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Résumé de l'article

Cet article propose le « jeu à règles changeables » comme métaphore pour comprendre le fonctionnement de la réforme du droit d'auteur. Utilisant comme exemple illustratif le jeu de Calvinball (créé par l'artiste Bill Watterson dans sa bande dessinée de longue durée Calvin & Hobbes), et s'inspirant de la théorie des choix politiques et de sa description de la manière dont les changements politiques sont effectués par des intérêts privilégiés, l'article examine comment le concept d'un jeu dont les joueurs peuvent modifier les règles pendant la partie explique comment les utilisateurs sont souvent désavantagés pendant les processus de réforme du droit d'auteur. La métaphore du jeu introduit aussi une mesure normative d'équité au cœur de l'évaluation du processus de révision du droit d'auteur du point de vue de l'utilisateur. La notion de jeu à règles changeables nous dit quelque chose d'important sur le genre de discours que nous devrions tenir sur le droit d'auteur et la réforme du droit d'auteur. Le pouvoir narratif de la norme de « franc jeu » inscrite dans le concept de jeu peut faciliter un langage qui ne fait pas que condamner les utilisateurs à ruminer sur leurs défaites politiques, mais qui leur donne le pouvoir de concevoir des stratégies en vue de victoires futures.

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Calvinball: Users' Rights, Public Choice Theory and Rules Mutable Games

Bob Tarantino*

This article proposes the “rules mutable game” as a metaphor for understanding the operation of copyright reform. Using the game of Calvinball (created by artist Bill Watterson in his long-running comic strip Calvin & Hobbes) as an illustrative device, and drawing on public choice theory’s account of how political change is effected by privileged interests, the article explores how the notion of a game in which players can modify the rules of the game while it is being played accounts for how users are often disadvantaged in copyright reform processes. The game metaphor also introduces a normative metric of fairness into the heart of the assessment of the copyright reform process from the standpoint of the user. The notion of a rules mutable game tells us something important about the kinds of stories we should be telling about copyright and copyright reform. The narrative power of the “fair play” norm embedded in the concept of the game can facilitate rhetoric which does not just doom users to dwell on their political losses, but empowers them to strategize for future victories.

Cet article propose le « jeu à règles changeables » comme métaphore pour comprendre le fonctionnement de la réforme du droit d’auteur. Utilisant comme exemple illustratif le jeu de Calvinball (créé par l’artiste Bill Watterson dans sa bande dessinée de longue durée Calvin & Hobbes), et s’inspirant de la théorie des choix politiques et de sa description de la manière dont les changements politiques sont effectués par des intérêts privilégiés, l’article examine comment le concept d’un jeu dont les joueurs peuvent modifier les règles pendant la partie explique comment les utilisateurs sont souvent désavantagés pendant les processus de réforme du droit d’auteur. La métaphore du jeu introduit aussi une mesure normative d’équité au cœur de l’évaluation du processus de révision du droit d’auteur du point de vue de l’utilisateur. La notion de jeu à règles changeables nous dit quelque chose d’important sur le genre de discours que nous devrions tenir sur le droit d’auteur et la réforme du droit d’auteur. Le pouvoir narratif de la norme de « franc jeu » inscrite dans le concept de jeu peut faciliter un langage qui ne fait pas que condamner les utilisateurs à ruminer sur leurs défaites politiques, mais qui leur donne le pouvoir de concevoir des stratégies en vue de victoires futures.

I. INTRODUCTION AND THE ADVISABILITY OF LEGAL METAPHORS

The five years preceding 2017 have presented two signal opportunities to assess the ongoing history of Canadian copyright law from the standpoint of copyright’s “user.” In 2012, Canada’s legislative copyright regime was amended by the *Copyright Modernization Act*,¹ containing provisions that seemed, at first

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¹ *Copyright Modernization Act*, SC 2012, c 20.

glance, to represent unequivocal wins for users: the expansion of the fair dealing mechanism to include education, parody, and satire;² exceptions to infringement for “private purposes,” as well as permitted time-shifting and format-shifting;³ and an innovative “user-generated content” provision.⁴ But those apparent gains were accompanied by provisions relating to technological protection measures, which seemed to obviate the purported gains for users and prompted dissatisfaction among many copyright scholars. In 2015, the Canadian government amended the *Copyright Act* – with no public consultation and outside of the *Act*’s five-year legislative review process – to extend the term of protection for published sound recordings from fifty to seventy years.⁵ Michael Geist described the change as “strictly the product of behind-the-scenes [recorded music] industry lobbying with no broader consultation or discussion.”⁶

So even when the *Copyright Act* is amended in ways which appear to be solicitous of the interests of users (as in 2012), such advances for users’ rights may be provisional and are subject to important caveats. Public choice theory assists in explaining these setbacks for users’ rights in Canada: if public choice theory is, in the words of James M. Buchanan, “politics without romance,”⁷ it appears well-suited to account for results which see the well-positioned make their positions even better. But the public choice account seems unsatisfactory: it tells us why users are often disadvantaged in copyright reform, but it does not tell us whether that is a good or bad result. Can we supplement the story told by public choice theory? Is there an account of copyright reform which is at least equally consonant with observations of how copyright reform occurs, but which operates by way of an engaging and illuminating metaphor – ideally, one which enables us to make normative assessments of the copyright reform process?

This article proposes the “rules mutable game” as a metaphor which assists in analyzing the phenomenon of copyright reform. Rules mutable games are games in which participants have the ability to change the rules *while the game is being played*. Using “Calvinball,” the game played in the iconic *Calvin and Hobbes* comic strip, as an illustrative device, this article demonstrates that the rules mutable game metaphor is one which contains an embedded normative element useful for critiquing when and how users are disadvantaged in the reform process. The notion of the rules mutable game supplements existing accounts of copyright reform by introducing a normative metric of *fairness* into the heart of the analysis: games are expected to be fair, but when one player has a systemic advantage and abuses it to the detriment of the other participants in the game (indeed, to the detriment of the viability of the playing of the game itself), the ethical propriety of the activity becomes unstable. Public choice theory helps tell us why users seem only rarely to win the copyright game; the rules mutable game metaphor tells us why they occasionally *should*. All legal regimes are subject to the power of political lobbying by interested parties, a notion which is adequately reflected in public choice theory. But the rules mutable game metaphor tells us something important about the kinds of stories we should be telling about copyright and copyright reform. The narrative power of the “fair play” norm embedded in the concept of the game enables rhetoric which may facilitate future victories for users.

Metaphors are linguistic devices which identify (and implicitly compare) one phenomenon with another – a story offering a “roller coaster” of emotions, clouds as “cotton balls,” a game of chess as a

² *Copyright Act*, RSC, 1985, c C-42, s 29(1).

³ *Ibid*, ss 29.22-29.23.

⁴ *Ibid*, s 29.21.

⁵ *Economic Action Plan 2015 Act, No. 1*, SC 2015, c 36, s 81.

⁶ Michael Geist, “Harper Letter to Music Canada on Budget Day Confirms Copyright Extension the Product of Industry Lobbying” (15 May 2015), *Michael Geist* (blog), online: <<http://www.michaelgeist.ca/2015/05/harper-letter-to-music-canada-on-budget-day-confirms-copyright-extension-the-product-of-industry-lobbying/>> [Geist, “Harper Letter”].

⁷ James M Buchanan, *Public Choice: The Origins and Development of a Research Program* (Fairfax, VA: Center for Study of Public Choice, George Mason University, 2003) at 8.

“battle” of intellects.⁸ The use of metaphors is common in legal discourse generally⁹ – few Canadian legal scholars, for example, would be unfamiliar with references to the Constitution as a “living tree”¹⁰ – and its use in intellectual property discourse has given rise to much academic commentary, with some going so far as to assert that “the rhetoric of intellectual property is metaphorical.”¹¹ Metaphors are productive because they provide common reference points for speakers and listeners, and can illuminate aspects of the referent which may otherwise remain obscure.¹² They assist in “order[ing] our social world,”¹³ both by providing structure to debates and, when competing metaphors are offered to describe a phenomenon, by posing a sufficient challenge to prevailing conceptions that a new metaphor might dissolve old certainties. Good metaphors can become “tenacious carriers of legal meaning.”¹⁴ Metaphors are also imbued with a condensed form of narrativity: they are essentially very compact syllogisms, in that they tell a story about two things, where the first thing is somehow like the second thing, and can contain implicit normative statements and admonitions to action (e.g., thing A is like thing B, thing B is bad, therefore we should try to change thing A). Narrativity is itself abundantly used in many areas of legal discourse, including in areas of legal discourse which are closely connected to the copyright regime, such as property.¹⁵ Because metaphors prompt us to engage in visceral and emotive terms with a phenomenon,¹⁶ the best of them can transform our thoughts about a phenomenon, and can alter our approaches to that phenomenon (and, potentially, result in an alteration of the phenomenon itself).¹⁷

The use of metaphors – employing them to tell stories – structures arguments and, because stories often carry moral messages or embody moral lessons, can help to form and structure a moral community.¹⁸ Metaphors and narratives are imbued with ethical visions¹⁹ – as James Grimmelman describes the concept,

⁸ Bernard J Hibbitts, “Making Sense of Metaphors: Visuality, Aurality, and the Reconfiguration of American Legal Discourse” (1994) 16 *Cardozo L Rev* 229 at 233.

⁹ See e.g. Haig Bosmajian, *Metaphor and Reason in Judicial Opinions* (Carbondale, IL: Southern Illinois University Press, 1992); Robert L Tsai, “Fire, Metaphor, and Constitutional Myth-Making” (2004) 93 *Geo LJ* 181.

¹⁰ See e.g. Wil Waluchow, “Constitutions as Living Trees: An Idiot Defends” (2005) *Can JL & Jur* 207.

¹¹ Brian L Frye, “IP as Metaphor” (2015) 18 *Chap L Rev* 735 at 736. See also Patricia Loughlan, “Pirates, Parasites, Reapers, Sowers, Fruits, Foxes... The Metaphors of Intellectual Property” (2006) 28 *Sydney L Rev* 211; and Andrew Gilden, “Raw Materials and the Creative Process” (2016) 104 *Geo LJ* 355. For Canadian scholarship which explores the use of metaphor in copyright rhetoric, see Tina Piper, “An ‘Independent’ View of Bill C-32’s Copyright Reform” in Michael Geist, ed, *From “Radical Extremism” to “Balanced Copyright”: Canadian Copyright and the Digital Agenda* (Toronto: Irwin Law, 2010) 423. See also the “Myths & Metaphors of Private Law and Intellectual Property” seminar series hosted by McGill University’s Faculty of Law, online: <http://m-m.mcgill.ca/home_en.html>.

¹² Hibbitts, *supra* note 8 at 234. Of course, as Hibbitts is careful to point out, metaphors may also distract or obfuscate certain elements of the referent (“[c]alling chess a battle distracts attention from the co-operative aspects of that game”). As noted by Loughlan, *supra* note 11 at 224-226, the use of metaphors can also be dangerous or counter-productive and so should be used judiciously (metaphors can obscure or distort some aspects of a phenomena while highlighting others, and can “lock us into the internal logic of an image or set of images, structure our thinking in a way that may weaken or distort our rational decision-making capabilities”).

¹³ Tsai, *supra* note 9 at 188.

¹⁴ *Ibid* at 189.

¹⁵ See e.g. Carol M Rose, “Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory” (1990) 2 *Yale JL & Human* 37 at 52 (commentators “are so fond of telling stories when they talk about the origins of property ... [because] that makes property ‘plausible’”).

¹⁶ Tsai, *supra* note 9 at 190.

¹⁷ Rose, *supra* note 15 at 55 (“narratives change our minds, and give us an opportunity to reconsider and reorder our approach to events; we can ... act differently in the future”).

¹⁸ *Ibid*.

¹⁹ Hibbitts uses the example of a libertarian describing government as a “parasite” – a choice of metaphor which viscerally communicates distaste for the government and carries with it a plethora of implicit moral judgments (Hibbitts, *supra* note 8 at 235).

an ethical vision is “a set of expectations about how people do and ought to behave.”²⁰ As Grimmelmann has noted about copyright law debates, ethical visions are “important to how people behave, because they affect the persuasiveness of our policy arguments ... and because they make provocative claims about what intellectual property law ought to look like.”²¹ The rhetoric used in discussion and debates about copyright has an inevitable effect on how copyright is perceived, experienced, enforced and reformed.²² A compelling metaphor, one which speaks in an ethically appealing way, can assist in crafting more compelling arguments about copyright reform.²³ Laura Murray has observed, in the context of discussing Canadian copyright reform, that metaphors can be “strategically chosen”²⁴ – I suggest that, if one is inclined to advocate for copyright users’ rights, there is strategic wisdom in choosing the rules mutable game as a metaphor for copyright.²⁵

This article is not an argument that the rules mutable game metaphor is the best way to think about copyright or copyright reform, only that it is an interesting way to think about it, and one which illuminates some aspects of the copyright reform process in ways which other accounts may not.²⁶ In this article I intend to advance the argument that because the game metaphor contains an inherent ethical vision, it is a useful supplement to models – such as public choice theory – which provide accounts of why legislative copyright reform looks the way it does, particularly when viewed from the standpoint of copyright’s user. Use of the rules mutable game metaphor can play a role in sensitizing the participants in the copyright reform process to the ethical obligations they owe to other participants and to copyright’s legislative scheme writ large.

