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The Future of the First Sale Doctrine with the Advent of Licences to Govern Access to Digital Content[1]

Charles A Masango[2]

ABSTRACT: The article examines the origin of copyright and the first sale doctrine. It exposes the advantages that the doctrine confers to the purchasers of copyright works and how it is possible for purchasers to use the doctrine to advance scholarship. The article also examines whether the advantages that the doctrine confers to the purchasers of printed copyright works has been permanently swept away by the introduction of licences by authors to govern access to digital content. Finally, the article looks at content access models being used in the digital environment that may ultimately serve the same function as that played by the first sale doctrine in the previous offline-only, hard-copy environment.

Introduction

The first sale doctrine, according to Keenan & Johnston (2000:108), is a "copyright law provision which allows the owner of an authorised copy of a protected work to dispose of that copy without interfering with the copyright holder's distribution rights". Put more simply, the first sale doctrine permits the purchaser of a book to lend the book to anyone who wishes to make use of the content of the book.

The first sale doctrine emerged after the promulgation of the first copyright law in 1710 (the Statute of Anne of 1710) and was based on print media where property is sold. This doctrine is called the first sale doctrine because it allows the first purchaser of a copyright work to own and treat the physical object in any manner he or she wishes.

However, in the digital environment, partly because of the advantages and convenience of digital content, authors no longer sell copies of works but rather provide access in exchange for a fee (Matheson, 2002: 157). The access that authors provide is in practice governed most directly by licences (McCracken, 2004: 122) – a form of contract between a subscriber and an author.

The *raison d'être* of this paper is to examine whether the advantages that the first sale doctrine traditionally bestowed upon the first purchasers of printed copyright works have been permanently swept away by the licensing contract introduced by authors to govern access to digital content. In order to view this scenario, this paper first examines the origin

1 [Editor's note: as South African copyright law (unlike American and British copyright law, for example) does not confer on an author a general distribution right or a rental right (except in respect of cinematograph films, sound recordings, and computer programs), the application of the first sale doctrine is arguably unwarranted in South African law. The dualism of copyright and ownership of the physical object in which the copyright work is embodied, is, however, maintained in South African law, along the lines set out by the author. (The only exception is in respect of a computer program: a backup copy made by the owner of such program must be destroyed when possession of the program becomes illegal.) Also, the adverse results of restricting access to copyright works in the digital environment canvassed by the author do flow from an application of South African copyright law.]

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and rationale of copyright and the first sale doctrine. Secondly, the paper divulges how scholarship has been advanced through the application of the doctrine. The negative effects of licensing contracts on the first sale doctrine and scholarship are then uncovered. Finally, the article looks at measures that producers of, and subscribers to, digital content are using in the digital environment in order to uphold the needs of scholarship – regardless of the status of the first sale doctrine in this environment.

The origin and rationale of copyright and the first sale doctrine

Prior to the emergence of copyright law, there were no laws that conferred literary property on individuals, as such works were handwritten manuscripts (Darch, 2001: 4), and there were no machines that could reproduce such manuscripts *en masse*. The invention of the printing press in 1450 by Gutenburg, and the introduction of printing in England in 1476 by William Caxton, opened up the possibility for the large-scale reproduction of copyright works (books) for the first time (Leaffer, 1989: 2). The Crown did not welcome this large-scale reproduction of books, because there was an uncontrolled printing of potentially subversive religious and political literature (Phillips, Durie & Karet, 1997: 3). The reaction of the Crown was to place the control of printing in the hands of a traditional London-based trade guild, the Stationers' Company, "who would not publish books that the Crown considered politically or religiously objectionable" (Merges, Menell & Lemley, 2000: 345-346). The Crown's reaction was, however, met with agitations from religious, ideological, and provincial printers, which lead to Parliament promulgating the first copyright law in 1710 to govern "the interrelationship of authorship, printing and publishing" (Phillips, Durie & Karet, 1997: 5).

When the first copyright law appeared in 1710, its objective was to encourage "learned men to compose and write useful work" (Leaffer, 1989: 3). In order to fulfil its objective, the Act instituted copyright protection and the concept of the public domain (Mark, 2003: 76). Despite the fact that the 1710 Act gave birth to both copyright and the public domain, one of the two was, and has been, considerably healthier than the other. Copyright has been more familiar and powerful than the public domain (Boyle, 2003: 4). This is probably because the former brings in revenue for authors while the latter takes away the authors' revenue – for this reason authors have always agitated for copyright in perpetuity.

When the 1710 Act instituted copyright for printed works, it introduced a dualism that still exists – the copyright in the literary work (the text), on the one hand, and the ownership of the physical object containing the literary work (the book). While the copyright does not exist in perpetuity (copyright has a limited term), ownership of the physical object is, in principle, unlimited in duration. This dualism is evident from the statement that "this Act [was] for the Encouragement of Learning by Vesting the Copies of Printed Books in the Authors or Purchasers of Such Copies" (Harrison, 1971: 34).

