

BOOK REVIEW

Digital Copyright Law

Cameron Hutchison
(Irwin Law Inc.: Toronto, 2016)

*Mark Swartz**

It is difficult to over-emphasize the impact that the Internet and the digital technologies that support the Internet have had on copyright law. From electronic books and articles to streaming music and videos, these technologies have changed the way copyrighted works are purchased, consumed, created, and shared. This change also presents significant interpretive challenges for those using copyright to protect (or use) creative works. It is no wonder, then, that digital copyright law is one of the hottest and most complicated topics for copyright owners and users, as well as legal professionals and laypersons working in areas related to copyright law.

Professor Cameron Hutchison's new book, *Digital Copyright Law*, provides a useful survey of the application of copyright law to digital works in Canada. While there are many other excellent books that provide comprehensive treatments of Canadian Copyright law, *Digital Copyright Law* is unique as it focuses solely on digital copyright, addressing a gap in the literature in Canada. In the introduction, Hutchison states that the aim of this book is to take an objective approach to "introducing to the legal community and educated laypersons the full range of legal issues, big and small, that animate this novel area of Canadian law and of doing so in an accessible manner."¹ This approach, which is comprehensive in its coverage of the relevant statutory requirements, the case law, and the implications of digital technologies on copyright, makes this title both an engaging read and a fantastic addition to any legal reference collection.

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¹ Cameron Hutchison, *Digital Copyright Law* (Toronto, Ontario: Irwin Law Inc., 2016), 8.

Dr. Cameron Hutchison is a professor at the University of Alberta who has written extensively about the relationship between digital technologies and copyright law. His previous papers are on topics such as technological neutrality, fair use and fair dealing and statutory interpretation. This is Dr. Hutchison's first book.

Hutchison introduces the book by noting that the purpose of copyright law is to promote "the generation of knowledge and culture in society,"² a purpose that is often portrayed as a balance in legal discourse between the interests of copyright creators and users. He eloquently explains how digital technologies have disrupted copyright, prompting changes in both the interpretation and the statutory requirements of the *Copyright Act*. Hutchison clearly describes both positive and negative implications of digital technologies for copyright holders and then explains how the book will address the legal adjustments caused by this monumental change.

Chapter one sets out the theoretical underpinnings and concepts required to fully understand the relationship between digital technology and Canadian copyright law, starting with a discussion of how these technologies have changed our interactions with copyrighted works. Approaches to statutory interpretation are then discussed, including many evolving principles of law, such as legitimate economic interests, separation and technological neutrality.³ The section on

² *Ibid.* 13. In the introduction, Hutchison states that, while he does try and keep an objective and neutral tone throughout the book, there are certain issues where he puts forward a position that he strongly feels is correct. This example is the first time he does so in the book.

³ Legitimate Economic Interests and Separation are two principles that have recently emerged from Supreme Court jurisprudence. Legitimate Economic Interests first appears in *Théberge v. Galerie d'Art du Petit Champlain Inc.*, 2002 SCC 34, [2002] 2 S.C.R. 336 and "offers a reason to limit the copyright holder's reproduction right in favour of the purchaser's interest to engage in this activity with validly purchased copies." *Ibid.* 26. Separation debuts in *Kirkbi AG v. Ritvik Holdings Inc.*, 2005 SCC 65, [2005] 3 S.C.R. 302 and relates to returning to the organizing principles of Intellectual Property regimes when faced with an "otherwise absurd application of the statute" *ibid.* 27. These principles are also featured in *Euro-Excellence Inc. v. Kraft Canada Inc.*, 2007 SCC 37, [2007] 3 S.C.R. 20. The technological neutrality principal embraces the objectives of "non-discrimination (in extending user rights into new technologies) and non-interference (in not attaching copyright liability to a new and potentially infringing activity)" *ibid.* 30, as set out in *SOCAN v. Bell Canada*, 2012 SCC 36, [2012] 2 S.C.R. 326.

technological neutrality is particularly interesting as Hutchison spells out the approaches that courts currently use and then proposes a purposive approach to reproduction rights which he posits may be the “only coherent way to address copyright in the digital age.”⁴

Chapters two and three cover the two categories of creative works covered by copyright; authored works and neighbouring rights (sound recordings, performers’ performances and broadcasts). Chapter two summarizes the types of authored works protected by the *Copyright Act*, including a discussion of both compilations and computer programmes. The requirements of copyright — fixation, expression, originality and authorship — are also described. The most interesting of the four descriptions is the one on authorship, where Hutchison details how computer generated creative works may impact the concept of authorship and the way in which it is treated in the statute.

