited extent in the CCA, *supra* note 2. For example certain exceptions to copyright infringement only apply to actions that are carried out "without motive of gain": s. 29.3. Among the four new exceptions to copyright infringement introduced in the CCA in 2012 and studied here, the requirement of non-commercial purposes is present in the "non-commercial user-generated content" exception to copyright infringement: s. 29.21. The 2012 amendments also introduced permitted acts on copyright works for "private purposes," which is a sphere that does not involve performances in or communications to the public: s. 29.22 "Reproduction for Private Purposes" and s. 29.23 "Fixing Signals and Recording Programs for Later Listening or Viewing" limit the acts that can be performed on copyright works without authorization to reproduction and fixing communication signals and do not involve communication to the public or performance in public. The fact that permitted acts for "private purposes" apply to individuals only and not persons, as is the case under other permitted acts (*e.g.*, s. 29.24 "backup copies" and s. 30.6, the permitted acts with respect to computer programs), may also suggest that it precludes that the act be performed within commercial or other non-personal capacity settings. The commercial versus non-commercial dichotomy is also relevant to determine the scope of remedies and damages that are available to copyright holders: ss. 32.2(1), 38.1(1)(b), 38.1(1.12), 38.1(1.2), s. 38.1(5)(d).

⁴² See the discussion below in Part 4 of this article.

(a) Non-commercial User-generated Content

The non-commercial user-generated content exception to copyright infringement (familarly referred to as the “YouTube exception”)⁴³ allows individuals to perform on any form of published copyright works,⁴⁴ *for the creation of new copyright works*, all acts (but for one) otherwise reserved to copyright holders (*i.e.*, the exclusive right to produce, reproduce, and to perform substantial parts of the works in public).⁴⁵ The individuals are still subject to the moral rights of the author of the underlying work.⁴⁶ The individuals have rights with respect to the newly created works that are limited to: authorizing other household members to use the works and authorizing an intermediary to disseminate the newly created works,⁴⁷ for non-commercial purposes, with proper reference to the pre-existing work. Such use or dissemination must not “have a substantial adverse effect, . . . on the exploitation . . . of the existing [copyright] work or on an existing or potential market for it, including that the new [copyright] work is not a substitute for the existing one.”⁴⁸ The individual must also have reasonable grounds to believe that the pre-existing copyright work or copy of it was not infringing copyright.⁴⁹

The non-commercial user-generated content exception to copyright infringement is the broadest of the four new user provisions in two respects: the wide range of permitted acts that may be performed with respect to pre-existing copyright works and the fact that it is not specifically subjected to the non-circumvention of TPMs.⁵⁰ It confers a special standing to the creation of new copyright works that takes place through the use of pre-existing works (often referred to as transforma-

⁴³ See: Government of Canada, *Balanced Copyright, Copyright Modernization Act — Background*, What will the Bill do — Users and Consumers, available at <http://balancedcopyright.gc.ca/eic/site/crp-prda.nsf/eng/h_rp01237.html>. For a discussion on the non-commercial user-generated content exception to copyright infringement see: Theresa Scassa, “Acknowledging Copyright’s Illegitimate Offspring: User-Generated Content and Canadian Copyright Law” in Michael Geist, ed., *The Copyright Pentology, How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (Ottawa: University of Ottawa Press, 2013) 431.

⁴⁴ Or otherwise made available to the public: *CCA*, *supra* note 2, s. 29.21(1).

⁴⁵ *CCA*, *supra* note 2, ss. 3, 15, 18, 21 26. It does not permit individuals to publish unpublished works: s. 29.21. Also, for the exception to copyright infringement to apply, the new creation must meet the requirement of originality for works to be protected: s. 5. For the test of originality in Canadian copyright law, see: *CCH*, *supra* note 3 at paras. 14ff. See also David Vaver, *Intellectual Property Law Copyright, Patents, Trade-Marks*, 2nd ed. (Toronto: Irwin Law, 2011) [Vaver, *Intellectual Property Law 2011*] at 100ff.

⁴⁶ *CCA*, *supra* note 2, s. 29.21 creates an exception to the infringement of *copyright* which is separate from moral rights: *CCA*, *ibid.*, s. 14.1.

⁴⁷ Or authorize members of their household to do so: *CCA*, *supra* note 2, s. 29.21(1).

⁴⁸ *CCA*, *supra* note 2, s. 29.21(1)(d).

⁴⁹ *Ibid.*, s. 29.21(1)(c).

⁵⁰ *Ibid.*, s. 29.21.

tive acts or uses).⁵¹ The premise is that if the objective of copyright is to promote the creation of works, the use of a pre-existing work to create a new work should be desirable and should be promoted to balance the interests of the pre-existing copyright holder with the ones of the would-be copyright holder. Among the broader group of consumers and users, it favours individuals who generate new creations. I have questioned elsewhere the greater emphasis that is placed on creative consumers, the extent to which this differential treatment is justified within copyright's design and objectives, and the potential detrimental effects that this has on less laborious users.⁵² The sharp contrast between the non-commercial user-generated provision and the other new user provisions introduced in the CCA that I look at next illustrate that gap.

(b) Reproduction for Private Purposes

The reproduction for private purposes exception to copyright infringement (also referred to as the "MP3 exception")⁵³ allows individuals to perform one of the acts (*i.e.*, reproduction) otherwise reserved to copyright holders on any form of copyright works, subject to a list of strict conditions.⁵⁴ This user provision applies to a broad range of methods of reproductions,⁵⁵ subject to the application of the private copying regime that continues to apply to sound recordings and certain copyright works embodied in sound recordings⁵⁶ and that falls under its purview.⁵⁷

This user provision does not set any limits on the number of reproductions that may be made,⁵⁸ but does require that they be made for private purposes.⁵⁹ Because the permitted act is limited to reproduction, this exception to copyright infringement would not permit the user to *e.g.*, communicate copies of the work to the

⁵¹ Under U.S. copyright law, whether a transformation occurred, *i.e.*, the creation of a new work when using a pre-existing copyright work, is a favourable element for a finding of fair use in applying the first factor of the fair use provision, *i.e.*, the purpose and character of the use (17 USC §107): *Campbell v. Acuff-Rose Music*, 510 U.S. 569 (1994) (U.S. Supreme Court).

⁵² Chapdelaine, *supra* note 23 at 45–49.

⁵³ See: Government of Canada, Balanced Copyright, *Copyright Modernization Act — Background*, *supra* note 43.

⁵⁴ CCA, *supra* note 2, s. 29.22.

⁵⁵ *Ibid.*, at s. 29.22(2) which defines medium or device as including "digital memory in which a work or subject-matter may be stored for the purpose of allowing the telecommunication of the work or other subject matter through the Internet or other digital network."

⁵⁶ More precisely: a musical work embodied in a sound recording, a performer performance of a musical work embodied in sound recording, or a sound recording in which a musical work, or a performer's performance of a musical work is embodied CCA, *supra* note 2, s. 80(1).

⁵⁷ CCA, *supra* note 2, s. 29.22(3), *i.e.*, if the reproduction is made onto an audio recording medium as defined in s. 79.

⁵⁸ *Ibid.*, s. 29.22(4) reference to the destruction of any *reproductions* made from the copy confirms that multiple reproductions are permitted.

⁵⁹ *Ibid.*, s. 29.22(1)(e).

public by telecommunication through the Internet.⁶⁰ The private purpose required for the exception to apply could also be an obstacle although the scope of use that it allows has yet to be defined. The reproduction(s) need(s) to be made from a non-infringing copy that the individual lawfully acquired (other than through loan or rental) on a medium or device that the individual is authorized to use.⁶¹ Other conditions apply to the handling of the reproduction(s) and the copy from which the reproduction was made.⁶² Last but not least, this user provision is subject to the individual not circumventing any access control or copy control TPM in place.⁶³

By its dual requirement of ownership of the copy from which reproductions are made and that reproductions are confined to *private purposes*, the reproduction for private purposes exception applies more specifically to copyright consumers than any of the other user provisions, although its application could extend beyond that group.⁶⁴ It also supplements the private copying regime that only applies to sound recordings and certain copyright works embedded in sound recordings, and does not cover reproduction on devices such as MP3 players.⁶⁵ The fact that it is explicitly subject to TPMs may significantly reduce its scope of application in practice and raises questions about the exact nature of that exception.⁶⁶

(c) Later Listening or Viewing Exception

This user provision allows individuals to fix a communication signal or to reproduce a work or sound recording or fix or reproduce a performer's performance that is being broadcast, and to record a program for later listening or viewing.⁶⁷ This exception is subject to a list of strict conditions similar to the ones found in the reproduction for private purposes exception examined earlier.⁶⁸ This exception to

⁶⁰ CCA, *supra* note 2, s. 2.4(1.1).

⁶¹ CCA, *supra* note 2, s. 29.22.

⁶² The individual cannot give the reproduction away: *ibid.*, s. 29.22(1)(d). If the individual sells, rents, or gives away the copy from which the reproduction was made, she needs to destroy any reproduction made from that copy: s. 29.22(4).

⁶³ CCA, *supra* note 2, s. 29.22(1)(c). CCA, *ibid.*, s. 41 defines "circumvent" as performing acts either with respect to access controls or controls that restrict the doing of any reserved acts.

⁶⁴ By contrast, lawful acquisition of the copy is not required for the non-commercial user-generated content exception and the purpose is broadened to include non-commercial purposes. The later listening or viewing exception would also typically apply to consumers in their use of a service (*i.e.*, broadcasting), but could apply to a broader circle as well, beyond consumers as understood in consumer law, depending on the scope of "private purposes."

⁶⁵ *Canadian Private Copying Collective v. Canadian Storage Media Alliance*, 2004 FCA 424 where the Federal Court of Appeal held that a permanently embedded or non-removable memory, incorporated into a digital audio recorder (MP3 player) was not an "audio recording medium" and therefore did not fall under the private copying exemption of the CCA. This considerably limits the scope of the allowable private copying.

⁶⁶ See the discussion in Parts 3.(b) and 4 of this article.

⁶⁷ CCA, *supra* note 2, s. 29.23.

⁶⁸ See Part 2.(b) of this article.

copyright infringement applies only if the individual received the program legally⁶⁹ and does not include work, performer's performance, or sound recordings received through an on-demand service.⁷⁰ The individual may only make one recording, may not give the recording away, and may not keep it longer than is reasonably necessary to view it at a convenient time.⁷¹ The individual may only use the recording for her private purposes.⁷² Lastly, this user provision is subject to the individual not circumventing any access control or copy control TPM in place.⁷³

The acts authorized by this user provision have been allowed for some time in the U.S. further to the landmark Supreme Court judgment *Sony Corp. v. Universal City Studios, Inc.*,⁷⁴ where the court held that manufacturers' sale of home video equipment was not contributory infringement of the copyrights in television programs.⁷⁵ The U.S. Supreme Court arrived at that conclusion, *inter alia*, on the basis that recording a televised copyrighted audiovisual work for time-shifting purposes and for private home use was a fair use⁷⁶ of the work and did not infringe copyright.⁷⁷ In Canada, recording programs for later viewing did not always fall under the allowable purposes of fair dealing,⁷⁸ which explains in part the introduction of this new exception to copyright infringement.

The later listening or viewing exception to copyright infringement legitimizes mundane acts on programs that have been performed in many households for decades. It fills a lacuna in the CCA where Canada was lagging behind compared to other jurisdictions. Unlike the reproduction for private purposes exception, it does not target as specifically copyright consumers and their permitted uses of copies of copyright works lawfully acquired.⁷⁹ It covers a broad range of users who have, at one point in time, the ability to record programs protected by copyrights and do so for private purposes. The fact that it is subject to TPMs raises questions around the exact nature and scope of this exception to copyright infringement.⁸⁰

(d) Backup Copies

The fourth user provision allows persons (which would include natural and moral persons) to make one of the acts otherwise reserved to copyright holders

⁶⁹ CCA, *supra* note 2, s. 29.23(1)(a).

⁷⁰ CCA, *supra* note 2, s. 29.23(3) defines "on-demand service" as "a service that allows a person to receive works, performer's performances and sound recordings at times of their choosing."

⁷¹ *Ibid.*, s. 29.23(1)(c), (d), (e).

⁷² CCA, *supra* note 2, s. 29.23(1)(f).

⁷³ CCA, *supra* note 2, s. 29.23(1)(b); s. 41, defines "circumvent" as performing acts either with respect to access controls or controls that restrict the doing of any reserved acts. 464 U.S. 417, 454-55 (1984) (U.S. Supreme Court).

⁷⁴ *Ibid.*

⁷⁵ 17 USC §107.

⁷⁶ *Sony Corp. v. Universal City Studios, Inc.*, *supra* note 74 at 455.

⁷⁷ CCA, *supra* note 2, ss. 29-29.2.

⁷⁸ See the discussion in Part 2.(b) of this article.

⁷⁹ See the discussion in Parts 3.(b) and 4 of this article.

