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Amazon's Kindle 2: The Copyright Ghost in the Machine

Prof. Jim Gibson, University of Richmond

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A number of copyright controversies have caught the public's eye this year — e.g., the [lawsuit over the AP photo of Barak Obama](#), the [feud between Coldplay and Joe Satriani](#), the [debate about Facebook's policies toward the intellectual property of its users](#). Yet these disputes, fascinating though they are, involve the application of well-known legal principles. The facts are interesting, but the law is straightforward.

A somewhat less prominent controversy, however, offers a nice example of the frequent collision between copyright law, established business models, and new technologies. In February, Amazon introduced the [Kindle 2](#) — the latest model of its groundbreaking electronic book reader. One of its new features is a read-aloud feature that converts written text into speech, so users can listen to the books stored on the device rather than reading them. The audio is actually fairly good; one would not mistake it for a human reader, but [it's a far cry from the disembodied voices of earlier generations of computerized text-to-speech](#).

In any event, the new feature was good enough to worry publishers about the impact on their audiobook business, which generates about \$1 billion per year for their industry. And here's where copyright law comes in. Using a narrator to create an audiobook requires a license from the owner of the book's copyright; after all, the audiobook is a "copy" of the book, albeit not in written form. Recording a read-aloud version without a license would constitute copyright infringement.

But the Kindle 2 contains no audio recordings. It stores a *written* copy of each book, of course, and it pays a license to do so. But the read-aloud feature literally reads the book aloud, rather than playing a pre-recorded version. In copyright lingo, this is known as a "performance," as opposed to a "copy" — a distinction that makes a big difference. The law gives copyright owners control over *public* performances of their works (playing a song in concert, for example, or reading a book to a live audience). But the Kindle 2 clearly seems intended for private use. And a private performance requires no license; it simply doesn't implicate copyright law at all.

The publishers have two possible responses to this analysis, neither of them particularly convincing. First, they could contend that the read-aloud feature violates copyright law by creating a derivative work. This is an argument only a copyright litigator could love. It is based on an arcane interpretation of the relationship among certain terms in the copyright statute ("prepare," "copy," and "fixed," among others) — an interpretation that would take too long to explain, and even longer to defend. Suffice it to say that if this argument is correct, singing in the shower also constitutes *prima facie* copyright infringement.

Second, publishers could argue that the read-aloud feature creates an infringing copy in the active memory of the Kindle 2. It is true that computers often make a temporary copy of the data they process. The Kindle 2 probably does: as it reads a book aloud, it most likely reproduces a few words at a time in its RAM memory. But it is hard to see how this offends copyright law. The "copy" exists in a series of tiny bits, none of which exists for more than a second or

two (if that). The most recent and relevant precedent, *Cartoon Network v. CSC Holdings*, ruled that converting a few seconds of a work at a time into RAM does not create an infringing copy.

The weakness of these two arguments reveals that the publishers' real beef is not that the Kindle 2's read-aloud feature violates their copyrights, but that it undercuts the audiobook market — a market that copyright *does* give them control over and thus allows them to profit from. The threat may not be too great now, but as the read-aloud feature improves it may begin to act as a real substitute for audiobooks.

Nevertheless, copyright law does not guarantee authors and their publishers a stream of income, nor does it ensure the viability of any particular business model. Instead, it gives authors and publishers control over certain specific uses of their works — reproduction, distribution, etc. — and invites them to exploit that control for profit.

Here, the control that copyright already provides should suffice. After all, as already mentioned, Amazon needs a license to include a book in the Kindle 2 in the first place. When negotiating that license, authors and publishers can simply insist that they be compensated for the read-aloud feature as well — or that the feature be disabled. Indeed, [that seems to be where the controversy is now headed](#). The problem, to the extent there is one, is that publishers didn't think to include such a provision in their original agreements with Amazon.

In the end, then, perhaps the Kindle 2 controversy is not all that different from the other examples that began this commentary. It is true that sometimes the law must adjust to accommodate new technologies, as copyright has done over the years with radio, television, the Betamax, the Internet, and more. But sometimes — like this time — the law already provides the tools we need.

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