Economic rights are also addressed in this chapter, including a discussion of non-consumptive copies like “caching, indexing by search engines, and data mining.”⁵ Digital technologies like streaming for musical and cinematographic works depend on non-consumptive copies to facilitate communication on the Internet and have become a prominent way for individuals to consume copyrighted works. Hutchison puts forward an argument about how copyright should treat non-consumptive copies: “given these continuing technological developments, there is every reason to calibrate the balancing of interests in favour of supporting technological innovation over the relatively weak claims of authorial incentive in non-consumptive copies.”⁶ This chapter also includes discussions of substantiality, telecommunication, distribution and exhaustion, authorization and moral rights, with the most engaging content relating to the inability to apply national exhaustion rights to digital materials and the implications that this may have for physical copies.⁷

Neighbouring rights and collective management are grouped together in chapter three, as collective organizations often administer the copyrights for this class of works. This chapter

⁴ *Ibid.* 41.

⁵ *Ibid.* 58.

⁶ *Ibid.* 64.

⁷ *Ibid.* 74.

describes the different regime of rights associated with performers' performances, sound recordings and broadcasts. This includes discussion on how the right to equitable remuneration applies to both sound recordings and performers' performances communicated to the public through telecommunication, for example. The chapter ends with information about the collective management of copyright, including a chart that outlines all of the Canadian collective societies, who they represent and the works represented and administered.

Hutchison moves on to ownership, licensing, registration and infringement in chapter four. While Hutchison clearly outlines the facets of copyright ownership, including works made in the course of employment and the implications of both exclusive and non-exclusive licensing of copyrighted works, the chapter's strength is when Hutchison discusses the fundamental relationship between copyright and contract law. This section includes information about terms of use agreements on websites, click-through agreements and the ability to contract out user rights. It was also nice to see libraries mentioned in this context, as "contracts between publishers, on the one hand, and libraries and educational institutions on the other, frequently contain provisions that effectively prevent these licensees and their clientele from exercising their fair dealing rights."⁸

Open-Source software (software that is licensed in a way that facilitates free access and promotes sharing and collaborative creation) is also covered in chapter four. Open-Source software has facilitated much of the growth of the Internet and Hutchison's description of both the licences and the legality of such licences was interesting and important. After a brief discussion on the copyright registration system, chapter four concludes with a synopsis of primary and secondary infringement and the challenges (and criteria) for identifying infringers on the Internet.

Technological Protection Measures (TPMs) and Rights Management Information have their own chapter, as would be expected in a book on digital copyright law. The most useful section of this chapter consists of background information about the international legal context for TPMs, including information about the U.S. and EU experiences. Included is a significant

⁸ *Ibid.* 110.

analysis of the use of the word “effective” in section 41, a descriptor that is treated with a thorough and engaging analysis. Hutchison breaks down each facet of section 41, including information on circumvention, manufacturers and intermediaries, remedies and exceptions. He also pulls out interesting controversies and discussions, including the debate as to whether an access control right exists. Hutchison takes this opportunity to state that the language in section 41 is inconsistent with the purpose of copyright law, and he makes the case for an access right like the one in section 1201(c)(1) in the DMCA which affirms the “rights and defenses of users of works.”⁹

The second — and shorter — half of this chapter deals with rights management information, or the “information attached to a work which identifies the author, owner, or terms and conditions that might apply to use of the work or a neighbouring right.”¹⁰ Hutchison skillfully analyzes this material, with reference to issues surrounding where rights management information must appear in a file and the privacy concerns related to how this technology may allow rights-holders to monitor user behaviour. The chapter finishes with a warning — that, because Canada has seemingly put in place a stronger anti-circumvention regime than the U.S., there may be adverse effects on aspects like innovation and competition.

