Lending E-Readers: Legal? Ethical? Practical?

> ## While a variety of libraries are testing the devices and services, many others are holding out, questioning the legal, ethical, practical, and economic factors.

L ibraries of all types have taken the plunge of lending ebook readers to their patrons, yet controversy remains. As far back as 2007, the Sparta, N.J., Public Library was one of the first to dip its toes into then unknown waters (www .libraryjournal.com/article/CA6533029.html). Many others have followed suit. In fact, *Library Journal's* 2011 "Ebook Penetration and Use" surveys (www.the digitalshift.com/research/ebook-penetration) found that 12% of academic libraries, 15% of public libraries, and 17% of school libraries are lending e-read-ers. They lend Kindles, NOOKs, iPads, and Sony Readers of all shapes and sizes. Some are for classroom use, and others are for full-blown lending programs.

The *Library Journal* survey also showed that in the academic library, Kindle is the device of choice by a margin of 2 to 1. While a variety of libraries are testing the devices and services, many others are holding out, questioning the legal, eth-ical, practical, and economic factors.

WHY LEND E-READERS?

Libraries have hardback, paperback, large print, audio, and ebook collections. Why then, shouldn't they also have devices? After all, the e-reader is simply a case with software to house books—think of it as content in a container. There's a philosophical component as well. Libraries keen on new services and innovative technologies see offering e-reading devices as a demonstration of how well they are keeping up and embracing the digital future.

Many libraries have e-readers on hand to demonstrate how to download from their ebook collections or for other training purposes. Others offer the "try it before you buy it" service, providing a variety of devices for their patrons to sample before investing in one. Some libraries may use the devices to host and promote special collection materials such as documents, images, videos, or music. Corporate libraries can use e-readers to provide access to internal company documents. Finally, some users prefer ebooks and e-readers. If libraries are going to invest in multiple print formats to suit variable needs, then why not electronic ones too?

AND WHY NOT TO

There are just as many reasons not to offer e-readers, however. First is the cost. Devices aren't cheap, and they require peripherals, ongoing maintenance, and an assortment of content. Purchasing the devices and content is not part of the nor-mal acquisition workflow—new policies and procedures must be established. The entire process is time-consuming and becomes one additional service to maintain.

What about fads? Are e-readers the latest fad in techno gadgets, soon to be as popular as Betamax or even compact discs? If so, that calls into question the investment required. Furthermore, libraries wonder about the legality of lending readers, particularly in light of recent legal claims initiated by the National Federation of the Blind (NFB) and other associations.

LEGAL ISSUES

Is it legal for libraries to lend e-reading devices? This is the million dollar question that librarians need to answer. Mary Minow, a licensed attorney and the Follett Chair at Dominican University, elaborated on this during the Handheld Librarian VII Conference (HHL7), held online Aug. 15–16, 2012 (http://handheldlibrarian.org/sessions/state-of-the-ebook).

Minow used the analogy of a traffic light to indicate the level of caution you should take when considering an e-reader lending program. According to Minow, lending an empty device would be covered under the first sale doctrine, even if the device contains the software (so long as libraries aren't hacking or copying the software), according to 17 U.S.C. Sect. 109(b)(1)(B)(i). Lending the device with content that is in the public domain, creative commons licensed content, or other unrestricted content (perhaps donated by the rightsholder) is also permitted under copyright law. For these instances, Minow gave a green light to libraries.

LICENSES TRUMP COPYRIGHT

Most library users want new releases, best-sellers, today's newspaper, or the latest travel guide for their big trips. These are in-copyright items. In order to load this content, the common route is through a licensing agreement with an online bookstore. License agreements trump copyright law, and libraries that agree to licenses can no longer rely on the library, educational, or other user rights provided by copyright law.