Part II of this article considers the status of the “user” in copyright debates, identifying the concept as a placeholder for a diverse set of stakeholders. Part III explores the insights of public choice theory as they have been applied to legislative copyright reform processes in the United States, with particular attention to the role played by, and the results imposed upon, copyright’s users. In Part IV, short reviews from the user’s perspective are offered of two recent episodes in Canada’s copyright reform process, namely the introduction of a bevy of user-focused provisions in the 2012 *Copyright Modernization Act* and the 2015

²⁰ James Grimmelmann, “The Ethical Visions of Copyright Law” (2009) 77 *Fordham L Rev* 2005 at 2010.

²¹ *Ibid* at 2006.

²² Laura J Murray, “Copyright Talk: Patterns and Pitfalls in Canadian Policy Discourses” in Michael Geist, ed, *In the Public Interest – The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005) at 16-17. Frye, *supra* note 11, objects to much of the conventional usage of metaphor in intellectual property discourse as inappropriately reifying the supposedly proprietary nature of intellectual property, and suggests that “[i]n order to understand intellectual property, we must abandon intellectual property metaphors” (at 758); helpfully, Frye somewhat backs away from that position and suggests “adopt[ing] metaphors that emphasize the welfarist justification of intellectual property, rather than obscuring it” (*ibid*).

²³ Grimmelmann, *supra* note 20 at 2036. Loughlan, *supra* note 11, notes of metaphors that they “persuade us even as they please us” (at 213), and notes that the “use and misuse of metaphor” (*ibid*) can play a substantive role in determining the contours of copyright protection.

²⁴ Murray, *supra* note 22 at 17.

²⁵ On the deployment of persuasive argumentation in copyright enforcement and reform on behalf of content owners, see Peter K Yu, “Digital Copyright and Confuzzling Rhetoric” (2011) 13 *Vand J Entertainment & Technology L* 881, esp at 914ff (“this Part emphasizes rhetoric and logic – that is, how the industry can make its arguments more *convincing*” [emphasis in original]).

²⁶ In developing my own assessment of the quality or value of the metaphor proposed in this article, I have turned to Wayne C Booth, “Metaphor as Rhetoric: The Problem of Evaluation” (1978) 5 *Critical Inquiry* 49. In particular, I lean heavily on Booth’s notions that part of the value of metaphor lies in its ability to communicate more than is literally present in the words (at 54), and that good metaphors carry the qualities of being active, concise, “appropriate, in their grandeur or triviality, to the task in hand,” accommodating of the audience, and constitutive of the speaker’s character as someone to be trusted (at 56-57).

sound recording term extension. Part V introduces the rules mutable game metaphor and explores the benefits and possible criticisms of using the metaphor as a supplement to the conventional public choice model. In Part VI some concluding thoughts are offered about possible future development of the rules mutable game metaphor.

II. THE NATURE OF COPYRIGHT'S "USER"

The concept of the "user" has played a prominent role in Canadian copyright reform debates over the last decade.²⁷ An examination of the complex nature of copyright's user provides an entry point into a discussion of the two copyright episodes discussed in Part IV, highlighting the disparate nature of the myriad interests that confront copyright policy-makers. More than ten years ago, Julie Cohen noted that the preceding decade had seen an "upsurge of interest ... in users of copyrighted works."²⁸ We have thus enjoyed something on the order of twenty years of scholarly attention to the copyright "user" – however, notwithstanding that sustained attention, both the nature of copyright's user and the scope of their rights remain contested.²⁹ The terminological debates which accompanied the initial upsurge in interest eventually settled on the convention of employing the term "user" to describe a set of actors who engaged with or who were affected by copyright law in respect of a particular copyright-protected work, though without enjoying the status of "owner" in respect of that particular work.³⁰ However, as Cohen notes, use of the term "user" is "not without some awkwardness."³¹ That awkwardness stems from the analytical and rhetorical work which the term "user" is forced to perform in the discourse of copyright debates. Cohen alone identifies at least four different types of, or "roles" for, users: what she terms the economic user, the postmodern user, the romantic user, and her own preferred model of the "situated user."³² But even that apparent precision elides: lurking somewhere behind those models yet another "user" is hinted at – the "real user"³³, whose lived experience with copyright remains to be adequately captured by a single concept. Others have argued that there "are many different types of 'users'" of copyright-protected works,³⁴ whose multiplicity of identities complicates efforts to speak authoritatively or generically about users.

Users are variegated along a number of different axes, including interests, activities, institutional form and demographic characteristics.³⁵ As noted by Laura Murray, the term "user" seems to have come into common usage as a result of digital technology, particularly in its desktop computing and online forms –

²⁷ See e.g. Pascale Chapdelaine, "The Ambiguous Nature of Copyright Users' Rights" (2013) 26 IPJ 1 (noting (at 2) that "[r]ecent developments in Canada and worldwide, signal a greater consideration for the interests of users in copyright law and policy").

²⁸ Julie E Cohen, "The Place of the User in Copyright Law" (2005) 74 Fordham L Rev 347 at 347.

²⁹ For a general review of the legal literature on the concept of the user, see James Meese, "User production and law reform: a socio-legal critique of user creativity" (2015) 37 Media, Culture & Society 753 at 756. For a discussion of the nature of users' rights generally under Canadian copyright law, see Chapdelaine, *supra* note 27.

³⁰ Of course, a stakeholder who is a "user" with respect to Work A may simultaneously be an "owner" with respect to Work B.

³¹ Cohen, *supra* note 28 at 347. Other terms which competed with "user" in the literature included "consumer," "audience" and "public" (see generally Joseph P Liu, "Copyright Law's Theory of the Consumer" (2003) 44 Boston College L Rev 397 at 400).

³² Cohen, *supra* note 28 at 348-349.

³³ *Ibid* at 349 ("although some of these characters are better adapted to certain situations than to others, none of them provides a convincing model of how real users actually behave").

³⁴ Teresa Scassa, "Interests in the Balance" in Geist, *Public Interest*, *supra* note 22, 41 at 42 [Scassa, "Interests"].

³⁵ *Ibid* at 58.

there appears to be scant reference in the older copyright literature to television or radio “users,” likely “because those technologies, relatively speaking, simply didn’t permit the kinds of interaction and participation that digital technologies can.”³⁶ Contemporary notions of the user have been fundamentally impacted by technological change, particularly the widespread availability of broadband internet connections and online platforms which enable interactive engagement with copyright-protected content.³⁷ Technological change has resulted in an expansion of creative agency, thus transforming users, at least potentially, from passive recipients into active participants in the creative process, and who by reason of that transformation are prone to greater interaction with the copyright regime.³⁸

Despite being able to identify technological change as the catalyst for considerations of copyright’s user, the concept of the user remains quicksilver: attempts to pin it down seem doomed to frustration. It seems to apply simultaneously to every possible stakeholder who is subject to copyright – indeed, it seems easy enough to conclude that *everyone* is a “user,” whether they are also corporate conglomerates who own libraries of copyright protected-works, institutions such as libraries and archives, or simply an individual human being looking for a movie to binge-watch on a Friday night. The “user” concept overlaps with other nearly-congruent categories: some commentators employ the terms “user” and “public” interchangeably, while recognizing that all of the analytical frailties attendant in the term “user” are also present in use of “the public”;³⁹ still others query whether the interests of “users” are co-extensive with the “public interest.”⁴⁰ Users have also been cast as “consumers” engaged in a “revolution against digital copyright laws”;⁴¹ though even the use of the term “consumer” appears to cover an endlessly refracting set of identities, the term being a “capacious one, covering a range of characters” who have “heterogeneous interests.”⁴² Concerns have also been raised about whether the term “user” bears negative connotations,⁴³ and whether its use obfuscates more than it illuminates because such usage risks “underplay[ing] the range and depth of interests” contained within the concept of the “public interest.”⁴⁴ It is also the case that, because of the variety of users, not all users are equally served or affected by provisions intended to protect or amplify users’ rights.⁴⁵ It may be that the most we can conclude is that the term “user” is indexical – a term which is intended to point to *something*, but what it refers to changes from context to context.⁴⁶

The challenge of defining the user is analytical and theoretical, and also rhetorical: if it is difficult, even impossible, to coherently describe the “user” as a finite set of copyright stakeholders, how can the concept be deployed in debates about copyright reform? If accurate descriptions of users require particularity,⁴⁷ is

³⁶ Murray, *supra* note 22 at 39-40.

³⁷ Meese, *supra* note 29 at 754.

³⁸ *Ibid.* See also, generally, Yochai Benkler, “From Consumers to Users: Shifting the Deeper Structures of Regulation Toward Sustainable Commons and User Access” (2000) 52 Fed Comm LJ 561.

³⁹ Sara Bannerman, “Canadian Copyright Reform: Consulting with Copyright’s Changing Public” (2006) 19 IPJ 271 at 272 (“a philosophy that balances the interests of the copyright holder and the interests of some *other*: the non-copyright holder, users, or ‘the public’”).

⁴⁰ Scassa, “Interests,” *supra* note 34 at 48.

⁴¹ Matthew Rimmer, *Digital Copyright and the Consumer Revolution* (Cheltenham, UK: Edward Elgar, 2007) at 296.

⁴² *Ibid.* at 12.

⁴³ Scassa, “Interests,” *supra* note 34 at 57. See also Murray, *supra* note 22 at 39;

⁴⁴ Scassa, “Interests,” *supra* note 34 at 50.

⁴⁵ *Ibid.* at 51 (“within these groups there is such a diversity of constituents that it is safe to say that their interests are not always equally served, or served at all by the same copyright provisions”).

⁴⁶ See David Braun, “Indexicals,” in Edward N Zalta, ed, *The Stanford Encyclopedia of Philosophy* (Fall 2016 Edition), online <<https://plato.stanford.edu/archives/fall2016/entries/indexicals/>>.

⁴⁷ Meese, *supra* note 29 at 754 (the term ‘user’ “must be examined within specific legal and cultural contexts, allowing us to explore *how* particular individuals or groups get to be called users” [emphasis in original]).

it even possible to productively utilize an expansive category of user in copyright discourse? All of this matters because, as James Meese has noted, the “discursive shaping of the user ... has an impact on the rights granted” by the law⁴⁸ – in short, who gets to enjoy the status of user in respect of which activities, and the content and the scope of the rights they are accorded as a result of that status, “matters substantially.”⁴⁹ The term seems destined to bear an enormous amount of rhetorical weight, doomed to endless iterations of varying specificity and expansiveness, a kaleidoscope of shifting identities and interests. Nonetheless, accounts of the user must strive to maintain referential integrity in order to faithfully represent who copyright users are and what they are doing.⁵⁰ As Meese succinctly phrases the matter, “[b]efore we can legislate for the user, we need to know who the user *is*.”⁵¹

To the extent that the concept of “use” has received legislative attention in Canada, it is expansive: in its “Non-commercial User-generated Content” [UGC] provisions, the *Copyright Act* (Canada) does not define “user,” but it defines “use” as “anything that by this Act the owner of the copyright has the sole right to do, other than the right to authorize anything.”⁵² Etymologically, then, for certain purposes under Canadian copyright law, a “user” is someone who, with respect to a particular copyright-protected work or other subject-matter, performs an activity which is otherwise reserved exclusively to the owner thereof; from the standpoint of the protected work, the (potential) “user” is simply whoever is not the owner. Given the extensive scope of rights granted to copyright owners, then, it seems that the academic assessments of “user” coincide with the legislative: virtually anyone is or can be a copyright user. However, it should be highlighted that the UGC provision in the *Copyright Act* (Canada) which employs the defined term “use” is available only to “individuals,” and not other legally recognized persons such as corporations or partnerships.⁵³ In order to provide some definitional coherency to the “user” who will feature in the metaphor being constructed in this article, and to emphasize the differential in political power that is a key component of the discussion in Part III of this article, I will use “user” to refer to the archetype implicitly employed in the Canadian UGC provisions – that is, a human individual who interacts with copyright-protected subject-matter in a way which the Act nominally reserves to the owner of that work. Having in mind that archetypal user, then, what can be said about the role of the user in copyright reform? Alternatively, how can we describe how users are affected by copyright reform?

III. PUBLIC CHOICE THEORY

In an effort to discern how we might account for the role played by the user in legislative copyright reform, this section considers the model found in public choice theory. Public choice theory has been summarized by one of its leading proponents as “politics without romance,”⁵⁴ though perhaps less evocatively as “simply the application of economics to political science.”⁵⁵ The public choice model has been described as premised on the assumption that politicians and other law-makers are “motivated

⁴⁸ *Ibid* at 763.

⁴⁹ *Ibid* at 765.

⁵⁰ *Ibid* at 755, 756.

⁵¹ *Ibid* at 756 [emphasis in original].

⁵² *Copyright Act*, *supra* note 2, s 29.21(2). The definition of “use” is employed in the context of the “Non-commercial User-generated Content” provisions which permit an individual “to use an existing work other subject-matter.”

⁵³ *Ibid*, s 29.21(1). See also Teresa Scassa, “Acknowledging Copyright’s Illegitimate Offspring: User-Generated Content and Canadian Copyright Law,” in Michael Geist, ed, *The Copyright Pentalogy: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (Ottawa: University of Ottawa Press, 2013) 431 at 436.

⁵⁴ Buchanan, *supra* note 7 at 8.