One can argue that the fact that the 1710 Act made it clear that the first purchasers to own copies of copyright books had extensive rights as to the use of the copies culminated in the development by case law of the first sale doctrine (Miller & Feigenbaum, [n.d.]). Through this doctrine, scholars and institutions that first purchase copyright works have been able to promote scholarship. Through the first sale doctrine individuals and libraries, for example, are able to fulfil the objectives of the first copyright statute – because the doctrine "holds that a copyright owner's exclusive right to distribute extends only to the first sale of a copy" (Bielefield & Cheeseman, 1997: 43) and a purchaser can dispose of the physical work as he or she wishes (Ou, 2003: 90). This is so because when a copy of a copyright work is sold, the author transfers ownership of the physical copy to the purchaser.

The advancement of scholarship through the first sale doctrine

As the first sale doctrine permits ownership of physical property to be transferred from the author to the purchaser, libraries, for example, are able to provide access to any one who needs a physical copy of a copyright work that the library holds. Libraries give out physical copies of copyright works to those who need them but cannot purchase the works. Libraries are free to loan out these works to as many users as possible, and to repeat the lending process as often and as long as they like (Ou, 2003: 90). It can be said that by (mostly academic) libraries placing copyright books at the disposal of as many readers as they like, they help in the process of generating more creative works. And those given access to the physical copies are not necessarily only the members of the institution the library was established to serve. Scholars from other institutions are generally given access to the physical copies of copyright works, as they are not prevented from visiting and consulting these works. These non-members can also use the copyright works to promote scholarship and generate more creative works.

However, despite the fact that libraries legally loan physical works to those who need them, the users are required to use the content of the copyright works in accordance with the copyright law. Copyright law governs the content of the work by instituting a timeframe within which such works are protected. When the 1710 Act was promulgated, the protection was 21 years for books that had been produced before the promulgation of the Act ("old books"), and 14 years, with a possible further 14 years, for books that were produced after the Act had been promulgated ("new books") (Ross, 1992: 2). This period has been extended as new reproductive technologies have emerged. It moved to lifetime of the author plus 50 years, and, in the United States, because of Disney's copyright on Mickey Mouse, the protection was extended by Congress through the Sonny Bono Copyright Term Extension Act (CTEA) to the lifetime of the author plus 70 years (Sprigman, 2002).

The first sale doctrine gives libraries not only the right to place physical copyright books at the disposal of anyone who is willing to make trips to the library and to use the physical space of the library, but also have the right to send the copyright works through inter-library loan (ILL). Since libraries own the physical copies of books in perpetuity, they can distribute the book in any manner they see fit, without the permission of the authors (Miller & Feigenbaum, [n.d.]).

Also, libraries are permitted to hold all that they have purchased in an archive for posterity. For example, when a library purchases copyright works or subscribes to printed copyright works or journals, the library, through the first sale doctrine, may retain old copies as part of its archive. These rights continue despite the fact either the subscription has elapsed or the journal has been discontinued, or the rights holders have been taken over by other rights holders (McCracken, 2004: 123).

Due to the advantages that the first sale doctrine confers on first purchasers of copyright works, it can be said that the purchasers of copyright works have been able to promote scholarship, using the first sale doctrine with little or no resistance from the authors. Practically, the purchasers of copyright works own the physical objects in perpetuity.

However, although authors in the offline, hard-copy dispensation have never contested such ownership, the scenario is different in the digital environment, as we shall see.

The emergence of digital content

With the advent of digitisation, the channels of acquiring and using scholarly works have changed. Scholars who use digital technology to acquire and access copyright digital content are no longer required to use the physical spaces of libraries as they did prior to the advent of digitisation. Online systems demand limited space and obviate the need for scholars making trips to libraries to locate needed items or using the inter-library loan system to obtain needed copyright works (Richey, 2002:17; Steve, 2001:521).

In spite of the advantages of digitisation, the new technologies of acquiring and using digital content are in practice governed most directly by access licences (McCracken, 2004: 122) – a form of contract between a library and vendor introduced by the content authors. The introduction of licences to acquire and access digital content has given authors the opportunity to attain rights to the physical object that contains digital content. The subscribers to digital content do not purchase a physical object that contains the contents of copyright works but merely "purchase" access to the content (Matheson, 2002: 157).

Authors are aware that in the digital environment their works can not only be distributed easily but can also be easily reproduced. Thus, authors have reverted to selling access to their works for "fear that a new digital lending system allowing unlimited access to books as opposed to letting patrons check them out one at a time would further sap their potential

income" (Bowman, 2001). Such an "access" right does not exist in the same way in the offline, hard-copy environment where the purchaser of a copyright work owns the physical object (the book, the journal, and so on).