(*i.e.*, reproduction) with any form of copyright work for backup purposes, so long as the following conditions are respected: the person owns or has a licence to use a copy of the copyright work that is being reproduced; it is not an infringing copy; and the person does not give any of the reproductions away.⁸¹ The application of the backup copy exception to copyright infringement is also subject to not circumventing any existing access control or copy control TPMs.⁸² With its recent introduction to the *CCA*, the backup copies provision extends to all copyright works a similar exception to copyright infringement that already applied to computer programs.⁸³

The four new user provisions recognize the interests of copyright users in an unprecedented way and validate acts that were previously an infringement of copyright, or the status of which was unclear. A more sobering account of these amendments is that they have been keeping us waiting. The acts that are now permitted are so much part of the everyday life of an increasingly large segment of consumers, with no apparent harm to copyright holders, that Parliament had little choice but to recognize their lawfulness to maintain the credibility of copyright. Does the predominantly narrow scope and piecemeal approach of the four new user provisions, combined with pre-existing exceptions to copyright infringement address lawful consumers' reasonable expectations and does it reflect the main objectives of copyright? Or, does it instead reflect a copyright-holder-centric approach that is mainly preoccupied with preserving the strength of the copyright holders' exclusive rights with little compromise? The co-existence of some of the four new user provisions with TPMs and the uncertainty of their mandatory nature bring an important perspective to these questions as I discuss further below.⁸⁴

Understanding the magnitude of copyright holders' ability to shape the user rights discussed so far in this article through contract is critical for a clearer view of the acts that consumers may actually perform on copyright works and the dilemmas they face. Copyright holders' contracts with end-users also raise broader policy design questions on the effects of copyright holders' commercial practices, including the use of TPMs, on the primary objectives of copyright law. This is what I turn to next.

3. THE INTERACTION BETWEEN COPYRIGHT, CONTRACTS AND TECHNOLOGICAL PROTECTION MEASURES (TPMS)

(a) Copyright Public Policy Meets Copyright Holders' Private Rights

The interaction between copyright, contracts, and TPMs raises among the most pressing issues in contemporary copyright law. The interaction puts in question the desirable scope of the private rights created by copyright law and the public policy goals that it promotes, as well as the proper level of flexibility that needs to be granted for the commercial exploitation of copyright. The *CCA* sets the de-

⁸¹ *CCA*, *supra* note 2, s. 29.24.

⁸² *CCA*, *supra* note 2, s. 29.24(1)(c); s. 41 defines "circumvent" as performing acts either with respect to access controls or controls that restrict the doing of any reserved acts.

⁸³ *CCA*, *supra* note 2, s. 30.6(b).

⁸⁴ See the discussion in Parts 3.(b) and 4 of this article.

fault rules of copyright holders' exclusive rights in their works that are opposable to all.⁸⁵ This includes the exclusive right of copyright holders to authorize any of the acts specifically reserved to them by the *CCA*.⁸⁶ Copyright holders control the exploitation of their exclusive rights and commercialization of their works by granting authorizations including through contracts. In the absence of explicit contract terms, the default rules of the *CCA* will apply and some terms may be implied between the parties based on the relevant circumstances.⁸⁷ In consumer transactions, copyright holders resort increasingly to non-negotiated standard end-user agreements.⁸⁸ Copyright holders can also control the commercialization of their works by applying TPMs that, in their effect, are comparable to contract terms, while raising distinct issues and debates within and outside copyright law.⁸⁹

As much as the *CCA* confers exclusive rights on copyright holders, it is by its own design and purpose an incomplete code: more often than not, copyright holders resort to contracts as a vehicle to tailor their copyright to the particular needs of the transaction.⁹⁰ This occurs at two levels. First, authors conclude contracts for the

⁸⁵ *CCA*, *supra* note 2, s. 27ff.

⁸⁶ *Ibid.*, ss. 3, 15, 18, 21, 26.

⁸⁷ With respect to implied licences see: Vaver, *Intellectual Property Law 2011*, *supra* note 45 at 137–141; Robert Bradgate, “Consumer rights in digital products” 2010, on-line: <http://www.google.ca/search?sourceid=navclient&ie=UTF-8&rlz=1T4ADBF_enCA275CA275&q=Bradgate%2c+Consumer+rights+in+digital+products+2010> at 37.

⁸⁸ I discuss the nature and content of non-negotiated standard end-user agreements through which copies of copyright works are commercialized in Part 3.(c) of this article.

⁸⁹ TPMs are comparable to contracts in effect because the physical restrictions they impose on copyright works can be analogized to a contractual restriction on use of the copyright work. Trotter Hardy, “Contracts, Copyright and Preemption in a Digital World” (1995) 1 *Rich. J.L. & Tech.* 2 at 2–11 describes TPMs alongside contracts as two of the four means by which copyright holders can control unauthorized acts being performed on their works (the other two being copyright law and the obstacle based on the state of the copying art (*e.g.*, the (in)ability to make perfect copies as a practical limitation (present or absent) that confers greater power for copyright holders' to control the unauthorized use of their works (or not)). TPMs are also regulated by specific provisions of the *CCA*, *supra* note 2 that were introduced in 2012: see the discussion on the nature and effects of TPMs in Part 3.(b) of this article.

⁹⁰ See *CCA*, *supra* note 2, s. 13(4); *Théberge*, *supra* note 14 at para. 12; As the Supreme Court of Canada noted in *Robertson v. Thomson Corp.*, 2006 SCC 43 at para. 58: “parties are, have been, and will continue to be, free to alter by contract the rights established by the *Copyright Act*.” In *Kraft Canada Inc. v. Euro Excellence Inc.*, 2007 SCC 37 at para. 117, *per* Abella J. (to which Chief Justice MacLachlin concurred, as well as Bastarache, Lebel and Charron JJ. on this particular issue): “Other cases illustrate that a copyright holder’s ability to alienate its interest either through licensing or assignment is perfectly consistent with the statutory scheme. Vertical and horizontal divisibility is, arguably, a hallmark of copyright: see *Bouchet v. Kyriacopoulos* (1964), 45 C.P.R. 265 (Can. Ex. CT).” In a U.S. context, see David Nimmer, Elliot Brown & Gary N. Frischling, “The Metamorphosis of Contract into Expand” in David Nimmer, *Copyright, Sacred Text, Technology and the DMCA* (The Hague, Netherlands: Kluwer Law Inter-

exploitation of their economic intangible rights with publishers, music producers, film-makers, *etc.* They may assign or license their copyright, in whole or in part, including with respect to the list of their exclusive rights, territory, or the duration of their copyright. The *CCA* explicitly contemplates this panoply of scenarios.⁹¹ These agreements address the exploitation of the intangible exclusive rights of authors/copyright holders. Second, authors, but most frequently copyright holders, conclude contracts for the commercialization of copies of the copyright works that generally dictate what users are allowed to do with the copies. These contracts are commonly referred to as “shrink wrap,” “browse wrap,” “click wrap,” or end-user licence agreements.⁹² In a consumer context, they are typically non-negotiated standard end-user agreements. This is the area where the incompleteness of the copyright code is most apparent, leading to uncertainty about the effects and proper treatment of the interaction between the *CCA* and the contracts for the commercialization of copies of copyright works. It concerns the exclusive distribution right that was only added recently in Canada to copyright holders' exclusive rights.⁹³

In Canada, the *CCA* has been described by the Supreme Court in *Théberge* as the 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.”⁹⁴ How does (should) the law treat contracts for the commercialization of copyright works that expand the exclusive rights and powers of copyright holders or go against the objectives of the *CCA* or similar constitutive acts? How do we make that assessment? To what extent is an expansion through contract the normal exercise of freedom of contract and of privileges and powers of copyright holders and to what extent is it outside their prerogative or needs to be constrained? Should we make a distinction between non-negotiated and negotiated agreements, mass-market commercialization and isolated occurrences?

The proliferation of the commercialization of copies of copyright works through non-negotiated standard end-user agreements, combined with the use of TPMs, has been widely commented upon by authors, including Margaret Jane Radin, Niva Elkin-Koren and Jacques De Werra, as occasioning the “privatization of

national, 2003) 267 at 274 (reproducing an article by the same title initially published in (1999) 87 Cal. L. Rev. 17).

⁹¹ *CCA*, *supra* note 2, s. 13(4).

⁹² For a description of the various types of standard form agreements of digital products, see: Marco B.M. Loos, *et al.*, “Analysis of the applicable legal frameworks and suggestions for the contours of a model system of consumer protection in relation to digital content contracts” (2011) University of Amsterdam, Centre for the Study of European Contract Law (CSECL), Institute for Information Law (IViR), Amsterdam Centre for Law and Economics (ACLE), online: <http://ec.europa.eu/justice/newsroom/consumer-marketing/events/digital_conf_en.htm at 65-66>; see also Margaret Jane Radin, *Boilerplate The Fine Print, Vanishing Rights, and the Rule of Law* (Princeton and Oxford: Princeton University Press, 2013) at 10–12. For a summary of the various scenarios under which digital products are distributed see: Bradgate, *supra* note 87 at 32.

⁹³ In Canada, the exclusive distribution right and its exhaustion were introduced in 2012 by the *CMA*, *supra* note 1, which amended the *CCA*, *supra* note 2, ss. 3, 15 and 18. See also *supra* note 22.

⁹⁴ *Théberge*, *supra* note 14 at para. 30.

copyright” or as the techno-governance phenomenon.⁹⁵ The fear is that through non-negotiated standard end-user agreements or TPMs, copyright holders supersede the pre-existing copyright regime by expanding their privileges and powers.⁹⁶ These concerns fit in the broader discussion of the perception by users that standard form agreements exemplify the norm, by behavioural law and economics research suggests.⁹⁷ Superseding the copyright regime can occur through restrictive terms that also apply to works that are in the public domain, or that make exceptions to copyright holders’ exclusive rights no longer effective. For example, contract terms or TPMs can limit users’ ability to make a fair dealing or fair use of a work that allow users to, *inter alia*, exercise their freedom of expression through criticism, review or parody.⁹⁸ Its effects on the balance objectives of copyright law become significant in a standardized environment where the commercial practice is widespread.

⁹⁵ See, for example, Niva Elkin-Koren, “A Public-Regarding Approach to Contracting over Copyrights”, in R. Cooper-Dreyfuss, *et al.*, eds., *Expanding the Boundaries of Intellectual Property: Innovation Policy for the Knowledge Society* (Oxford: Oxford University Press, 2001) 191 at 195; Margaret Jane Radin, “Regime Change in Intellectual Property: Superseding the Law of the State with the “Law” of the Firm” (2003-2004) *U. Ottawa L. & Tech. J.* 173; Jacques De Werra, “Moving Beyond The Conflict Between Freedom Of Contract And Copyright Policies: In Search Of A New Global Policy For On-Line Information Licensing Transactions” (2003) 25 *Colum.-V.L.A. J. L. & Arts* 239. See also Marc A. Lemley, “Beyond Preemption: The Law And Policy Of Intellectual Property Licensing” (1999) 87 *Cal. L. Rev.* 111; Charles R. McManis, “The Privatization (“Shrink-Wrapping”) of American Copyright Law” (1999) 87 *C.A.L.R.* 173; for an analysis of the complex interplay between copyright law, contract and technology, see generally Daniel Gervais, “The Price of Social Norms: Towards a Liability Regime for File-Sharing” (2004) 12 *J. Intell. Prop. L.* 39. This interaction is addressed in the context of authors rights in: Giuseppina D’Agostino, *Copyright, Contracts, Creators, New Media, New Rules* (Cheltenham, U.K.: Edward Elgar Publishing, 2010) in particular, chapters 6 to 9 (112–200); Nicola Lucchi, “The Supremacy of Techno-Governance: Privatization of Digital Content and Consumer Protection in the Globalized Information Society” (2007) 15 *Int’l J.L. & I.T.* 192 at 194; Jens Schovsbo, Integrating Consumer rights into Copyright law: From the European Perspective (2008) 31 *J. Cons. Policy* 393 at 398; Eduardo Moises Penalver & Sonia K. Katyal, *Property Outlaws* (New Haven, Conn.: Yale University Press, 2010) at 46–51. Generally, on the phenomenon of non-negotiated standard terms, see Radin, *supra* note 92.

⁹⁶ Natali Helberger, *et al.*, “Digital Rights Management and Consumer Acceptability: A Multi-Disciplinary Discussion of Consumer Concerns and Expectations” (2004), online: <http://www.indicare.org/tiki-download_file.php?fileId=111> at 117.

⁹⁷ In particular, how default rules (and in the present case standard end-user agreements) both respond to and construct social norms and have a normative effect: On Amir & Orly Lobel, “Stumble, Predict, Nudge: How Behavioral Economics Informs Law and Policy”, book review of *Nudge: Improving decisions about health, wealth, and happiness*, by R.H. Thaler & C.R. Sunstein and of D. Ariely, “Predictably irrational: the hidden forces that shape our decisions” (2008) 108 *Colum. L. Rev.* 2098 at 2121-2122.

⁹⁸ Elkin-Koren, *supra* note 95 at 197, where the author notes that the public interest or public domain is an absent consideration in individualized market transactions and that the promotion of these interests cannot be left to the will of market forces alone.

