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Locking Out Lawful Users: Fair Dealing and Anti-Circumvention in Bill C-32

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Locking Out Lawful Users:

Fair Dealing and Anti-Circumvention in Bill C-32

Carys Craig

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A. INTRODUCTION

Fair dealing and other exceptions to copyright owners' rights perform a vital role in the copyright system: they permit substantial uses of copyright-protected works, which would otherwise be infringing, in order to ensure that copyright does not defeat its own ends. By creating the necessary "breathing space"¹ in the copyright system, the fair dealing defence acknowledges the collaborative and interactive nature of cultural practices, recognizing that copyright-protected works can be used, copied, transformed, and shared in ways that actually further—as opposed to undermine—the purposes of the copyright system.² If copyright is to be justified as a means to encourage the creation and exchange of intellectual

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- 1 In the famous US Supreme Court decision of *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, www.law.cornell.edu/copyright/cases/510_US_569.htm, 114 S. Ct. 1164 (1994) at 579 [*Campbell* cited to U.S.], Justice Souter referred to the "fair use doctrine's guarantee of breathing space within the confines of copyright." The need for breathing space flows from "the need simultaneously to protect copyrighted material and to allow others to build upon it": (*ibid.* at 575).
 - 2 In this sense, the concept of fair dealing embraces the dilemma that pervades all aspects of copyright policy-making: the need to minimally restrict the general dissemination and use of cultural products, and maximally promote both knowledge production and the distribution of authorized copies of protected works. See Economic Council of Canada, *Report on Intellectual and Industrial Property* (Ottawa: Public Works and Government Services Canada, 1971) at 31–35.

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works to the benefit of authors and society as a whole, then a suitable fair dealing defence is an essential part of that justification.

Unfortunately, the fair dealing defence in Canada has always lacked the strength that this role requires of it. For many years, the restrictive contours of the defence as framed in the *Copyright Act*, combined with a judicial tendency to reject the defence out of hand, ensured that fair dealing was rarely invoked, and seldom applied. The fate of fair dealing seemed to improve with the now famous case of *CCH Canadian Ltd. v. Law Society of Upper Canada* [CCH],³ in which the Supreme Court of Canada acknowledged the importance of the defence in striking the necessary balance between owners' rights and users' interests. In the copyright reform process that has unfolded since that ruling, I hoped (as did many others) to see an expansion in the statutory formulation of fair dealing to allow it to better perform this vital role.⁴ Of the three most recent attempts at copyright reform in Canada,⁵ only the latest, Bill C-32, includes any significant improvement to the fair dealing provisions of the *Copyright Act*.⁶ These potential improvements do not go far enough, in my view, but there is a larger problem looming than the definitional boundaries of fair dealing: the proposed protection of technological protection measures [TPMs] or "digital locks" threatens to undermine the significance of fair dealing and other exceptions by making them ineffectual in the face of technical controls.

In what follows, I will briefly outline the nature and role of fair dealing in Canadian copyright policy post-CCH, and then I will examine the potential impact of the proposed fair dealing and anti-circumvention

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3 2004 SCC 13, www.canlii.org/ca/cas/scc/2004/2004scc13.html, [2004] 1 S.C.R. 339 [CCH cited to S.C.R.].

4 See Carys Craig, "The Changing Face of Fair Dealing in Canadian Copyright Law: A Proposal for Legislative Reform" in M. Geist, ed., *In the Public Interest: The Future of Canadian Copyright Law*, (Toronto: Irwin Law, 2005), at 437–61, www.irwinlaw.com/pages/content-commons/the-changing-face-of-fair-dealing-in-canadian-copyright-law--a-proposal-for-legislative-reform---carys-craig ["Changing Face of Fair Dealing"]. See also, Laura J. Murray & Samuel E. Trosow, *Canadian Copyright Law: A Citizen's Guide* (Toronto: Between the Lines, 2007).

5 Bill C-60, *An Act to Amend the Copyright Act*, first reading 20 June 2005, www.parl.gc.ca/PDF/38/1/parlbus/chambus/house/bills/government/C-60_1.PDF; Bill C-61, *An Act to Amend the Copyright Act*, first reading 12 June 2008, www2.parl.gc.ca/housepublications/publication.aspx?docid=3570473&language=e&mode=1&file=14; Bill C-32, *An Act to Amend the Copyright Act*, first reading 2 June 2010, www2.parl.gc.ca/HousePublications/Publication.aspx?Docid=4580265&file=4.

6 *Copyright Act*, R.S.C. 1985, c. C-42, <http://laws.justice.gc.ca/en/C-42> [*Copyright Act*].

provisions of Bill C-32. I will suggest that the minimal expansion of fair dealing to cover “new” purposes, as well as the addition of a few new user exceptions, while welcome, is insufficient to ensure the breadth of applicability that the copyright balance demands; but more importantly, I will argue, the extensive protection of TPMs without any regard for lawful uses of copyright material has the potential to effectively eviscerate fair dealing in the digital age. Acts permitted in relation to owned content can be prevented by the use of TPMs, and rendered unlawful by proposed anti-circumvention provisions. To extend legal protection to TPMs in a manner that fails to guard the contours of fair dealing and user rights from technological encroachment is to undermine the social goals of the copyright system, and to relinquish the policy balancing act performed in their name.

The following section offers an introduction to the fair dealing defence and the role that it plays in maintaining Canada’s “copyright balance.” Part C considers the drawbacks of the existing fair dealing provisions in Canada’s *Copyright Act* while Part D goes on to canvass the proposed additions to fair dealing and other user exceptions found in Bill C-32. Part E tackles the problematic interaction of copyright exceptions and TPMs that control access to, and the uses that can be made of, protected content. The new anti-circumvention prohibitions found in Bill C-32 and their relation to the fair dealing and user exception provisions will be explored in Part F. Finally, in Part G, I will suggest possible ways in which Bill C-32 could be revised in order to safeguard user rights and maintain an appropriate balance in Canada’s copyright system going forward.

B. THE ROLE OF FAIR DEALING IN CANADA’S COPYRIGHT SYSTEM

Fundamentally, copyright policy assumes that the restriction of the public’s use of works through the creation of private rights can further the public’s interest in the widespread creation and distribution of works. The limits to these private rights, defined by fair dealing and other exceptions—and circumscribed by the boundaries of the public domain—are therefore essential to ensure that the copyright system does not defeat its own ends.

In recent years, the Supreme Court of Canada has articulated the purposes of Canadian copyright law, and has acknowledged the inherent tensions that these purposes present, as well as the vital role that fair dealing and the public domain must play in alleviating them. In *Théberge*

v. Galerie D'Art du Petit Champlain Inc.,⁷ the Supreme Court identified copyright's purpose as "a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator." The Court went on to explain that "[t]he proper balance among these and other public policy objectives lies not only in recognizing the creator's rights but in giving due weight to their limited nature."⁸

The *Théberge* decision represented a crucial moment in Canadian copyright policy, cementing a vision of copyright as a system intended not only to protect the rights of authors and their assignees, but also (and equally) to further the wider public interest. In describing how the metaphorical balance might be struck, it brought into the equation and attributed "due weight" to the limits of the rights that the system protects. Regarded in this way, the boundaries and limitations of the copyright interest are not external to copyright policy—they are a central part of how the system works.

The significance of this insight became clear with the Supreme Court's ruling in *CCH*:

[T]he fair dealing exception, like other exceptions in the Copyright Act, is a user's right. In order to maintain the proper balance between the rights of a copyright owner and users' interests, it must not be interpreted restrictively. As Professor Vaver has explained, "User rights are not just loopholes. Both owner rights and user rights should therefore be given the fair and balanced reading that befits remedial legislation."⁹

In the name of balance, the Court generously interpreted the fair dealing provisions in order "to ensure that users' rights are not unduly constrained."¹⁰ Against the backdrop of copyright's public purpose, fair dealing was recognized to be central—not exceptional—to the system. Chief Justice McLachlin wrote: "the fair dealing exception is perhaps more properly understood as an integral part of the *Copyright Act* than simply a defence. Any act falling within the fair dealing exception will not be an infringement of copyright."¹¹ Put otherwise, fair dealing does not merely

7 2002 SCC 34, www.canlii.org/ca/cas/scc/2002/2002scc34.html, [2002] 2 S.C.R. 336, (2002), 210 D.L.R. (4th) 385 [*Théberge* cited to S.C.R.].

