

Chapter 7

The Migration of the Book across Territorial Borders: Copyright Implications for Authors in the Digital Economy

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ABSTRACT

*This chapter deals with the copyright issues faced by authors once their books enter the digital sphere, as well as the difficulties associated with overseas publications of their books, from a territorial perspective. It examines whether territorial copyright borders still afford book authors effective copyright protection in the digital economy, and further, whether the culture of the book is being eroded through the prevalence of extra-territorial publications. Relevantly, this article examines the landmark US Supreme Court decision of *Kirtsaeng v Wiley and Sons, Inc.* and considers its likely future impact on the enforcement of territorial copyright by authors and publishers. Finally, the article concludes that territorial copyright borders have become blurred, difficult to enforce in view of recent precedent, and are ineffective in preserving authors' copyright and the cultural dimensions of their books.*

INTRODUCTION

It should be stated at the outset that there is no concept of 'international copyright', which will automatically protect authors' copyright globally. Instead, copyright protection is territorial in nature and relies on the laws of individual countries for protection in that country. For example, in the USA the 1976 *Copyright Act* (together with a number of other statutes) regulates copyright use; in Australia the *Copyright Act* of 1968 (as amended) applies.

Most countries, however, (including the USA and Australia) are members of international copyright treaties, namely the *Berne Convention for the Protection of Literary and Artistic Works* (1971) where

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copyright works are defined as ‘literary and artistic works’ (Article 2(1), 102). Under this treaty authors receive recognition for their foreign rights under the ‘national treatment’ requirement, which provides that a qualifying ‘foreign work’ must receive the same protection as a ‘local work’ [Article 7(8)]. Thus member States’ copyright laws should have certain ‘minimum standards’ of copyright protection to comply.

In practice, however, it has become apparent that digital publishing and global book sales have eroded these principles and have impacted on authors’ ability to protect and monetise their copyright internationally. In dealing with the migration of the book across territorial borders this article considers two aspects of the migration process:

First, it discusses the impact of electronic publishing or the digitalisation of the book across borders and what this means to authors in relation to their copyright. Whilst these advances have positively impacted on the availability and accessibility of books, and the creation of increased publishing opportunities for authors, there have also been corresponding negative consequences. Problem areas for authors have included pirating of their work on the internet through unauthorised copying, as well as a lack of knowledge on digital publishing and copyright protections on the internet.

Secondly, the issue of extra-territorial print publications – another area of book migration – is examined in relation to authors’ copyright, as traditional publishing also faces cross-border issues which cannot always be readily resolved. This global trend in publishing may lead to territorial copyright infringements. One increasing problem faced by Australian authors and publishers is the issue of unlawful parallel importing, which is difficult to police, especially in relation to digital copies. Parallel importing restrictions apply in the USA, Australia, Canada and the UK, but in reality these provisions are often breached by:

- Wholesalers or discounters who import illegally printed copies of books from the Far East into Australia and sell books at discounted prices: In these instances, authors don’t benefit from royalties as printing typically takes place in third world countries without regard to copyright. These books are often text books with poor quality printing and binding.
- Where books are lawfully published for an overseas market, and are then imported back into the country in breach of parallel import restrictions, or sold online across territorial borders at cut-rate prices: Again authors don’t benefit from royalties and these books are sold in competition with local publishers, who suffer losses as a result.

In Australia the issue of the sale of books on the internet has not been addressed in Court but the landmark US case of *Kirtsaeng v John Wiley & Sons* (2013) could have a far-reaching impact on authors and local publishers in the US, and potentially worldwide. In this case Kirtsaeng purchased text books from Thailand and then resold them on eBay to students in the US. The Court held that US copyright owners may not prevent importation and reselling of copyrighted content lawfully sold abroad, due to the application of the ‘first sale doctrine’. This case, discussed in more depth below, is a clear illustration that the availability of books online and cross-border selling may affect the application of territorial copyright, essentially rendering it inoperative in practice.

This article aims to provide insights on these issues by including references to research conducted with a purposive sample of published Australian authors, which examines authors’ views on these concerns from a ‘grassroots’ perspective. A brief synopsis of the methodology applied in this research follows below.

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