The commercialization of copyright works through non-negotiated standard end-user agreements is not a new phenomenon. It became prevalent with respect to the commercialization of computer programs in the 60s at a time when their legal protection through copyright was not yet certain.⁹⁹ In that context, it was deemed necessary to seek additional protection through contract.¹⁰⁰ Until recently, books, music and films were commercialized without exhaustive terms and conditions. The landscape is changing with the commercialization of these works through on-line means of distribution,¹⁰¹ which can also include TPMs.¹⁰² Given the current protection of books, music, and films under copyright law and the fact that they have been traditionally commercialized without terms and conditions, one would assume that contract clauses that dictated permitted uses of copies would be superfluous, unless copyright holders authorize consumers to perform more acts on their work than the *CCA* allows.¹⁰³ Conversely, it would be suspicious if they constrain consumers to perform fewer acts on their works than the *CCA* allows.¹⁰⁴

Commentators have looked at how various doctrines, within and outside copyright law, provide remedies to copyright users and consumers in the case of contracts (in particular, non-negotiated standard end-user agreements) that tend to expand copyright's exclusive powers and privileges beyond the statute that creates them.¹⁰⁵ They include the application of the U.S. doctrine of preemption¹⁰⁶ and,

⁹⁹ See: Glen. O. Robinson, "Personal Property Servitudes," 71 U. Chicago L. Rev. 1449 at 1473-1474.

¹⁰⁰ *Ibid.*

¹⁰¹ I discuss the nature and scope of online non-negotiated standard end-user agreements in Part 3.(c) of this article.

¹⁰² See the discussion in Part 3.(b) of this article.

¹⁰³ This assumption of the scope of contractual terms of use *vis-à-vis* the default regime of the *CCA* relies on the particular emphasis by the Supreme Court copyright jurisprudence on the *CCA*'s role to balance competing interests and on the place of exceptions to copyright infringement as user rights: see *Théberge*, *supra* note 14; *CCH*, *supra* note 3; *Bell Canada*, *supra* note 5; *Alberta*, *supra* note 5; *CRTC*, *supra* note 5. For a discussion on how a more absolutist view of copyright holders' exclusive rights supports further control of copyright holders' exclusive rights through contract, see Hardy, *supra* note 89, in particular at 10-11, 36-44.

¹⁰⁴ *Ibid.*

¹⁰⁵ In particular, Elkin-Koren, *supra* note 95; Lucchi, *supra* note 95; de Werra, *supra* note 95.

¹⁰⁶ *I.e.*, the U.S.-based federal doctrine of statutory preemption: 17 USC, §301, supremacy clause preemption or constitutional preemption: see de Werra, *supra* note 95 at 263-273, and the doctrine of contractual preemption: see U.S. Copyright Office, *A Report of the Register of Copyrights pursuant to section 104 of the DMCA* (2001) online: <http://www.copyright.gov/reports/studies/dmca/dmca_study.html> [*DMCA 2001 Report*] at 162-164; see also Hardy, *supra* note 89 at 22-35; David Nimmer, Elliot Brown & Gary N. Frischling, "The Metamorphosis of Contract into Expand" (1999) 87 Cal. L. Rev. 17 at 40-68; Elkin-Koren, *supra* note 95 at 215.

more generally, of constitutional fundamental rights,¹⁰⁷ of copyright misuse,¹⁰⁸ public policy,¹⁰⁹ unconscionability,¹¹⁰ competition and antitrust law,¹¹¹ and the doctrine of *abus de droit* in the civil law jurisdictions.¹¹² While these doctrines may provide a legal basis for copyright users' claims in specific cases, they are either too broad or too narrow to address the specific issues and effects of copyright end-user agreements.¹¹³ They provide little guidance and support to copyright users.¹¹⁴ The detailed analyses of the application of these legal doctrines to the commercialization of copyright works underscore the distorting pressures that private ordering can exercise on the copyright framework. They illustrate the power that the sphere of private ordering enables for copyright holders, with little countervailing force to integrate public interest considerations and with that, the ability of lawful users to perform certain acts on copyright works.

The interaction between the copyright regime and contracts raises complex issues because it questions the purpose and objectives of copyright, what its proper scope should be, and how much flexibility is desirable in how copyright is exploited and commercialized. The *CCA* and similar copyright laws in other jurisdictions say little about this interaction if it is not to endorse an unrestricted freedom of exploitation of copyright holders' works. The fear is that through non-negotiated standard end-user agreements or TPMs, copyright holders supersede the pre-existing copyright regime to their advantage to expand their privileges and powers to the detriment of other competing interests that are addressed in the *CCA* and similar statutes in other jurisdictions.¹¹⁵ The use of TPMs by copyright holders is a manifestation of the possible extension of copyright through private ordering. The legal protection of TPMs recently introduced in the *CCA* raises specific issues that I explore next.¹¹⁶

¹⁰⁷ Lucie Guibault, *Copyright Limitations and Contracts, An analysis of the Contractual Overridability of Limitations on Copyright* (The Hague: Kluwer Law International, 2002) at 263–277.

¹⁰⁸ *Ibid.*, at 284–289; De Werra, *supra* note 95 at 273–279.

¹⁰⁹ De Werra, *supra* note 95 at 279–282.

¹¹⁰ *Ibid.*, at 282–286; Lucchi, *supra* note 95 at 221ff.

¹¹¹ Guibault, *supra* note 107 at 242–251; De Werra, *supra* note 95 at 286–291.

¹¹² Guibault, *supra* note 107 at 278–283; De Werra, *supra* note 95 at 338–339. On the application of the doctrine of *abus de droit* to copyright, see also: Pierre-Emmanuel Moyse, “Kraft Canada c. Euro-Excellence: l’insoutenable légèreté du droit” (2008) 53 R.D. McGill 741 at 784–791.

¹¹³ De Werra, *supra* note 95 at 263–294, 338–339, 345–346.

¹¹⁴ *Ibid.*

¹¹⁵ Marc A. Lemley, *supra* note 95; McManis, *supra* note 95; See, for example, Elkin-Koren, *supra* note 95 at 195; Radin, *supra* note 95; De Werra, *supra* note 95. For an analysis of the complex interplay between copyright law, contract and technology, see generally Gervais, *supra* note 95. This interaction is addressed in the context of authors rights in: D’Agostino, *Copyright, Contracts, Creators*, *supra* note 95, in particular, chs. 6 to 9 (112–200); Lucchi, *supra* note 95 at 194; Schovsbo, *supra* note 95 at 398; Penalver & Katyal, *supra* note 95 at 46–51.

¹¹⁶ *CMA*, *supra* note 1 which amended the *CCA*, *supra* note 2 by adding ss. 41ff.

(b) Technological Protection Measures (TPMs)

One of the greatest controversies in contemporary copyright law explores how the implementation of provisions to protect technological measures as required by the *WIPO Internet Treaties* of 1996¹¹⁷ disturbs (or not) the fragile balance that needs to subsist between copyright holders' exclusive rights and the rights of copyright users to copyright works.¹¹⁸ The *WIPO Internet Treaties* require member states¹¹⁹ to provide "adequate legal protection and effective legal remedies against the circumvention of effective technological measures" used by copyright holders with respect to digital works.¹²⁰ The *WIPO Internet Treaties* impose no counterbalancing obligation on member states to preserve users' exercise of permitted acts on copyright works without the permission of the copyright holders, such as through fair use, fair dealing, and other long-established exceptions to copyright infringement.¹²¹

The *WIPO Internet Treaties'* obligations to protect technological measures fall within the broader digital agenda initiated by the World Intellectual Property Organization [WIPO] that seeks to address "the profound impact of the development and convergence of information and communication technologies on the creation and use of literary and artistic works."¹²² More than 15 years after the adoption of TPMs in the *WIPO Internet Treaties*, the earlier passions ignited by their introduc-

¹¹⁷ *WCT*, *supra* note 2; *WPPT*, *supra* note 2. *WCT* and *WPPT* are commonly referred to as the *WIPO Internet Treaties*.

¹¹⁸ For a Canadian perspective on the digital agenda of the *WIPO Internet Treaties*, and particularly the TPM provisions, see Michael Geist, ed., *From "Radical Extremism" to "Balanced Copyright": Canadian Copyright and the Digital Agenda* (Toronto: Irwin Law, 2010) in particular ch. 7: Carys Craig, "Locking out lawful users: Fair Dealing and anti-circumvention in Bill C-32" and ch. 8: Michael Geist, "The Case for Flexibility in Implementing the *WIPO Internet Treaties*: An Examination of the Anti-Circumvention Requirements."

¹¹⁹ *WCT*, *supra* note 2 and *WPPT*, *supra* note 2 had, respectively, 91 and 92 member states as per the WIPO official website reporting of contracting parties: <<http://www.wipo.int/treaties/en/>> (last visited December 4, 2013). Canada was a signatory but was not yet listed as a ratifying party. Member states include the U.S., the E.U. and Member States of the E.U., China, Japan, Australia, and The Russian Federation.

¹²⁰ *WCT*, *supra* note 2, art. 11; *WPPT*, *supra* note 2, art. 18.

¹²¹ On how this topic and how this void does not allow a balance to subsist between copyright holders and users, see David Vaver, "Copyright and the Internet: From Owner Rights and User Duties to User Rights and Owner Duties?" (2007) *Case W. Res. L. Rev.* 731 [Vaver, "From Owner Rights to User Rights"].

¹²² *WCT*, *supra* note 2, Preamble. For a discussion of the new international obligations brought on in the *WIPO Internet Treaties* with the TPMs and digital rights management provisions, and of the drafting process leading up to their adoption, see Mihaly Ficsor, *The Law of Copyright and the Internet, The 1996 WIPO Treaties, Their Interpretation and Implementation* (Oxford: Oxford University Press, 2002), Part III; Sam Ricketson & Jane C. Ginsburg, *International Copyright and Neighbouring Rights, The Berne Convention and Beyond*, 2nd ed. (Oxford: Oxford University Press, 2006) at 964ff.

tion are still alive, as illustrated by Canada's various attempts at copyright legislative reform that finally led to the entry into force of the *CMA* in 2012.¹²³

The controversy around TPMs forms part of the broader debate on the proper balance that needs to exist between the exclusive rights of copyright holders and the public interest, including the rights of copyright users.¹²⁴ It includes conflicting views on the scope of the international obligations that the *WIPO Internet Treaties* impose on member states.¹²⁵ Proponents of strong TPMs argue that the additional clout to control access to and use of digital copyright works is essential to counter piracy and is the mere recognition of the principle that copyright holders have the right to control access to their copyright works.¹²⁶ For supporters of TPMs, the proper balance lies in providing sufficient protection that will promote the future creation of digital copyright works to be disseminated for the benefit of users and the public. Critics argue that access controls were never part of the exclusive rights of copyright holders.¹²⁷ They raise concerns about the effect of the legal protection

¹²³ In Canada, TPMs occupied the larger part of the debates throughout the recent copyright legislative reform that led to the entry into force in 2012 of the *CMA*, *supra* note 1: See IP Osgoode (<www.iposgoode.ca>) a *Canadian Copyright Reform resource Guide*, online at <<http://researchguides.library.yorku.ca/content.php?pid=197824&sid=1657041>> assembling references to commentaries that were made during the discussions on Bill C-32, a large portion of which concerned digital locks and TPMs. Carys Craig, "Locking Out Lawful Users: Fair Dealing and Anti-Circumvention in Bill C-32" in Michael Geist, ed., *From Radical Extremism to Balanced Copyright: Canadian Copyright and the Digital Agenda* (Toronto: Irwin Law, 2010) 177 ["Locking Out Lawful Users"]; Michael Geist, "The Case for Flexibility in Implementing the WIPO Internet Treaties: An Examination of the Anti-Circumvention Requirements" in *From "Radical Extremism" to "Balanced Copyright": Canadian Copyright and the Digital Agenda* (Toronto: Irwin Law, 2010) 222; Mihaly Ficsor, "TPMs and Flexibility ("The Ability of *Bending without Breaking*") — Why Should the TPM Provisions of Bill C-32 Protect Access Controls and Prohibit "Preparatory Acts," online at <<http://www.iposgoode.ca/2010/11/digital-locks-circumvention-and-the-copyright-reforms-proposed-by-bill-c-32/>>.

¹²⁴ For a summary of the policy and legal debate around TPMs from the perspective of copyright holders and copyright users and the public interest, and about where the proper balance should be struck, see Peter K. Yu, "Anticircumvention and Anti-Anticircumvention" (2006) 84 *Denv. U.L. Rev.* 13, in particular at 17–19. See also Radin, *supra* note 92 at 46-51.

¹²⁵ In the context of Canada recent copyright reform, see, for example, Geist, *supra* note 123 and Ficsor, *supra* note 123.

¹²⁶ Jane C. Ginsburg, "Can Copyright become User-Friendly? Review: Jessica Litman, *Digital Copyright*" (2001) 25 *Colum. J. L. & Arts* 71 at 75-76; Jane C. Ginsburg, "From Having Copies to Experiencing Works: The Development of an Access Right in U.S. Copyright Law" (2003) 50 *J. Copyright Soc'y U.S.A.* 113 at 123. The author acknowledges troubling aspects of the implementation of the *WIPO Internet Treaties* in the U.S. through the DMCA: Jane C. Ginsburg, "Copyright Legislation for the Digital Millennium" (1999) 23 *Colum. J. L. & Arts* 137 at 152-153.