⁵⁵ Dennis C Mueller, *Public Choice III* (Cambridge: Cambridge University Press, 2003) at 1.

primarily by self-interest,”⁵⁶ and as providing an account which posits that “[l]egislators are disproportionately influenced by organized interest groups and thus enact legislation enabling those groups to exact economic rents from others.”⁵⁷ Public choice models posit that lawmaking is the result of a competitive process involving “organized interest groups who compete to implement their agenda, while the outcome is dictated by relative group strength – the group with the greatest political capital is likely to wield superior influence on the process.”⁵⁸ Comparatively small groups with discrete identifiable interests are able to “effectively use their organizational advantages to extract economic benefits” from changes in the law.⁵⁹ The legislative reform process results in laws which over-allocate resources to organized, determined, interested groups.⁶⁰ In short, public choice approaches apply the “analytical tools of economics” to frame politics as a process of “selling and buying power and legislation.”⁶¹ A critical insight of public choice theory is that the success of a legislative reform agenda is often a function of how widely dispersed are the associated costs and benefits: “[c]oncentration is positively correlated with power.”⁶²

The logic of collective action provides a reason for stakeholders affected by copyright’s regime to organise and lobby to advance their interests.⁶³ But that logic applies with differing force to different stakeholders: copyright owners, for example, because they are able to directly convert their exclusive rights into pecuniary reward, have an obvious and immediate incentive to argue in favour of expanding their rights.⁶⁴ The benefits of collective action are less obvious for more dispersed types of actors and more speculative activities – it might be relatively easy for a particular copyright owner to quantify the monetary value of a twenty year term extension for a given sound recording which they own and have been exploiting for twenty years, but it is difficult to quantify the potential future monetary value to a screenwriter of a fair dealing provision which is expanded to include parody. The more diffuse the group impacted by legislation, and the lower the cost which would be borne by an individual member of the group due to a change in the law, the more difficult it is for that group to effectively coalesce and lobby to protect their interests.⁶⁵ The model further posits a systemic imbalance in the lawmaking process, pitting, on one side, “a well-organized group with resources and clearly defined interests,” against

⁵⁶ Sepehr Shahshahani, “The Nirvana Fallacy in Fair Use Reform” (2015) 16 *Minn J L Sci & Tech* 273 at 288.

⁵⁷ Einer R Elhauge, “Does Interest Group Theory Justify More Intrusive Judicial Review?” (1991) *Yale LJ* 31 at 32.

⁵⁸ Yafit Lev-Aretz, “Copyright Lawmaking and Public Choice: From Legislative Battles to Private Ordering” (2013) *Harvard JL & Tech* 203 at 205. The public choice model posits that legislation is a good to be transacted for in a market, and so “groups with great stakes in the legislative process would dedicate resources to influence governmental transfers of wealth through rent-seeking activities” (at 213). It also bears noting that “public choice theory” is a label which covers a number of different theories and sub-models, but for the sake of brevity this article uses “public choice theory” as short-hand; for additional details, see Mueller, *supra* note 55, and D Daniel Sokol, “Explaining the Importance of Public Choice for Law” (2011) 109 *Mich L Rev* 1029.

⁵⁹ Lev-Aretz, *supra* note 58 at 214.

⁶⁰ *Ibid* at 215.

⁶¹ Shahshahani, *supra* note 56 at 288-289; see *ibid* at fn 85 for an extensive bibliography of public choice scholarship.

⁶² *Ibid* at 290.

⁶³ Peter Drahos, *A Philosophy of Intellectual Property* (Aldershot, UK: Dartmouth Publishing Company., 1996; Acton, Australia: ANU eText, 2016) at 165. All citations herein to the Drahos text are to the ANU eText version, available online <<https://press.anu.edu.au/publications/philosophy-intellectual-property>>.

⁶⁴ *Ibid* at 166ff.

⁶⁵ Lev-Aretz, *supra* note 58 at 214 (noting that large groups of individuals are confronted by collective action problems, “especially information costs, organization costs and free rider costs ... [t]he costs associated with contributing to communal effort to promote legislation are significant, while the reward to each individual member from joining a public lobby is minor”).

“decentralized groups suffering from collective action problems.”⁶⁶ Of particular salience for the public choice account is the ambiguity and diffuseness of the identity of copyright’s user – yes, users are legion, but they may be *too* legion, unable to marshal the resources and organizational heft needed to lobby for re-orientation of copyright’s rules in their favour.

There appears to be a scholarly consensus that public choice theory provides an accurate account of legislative copyright reform in the United States.⁶⁷ Jessica Litman’s work has been cited as a preeminent example of scholarship applying public choice theory to copyright law reform.⁶⁸ Her book *Digital Copyright*⁶⁹ provides “a history of the industry lobbying and the political wrangling behind the passage of the digital copyright laws [in the late 1990s] through the United States Congress,”⁷⁰ foreshadowing her statement in 2002 that “our copyright laws have been written not by Congress ... but by copyright lobbyists...”⁷¹ Eli Dourado and Alex Tabarrok describe a political environment in which the expansion of copyright owner’s rights – and the concomitant shrinking of users’ rights – can be explained resorting to a maxim of public choice theory (particularly its Virginia school variant): “concentrate benefits, disperse costs.”⁷² As stated by Sepehr Shahshahani, “the legislative political economy of copyright is such that the rightsholders get their way and the general public is unheard.”⁷³

In this account, as ownership of copyright-protected works has been increasingly concentrated in the hands of multinational conglomerates, those owners have increasingly acute incentives to lobby for expansions of owners’ rights – but the individual users whose interests would be negatively affected have little marginal utility to be gained from the wearying and costly battles which would need to be waged in order to check the expansion of owners’ rights. There is an inherent imbalance in the value of the rewards accruing to copyright owners (particularly owners who have agglomerated large collections of protected works) and the rewards accruing to copyright users. As Yafit Lev-Aretz has summarized the work of Yochai Benkler on the matter,

the systematic expansion of exclusive private rights at the expense of the public has continued because the beneficiaries of such rights are industrial players, whose focused, well-organized, and well-funded interests are more effectively communicated to lawmakers during the legislative process. ... these players band together easily, are highly aware of any proposed changes to the copyright system, and enjoy powerful lobbyists to confirm that such changes agree with their shares. The social costs of legislation of this sort are diffuse and only materialize after the statute is enacted, further hindering the public’s ability to recognize the costs and influence the legislation appropriately.⁷⁴

⁶⁶ *Ibid* at 205. See also William M Landes & Richard A Posner, *The Political Economy of Intellectual Property Law* (Washington, DC: AEI-Brookings Joint Center for Regulatory Studies, 2004) at 14 (attributing expansion in U.S. of owner-favourable copyright law provisions since 1976 to “inherent asymmetry between the value that creators of intellectual property place on having property rights and the value that would-be copiers place on the freedom to copy without having to obtain a license”).

⁶⁷ See Shahshahani, *supra* note 56 at 291-293 (variously describing public choice theory’s predictions as “dead on” and “borne out with remarkable accuracy” in the copyright context).

⁶⁸ See e.g. Lev-Aretz, *supra* note 58 at 216.

⁶⁹ Jessica Litman, *Digital Copyright: Protecting Intellectual Property on the Internet* (Amherst, NY: Prometheus Books, 2001).

⁷⁰ Rimmer, *supra* note 41 at 9.

⁷¹ Jessica Litman, “War Stories” (2002) 20 *Cardozo Arts & Ent LJ* 337 at 350.

⁷² Eli Dourado & Alex Tabarrok, “Public choice perspectives on intellectual property” (2015) *Public Choice* 129 at 134.

⁷³ Shahshahani, *supra* note 56 at 304.

⁷⁴ Lev-Aretz, *supra* note 58 at 218.

The trajectory of legislative copyright reform in the US over the last forty years has been almost unerringly in favour of copyright owners along almost every conceivable axis of measurement: protectable subject-matter has expanded, the scope of exclusive rights accorded to owners has expanded and the duration of copyright rights has expanded.⁷⁵ That is a function of the structural nature of the copyright ecosystem: certain types of copyright owners are relatively concentrated and relatively homogeneous, as compared to a large and diffuse set of users.⁷⁶ The inchoate nature of copyright's users align with the insights of public choice theory: because they are not a homogenous group, they "lack[] a clear agenda and concentrated interests, and hence [are] unlikely to regularly engage in political action."⁷⁷ Users are thus "unable to effectively advocate for [themselves], while the interests of copyright owners and the content industries are broadly met."⁷⁸ There have been dissenting voices from the broad strokes of the public choice account,⁷⁹ but for the most part it remains the dominant, if pessimistic, assessment among contemporary copyright scholars.

However, it should be noted the public choice account of legislative copyright reform does not postulate that content owner success in copyright reform efforts is pre-ordained. We can look, by way of illustration to recent experience in the United States: in 2012 two anti-piracy bills which were making their way through the United States Congress – the *Stop Online Piracy Act* [SOPA] and the *Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act* [PIPA] – were abandoned after a twenty-four hour online "strike" on January 18, 2012 (billed as the "largest online protest in history"⁸⁰) designed to voice opposition to the bills.⁸¹ The protest, which resulted in the bills being shelved on January 20, 2012,⁸² was "unanimously hailed as successful."⁸³ The success of the protest was attributable not just to enhanced lobbying efforts by a rival group of corporate entities, but to the participation of users whose involvement was facilitated by online social media platforms which dramatically lowered coordination costs for those users, thus obviating one of the primary impediments to user success as identified by public choice theory.⁸⁴ Because the internet facilitates communication and community formation, "even small, poorly-funded groups can successfully be at the helm of public mobilization."⁸⁵

The public choice model does not mandate that copyright owners *must* or *will always* win, nor even predict that they will do so a majority of the time – instead, public choice theory simply indicates that

⁷⁵ See generally Shahshahani, *supra* note 56 at 294-295.

⁷⁶ For example, the large book publishers, Hollywood studios, and music publishers. However, it is inaccurate to describe rightsholders as "a small group with well-defined interests" (Shahshahani, *supra* note 56 at 293) – the universe of protected works is vast, the number of owners enormous, the degree of concentration varies from industry to industry, and the interests of owners in even closely-aligned facets of different industries are not always congruent, e.g., music publishers (representing owners of copyright in musical compositions) and record companies (representing owners of copyright in sound recordings) have different views on whether and the extent to which radio stations should be obliged to pay record companies for the public performance of sound recordings in the "over the air" radio broadcasts; see generally Melanie Jolson, "Congress Killed the Radio Star: Revisiting the Terrestrial Radio Sound Recording Exemption in 2015" (2015) Colum Bus L Rev 764.

⁷⁷ Lev-Aretz, *supra* note 58 at 247.

⁷⁸ *Ibid* at 205-206.

⁷⁹ See e.g. Timothy Wu, "Copyright's Communications Policy" (2004) 103 Mich L Rev 278 at 291ff.

⁸⁰ See online: <<http://www.sopastrike.com/>>.

⁸¹ Lev-Aretz, *supra* note 58 at 204. For a detailed examination of the history of the SOPA/PIPA protests, see *ibid* at 220-226.

⁸² See online: <<https://thinkprogress.org/breaking-harry-reid-cancels-senate-debate-over-protect-ip-act-817a8b753a82#.h6uqilksi>>.

⁸³ Lev-Aretz, *supra* note 58 at 204.

⁸⁴ *Ibid* at 206; see also *ibid* at 207-208, 226-237.

⁸⁵ *Ibid* at 230.

those who wield, and adeptly deploy, more political power will win. While it may be that in many, most, or all situations the better-resourced will be the more politically savvy, that is not necessarily the case. Nor is it the case that the identity of who is better-resourced will remain static over time – if the SOPA/PIPA protests indicate anything, it is that the “tech lobby” (comprised of stakeholders such as Google, Facebook, Wikipedia, reddit and Mozilla) may have matured in their lobbying sophistication to match the political aptitude of the traditional “content” or “entertainment” industries.⁸⁶ The SOPA/PIPA protests should not be understood as heralding a turning point marking a new epoch in which the lobbying power of copyright owners has been neutered – the success of the protests is explicable as the fortuitous confluence of a number of factors.⁸⁷ The SOPA/PIPA protests were a combination both of the tech industries promoting their business interests and the rallying of user communities, with each factor catalyzing the other.⁸⁸

IV. RECENT CANADIAN COPYRIGHT REFORM EPISODES

Having noted that copyright users are dispersed and unlikely to be in a position to effectively lobby for their interests, and having noted that public choice theory predicts that users will generally, for systemic reasons, find their interests sub-optimally reflected in legislative copyright reform efforts, this section reviews two recent episodes of legislative copyright reform in Canada: the passage of the *Copyright Modernization Act* in 2012 and the extension of the duration of copyright protection for sound recording and performer’s performances in 2015.

A. *Copyright Modernization Act*

Receiving Royal Assent in June 2012, the *Copyright Modernization Act* [CMA],⁸⁹ was the culmination of nearly a decade of attempts to amend the *Copyright Act* (Canada).⁹⁰ More than a decade before the CMA passed, the Canadian government began consulting the public on copyright reform proposals.⁹¹ In connection with Bill C-32 (the immediate predecessor to Bill C-11, which was ultimately passed as the CMA), the government held extensive public consultations over a period of two months in 2009 (which included round tables, town hall meetings and opportunities for the provision of online feedback) and the legislative committee on Bill C-32 convened “twenty meetings between November 2010 and March 2011, and heard from over 100 witnesses from various stakeholder organizations.”⁹² Among the large number

⁸⁶ *Ibid* at 206.

⁸⁷ See generally *ibid* at 208-209, 235ff (citing, in addition to the facilitative role of social media platforms, the inspirational role of the Arab Spring and the sense of personal threat felt by users in connection with their access to social platforms such as Facebook and YouTube). Lev-Aretz is careful to emphasize that the SOPA/PIPA protests should be understood as exceptional and not as presaging a dramatic alteration of the copyright law-making process, suddenly bending to the interests of the public/users (at 235).

