

# Publishers developing strategies to target e-book pirates

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BY SHERI QUALTERS

As sales of electronic books and readers skyrocket, the threat of piracy and other copyright issues loom. Publishers are test-driving different litigation strategies to fight illegal downloads. They are also arguing in court that author contracts, some decades old, give them the exclusive rights to publish e-books.

In 2007, there were 147,000 e-reader sales, compared with an estimated 18.7 million in 2011 and a projected 23 million this year, according to the Consumer Electronics Association. The Association of American Publishers' data show that e-books' share of the so-called trade market, which includes fiction, nonfiction and religious books for adults and young consumers, is on the upswing. In 2010, the most recent year available, e-books made up 6.4 percent of the trade market, compared with 0.6 percent in 2008.

The digital files for e-books are much smaller than those for music or movies and thus they are quicker and easier for pirates to copy and distribute through peer-to-peer file-sharing.

Publisher John Wiley & Sons Inc. has engaged in an aggressive strategy in combatting e-book piracy. Last October, the publisher filed the first of seven "John Doe" suits in the Southern District of New York against unknown defendants, identified by their Internet Protocol addresses. The complaint alleged illegal copying and distribution of e-books in Wiley's "For Dummies" series of instructional books. The publisher filed subsequent "John Doe" suits in December, January and February.

Although Wiley's campaign appears similar to the one pursued by the recording industry that targeted music downloaders in recent years, lawyers for the publisher say it's not nearly as broad.

Between 2003 and 2008, the Recording Industry of America led long-running litigation against thousands of alleged music downloaders across the country. These suits also named "John Doe" defendants identified by their Internet Protocol addresses. After being identified by their Internet service providers, most defendants settled, but two cases culminated in steep verdicts against defendants who wouldn't settle and now claim they can't afford to pay. One was upheld on appeal in the U.S. Court of Appeals for the 1st Circuit, and the other is still on appeal in the 8th Circuit.

Wiley's litigation strategy is much narrower, said Maria Danzilo, legal director at Wiley's global education business. The company's objective in the litigation is more nuanced than one might think, she said. The ultimate goal is "going after the worst of the worst and people who are profiteering. We're doing a lot of due diligence to differentiate" between those who operate on a large scale and small-time downloaders, Danzilo said.

Bill Dunnegan of New York-based Dunnegan & Scileppi, who represents Wiley in these lawsuits, said the litiga-



R. BRUCE RICH: "There are...incredibly important works...from the pre-Internet era that...have great value to publishers and authors."

tion is meant "to demonstrate or educate people that this type of infringement is not a no-risk proposition." He said the publisher wants to "dry up the demand for [pirated] e-books."

Dunnegan said the company is "bending over backwards not to treat this as an assembly line operation." Wiley is investigating the John Does "in order to avoid going after teenagers and grandmas. After we've identified people we don't want to send a [demand] letter to, we have a lawyer listen to their story and explain to them what's going on," Dunnegan said. For many offenders, the company will take \$750 for minimum statutory damages "even if we could negotiate more."

Wiley's approach is necessary and a good first step in stopping the burgeoning e-book piracy problem, said Andrew Berger, an intellectual property counsel to New York-based Tannenbaum Helporn Syracuse & Hirschtritt who isn't involved in the cases. "A lot of authors are really pleased by what they're doing," Berger said. "It's a wise first move; they just can't sit back and let this go on."

## FORMING AN ALLIANCE

Wiley is also part of an alliance of 17 U.S. and foreign publishers that won separate interim injunctions against two Web sites, [www.library.nu](http://www.library.nu) and [www.ifile.it](http://www.ifile.it), in the regional Landgericht Munich court in Germany. The alliance included other top U.S. publishers such as The McGraw-Hill Cos. Inc. and Pearson Education Inc.

Wiley's participation is part of its strong, multifaceted approach, Danzilo said. Sharing costs and dealing a hard blow to pirates were two motivating fac-

tors, she said. "The more content that's the subject of an injunction the more likely there will be an impact."