¹²⁷ Vaver, *Intellectual Property Law 2011*, *supra* note 45 at 199; Craig, "Locking Out Lawful Users", *supra* note 123 at 197; Séverine Dusollier, *Droit d'auteur et protection des oeuvres dans l'univers numérique*, 2nd ed. (Bruxelles: Larcier, 2007) [Dusollier

of technological measures on access to copies of copyright works (which may include materials that are in the public domain) and exceptions to copyright infringement, such as fair dealing or fair use.¹²⁸ At the wider level of digital rights management,¹²⁹ critics fear that TPMs, as protected by law, allow copyright holders to control uses of copyright works (amount of reading, viewing, and listening) that have traditionally been outside the scope of copyright holders' exclusive rights.¹³⁰

With the entry into force of the *CMA* in 2012,¹³¹ Canada opted for a higher level of protection of TPMs, similar to the highly contentious regime adopted in the U.S. with the entry into force of the *Digital Millennium Copyright Act [DMCA]* more than a decade earlier.¹³² The *CCA* now includes a new infringement with

2007] at 384-385, 394-395, argues that the right to control access to the work resides with the owners of the physical embodiment of the work, not copyright holders.

128 David Nimmer, "A Riff on Fair Use in the *Digital Millennium Copyright Act*" (2000) 148 U. Pa. L. Rev. 673 at 739-740, observes: "The lengthy analysis of how section 1201 works in practice leads to the conclusion that its entire edifice of user exemptions is of doubtful puissance. The user safeguards so proudly heralded as securing balance between owner and user interests, on inspection, largely fail to achieve their stated goals. If the courts apply section 1201 as written, the only users whose interests are truly safeguarded are those few who personally possess sufficient expertise to counteract whatever technological measures are placed in their path."; Craig, "Locking Out Lawful Users," *supra* note 123, in particular at 195.

129 Digital rights management is a broader concept than TPMs that encompasses tracking uses made by copyright holders and identification codes and copyright holders' signatures of copies of copyright works. In addition to obligations imposed on TPMs, the *WIPO Internet Treaties* impose obligations concerning rights management information (*WCT*, *supra* note 2, art. 12; *WPPT*, *supra* note 2, art. 19).

130 Jessica Litman, "Lawful Personal Use" (2007) 85 Tex. L. Rev. 1871 [Litman, "Lawful Personal Use"] at 1872, where Litman states that lawful personal use of copyright works is progressively shrinking in the U.S. She attributes it to successive copyright reform of the last decades and the tracking powers of copyright holders with digital technologies; Elkin-Koren, *supra* note 8 at 1143-1144, where the author describes the effect of digital rights management used by copyright holders as redefining the relationship between consumers and copyright holders in a way that is not always transparent to the consumer. It also has the potential of compromising intellectual freedoms.

131 *Supra* note 1.

132 *Digital Millennium Copyright Act*, Pub. L. No. 105-304, 112 Stat. 2860 (1998), amending 17 USC, including the introduction of §§1201-1205 [*DMCA*]. Countries offering a lower level of protection of TPMs include Japan, Switzerland, and New Zealand: for a summary of the main features of the national implementation of TPMs in Japan, Switzerland and New Zealand, see Geist, *supra* note 123 at 233-236. The European Union set a framework of implementation for its member states that sits somewhere in the middle: EC, *Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society*, [2001] OJ, L167/10 [*Directive 2001/29/EC*], is the secondary law that sets the minimum requirements for EU Member States regarding the implementation of the *WIPO Internet Treaties*, *supra* note 2, and the harmonization of certain aspects of copyright law. Article 6.4 imposes an obligation on Member States to

respect to the circumvention of access-controls but not for usage-controls.¹³³ The TPM provisions provide a list of specific exceptions to this new infringement.¹³⁴ The Governor in Council may make regulations prescribing circumstances additional to the ones already listed in the *CCA*, in which infringement by circumventing access controls does not occur.¹³⁵ The premise behind forbidding the circumvention of access-controls but not usage-controls is that copyright holders should legitimately control the lawful access to their works. Once this lawful access is granted, users should be able to make any lawful use of the copyright work, including uses that do not require the consent of copyright holders (such as private copying, fair dealing, and the four new user provisions examined in this article).¹³⁶ Users should not be liable for infringement if they circumvent usage-controls to achieve that goal.

At first sight, the creation of a new infringement in the *CCA* with respect to the circumvention of access-controls, but not for usage-controls, seems to strike a balance between the interests of copyright holders and copyright users by restricting infringement to the circumvention of access-controls.¹³⁷ While copyright law may not have granted access-controls to copyright holders in the past, it did not allow users to access copies unlawfully either. This latter issue was addressed in another legal sphere: criminal law, *i.e.*, theft of a chattel (*e.g.*, copy of a book, music CD), bypassing library loan privileges, henceforth. Because it was not clear that acts of circumvention (including circumventing access-controls of copyright works) would be an actionable wrong — circumvention can take place without any taking or stealing — a new infringement of circumvention of access-controls was introduced.¹³⁸ By conferring this new legal protection for access-controls on copyright holders, the two spheres of control (*i.e.*, rights to the physical copy and exclusive copyright) are now merged under the helm of copyright holders. The expansion of the scope of application of the *CCA* has made commentators question the constitutionality of TPMs in a copyright framework.¹³⁹

The appeal of the balance that TPMs seek to strike between diverging interests by distinguishing circumvention of access-controls from usage-controls for the purpose of infringement is short-lived. While there is no infringement for circum-

require copyright holders to make available to beneficiaries of certain exceptions or limitations to copyright, the means of benefiting from those exceptions and limitations.

¹³³ *CCA*, *supra* note 2, s. 41.1(1).

¹³⁴ *CCA*, *supra* note 2, ss. 41.11–41.18. The exceptions include law enforcement and interoperability issues.

¹³⁵ *CCA*, *supra* note 2, s. 41.21(2)(a). The factors that the Governor in Council would need to consider include the extent to which TPMs effectively affect the exercise of fair dealing under the *CCA*, *ibid.*

¹³⁶ See the discussion in Part 2 of this article.

¹³⁷ *CCA*, *supra* note 2, s. 41.1(1).

¹³⁸ Vaver, *Intellectual Property Law 2011*, *supra* note 45 at 197–198; Jeremy F. de Beer, “Locks & Levies” (2006) 84 *Denv. U.L. Rev.* 143 at 152–155.

¹³⁹ Jeremy F. de Beer, “Constitutional Jurisdiction over Paracopyright Laws” in Michael Geist, ed., *In the Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005) ch. 4; Vaver, *Intellectual Property Law 2011*, *supra* note 45 at 200.

venting usage-controls for lawful uses, the onus is entirely placed on the users' ability to circumvent the TPMs with no counterpart obligation to facilitate such uses by copyright holders.¹⁴⁰ Makers of circumventing devices, distributors, service providers, and others are also liable for infringement,¹⁴¹ which diminishes consumers' ability to circumvent usage-controls even more, in spite of the lawfulness of their intended uses. Also, the infringement of access-controls under the *CCA* can occur independently of an infringement of copyright.¹⁴² As one commentator observes, the legal protection of TPMs, as they now form part of the *CCA*, is blind to the lawfulness of the use.¹⁴³ TPMs do not parallel the existing exclusive rights of copyright holders, but rather endorse an indiscriminate lockout approach.¹⁴⁴

While advocates of TPMs will argue that this is the only effective means to counterbalance digital piracy, a legal framework that allows the combination of unfettered powers of access-controls with exclusive copyright, and that does not place the onus on copyright holders to allow lawful uses of their works by "lifting" usage-controls, tilts the balance toward copyright holders even further and imposes the burden of countering piracy on lawful copyright users. In contrast, countries granting a lower level of protection to TPMs typically link the infringement of circumvention to an infringement of copyright.¹⁴⁵ This link was made in an effort to address the changes brought on by digital technologies, while preserving the balance between incenting innovation and promoting access and lawful uses of copyright works.

The adoption of a higher level of protection of TPMs in a Canadian context raises a slew of new questions, even 15 years after the adoption of the *WIPO Internet Treaties* and their national implementations worldwide; not the least of which is: what is the effect of the newly implemented TPMs on Canada's copyright users' rights, as proclaimed in *CCH* and confirmed in three Supreme Court judgments in 2012?¹⁴⁶ The legal protection of TPMs creates confusion around copyright holders' obligations with respect to acts that users may perform without their authorization, such as fair dealing, under the private copying regime and the newly

¹⁴⁰ See the discussion in Part 4.(b) of this article.

¹⁴¹ *CCA*, *supra* note 2, s. 41.1(1)(b), (c).

¹⁴² The *CCA*, *supra* note 2 makes a distinction between acts of circumvention of access controls which are an infringement of copyright holders' rights and acts of circumvention of copy controls which are not *per se* an act of infringement: s. 41.1(1)(a). The effects of anti-circumvention measures make acts of circumvention of TPMs an infringement of copyright holders' rights, independently of an act of copyright infringement. This is the model adopted by the U.S.: *DMCA*, *supra* note 132.

¹⁴³ Craig, "Locking Out Lawful Users", *supra* note 123 at 192.

¹⁴⁴ *Ibid.*

¹⁴⁵ Those jurisdictions include Japan, New Zealand and Switzerland: see Geist, *supra* note 123. Bill C-60, *An Act to Amend the Copyright Act*, 1st Sess., 38th Parl., 2005 (first reading 20 June 2005) cl. 27, s. 34.02(1) (one of the earlier attempts to amend the *CCA*, *supra* note 2, to comply with the *WIPO Internet Treaties*, *supra* note 2) linked the infringement of circumvention to the infringement of copyright.

¹⁴⁶ *Bell Canada*, *supra* note 5; *Alberta*, *supra* note 5; *CRTC*, *supra* note 5.

introduced four user provisions that are discussed in this article.¹⁴⁷ Can these uncertainties be remedied through non-negotiated standard end-user agreements? How do these terms address TPMs and users' rights?

(c) Terms of Use of Commercial Copies of Copyright Works

Copies of copyright works are made available commercially to consumers with no contractual terms attached to them¹⁴⁸ or, increasingly, with a lengthy list of non-negotiated standard terms of use.¹⁴⁹ In the former case, consumers' permitted uses of copies of copyright works are dictated predominantly by the application of the *CCA*.¹⁵⁰ In the latter case, the effect of these terms of use varies depending on their enforceability,¹⁵¹ on their nature¹⁵² on their interaction with copyright law,¹⁵³ and on their treatment by sale of goods and consumer protection laws.¹⁵⁴ For the purposes of this article, I will limit my remarks on the interaction between a selected sample of non-negotiated standard end-user agreements and exceptions to copyright infringement or users' rights as conferred by the *CCA*. It is beyond the scope of this article to discuss the debate around the exact nature of terms of use in intellectual property licences, including non-negotiated standard end-user agree-

¹⁴⁷ See the discussion in Part 2 and in Part 4 of this article.

¹⁴⁸ This is the case for copies of copyright works sold with a physical supporting medium exchanged hand to hand such as books, music CDs, film DVDs.

¹⁴⁹ For example, this is the case for e-books, digital films and digital musical recordings made accessible online with no supporting physical medium exchanged hand to hand: see the Apple iTunes store terms of services for music downloads, film rentals and iBooks, online: <<http://www.apple.com/legal/itunes/us/terms.html#SERVICE>>; Netflix terms of use for audio-visual entertainment streaming services: online at <<https://signup.netflix.com/TermsOfUse>>; Amazon.com Kindle License Agreement and Terms of Use, online: <http://www.amazon.com/gp/help/customer/display.html/ref=help_search_1-1?ie=UTF8&nodeId=200506200&qid=1336750645&sr=1-1>; and KOBO INC. CANADA TERMS OF USE for the purchase of e-books, online: <<http://www.kobobooks.com/termsfuse>>.

¹⁵⁰ See Part 2 of this article.

¹⁵¹ The case law on the enforceability of terms of use varies significantly. The question to be determined *inter alia* is whether, based on the manner in which the terms were made available to users, it can be inferred that they were agreed to by them. For a review of the enforceability of non-negotiated terms and conditions, Loos, *et al.*, *supra* note 92 at 65-66.

¹⁵² *E.g.*, whether they form part of a bilateral agreement or of a unilateral licence will have an impact *inter alia* on their scope, the remedies available in case of breach, *etc.*

¹⁵³ More specifically, whether there are provisions in copyright law that are mandatory and cannot be overridden by contract: see the discussion in Part 4 of this article (in particular Part 4.(c)).

¹⁵⁴ I refer here more specifically to how sale of goods and consumer protection laws may affect the applicability of copyright works standard terms of use, including through the application of implied obligations of quality, fitness for purpose, quiet possession, prohibitions against unfair terms and information disclosure requirements.

ments.¹⁵⁵ For the intents of the present discussion, I will focus on restrictive terms of use that are considered binding enforceable terms.¹⁵⁶

There are common denominators and noticeable variances between what suppliers permit and forbid consumers to do with copies of copyright works lawfully accessed. The permitted purpose of the uses is most often defined as “personal” and “non-commercial” uses.¹⁵⁷ Consumers are usually forbidden to produce derivative or transformative uses with the copies of copyright works that they lawfully accessed.¹⁵⁸ Also, they have no right to transfer the copy of the copyright work that they lawfully acquired.¹⁵⁹ Consumers are typically not notified of their rights or of copyright exceptions under copyright laws or on how they may exercise such rights.¹⁶⁰ There are indications that copyright holders often disregard those users’ rights or exceptions to copyright infringement.¹⁶¹ The right to make copies of the copyright work for personal non-commercial uses varies greatly from no right to make copies¹⁶² to the right to make an unlimited number of copies.¹⁶³ There is also a noticeable variance in the uses of TPMs from none¹⁶⁴ to ones restricting access, ones restricting uses once access is granted, and the ones restricting both the access to and the uses of copyright works. Some suppliers inform consumers of the exist-

¹⁵⁵ The nature of intellectual property licence terms (*e.g.*, bilateral contracts, unilateral licences) is unclear and their treatment is not always consistent. For a discussion on the nature of intellectual property licences and the parallels to be made with tangible property, see: Mark R. Patterson, “Must Licenses be Contracts? Consent and Notice in Intellectual Property” (2012) 40 Fla. St. U.L. Rev. 105. See also Robinson, *supra* note 99.