⁸⁸ *Ibid* at 240.

⁸⁹ *Supra* note 1.

⁹⁰ *Supra* note 2. One earlier reform effort (Bill C-60) was tabled in June 2005, but then died on the order paper when the 38th Parliament was dissolved in November 2005. The next reform effort (Bill C-61) was tabled in June 2008, but that bill, too, died when the 39th Parliament was dissolved in September 2008. In June 2010, the government introduced Bill C-32, but that died on the order paper when the 40th Parliament dissolved in March 2011. Bill C-11 (which was essentially a verbatim repurposing of Bill C-32) was introduced in September 2011 and received Royal Assent in June 2012. For an overview of the history of Canadian legislative reform efforts, see Government of Canada, Canadian Heritage, “History of Copyright in Canada,” online: <<http://canada.pch.gc.ca/eng/1454685408763>>.

⁹¹ See Bannerman, *supra* note 39.

⁹² See Legislative Summary, *Bill C-11: An Act to amend the Copyright Act* (Publication No. 41-1-C11-E; October 14, 2011, revised April 20, 2012) (Legal and Legislative Affairs Division, Parliamentary Information and Research

of changes made to the *Copyright Act* (Canada) by the *CMA*, it introduced a number of new exceptions to infringement targeted at users which permitted: (i) the creation of non-commercial user-generated content,⁹³ (ii) reproduction for private purposes,⁹⁴ (iii) time-shifting,⁹⁵ and (iv) back-up copies.⁹⁶ The *CMA* also added provisions relating to technological protection measures [TPMs], by giving to owners of works, sound recordings and performer's performances, a right to remedies when a so-called "access control" TPM is circumvented in connection with the owner's protected subject-matter.⁹⁷ The TPM provisions were a source of significant debate during the *CMA* consultation process.⁹⁸

The government's rhetorical positioning of the *CMA* offers a glimpse of how the government articulated its legislative goals in formulating the *CMA*. The government's own website created for the copyright reform process was titled "Balanced Copyright,"⁹⁹ and the preamble to the *CMA* expressly articulated a desire to tailor the rights granted under the *Copyright Act* to effect a calibration between owners and users,¹⁰⁰ indicating that the interests of various groups of stakeholders were taken into account in the formulation of the legislation. Myra Tawfik, writing in the midst of the reform process, noted that the legislation had been drafted in a manner which seemed designed to curry favour with all potential stakeholders.¹⁰¹ Barry Sookman has argued that, assessed holistically, the TPM anti-circumvention provisions would ultimately prove beneficial to consumers because those provisions facilitated the development of innovative business models which would ultimately deliver more choice and content to consumer-users.¹⁰² Nonetheless, notes of dissatisfaction were struck by others with respect to the interface between users' rights and the TPM anti-circumvention provisions. As Tawfik phrased it when commenting on one of the *CMA*'s predecessor bills, the presence of the TPM provisions meant that the "recognition and enhancement of user rights ... may well be nothing but smoke and mirrors."¹⁰³ Carys Craig concluded that all of the new exceptions or users' rights contained in the legislation "were made subject to non-circumvention provisos that ... render them redundant in the face of TPMs."¹⁰⁴ Similarly, Pascale Chapdelaine concluded that, while the *CMA* (and the Supreme Court of Canada's 2012 so-called

Service)(Dara Lithwick, Maxime-Olivier Thibodeau), online:

<<http://www.lop.parl.gc.ca/content/lop/LegislativeSummaries/41/1/c11-e.pdf>> at 8-9.

⁹³ *Copyright Act*, *supra* note 2 29.21.

⁹⁴ *Ibid*, s 29.22.

⁹⁵ *Ibid*, s 29.23.

⁹⁶ *Ibid*, s 29.24. For further discussion of the four new exceptions, see Chapdelaine, *supra* note 27 especially at 11-15.

⁹⁷ *Copyright Act*, *supra* note 2 ss 41.1(1) – 41.1(4). For an overview of the international treaty context relating to TPMs and the operation of "access control" TPMs and "usage control" TPMs, see Chapdelaine, *supra* note 27 at 21-24.

⁹⁸ See Chapdelaine, *supra* note 27 at fn 123 ("In Canada, TPMs occupied the larger part of the debates throughout the recent copyright legislative reform that led to ... the *CMA*").

⁹⁹ Online: <<http://www.balancedcopyright.gc.ca>>.

¹⁰⁰ Preamble, *Copyright Modernization Act*, *supra* note 1 ("Whereas the exclusive rights in the *Copyright Act* provide rights holders with recognition, remuneration and the ability to assert their rights, and some limitations on those rights exist to further enhance users' access to copyright works or other subject-matter").

¹⁰¹ Myra Tawfik, "History in the Balance: Copyright and Access to Knowledge" in Geist, *Radical Extremism*, *supra* note 11, 69 at 85 ("Bill C-32 provides for a number of legislative reforms to bolster the rights of each key constituent in the copyright equation").

¹⁰² See Barry Sookman, "'TPMs': A Perfect Storm for Consumers: Replies to Professor Geist" (2005) 4 CJLT 23 [Sookman, "TPMs"].

¹⁰³ Tawfik, *supra* note 101 at 86.

¹⁰⁴ Carys Craig, "Digital Locks and the Fate of Fair Dealing in Canada: In Pursuit of 'Prescriptive Parallelism'" (2010) 13 J World IP 503 at 522.

“copyright pentology”¹⁰⁵) “give[s] an unprecedented place to the interests of copyright consumers and other users in copyright law ... 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 *CMA*.¹⁰⁶ As Chapdelaine noted, three of the four new user-oriented provisions contained in the *CMA* were expressly subject to “override” by TPMs.¹⁰⁷

The core of the argument against the “balance” struck by the *CMA* is that the TPM anti-circumvention provisions are not linked to, or are not subject to, the exercise by users of their users’ rights.¹⁰⁸ In Chapdelaine’s view, any benefits arising from the introduction of the new user-oriented provisions in the *CMA* are largely curtailed by their limited scope and the uncertainty resulting from their confusing construction.¹⁰⁹ The government’s response to concerns raised about the TPM provisions was effectively to delegate the solution to market forces, arguing that digital locks are generally unpopular with consumers and so owners would employ them only sparingly for fear of losing market share.¹¹⁰

Final assessments of the efficacy of the *CMA*’s balancing exercise remain to be written.¹¹¹ Many of the competing claims made about the legislation are capable of empirical testing, though in some cases only with great difficulty (*e.g.*, has the introduction of the TPM provisions led to increased introduction into the Canadian market of digital services? has the creation of new original expression been lower than what it might otherwise have been due to the uncertainty of some of the users’ rights provisions?). At the time of writing, there have been only two final decisions in cases in which the plaintiffs grounded their claims of infringement in the TPM provisions – in neither case was the defendant an individual user.¹¹²

B. Sound Recording Term Extension

In 2015, as part of its annual budget process, the Canadian government announced amendments to the *Copyright Act* (Canada) which extended the term of copyright protection for published sound recordings and performer’s performances fixed in such recordings from fifty years to seventy years.¹¹³ The

¹⁰⁵ *ESAC v SOCAN* 2012 SCC 34; *Rogers v SOCAN* 2012 SCC 35; *SOCAN v Bell* 2012 SCC 36; *Alberta v Access Copyright* 2012 SCC 37; and *Re:Sound v MPTAC* 2012 SCC 38.

¹⁰⁶ Chapdelaine, *supra* note 27 at 44.

¹⁰⁷ *Ibid* at 35-37.

¹⁰⁸ *Ibid* at 24-26. For example, a documentary filmmaker who, in reliance on the fair dealing category of criticism and review, wished to include in their documentary an extract from a movie protected by an “access control” TPM would be liable for circumvention of the TPM, irrespective of their purpose for the circumvention.

¹⁰⁹ *Ibid* at 44-45.

¹¹⁰ Tawfik, *supra* note 101 at 88. For arguments in favour of robust protection for TPMs, see *e.g.* Sookman, “TPMs,” *supra* note 102.

¹¹¹ Cf. Timothy Vollmer, “An interview with Michael Geist: copyright reform in Canada and beyond,” online: <<https://creativecommons.org/2017/04/17/michael-geist/>> (while Geist notes that there is “still room for improvement,” he also notes that “Canada is often held out as a great example of successful copyright advocacy leading to a more balanced law,” noting a number of user-friendly provisions such as the UGC provision and the cap on statutory damages in non-commercial cases).

¹¹² In *1395804 Ontario Ltd (Blacklock’s Reporter) v Canada (Attorney General)*, 2016 FC 1255, the plaintiff was unsuccessful in its attempt to sue the federal Ministry of Finance for copyright infringement arising from activities of individuals in the Ministry who acquired and distributed copies of articles owned by the plaintiff. In *Nintendo of America Inc. v Jeramie Douglas King and Go Cyber Shopping (2005) Ltd.*, 2017 FC 246 the plaintiff sought a declaration that the defendants, an operating business and its sole director and officer, “circumvented, offered services to circumvent, and trafficked in devices which circumvent” the TPMs of the plaintiff on the basis of certain devices offered for sale by the defendant; the parties had entered into a settlement agreement, and the plaintiff was granted its application for the declaration in what was effectively an uncontested proceeding.

¹¹³ Canada, Dept of Finance, *Strong Leadership: A Balanced-Budget, Low-Tax Plan for Jobs, Growth and Security* (tabled in the House of Commons April 21, 2015), online: <<http://www.budget.gc.ca/2015/docs/plan/budget2015-eng.pdf>>

amendments did not revive copyright in any sound recordings or performances which had already fallen into the public domain,¹¹⁴ but nor did they only apply prospectively to new sound recordings and performances created after the amendments were enacted – the term of copyright for any published recording or performance which was protected by copyright on June 23, 2015 (the date on which the amendment received Royal Assent) was automatically extended by twenty years.

As chronicled by Michael Geist, the sound recording term extension was “strictly the product of behind-the-scenes industry lobbying with no broader consultation or discussion.”¹¹⁵ The lobbying effort appears to have been prompted by the appearance in the Canadian market of low-cost CDs carrying recordings from the early 1960s on which copyright protection had expired.¹¹⁶ Geist, relying on schedules of lobbyist meetings which are required to be publicly disclosed, showed that the Director of Policy for the Canadian Heritage Minister (one of two federal ministers with Cabinet responsibility for the *Copyright Act*) attended a series of meetings with record industry lobbyists which began in the autumn of 2014 and continued through the spring of 2015.¹¹⁷ The Standing Committee on Finance which conducted a clause-by-clause review of the 2015 Budget, heard from only a single witness: the president of Music Canada (the trade association whose membership consists of the country’s largest record companies).¹¹⁸

The government’s express intention in extending the term was to prolong the entitlement of sound recording owners and performers to receive a portion of sales revenues generated by the sale of sound recordings and equitable remuneration from continued exploitation of the recordings:

[*Strong Leadership*] at 305-306. Prior to the 2015 amendments, sound recordings were protected by copyright for a period of fifty years from the later of fixation or publication (*i.e.*, the recording was protected for a period of fifty years from the end of the calendar year in which the recording was created, but if the sound recording was published during that fifty year period, the recording would be protected for a period of fifty years from the end of the calendar year in which the recording was published) and performer’s performances were protected for a period ranging from fifty years to ninety-nine years, depending on whether the performance was fixed in a published or unpublished sound recording (an unfixed performance was protected for fifty years from the end of the calendar year in which the performance took place; a performance fixed in a sound recording during that fifty year period was protected for a period of fifty years from the end of the calendar year in which fixation occurred; if the sound recording was published, the performance would be protected until the earlier of (i) fifty years from the end of the calendar year in which publication occurred or (ii) ninety-nine years from the end of the calendar year in which the performance took place.). The 2015 amendments provided that (a) copyright in a published sound recording subsists until the earlier of seventy years from the end of the year in which first publication occurred or one hundred years from the end of the calendar year in which fixation of the sound recording first occurred, and (b) copyright in a performer’s performance which is fixed in a published sound recording subsists for an equivalent term (*i.e.*, the earlier of seventy years from first publication or one hundred years from fixation).

¹¹⁴ *Economic Action Plan 2015*, *supra* note 5, s 82.

¹¹⁵ Geist, “Harper Letter,” *supra* note 6.

¹¹⁶ Michael Geist, “Is the Great Canadian Copyright Giveaway Really About Some Cheap Beatles Records?” (23 April 2015), *Michael Geist* (blog), online: <<http://www.michaelgeist.ca/2015/04/is-the-great-canadian-copyright-giveaway-really-about-some-cheap-beatles-records/>>.

¹¹⁷ Michael Geist, “The Power of Backroom Lobbying: How the Recording Industry Got Their Copyright Term Extension” (28 April 2015), *Michael Geist* (blog), online: <<http://www.michaelgeist.ca/2015/04/the-power-of-backroom-lobbying-how-the-recording-industry-got-their-copyright-term-extension/>>. Geist identifies meetings which occurred on November 10, 2014, November 26, 2014, December 5, 2014, February 17, 2015 and March 18, 2015; there was also a November 28, 2014 meeting with the Chief of Staff to the Industry Minister, the other Cabinet minister with oversight of the *Copyright Act*.