8 *Ibid.* at paras. 30–31, Binnie J.

9 *CCH*, above note 3 at para. 48.

10 *Ibid.* at para. 51. The Court allowed the defendant Library to claim a "research" purpose in the provision of copying services to its patrons.

11 *Ibid.* at para. 48.

excuse infringement, but rather *defines* it; the owner's rights end where the user's rights begin. Following the *CCH* decision, it should be clear that, rather than a marginal exception to the norms of Canadian copyright law, the fair dealing defence is an instantiation of the public-author balance; one that is necessary to support the normative claims so often made on behalf of the system. Drassinower explains: "the defence of fair dealing . . . is to be understood and deployed not negatively, as a mere exception, but rather positively, as a user right integral to copyright law."¹²

It is also important to underscore, at this juncture, the potential significance of the term "users' rights" employed by the Supreme Court. Much has been made of this terminology and the equality it brings to the balancing of authorial and public claims.¹³ For the purposes of my argument, however, its importance lies primarily in the positive nature of a "user right," in contrast to the negative nature of mere defences, justifications, exemptions or even privileges. A basic Hohfeldian analysis¹⁴ reveals that, when conceptualized as a privilege, fair dealing establishes only the liberty or freedom to act: the owner has no right to prevent the privileged activity, and the user owes no duty to refrain from the activity. But conceptualized as a right, fair dealing establishes a corresponding *duty* on behalf of the owner to honour the user's right: in this analysis, the user has a *positive* claim-right against the copyright owner to be permitted to deal fairly with the work. Where fair dealing is recognized as a "user right," it can be argued that copyright owners have a correlative *obligation* to permit users' fair dealings with their works.

C. THE INADEQUACY OF THE EXISTING FAIR DEALING PROVISIONS

The existing fair dealing defence permits fair dealings with copyright protected works for the purposes of research or private study, criticism or review, or news reporting.¹⁵ Acts undertaken for these purposes that would *prima facie* constitute infringement are nonetheless lawful if found to be

12 Abraham Drassinower, "Taking User Rights Seriously," in M. Geist, ed., *In the Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005), 462–79, www.irwinlaw.com/pages/content-commons/taking-user-rights-seriously---abraham-drassinower at 467.

13 Craig, "Changing Face of Fair Dealing," above note 4 at 454–55.

14 See W.N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (New Haven, CT: Yale University Press, 1946).

15 *Copyright Act*, above note 6, ss. 29–29.2.

fair, and if—in the case of criticism, review or news reporting—there is sufficient acknowledgement of the source and author of the protected work. As such, Canada’s fair dealing provisions do not provide a general, open-ended defence for any dealing that can be regarded as “fair”; the fairness of a particular dealing is relevant to infringement proceedings only if it was undertaken for at least one of these specified purposes.¹⁶ In addition, where the dealing is for any purpose other than research or private study, the defence can succeed only if there has been sufficient acknowledgement of the source of the copied work.¹⁷ There are therefore three hurdles to be met by a defendant who claims to have dealt fairly with a work: first, the purpose must be one of those listed in the Act; second, the dealing must be fair; and finally, sufficient acknowledgement must have been given where required by the Act. Failure to overcome any one of these hurdles causes the defence to fail.

This triple-tiered approach stands in contrast to the American equivalent of “fair use.” Under the US law, the purposes listed in the provision are not exhaustive,¹⁸ and failure to acknowledge source is not a bar to the defence. The US fair use provision is open-ended, and the overarching consideration for the courts is one of fairness; fairness is to be determined with reference to a non-exclusive list of relevant factors such as the purpose and character of the use, the nature of the protected work, the amount of the work that has been used, and the likely consequence of this use upon the market for the original.¹⁹

16 *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2002 FCA 187, www.canlii.org/en/ca/fca/doc/2002/2002fca187/2002fca187.html, [2002] 4 F.C. 213, (2002), 212 D.L.R. (4th) 385 at para. 127 [*CCH (FCA)* cited to F.C.]. Linden J. explained the significance of the closed list of purposes in the Act: “If the purpose of the dealing is not one that is expressly mentioned in the Act, this Court is powerless to apply the fair dealing exemptions.”

17 Both ss. 29.1 and 29.2 of the *Copyright Act*, above note 6, contain the caveat: “. . . if the following are mentioned: the source: and if given in the source, the name of the author, in the case of a work, performer, in the case of a performer’s performance, maker, in the case of a sound recording, or broadcaster, in the case of a communication signal.”

18 17 U.S.C. § 107 (1976), www.copyright.gov/title17/92chap1.html#107 provides: “The fair use of a copyright work . . . , for purposes *such as* criticism, comment, news reporting, teaching . . . , scholarship, or research, is not an infringement of copyright” [emphasis added].

19 *Ibid.*: “In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include: 1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; 2) the nature of the copyrighted work; 3) the amount and the

The significance of this difference becomes apparent when one considers, for example, the case of parody. Under the US fair use model, parodies of protected works will typically enjoy the protection of the fair use defence because they represent precisely the kind of “transformative,” creative use that copyright is designed to foster.²⁰ In Canada, the position is far less clear. In *Cie Générale des Établissement Michelin-Michelin & Cie. v. C.A.W. — Canada*,²¹ it was held that the defendants’ parody of a corporate logo could not be included within the category of “criticism.”²² Justice Teitelbaum observed that, in contrast to the US position, the exceptions to acts of copyright infringement are “exhaustively listed as a closed set,” and inferred from this that “[t]hey should be restrictively interpreted as exceptions.” Parody was thought to require an explicit new exception because it did not expressly appear in the closed set of permitted purposes.²³ However, from a copyright policy perspective, the transformative value of parody and the power that it wields as a means of social critique make a strong case for its inclusion in the fair dealing defence.²⁴ The precarious situation of parody in Canadian copyright law — particularly compared to the room accorded to such uses in the US regime — thus exemplifies the shortcomings of a closed-purpose approach, and underscores the general

substantiality of the portion used in relation to the copyrighted work as a whole; and 4) the effect of the use upon the potential market for or value of the copyrighted work.”

20 In *Campbell*, above note 1 at 577, the court explained that fair use “permits and requires courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.”

21 [1997] 2 F.C. 306, www.canlii.org/en/ca/fct/doc/1996/1996canlii3920/1996canlii3920.html, (1997), 71 C.P.R. (3d) 348 (F.C.T.D.) [*Michelin* cited to F.C.].

22 *Ibid.* at para. 66: “[P]arody does not exist as a facet of ‘criticism,’ an exception to infringement in Canadian copyright law. I do accept that parody in a generic sense can be a form of criticism; however, it is not ‘criticism’ for the purposes of the *Copyright Act* as an exception under the fair dealing heading.”

23 *Ibid.* at para. 63. “[E]xceptions to copyright infringement should be strictly interpreted. I am not prepared to read in parody as a form of criticism and thus create a new exception.” The defendants’ position also suffered at the third hurdle of the fair dealing inquiry: the additional requirement that the source be mentioned. The implicit acknowledgement of source or allusion to the original that is characteristic of parody was held to be insufficient mention for the purposes of the Act (*ibid.* at paras. 68–69). Also, the Court held that the parody was unfair because it held the plaintiff’s work up to ridicule (*ibid.* at para. 70).

24 As explained by Justice Souter in *Campbell*, above note 1 at 579: “[T]he goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine’s guarantee of breathing space within the confines of copyright.”

inadequacy of Canada's current fair dealing defence to advance the public purposes of copyright.