¹⁵⁶ For a review of the enforceability of non-negotiated terms and conditions, see Loos, *et al.*, *supra* note 92 at 65-66. See also Radin, *supra* note 92, in particular at 1-32.

¹⁵⁷ This is the case of major suppliers of online audio, audio-visual and e-books products, see *supra* note 149.

¹⁵⁸ *Ibid.*

¹⁵⁹ *Ibid.*

¹⁶⁰ *Ibid.*

¹⁶¹ See The Hargreaves Report, which was commissioned by U.K. Prime Minister in 2010: Ian Hargreaves, “Digital Opportunity, a Review of Intellectual Property and Growth” 2011 at 51, where the author refers to a study that analyzed 100 contracts referred to the British Library (*i.e.*, submission by Libraries and Archives Copyright Alliance (LACA)) and that demonstrated that contracts and licences often override the exceptions and limitations allowed in copyright law.

¹⁶² See the Kobo books terms of use for e-books, *supra* note 149.

¹⁶³ See the terms of use of the Apple iTunes store products, *supra* note 149, where no limits to copy apply to iTunes Plus Products, and users may make as many copies “as reasonably necessary for personal, non-commercial use.”

¹⁶⁴ See the terms of use of the Apple iTunes store products, *supra* note 149, where it is specified that a particular product, “iTunes Plus Products do not contain security technology that limits your usage of such products.”

tence of TPMs on the copies of copyright work they provide to consumers,¹⁶⁵ while others make no reference to their existence.¹⁶⁶

Non-negotiated standard end-user agreements tend to overlook exceptions to copyright infringement or users' rights as they are set out in the *CCA* and similar statutes in other jurisdictions. To understand the effect of non-negotiated standard end-user agreements on the copyright design, in particular the extent to which they may take precedence over exceptions to copyright infringement or users' rights,¹⁶⁷ requires the investigation of two related questions. What is the exact nature and scope of these permitted uses or exceptions to copyright infringement? Are they mandatory? This will be explored next.

4. EXCEPTIONS TO COPYRIGHT INFRINGEMENT: RIGHTS OR PRIVILEGES? ARE THEY MANDATORY?

Whether exceptions to copyright infringement may qualify as rights, or privileges or mere defences to copyright infringement is an important component of the broader task of defining consumers' rights to commercial copies of copyright works. This question is gaining more importance for consumers as the recent amendments to the *CCA* expand the instances under which copyright users may perform acts without the authorization of copyright holders.¹⁶⁸ Whether exceptions to copyright infringement are mandatory is of equal importance in an environment where copies of copyright works are increasingly commercialized through non-negotiated standard end-user agreements. I look at these two questions sequentially.

(a) The Nature of Exceptions to Copyright Infringement

The qualification of exceptions to copyright infringement as rights, or as privileges or mere defences has important legal ramifications for consumers and other users. Based on Wesley Hohfeld's theory of jural correlatives,¹⁶⁹ lawful consumers have a legal claim against copyright holders to exercise exceptions to copyright

¹⁶⁵ Apple iTunes store terms of use for audio, audio-visual works and e-books, *supra* note 149, make general reference to TPMs being applied to certain of the iTunes store services.

¹⁶⁶ See the Kobo books terms of use for e-books, *supra* note 149.

¹⁶⁷ *I.e.*, as they are set out in the *CCA*, *supra* note 2, and similar statutes in other jurisdictions: see Part 2 of this article.

¹⁶⁸ See the discussion in Part 2 of this article.

¹⁶⁹ *I.e.*, that someone's right implies that someone has a duty towards it. A privilege is the ability to do something with no correlation from anyone obligated towards it (no right). For example, a defence to copyright infringement would qualify as a privilege to the extent that it allows a user to perform certain acts without authorization but does not require copyright holders to facilitate the exercise of these acts. See Wesley N. Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913) 23 *Yale L.J.* 16 at 30-31. See also Wesley N. Hohfeld, "Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1917) 26 *Yale L.J.* 710.

infringement¹⁷⁰ that they lawfully access if they are rights,¹⁷¹ but not if they are privileges or mere defences to copyright infringement.¹⁷² This is particularly relevant when TPMs restrict the exercise of an otherwise permitted act.¹⁷³ By contrast, an exception to copyright infringement is a privilege to the extent that it does not impose any duty on copyright holders, such as to facilitate the performance of a permitted act. At the same time, it leaves consumers free to make the permitted use as they please, unless the exceptions to copyright infringement are not mandatory, and are restricted by contract or by TPMs.¹⁷⁴ If exceptions to copyright infringement are mandatory privileges, any attempt by copyright holders to restrain the exercise of the exceptions is not enforceable.¹⁷⁵ As a result, mandatory user rights offer the strongest form of protection for copyright consumers and other users, while non-mandatory privileges offer them the weakest form of protection. Between the two poles, a mandatory privilege does not impose any obligation on copyright holders to facilitate the exercise of an act permitted under an exception to copyright infringement, but at the same time, any obstacle imposed by copyright holders restricting the performance of the said act by consumers is non-enforceable, leaving consumers free to perform an act otherwise permitted by an exception to copyright infringement. A user right that may be superseded by contract is weaker in mass market environments where non-negotiated standard end-user agreements prevail, to the extent that it is subject to contract terms that may negate it.¹⁷⁶

The Supreme Court of Canada stated unanimously in *CCH*, and reaffirmed in three judgments in 2012,¹⁷⁷ that exceptions to copyright infringement are “more properly understood as an integral part of the *Copyright Act* than simply a defence”¹⁷⁸ and are users’ rights.¹⁷⁹ The Supreme Court could have referred to ex-

¹⁷⁰ *E.g.*, the right to make copies for private purposes or fair dealing.

¹⁷¹ Unless they are not mandatory and have been restricted by the copyright holder in a binding agreement.

¹⁷² See the discussion further below in Part 4.(a) of this article on the French cases *Warner Music* and *Mullholland Drive*.

¹⁷³ See the discussion on the nature and effects of TPMs in Part 3.(b) of this article.

¹⁷⁴ In the case of TPMs blocking the permitted use, consumers would be allowed to circumvent usage-control TPMs to perform a permitted act, provided that they have the technical ability to do so: see the discussion on TPMs in Part 3.(b) of this article. I discuss whether exceptions to copyright infringement are mandatory in Part 4.(c), below. In the case of TPMs blocking the permitted use, the consumer would be allowed to circumvent the TPMs to perform a permitted act.

¹⁷⁵ Hohfeld, *supra* note 169. On the distinction between mandatory exceptions and mandatory rights, see Dusollier 2007, *supra* note 127 at 483-484.

¹⁷⁶ For a discussion on the legal nature of exceptions to copyright infringement and on their mandatory nature, see Dusollier 2007, *supra* note 127 at 477-511.

¹⁷⁷ *Bell Canada*, *supra* note 5, *Alberta*, *supra* note 5, *CRTC*, *supra* note 5.

¹⁷⁸ *CCH*, *supra* note 3 at para. 48, referring here specifically to the fair dealing exception to copyright infringement.

¹⁷⁹ *Ibid.*; *Bell Canada*, *supra* note 5 at para. 11; *CRTC*, *supra* note 5 at paras. 36, 58.

ceptions to copyright holders' exclusive rights,¹⁸⁰ but instead it explicitly referred to them as *rights*. This qualification by the Supreme Court of exceptions to copyright infringement contrasts with the one made by courts in other jurisdictions including France, that have held that exceptions to copyright infringement are mere defences that cannot form the basis of a legal claim.¹⁸¹ The U.K. *Copyright, Designs and Patents Act 1988*¹⁸² suggests that exceptions to copyright infringement are not rights.¹⁸³ The view that exceptions to copyright infringement do not constitute rights in the sense that they implicate duties on the part of copyright holders, as per Hohfeld's theory of jural correlatives, is also shared by copyright scholars.¹⁸⁴

The consequences of the distinction between rights and mere defences to copyright infringement are illustrated in the French case *Warner Music*.¹⁸⁵ The Tribunal of first instance had ordered the rescission of the sale of CDs for digital music on the basis that the CD, which contained TPMs, could not be used on a specific kind of laptop. The CD contained a notification of the TPMs and stated that it could be read on most CD players and computers. The Tribunal held that this incompati-

¹⁸⁰ The title preceding *CCA*, *supra* note 2, ss. 29ff, refers to "Exceptions." Exceptions or defences to copyright infringement is how these limitations of copyright holders' exclusive rights are commonly referred to: see *Berne Convention*, *supra* note 2, art. 9; The *WCT*, *supra* note 2, art. 10 and the *WPPT*, *supra* note 2, art. 16, also refer to "exceptions" and "limitations" of the exclusive rights of copyright holders.

¹⁸¹ See the discussion below in Part 4.(a) of this article on the French cases *Warner Music* and *Mulholland Drive*. See Law.co.il, "Israeli Supreme Court: circumvention of copyright protection is not prohibited" online: <http://www.law.co.il/news/israeli_internet_law_update/2013/09/05/IL-Supreme-court-permits-access-control-circumvention/>, referring to a 2013 judgment by the Israeli Supreme Court: *Telran Communications (1986) Ltd. v. Charlton Ltd.* (in Hebrew) whereby Law.co.il reports that Justice Zvili Zilbertal stated: "contrary to the ruling in the Hebrew University case, that even if 'permitted uses' are deemed a defense and not a legal right, the defense can apply to the middleman as well." [emphasis added]. See also: Séverine Dusollier, "Copie privée v. mesures techniques de protection: l'exception est-elle un droit?" note sous Prés. Bruxelles (cess.), 25 mai (2004) 4 *Auteurs & Média*, 338 at 342–344 where the author argues in a Belgian context that exceptions to copyright infringement are not rights.

¹⁸² Chap. 48.

¹⁸³ *Ibid.*, s. 28 (1) which states with respect to acts permitted in relation to copyright works: "The provisions of this article specify acts which may be done in relation to copyright works notwithstanding the subsistence of copyright; they relate only to the question of infringement of copyright and do not affect any other right or obligation restricting the doing of any of the specified acts." (emphasis added)

¹⁸⁴ For a review of the literature and case law on the legal nature of exceptions to copyright infringement see Dusollier 2007, *supra* note 127 at 477–494, in particular at 481–485 regarding the arguments against qualifying exceptions to copyright infringements as rights. See also David Vaver, "Copyright Defenses as User Rights" (2013) *J. Pat. & Trademark Off. Soc'y* 14 (forthcoming), who hesitates to qualify exceptions to copyright infringement as rights with correlative duties in Hohfeld terms, or that can be transferred, but acknowledging that they are nevertheless entitlements.

¹⁸⁵ Trib. gr. inst. Sieme Paris, 10 January 2006, *Christophe R., UFC Que Choisir / Warner Music France, Fnac* (2006) *JurisData*: 2006-292685.

bility with some computers constituted a latent defect under the French *Code Civil*.¹⁸⁶ The Tribunal also ordered Warner Music France to remove TPMs from the CDs it distributed as TPMs prevented consumers from making private copies of the digital music. The Tribunal held that this annulled *de facto* the limit set by the legislator on the exclusive right of authors, which allowed individuals to make private copies.¹⁸⁷ The Court of Appeal reversed the two orders of the Tribunal outlined above.¹⁸⁸ It reversed the first order on the ground of deficient evidence of the existence of a latent defect.¹⁸⁹ It reversed the second order on the basis that the private copying exception to authors' rights was not a right but a defence.¹⁹⁰ Hence it could not be the basis for the initiation of a claim.¹⁹¹ The same approach was adopted by the French Court of Appeal and the Cour de Cassation in the *Mulholland Drive* case.¹⁹² By contrast to the French cases of *Warner Brothers* and *Mulholland Drive*, can the Supreme Court of Canada qualification of exceptions to copyright infringement as *users' rights* serve as the basis of claims by users against copyright holders who restrict the performance of acts otherwise permitted under those exceptions? Are such exceptions mandatory?

Determining whether exceptions to copyright infringement should give rise to legal claims against copyright holders to allow users the performance of the restricted act, as opposed to a privilege, calls in question the balance that needs to be achieved between the scope of copyright holders' and users' rights to lawful copies of copyright works. The role of exceptions to copyright infringement to balance competing interests as enunciated by the Supreme Court in *Théberge*,¹⁹³ was emphasized by the same court in *CCH, Bell Canada* and *CRTC*.¹⁹⁴

The qualification by the Supreme Court of exceptions to copyright infringement as *users' rights* in *CCH*, and subsequently in *Bell Canada, Alberta* and *CRTC*, has served as a rule of interpretation that gives more prominence than it ever did before to the interests of copyright users.¹⁹⁵ The rule of interpretation has

¹⁸⁶ Art. 1641 CcF.

¹⁸⁷ As per art. L 122-5, L 211-3 CPI.

¹⁸⁸ CA Paris, 20 June 2007, *Fnac Paris / UFC Que Choisir et autres* (2007) Juris Data 2007-337236.

