

Book Review *Compte rendu*

Copyright User Rights: Contracts and the Erosion of Property

By Dr. Pascale Chapdelaine, Associate Professor, Faculty of Law, University of Windsor, Canada
Oxford University Press, 2017, 230 pages.

Reviewed by Olivier Charbonneau*

Copyright law has seen its share of mutations over the past few hundred years. In the 18th century, copyright law was shaped by publishers who sought ground rules pursuant to the demise of printing privileges and monopolies granted by the Crown. In the 19th century, authors fought for and obtained statutory recognition, while the 20th century was dominated by tectonic shifts between new corporate interests brought on by disruptive technologies as well as globalization and its myriad of international and bilateral instruments. In her 2017 book, *Copyright User Rights: Contracts and the Erosion of Property*,¹ Professor Pascale Chapdelaine offers a thorough account of what may dominate the 21st century—users and their rights over copyrighted works.

In the opening paragraph of her book, Chapdelaine begins with a pertinent question: “[d]o copyright users have rights?”² The question is salient for those brave enough to tackle the terms of use of any online licensing service. Gone are the days when buying a book was a rather simple affair regarding legal implications; for example, to access an ebook, one is now subject to a long and complex contract compounded by the jurisdiction-hopping scale of the digital world.

Drawing on statutes and cases from an impressive selection of salient jurisdictions, including the European Union, the United States, and Commonwealth countries—with a penchant for Canadian sources—Chapdelaine eschews analysing user rights from the perspective of human rights, constitutional law, or competition law. She prefers a “radically different approach” to this “macro-level perspective”, basing her analytical framework in “private rights through property, contracts, copyright law, and remedies, without hereby neglecting the constant interaction between private law and

* Olivier Charbonneau is an Associate Librarian at Concordia University in Montréal, Canada. He completed his doctoral studies at the Centre de recherche en droit public at the *Université de Montréal*. He keeps a [research blog, in French](#), online: <www.culturelibre.ca>.

¹ Pascale Chapdelaine, *Copyright User Rights: Contracts and the Erosion of Property* (New York: Oxford University Press, 2017).

² *Ibid* at 1.

public law.”³ She also casts a similarly wide net when defining users: “from seemingly more passive users to active user-authors, and from individual users to institutional users (e.g., broadcasters, libraries, and educational institutions).”⁴

The book is divided in three parts, each one setting the stage for the next. The first offers a subjective lens and presents mechanisms relevant to users of copyrighted material as subjects of law. The second takes an objective perspective and covers the nature of copyright works as objects of law. In a sense, these two parts reflect each other, as they cover similar topics from different perspectives, constituting a novel and astute analytical framework. The final part blends both the subjective and objective approaches and offers some sound ontological and analytical perspectives.

Chapdelaine begins by tackling the tricky question of property rights in the first part, discussing the context of commercial copies of purchased works, the role of copyright exceptions vis-à-vis infringement, as well as user remedies, such as consumer law, each in a chapter. She slowly and thoroughly dissects recent rulings as well as legislative reforms to characterize the contours of user rights, subtly deconstructing salient developments to positive law in light of a novel ontological structure useful to better understand the subject at hand.

The second part mirrors the first in its structure, but focuses on the nature of copyrighted works rather than the users. It constitutes the most interesting part of Chapdelaine’s analysis, particularly her take on conceptualizing copyrighted works as tangible or intangible property:

The key distinguishing factor between tangible and intangible property revolves around the ability of someone in physical possession to exercise power and control over the resource, which is possible in relation to tangible property (choses in possession). For intangible property (or choses in action), court intervention is generally necessary for the owner to exercise power and control over their resource.⁵

This part is where Chapdelaine offers a complete analytical framework for the properties of information products and how they should be governed by law and the courts, be them digital files, streaming, licensed, or sold. Hopefully, a more nuanced understanding of the properties of information products will allow us to move away from the blunt and mostly useless physical object versus immaterial (e.g., digital) distinction. Similarly, her chapters on the first sale (in the USA) or exhaustion (in the EU) doctrines

³ *Ibid* at 3.

⁴ *Ibid* at 5.

⁵ *Ibid* at 92.

as well as digital locks and technological protection measures reflect how her analytical framework casts new light on a difficult area of law.

After circling around the ideas of users as subjects with rights and copyrighted works as objects in law, Chapdelaine closes the loop in her final part by suggesting that a pluralist understanding to copyright user rights would allow us to break free from sterile doctrinal arguments emanating from other approaches:

The task of a unified theory of copyright user rights is more ambitious than it might first appear, given ... the heteroclitite nature of user rights, encompassing personal property rights in copies of works, exceptions to copyright infringement, and from the standpoint that users experience works as goods, *sui generis* products, services, or as a combination thereof. Users' relationship with copyright works does not always occur (and in fact less so) through property in the copy of the copyright work. Thus, while property theory offers a starting point from which to substantiate copyright user rights, for instance, when we look at the normative status of all ownership freedoms, it cannot fully account for the significance of the role of users within copyright law.⁶

Her concluding chapter sets two broad principles for user rights: “[t]he first principle calls for a greater cohesion and harmony between copyright law and traditional concepts of private and public law. The second principle or tool calls for important structural change to how copyright law currently addresses the balance between competing interests.”⁷ These principles are set along the lines of property rights and privileges, and “paying close attention to the context in which those rights arise, whether grounded in property or contracts or whether there is an implied licence, and by demonstrating how they further the core objectives of copyright.”⁸

With her thorough analysis of recent rulings and legislative developments from multiple jurisdictions, combined with her novel approach to a complex subject, Chapdelaine hits so many high notes that one is hard pressed to identify any weaknesses in her book. One limitation rather than an actual drawback, which may speak to this reviewer's perspective as a librarian in an academic setting as well as *legum doctor*, comes from lumping all “users” in a single category comprised of consumers, institutions (libraries, archives museums), and corporations (intermediaries, database publishers, and the like). Chapdelaine's work is clearly targeting scholars of copyright and similarly initiated practitioners. One cannot easily locate within her work sections dealing uniquely with various user types—either in the table of

⁶ *Ibid* at 154 [footnotes omitted].

⁷ *Ibid* at 180.

⁸ *Ibid* at 203.

contents or the back index. This may be a cautionary note important for the growing class of readers actively working with user communities and hungry for guidance; this book is a thorough theoretical account of a shifting legal institution rather than an actual guide from which to draw.

In closing, this reviewer was skeptical of Chapdelaine's approach at the outset, as it seemed that she was employing an academic detour to casually curtail questions dealing with uses of digital copyrighted works. However, to be fair, it is obvious that Chapdelaine's approach provides for a deeper and novel account of how to understand copyright user rights. It also provides technological disruptors, librarians, and consumers a detailed intellectual roadmap with which to graph new trails for the coming century.