¹¹⁸ Michael Geist, “Canadian Copyright Extension Set to Pass Committee As Recording Industry Lobbyist the Only Copyright Witness” (4 June 2015), *Michael Geist* (blog), online: <<http://www.michaelgeist.ca/2015/06/canadian-copyright-extension-set-to-pass-committee-as-recording-industry-lobbyist-the-only-copyright-witness/>>.

The mid-1960s were an exciting time in Canadian music, producing many iconic Canadian performers and recordings. While songwriters enjoy the benefits flowing from their copyright throughout their lives, some performers are starting to lose copyright protection for their early recordings and performances because copyright protection for song recordings and performances following the first release of the sound recording is currently provided for only 50 years.

Economic Action Plan 2015 proposes to amend the Copyright Act to extend the term of protection of sound recordings and performances from 50 to 70 years following the first release of the sound recording. This will ensure that performers and record labels are fairly compensated for the use of their music for an additional 20 years.¹¹⁹

The extended term secures for owners and performers an entitlement to additional revenues in two ways: first, the owner of copyright in the sound recording will continue to enjoy the exclusive rights, among others, to reproduce, make available and communicate the sound recording to the public by telecommunication, and so will be able to receive compensation in connection with those activities (generally by means of the sale of the physical discs or digital files on which the recordings were embodied);¹²⁰ second, the owner of the recording and the artists who performed on the recording will continue to be entitled to receive equitable remuneration in connection with public performances or communication to the public by telecommunication in Canada of the recording.¹²¹ Although not expressly mentioned by the government in its budget materials, the term extension harmonized the term of protection for sound recordings with that found in the copyright regimes of many of Canada's major trading partners – with the additional beneficial result that Canadian owners and performers will continue to be entitled to receive equitable remuneration from collectives in those countries that make the entitlement of foreign recipients to such payments conditional on reciprocal term durations.¹²²

¹¹⁹ *Strong Leadership*, *supra* note 113 at 305-306. [emphasis added].

¹²⁰ Where the artist who performed on the recording was not also the owner of the recording, that artist (assuming they were a featured artist and not a “background” or session performer) would generally be entitled to a royalty on sales by virtue of the recording contract that the artist had entered into with the record company.

¹²¹ *Copyright Act*, *supra* note 2, s 19(1).

¹²² The major exception to the harmonization is the United States, which does not accord copyright protection to performer's performances, and which has a notoriously complicated treatment of copyright in sound recordings (see the “Sound Recordings” section of Cornell University Library Copyright Information Center's *Copyright Term and the Public Domain in the United States* (online: <<https://copyright.cornell.edu/publicdomain>>). Regarding the harmonization of the Canadian term of protection for sound recordings and performer's performances vis-à-vis countries other than the United States, see Barry Sookman, “Canada to extend copyright term for artists and record producers” (21 April 2015), *Barry Sookman* (blog), online: <<http://www.barrysookman.com/2015/04/21/canada-to-extend-copyright-term-for-artists-and-record-producers/>> [Sookman, “blog”]. While the reciprocity issue was not mentioned in the government's messaging, the topic was repeatedly mentioned by Music Canada's public statements relating to the term extension (see, e.g., Music Canada, “Update: Artists react to proposal to extend the term for copyright of sound recordings in Canada to 70 years” (30 April 2015), *Music Canada* (blog), online: <<http://musiccanada.com/news/artists-react-to-proposal-to-extend-the-term-for-copyright-of-sound-recordings-in-canada-to-70-years/>>, containing quotes from multiple Canadian artists, a number of which include reference to Canada's trading partners; see also Music Canada, “Backgrounder: Term Extension for Sound Recordings” (21 April 2015), *Music Canada* (blog), online: <<http://musiccanada.com/news/backgrounder-term-extension-for-sound-recordings/>> which includes an appendix listing sixty-six countries with terms of protection longer than the fifty years then applicable in Canada; and see Music Canada, “Term Extension Benefits Canadian Artists, Music Companies and the Economy: Music Canada” (21 April 2015), *Music Canada* (blog), online: <<http://musiccanada.com/news/term-extension-benefits-canadian-artists-music-companies-and-the-economy-music-canada/>> which mentions Canada's term of protection “not being aligned with our international trading partners.”

Music Canada's public statements in favour of the term extension cited re-investment in younger artists and the "incentive[] to digitize and reissue classic recordings, often with remastering and additional and enhanced features."¹²³ In its press release marking the coming into effect of the 2015 budget, Music Canada stated that the seventy year term will "mean that artists and other rights holders retain control of their sound recordings and can profit from them into their elder years."¹²⁴ In addition, the release stated that "[f]or younger artists, additional profits derived by rights holders from older recordings will be reinvested in developing artists."¹²⁵

The 2015 sound recording term extension bears strong resemblance to an earlier copyright reform episode in the United States: the passage in 1998 of the *Sonny Bono Copyright Term Extension Act* [CTEA].¹²⁶ Shahshahani describes the legislative process surrounding the CTEA as one-sided and dominated by entertainment industry lobbyists,¹²⁷ and contrasts it with the legislative process for the *Fairness in Music Licensing Act*, in which the music publishing industry was pitted against the hospitality industry.¹²⁸ As predicted by public choice theory, the terms of the latter debate were much more evenly-matched, with lobbyists and public representatives lined up on both sides of the debate, unlike during the term extension debate. Consistent with the Canadian experience in 2015, the public rhetoric of those in favour of the CTEA term extension emphasized "rights to existing works and not incentives for future creation."¹²⁹

Retroactive term extensions are perhaps the *ne plus ultra* of one-sided copyright reform. They benefit content owners almost exclusively, and do not align with copyright's animating myth of providing incentives for the creation of new works – as drily noted by Dourado and Tabarrok, "no incentive can increase the number of works created in the past."¹³⁰ A point which bears highlighting: entirely absent from the public statements by the government and Music Canada about the 2015 term extension was any argument that the extension would act as a direct incentive for the creation of *future* works.¹³¹ Present,

¹²³ Music Canada 21 April 2015 blog post, *supra* note 122.

¹²⁴ Music Canada, "It's Official! Copyright in Canada Extended to 70 Years for Sound Recordings" (24 June 2015), *Music Canada* (blog), online: <<http://musiccanada.com/news/its-official-copyright-in-canada-extended-to-70-years-for-sound-recordings/>>.

¹²⁵ *Ibid.*

¹²⁶ *Sonny Bono Copyright Term Extension Act of 1998*, Pub L No 105-298, 112 Stat 2827 (amending 17 USC §§ 302, 304).

¹²⁷ Shahshahani, *supra* note 56 at 298-301.

¹²⁸ *Ibid* at 301-302. The *Fairness in Music Licensing Act* expanded the scope of the exemptions from public performance licences available to bars and restaurants; see *Fairness in Music Licensing Act of 1998*, Pub L No 105-298, 112 Stat 2830-34 (codified as amended 17 USC §§ 101, 110, 504, and 17 USC § 512 (2012)).

¹²⁹ Dourado & Tabarrok, *supra* note 72 at 134.

¹³⁰ *Ibid* at 133. Buccafusco and Heald (Christopher Buccafusco & Paul J. Heald, "Do Bad Things Happen When Works Enter the Public Domain?: Empirical Tests of Copyright Term Extension" (2013) 28 BTLJ 1), identify three other possible arguments in favour of term extension (absence of incentives to exploit public domain works, thereby resulting in underuse; over-exploitation of public domain works, resulting in a diminishment of their economic and cultural value; and tarnishment or debasement of public domain works due to low quality versions); none of those arguments appear to have been publicly made by either the government or Music Canada in connection with the Canadian term extension. In any event, Buccafusco and Heald's empirical work leads them to conclude that all three arguments are "unsupported" (at 37). There also appears to be little empirical evidence to justify the claim that term extensions provide an incentive to copyright owners to restore and disseminate older protected works (Dourado & Tabarrok, *supra* note 72 at 139).

Sookman, "blog," *supra* note 122, advanced a number of arguments in favour of the Canadian term extension, some of which overlap with the arguments identified in Buccafusco & Heald, though many of them are original to Sookman.

¹³¹ Buccafusco & Heald, *supra* note 130 at 3 ("the primary argument in favor of extending the copyright term for future works is based on this incentive-to-create rationale: a longer term means that the author will be able to generate more

though somewhat mutedly, were arguments that the revenues resulting from the term extension would be employed to further exploitation of the protected works and would indirectly benefit creators through increased investments for future development. The dominant theme in the advocacy for the term extension was simply that owners would (and should) be able to continue to enjoy receiving revenues which would otherwise disappear due to the sound recordings falling into the public domain. Robert Merges has described the *CTEA* as “almost pure rent-seeking legislation” – it is “legislation that strongly favored a narrow class of copyright owners, broadly but mildly affected many present and future consumers, was intensively lobbied, and became law with little opposition.”¹³² It is difficult to more succinctly describe the nature and impact of the 2015 sound recording term extension in Canada.

C. Recapping Recent Reforms Through the Lens of Public Choice Theory

Committed public choice theorists would find little that is remarkable about Canada’s 2015 sound recording term extension – a determined group of copyright owners deployed their lobbying prowess to secure an amendment favourable to their interests. While the 2012 *CMA* amendments present a more equivocal picture, they too are well within the parameters of what we might predict using public choice theory: some meaningful gains for users were perhaps overwhelmed in the balance by the TPM provisions. We can conclude that the two episodes demonstrate the status of the user in copyright reform is precarious – almost always outmatched by better-resourced stakeholders such as organized content owners.

My own intuitive response to the two rounds of reform views the 2015 term extension as distasteful and wrong, while the 2012 amendments are more palatable. In part those responses can be explained by reference to the substance of the changes: I’m generally averse to term extensions, for instance,¹³³ and I rather like some of the innovative changes made in the *CMA* (and I think those revisions to the *Copyright Act* – such as the private purpose and time-shifting provisions – which align the legislation with the actual practices of copyright users are to the good).¹³⁴ In part my responses are also a reaction to the perceived adherence (or lack thereof) to norms of liberal democratic process: in 2015, in response to the lobbying by Music Canada, the government solicited the views of no other stakeholders; in the years leading up to the passage of the *CMA* in 2012, public consultation by successive governments was as robust as one might reasonably expect.

But accounting for my reactions in terms of public choice theory alone is difficult. If public choice theory is simply the application of economics to legislative processes, the approach carries recognized limitations in that drawing normative conclusions about phenomena examined using cost-benefit analysis or the lens of efficiency requires resort to other sources of values.¹³⁵ Public choice theory tells us that organized, committed interest groups will more often see their desired results implemented in legislative

money from her work, thereby increasing the ex ante incentive to create,” citing Willam M Landes & Richard A Posner, *Economic Structure of Intellectual Property Law* (2003)).

¹³² Robert P Merges, “One Hundred Years of Solicitude: Intellectual Property Law, 1900-2000” (2000) 88 Cal L Rev 2187 at 2236.

¹³³ For arguments against lengthy (and increasing) copyright terms, see generally David Lametti, “Coming to Terms with Copyright” in Michael Geist, *Public Interest*, *supra* note 22, 480.

¹³⁴ See David Lametti, “How Virtue Ethics Might Help Erase C-32’s Conceptual Incoherence” in Geist, *Radical Extremism*, *supra* note 11, 327 at 333-334.

¹³⁵ See e.g. Daniel A Farber & Philip P Frickey, *Law and Public Choice: A Critical Introduction* (Chicago: University of Chicago Press, 1991) at 35, citing Richard Posner, *Economic Analysis of Law* (3rd ed, 1986) at 25-26 (“there is more to justice than economics”). For a discussion of the extent to which law as a human activity can be described in terms of play and games, see Johan Huizinga, *Homo Ludens: A Study of the Play-Element in Culture* (London: Routledge & Kegan Paul, 1944, translated edition published in 1949) at 76-88.

reform than disparate, unfocused groups of affected individuals;¹³⁶ it does little to tell us whether there is any positive or negative valence to that result. Applied to the status of the user in copyright reform, public choice theory seems to be a counsel of despair: users will almost inevitably see their rights subordinated to those of owners and there is little normative appraisal of that result. For the public choice theorist, if copyright's users want better results in the reform process, then they should be better organized and prepare themselves to better play the copyright reform "game." The balance of this article explores whether there is another, more ethically satisfying, story that can be told about copyright reform.

V. A METAPHOR: THE RULES MUTABLE GAME

Game metaphors are often invoked in connection with copyright law and intellectual property law generally.¹³⁷ My intention in this Part is to develop a rich, structured account of the "game" which is being played in copyright law by exploring the concept of the rules mutable game as a metaphor to be used in thinking about the copyright reform process and the status of users' rights in that process. In crafting the rules mutable game metaphor, I am cognizant that, because it is a metaphor, it falls on the opposite end of a spectrum which has algorithmic models at the other terminal end; this metaphor lacks predictive power – it is not intended to be a formula into which data is inserted and a forecast is generated of how copyright reform will unfold. Instead, this metaphor is intended to be a descriptive device which provides some insight into the phenomenon of copyright reform.¹³⁸ In the course of exploring the rules mutable game metaphor, four questions will be posed and answered in this Part: (a) what is a rules mutable game? (b) why is copyright law reform appropriately described as a rules mutable game? (c) what are the benefits of describing copyright law reform in this way? and (d) what are the drawbacks to describing copyright law reform as a rules mutable game?

