



The Amazon & Authors Guild

Legal Implications of Withholding Accessible Technology from Readers

By Robin Springer

IN FEBRUARY 2009, AMAZON released its ebook reader, Kindle 2, a portable device onto which users download books and other printed materials. Kindle, like other ebook readers, such as Barnes & Noble's Nook and Sony's Reader, offers ease of use in that the devices are thinner and lighter than traditional books, and users can download multiple books onto the device instead of carrying the individual print copies, making it more convenient.

One of Kindle 2's features, which was not available on its predecessor, is text-to-speech (TTS) to read the printed words aloud. With TTS on Kindle 2, the more than 30 million people in the United States who are print-disabled because of blindness, dyslexia, spinal cord or brain injury, or other conditions that preclude them from reading text, holding a book or turning its pages are now able to read, learn and enjoy the printed word; they can participate more fully in society.

One might imagine that authors and publishers would be thrilled with the addition of this new technology because of its potential to increase sales exponentially. But imagination is for fiction. Instead of lauding this new technological integration and welcoming a burgeoning new market, the Authors Guild and publishing houses have demanded that Amazon remove the TTS feature from Kindle 2. Amazon acquiesced, allowing publishers the option of disabling TTS on their books.

The Authors Guild states that using TTS in ebooks without paying extra for it is against the law. Publishing companies, including Random House, have sided with the Guild, disabling TTS on many ebooks.

Interestingly, the Guild has no quarrel with consumers who use TTS to read books on traditional computers. Nor does it object to users manipulating font size on Kindle. The Guild is also okay with humans reading ebooks aloud. It believes, however, that authors are entitled to additional royalties if Kindle's TTS is used.

Contract Violation

Stating that authors' contracts include only display rights, not audio rights, for ebooks, the Guild believes using TTS infringes on the author's right to collect a royalty for the audio playback and, as such, violates the author's ebook contracts. Audio rights, however, typically refer to making a recorded presentation, such as an audio book. But TTS in ebooks is not the same as audio books, which are professionally produced performances of literary works, voiced by real, live humans, replete with dramatic intonations.

"Audio books are a billion dollar market," said Roy Blount Jr., president of the Authors Guild, in an article on the Guild's website in which he could have been intimating that ebooks and audio books are one and the same. Perhaps the Guild is intentionally trying to confuse consumers by implying the products are synonymous, or perhaps it believes that Amazon, instead of authors, is benefiting from the audio rights. Maybe the Guild is concerned that as TTS becomes more natural-sounding, it will more effectively dramatize the text, competing with sales of audio books. The Guild declined to comment, so it's hard to say. (Amazon and Random House also declined to comment.)

The modulation of the human voice found in audio books, however, is not always a selling point. Many readers dislike audio books precisely because of the inflections and would prefer to purchase books that could be read with the more monotone TTS. "I prefer to hear the voice without expression," says one reader, "because it allows my imagination to step in and do the work." The inclusion of TTS with ebooks might cause these readers to opt for an ebook instead of an audio book, but no one is losing a sale.

A basic tenet of contract law is the court will not enforce a contract that is against public policy. Reading increases creativity, improves comprehension and mental acuity and allows print-disabled people to participate in the social experiences that most people take for granted. For the first time TTS offers people with print disabilities the ability to read. Denying this ability is against public policy; it discriminates by making it more difficult for a class of individuals to participate fully in society.

"The disadvantaged and disabled shoulder enough heartache and disappointment just getting through daily life," says disability law attorney Frank Darras. "The text-to-speech function sounds like a lot of noise about nothing unless you're one of the millions of print-disabled. Amazon should be corporately ashamed for adding insult to its print-impaired customer base."

Authors Guild's Contentions

The Authors Guild also contends that using TTS on Amazon's Kindle is a copyright violation. Copyright law was

created to promote creativity and reward writers for their work. This law, which has evolved since the 1700s, states, in part, that an author has the exclusive right to reproduce and distribute his work, to perform his work publicly (including digital audio transmission), and to prepare derivative works. The Guild's position is that TTS infringes on these rights, resulting in a copyright violation.

"It's not the reading of the text that creates the infringement," counters Rod S. Berman, a Los Angeles intellectual property attorney. "The TTS must actually make a copy of the words." For a violation to occur, the infringement must both be fixed in a tangible medium and remain fixed for more than a transitory amount of time. One court recently held that "buffer data is not a 'copy' of the original work whose data is buffered."

With TTS on Kindle, it is more likely that the software processes a word or sentence, dumps it from the buffer, and then starts processing the next words. "There is no reason for the software to keep text or speech data for any duration after the speech event," says Barry Romich, engineer and chief operating officer at the AAC Institute, an organization for people who rely on augmentative and alternative communication. Romich adds that the data is probably in RAM for fractions of a second, which would negate a finding of infringement.

Derivative Work Defined

A derivative work is one based on a copyrighted work, such as a play or movie adapted from a novel. A public performance occurs where the work is performed at a place open to the public or where a substantial number of people are gathered. Because public performances include digital audio transmission, the Guild would like consumers to believe that any aural presentation is a public performance, even though this is not consistent with the law.

If a theatre company performs a play adapted from a novel (a derivative work), it sells tickets (a public performance) and pays the playwright a royalty. But what if a person goes to the play with a friend who happens to be deaf and blind? If he/she signs into friend's hand so they can enjoy the play in a different format, then is that a derivative work? A public performance?

Like signing, "TTS is simply another way of presenting the same material that's available to all other consumers,"

says Chris Danielson, director of public relations at the National Federation of the Blind. If the Guild is so concerned about giving away for free an additional method to access ebooks, then should publishers give a discount to print-disabled consumers for the written text they cannot use?

For argument's sake, let's assume a copyright violation existed. Article 30 of the U.N. Convention on the Rights of Persons with Disabilities, signed by the United States in 2009, mandates that parties shall ensure "laws protecting intellectual property rights do not constitute an unreasonable or discriminatory barrier to access by persons with disabilities to cultural materials." Refusing access to TTS-enabled ebooks appears to violate Article 30.

"Just as people with disabilities don't pay to use parking meters, they should be able to use text-to-speech on Kindle without paying extra for the technology," says author Dylan Landis, who advocates for improving all types of access for people with disabilities.

The Guild believes the Chafee Amendment – an exception to the

copyright law that allows alternative formats of text to be created for people who are blind, deaf, or have other disabilities – is the answer. Verbiage in Chafee, however, suggests this exception would not apply. Further, according to Danielson, most of the nearly 30 million Americans with print disabilities do not qualify under Chafee.

As TTS continues to improve in sophistication, the struggle over copyright will likely escalate. Many, including Berman, believe this is an issue Congress will ultimately have to resolve. ♣

(Author's note: Amazon, the Authors Guild, and Random House declined to comment for this article.)

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