

University of Nottingham Commercial Law Centre, 17 June 2020

User rights in copyright law – and why they really matter

Maurizio Borghi

Professor of Law

CIPPM, Bournemouth University



Erasmus+

Project details

Project title	“Copyright exceptions as user rights”
Aim	to investigate the effect of the legal nature of copyright exceptions on risk propensity of beneficiaries of such exceptions
Researchers	<ul style="list-style-type: none">• Guy Pessach (Hebrew University of Jerusalem)• Maurizio Borghi (CIPPM, Bournemouth University)
Funder	Funded under the Erasmus + Programme “Jean Monnet Centre of Excellence in European Intellectual Property and Information Rights” (2018-2021)

Today's presentation – overview

Part 1 – nature and scope of user rights

Part 2 – user rights in practice

Language

- ✓ Exclusive rights



- ✓ Exceptions
- ✓ Limitations
- ✓ Limitations & exceptions
- ✓ Exceptions OR limitations
- ✓ Free uses
- ✓ Permitted uses / acts
- ✓ Acts not constituting infringements
- ✓ Exemptions
- ✓ Defences
- ✓ User rights

Defining (rule's) exceptions

Exceptions in statutory law are needed when the legislator intends to exclude something from the application of a rule – namely something that would otherwise be within the scope of the rule.

→ The need for of an exception depends on the level of generality at which the rule is expressed
(Schauer 1991, Drassinower 2009)

Example

Rule – v1: “an author has the exclusive right to reproduce her work”

Rule – v2: “an author has the exclusive right to reproduce any substantial part of her work”

Rule – v3: “an author has the exclusive right to reproduce any substantial part of her work for purposes other than criticism or review”

Limits to internalization

To what extent can the rule internalize “exceptions”?

→ Some exceptions resist internalization

Example:

Rule (?): “an author has the exclusive right to reproduce her work for purposes other than performing it in a hospital or in a prison”

- “Exceptions” that are integral to the very definition of the scope of the right = “user rights”
 - Exceptions that express the encounter of author’s rights with other juridical interests = “exceptions properly so-called” (Drassinower 2009)

Supreme Court of Canada

Procedurally, a defendant is required to prove that his or her dealing with a work has been fair; however, 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. The 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, *supra*, has explained, at p. 171: "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."

CCH Canadian Ltd. v. Law Society of Upper Canada [2004] SCC 13, § 48

(See Drassinower 2005, Vaver 2013 and Geist 2017)

Supreme Court of Canada

Procedurally, a defendant is required to prove that his or her dealing with a work has been fair; however, **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. The 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, *supra*, has explained, at p. 171: "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."

CCH Canadian Ltd. v. Law Society of Upper Canada [2004] SCC 13, § 48

(See Drassinower 2005, Vaver 2013 and Geist 2017)

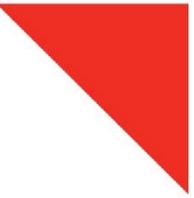
Construing exceptions as user right – arguments

- Normative (Breakey 2010, Drassinower 2005)
- Socio-legal (Elkin-Koren 2017)
- “Rhetorical” (Burrell & Coleman 2005)

→ *Effect on users’ risk propensity*

Mapping the content of user rights

- 1) Enforceability against the copyright owner
- 2) Prevalence over contractual provisions
- 3) Enforceability against third parties
- 4) Transferability
- 5) Presumption of lawfulness
- 6) Burden of proof



Part 2

User rights in practice

Chilling effects

Beneficiaries do not seem to take full advantage of permitted uses / exceptions. Why?