If you've ever taken the time to read the use agreements from Amazon, Apple, or Barnes & Noble, you quickly realize that these licenses are written for individuals and not enterprise distribution. For example, the Amazon use agreement (www.amazon.com/forum/kindle?_encoding=UTF8&cd Forum=Fx1D7SY3BVSESG&cdPage=1&cdSort=newest&cd Thread=Tx33TZCJY0YVHNC) states the following (emphasis added):

> Upon your download of Digital Content and payment of any applicable fees (including applicable taxes), the Content Provider grants you a non-exclusive right to view, use, and display such Digital Content an unlimited number of times, solely on the Kindle or a Reading Application or as otherwise permitted as part of the Service, **solely on the number of Kindles or Other Devices specified in the Kindle Store, and solely for your personal, non-commercial use.**

Apple follows suit in its IBOOKSTORE PRODUCT USAGE RULES (www.apple.com/legal/itunes/us/terms.html) by saying, "You shall be authorized to use the iBookstore Products only for personal, noncommercial use."

Barnes & Noble (www.barnesandnoble.com/include/terms_of_use.asp) "offers Users the ability to purchase or download digital content, such as eBooks ... from time to time from and through the Barnes & Noble.com Site ... [and] grants you a limited, nonexclusive, revocable license to access and make personal, non-commercial use of the Digital Content in accordance with these Terms of Use."

Libraries then, must proceed with caution (yellow light) when loading licensed content onto devices. The online bookstores are aware that libraries are lending out devices loaded with content, but they do not have official statements on library lending programs. Minow recommends that libraries consult with legal counsel before proceeding.

Are there circumstances that would garner the red light—STOP? Minow said yes and cited a variety of legal claims against Kindle and NOOK programs in universities, libraries, and even the U.S. State Department. The latter recently canceled its $16.5 million Kindle order after the NFB claimed that the devices are not accessible. Even with text-to-speech available for some (not all) titles, the devices themselves are not navigable without sight. Minow highly recommends that libraries consult with legal counsel before proceeding with a lending program of devices that are not accessible.

ONE TO ONE OR THE POWER OF SIX

For most titles purchased from an online bookstore, it is technically possible to load the content onto six devices (five for Apple), so long as those devices are registered under the same account. For instance, I have my Kindle Fire, iPhone and iPad Kindle apps, Kindle reader for the Mac, and the Kindle Cloud reader registered to my personal Amazon account. Under the use agreement, I, as an individual, can purchase a book and read it on any one of these devices. Again, this is designed for an individual, not libraries. Therefore, if libraries proceed with lending e-readers loaded with licensed content, it is highly recommended that they maintain the 1-to-1 ratio for content to devices.

Dawn Nelson, instructional media and technology coordinator with Osseo (Minn.) Area Schools, commented about the 1-to-1 ratio during her HHL7 presentation. Osseo is part of the Barnes and Noble Managed Digital Locker program. In this program, B&N works directly with the school to purchase, license, and load content onto devices. Nelson said the use agreement is specifically designed for school libraries and is not the standard legalese found in the "I agree" button on the B&N site.

The critical piece is the 1-to-1 ratio. If a library signs on for the Managed Digital Locker program (partial or fully corporate managed), the school must purchase one title for every device. Nelson likes this program because she can use purchase orders to pay for the devices and content, and the

fully managed corporate program cuts back on the staff time needed to maintain devices. It also prevents her school district from obtaining any unauthorized purchases. So, does this make the B&N Managed Digital Locker program a legal way to lend e-readers? Well, it's close, but is missing one critical piece—accessibility.

E-READER ACCESSIBILITY

The ability to read a print book via text-to-speech (TTS) does not make an e-reader fully accessible. E-readers must have audio-controlled menus as well. Without the audio cues to announce a book title, page number, bookmark, or volume control, a person who is blind or has severe visual impairments cannot use the device. This was the basis of the 2010 lawsuit against Arizona State University by the NFB and the American Council of the Blind. The Kindle devices the university was using to replace print textbooks offered TTS, but the menu controls had no audio option.