A. What Is a Rules Mutable Game?

Bill Watterson's comic strip *Calvin and Hobbes*, starring an adventurous six-year old boy and his anthropomorphized stuffed tiger, featured a comedic trope which avid readers of the strip will recall fondly: Calvinball.¹³⁹ A charmingly anarchic mash-up of obstacles, equipment and scoring (which at one

¹³⁶ As described by Farber and Frickey, *supra* note 135, public choice theory is well-positioned to explain tendencies within political systems, rather than predict particular results, as legislators make decisions based on a variety of factors, including constituent interests, interest group pressure, and ideological commitment; see *ibid* at 33.

¹³⁷ See e.g. Craig, *supra* note 104 at 527 ("should also appreciate the extent to which TPMs and their protection threaten to change the established rules of the game"); Seagull Haiyan Song, "Reevaluating Fair Use in China – A Comparative Copyright Analysis of Chinese Fair Use Legislation, the U.S. Fair Use Doctrine, and the European Fair Dealing Model" (2011) 51 IDEA 453 at 473 ("*CCH Canadian Ltd v Law Society of Upper Canada* ... is believed to have changed the rules of the game"); Howard B. Abrams, "*Eldred, Golan and Their Aftermath*" (2012-2013) 60 J Copyright Soc'y USA 491 at 511 ("[c]reation of the World Trade Organization in 1994 changed the rules of the game"); and Liza Vertinsky, "An Organizational Approach to the Design of Patent Law" (2012) 13 Minn J L Sci & Tech 211 at 228 ("public ordering can be viewed as the 'rules of the game,' while private ordering can be viewed as the 'play of the game'"). See Loughlan, *supra* note 11 at 216ff for extended discussion of other metaphors commonly used in intellectual property discourse, particularly users as pirates or parasites, authors as farmers, and intellectual creation as commons.

¹³⁸ For a general discussion on the distinctions between frameworks, theories and models, see Michael J Madison, Brett M Frischmann & Katherine J Strandburg, "Constructing Commons in the Cultural Environment" (2010) 95 Cornell L Rev 657 at 677-678, discussing Elinor Ostrom, *Understanding Institutional Diversity* (Princeton: Princeton University Press, 2005).

¹³⁹ For perhaps the definitive illustration of Calvinball at work, see the August 26, 1990 strip of *Calvin and Hobbes*: Hobbes claims Calvin has just entered the "invisible sector" and has to cover his eyes; Calvin objects that he didn't know there

point is announced as “Q to 12”), one of the few constants of Calvinball is that the players make up the rules as they go along – they modify the parameters of the game on the fly in order to maximize their momentary advantage.¹⁴⁰ The instant a player perceives that the existing rules put him at a disadvantage, the player can simply unilaterally alter the rules so that disadvantage is, by fiat, transformed into advantage. The only true limit on the jostling for position appears to be the wit and stamina of the players.¹⁴¹

Calvinball is a particularly memorable example of what Peter Drahos describes as “rule mutable” games – games in which the rules can be “changed by the players as the game progresse[s]”¹⁴² and in which “players secure changes to the rules during the course of the game in order to win.”¹⁴³ As Drahos notes, the method for changing the rules is malleable depending on the context: it may require bargaining or negotiation among the players, one player may physically coerce the other player(s), or there may be need to resort to a “referee” empowered to promulgate and enforce the original and altered rules.¹⁴⁴ A rules mutable game requires players to engage with the game on two levels: awareness of the rules (and playing in accordance with them in order to secure advantage) but also awareness that the rules themselves can be changed (and changing them in order to secure advantage). As Drahos notes, a “natural” strategy for anyone operating in the context of a rules mutable game is to work (either individually or collectively with similarly-situated players) to redefine the relevant rules “in order to obtain a more favourable pay-off matrix.”¹⁴⁵

Conventional or traditional games are “fixed rules” games.¹⁴⁶ In a fixed rules game, the game has pre-determined rules which are made known to players and which determine the ambit of permissible actions

was an invisible sector; Hobbes retorts that it’s invisible; Hobbes proceeds to hit Calvin with the Calvinball; Calvin retaliates by declaring that Hobbes has run into a “vortex spot,” requiring Hobbes to spin around until he falls down; Hobbes counters by declaring the vortex spot to be in the “boomerang zone,” with the result that the vortex effect rebounds onto whoever declared it – Calvin protests at the unfairness, but eventually begins rotating himself dizzy, remarking “this game lends itself to certain abuses”; Hobbes waits patiently, Calvinball cocked and ready for launch at Calvin’s head. Bill Watterson, *Attack of the Deranged Killer Mutant Snow Goons* (Kansas City: Andrews & McMeel, 1992) at 34. For a list of Calvinball features, see <<http://calvinandhobbes.wikia.com/wiki/Calvinball>>. For other references to Calvinball in legal commentary, see Bret Rappaport & Joni Green, “Calvinball Cannot be Played on This Court: The Sanctity of Auction Procedures in Bankruptcy” (2002) 11 J Bank L & Practice 189 at 189; and Nicole Lapsatis, “In the Best Interests of No One: How New York’s ‘Best Interests of the Child’ Law Violates Parent’s Fundamental Right to the Care, Custody, and Control of Their Children” (2014) 86 St John’s L Rev 673 (noting “any player may declare a new rule at any point in the game ... [and] [s]core does not need to be kept with any logical consistency”).

¹⁴⁰ As described in the May 27, 1990 strip, the only constant rule of Calvinball is that it cannot be played the same way twice. See Bill Watterson, *Scientific Progress Goes “Boink”* (Kansas City: Andrews and McMeel, 1991) at 113.

¹⁴¹ In the May 27, 1990 strip (*ibid*), Hobbes tells Calvin that Calvin has to sing the “I’m Very Sorry Song” because Hobbes touched Calvin with the Calvinball; Calvin responds that he was in the “No Song Zone” and so does not have to sing; Hobbes asserts that, to the contrary, Hobbes had previously touched the “Opposite Pole,” thus rendering the “No Song Zone” into the “Song Zone”; increasingly desperate, Calvin states that he didn’t see Hobbes touch the pole and Hobbes had failed to declare that he touched the pole, thereby negating the purported operation of the Opposite Pole – to which Hobbes responds that he “declared it oppositely by *not* declaring it.” Thus stymied, Calvin starts singing.

¹⁴² Drahos, *supra* note 63 at 157. The formal concept of a rules mutable game was first developed by Peter Suber, who created the game *Nomic* (in which players are empowered to change all the rules, including the rule about rule mutability itself) in the early 1980s. The text of the initial state game rules is available in Peter Suber, *The Paradox of Self-Amendment: A Study of Law, Logic, Omnipotence, and Change* (Peter Lang Publishing, 1990) and online: Harvard University <<https://dash.harvard.edu/handle/1/10288408>>.

¹⁴³ Drahos, *supra* note 63 at 158.

¹⁴⁴ *Ibid*.

¹⁴⁵ *Ibid*.

¹⁴⁶ *Ibid* at 157.

during gameplay and the consequences of those actions.¹⁴⁷ Traditional economic game theory – which models interactions among decision-makers by constructing matrices consisting of three elements (players, the alternate choices (or “strategies”) available to the players, and the pay-offs to each player for taking each available strategy)¹⁴⁸ – is premised on fixed rules games.¹⁴⁹ By contrast with the fixed rules game, the rules mutable game “draws attention to the fact that rational actors are just as likely to think strategically about the structural elements of the game as they are about the options that they have under a set of [existing] rules.”¹⁵⁰ In short, in a rules mutable game, players will not only act tactically within the confines of the existing set of rules (“I can get two points if I put the ball into the net”), they will act strategically to alter the rules of the game to maximize their interests given their situational realities within the game (“I’m wearing a blue jersey, so I should change the rules to say that players wearing blue jerseys get ten points for putting the ball into the net”). This form of structural strategizing enables players to “change the constraints which the game imposes on them,”¹⁵¹ and alter the payoffs which they stand to enjoy to better match their characteristics (whether those are inherent personal attributes or contingent facts, such as property ownership).

B. Why Is Copyright Law Reform Appropriately Described as a Rules Mutable Game?

Copyright and its reform can be conceived of as a game in the terms used in economic game theory (and its application to the law), which employs a model consisting of players, rules which entail choices, and pay-offs. The players in the copyright game can be characterized in a variety of ways – this article has already made mention of users, and there are different (perhaps equally fluid) categories of copyright players, such as creators, owners, and disseminators. The rules of the copyright game are the rules of copyright’s legal regime: the collection of legislative instruments and judicial and administrative decisions which lawyers would recognize as constituting copyright law. Those rules determine the pay-offs available to players; alternatives to the existing rules present potential pay-offs which players may prefer to secure by comparison with the existing rules.

Copyright is a rules mutable game because the rights and entitlements bestowed by the rules are targets for player strategizing.¹⁵² The possibility of rules mutability is what gives rise to the “natural strategy” identified by Drahos in the legislative copyright reform context: there can be significant incentives to a player who is able to secure a change to copyright’s rules. Copyright reform’s status as a rules mutable game is perhaps easiest to recognize if approached from the standpoint of the copyright owner: the copyright regime bestows particular legally-enforceable rights claims on copyright owners, which can be modeled as pay-offs in a normal fixed rules game. The players in the rules mutable game, however, can

¹⁴⁷ *Ibid.*

¹⁴⁸ See Douglas G Baird, Robert H Gertner and Randal C Picker, *Game Theory and the Law* (Cambridge, MA: Harvard University Press, 1998) at 6ff.

¹⁴⁹ Drahos, *supra* note 63 at 157.

¹⁵⁰ *Ibid* at 158.

¹⁵¹ *Ibid.*

¹⁵² It bears emphasizing that there is no reason in principle why the “Calvinball” game metaphor cannot be used to describe a playing field with many more than two players. While this article, for the sake of brevity, will usually describe the “game” of copyright reform as one that is being played between two players (owners and users), that is, of course, a dramatic over-simplification (though one that is warranted to make the metaphor simpler and more palatable). As alluded to in Part II, even the notion of “user” can be disaggregated into a vast array of different users, each of whom could be considered a player in the copyright game; the same observation applies to owners, and the account could be made more intricate still by, for example, distinguishing among individual or corporate owners and collectives who act on their behalf but whose own interests may not be perfectly aligned with their members (or whose members may have divergent interests).

also model what the pay-offs might be given *alternative* rules sets and rights claims. Thus, the rational copyright player will seek to redefine the rules of the copyright game to obtain more favourable pay-offs.¹⁵³ Alteration of the rules to increase the extent and value of rights claims is a consistent feature of legislative copyright law reform in Canada. It has taken a variety of forms, from expansion of existing categories of protection, to additions of new categories of protection, to alterations in the duration of protection. Examples from the last few decades include adding computer programs to the list of protected “literary works” in 1988,¹⁵⁴ the addition of copyright protection for performer’s performances in 1997,¹⁵⁵ and the sound recording term extension in 2015.¹⁵⁶

The copyright system, and the copyright reform process, have an additional feature which is not necessarily present in all rules mutable games: a “neutral” third party. While the legislature is a participant in the copyright reform game, the legislature is not a player in the conventional sense – rather it is the arbiter or referee.¹⁵⁷ The legislature’s function is to enable enforcement of the rules of the game as they exist, but also to respond to the pleas of the players for changes to the rules. It bears noting that, as in most games, not all participants on the copyright field are equivalent in their aptitudes, capacities or resources.

While copyright can be described as a rules mutable game from the standpoint of economic game theory, the matter can also be approached from the standpoint of formal gaming theory. In this regard, it is important to distinguish the concept of the rules mutable game from mere frivolity – games can be serious, and, if the stakes are high enough, serious business.¹⁵⁸ It is also necessary to distinguish games from “play” – games are played, but “play” is ontologically different in that it lacks the structure and possibility of winning or losing.¹⁵⁹ While numerous definitions of “game” have been proffered,¹⁶⁰ and the difficulties in articulating a comprehensive definition of “game” are acknowledged,¹⁶¹ I adopt the widely-cited definition articulated by Jesper Juul, according to which a game has six features: (1) it is rule-based; (2) it has variable, quantifiable outcomes; (3) there are positive or negative values assigned to the various possible outcomes; (4) player effort is required to influence the outcome; (5) players have emotional or psychological “attachment” to the outcome which results from their efforts; and (6) there are negotiable consequences in that the game can be played with or without real-life consequences.¹⁶² A rules mutable

¹⁵³ *Ibid.*

¹⁵⁴ SC 1988, c 15, s 1(2)-1(3).

¹⁵⁵ SC 1997, c 24, s 14.

¹⁵⁶ *Economic Action Plan 2015*, *supra* note 5, s 81.

¹⁵⁷ Tawfik, *supra* note 101 at 69 (“[i]t is the legislature’s responsibility to be dispassionate, to mediate between these often competing interests in order to craft appropriate legislation in the name of the greater good”).

¹⁵⁸ Consider the value of prestige, satisfaction, prizes, sponsorship, advertising and spin-off revenues derived from, *e.g.*, major sporting competitions, e-sports tournaments, and games competitions.

¹⁵⁹ See generally Bryan Adamson et al, “Can the Professor Come Out and Play? – Scholarship, Teaching, and Theories of Play” (2008) 58 J Legal Edu 481 at 485ff.