While the exclusion of parody in *Michelin* was determined by a narrow interpretation of enumerated purposes, the Supreme Court has now opined that these purposes "should not be given restrictive interpretation."²⁵ The large and liberal reading of purposes advocated by the Court in *CCH* could permit, one would think, the inclusion of parody within the category of "criticism."²⁶ Whether Canadian courts will agree with this assessment, however, remains to be seen. The British Columbia Supreme Court was recently presented with an opportunity to consider the inclusion of parody as a fair dealing purpose post-*CCH*, but it simply ruled, citing Justice Teitelbaum in *Michelin*, that "parody is not an exception to copyright infringement under the *Copyright Act*, and therefore does not constitute a defence."²⁷ It is also notable that, in *Michelin*, the defence would have failed even if the use had been held to be for a permitted purpose because the treatment of the plaintiff's work was considered unfair,²⁸ and the implicit acknowledgement of source, insufficient.²⁹ As such, even if future courts see fit to bring parodies within the fair dealing purposes on the basis of *CCH*, the three hurdle test presents other grounds upon which parodists could be prevented from successfully claiming the defence.

There are many examples of activities that may benefit from the fair use doctrine in America, but fail to squeeze within the tight confines of statutory fair dealing: educational and classroom uses may be excluded if they do not fit the definition of "private study or research";³⁰ both time- and space-shifting content may be excluded if they do not fit the defin-

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²⁵ *CCH*, above note 3 at para. 54.

²⁶ See for example Giuseppina D'Agostino, "Healing Fair Dealing: A Comparative Analysis of Canadian Fair Dealing to U.K. Fair Dealing and U.S. Fair Use" (2008) 53(2) McGill L.J. 309, <http://lawjournal.mcgill.ca/documents/dAgostino.pdf> at 359: "In light of *CCH*'s liberal interpretation of the enumerated grounds, it may be argued that 'criticism' could now encompass parody."

²⁷ *Canwest Mediaworks Publications Inc. v. Horizon Publications Ltd.*, 2008 BCSC 1609 at para. 14.

²⁸ *Michelin*, above note 21, at paras. 68-69.

²⁹ *Ibid.* at para. 70. I have written more extensively about the shortcomings of the *Michelin* ruling elsewhere. See Craig, "Putting the Community in Communication: Dissolving the Conflict between Freedom of Expression and Copyright" (2006) 56(1) U.T.L.J. 75, www.jstor.org/pss/4491681.

³⁰ *Boudreau v. Lin* (1997), 150 D.L.R. (4th) 324, <http://www.canlii.org/en/on/onsc/doc/1997/1997canlii12369/1997canlii12369.html>, (1997), 75 C.P.R. (3d) 1 (Ont. S.C.) at 335 [*Boudreau* cited to D.L.R.]: "The material was distributed to all the members of the class of students. This does not qualify as 'private study.'"

itions of “private study” or “review”;³¹ transformative practices such as the creation of “fan fiction” or “machinima,” appropriation art or digital sampling may be excluded if they fail to fit the definition of “criticism or review”;³² and so on. The fundamental problem is that, no matter how large and liberal the interpretation of a defendant’s purposes, not all fair dealings will be subsumable into the specified purposes: there is a limit to how far a “users’ rights” approach can stretch the finite meanings of words like “research,” “private study,” “criticism,” “review” and “news reporting.” The power to achieve the appropriate balance between owners’ and users’ rights is therefore beyond the reach of Canada’s courts. Rather than struggling to fit users within restrictive categories, the central concern of any fair dealing inquiry should be “to see . . . whether the new work merely ‘supersede[s] the objects’ of the original creation . . . or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.”³³ Copyright law, with the help of fair dealing, should aim to encourage the creation of new expressions, meanings and messages, even if this sometimes means permitting the use of protected expression.³⁴

D. NEW EXCEPTIONS IN BILL C-32

On 2 June 2010, the Canadian government released its much anticipated copyright reform bill, Bill C-32, accompanied by claims that this legislation offers “a fair, balanced, and common-sense approach, respecting both the rights of creators and the interests of consumers in a modern

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31 See *Tom Hopkins International Inc. v. Wall & Redekop Realty Ltd.* (1984), 5 W.W.R. 555, www.canlii.org/en/bc/bcsc/doc/1984/1984canlii519/1984canlii519.html, (1984), 1 C.P.R. (3d) 348 at 352–53 (B.C.S.C.): “as interesting as the time-shifting concept may be, this does not seem to be a realistic exception to the clear language contained in our legislation.” See also Craig, above note 4 at 457–58.

32 See for example Rebecca Tushnet, “Payment in Credit: Copyright Law and Sub-cultural Creativity” (2007) 70 *Law & Contemp. Prob.* 135; Graham Reynolds “All the Game’s a Stage: Machinima and Copyright in Canada” (forthcoming 2010) *Journal of World Intellectual Property*.

33 Justice Souter in *Campbell*, above note 1 at 579.

34 As Justice Binnie wrote in *Théberge*, above note 7 at para. 32: “[E]xcessive control by holders of copyrights and other forms of intellectual property may unduly limit the ability of the public domain to incorporate and embellish creative innovation in the long-term interests of society as a whole, or create practical obstacles to proper utilization. This is reflected in the exceptions to copyright infringement enumerated in ss. 29 to 32.2, which seek to protect the public domain in traditional ways such as fair dealing.”

marketplace.”³⁵ In particular, with respect to users and consumers, it was claimed that the bill would “legitimiz[e] Canadians’ everyday activities.”³⁶ The bill is said to achieve this through the inclusion of several new exceptions from which users may benefit. Perhaps most notably, additional purposes have been added to the fair dealing defence, which may address several of the concerns raised above. Section 29 of the Act is to be expanded to include “fair dealing for the purpose of research, private study, education, parody or satire.”³⁷

The inclusion of parody and satire as enumerated fair dealing purposes will overcome many of the doubts and concerns that have persisted as a result of the *Michelin* ruling even after the *CCH* case. Indeed, the fact that the categories in section 29 are not subject to an acknowledgement requirement (in contrast to dealings for the purpose of criticism) further secures the position of parody as a potentially permitted use. Moreover, by including “satire” specifically, the bill has wisely avoided the artificial and problematic distinction between parody and satire that has arisen in the US context.³⁸ This distinction (between parodic works that specifically target the original and satirical works that use protected material to comment on other facets of society) is difficult for even literary theorists to maintain or apply.³⁹ It is also difficult to justify from a policy perspective; excluding satire from the realm of fair use silences a powerful and socially valuable form of critical expression for which permission is unlikely to

35 Balanced Copyright, News Release, *Government of Canada Introduces Proposals to Modernize the Copyright Act*, 2 June 2010, www.ic.gc.ca/eic/site/crp-prda.nsf/eng/h_rpo1149.html.

36 Balanced Copyright, *Copyright Modernization Act — Background*, www.ic.gc.ca/eic/site/crp-prda.nsf/eng/h_rpo1151.html.

37 Bill C-32, above note 5, s. 21.

38 This distinction emerged from the *Campbell* decision in which Justice Souter wrote: “Parody needs to mimic an original to make its point, and so has some claim to use the creation of its victim’s (or collective victims’) imagination, whereas satire can stand on its own two feet and so requires justification for the very act of borrowing” (above note 1, at 580–581). The Ninth Circuit, in particular, has maintained a strict distinction between parody and satire, such that the classification of a work can determine the availability of a fair use defence. See for example *Dr. Seuss Enters. v. Penguin Books USA*, 109 F.3d 1394 (9th Cir. 1997).

39 Compare E. Gredley and S. Maniatis, “Parody: A Fatal Attraction? Part 1: The Nature of Parody and its Treatment in Copyright” [1997] 7 EIPR 339 at 343: “Basing a legal theory on the distinction between [parody and satire] may, however, lead the courts into the need to devise near impossible distinctions between satiric parodies and parodic satires.”

be granted by the copyright owner.⁴⁰ The explicit inclusion of both parody and satire within section 29 is therefore a welcome amendment to the Act, and one that advances the goals of copyright law by making space for transformative downstream uses of protected material.