- ✓ The “clearance culture” (Aufderheide & Jaszi 2004)
- ✓ Risk aversion
 - Uncertainty about the scope of the permitted use
 - Unpredictability (US fair use)
 - Ambiguous nature of permitted uses

→ *Unlike copyright owner’s exclusive rights, permitted uses are neither construed nor perceived as endowments – i.e. something you are entitled to.*

Some insights from behavioural economics

- “Prospect theory”: People perceive outcomes of risky decisions as gains or losses
- Gains and losses are defined relatively to a reference point
- **Endowment effect**: people tend to place higher value on entitlements that they already have, compared to entitlements that they do not have
 - Departing from an entitlement is perceived as a loss, whereas acquiring an entitlement is perceived as a gain
 - People’s tendency towards risk aversion in the domain of gains is higher than their tendency towards risk seeking in the domain of losses.

The decision to engage in an act of uncertain permissibility

Case 1: the permitted act is construed as an “exception to the rule”

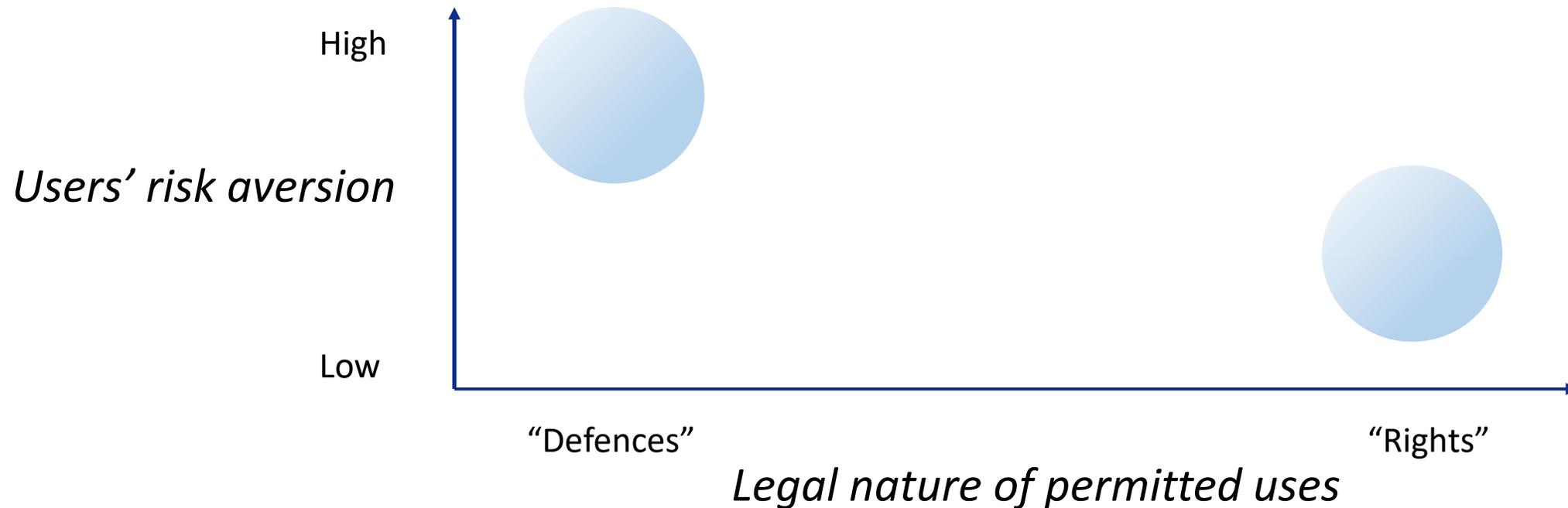
- Unlikely to be perceived as an endowment (i.e. something you are entitled to)
- Therefore, refraining from the purported act is more likely to be perceived as an unfulfilled gain rather than as a loss
→ *Higher tendency towards risk aversion*

Case 2: the permitted act is construed as a fully-fledged “user right”

- More likely to be perceived as an endowment
- Therefore, refraining from the purported use is more likely to be perceived as a loss rather than an unfulfilled gain
→ *Higher tendency towards risk seeking*

The decision to engage in an act of uncertain permissibility

Hypothesis: *The closer permitted acts are to mere defences, the more risk averse users would be, and the closer they are to positive rights, the more users would be inclined to take the risks when engaging in those uses*