¹⁶⁰ See Jesper Juul, “The Game, the Player, the World: Looking for a Heart of Gameness” in Marinka Copier & Joost Raessens, eds, *Level Up: Digital Games Research Conference Proceedings* (Utrecht: Utrecht University, 2003) 30. Available online at <<http://www.jesperjuul.net/text/gameplayerworld/>> (Juul identifies seven prior definitions of “game” and offers an eighth). Ludwig Wittgenstein is held to have posited that the concept of “game” is impossible to define (see MW Rowe, “The Definition of ‘Game’” (1992) 67 *Philosophy* 467 at 467); many others (including Rowe), from a variety of disciplines, have offered their own attempts at a definition in the face of Wittgenstein’s implicit challenge. Readers may wish to consider whether either copyright or copyright reform qualifies as a game pursuant to the definition employed by philosopher Bernard Suits: “the voluntary attempt to overcome unnecessary obstacles” (Bernard Suits, *The Grasshopper: Games, Life and Utopia* (Toronto: University of Toronto Press, 1978) at 41).

¹⁶¹ See *e.g.* Bruce E Boyden, “Games and Other Uncopyrightable Systems,” (2011) 18 *Geo Mason L Rev* 439 at 449-450.

¹⁶² Juul, *supra* note 160.

game is one which satisfies Juul's definition, with the additional feature that the players are able in a meaningful fashion to alter the rules of the game during play.¹⁶³

The applicability of the concept of the rules mutable game to copyright reform thus becomes clear: the rules of the copyright game are contingent and mutable; instead of a fixed system in which the "pay-offs" are pre-ordained by the application of *a priori* axioms, the copyright regime is structured by human agency and is one in which rational game players can (and do) expend effort to lobby the arbiter to alter the rules in order to increase their pay-offs ("I make \$100 per year because I have exclusive copyrights in this recording – but the rules say my copyright is due to expire at the end of this year, so next year I will make \$0 from the recording. I will try to change the rules to make my copyright expire in twenty years!"). Observations about rules mutability are not peculiar to copyright, of course. As Drahos notes, "much of

¹⁶³ Copyright and copyright reform each satisfy at least five of six elements of Juul's definition of a game (see Juul, *supra* note 160, at 5), and arguably all six elements, as follows: (1) *It is rule-based* – the rules of the copyright game are found in the *Copyright Act*, its regulations and the jurisprudence interpreting and applying them; (2) *It has variable, quantifiable outcomes* – the rules of the copyright game allocate certain attributes and powers to the players who carry on activity which falls within copyright's rules: for example, carrying out authorial activities results in the bestowal of exclusive rights to copyright authors which can be enforced against other players. Similarly, carrying out certain activities in connection with a copyright-protected work can result in variable outcomes (e.g., reproducing a work (or a portion thereof) in accordance with the rules of fair dealing results in a non-infringing activity, whereas reproduction of that same work (or a portion thereof) in a manner which is not in compliance with the rules of fair dealing results in an infringing activity); (3) *Positive or negative values are attributed to outcomes* – Copyright as a system, and the broader legal system within which copyright is nested, affords positive ascriptions to outcomes such as ownership (which entails imbuing the owner with enforceable rights claims), and negative ascriptions to outcomes such as infringement (which entails civil liability on the part of the infringer to the party whose rights have been infringed, and even potential criminal liability). Of course, those ascriptions are not determined solely or entirely within the parameters of copyright's rules: ownership has positive value because of the underlying system of property law, and infringement has negative value because of the availability of a court system which will enforce the relevant claims; (4) *Player effort is required to influence the outcome* – This criteria stipulates that players in the game must have some meaningful interactivity with the rules which leads to outcomes. Put differently, copyright, unlike the weather, does not just *happen*: authors must exert authorial activity rising to the level of originality in order to obtain copyright's exclusive rights; those who transact for ownership of copyright must engage in purchasing and contracting activities; users must "use" copyright-protected works in certain ways in order to potentially incur liability; (5) *Attachment of the player to the outcome* – This feature operates in multiple directions: the player must have a *psychological* connection with the game (i.e., the player is "invested" in the playing and outcome of the game), but also the game attributes certain conditions to the player as a result of playing (i.e., in the game's own terms it acknowledges or rewards the *player* (as distinct from, say, the referee or the observer) as the participant who "wins" the game or otherwise enjoys the benefits, such as accolades, of the game having been played). Copyright operates along both those axes: it formally attributes agency and responsibility to copyright players (by, for example, granting exclusive rights and moral rights to authors who create original works), and recent scholarship has explored how copyright owners (including but not limited to authors) develop psychological attachment to their copyright-protected works and feel aggrieved when their rights are infringed. (See Christopher Buccafusco & David Fagundes, "The Moral Psychology of Copyright Infringement" (2016) *Minn L Rev* 2433); (6) *Negotiable consequences* – this feature is the most contestable when it is applied to copyright law. Juul's definition at first seems to require that a game's results can only "optionally be assigned real-life consequences" (emphasis in original), a notion which is difficult to square with the mandatory nature of law. However, the stringency of this definitional feature is itself contestable. As Juul notes, "all games have some ... non-optional consequences," and, further, the optionality of a game's consequences may be more of an "ideal" than a requirement. Further, assignment of consequences "can be negotiated on a play-by-play, location by location and person to person basis" (for example, you might play poker with your friends only for fun and without money changing hands, but you cannot play poker in a Las Vegas casino "only for fun"). Pursuing that line, we can see how copyright's "real-life consequences" can take on an optionality: though the law bestows claim rights on owners and users, they are not obligated to take actions to enforce those claims (though that observation certainly operates more forcefully with respect to owners than with respect to users, who may find themselves on the non-negotiable receiving end of a rights claim from an owner).

economic life ... is a complex mixture of fixed-rule and rule mutable games in which the actors are trying to shift the constraints that operate on them and increase the opportunities available to them."¹⁶⁴

C. What are the Benefits of Describing Copyright Law Reform as a Rules Mutable Game?

The metaphor of the rules mutable game can improve the discourse around copyright and its reform by performing a normative function whereby ethical information is imparted and certain ethical imperatives are introduced into the discourse. In addition, the metaphor draws attention to ethically relevant aspects of how copyright's stakeholders (including owners, users and lawmakers) conduct themselves in effecting copyright reform.

As identified in the introduction to this article, one potential benefit to using a metaphor is the capacity of metaphors to impart ethical information. The game metaphor performs a normative function because it injects into the analysis the concept of *fairness*. Questions about fairness are intimately connected with game playing.¹⁶⁵ One definition of fairness in a game posits that in a fair game, presuming that each player plays "perfectly" (*i.e.*, makes no sub-optimal moves within the rules of the game), all players have an equivalent chance of winning; in an unfair game, players have unequal chances at winning, even if they make optimal moves within the game.¹⁶⁶ (An example of an unfair game is a version of poker where the player to the left of the dealer is entitled to always receive two kings in their hand.) A game in which the results, indeed even the possibility of obtaining results, are always stacked in favour of one or more players to the detriment of the other players is an unfair game, and unfair games are generally considered not worth playing.¹⁶⁷

Viewed from within the confines of the copyright system, there seems nothing inherently objectionable about rational game players attempting to change the rules to their benefit:¹⁶⁸ allocated a particular set of entitlements which lead to particular pay-offs, and equipped with the knowledge that they can alter the rules in order to increase their entitlements (and hence their pay-offs) there is no systemic constraint on them seeking to alter their entitlements (by, say, extending the copyright term or expanding the scope of the fair dealing mechanism). But what can appear to be rational from within the copyright system becomes irrational if viewed pan-systemically: rational behaviours become ultimately self-defeating by threatening to destabilize the continued operation of the system itself. The rules mutable game metaphor provides a vocabulary for articulating that irrationality by introducing normative restraints on the activities of all participants in the copyright game, both players and referees. One normative concern highlighted by describing copyright reform as a rules mutable game is the unfairness of the arbiter (*i.e.*, the legislature) attending only to the concerns of one player (or set of players) and ignoring – indeed, not even deigning to solicit – the views of other players. An element of role ethics informs the analysis at this point: the special role played by the legislature in the copyright game indicates that the legislature's obligations vis-à-vis the other participants and the game itself are categorically different from those of the "standard"

¹⁶⁴ Drahos, *supra* note 63 at 158.

¹⁶⁵ Hector Rodriguez, "The Playful and the Serious: An approximation to Huizinga's *Homo Ludens*" (2006) 6:1 Game Studies (available online at <<http://gamestudies.org/0601/articles/rodriques>>).

¹⁶⁶ See e.g. Mark Newheiser, "Playing Fair: A Look at Competition in Gaming" *Strange Horizons* (9 March 2009), online: <<http://strangehorizons.com/non-fiction/articles/playing-fair-a-look-at-competition-in-gaming/>>, and discussion at <<http://math.stackexchange.com/questions/122423/fair-and-unfair-games>>.

¹⁶⁷ With the caveat that if you are the player in whose favour the unfairness runs, playing an unfair game may be a more attractive proposition.

¹⁶⁸ Tawfik, *supra* note 101 at 69 ("[e]ach of these groups has found enough support in the history of copyright law to argue that its interests should predominate ... [a]s interested parties, their advocacy position is to be expected").

copyright players, and the legislature has an obligation to steward operation of the system as a whole.¹⁶⁹ The metaphor asks us to focus attention on the moral quality of the *officiating* – on the decision made with reference to the rights of the players, and how the dynamic system as a whole interacts with and is impacted by the changes (both the fact of the change and the effect of the change). While univocal striving to improve your position or payoff matrix within the game rules may be morally neutral behavior for a *player* to engage in, accommodating such behaviour has a different cast when the *referee* indulges in it. The metaphor highlights that a profound unfairness is visited on the players when the referee only permits *one* player (or only one set of players) to alter the rules to their benefit. In extending the term of sound recording protection, the Canadian government did not solicit input from the other players on the copyright field. The game metaphor helps us to articulate *why* that approach was objectionable: because it was *unfair* – because not all of the players were given an opportunity to *play the game*. That unfairness, understood from within the systemic norms of the game, is what gives the 2015 rules extension a different normative patina than the 2012 *CMA* amendments. When we (or our preferred player) loses a game, we can live with the result – even consider it just, if regrettable – so long as the game itself was conducted fairly. The 2012 amendments may not have been optimal from the standpoint of users, but they were fair by the standards of copyright’s game because the desires of all players for changes were given a meaningful hearing; the 2015 amendments were not only sub-optimal, they were unfair.

Describing copyright reform as a rules mutable game also means recognizing that participation imposes systemic obligations on the game’s participants, and obligates them to be conscientious of the interests of the other players and also of the integrity of the game and its play. It is an opportunity for all copyright stakeholders to remind themselves of the necessity of respecting what David Lametti has referred to as copyright’s “informal norm” of fairness and employing it when making decisions about when and whether to advance competing claims, whether as owners or users.¹⁷⁰ Lametti encourages copyright’s rightsholders and users to be reasonable in the exercise of their rights in order to maintain the operability of copyright’s legislative schema.¹⁷¹ As Lametti points out, copyright is embedded in “cultural practices that have existed at the fringes of formal normativity under the radar of copyright and often in contravention of some of the formal aspects of copyright law that over time have been tolerated, ignored or have been deemed to be otherwise unenforceable”;¹⁷² in that sense, much as is the case for game-playing, an informal norm of fairness (distinct from any formal fairness rules found in statutory mechanisms such as fair dealing) forms an important part of copyright’s context.¹⁷³ An important part of that fairness norm is an ethical imperative to act “with restraint”¹⁷⁴ – meaning restraint not only in the exercise of copyright rights, but also in the effort to expand those rights. The ethical lessons of the Calvinball metaphor are resonant with David Lametti’s call for the development of an “informal normativity based on virtue,”¹⁷⁵ whereby copyright’s players, its owners and users, act in an ethically sensitive manner vis-à-vis each other when exercising and seeking to expand their rights.

The concept of “fair play” applicable to games requires players and other participants to “respect the game,”¹⁷⁶ a notion which itself imposes ethical obligations and constraints. In most games, respecting the

¹⁶⁹ See *supra* note 1577 and accompanying text.

¹⁷⁰ Lametti, *supra* note 134 at 358 (copyright “has *always* relied on informal norms and notions of fairness and ethics to settle claims about the scope of protection and competing claims as between holders and copiers”).

¹⁷¹ *Ibid* at 328. See also *ibid* at 356.

¹⁷² *Ibid* at 332-333.

¹⁷³ *Ibid* at 341.

¹⁷⁴ *Ibid* at 353.

¹⁷⁵ *Ibid* at 328.

¹⁷⁶ Robert Butcher & Angela Schneider, “Fair Play as Respect for the Game” (1998) 25 *J Philosophy of Sport* 1.

game entails respecting the rules, but in rules mutable games that is less of a constraint; in the rules mutable game, the locus of respect shifts slightly from focusing on the rules as they are to the process of changing the rules and the interests of the other players. Having respect for the game leads naturally to a recognition of, and respect for, the other participants in the game, without whom the game could not be played.¹⁷⁷ The goal of systemic coherency – effecting the sought-after “balance” in copyright among creators, owners, users, and society – obliges participants to conduct themselves in a way which does not threaten the entire enterprise.¹⁷⁸ Of course, acting in such an ethically virtuous manner necessitates attention to context and position: the contemporary reality is that copyright owners wield greater rights, and so bear a commensurably greater obligation to act with restraint when determining whether to try and expand their rights through the reform process.