The injunctions were issued in mid-February, said Ursula Feindor-Schmidt, a partner at Munich-based Lausen Rechtsanwälte, who represents the publishers' alliance. "All the sites are operating globally, so it makes sense that publishing branches and rights owners join together to find effective measures and actions to fight back those phenomena of piracy," she said.

According to Feindor-Schmidt, the [www.library.nu](http://www.library.nu) site provided thousands of links to illegal sources for e-books available on the [www.ifile.it](http://www.ifile.it) share-hosting service. Share hosters enable users to store files directly on their servers. Together, the two services operated an illegal Internet library where more than 400,000 e-books could be downloaded for free.

Based on information that Feindor-Schmidt gathered for the case, she estimates that the defendant operators might have earned about \$10.6 million from advertisement revenues and

sales of premium accounts for the pirated content during their roughly one year of operations.

The publishers teamed up to share costs, including investigation and development of software to detect the infringing works, Feindor-Schmidt said.

What's more, German case law gives courts clear jurisdiction over share hosters, Feindor-Schmidt said: "In most of the other countries you don't have any decisions on that." Web sites that provide links and those that host files often operate separately, but these two entities turned out to be connected and based in Ireland. European Union enforcement directives enable enforcement of German-issued injunctions in Ireland, she said.

Thomas Stein of Winterstein Rechtsanwälte in Frankfurt, Germany, who represents [www.library.nu](http://www.library.nu) and [www.ifile.it](http://www.ifile.it), did not respond to requests for comment.

There's been a lot of litigation in Europe during the past couple of years against Internet service providers hosting all kinds of infringing content and this is the next step against a different target, said Berger of Tannenbaum Helporn. "This is another stage in the same development of copyright holders trying to protect their turf." That means companies and people who use unauthorized copyrighted materials in e-books must be ready for lawsuits anywhere.

## DISPUTES OVER CONTRACTS

Another contentious issue is over contractual rights to publish e-books. Publishers claim that their contracts encompass e-book rights, but some authors believe they retain these rights

and are free to license them elsewhere. A New York federal court is the site of a lawsuit brought by HarperCollins Publishers LLC against digital book publisher Open Road Integrated Media LLP over the e-book rights to Jean Craighead George's 1972 children's book *Julie of the Wolves*.

In December, HarperCollins filed a copyright infringement case in the Southern District of New York, which pointed to its contract with George. The 1971 agreement between HarperCollins' predecessor company and George gives the company the exclusive right to publish the work "in book form," including via "computer, computer-stored, mechanical or other electronic means now known or hereafter invented." According to the complaint, George's literary agent informed HarperCollins that Open Road intended to publish a *Julie of the Wolves* e-book.

HarperCollins views Open Road's actions "as a clear-cut violation of their publishing contract and they hired us to demonstrate that," said the publisher's lead lawyer on the case, R. Bruce Rich, a senior partner at New York-based Weil, Gotshal & Manges. HarperCollins has asked the court for a permanent injunction barring Open Road from advertising, promoting or selling that e-book and attempting to make similar e-book deals with any other HarperCollins author.

"In cases of this sort involving interpretation of publishing agreements, by definition one has to examine the language of the agreement," Rich said.

Rich squared off more than a decade ago in a similar case in the Southern District of New York against Open Road's lawyer, Michael Boni, co-founder of Boni & Zack in Bala Cynwyd, Pa. Boni declined to comment on either case.

In the earlier case, *Random House Inc. v. Rosetta Books LLC*, Rich represented Random House, which lost a preliminary injunction battle based on less specific contract language. Random House sought to bar Rosetta from selling eight digital works over the Internet based on contracts that gave Random House the right to "print, publish and sell the work[s] in book form."

Before the case settled, the district court denied Random House's motion for a preliminary injunction on that contract in 2001. The U.S. Court of Appeals for the 2d Circuit upheld that ruling in 2002. It found that "determining whether the licenses here in issue extend to ebooks depends on fact-finding.... Without the benefit of the full record to be developed over the course of the litigation, we cannot say the district court abused its discretion in the preliminary way it resolved these mixed questions of law and fact." Rich said the decision is pretty limited.

The current case is significant because "there are just incredibly important works that are from the pre-Internet era that are under copyright and have great value to publishers and authors," Rich said.

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