



**ENGELBERG  
CENTER**  
**on Innovation Law & Policy**  
NYU School of Law

In the Matter of  
**Indagine Conoscitiva IC57**  
**EDITORIA SCOLASTICA IN ITALIA**

Comment of  
Michael Weinberg

Thank you for this opportunity to contribute to the Authority's investigation into the school publishing sector's use of electronic books and textbooks. I apologize that this filing is in English, but my Italian is not good enough to prepare this type of comment.

As the Authority has already recognized, the transition from physical books to ebooks and etextbooks can bring a number of benefits to students and teachers. Unfortunately, in many cases around the world, publishers have used the transition to ebooks to rewrite traditional access terms in their favor. As a result, instead of being a source of benefits, the transition to ebooks has meant a loss of user rights and a reduction in competition.

Fortunately, this loss is not inevitable. The Authority is positioned to intervene in the market in order to help assure that the benefits of ebooks do not come at the cost of current rights or abilities.

I am currently the Executive Director of the Engelberg Center on Innovation Law & Policy at the New York University School of Law in the United States. In 2023 I, along with co-authors Professor Sarah Lamdan, Professor Jason Schultz, and Claire Woodcock, published a report titled "The Anti-Ownership Ebook Economy: How Publishers and Platforms Have Reshaped the Way We Read in the Digital Age".<sup>1</sup> I have attached the full report as an appendix to this comment. I provide this comment as a co-author of that report, and not on behalf of the Engelberg Center as an institution.

Grounded in an investigation into the relationship between libraries and publishers, the report describes the larger forces shaping the development of the ebook market. Of particular relevance to this investigation, the report explores the ways in which publishers have used ebook licensing terms to reduce and eliminate the rights of readers.

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<sup>1</sup> <https://www.nyuengelberg.org/outputs/the-anti-ownership-ebook-economy/>

In addition to submitting the report itself, I will take this opportunity to highlight three trends and suggestions that might be of interest to the Authority.

### **The Transition to Digital has Allowed Publishers to Rebalance Traditional Rights**

Copyright law incorporates rules that balance the rights of publishers with the rights of readers. In the context of physical books, copyright law allows publishers to control the making of new copies of a work. However, the reader enjoys rights as well, especially with regard to copies of works they have lawfully acquired. Those rights included the right to annotate the book, and share the book with others, and even the right to sell the book without the publisher's permission.

Publishers around the world have used the development of ebooks to roll back reader rights while extending their own control over works, upsetting the balance at the heart of copyright law. They have retained the rights that exist with physical books, controlling the creation of new copies and the sale of those copies to the public. However, by styling the transfers of ebooks as licenses instead of sales, publishers have eliminated rights enjoyed by readers of physical books. Publishers use licenses to exert control over (and often prevent entirely) lending and sale of ebooks. They also limit the types of software that can access the ebooks. Publisher-approved software often fails to include features such as printing portions of ebooks, or even annotating ebooks.

The Authority's Preliminary Report indicates that Italian textbook publishers are following this pattern. Publishers require readers to use proprietary platforms that limit activity such as printing and annotations.<sup>2</sup> They also limit the ways ebooks can be shared or transferred.<sup>3</sup> These limitations can effectively eliminate the secondary market for textbooks. It is easy to understand why publishers would prefer that the secondary market for textbooks disappear. It is less easy to understand why that preference should control the fate of the secondary market.

The Authority should understand these efforts as an attempt by publishers to unilaterally rewrite copyright law to reduce competition in the space. The publishers' version of copyright law eliminates competition from the secondary market, and even from third party applications that might provide ebook usability features that the publishers themselves are uninterested in providing.

### **EBooks Can Be Sold**

There is nothing about ebooks that make them inherently incompatible with sale. Title to an individual ebook can be transferred from a publisher to a reader. Making unauthorized copies of

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<sup>2</sup> Preliminary Report, 261.

<sup>3</sup> Preliminary Report, 263.

a specific ebook is an infringement of copyright law, just as making unauthorized copies of a specific physical book is an infringement of copyright law.

Some publishers raise the specter of increased copyright infringement with ebooks. However, publishers have been unable, or unwilling, to provide data to substantiate those claims. To the extent that publishers are raising concerns about increased copyright infringement, and the Authority is inclined to view those concerns as legitimate, the Authority could conduct a study to test the hypothesis. The Authority could collaborate with researchers and publishers to select a portion of ebooks, offer them for sale, and compare infringement rates against a control group. At a minimum, the Authority should not allow mere speculation from an interested party to serve as a pretext to eliminate important reader rights.

### **Licensed Markets Can Still Offer Flexibility**

In addition to requiring the actual sale of ebooks, there are many opportunities for the Authority to improve the terms of the licensing market. In doing so, the Authority should focus on allowing the benefits of ebooks to enhance the traditional rights of readers, not eliminate them. The Authority should place the burden on publishers to prove that flexibility and traditional rights are not compatible with a thriving ebook market.

If publishers are able to establish those harms, the Authority can help craft market terms that mitigate those harms in ways that minimize the burden that the mitigation efforts place on readers. The Authority can pay special attention to retaining rights in specific areas:

*Facilitate Short-Term Sharing.* There is no reason that it should be impossible for readers to share ebooks (or portions of ebooks) with others. This ability has been an integral part of the bargain at the core of copyright law for centuries. The Authority can work with stakeholders to establish reasonable limits on the duration and number of shares, and enforce those restrictions through the least burdensome technical measures available.

*Allow For Printing.* There are a number of potential benefits to reading on paper instead of on screens. As with short-term sharing, the Authority can work with stakeholders to establish reasonable limits on this activity. In balancing the benefits and harms, the Authority should be skeptical of claims that printed versions of ebooks could cause any more harm to publishers than the paper versions publishers sell.

*Require Third Party Readers.* Competition among the software used to access ebooks will lead to more innovative features for readers. Restricting access to publisher-provided software options eliminates that competition and prevents readers from accessing features they deserve. A number of technologies exist that would allow publishers and the Authority to enforce technical limitations on a broader set of platforms. The Authority should explore ways to allow third party readers to be used in ways that uphold any limitations deemed legitimate.

*Enable the Reselling and Transfer of Licenses.* Even if the Authority concludes that publishers should not be required to fully sell ebooks, it can construct a controlled technical ecosystem that allows for the transfer of licenses between readers. Such a transfer would prevent the transferring party from accessing the ebook post-transfer, preventing the types of simultaneous access concerns that are sometimes raised in the context of ebooks. Etextbooks may be especially amenable to this type of solution. Since they are often used for entire semesters or academic years, the license transfer is likely to happen infrequently. Unlike a new bestseller that might be transferred dozens of times in the first year of publication, the slower use pattern of textbooks means that an etextbook would be transferred far fewer times before being superseded by a new edition.

Thank you for this opportunity to participate in this proceeding.

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