The addition of “education” as a free-standing purpose is also potentially significant to the extent that it overcomes the possible limitations that may have been found to inhere in the definition of “private study.” While the latter category left open contentious questions about the applicability of fair dealing to copies made for study purposes in the context of *classes* of students,⁴¹ the inclusion of “education” as a permitted purpose would undermine the validity of such tenuous but crucial distinctions. Copies made for educational or instructional purposes will be able to clear the first hurdle of the fair dealing inquiry, and the application of the defence will turn, then, on the fairness of the use that is made in light of all the relevant circumstances.⁴²

Also welcome is the creation of a new exception, for “non-commercial user-generated content.”⁴³ Sometimes referred to as “the YouTube exception,” this would permit the use of legitimately acquired material in the creation of new works, as well as their use and dissemination, provided that the user’s purposes are not commercial in nature, the source is mentioned where reasonable, and the new work has no “substantial adverse effect” on the exploitation of the original. The government’s fact sheet offers as examples “making a home video of a friend or family member dancing to a popular song and posting it online, or creating a ‘mash-up’ of video clips.”⁴⁴ In our digital environment, facilitated by new technologies and their accessibility, the transformative use of cultural content—mixing, mashing, (re)making and disseminating—is increasingly fundamental to the processes of cultural engagement and democratic participation. The creation of this exception goes some distance towards acknowledging and making space for this new reality. Of course, the user’s rights in this

40 See Nicolas Suzor “Where the Bloody Hell does Parody Fit in Australian Copyright Law?” (2008) 13 *Media & Arts Law Review* 218, 238–43. See also Daniel Austin Green “Gulliver’s Trials: A Modest Proposal to Excuse and Justify Satire” (2006) 11 *Chapman Law Review* 283.

41 See for example, *Boudreau*, above note 29.

42 *CCH*, above note 3 at para. 53: The factors to consider include: the purpose of the dealing, the character of the dealing, the amount of the dealing, alternatives to the dealing, the nature of the work, and the effect of the dealing on the work.

43 C-32, above note 5, s. 29.21.

44 Balanced Copyright, *What the New Copyright Modernization Act Means for Consumers*, www.ic.gc.ca/eic/site/crp-prda.nsf/eng/rp01186.html [Balanced Copyright].

instance remain subject to the commercial (and attribution) interests of the owner of the original content, such that the owner's rights essentially take priority. Nonetheless, this is an important addition to the exceptions offered by the Act, both from a practical perspective (legalizing common, non-commercial creative practices), and from a policy perspective (limiting owners' legal claims where the full enforcement of their rights would unduly restrain creative play and upset the copyright balance).

I also raised, in the preceding section, concerns about legal limits on common space-shifting and format-shifting practices. The new bill addresses these concerns to a significant extent, creating exceptions for "reproduction for private purposes"⁴⁵ and for "fixing signals and recording programs for later listening or viewing."⁴⁶ A new exception is also added for the making of "backup copies" of a lawfully owned or licensed copy of a protected work.⁴⁷ Each of these sections is subject to a fairly extensive list of limitations, however, which are said "[t]o ensure that the legitimate interests of rights-holders are respected."⁴⁸ Thus, for example, a person recording a program for later viewing can benefit from the exception only if "the individual keeps the recording no longer than is reasonably necessary in order to listen to or view the program at a more convenient time."⁴⁹ A person reproducing a work for private purposes can benefit from an exception only if that copy or reproduction is destroyed before giving away or selling the original.⁵⁰ Perhaps most importantly, however, all three defences are unavailable where the user has circumvented a technological protection measure in order to perform the permitted action.

I will return to consider more fully the interaction of exceptions and TPM protection in the following section. Before I do so, however, it seems important to identify what are, in my view, the shortcomings of the revisions to the fair dealing provisions and consumer exceptions even in their own right. For one thing, the additions to section 29 do not give much, if anything, more than that to which users would be entitled under the existing provisions. Educational uses are readily assumable within the category of "research or private study," particularly when these terms are given a suitably liberal reading. Parody and satire can be easily brought

45 C-32, above note 5, s. 29.22.

46 *Ibid.*, s. 29.23.

47 *Ibid.*, s. 29.24.

48 Balanced Copyright, above note 44.

49 C-32, above note 5, s. 29.23(d).

50 *Ibid.*, s. 29.22(4). A similar condition exists for reproductions made for back-up purposes: s. 29.24(3).

within the category of “criticism,” broadly interpreted. The explicit inclusion of these purposes is certainly preferable to relying upon an appropriate interpretation of existing categories by the courts, but it is properly understood as an affirmation of the state of current fair dealing doctrine post-*CCH*, and not the creation of “new” exceptions as some would have it portrayed.

Exceptions for user-generated content, back-up copies, copies for personal use and for later listening and viewing can more properly be characterized as “new,” excluded as they likely are from the limited fair dealing purposes. However, from a common sense user perspective, it seems reasonably obvious that such activities should not have been regarded as infringing in the first instance; they are “socially beneficial and cause little prejudice to right holders’ ability to exploit their works.”⁵¹ Few people unfamiliar with copyright law would have imagined that they were breaking the law when they shot or shared a home video of their toddler dancing to a Beyoncé hit, or recorded a TV show to watch when the kids were in bed. Under a US fair use model, many of these uses could be presumed (or have been held)⁵² to fall within the fair use defence, highlighting the inherent flexibility and trans-temporality of the American approach. What we have in Bill C-32 is a piecemeal expansion of the narrowly constructed exceptions that already exist in the *Copyright Act*; what we need instead is a broad, principled and purposive approach to user rights that is capable of evolving and expanding to embrace new and common practices as they arise.

I have argued elsewhere that the only way for Canada to ensure that socially beneficial uses are not excluded is to adopt an open-ended fair dealing provision based upon the US fair use model. In the words of Britain’s Whitford Committee: “Any sort of work is likely to be of public interest, and the freedom to comment, criticize, to discuss and to debate, ought not, in principle, to be restricted to particular forms (‘criticism or review’ or ‘reporting current events’).”⁵³ A flexible fair use model permits courts to ad-

51 Industry Canada, *Supporting Culture and Innovation: Report on the Provisions and Operation of the Copyright Act* (Ottawa: Intellectual Property Policy Directorate, 2002), http://strategis.ic.gc.ca/epic/internet/incrp-prda.nsf/en/rp00873e.html#B2_8 at B.2.8.

52 *Sony Corporation v. Universal City Studios*, 464 U.S. 417, www.law.cornell.edu/copyright/cases/464_US_417.htm, 104 S. Ct. 774 (1984): A majority of the court supported the District Court’s holding that the recording of television programs for later viewing was typically a fair use, thus permitting the ruling that the Betamax video recorder was capable of substantial non-infringing uses.

53 Sir John Whitford, *Copyright and Designs Law: Report of the Committee to Consider the Law on Copyright and Designs*, (London: HMSO, 1977), cmnd. 6732 at para. 676 [Whitford Report].

dress challenges posed by new technologies and unforeseen developments in a principled manner, guided by the policy concerns underlying the law. A purpose-specific model guarantees that Parliament is always playing catch-up, with socially beneficial uses stifled along the way. As Murray and Trosow explain, “[a]ugmenting the list of categories might be part of a clarification of fair dealing. But adding categories alone would be unlikely to create laws flexible enough to address the range of appropriate and fair uses . . .”⁵⁴

The fair dealing provisions should be revised to expressly include the purposes enumerated in the Act and those proposed in Bill C-32 as *examples* of the kind of uses that may be considered fair, but without restricting the defence to those purposes exclusively. It should also provide a non-exhaustive list of factors to be considered in determining the fairness of a use, incorporating the factors set out by the Court of Appeal and endorsed by the Supreme Court in *CCH*.⁵⁵ The current acknowledgement requirement should either be removed or relegated to a consideration in fairness determinations; there is no place for such mechanical rules in a flexible fair use model.⁵⁶ Finally, in order to ensure adequate space for parody, satire and other transformative uses that could be regarded as prejudicial to the honour or reputation of the original author, fair dealing should be available as a defence to both economic and moral rights infringement claims.

