

“Digital Rights Management: Whose Rights Are Being Managed?”
An Event Sponsored by the Internet Caucus Advisory Committee

An “e-book” is a new product that is quite different from a traditional print book, even when it presents the same copyrighted literary work for the reader’s use. The chief differences lie in the user’s ability to search, copy, excerpt, or annotate text with automated speed and precision; achieve economies of scale and convenience in the portability of multiple literary works; transfer, store and use “books” on a variety of devices alongside audio, visual and multimedia works; and make other uses of the embodied work in ways that are possible with the digital technology of e-books, but not possible with the ink-on-bound-paper technology of print books. But another key difference – important from the publisher’s perspective – is that the same technology that facilitates the added-value uses of this new product also creates risks that some users will engage in unauthorized reproduction and distribution of the embodied copyrighted work at levels of quality, speed and magnitude that can destroy the work’s market in a way that never could have been done with print books.

Consumer expectations for enhanced use of literary works through the application of digital capabilities to the traditional linear narrative format of a “book” make publishers optimistic that e-books – intended to supplement, rather than supplant, the availability of traditional print books – eventually will be enthusiastically embraced in the marketplace. But, unless publishers can confidently manage the “risk” attributes of digital technology as part of a viable business model for offering added-value uses of literary works, e-books may quickly disappear as a consumer option.

Publishers are using digital rights management (“DRM”) technologies as part of their e-book business models to manage the risk attributes of e-book technology. Competing publishers, working with competing software and hardware vendors, have different approaches to DRM. But, as noted in a recent “White Paper” that was jointly produced by the Association of American Publishers and the American Library Association, *see* www.publishers.org/press/pdf/DRMWhitePaper.pdf, DRM deployment in the nascent e-book marketplace generally has not yet reconciled adequate levels of copyright protection for the publisher with optimal levels of functionality and use for consumers. It is hoped that, in their role as important test-beds for introducing readers to e-books and refining DRM for e-book “lending,” libraries will continue to augment the efforts by publishers and technology vendors to develop “user-friendly” e-books and related DRM systems.

Still, DRM is unlikely to fully solve the publishers’ security issues because it cannot be made invulnerable to hacking. And the problems with e-book DRM are unlikely to be resolved if it is presumed that consumers’ must be able to enjoy new added-value uses of a literary work beyond those possible with print books without accepting some changes in the application of familiar copyright “use” rules, like the “first sale” and “fair use” doctrines, to accommodate the risk attributes of the same digital technology that permits those added-value uses.

Legislative efforts to force e-books into the same copyright “use” rules that apply to print books will not produce “user-friendly” e-books, which are already evolving through competition among publishers and industry standardization efforts that also involve libraries, technology vendors and others. Consumer expectations are better met through evolving business models governed by market forces and private sector initiatives than by well-intended but ill-fitting government fiat. As the U.S. Copyright Office noted about the “first sale” doctrine:

“Straight-jacketing copyright owners into a distribution model that developed around a different technology at a different time is a formula for stifling innovative, market-driven approaches to meeting consumer demand for digital content. If, as has been asserted, the current terms by which copyright owners offer their products are unacceptable to consumers, consumers will stop buying them under those terms and competitors will step into the breach.”

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