

# Don't Restrict My E-book

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Angela Daly, *E-Book Monopolies and the Law*, 18 Media & Arts L. Rev. 350 (2013), available at [SSRN](#).

It's still fashionable to point to the "cloud" as the solution to all sorts of problems in technology. But can such a shift disturb the carefully worked out compromises between different interests, which are embedded in legislation on topics such as competition and intellectual property?

[Angela Daly](#), a research fellow at the [Swinburne Institute of Technology](#) (Australia) who is also about to complete a doctorate at the European University Institute (Florence, Italy), suggests that these clouds may bring little but rain. In her article, "E-book monopolies and the law", published in the consistently topical Melbourne-based [Media and Arts Law Review](#), she considers two particular features of e-book platforms and content: digital rights management, and competition.

The significance of these sectors is apparent. Daly sets out the successes of various players (notably Amazon and its Kindle and Kindle Store), even in markets that they have not officially entered like Australia. Quickly, however, the problem is apparent: depending on how you define the relevant market, the user can find themselves faced with high 'switching costs' and with limited opportunities to take advantage of all that the digital world appears to promise.

The problems of the legislative protection of DRM are well known. While restating the key criticisms (including the replacement of flexible rules with unbalanced stipulations or complex processes and presumptions), Daly also brings to wider attention the particular difficulties encountered in Australia, where the result of trade deals has been the worst of both worlds—greater US-style protection for rightsholders without even the safeguards of the US system. The key argument in this section, though, is about exhaustion (taking in the landmark European decision in the software case of [UsedSoft v Oracle](#) and the very different US decision in [Capitol Records v ReDigi](#)). It's argued that the potential for exhaustion to protect competition and consumer interests in the e-book world is being stifled by some decisions, by whittling away exemptions for temporary copies, and above all the move from "goods" to "services" and from "sales" to "licenses".

One consequence of poorly designed or implemented DRM legislation is the locking in of users to a particular platform. In the second main part of the paper, Daly develops a theme that runs across much of her work—the combination of potential harms to competition (especially for the 'normal' user who is not accustomed to complex workarounds) and wider harms to the public interest (e.g., censorship by powerful platform operators). Reviewing the various stages in the US and European Union investigations into the agency models adopted by Apple and publishers and a class action against Amazon, Daly makes some particularly telling points about the wider problems of Apple's approach to revenue sharing, and the interaction between these models and DRM.

Daly's proposed solution is an interesting one. She recognises that competition law brings something to the table, but although these cases and investigations may have the result of lowering prices, they do not address the underlying (detrimental) impact of the use of DRM as a tool to protect business models rather than creative works. As such, she calls for greater attention to fair use outside the US and a "fair deal for users" in trade negotiations. When so many questions are seen solely in

competition terms, this more subtle approach is particularly welcome.

Since this wide-ranging article was published, the competition matters have rolled on. [Apple](#) and [major publishers](#) have settled with some of their opponents, and Amazon prevailed in a [case brought by bookstores](#), although Amazon and the publisher Hachette are now caught up in a [significant dispute](#) about ebook prices. Disclosures regarding the activities of national security services may have shaken some user confidence in the shift to the cloud—but the reliance on DRM in the e-book sector remains clear. Daly's deft handling of the range of issues in this sector should be of particular interest to the many committees and bodies investigating 'copyright reform' around the world.

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