I witnessed this firsthand during a conference presentation by representatives of the NFB. The presenter, who was blind, held up a NOOK device and demonstrated what she could do with the device. Nothing. She then demonstrated her iPad with its built-in VoiceOver feature. This device was able to navigate through the apps on the screen and menus within most apps, responding to her touch, taps, and swipes of the screen. She quickly navigated to iBooks and opened a title, and the book began reading to her. If you have an iOS device, give it a try. Turn the VoiceOver feature on by going to Settings -> General -> Accessibility -> Vision.

On the positive side, the U.S. Justice Department announced a settlement with the Sacramento (Calif.) Public Library Authority regarding e-readers on Aug. 29, 2012. Under the agreement, the library will cease acquiring nonaccessible e-readers and will acquire at least 18 accessible e-readers.

STANDARDS AND GUIDELINES FOR ACCESSIBILITY

Ken Petri, director of the Web Accessibility Center at the Ohio State University, also presented at HHL7. Petri believes that e-readers must be accessible not just to those with a print disability, but to those with nerve disabilities who cannot hold or manipulate a print book, as well as those with a hearing disability who cannot hear an embedded video or audio clip in enhanced ebooks.

Petri also wrote the "Accessibility Issues in E-Books and E-Book Readers" chapter in *No Shelf Required 2: Use and Management of Electronic Books*. In the chapter, he highlighted a variety of standards and guidelines related to the accessibility of electronic devices. One of the most prominent U.S. legal statements, according to Petri, is Section 508 of the Federal Rehabilitation Act. He wrote in his chapter, "Meeting Section 508's Functional Performance Criteria demands that a user-facing hardware or software component have at least one mode of operation and information retrieval that does not require vision; that accommodates low visual acuity; that does not require hearing and/or can amplify produced sound to compensate for poor hearing;

that does not require fine motor control or simultaneous actions; and that is operable with limited reach and strength" (p. 41).

ACCESSIBLE E-READERS

Given these criteria, another million-dollar question arises—what e-readers, if any, are accessible? Petri recommended iOS devices during his HHL7 presentation due to the VoiceOver controls and host of other accessible features. He also recommended apps for these devices including iBooks, Blio, and Read2G.

Blio is a free, full-featured e-reading app developed by K-NFB Reading Technology, Inc., founded by technology visionary Ray Kurzweil. Kurzweil should sound familiar to librarians because he was the lead developer for the first print-to-speech reading machine for the blind—aka the Kurzweil Reading Machine, developed in 1976 and present in a host of libraries around the world. Blio is the reading app for Baker & Taylor's Axis 360, honored in July 2012 by the NFB for its "industry-leading example in making its ebook products accessible" (www.libraries.wright.edu/no shelfrequired/2012/07/25/baker-taylors-axis-360-wins-accessibility-award-from-the-nfb).

Petri maintains a website on the functional criteria for ebook accessibility (http://wac.osu.edu/ebook-access-overview). Here he discusses the functional limitations for people with disabilities and offers solutions or accommodations that can be made to products to make them accessible. He also uses this space to review the accessibility features in various web-based, PC/Mac-installed, and stand-alone e-readers.

Petri also recommends the DIAGRAM Center's Product Matrices (http://diagramcenter.org/index.php?option=com_content&view=article&id=24&Itemid=28). The DIAGRAM Center is managed by The Benetech Initiative, a 20-year-old nonprofit organization whose mission is to create innovative technological solutions that solve social challenges. A core program of Benetech's is Bookshare, the largest online library of accessible materials for people with print disabilities, and the creator of Read2Go, a $19.99 accessible ebook reader app.

TO LEND, OR NOT TO LEND?

Lending e-readers is a complicated service for libraries, one that has a host of legal, ethical, and practical considerations. I have much respect for libraries that have forged ahead into unknown legal waters to test this service for the rest of us. I also have respect for those who want to keep their distance from a lending program. There is no magic answer. Lending devices will be a local decision, based on local needs. My hope is that someone finds the perfect solution, the one that is 100% legal, ethical, and practical for both users and libraries.

Sue Polanka is head of reference and instruction, Wright State University Libraries, and blogs at No Shelf Required.
Comments? Email the editor (marydee@xmission.com).