¹⁸⁹ *Ibid.*

¹⁹⁰ *Ibid.*

¹⁹¹ *Ibid.* Confirmed by the Cour de cassation, Cass, civ. 1ère, 27 November 2008, *UFC Que Choisir / Fnac, Warner music France* (2008) JurisData 2008-046005.

¹⁹² CA, Paris, 4 April 2007, *Studio Canal et al. v. S. Perquin and Union fédérale des consommateurs Que choisir*, Gaz. Pal. 18/07/2007 N° 199, 23; confirmed by the Cour de Cassation: Cass civ 1st, 19 juin 2008 (2008) Bull civ, I, N° 177.

¹⁹³ *Théberge*, *supra* note 14 at para. 30.

¹⁹⁴ The objective of the CCA to balance competing objectives as stated in *Théberge*, *ibid.*, was referred to in the context of interpreting the scope of exceptions to copyright infringement in *CCH*, *supra* note 3 at para. 10; *Bell Canada*, *supra* note 5 at paras. 8ff; *CRTC*, *supra* note 5 at paras. 64ff. See also *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45 at paras. 88-89.

¹⁹⁵ *CCH*, *supra* note 3 at para. 48; *Bell Canada*, *supra* note 5 at paras. 9-11.

guided the Supreme Court and lower courts in their determination of the scope of exceptions to copyright infringement.¹⁹⁶ The Supreme Court relied on its qualification of exceptions as *users rights* to justify that the allowed purposes under the fair dealing provisions need to be interpreted broadly.¹⁹⁷ The qualification of exceptions as users' rights further led the Supreme Court in *Alberta* and *Bell Canada* to hold that exceptions have to be interpreted from the perspective of the user, not copyright holders.¹⁹⁸ More recently, the Supreme Court held that a value for signal regime set up by the CRTC was *ultra vires* of its powers as it, *inter alia*, effectively allowed broadcasters to control the simultaneous retransmission of works while section 31 of the *CCA*, a user's right, explicitly restricts them from doing so.¹⁹⁹ How should *users' rights*, as a rule of interpretation, guide us in determining whether exceptions to copyright infringement give rise to positive claims against copyright holders restricting their exercise or rather that they constitute privileges?

Whether exceptions to copyright infringement are rights or privileges requires a closer look at their nature and function. The essence of exceptions to copyright infringement is to allow lawful copyright users to perform certain acts on copyright works *without the authorization* of copyright holders with or without remuneration. As a precondition, it would seem that the performance of the act being constrained by copyright holders needs to be identifiable as falling under an exception to copyright infringement. While certain acts can be readily identifiable as falling under an exception to copyright infringement, in other instances it may not be clear for copyright users. The delineation of some exceptions is reasonably clear (*e.g.*, private copying regime, reproduction for private purposes, backup copies, exceptions relating to computer programs) while the contour of others is to be assessed on a case by case basis with the development and support of judge-made rules (*e.g.*, fair dealing, non-substantial part doctrine). Also, to maintain the integrity of the essence of exceptions to copyright infringement, *i.e.*, as not requiring the authorization of copyright holders, the circumvention of the obstacle to perform the act (*e.g.*, TPMs) should be both lawful and reasonably accessible.

The lack of certainty, *i.e.*, whether certain acts fall within the scope of an exception to copyright infringement, should not be a bar *per se* to qualify exceptions as rights giving rise to claims. The acts that are readily known to fall within an exception to copyright infringement should give rise to claims against copyright holders in case of obstacles to their exercise, while the acts for which it is uncertain

¹⁹⁶ In *CCH*, *supra* note 3 at paras. 48ff; *Bell Canada*, *supra* note 5 at paras. 8ff; *Alberta*, *supra* note 5 at paras. 12ff; the Supreme Court characterized exceptions to copyright infringement as users' rights and applied a broad interpretation of the fair dealing provisions to determine whether the alleged infringing acts fell under their scope. In *CRTC*, *supra* note 5 at para. 69, the court held that a value for signal regime set up by the CRTC was *ultra vires* of its powers as it, *inter alia*, effectively allowed broadcasters to control the simultaneous retransmission of works while section 31 of the *CCA*, *supra* note 2, an exception to copyright infringement explicitly restricts them from doing so. See also *SOCAN*, *supra* note 194.

¹⁹⁷ *CCH*, *supra* note 3 at paras. 48ff; *Bell Canada*, *supra* note 5 at paras. 8ff; *Alberta*, *supra* note 5 at paras. 12ff.

¹⁹⁸ *Alberta*, *supra* note 5 at para. 22; *Bell Canada*, *supra* note 5 at paras. 29, 30, 34.

¹⁹⁹ *CRTC*, *supra* note 5 at para. 69, referring to *CCA*, *supra* note 2, s. 31.

that the exception would apply could be ascertained later on, *e.g.*, through court judgments. However, the indeterminacy of the scope of exceptions to copyright infringement raises practical issues to the extent that users will be less prone to assert claims with respect to acts that do not clearly fall within the exceptions than the ones that do, for the fear of being held liable for copyright infringement. Such practical difficulties are not restricted to the exercise of rights giving rise to claims; they also apply to the exercise of privileges.

With respect to the obstacles posed by TPMs on the exercise of exceptions to copyright infringement, the introduction of TPMs does not necessarily foreclose the possibility that exceptions to copyright infringement can give rise to a positive claim by users against copyright holders to allow them to perform the lawful act, and therefore qualify as rights in Hohfeld terms. While I have argued above in this paper that the endorsement of TPMs in a manner that disregards the lawfulness of the intended use, strips exceptions to copyright infringement of one of their core features,²⁰⁰ it is not entirely clear whether the introduction of TPMs in the *CCA* in 2012 necessarily negates the proposition that exceptions to copyright infringement are rights giving rise to claims.²⁰¹ What is clearer is that the introduction of TPMs effectively creates a hierarchy between the exceptions to copyright infringement as I discuss below.²⁰²

A more central question to assess whether exceptions to copyright infringement are rights in Hohfeld terms is the legal base under which users can ascertain their claim against copyright holders. While the *CCA* provides myriad of remedies available to copyright holders when copyright infringement occurs,²⁰³ it does not provide any remedies for copyright users. Users could seek a declaratory judgment to confirm that certain uses fall under an exception to copyright infringement but this does not confirm *per se* the existence of a right giving rise to a legal claim. Users could ascertain claims under other laws, *e.g.*, consumer or sale of goods law breach of an implied obligation of fitness for purpose or quiet possession, but following the reasoning of the French case *Warner Brothers*,²⁰⁴ the claim could only be made on the basis that exceptions to copyright infringement are rights in Hohfeld terms,²⁰⁵ which remains unclear. The absence of readily identifiable legal procedures and designated remedies under which copyright users can make a claim against copyright users would be a more serious obstacle to qualify exceptions to

²⁰⁰ *I.e.*, not having to ask the authorization of copyright holders to perform the permitted acts. This is particularly true for users who do not have the technical ability or means to circumvent TPMs to perform the otherwise lawful act without the help of copyright holders. See the discussion on TPMs in Part 3.(b) of this article where I describe how TPMs introduced in 2012 the *CCA*, *supra* note 2 do not make the circumvention of usage-controls for the performance of lawful acts an infringement of copyright holders' exclusive rights.

²⁰¹ See the discussion in Part 4.(b)(i) and (ii), below.

²⁰² See the discussion in Part 4.(b)(i) and (ii) below.

²⁰³ *CCA*, *supra* note 2, ss. 34ff.

²⁰⁴ See *supra* note 185, 188 and 191.

²⁰⁵ See *supra* note 169.

copyright infringement as rights, than the potential lack of clarity of scope of the exceptions and the introduction in 2012 of TPMs in the *CCA*.

The recent amendments to the *CCA* raise questions about the scope of users' rights that vary between the different permitted uses that the *CCA* confers to copyright users. I explore next the scope of exceptions to copyright infringement as they are currently set out in the *CCA* by distinguishing between those exceptions that are not subject to the non-circumvention of TPMs and those exceptions that are.

(b) The Scope of Users' Rights Under the *CCA*

The amendments to the *CCA* in 2012 introduced the legal protection of TPMs.²⁰⁶ The amendments created various new infringements, including the circumvention of access-controls to copies of copyright works.²⁰⁷ No exception applies to acts of circumvention to perform acts that are specifically authorized by the *CCA*, such as fair dealing, private copying, and the four newly introduced user provisions that I discussed earlier in this article.²⁰⁸ By contrast, acts of circumvention of usage-control TPMs do not constitute a separate copyright infringement.²⁰⁹

The introduction of the legal protection of TPMs in the *CCA* raises additional areas of uncertainty regarding the scope of users' rights as described in *CCH*, at least when copyright holders distribute their works commercially with TPMs. Do the exceptions to copyright infringement or users' rights subsist in all cases when copyright holders make their copyright works available with TPMs or are they superseded by TPMs as they are now legally endorsed by the *CCA*? The following analysis does not apply to copies of copyright works that are made available without TPMs. I explore the scope of exceptions to copyright infringement as they are currently set out in the *CCA* by distinguishing between those exceptions that are not subject to the non-circumvention of TPMs and those exceptions that are.

(i) Exceptions to Copyright Infringement not Subject to the Non-Circumvention of Technological Protection Measures (TPMs)

The legal status of fair dealing, the non-substantial part doctrine, the private copying regime, computer program exceptions, exhaustion or first sale doctrine, and the newly introduced non-commercial user-generated content exception to copyright infringement are affected peripherally by the introduction of the legal protection of TPMs in the *CCA*.²¹⁰ On the one hand, consumers who circumvent access-control technologies and then perform an act that is a users' right, such as a fair dealing with the work, would be liable for the separate infringement of circumventing access-control technologies regardless of their subsequent lawful use of the copyright work.²¹¹ This infringement would have no bearing on the legality of the fair dealing, private copying, non-substantial part, exercise of computer program

²⁰⁶ See the discussion in Part 3.(b) of this article.

²⁰⁷ *CCA*, *supra* note 2, s. 41.1(1)(a).

²⁰⁸ See the discussion in Part 2 of this article.

²⁰⁹ *CCA*, *supra* note 2, s. 41.1(1)(a). See also *DMCA*, *supra* note 132, §1201.

²¹⁰ *CCA*, *supra* note 2, ss. 41 to 41.21.

²¹¹ *CCA*, *supra* note 2, s. 41.1(1)(a).

exception, exhaustion, first sale doctrine, or non-commercial user-generated content, which would be assessed on their own merits. On the other hand, consumers are not forbidden to circumvent user-control technologies to perform those users' rights.²¹² In other words, consumers are not infringing copyright holders' rights if they circumvent usage-control technologies, if their use of the copyright work is otherwise lawful, including if their dealing of the work is fair, or if they wish to exercise the newly introduced non-commercial user-generated content exception to copyright infringement.

The introduction of the legal protection of TPMs makes the nature of exceptions to copyright infringement or *users' rights* as characterized in *CCH* even more unclear than it was before. Assuming for the intents of our discussion that the Supreme Court judgment imposes positive obligations on copyright holders to allow the permissible uses (as per the Hohfeldian model of jural correlatives of rights and duties), the introduction of the legal protection of TPMs adds a new layer of complexity. One interpretation is that TPMs effectively allow copyright holders who apply usage-control TPMs to override *users' rights* (*rights* understood here as imposing positive obligations on copyright holders to allow permitted acts) and convert them to exceptions to copyright infringement or *privileges*. In essence, this amounts to a "halfway house" overriding effect. Another interpretation is that they leave users' rights as characterized by *CCH* (and as understood in Hohfeldian terms) more or less intact. While they confer more protection on copyright holders by creating additional hurdles against would-be unlawful users, they still require copyright holders to facilitate permitted uses by lawful users either proactively or at least at users' request. Even if the second interpretation on the effect of the TPMs introduced in the *CCA* preserves the effects of *CCH* better than the first interpretation, this illustrates how the TPM provisions effectively weaken users' rights. The TPM provisions do so by imposing an additional hurdle for consumers (who do not have the ability to circumvent the usage-controls) to ask permission when the essence of their right is that they do not need copyright holders' authorization in the first place, let alone the disincentive to exercise those rights and the additional legal uncertainty that the newly introduced legal protection of TPMs creates around the existence and scope of such users' rights.²¹³ This is unprecedented in Canadian copyright law.

(ii) *Exceptions to Copyright Infringement Subject to the Non-Circumvention of Technological Protection Measures (TPMs)*

The newly introduced legal protection of TPMs have more drastic effects on the scope of the users' rights examined here than the ones analyzed earlier,²¹⁴ for copyright works that are made commercially available with TPMs. In that case, the

²¹² *Ibid.* the circumvention act is an infringement only if it relates to access-control TPMs, not usage-control ones.

²¹³ Hargreaves, *supra* note 161 at 51 who discusses the detrimental effects that contract terms that restrict users' rights have on legal certainty about the very existence of those rights which makes him conclude that users' rights should be made mandatory.