Testing the hypothesis empirically

1. Select a sample of users who engage with permitted uses on a regular basis (e.g. online video creators, film documentarists, educators, ...)
2. Participants are confronted with a **hypothetical scenario** in which they have to engage in acts of uncertain permissibility and asked to make decisions based on a **hypothetical legal advice**.
3. Participants are divided into two groups. While the scenario is the same for the two groups,
 - Group 1 receives an advice that reflects a legal framework in which the permitted use is a mere defence
 - Group 2 receives an advice that represents the permitted use as a positive right

Structuring the experiment

Hypothetical scenario: *“You have been offered a contract to produce a video documentary... As part of your project you are planning to include the following material in your documentary... You are aware that the material is protected by copyright... You seek legal advice”*

- Legal advice – Group 1: *“The copyright owner has the exclusive right to authorize or prohibit any use of their works, but you have a defence if you can prove that the amount taken was fair ...”*
- Legal advice – Group 2: *“You have the right to copy and use a fair amount of the work without permission from the copyright owner, but the copyright owner can sue you if he can prove that the amount taken was excessive...”*

→ Participants of Group 1 and 2 are requested to take a series of decisions on the use of the copyright-protected material for their project

Possible outcomes

Responses from Group 1 and 2 show statistically significant differences

→ *Hypothesis is confirmed: the legal formulation of permitted acts is a determinant factor in users' risk propensity*

Responses from Group 1 and 2 differ only in respect to certain decisions

→ *Hypothesis is confirmed in part and disproved in part: the legal formulation of permitted acts may be a determinant factor for certain categories of works / type of uses / type of users*

Responses from Group 1 and 2 do not show statistically significant differences

→ *Hypothesis is disproved: other factors may be more relevant in determining risk propensity*

References

- Aufderheide, P. & P. Jaszi (2004) *Untold Stories: Creative Consequences of the Rights Clearance Culture for Documentary Filmmakers* (Centre for Social Media)
- Breakey, H. (2010) “User’s rights and the public domain” 3 *I.P.Q.* 312
- Burrell, R. & A. Coleman (2005) *Copyright exceptions: the digital impact* (CUP)
- Drassinower, A. (2005) “Taking User Rights Seriously” in M. Geist (ed.) *In the Public Interest: the Future of Canadian Copyright Law* (Irwin Law) 462
- Drassinower, A. (2009) “Exceptions Properly So-Called”, in Y. Gendreau & A. Drassinower (eds.) *Langues et Droit d’Auteur / Language and copyright* (Bruylant/Carswell) 205
- Elkin-Koren, N. (2017) “Copyright in a Digital Ecosystem: A User Rights Approach”, in R. Okediji (ed.) *Copyright Law in an Age of Limitations and Exceptions* (CUP), 132
- Schauer, F. (1991) “Exceptions” 58 *U. Chi. L. Rev.* 871
- Vaver, D. (2013) “Copyright Defenses as User Rights” 60 *J. Copyright Soc’y U.S.A.* 661

My publications on (or around) this subject

Borghgi, M. (2020) “Copyright exceptions as user rights?” in E. Rosati (ed.) *The Routledge Handbook of European Copyright Law* (Routledge) – *forthcoming*

Borghgi, M. (2020) “Reconstructing fairness: the problem with fair use exclusivity” in D. Gervais (ed.) *Fairness, Morality and Ordre Public in Intellectual Property* (Elgar) 53

Borghgi, M. (2018) “Copyright and the Commodification of Authorship in 18th and 19th Century Europe”, *Oxford Research Encyclopaedia of Literature* (OUP), DOI: 10.1093/acrefore/9780190201098.013.268

Borghgi, M. (2016) “Copyright use and the many faces of property”, 3 *Intellectual Property Journal*, 77

Borghgi, M. & S. Karapapa (2015) “Contractual restrictions on lawful use of information: sole-source databases protected by the back door?” 37 *E.I.P.R.* 505

mborghgi@bournemouth.ac.uk