User rights are covered in chapter six, beginning with fair dealing. Hutchison provides a comprehensive synopsis of fair dealing, including the criteria for assessing fairness and detailed information about assessing fair dealing in the digital context. In this chapter, Hutchison devotes considerable space to the idea of applying fair dealing to mass digitization projects. Included is an interesting fair dealing analysis, which demonstrates how fair dealing can be used to support mass digitization, provided that appropriate safeguards are put in place. This chapter also includes interesting commentary on the user-generated content exception, and then a synopsis of many of the other user rights in the Act, including the exceptions for private copying, educational institutions and libraries, archives and museums.

Chapter seven covers Internet intermediaries, which include groups like Internet service providers, web hosting companies,

⁹ *Ibid.* 133.

¹⁰ *Ibid.* 140.

search engines and websites that enable file sharing. The role and the relationship between Internet intermediaries and copyright law is complex, and Hutchison skillfully brings all of these concepts together in this chapter. His description of the safe-harbour considerations for a variety of Internet intermediaries and then the U.S. takedown and notice regime and the notice and notice regime in Canada is particularly well done, concluding with a strong suggestion for improving the notice and notice regime in a way that may cut down on abuses by copyright trolls. This chapter also includes an analysis of subsection 27(2.3), which targets file-sharing sites but may also implicate other services like Pinterest that “enable infringement on a larger, but still much lesser, scale.”¹¹ Hutchison concludes this section with some thoughts on whether the authorization right in section 3 can still play role in a finding of infringement against an Internet intermediary or if the Internet intermediary provisions are designed to be a complete regime of liability.

The final chapter of the book deals with the international dimensions of digital copyright law, outlining how public international law, through treaties, sets minimum standards for copyright and generally requires that foreign works are treated equally under the law to domestic works, and how private international law resolves case with multi-jurisdictional elements. This chapter also includes a lengthy and detailed analysis of how jurisdiction is determined in copyright cases, including the potential for using Canadian law to adjudicate claims of foreign copyright infringement.

The indexing in *Digital Copyright Law* includes both a table of cases and a traditional index. This system is comprehensive and well-organized. Notably, the index includes references to specific sections in the Act and includes references that provide recommendations for related topics to major areas detailed in the book. There are, however, a few instances where topics featured in the book were missing from the index. For example, there is no index entry for Open-Source software.

Digital Copyright Law has strengths as both a reference book and as an introduction to the relationship between Canadian Copyright law and digital technology. Each chapter is meticulously organized, and Hutchison’s ability to distill meaning from the

¹¹ *Ibid.* 187.

complex mix of facts that come out of the statutory analysis and case law, and the complex sets of facts and circumstances that result from digital technology, makes this book essential for both legal practitioners and for others who work or have an interest in Canadian Copyright law.

This book has few weaknesses, but one may be that Hutchison does gloss over a few sections that are covered either equally or in more detail in other books on Canadian Copyright law. For example, the treatment of certain areas, such as works made in the course of employment or exceptions for educational institutions and for libraries, archives and museums is limited to the descriptions of the statutory requirements with a few explanatory notes on how these requirements should be interpreted. The intention may have been that this book could serve as a complete reference for individuals who require information on copyright, generally, as well as its application to digital works, but, for a few of these topics that are not directly related to digital technology, it may be advisable to use other sources in addition to this title.

While most of the areas that relate to digital materials are dealt with comprehensively, there was one notable omission in chapter four on ownership. Hutchison does address Open-Source software, but it would have added to the book to have included analysis of other connected open movements, such as Open Access publishing and Open Educational Resources. Creative Commons licensing is covered briefly in the section on Open-Source licences, but it would have been nice to see a bit more content on this licensing system considering how important a tool it has become for many creators of digital works.

These few small issues aside, *Digital Copyright Law* is an incredibly useful and comprehensive title that would be a fantastic edition to any collection. Hutchison's explanations are incredibly clear and comprehensive, and each important topic that relates to digital technology is covered in detail. I would strongly recommend this book for anyone interested in either copyright law or in digital technologies.

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