²¹⁴ *I.e.*, the users' rights examined earlier are: fair dealing, the non-substantial part doctrine, the private copying regime, computer program exceptions, exhaustion or first sale

CCA makes the existence of those rights explicitly subject to not circumventing access-control and usage-control technologies.²¹⁵ Consumers and other users may, without the authorization of copyright holders, perform reproduction for private purposes, fix signals, record programs for later listening or viewing, and create backup copies *subject to* not circumventing access-control or usage-control technologies that restrict them from doing so.²¹⁶ If they do, the acts they perform no longer fall under these user rights provisions and may infringe copyright, unless they are authorized under other provisions of the CCA.²¹⁷ They may also be liable for the separate act of infringement for the circumvention of access-control technologies.²¹⁸

Through the effect of TPMs on the user rights examined in the present section, the CCA effectively creates a hierarchy of users' rights: unlike the users' rights examined earlier,²¹⁹ the newly introduced reproduction for private purposes, fixing signals, recording programs for later listening or viewing, and backup copies users' rights are "default rights" that exist subject to copyright holders' application of access-control or usage-control TPMs. The CCA explicitly allows copyright holders to override these rights through the use of TPMs. That is, even after consumers gain lawful access to the copyright work, copyright holders restraining consumers' uses through usage-control technologies effectively annihilate their right to exercise one of the exceptions to copyright infringement examined here without copyright holders' consent (and unlike the exceptions examined previously where circumvention of usage-controls does not amount to an infringement of copyright).²²⁰

The amendments brought on to the CCA in 2012 effectively created a hierarchy of users' rights, occasioned by the effect that TPMs have on certain exceptions to copyright infringement and not on others.²²¹ In the first category of users' rights examined above, users' circumvention of existing usage-control TPMs to perform their users' rights will not infringe copyright.²²² In the second category of users' rights examined above, users' circumvention of existing usage-control TPMs negates their user right, which is conditional on not circumventing existing TPMs.²²³

doctrine and the newly introduced non-commercial user-generated content exception to copyright infringement as discussed in Part 4.(b)(i) of this article.

²¹⁵ CCA, *supra* note 2, ss. 29.22(1)(c), 29.23(1)(b), 29.24(1)(c).

²¹⁶ *Ibid.*

²¹⁷ Such as under the fair dealing provisions of the CCA, *supra* note 2, ss. 29 to 29.2.

²¹⁸ CCA, *supra* note 2, s. 41.1(1)(a).

²¹⁹ *E.g.*, fair dealing, the non-substantial part doctrine, the private copying regime, computer program exceptions, exhaustion or first sale doctrine and the newly introduced non-commercial user-generated content rights examined earlier in Part 4.(b)(i) of this article.

²²⁰ See the discussion in Part 4.(b)(i) of this article.

²²¹ *I.e.*, the exceptions to copyright infringement are divided into two categories based on how the existence of the exception to copyright infringement is incumbent upon not circumventing any usage-control TPMs in one case (Part 4.(b)(ii), above) and not in the other (see Part 4.(b)(i), above).

²²² See the discussion in Part 4.(b)(i), above.

²²³ See the discussion in Part 4.(b)(ii), above.

Whether exceptions to copyright infringement are rights the restriction of which gives rise to a legal claim leads to another important question on the interaction between the *CCA* and contracts: are copyright exceptions or users' rights mandatory? Should a difference be made between negotiated and non-negotiated contracts?

(c) Are Exceptions to Copyright Infringement Mandatory?

Whether exceptions to copyright infringement are mandatory is a distinct field of inquiry from their nature as rights, privileges or defences discussed above, yet it is equally important to assess consumers' and other users' rights to commercial copies of copyright works.²²⁴ While exceptions to copyright infringement confer greater benefits on users if they constitute rights as opposed to privileges,²²⁵ potentially they are weakened significantly if they are not mandatory, especially with respect to consumer transactions subject to non-negotiated standard end-user agreements. A mandatory exception makes a contract term to the contrary unenforceable, while a non-mandatory user right can be the basis of a legal claim only to the extent that it has not been overridden by enforceable contract terms.²²⁶

The mandatory nature of exceptions to copyright infringement is an unsettled area of the law that is gaining a revived interest among copyright scholars, especially with the recent introduction of the legal protection of TPMs worldwide.²²⁷ Unlike other jurisdictions, the *CCA* does not explicitly state whether exceptions to copyright infringement are mandatory.²²⁸ Does this silence mean that exceptions to

²²⁴ See the discussion in Part 4.(a) and (b) of this article. Exceptions to copyright infringement as set out in the *CCA*, *supra* note 2 are either mandatory or non-mandatory rights, or mandatory or non-mandatory privileges or defences.

²²⁵ *Ibid.*

²²⁶ The significance of the mandatory nature of exceptions to copyright infringement is illustrated by the French case *Studio Canal* where the Court of Appeal had ruled that the private copying was an exception to copyright infringement (not a right) but that it was nonetheless mandatory; any attempts by Studio Canal to limit its exercise was non-enforceable. The Cour de cassation (Cass civ. 1st, 28 February 2006, (2006) Bull civ 05-15.824) overturned the Court of Appeal judgment (CA Paris, 22 April 2005 (2005) JurisData 2005-268600) which had forbidden Les Films Alain Sarde and Studio Canal to apply TPMs that were incompatible with private copying as an exception to copyright infringement, and held that the private copying exception was not mandatory.

²²⁷ I discuss TPMs in Part 3.(b) of this article. An entire book is devoted to the question of the mandatory nature of limitations to copyright holders' exclusive rights: see Guibault, *supra* note 107; see also De Werra, *supra* note 95; Dusollier 2007, *supra* note 127 at 495-511; Estelle Derclaye, "Copyright Contracts, Public Policy and Antitrust, in Christopher Heath and Kung-Chung Liu, eds., *Copyright Law and the Information Society in Asia*, IIC Studies (Oxford: Hart Publishing, 2006) at 167-226; U.K., Strategic Advisory Board for Intellectual Property, *The relationship between copyright and contract law*, by Martin Kretschmer, *et al.*, 2010, online: <<http://www.ipo.gov.uk/ipresearch-relation-201007.pdf>>.

²²⁸ For example, this is the case of Belgium copyright law under which most limitations of copyright are mandatory with an exception in the case of on-demand services: *Loi du 30 juin 1994 relative au droit d'auteur et aux droits voisins*, online:

copyright infringement are not mandatory? To what extent is the user right jurisprudence by the Supreme Court relevant to this question?

The consequence of the absence of explicit reference to the mandatory nature of exceptions to copyright infringement gives rise to diverging opinions.²²⁹ For some commentators having conducted a comparative study on the mandatory nature of exceptions to copyright infringement, no definitive conclusion can be derived from statutory silence on that question.²³⁰ For others, the answer varies based on the underlying justifications of the exceptions to copyright infringement. Exceptions that are justified by fundamental rights may not be overridden by contract, while the ones that are justified on other grounds, *e.g.*, public policy considerations may.²³¹ The same reasoning applies to exceptions to copyright infringement that are justified by market failures, *i.e.*, they may be overridden by contract to the extent that the market failure disappears with new technologies.²³² Relying on the underlying justifications of exceptions to copyright infringement to elucidate whether exceptions are mandatory may not be all that satisfactory given the debate and uncertainty around what the proper justifications should be.²³³

The jurisprudence by the Supreme Court on copyright user rights may support the proposition that exceptions to copyright infringement are mandatory, at least with respect to non-negotiated standard end-user agreements. Through *CCH, Bell Canada, Alberta* and *CRTC, users' rights* have become an important tool giving shape to the objective of the *CCA* to maintain a balance between competing interests, as it was enunciated by the same court in *Théberge*.²³⁴ In *CCH*, the Supreme

<<http://www.sacd.be/Legislation-belge-du-droit-d?lang=fr>>, art. 23bis. See also EC, Council and Parliament Directive 2009/24/EC of 23 April 2009 on the legal protection of computer programs, [2009] OJ L 111/16 [Directive 2009/24/EC] where some exceptions to copyright infringement related to computer programs cannot be limited by contract: art. 5(2) and (3).

²²⁹ See Guibault, *supra* note 107 at 214–240, 263–277; 291, 296–302: based on her analysis of E.U. and U.S. copyright and other laws, she concluded that there is no definite mean to determine whether limitations to copyright are mandatory or not, unless the relevant copyright laws state explicitly so. De Werra, *supra* note 95 at 336–336 takes the position in a European context, that copyright limitations that are grounded in fundamental rights (*e.g.*, freedom of expression) cannot be overridden by contract but that most other limitations can.

²³⁰ Guibault, *supra* note 107.

²³¹ De Werra, *supra* note 95 at 335–336. See also Dusollier 2007, *supra* note 127 at 507–509.

²³² De Werra, *supra* note 95 at 336–337.

²³³ The justifications of exceptions to copyright infringement are part of the broader discussion on the theoretical justifications of copyright and users' rights to copies of copyright works: I discuss the various theoretical justifications of copy ownership and users' rights in Chapdelaine, *supra* note 23 at 199–224. See also De Werra, *supra* note 95 at 333–335 on the debate on the theoretical justifications that withstand the right to make private copies, *i.e.*, the extent to which it is based on the right to privacy.

²³⁴ The objective of the *CCA*, *supra* note 2, to balance competing objectives as stated in *Théberge*, *supra* note 14 at para. 30 as referred to in the context of interpreting the scope of exceptions to copyright infringement in *CCH*, *supra* note 3 at para. 10; *Bell*

Court characterized exceptions to copyright holders' exclusive rights as users' rights, and not mere loopholes in the *CCA*.²³⁵ In *Bell Canada, Alberta* and *CRTC*, the Supreme Court reaffirmed the user rights' nature of exceptions to copyright infringement and provided further insights into the consequences of this qualification: exceptions as user rights need to be interpreted from the perspective of users, not copyright holders.²³⁶

Of particular significance to the discussion on the mandatory nature of exceptions is *CRTC*, where Rothstein J. for the majority, held that a value for signal regime set up by the CRTC was *ultra vires* of its powers because it effectively tempered with the balance set out by Parliament in the *CCA* between copyright holders' exclusive rights and exceptions to copyright infringement:

In my view, s. 21(1) represents the expression by Parliament of the appropriate balance to be struck between broadcasters' rights in their communication signals and the rights of the users, including BDUs, to those signals. It would be incoherent for Parliament to set up a carefully tailored signals retransmission right in the *Copyright Act*, specifically excluding BDUs from the scope of the broadcasters' exclusive rights over the simultaneous retransmission of their signals, only to enable a subordinate legislative body to enact a functionally equivalent right through a related regime. The value for signal regime would upset the aim of the *Copyright Act* to effect an appropriate "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" (*Théberge*, at para. 30).²³⁷

Commenting on the effects of the CRTC regime on the exception to copyright infringement set out in section 31 of the *CCA*, Rothstein J., for the majority, added:

Again, although the exception to copyright infringement established in s. 31 on its face does not purport to prohibit another regulator from imposing conditions, directly or indirectly, on the retransmission of works, it is necessary to look behind the letter of the provision to its purpose, which is to balance the entitlements of copyright holders and the public interest in the dissemination of works. The value for signal regime would effectively overturn the s. 31 exception to the copyright owners' s. 3(1)(f) communication right. It would disrupt the balance established by Parliament.²³⁸

The court held that the value for signal regime of the CRTC would "rewrite the balance between the owners' and users' interests as set out by Parliament in the

Canada, *supra* note 5 at paras. 8ff; *CRTC*, *supra* note 5 at paras. 64ff. See also *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45 at paras. 88-89.

²³⁵ *CCH*, *supra* note 3 at para. 48.

²³⁶ *Bell Canada*, *supra* note 5 at paras. 29ff and *Alberta*, *supra* note 5 at para. 22 whereby the Supreme Court stated that the applicability of exceptions to copyright infringement or users' rights needs to be assessed from the perspective of users. In *CRTC*, *supra* note 5 at paras. 36, 58, where the court reiterated that exceptions to copyright infringement are users' rights.

²³⁷ *CRTC*, *supra* note 5 at para. 67.

²³⁸ *Ibid.*, at para. 70.

*Copyright Act.*²³⁹ Is the effect by extension, of the majority judgment in *CRTC*, that copyright holders' exclusive rights and their exceptions may not be altered by contract? An important distinction needs to be made between the effects of a regime set out by the CRTC, a public body, and the one established by private parties through contract. However, *CRTC* may support the proposition that copyright holders cannot override exceptions to copyright infringement through mass market non-negotiated standard end-user agreements to the extent that the effect would be to alter Parliament's balance set out in the *CCA*, building on the "fundamental functional equivalence" reasoning by the Supreme Court.²⁴⁰

In parallel to the Supreme Court jurisprudence on users' rights, the 2012 amendments to the *CCA* bring another dimension on whether exceptions to copyright infringement are mandatory.²⁴¹ Given the silence of the *CCA* on the mandatory nature of exceptions to copyright infringement, and the uncertain interaction between the 2012 amendments to the *CCA* and the user rights jurisprudence by the Supreme Court, are their other indicators that can help determine whether exceptions to copyright infringement are mandatory? In my view, the inquiry as to whether exceptions to copyright infringement are mandatory requires a different analysis between two categories of users' rights that is based on their different interaction with the TPMs recently introduced in the *CCA*.

In the first category, *i.e.*, fair dealing, the non-substantial part doctrine, the private copying regime, and non-commercial user-generated content exceptions, there is a reasonable (but not conclusive) argument to be made that those rights may not be set aside by copyright holders through non-negotiated standard end-user agreements. The stronger public policy underpinnings that withstand the exercise of fair dealing,²⁴² the non-commercial user-generated content provisions in incentivizing the creation of new works,²⁴³ and the automatic levy that is built into the private copying regime²⁴⁴ could support the argument that these exceptions to copyright infringement may not be overridden at the will of copyright holders. The mandatory nature of these user rights, at least with respect to non-negotiated standard end-user agreements, would be more consistent with the Supreme Court juris-

²³⁹ *Ibid.*, at para. 76.