These notions of formal fairness within the “game” construct can of course be further supplemented by other articulations of the normative concern with fairness. David Vaver, for example, has referred to a need for fair intellectual property systems because “if ... we conceive of intellectual property rights as a tax on users of intellectual property for the purpose of giving a bounty to creators, then it is important that the imposition and the level of both the tax and the bounty be fair”;¹⁷⁹ in Vaver’s view, fairness requires a “four-way compromise and barter between the creator, the person who markets the creation, the public, and the nations that trade intellectual property.”¹⁸⁰ Myra Tawfik similarly has referred to the need to “triangulate” among stakeholders when making policy choices that impact copyright’s legislative regime.¹⁸¹ We could articulate this notion of fairness using other criteria, such as liberal democratic norms (e.g., that in making policy decisions all interested stakeholders are entitled to an opportunity to present their views to the decision-maker). But there is an intuitive appeal to relying on the fairness inherent in games, because while not everyone can appreciate the nuances of responsive politics, everyone knows what it is like to play a game, and is familiar with the sense of grievance which arises when you discover that the game you are playing is unfair or somehow fixed against you or that the other participants in the game are impeding its fair play.

In addition, the metaphor of a rules mutable game complicates the conventional modelling of the copyright system which presupposes that the only relevant moment for analysis is the set of rules in place (i.e., the determinants of the players’ pay-offs) at the moment of a work’s creation. Retroactive term extensions demonstrate that the applicable rules can be altered at any time after creation, thereby amplifying the manner in which the copyright regime is suffused with incentives. Copyright’s game is played not merely at creation, but for the entirety of copyright’s term of protection. The game metaphor helps particularize the problems of copyright reform by drawing attention to the fact that manipulation of the copyright system recurs throughout the lifecycle of the works protected by the system.

All of these observations are suggestive of how users’ rights advocates might articulate future arguments. By emphasizing the contingency and variability of copyright’s rules, and making clear the

¹⁷⁷ *Ibid* at 16 (“respect for the game can be seen to lead readily to an attitude towards one’s opponents ... one cannot view one’s opponents as an obstacle to be overcome in one’s drive for victory”).

¹⁷⁸ See Lametti, *supra* note 134 at 332 (“Copyright’s evolving normative structure has tried, through specific norms, to account for both the rights of authors and the rights of users: this is the so-called copyright balance”); see also *Théberge v Galerie d’Art du Petit Champlain*, 2002 SCC 34 at para 32 (“Excessive control by holders of copyrights and other forms of intellectual property may unduly limit the ability of the public domain to incorporate and embellish creative innovation in the long-term interests of society as a whole, or create practical obstacles to proper utilization”).

¹⁷⁹ David Vaver, “Creating a Fair Intellectual Property System for the 21st Century” (2001) 10 *Otago L Rev* 1 at 5.

¹⁸⁰ *Ibid* at 15.

¹⁸¹ See e.g. Tawfik, *supra* note 101 at 84 (“all the key players ... play a role in the development and dissemination of knowledge and learning and the law must be triangulated so as to ensure that, together, they achieve this goal”).

susceptibility of copyright's rules to unfair manipulation by self-interested parties, it buttresses the arguments that the rules should only be changed in a fair manner, that is, in a way which gives all players a reasonable opportunity to effect change favourable to them.

D. What Are the Limitations in Describing Copyright Law Reform as a Rules Mutable Game?

The metaphor proposed in this article can be criticized on a variety of grounds; this section identifies a handful of the most obvious potential criticisms and attempts to formulate some cogent responses. First, the metaphor might be dismissed on the basis that it lacks illuminative power: just about any area of law could be described as a rules mutable game, since all legal rules are subject to change and to the power of lobbying and argumentation by or on behalf of interested parties. *Fine, copyright is Calvinball*, this criticism might proceed, *but so are mining law, divorce law and defamation law*. At the risk of glibness, a partial response is to say that's partly the point: by highlighting the mutability of copyright's rules, the metaphor challenges notions that copyright represents an attempt to instantiate *a priori* entitlements. The crafting of copyright law is as much an exercise in socially and politically justifiable resource allocation – in rule-making, as it were – as many other substantive areas of the law, something that the proposed metaphor recognizes and reflects. I also contend that the metaphor is useful because it identifies what copyright stakeholders are doing when they lobby to change copyright's rules: they are working to alter rules in order to gain positional advantage, perhaps at the expense of other players. The metaphor asks observers (and the players themselves) to be cognizant of that attempted positioning, and to be cognizant of the impacts of such moves within the game on other players in the system and on the viability of the system itself. Another partial response to this line of criticism is to note that legislative copyright reform in the Canadian context has certain features which more readily lend it to characterization as a game: the tempo of legislative change, at least over the last twenty years, is unlike virtually any other area of private law; copyright's players also evidence a level of intentionality and identitarian collectivity in their advocacy which resembles team-making more so than seems to be the case in other areas of law.¹⁸²

A second possible criticism challenges the normative contribution made by the metaphor. This criticism points out that the rules mutable game metaphor has little to say about the substantive content of copyright law or the content of proposed moves by players, and, worse, feigns neutrality about the game being played – it tells us nothing about whether the copyright game is at all worthwhile, thereby reflecting an implicit commitment to the continuation of the existing copyright system. By not offering a critical stance on the rules of the copyright game, it serves only to defer the truly important discussion about the goals of copyright reform. I concede that the metaphor does not fare particularly well on both counts of this line of criticism, but respond that the metaphor is intended for a different purpose: the metaphor takes as given copyright's existing state of play, and identifies certain ethical implications of player moves within that ecosystem – the metaphor is intended to be used in critiquing the process of copyright reform, not the advisability of copyright *in toto* or even the advisability of particular elements of copyright's game. The metaphor asks us to focus on how the game is played, not whether the game is worth playing in the first

¹⁸² Bannerman, *supra* note 39, writing in 2006 about stakeholders who identified themselves as speaking at least in part on behalf of the “public interest,” identified numerous organizations who made submissions to the consultation process, including the Public Interest Advocacy Centre, Electronic Frontier Canada, as well as “ten submissions ... representing libraries or archives, six representing educational institutions, and two representing the disabled” (at 282). A contemporary Google search also identifies the following organizations that participated in the *Copyright Modernization Act* consultation processes: the Business Coalition for Balanced Copyright; the Association of Canadian Archivists; the Canadian Association of Broadcasters; the Canadian Publishers Council; the Canadian Independent Music Association; ACTRA (Alliance of Canadian Cinema, Television and Radio Artists); and the Creators' Copyright Coalition.

place. Other theoretical and political theories or commitments will need to be drawn upon in order to undertake work which seeks a more systemically critical approach.

VI. CONCLUDING REMARKS

Copyright's user is locatable, if at all, in a web of instability: epistemologically fluid, and often marginalized – sometimes ignored entirely – in the copyright reform process by copyright's more powerful stakeholders. Public choice theory helps to explain why that is often the case: unable to easily marshal the political leverage available to concentrated interest groups, the user is often, though not always, on the losing end of the reform process. But public choice theory's story eventually runs out of normative road: it does not serve to tell us why the interests of copyright's users should be more often attended to by the rulemakers in copyright's world.

This article has proposed using the metaphor of the rules mutable game to understand the operation of copyright reform. The notion of a game in which players can modify the rules of the game while it is being played helps clarify how we should respond when users are disadvantaged in the course of copyright reform processes. Using the rules mutable game as a framing device calls attention to the fact that players in the copyright game are concerned not just with the options they have available to them under the existing set of copyright rules, but have the capacity to change the rules of the game to their advantage through the copyright reform process. The concept of the rules mutable game challenges conventional narratives about the only relevant set of rules being those in place at the time of creation, and forces consideration – and enables normative assessments of – strategic maneuvering by copyright players to alter the rules throughout the term of copyright protection (as it may be extended from time to time). The metaphor introduces a normative metric of fairness into copyright discourse: just as games are expected to be fair and unfair games are presumptively not worth playing, when one player has a systemic advantage or is otherwise able to unilaterally torque the rules of the game – and other players are *not equally empowered to do so* – it raises questions about the ethical validity of the entire enterprise. The notion of a rules mutable game tells us something important about the kinds of stories we should be telling about copyright and copyright reform. The metaphor conveys an implicit normative conclusion that the copyright reform process should be *fair* to the players and that players should play the game in a manner which is respectful of other players and the coherency of the game itself.

We can cast our eyes back over recent episodes in the history of Canada's copyright reform process through the lens of the metaphor. Public choice theory predicts that copyright owners, particularly when large, and particularly when concentrated, will often win the copyright game. The rules mutable game metaphor tells us that result is undesirable because of a lack of fairness, measured as equivalent opportunities to play the game. With respect to the 2015 sound recording term extension, from the perspective of copyright's users, no metaphor can dress up what happened: it was an unequivocal win for content owners. But the game metaphor may enable a more nuanced assessment of the users' rights which were embodied in the 2012 *Copyright Modernization Act*, and the changes to Canadian copyright law which preceded the passage of the *CMA*. The very notion of "users' rights" is evidence that users can occasionally win the copyright game: the phrase, and its operational logic, were injected into Canadian copyright law by the Supreme Court of Canada in the *CCH* decision when they quoted, and adopted, the words of David Vaver.¹⁸³ That introduction has repeatedly been identified as a significant change in the trajectory of Canadian copyright law.¹⁸⁴ The *CMA* changes can be understood as a legislative package

¹⁸³ *CCH Canadian Ltd v Law Society of Upper Canada*, 2004 SCC 13 at para 48.

¹⁸⁴ See e.g. Scassa, "Interests," *supra* note 34 at 46 ("a significant departure from past Canadian approaches").

which sought “balance” – for every scaling back of copyright’s empire (expanded fair dealing) there were accompanying advances in its frontier lines (PMs). The term extension was unequivocally negative for users in a way which the *CMA* was not: the term extension was an unfair unilateral alteration of the game rules, whereas the *CMA* changes bore the hallmarks of a referee listening to both sides and trying to effect changes to the rules of the game in a manner consistent with the internal logic of fairness which governs rules mutable games (everybody got a chance to change the rules and some rules were changed). If we were inclined to “score” Canadian copyright reform since 2012, we might say that owners triumphed 1-0 in 2015, but in 2012 they secured a narrow 4-3 victory.

As shown by the SOPA/PIPA protests, users and their advocates need to be cognizant of the power of rhetoric and the capacity of other copyright players to speak for them and advance their interest in the playing of copyright’s game.¹⁸⁵ This is not an argument that users and the tech community are natural allies, or that the only way in which users can advance their interests is in conjunction with the tech community.¹⁸⁶ Rather, it is a suggestion that users can play the copyright reform game well by advancing their interests through strategic alliances with more powerful players. The alignment of interests between users and corporate actors was not unique to the SOPA/PIPA protests – for example, Google’s extensive litigation in favour of fair use in the Google Books litigation also demonstrated a moment where the interests of users coincided with those of a corporate behemoth.¹⁸⁷ Some argue that the best forum for advancing the rights of users is through litigation,¹⁸⁸ this article is agnostic on the point, except to say that, as shown by the enactment of the *CMA*, advancing users’ rights is a viable project, that it need not simply consist of a rearguard action to protect against further encroachment, and that it can be made more effective by utilizing rhetoric – whether in the public forum, in lobbying legislators, or in the courts – which emphasizes the fairness norm at the heart of game playing.

One observation to make is that when users are consulted (as in the *CMA* process), or at least given an opportunity to voice their concerns (as in the SOPA/PIPA protests), they perform better than when they are not consulted (as in both of the term extension reforms occurring over the last twenty years in Canada and the United States). Those two data points are not determinative, of course, but they are indicative. At a minimum, then, copyright users should demand that they have a voice in the game – that the referee listens to their desired changes to the rules. As Sara Bannerman notes, governments and other copyright stakeholders have a role to play in ensuring that the voices of users are heard during the legislative copyright reform process.¹⁸⁹ There is thus an onus on all those involved in the copyright game – players as well as referees – to ensure that all other players are treated fairly by being given an opportunity to change the game’s rules; failure to observe that obligation threatens to erode confidence in the entire game.

The rules mutable game metaphor thus poses both opportunity and challenge. It is an opportunity for copyright’s users to make use of an ethically sensitive narrative to describe how they are treated in the

¹⁸⁵ With the caveat that while there might be some capacity for other players (e.g., librarians and tech companies) to act as a proxy for user interests it is not clear that there will ever be full congruence between their positions because of their institutional differences.

¹⁸⁶ Lev-Aretz, *supra* note 58 at 241.

¹⁸⁷ For a discussion of the litigation and settlement efforts through 2013, See Barry Sookman, “The Google Book Project: Is It Fair Use?” 61 J Copyright Soc’y 485. Subsequently, in 2015 the 2nd Circuit Court of Appeals agreed with the circuit court that Google’s copying constituted fair use (*Authors Guild, Inc. v Google, Inc.*, October 16, 2015, Docket No 13-4829-cv), and the United State Supreme Court denied *certiorari* on April 18, 2016, ending the litigation.

¹⁸⁸ See, in the context of developing the US fair use doctrine, Shahshahani, *supra* note 56 at 320ff.

¹⁸⁹ Bannerman, *supra* note 39 at 295-296 (“Government, organizations and individuals all have a role to play in ensuring that those framed by copyright are adequately represented at the table of legislative copyright discourse as the reform process continues”).

copyright reform process, which helps to illustrate the normative unfairness of certain moves in the copyright game. But fairness can be wielded as both shield and sword, and the metaphor implies that all players of the copyright game be cognizant of the risks by moves made during the copyright reform process. Where systemic frailties (*i.e.*, biases in favour of raw political power) exist in the copyright reform process, the rules mutable game metaphor challenges copyright's stakeholders – particularly the lawmakers (legislative, judicial, and administrative), who function as the game's referees – to be conscious of those frailties and enlightened in their responses to attempts to “game” the system.