The goal should be to achieve, through statutory revision, a fair dealing defence that is capable of principled application, guided by the purposes that underlie the copyright system, and responsive to the ever changing

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54 Murray & Trosow, above note 4 at 204.

55 *CCH (FCA)*, above note 16 at paras. 150-60; *CCH*, above note 3 at paras. 53-60 (endorsing Linden J’s factors).

56 Murray & Trosow, above note 4 at 204, have proposed the following revision along the same lines:

29 (1) Fair dealing for purposes such as research, private study, [education, parody, satire] criticism, review or news reporting does not infringe copyright.

(2) In determining whether the use made in any particular case is fair dealing, the factors to be considered shall include —

- (a) the purpose of the dealing,
- (b) the character of the dealing,
- (c) the amount of the dealing,
- (d) the nature of the work or other subject matter,
- (e) available alternatives to the dealing,
- (f) the effect of the dealing on the work or other subject matter,
- (g) the extent to which attribution was made where reasonable in the circumstances.

nature of cultural creativity and exchange in the (post)modern, digital environment. Even with the proposed improvements to fair dealing and other user exceptions found in Bill C-32, defences in the Copyright Act would remain “statutorily restrictive and not easily capable of a remedial, flexible, or evolutionary interpretation.”⁵⁷ The more numerous and specific the exceptions are, the less conducive they are to broad interpretation.⁵⁸ The limited purposes and specific exemptions approach to user rights, which is perpetuated in Bill C-32, reflects a vision of fair dealing as an exceptional derogation from general principles, antithetical to the normative presupposition of the copyright system: namely, that the author should have exclusive control over the use of her work. This vision is at odds with the goal of Canadian copyright—to achieve a balance between promoting the public interest and obtaining a just reward for the creator. The words of Mr. Justice Laddie, spoken with reference to British copyright law, should resonate with Canadians contemplating Bill C-32:

Rigidity is the rule. It is as if every tiny exception to the grasp of copyright monopoly has had to be fought hard for, prized out of the unwilling hand of the legislature and, once, conceded, defined precisely and confined within high and immutable walls [T]he drafting of the legislation bears all the hallmarks of a complacent certainty that wider copyright protection is morally and economically justified. But is it?⁵⁹

E. THE INTERACTION OF USER RIGHTS AND ANTI-CIRCUMVENTION

While policy-makers tinker with the fair dealing and user exception provisions in the Act, however, these exceptions are undercut by technological

57 Howard Knopf, “Limits on the Nature and Scope of Copyright” in Gordon F. Henderson, ed., *Copyright and Confidential Information Law of Canada* (Scarborough: Carswell, 1994), at 257.

58 Justice McLachlin (as she then was) once stated: “an implied exception . . . is all the more unlikely . . . in light of the detailed and explicit exception’s in [the Act] providing for matters as diverse as private study, research or critical review, educational use, disclosure of information pursuant to various Federal Acts, and performance of musical works without motive or gain at an agricultural fair.” *Bishop v. Stevens*, [1990] 2 S.C.R. 467, www.lexum.umontreal.ca/csc-scc/en/pub/1990/vol2/texte/1990scr2_0467.txt at paras. 478–79.

59 Justice Laddie, “Copyright: Over-Strength, Over-Regulated, Over-Rated” (1996) 18(5) *European Intellectual Property Review* 253 at 259.

capabilities. Acts permitted in relation to owned content — users' rights to research, study, criticize, transform, even read and listen — can be prevented by the use of technical controls. The overarching problem associated with the widespread use of TPMs in the distribution of digital content is simple enough to state: TPMs do not — and generally cannot — distinguish between lawful and unlawful uses and users. There is no necessary (and, typically, no practical) correlation between the limits imposed on would-be users by TPMs and the rights granted to copyright owners under the law.

The effect of a TPM is thus to prevent the kinds of activities that are recognized, within the realm of copyright policy, to be deserving of protection from private owner interests, and to be central to the balance that copyright must strike. Simply put, TPMs deny users the ability to exercise their rights and thereby tip the balance away from users and the public interest. It may be argued that a TPM-free version of a protected work will typically be available for anyone who wishes to deal fairly with it, but it is not satisfactory to restrict fair dealings to technologically inferior versions of copyright works.⁶⁰ Beneficiaries of copyright exceptions, like right holders, should be able to enjoy the opportunities presented by digital technologies, and should be free to engage with cultural resources in the technological environment in which they are situated.

I have argued elsewhere that copyright reform for the digital age should aim to achieve “prescriptive parallelism” to the greatest extent possible;⁶¹ that is to say, “the traditional copyright balance of rights and exceptions should be preserved in the digital environment.”⁶² The availability and protection of TPMs should not, therefore, alter the copyright balance with respect to the enjoyment of exceptions and limitations.⁶³ Unfortunately, the anti-circumvention provisions found in Bill C-32 make no attempt to achieve prescriptive parallelism or to maintain the traditional copyright balance, instead sacrificing user rights and privileges to the ultimate power of technical control.

60 Stefan Bechtold, “Digital Rights Management in the United States and Europe” (2004) 52 *American Journal of Comparative Law* 323 at 363.

61 Carys Craig, “Digital Locks and the Fate of Fair Dealing: In Pursuit of ‘Prescriptive Parallelism’” (2010) 13:4 *Journal of World Intellectual Property* 503, www3.interscience.wiley.com/journal/117991912/home; earlier draft available at <http://ssrn.com/abstract=1599610> [“Digital Locks”].

62 Jerome H. Reichman, Graeme B. Dinwoodie & Pamela Samuelson, “A Reverse Notice and Takedown Regime to Enable Public Interest Uses of Technically Protected Copyrighted Works” (2007) 22 *Berkeley Technology Law Journal* 981 at 1042.

63 *Ibid.* at 1041–42.

Bill C-32 essentially mirrors the stringent anti-circumvention provisions found in the much derided US *Digital Millennium Copyright Act* [DMCA],⁶⁴ and repeats the mistakes that were made in the last attempt at copyright reform in Bill C-61. It contains thirteen complex sections with innumerable subsections prescribing the broad protection of TPMs and setting out narrow limits thereto. Notably, the protection afforded to TPMs includes not only TPMs that restrict protected uses of underlying works but also extends to pure access-control TPMs.⁶⁵ While circumvention liability is limited to the circumvention of access controls, this fact should offer little comfort to would-be fair users. Proponents of Bill C-32 have placed much significance on this technical distinction, arguing that, because there is no blanket prohibition against circumventing copy-control protection measures, the bill would not permit TPMs to trump fair dealing activities.⁶⁶ In practice, however, a protected access-control TPM operates as a “virtual lock” that excludes outsiders from the digital content,⁶⁷ and thereby prevents them from lawfully accessing the protected work—a necessary precondition to dealing fairly with it. The bill crosses another important line by prohibiting, in addition to circumvention activities and services, devices or technologies that permit the circumvention of access- or use-control TPMs.⁶⁸ These broad prohibitions would deny fair users who are permitted to circumvent copy-control measures the means by which to do so. In sum, the combined effect of the access-control circumvention prohibition and the circumvention service and device prohibitions is the practical restriction of otherwise lawful fair use activities in relation to TPM-protected content.

64 *Digital Millennium Copyright Act*, 17 U.S.C. §1201, ss. (a)–(b) (1998), www.copyright.gov/legislation/dmca.pdf [DMCA].

65 A “Technological protection measure” is defined as “any effective technology, device or component that, in the ordinary course of its operation controls access to a work . . . or restricts the doing . . . of any [infringing] acts.” See Bill C-32, above 5, s. 41. Notably, the new user exceptions for format and time shifting or backup copies are subject to a non-circumvention proviso that covers any TPM within this broad definition.