The plight of the first sale doctrine in digital content

Because of the process of authors making digital content available through access licences, it has been argued that the first sale doctrine does not apply in the digital environment (McCracken, 2004: 123). The use of access licences in the digital environment confers on authors near-absolute control over their copyright works, even after their delivery to subscribers (Cohen, 1998: 1090). By restricting access to their works in the digital environment, authors may well have the ability to exercise their copyright and ownership in perpetuity. For example, licences in respect of databases do not specify when, if ever, their contents as a constantly renewable collective work might be expected to fall into the public domain. Article 10 of the European Database Directive of 1996 bears this out when it states that the term of protection of a database:

> *[...] shall run from the date of completion of the making of the database. It shall expire fifteen years from the first of January of the year following the date of completion. In the case of a database which is made available to the public in whatever manner before expiry of the period provided [...], the term of protection by that right shall expire fifteen years from the first of January of the year following the date when the database was first made available to the public. Any substantial change, evaluated qualitatively or quantitatively, to the contents of a database including any substantial change resulting from the accumulation of successive additions, deletions or alterations which would result in the database being considered to be a substantial new investment, evaluated qualitatively or quantitatively, shall qualify the database resulting from that investment for its own term of protection (EU, 1996).*

One can argue that the last sentence in the quotation signifies that the database will not enter the public domain, because when any substantial change is made, the database will be considered as a new investment. This may be severely inhibiting to users of the database, since it implies that access to the scholarly record in its technically most convenient form will always have to be paid for (Noam, 2004). The non-alignment of access licences with the concept of the public domain is an indication that authors in the digital environment have succeeded in arrogating to themselves a right in perpetuity that they struggled to achieve in the offline, hard-copy environment. This is contrary to the first copyright law, which instituted the public domain.

Hence, since the first "purchasers" of access to copyright works in the digital environment do not own the purchased property without authors' restrictions in perpetuity, they are not

permitted to loan, transfer, or treat the copyright works in any manner that they please. The licences that govern the use of digital information give authors ownership of, and extensive rights to, their works. This is so because authors reserve certain rights in the licences that give them total control of their works. For example, the South African Bibliographic and Information Network (SABINET) asserts, in its user agreement, a sweeping series of rights:

> *SABINET Online expressly reserves the right, in its sole and absolute discretion, to do any of the following at anytime without prior notice: change these terms and conditions; change the content and/or services available from the Sabinet Online web site; discontinue any aspect of the Sabinet Online web site or service(s) available from the Sabinet Online web site; and/or change the software and hardware required to access and use the Sabinet Online web site (SABINET, 2003).*

I argue that SABINET would not have been able to assert these rights if the first sale doctrine applied in the digital environment. The rights asserted by SABINET have the possibility of inhibiting access to the information and hence to scholarship. Scholars may be afraid to access or use the information for fear that they would be accused of having breached the agreement. Where the agreement is breached, SABINET may possibly terminate users' access to the information.

Also, in the digital environment, authors have the possibility of imposing usage policies (such as restricting certain users from using the content), and it can be said that this type of policy has the possibility of inhibiting scholarship. According to Williams (2002: 143), scholars are able to create new works by borrowing from earlier creations.

An example of a licence that inhibits certain scholars' access to digital content is that of BiblioLine, a metadata database service provided by the National Information Services Corporation (NISC). NISC subscriber rights, under its agreement, are limited to authorised users, who are permitted to print or otherwise use the metadata content for scholarly purposes. The BiblioLine licence says that "Subscriber rights do not extend to 'unauthorised users' including parent or subsidiary corporations, institutions, associations, or organisations affiliated with or related to the Subscriber" (BiblioLine, 2004).

Due to the rights that authors impose through licences on digital content, it can be argued that libraries are not permitted to exercise the first sale doctrine in the digital environment to promote the original objective of copyright law. The consequences of libraries not exercising the first sale doctrine are that authorised and unauthorised scholars following the BiblioLine Annual License and Subscription Agreement (2004), for instance, are impeded from loaning and reading works that may inspire them to write new works. This is detrimental to scholarship, as there is a belief among scholars that new works can only be produced after having read earlier works. Corroborating this opinion, Williams (2002: 123) and Sprigman

(2002) say that even Shakespeare and hundreds of thousands of authors read other authors' works in order to produce new works.

