# The First Sale Doctrine and its Benefits: Vanishing with Digitisation?

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While copyright is an intangible property right, the right is, until the proliferation of digitisation, usually embodied in tangible goods. The copyright in the literary expression in a book is separate from the personal property right in the book. When a person purchases a copyrighted good, s/he obtains a personal property right in that good notwithstanding that the copyright subsists in another person or entity. The first sale doctrine clearly establishes the implication of the distinction between the intangible property right (copyright) and the right in the resulting good itself. The first sale doctrine constrains the copyright owner's power to control subsequent distribution and use of copies of a work after the first sale of those copies by the copyright owner or his/her authorised agent. Consequently, the right of distribution gives the copyright owner exclusive control over the first distribution of a copyrighted good but does not extend to subsequent distribution of a lawfully purchased copyrighted good. The buyer of the good is at liberty to deal with it whichever way s/he

wants, provided s/he does not engage in any act that infringes on the other unexhausted rights of the copyright owner.

The application of the first sale doctrine in copyright law has proven to be quite beneficial, at least to copyright users. Rather than depend solely on the primary market of copyrighted works for access, the exhaustion of the distribution right of the copyright owner upon first sale facilitates secondary markets for copyrighted works. With this comes affordability. Persons who are unable to afford new copyrighted goods may be able to buy used copies at affordable prices. When the prices set for copyrighted goods in the primary market are excessive, the availability of secondary markets can put competitive pressure on copyright owners to sell at more affordable prices. The first sale doctrine also helps to provide access to out-of-print works because a used copy of the work may be accessible through loan or resale. Public libraries benefit from the first sale doctrine since they can lend out lawfully obtained copies of copyrighted works without the consent of the copyright owner.

Combined with an international exhaustion of right regime, the first sale doctrine can be used to tackle the negative effect of differential pricing in countries where the market price of a copyrighted good is above the price for which the same good is sold in other countries. A country operates an international exhaustion regime where the first sale of a copyrighted good in any nation in the world exhausts the exclusive distribution right of a copyright owner within its own country. This means that once a copyrighted good is introduced into any market in the world by the copyright owner, copies of same can be obtained from any of these markets for resale in a country that operates an international exhaustion regime. Where the copyrighted goods are sold at cheaper prices in those other markets, this can be advantageous for people within a country where it is sold at a much higher price since they can source for cheaper copies in those markets.

Perhaps no case illustrates the benefit of the first sale doctrine when combined with an international exhaustion regime like this United States (US) case: *Kirtsaeng v. John Wiley & Sons Inc.*, 133 S. Ct. 1351 (2013). Supap Kirtsaeng, a student from Thailand and studying in the US, needed money to pay his tuition in the US. He asked his family in Thailand to purchase English Language

textbooks that were sold at a price lower than the prices at which they were available for sale in the US and send him the books. He re-sold the books in the U.S. market for a profit. *Wiley & Sons* (the book's publisher and copyright owner) sued him for infringement of their distribution right under US copyright law. Kirtsaeng argued that the publisher's right to control the distribution of the books in the US was exhausted after the first sale of the books in Thailand. The lower courts rejected the argument of Kirtsaeng which led to his final appeal to the Supreme Court where the Supreme Court agreed with him on the basis that there was no geographic limitation for the first sale doctrine in the US law.

The highlighted 'powers' of the first sale doctrine in copyright law is not as effective when digital copyrighted goods are involved. This non-effectiveness is attributable to the nature of digital works. Once a person acquires a copy of a digital work, lending it out to another person would involve making a reproduction of the work, which would infringe on the reproduction right of the copyright owner; an act which the first sale doctrine would not excuse. For public libraries, it would involve hosting the work on their website (which require reproduction) and communicating it to the public through network. These are acts that are within the exclusive preserve of the copyright owner and not exhausted upon first sale.

Furthermore, because the first sale doctrine is founded on the "personal property right" (ownership) in a lawfully purchased copy of a copyrighted work, its application in the digital age will depend on the business model adopted by a copyright owner. Where the business model is based on licencing and not outright sale, the exhaustion of the distribution right of the copyright owner is doubtful. Licencing differs from sale fundamentally in that it does not confer an ownership right in a digital work in the licensee. For all intents and purposes, the ownership right in the copy of a digital work that is licensed remains in the copyright owner.

With the use of digital rights management technologies and contracts, the prevalent business model adopted by copyright owners is licencing and not sale. Intermediaries of digital copyright goods (producers and distributors) characterise what they "sell" as services that cannot be bought in the same way as goods. We stream movies on Netflix and not purchase copies of the

movies from Netflix which we can lay ownership claim on. We purchase books on iBook which cannot be downloaded to our local device storage because we do not “own” the copy purchased. We listen to music on Spotify and iTunes which though are paid for, are non-transferable. With the gradual erosion of “ownership” in these goods (or more aptly, “services”), the first sale doctrine, as traditionally known in copyright law, may be vanishing away where digital copyrighted works are concerned. In *Vernor v. Autodesk, Inc.,* 621 F.3d 1102 (9th Cir. 2010), the court held that the owner of the copyright in a computer program can escape copyright law limitations (exhaustion of distribution right on first sale) by licensing copies instead of selling them.

The implication of these trends is grave, from the perspective of access to copyrighted works, for Africa. While information and communications technologies facilitate digital access to works that may otherwise not be physically available on the African market, the business model used by copyright owners can effectively limit access and use. For a region like Africa and other less affluent regions, much dependence is placed on the possibility of borrowing copyrighted works from friends and families for access by persons who cannot afford purchasing their own copies. If the first sale doctrine and its accompanying benefits for access to works “vanish”, dissemination of digital works by way of lending becomes restricted.

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