66 See for example James Gannon, “Top 5 Myths About the New Copyright Bill and Digital Locks,” <http://jamesgannon.ca/2010/06/03/top-5-myths-about-the-new-copyright-bill-and-digital-locks/>.

67 Ian R. Kerr, A. Maurushat, & C.S. Tacit, “Technical Protection Measures: Tilting at Copyright’s Windmill” (2002–2003) 34(1) *Ottawa L. Rev.* 7 at 19–20.

68 Whether a particular technology would be caught by this prohibition was to be determined in light of its primary purpose (s. 41.1(c)(i)), commercial significance (s. 41.1(c)(ii)) or the manner in which it is marketed (s. 41.1(c)(iii)).

Bill C-32 sets out specific exceptions to circumvention liability—as well as numerous exceptions to these exceptions—relating to law enforcement or national security,⁶⁹ computer program interoperability,⁷⁰ encryption research,⁷¹ the collection/communication of personal information,⁷² the security of computer systems/networks,⁷³ persons with perceptual disabilities,⁷⁴ ephemeral recordings by broadcast undertakings,⁷⁵ and radio apparatus.⁷⁶ Thus, for example, a person circumventing a TPM for the purpose of encryption research would escape liability only if: it would not have been practical to carry out the research without circumventing the TPM; s/he lawfully obtained the protected work; s/he informed the copyright owner who applied the TPM (presumably, that s/he would be circumventing the TPM for research purposes); *and* s/he did nothing in relation to the underlying work that would constitute an infringement of copyright.⁷⁷ The criticism leveled by Jessica Litman against the exceptions to circumvention liability in the DMCA applies with full force to Bill C-32: these exceptions are “cast in prose so crabbed and so encumbered with conditions as to be of little use to anyone who doesn’t have a copyright lawyer around to explain which hoops to jump through.”⁷⁸

The bill establishes the power for the Governor in Council to make additional regulations creating further specific exceptions where technological measures “would unduly restrict competition in the aftermarket sector in which the technological protection measure is used.”⁷⁹ In the only implicit acknowledgement of fair dealing practices to be found in these provisions, section 41.21(2)(a) envisages the possibility of further regulations restricting liability for acts of circumvention (but, notably, not for liability relating to circumvention services or technologies) to be made in consideration of an open list of factors, including: whether the prohibition against acts of circumvention could adversely affect authorized uses; whether it would adversely affect criticism, review, news reporting, commentary, parody, satire, teaching, scholarship or research that could be

69 Bill C-32, above note 5, s. 41.11.

70 *Ibid.*, s. 41.12.

71 *Ibid.*, s. 41.13.

72 *Ibid.*, s. 41.14.

73 *Ibid.*, s. 41.15.

74 *Ibid.*, s. 41.16.

75 *Ibid.*, s. 41.17.

76 *Ibid.*, s. 41.18.

77 *Ibid.*, s. 41.13.

78 Jessica Litman, *Digital Copyright*, (New York, NY: Prometheus Books, 2001) at 31.

79 C-32, above note 5, s. 41.2(1).

made or done in respect of the work; whether the circumvention could adversely affect the market for the underlying work; and the work's commercial availability. An interesting provision contemplates the possibility of a positive claim against copyright owners, empowering the Governor in Council to make regulations that would actually require owners to provide access to a protected work to persons entitled to benefit from any limitations established under section 41.21(2)(a).⁸⁰

Overall, Bill C-32 fails to reflect the lessons readily drawn from the experiences of the United States and Europe: it seeks to establish broad anti-circumvention rights covering devices and services, access- and use-control measures, and to do so without tying these rights to copyright infringement; it sets out numerous complex exceptions with no general "fair circumvention" exception; it neglects even to offer lip-service to the preservation of fair dealing rights comparable to statements found in Article 6(4) of the EU Directive⁸¹ or section 1201(c) of the DMCA;⁸² it offloads the responsibility for carving out any more exceptions on the Governor in Council, without making clear on what basis such exceptions would be regulated, on whose request, and subject to what evidentiary burden; and it establishes no positive obligations for content providers, leaving any such obligations to be created through regulation, and only in respect of any new exceptions made under this regulatory power.

It is also significant that many of the "new" user exceptions that were included in the bill — which were much lauded as exemplifying the government's commitment to a fair balance between owners and users — are made subject to non-circumvention provisos. Thus, reproduction for private purposes is permitted only if "the individual, in order to make the reproduction, did not circumvent . . . a technological protection measure."⁸³ Similar restrictions apply to recordings made for later listening and viewing,⁸⁴ and to the making of backup copies.⁸⁵ As Graham Reynolds explains:

80 *Ibid.*, s. 41.21(2)(b).

81 Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, Article 6(4), 2001 O.J. (L 167) 10, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:167:0010:0019:EN:PDF> [Copyright Directive].

82 §1201(c)(1) DMCA, above note 64, explicitly states that, "[n]othing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, in this title."

83 Bill C-32, above note 5, s. 29.22(1)(c).

84 *Ibid.*, s. 29.23(1)(b).

85 *Ibid.*, s. 29.24(1)(c).

This approach to protecting TPMs undermines the balance between copyright owners and other parties that Bill C-32 purports to achieve. If the bill is passed in its current form, users, consumers, follow-on creators, and future innovators can effectively be prevented from exercising their rights — both those that existed before Bill C-32 and those introduced by it — through the application of a digital lock.⁸⁶

This limitation on the application of the new user exceptions will render them redundant in the face of TPMs, thereby privileging owners' use of technical controls over the public policy goals that the exceptions are ostensibly designed to serve. If fair dealing is "an integral part of the *Copyright Act*,"⁸⁷ then it should not be "unduly constrained"⁸⁸ by the use of TPMs. Permitted uses are not infringements of copyright, but in fact further the purposes of the copyright system; anti-circumvention laws that essentially prohibit permitted uses extend the scope of owners' rights at the expense of users and the public interest, and thereby frustrate copyright's goals. The existing anti-circumvention provisions in Bill C-32 do not meet the demands of prescriptive parallelism because they fail to protect the role of fair dealing and copyright exceptions that the Supreme Court has recognized as central to the purposes of Canada's copyright system.

F. WHAT CAN BE DONE TO ENSURE BALANCE AND PROTECT USER RIGHTS?

If the *Copyright Modernization Act* is going to maintain an appropriate balance between owners and users in the digital environment, then the protection afforded to TPMs must be as carefully circumscribed as the copyright interest itself. The anti-circumvention provisions must be re-drafted to ensure minimal disruption of the existing copyright balance. The simplest solution would be to rewind to the approach taken in Bill C-60, where TPM protections closely aligned with the existing rights of copyright owners, essentially reinforcing copyright proper by limiting unlawful circumvention to acts undertaken for purposes of copyright infringement.⁸⁹ The prohibition against circumvention should be restricted

86 Graham Reynolds, "How Balanced is Bill C-32?" *The Mark* (9 June 2010), <http://www.themarknews.com/articles/1667-how-balanced-is-bill-c-32>.

87 *CCH*, above note 3 at para. 48.

88 *Ibid.* at para. 51.

89 Bill C-60, above note 5, s. 34.02.

to circumvention “for the purpose of an act that is an infringement of copyright.”⁹⁰

Consistent with this approach, protection should be afforded only to use-control TPMs; copyright does not grant to owners exclusive control over access to protected works, and anti-circumvention provisions ought not to do so indirectly.⁹¹ This could be achieved by defining technical measures in terms of their ability to inhibit or prevent infringing acts, as was done in Bill C-60, and ideally with the explicit exclusion of measures that control access to works for non-infringing purposes, as seen in the New Zealand legislation.⁹²

Furthermore, the anti-circumvention provisions should not include service or device prohibitions. While such prohibitions may be the easiest way to prevent circumvention activities, circumvention services and technologies must be available to those who wish to access and use protected works in non-infringing ways. In *CCH*, the Supreme Court denied the plaintiff copyright owners the easiest route towards preventing a widespread, potentially infringing activity because the result would have been to shift the copyright balance too far in favour of owners’ rights, and to interfere with “the proper use of copyrighted works for the good of society as a whole.”⁹³ The same reasoning ought to warn us away from the enactment of circumvention service and device prohibitions as a shortcut to restrict circumvention activities. Where a distributor of circumvention services or technologies ought to be liable for subsequent infringement by third parties, that person will incur liability for “authorizing infringement” under existing copyright norms.⁹⁴

Ibid.