Furthermore, it can be said that the absence of the first sale doctrine in the digital environment makes it possible for authors to force subscribers to pay for each use of digital content (Harper, 2001), or else to deny former subscribers such use. This is because, depending on the terms of a subscription licence, once an institution stops paying the subscription for any digital content, the authors may withdraw access to the content (McCracken, 2004: 123; Bowman, 2001). Where subscribers lose the content, it could endanger the important archival role of the library, as the library would not be able to access the information it had earlier paid for. This type of scenario did not take place in the offline, hard-copy environment, because the first sale doctrine allowed purchasers to own and treat as they please all works that they purchased.

The possibilities for scholarship without the first sale doctrine?

As it seems impossible for the first sale doctrine to operate in the digital environment, certain other models need to be pursued for scholars to access digital content. Although these models do not transfer property to purchasers in line with the basic tenets of the first sale doctrine, it can be argued that these models function like the first sale doctrine. The models allow scholars to access and use digital content just as the first sale doctrine allows purchasers to make use of hard-copy print information.

In certain open access models, authors of digital content have consented to unrestricted reading, downloading, copying, sharing, storing, printing, searching, linking, and crawling (Suber, 2003). Authors of digital content have emerged with self-archiving, open access journals, and even the Creative Commons (cc) open content model that gives authors the option of permitting derivative works and even commercial use (see Keats 2006 in this volume for more on cc licences).

In the self-archiving model, for example, since authors of pre-refereed pre-prints of journal articles own the copyright on these works, they can transfer these pre-prints to online archives. The authors deposit the articles in open electronic archives (often called "e-prints archives") that can either be institutional, subject-based, or personal. Technical support is provided by the Open Archives Initiative (OAI), which has established standards with which e-prints should comply. When e-prints are deposited in compliance with OAI standards, the e-print archives are all searched as though they constitute a single archive (Phillips, 2004).

With the Creative Commons (cc) model, although it offers a flexible range of protections and freedoms for authors, the authors still own the copyright. The cc licence system offers authors ways to protect their works by reserving some of their rights but also at the same time encouraging users to access and use their works. By doing this, a cc licence "builds a

layer of reasonable, flexible copyright in the face of increasingly restrictive default rules" (Creative Commons, [n.d.]).

Meanwhile, open access journals are electronic journals that are freely available on the Internet, and users can read, download, copy, print, or link to the full texts of articles (Phillips, 2004). PubMed Central and the Budapest Open Access Initiative are examples of open access initiatives which, while retaining copyright, allow for free access. PubMed Central is aimed at providing free online access to the full text of life science research articles linked to a bibliographical database (Roberts et al, 2001: 2318). The Budapest Open Access Initiative ensures permanent open access to all articles they publish and does not charge subscription or access fees (Fishman, 2002:18). According to the *Budapest Open Access Initiative Statement*:

> *Because journal articles should be disseminated as widely as possible, these new journals will no longer invoke copyright to restrict access to and use of the material they publish. Instead they will use copyright and other tools to ensure permanent open access to all the articles they publish. Because price is a barrier to access, these new journals will not charge subscription or access fees...(OSI, 2002).*

It can be argued that with the introduction of the open access models it might not be necessary to implement the first sale doctrine in the digital environment because, with such models, access to copyright works is free. BioMed Central (a member of the Current Science Group of independent companies), for example, which provides full text access to all the peer-reviewed research papers that it publishes in all areas of biology and medicine, states that access to papers is immediate and barrier-free to potential users (Fishman, 2002:18; Van Orsdel & Born, 2003: 53). The Public Library of Science (PLoS), also prominent among the open access models, holds that journal records should be freely available through an international online public library "within six months of their initial publication date" (Fishman, 2002: 18). In another example, the Eldritch Press (a commercial online publishing house owned by Eric Eldred) expresses its willingness to provide free online access to information seekers (Sprigman, 2002). Similarly, the concept of "copy left", developed by Richard Stallman of the Free Software Foundation and which is sometimes indicated with a reversed (c) symbol, implies public ownership for software and documents (Stallabrass, 2002:142) and allows the public to use the information without fear of being accused of infringement.

With the above examples, it can be argued that there is no need for the first sale doctrine in the digital environment because the function that the first sale doctrine performs is already covered.

Conclusion

Following the emergence of new models aimed at giving free access to digital content, it can be said that the new models, especially the open access initiatives, serve to increase

scholarship in the same way that the first sale doctrine traditionally encouraged it. This is because open access initiatives override the terms and conditions in licences, as they allow scholars to make free use of digital content. However, notwithstanding the fact that the new models generally confer advantages on users of digital content because they advocate certain free uses of the information, sensitisation to these new models is needed to encourage more scholars to use them. The use of these models permits scholars freely to use other scholars' works and enables them to produce new works and hence promote scholarship. Scholars are dependent on ready and unimpeded access to published literature, which is the only permanent record of ideas, discoveries and research results upon which future scientific activity and progress are based (Roberts *et al*, 2001: 2318; Mayfield, 2002). ❑

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