²⁴⁰ *CRTC*, *supra* note 5 at para. 82, where while the court in its majority judgment recognized that the regime set out by the CRTC could not amend the *CCA*, this is effectively what it did, pointing to the "fundamental functional equivalence between the proposed regime and a copyright."

²⁴¹ In particular, with the addition of TPMs, and with the hierarchy of user rights that the 2012 amendments to the *CCA* create by explicitly subjecting the existence of exceptions to copyright infringement to not circumventing access-control or usage-control TPMs: see the discussion further below in Part 4.(c) of this article.

²⁴² *CCA*, *supra* note 2, ss. 29–29.2, with respect to some or all of the required purposes for the application of the fair dealing provisions.

²⁴³ *CCA*, *supra* note 2, s. 29.21.

²⁴⁴ *CCA*, *supra* note 2, ss. 79ff.

prudence on user rights and the *CCA*'s objectives to preserve a balance between competing interests.²⁴⁵

The interaction of these user rights (*i.e.*, fair dealing, the non-substantial part doctrine, the private copying regime, and non-commercial user-generated content exception) with the legal protection of TPMs introduced in the *CCA* also suggests that there is recognition of the special status for these exceptions to copyright infringement. While their exercise may be impaired by the presence of TPMs, the existence of these users' rights is not subject to the respect of TPMs. It is true that the *CCA* does not specifically require copyright holders to "lift" their usage-control technologies to allow consumers and other users to perform those acts that are usually permitted without the authorization of copyright holders. At the same time, consumers are allowed to circumvent usage-control technologies without infringing copyright by doing so.²⁴⁶ These accommodations between the legal protection of TPMs and users' rights, albeit imperfect, may signal Parliament's intent to make room for the exercise of users' rights. As I discussed above, the interaction between the TPMs and the users' rights in question²⁴⁷ would convert them from mandatory rights to mandatory privileges.

The mandatory nature of the second category of user rights (*i.e.*, the reproduction for private purposes, fixing signals and recording programs for later listening or viewing and backup copies exceptions) is less probable although there is no clear answer to that question either. As discussed above, the *CCA* explicitly subjects the existence of those rights to the non-circumvention of access-control and usage-control TPMs.²⁴⁸ The second category of users' rights examined here being explicitly subject to TPMs effectively allows copyright holders to override these rights when they commercialize their works with TPMs. By virtue of an interpretation by extension, copyright holders could also override these users' rights by restrictive contract terms because Parliament already signalled the non-obligatory nature of these users' rights. In a more restrictive interpretation, these users' rights may only be restricted by TPMs: if Parliament intended that they could be restricted otherwise, it would explicitly have stated so.

Beyond the proper statutory interpretation of the consequences of the silence of the *CCA* on the mandatory nature of exceptions to copyright infringement, I want to reflect here on the underlying justifications for supporting or rejecting mandatory exceptions to copyright infringement and the implications that each position has on the overall objectives and framework of the *CCA*. The argument that is frequently invoked against making exceptions to copyright infringement mandatory is that it would impede freedom of contract and constrain the flexibility of how copyright holders exploit their exclusive rights.²⁴⁹ The arguments invoked

²⁴⁵ *Théberge*, *supra* note 14 at para. 30; *CMA*, *supra* note 1, Preamble, 6th paragraph. See the discussion above in Part 4.(c) of this article.

²⁴⁶ See the discussion in Part 4.(b)(i) of this article.

²⁴⁷ *I.e.*, the users' rights examined in Part 4.(b)(i) of this article: fair dealing, non-substantial part, private copying regime and non-commercial user-generated content.

²⁴⁸ See the discussion in Part 2.(b), (c), (d).

²⁴⁹ See, for example, Barry Sookman, "Copyright Reform for Canada: What Should We Do? A Submission to the Copyright Consultation (2009) 22 I.P.J. 1 at 12ff.

to support the mandatory nature of exceptions to copyright infringement include the need to preserve by extension in the private contractual sphere the balance between competing interests that is embedded in exceptions to copyright infringement in the statutory instrument through which the state confers exclusive rights on copyright holders. If Parliament believes that copyright holders' exclusive rights need to be constrained for the benefit of copyright users in specific instances, the scope of copyright holders' proprietary rights should not be extended at copyright holders' own discretion, in particular in the case of non-negotiated standard end-user agreements. Commentators including Ian Hargreaves recommended that exceptions to copyright infringement in the *UKCDPA* be made mandatory to ensure greater legal certainty.²⁵⁰ By clarifying that exceptions to copyright infringement are mandatory would not only ensure greater legal certainty at the statutory level, it would also provide greater legal certainty and uniformity on a transaction per transaction level, giving rise to greater efficiency in the market place.²⁵¹

There are difficulties with the proposition that freedom of contract and copyright holders' flexibility in how they exploit their exclusive rights justifies overriding the application of exceptions to copyright infringement. First, *freedom of contract* is for the greater part non-existent in the case of non-negotiated standard end-user agreements which are increasingly present in the commercialisation of copies of copyright works in consumer markets.²⁵² Second, the flexibility to exploit copyright works needs to be understood within the scope of the exclusive rights that are conferred by Parliament to copyright holders by the *CCA*. Exceptions or users' rights are by definition outside the scope of those exclusive rights. Exceptions to copyright infringement serve a specific purpose for the benefit of designated users or users in general. Agreeing that copyright holders may override the application of exceptions to copyright infringement is conceding that they may by their own volition (particularly in non-negotiated standard end-user agreements) expand the scope of the exclusive rights conferred and carefully delineated by Parliament.

Whether we should allow copyright holders to override exceptions to copyright infringement (whether in negotiated or non-negotiated agreements) brings us back to the nature of exceptions to copyright infringement that I investigated earlier in this article.²⁵³ If exceptions are rights, should users be able technically to transfer them, trade or waive them to the same extent that copyright holders do with their exclusive rights? There are at least two reasons why putting exceptions on an equal footing with copyright holders' exclusive rights is problematic. First, because

²⁵⁰ Hargreaves, *supra* note 161 at 51. See also Lucie Guibault, "Accommodating the Needs of iConsumers: Making Sure They Get Their Money's Worth of Digital Entertainment" (2008) 31 J. Cons. Policy 409 at 421ff.

²⁵¹ The argument of legal certainty can also be invoked to support that copyright statutes clearly specify that exceptions to copyright infringement are not mandatory. In such case, each commercial transaction would give rise to the uncertainty of whether the exception to copyright infringement prevails or whether it has been overridden by contract. Thus, the argument of greater legal certainty has more strength to support the proposition that exceptions to copyright infringement should be mandatory as this would give rise to one uniform scenario: exceptions to copyright infringement prevail.

²⁵² See the discussion in Part 3.(c), above.

²⁵³ See the discussion in Part 4.(a), above.

an important function of exceptions to copyright infringement is the defence component in case of alleged infringement, is that aspect a tradeable commodity?²⁵⁴ Second, to treat exceptions as tradeable commodities assumes that users would be aware that they are giving something up, *i.e.*, something that is outside copyright holders' exclusive powers and privileges to begin with. In reality, it is unlikely that non-negotiated standard terms and conditions for the commercialization of copyright works will notify users of their rights and on the status of the clauses overriding them.²⁵⁵ From a copyright policy perspective, the highly probable absence of knowledge of users in what they would be giving up at the time they conclude the transaction to access copyright works indicates the need for a different analysis depending on whether the contract is negotiated and whether there are asymmetries of bargaining power that need to be acknowledged and taken into account in regulating the effects of copyright holders terms of use on exceptions to copyright infringement.

If exceptions to copyright infringement need to be interpreted from the perspective of users as stated in *Bell Canada* and *Alberta*, how does that inform the determination of their mandatory nature? What are the functions of exceptions in the overall copyright framework? Can we achieve the intended goals when exceptions to copyright infringement may be overridden by copyright holders, especially in non-negotiated standard end-user agreements? By conceding to a diluted version of Parliament's intent to address the interests of copyright users, *i.e.*, one that is subject to non-negotiated contracts, are we effectively letting the public down on the actual scope of the users' rights, the list of which was expanded with the 2012 amendments to the *CCA*?²⁵⁶

In Canada, while the nature of exceptions to copyright holders' exclusive rights has been characterized as "rights" by *CCH*, their nature as such and scope remain uncertain, even more so with the 2012 amendments to the *CCA* that added the legal protection of TPMs. As I argued above, the legal protection of TPMs effectively institutes a hierarchy of users' rights. The mandatory nature of those rights is also uncertain. In the spirit of the jurisprudence of the Supreme Court on users' rights, and based on the differential treatment between exceptions to copyright infringement in the *CCA*, a reasonable argument may be made that they are mandatory in some cases, at least with respect to one of the two categories of users' rights explored here and when the contract that interferes with those rights is a non-negotiated standard end-user agreement.²⁵⁷

²⁵⁴ See Radin, *supra* note 92 at 168-170 who argues that intellectual property user rights should not be fully alienable in the context where "boilerplate" can "achieve widespread cancellation of user rights" which "contributes to democratic degradation."

²⁵⁵ See the discussion on a sample of non-negotiated standard terms of use for online copies of copyright works in Part 3.(c), above.

²⁵⁶ See *CMA*, *supra* note 1, Preamble. As Radin, *supra* note 92 at 40 observes, referring to the U.S. *Copyright Act* as an example: "When firms can easily divest recipients of entitlements that are part of a legislative regime arrived at only with much difficulty, debate and compromise, it makes a sham of the apparatus of democratic governance."

²⁵⁷ *E.g.*, under the fair dealing, the non-substantial part doctrine, the private copying regime, computer program exceptions, exhaustion or first sale doctrine and the newly

5. CONCLUSION

The 2012 amendments to the *CCA* and the Supreme Court jurisprudence on users' rights give an unprecedented place to the interests of copyright consumers and other users in copyright law. They provide a response and, to some extent, a counterweight to the progressive expansion of copyright. To explicitly detail in a statute specific exceptions to copyright infringement, may offer a greater safeguard to protect the interests of users relative to the unnamed, by default allowances that copyright users have as a result of the scope of copyright holders' exclusive rights. At the same time, a closer examination of the nature, scope, and mandatory nature of copyright enumerated exceptions or users' rights in Canada reveals an overly complex web of interactions between the *CCA*, TPMs and contracts, that undermines the very existence of users' rights as we have come to describe exceptions to copyright infringement since *CCH*.²⁵⁸ The less than certain nature of copyright users' rights in the *CCA* is a somewhat desolate situation in light of the recent wave of Supreme Court jurisprudence that displays a greater attentiveness to interests competing with the exclusive rights of copyright holders, *i.e.*, the interests of users and the public.²⁵⁹ The unclear nature of users' rights brought on by the loose ends of their interactions with TPMs and contracts provides a less cheerful perspective on the recent major amendments to the *CCA* that give place more than ever before to individual users and consumers.²⁶⁰

The constraints that are permitted or not disallowed on users' rights in the *CCA*, leading to questions about their true nature and scope, are not mere academic questions. In addition to leaving consumers in an undesirable state of legal uncertainty and exposing them to increased risk of litigation,²⁶¹ the permitted constraints on their rights dictate to a large extent how copyright holders and intermediaries develop their business models and their offerings to consumers.²⁶² The unsettled nature of exceptions to copyright infringement, or the so-called users' rights, has rippling effects on the scope of copyright consumers' rights to commercial copies of copyright works as a whole. As an important legal basis to delineate copyright consumers' rights, the *CCA*'s uncertain rendering of users' rights can also have a rippling effect on the effective support that property and consumer law offers with respect to copyright consumers' claims to commercial copies of copyright works.

The legal landscape of copyright consumers is a maze: the paths of users' rights include many dead ends. What Parliament created and gave to consumers, it also gave explicit allowance to copyright holders to take back from them, or turned

introduced non-commercial user-generated content rights, as they are discussed in Part 2 and in Part 4.(b)(i) and (c) of this article.

²⁵⁸ *Supra* note 3.

²⁵⁹ *Théberge*, *supra* note 14; *CCH*, *supra* note 3; *Bell Canada*, *supra* note 5; *Alberta*, *supra* note 5; *CRTC*, *supra* note 5.

²⁶⁰ See the discussion in in Part 2 and Part 4 of this article.

²⁶¹ See Hargreaves, *supra* note 161 at 51.

²⁶² On a related idea, see Liu, "Enabling Copyright Consumers" (2007) 22 Berkeley Tech. L.J. 1099, where the author describes how clearer affirmation of users' rights would support the lawfulness of copyright content intermediaries' act which in turn enable and offer greater support to copyright consumers.

its head away from copyright holders' ability to do so. Of the four new user provisions, three may be explicitly overridden by TPMs. This compromises significantly their status as rights and makes their mandatory nature less likely. As to other exceptions to copyright infringement, their nature and scope as rights are debatable and so is their mandatory nature. With all these questions in mind, the so-called copyright users' rights, even when they apply, do not provide much solace to copyright consumers because of all the instances when they may not be applicable and the legal uncertainty that results therefrom.