91 See Craig, “Digital Locks” above note 61 at 8-10 [cited to SSRN].

92 See New Zealand’s *Copyright Act 1994* No. 143 (as amended by the *Copyright (New Technologies) Amendment Act 2008* (NZ), www.legislation.govt.nz/act/public/1994/0143/latest/DLM345634.html). Section 226 includes in its definition of TPM the following clarification: (b) for the avoidance of doubt, [TPM] does not include a process, treatment, mechanism, device, or system to the extent that, in the normal course of operation, it only controls any access to a work for non-infringing purposes (for example, it does not include a process, treatment, mechanism, device, or system to the extent that it controls geographic market segmentation by preventing the playback in New Zealand of a non-infringing copy of a work).

93 *CCH*, above note 3 at para. 41, refusing to find that the provision of photocopies by the Great Library amounted to authorizing infringement.

94 The *Copyright Act* makes it unlawful to authorize an infringing act: ss. 3, 27(1). The Supreme Court explained in *Society of Composers, Authors and Music Publishers of Canada v. Canadian Association of Internet Providers*, 2004 SCC 45, www.canlii.org/en/ca/scc/doc/2004/2004scc45/2004scc45.html, [2004] 2 S.C.R. 427, (2004), 240 D.L.R. 43b52

If circumvention services are to be prohibited, however, then this prohibition should be expressly limited to cases where the service provider “knows or has reason to believe that the service will, or is likely to, be used to infringe copyright in a TPM work.”⁹⁵ If device prohibitions remain in the bill, they should similarly be restricted to cases where the manufacturer, importer or distributor knows that the device “will, or is likely to, be used to infringe copyright in a TPM work.”⁹⁶ An exception must then be carved out to allow for the provision of circumvention devices to persons lawfully offering circumvention services to facilitate lawful uses. New Zealand, for example, has established a system whereby people wishing to carry out permitted acts in relation to TPM-protected works can seek assistance from a “qualified person” who can lawfully provide circumvention services and can lawfully be supplied with circumvention devices.⁹⁷

Finally, any anti-circumvention provisions in Canada should operate “without prejudice” to the exceptions contained in the *Copyright Act*. Tying circumvention liability to copyright infringement would go a large way to achieving this goal by implicitly permitting the circumvention of TPMs for the purposes of fair dealing and other lawful acts. However, it would be preferable to see an explicit statement that circumvention is not prohibited when undertaken for lawful purposes including fair dealings. New Zealand’s amended Copyright Act, for example, expressly states that anti-circumvention rights “do not prevent or restrict the exercise of a permitted act.”⁹⁸ Similarly, the recently released Indian Copyright (Amendment) Bill, 2010, states that nothing in its anti-circumvention provision “shall prevent any person from doing anything referred to therein for a purpose not expressly prohibited by this Act.”⁹⁹ And needless to say, the new user excep-

(4th) 193, at para. 127 [cited to S.C.R.]: “The knowledge that someone might be using neutral technology to violate copyright (as with the photocopier in the *CCH* case) is not necessarily sufficient to constitute authorization, which requires a demonstration that the defendant did ‘(g)ive approval to; sanction, permit; favour, encourage’ the infringing conduct”; (citing *CCH*, above note 16, para. 38).

95 Cf. New Zealand’s *Copyright Act* 1994 No 143, s. 226A(2), www.legislation.govt.nz/act/public/1994/0143/latest/DLM1705876.html.

96 Cf. *Ibid.*, s. 226C(1), www.legislation.govt.nz/act/public/1994/0143/latest/DLM1705882.html.

97 *Ibid.*, ss. 226D and 226E, www.legislation.govt.nz/act/public/1994/0143/latest/DLM1705887.html.

98 *Ibid.*, s. 226D, <http://www.legislation.govt.nz/act/public/1994/0143/latest/DLM1705887.html#DLM1705887>.

99 Indian Copyright (Amendment) Bill, 2010, s. 65A(2)(a), <http://prsindia.org/uploads/media/Copyright%20Act/Copyright%20Bill%202010.pdf>. The provision contains a proviso requiring that “any person facilitating circumvention by another person of

tion provisions dealing with copies made for private, time-shifting, and backup purposes should be amended to ensure that these activities do not constitute copyright infringement notwithstanding the circumvention of any digital locks undertaken for the purpose of such permitted acts.

In order to ensure that fair dealings and other permitted acts are not only lawful on the books but also possible in practice, a revised bill should establish positive obligations for right holders to facilitate fair and lawful dealings with TPM-protected works.¹⁰⁰ This could take the form of a basic requirement in the Act—similar to that found in the German law¹⁰¹—that owners make available the means by which lawful acts may be carried out in relation to TPM-protected works. Ideally, this would involve more than a bald statement of obligation, but would in fact include some mechanism by which users could vindicate their rights.¹⁰² Various efforts to establish such mechanisms have already been made in other jurisdictions, most notably in Europe where member states are to “take appropriate measures to ensure that right holders make available to the beneficiary of an exception or limitation . . . the means of benefiting from that exception or limitation.”¹⁰³

a technological measure for such a purpose shall maintain a complete record of such other person including his name, address and all relevant particulars necessary to identify him and the purpose for which he has been facilitated.”

100 Cf. Kerr *et al.*, above note 67 at 78, where they propose a possible “access-to-works right” that could impose upon copyright owners a “positive obligation to provide access-to-a-work when persons or institutions fall within an exception or limitation set out in the *Copyright Act*.”

101 Section 95b(1) of the German Copyright Act (*Urheberrechtsgesetz, UrhG*), added by the Law for the Regulation of Copyright in the Information Society 2003, requires rightholders to provide necessary means for users to benefit from recognized exemptions. See Wencke Baesler, “Technological Protection Measures in the United States, the European Union and Germany—How Much Fair Use Do We Need in the ‘Digital World?’” (2003) 8 *Virginia Journal of Law & Technology* 13, www.vjolt.net/vol8/issue3/v8i3_a13-Baesler.pdf, at 20-22.

102 Reichman, above note 62 at 1045, and his co-authors argue that if the principle of prescriptive parallelism is to be respected in the face of TPM protections, “users need a mechanism by which to vindicate their rights and to secure the certainty required to engage in creative activity privileged under traditional copyright principles”. The authors suggest a “reverse notice-and-takedown” regime which operates on a similar premise: “users would be able to give copyright owners notice of their desire to make public interest uses of technically protected copyrighted works, and right holders would have the responsibility to take down the TPMs or otherwise enable these lawful uses” (*ibid.* at 985).

103 Copyright Directive, above note 81. I have canvassed in more detail the various approaches taken by different European States elsewhere. See Craig, “Digital Locks” above note 61.

Canada could, for example, empower a “locked out” fair user to initiate a legal action, to instigate formal arbitration or mediation proceedings, or to follow a new administrative procedure by which a request or complaint could be lodged. It would be preferable, however, to establish a route that is less onerous and costly, and therefore less likely to prove prohibitive. This may require the identification of an intermediary body or bodies to facilitate fair dealings and permitted acts by providing TPM-free copies, circumvention services or “digital keys” on request.¹⁰⁴ This role could be performed by existing institutions (public libraries, archives, educational institutions or the Copyright Board), for instance, or by a new administrative body, housed at CIPO, and created for specifically for the task.¹⁰⁵ With an appropriate declaration of lawful purpose, user identification and/or traceable copies or keys, the appropriate intermediary or “qualified person” could ensure that fair dealing practices are both practical and possible, while allowing a copyright owner to protect his or her copyright interest in the work.¹⁰⁶

The development of an adequate lawful use infrastructure is, admittedly, a complicated and potentially resource-heavy proposition. It is also difficult to conceive of a lawful use mechanism that does not have a chilling effect on fair dealing practices by increasing user transaction cost and inhibiting spontaneous uses. Some effort must be made, however, to maintain user rights in the face of digital locks and so to safeguard the copyright balance. At the very least, then, users seeking to make lawful use of protected works and the third parties who assist them should be

¹⁰⁴ I have discussed the various forms that such an intermediary could take, and the manner in which its role could be performed in more detail elsewhere. See Craig, *ibid.* For some important proposals in this regard, see for example Daniel L. Burk & Julie E. Cohen, “Fair Use Infrastructure for Rights Management Systems” (2001) 15 *Harvard Journal of Law and Technology* 41; Paul Ganley, “Digital Copyright and the New Creative Dynamics” (2004) 12(3) *International Journal of Literature of Law & Information Technology* 282–332; Reichman *et al.*, above note 62.

¹⁰⁵ France established an entirely new administrative body, the *Autorité de régulation des mesures techniques de protection*, or ARMTP, which is empowered to hear claims brought by consumers, the beneficiaries of exceptions, and can order rightholders to take necessary steps to allow the exception to be exercised and impose financial penalties for failure to comply. See Jane Winn and Nicolas Jondet, “A ‘New Deal’ for End Users? Lessons from a French Innovation in the Regulation of Interoperability” (2009) 51(2) *William & Mary Law Review* 547, http://wmlawreview.org/files/Winn-Jondet_final.pdf.

¹⁰⁶ It should be noted that a system that requires users to identify themselves and their intended activities in order to benefit from exceptions inevitably raises privacy concerns that would have to be overcome (Burk and Cohen, above note 104 at 63–65).

shielded from liability; preferably, owners seeking to benefit from technical controls should be obligated by law to make available the means necessary for such users to carry out lawful acts; ideally, users will have an affordable and accessible mechanism through which they can enforce their rights to make lawful uses of protected works.

In our networked society, our culture is digitized; our information, news, research and educational resources and entertainment all come to us in digital packets. Increasingly, the way in which consumers access, use and consume digital content is the way in which we, as citizens, explore, experience and engage with our cultural environment. When it comes to technical and legal controls over intellectual works, the ability of the public to actively and meaningfully participate in our culture is at stake.¹⁰⁷

G. CONCLUSION

Bill C-32, it is claimed, “is a fair, balanced, and common-sense approach, respecting both the rights of creators and the interests of consumers in a modern marketplace.”¹⁰⁷ Unfortunately for consumers, users and the Canadian public in general, the pervasive reference to “balance” in this latest round of copyright reform is little more than empty rhetoric. It is true, certainly, that Bill C-32 contains several new (or at least newly confirmed) exceptions and defences for users dealing with protected works. There is, most notably, the welcome (and long overdue) addition of “education, parody or satire” to the list of purposes that can fall within the protective scope of the fair dealing defence, as well as a new defence for “non-commercial user-generated content.” These provisions, however, replicate the existing approach to copyright exceptions in Canada’s *Copyright Act*, adding more categories of potentially permitted uses that are restrictive, piecemeal, and “not easily capable of a remedial, flexible or evolutionary application.”¹⁰⁸ Indeed, the need to expressly include these specific exceptions speaks more to the shortcomings of the Canadian approach to fair dealing (in contrast to US fair use) than it does to the pursuit of a genuine balance between owners and users in the copyright reform process.

Bill C-32 also includes welcome user exceptions for private acts of format- and time-shifting, and making backup copies of lawfully acquired content, with the stated intention of “legitimizing Canadians everyday activities.”¹⁰⁹

107 Balanced Copyright, News Release, above note 35.

108 Knopf, above note 57.

109 Balanced Copyright, Backgrounder, above note 36.

While these exceptions are extremely sensible, and once again long overdue, they are also framed in restrictive language and subject to several provisos, reinforcing the sense that “every tiny exception to the grasp of copyright monopoly has had to be . . . prized out of . . . unwilling hand[s].”¹¹⁰ The existence of these multiple, technically drafted provisos should also raise concerns about the accessibility of the new bill. In an age where copyright affects everyday users carrying out everyday activities, everyone should be able to know and understand the rules by which he or she is expected to abide. Broad, principled rules are far more conducive to general understanding and respect than are narrow, dense and overly legalistic ones.¹¹¹

The most significant shortcoming of Bill C-32 with respect to user rights, however, is the consistent prioritization of TPM protection over copyright exceptions. Put another way, this amounts to the prioritization of private ordering over public policy. New user exceptions in the bill are explicitly unavailable where the would-be beneficiary of an exception has circumvented a TPM in order to carry out a permitted act. The fair dealing and user-generated non-commercial content defences do not fare much better even in the absence of an explicit circumvention carve-out. Where TPMs prevent access to a work, would-be beneficiaries of these defences are effectively locked out; circumvention of a TPM in such cases will give rise to liability under the anti-circumvention provisions notwithstanding the user’s lawful intended purpose. Where a work is protected by a copy-control TPM, users may be unable to carry out fair dealings or use the work in the creation of a new one; without access to circumvention services or devices, they will be unable to benefit from the exceptions to which they are entitled.

The anti-circumvention rights established in Bill C-32 are unduly expansive, while the complexity and rigidity of the many narrowly framed exceptions again suggests nothing more than a grudging willingness to make minimal carve-outs from far-reaching prohibitions. Anti-circumvention rights create the potential for zones of exclusion far greater than

110 Laddie, above note 59.

111 *Cp.* Samuel Trosow, “Why Copyright Fair Dealing Needs Flexibility” (12 March 2010) *Lawyers Weekly*, Volume 29, No. 41: “Parliament should avoid over-drafting technical rules with labyrinth exceptions and complex conditions and counter-exceptions. The law should be broadly understandable. As the roles of users and creators converge, Canadians will want to consistently engage in fair copyright practices. But respect for the law is eroded by the long cryptic passages that dwell on technical details and contain rules, exceptions, conditions and counter exceptions It is encouraged by adopting understandable principles that can be applied in practice.”

traditional copyright affords. The bill does not tie circumvention liability to copyright infringement in any way, and it does not contain any general exception for circumventions carried out for the purpose of non-infringing acts, not to mention establishing a mechanism for ensuring that such acts are possible in practice. In this way, Bill C-32 fails to reflect the centrality of fair dealing and other exceptions in copyright law, treating them as marginal elements of the existing system that can be reduced or eliminated to better protect owner interests in the digital environment. In doing so, it threatens to significantly upset the copyright balance established in Canada and articulated by our Supreme Court.

Of course, Parliament is not constitutionally bound to follow the conclusions of the Supreme Court or to pursue the goals of the copyright system as defined by the Court — but one might expect that Parliament would be duly influenced by the reasoning of the highest court of the land, and would share its commitment to achieving a balanced copyright system.¹¹² As Geist explains, “[b]y sending a clear message about its support for a fair copyright balance [in *Théberge*], the Supreme Court has indirectly provided the most important submission on the current digital copyright reform consultations.”¹¹³ Fair dealing and the limits of the copyright interest are central to the balance articulated by the Court, but Bill C-32 does not reflect this balance in any meaningful way: to take it seriously would be to embrace the goal of prescriptive parallelism, and to ensure that fair and lawful dealings are permitted, encouraged and actively facilitated in the digital age.

112 Laura Murray, “Bill C-60 and Copyright in Canada: Opportunities Lost and Found” (2005) 30(4) *Canadian Journal of Communication* 649 at 652.

113 Michael Geist, “Key Case Restores Copyright Balance” *The Globe and Mail*, 18 April 2002, B16, www.michaelgeist.ca/content/view/181/77; cited in Kerr *et al.*, above note 67 at 41.