

The Right to E-read



EBLIDA Position Paper

May 2014

--- 0 ---

Table of Contents

| | |
|--|-----------|
| Foreword | 3 |
| Executive Summary | 4 |
| E-publishing and acquisition | 8 |
| Improvement of services | 9 |
| Loss of control of authenticity of content | 9 |
| Imbalance of power | 9 |
| Enforced change to libraries' collection development policies | 10 |
| The e-book market: trade and trends | 10 |
| Change of legal basis: from lending to e-lending | 13 |
| Distribution right, exhaustion and lending right | 14 |
| E-Lending | 14 |
| Court cases and legal uncertainty | 16 |
| Review of current legislation and other initiatives in Europe | 17 |
| Recommendations | 23 |
| I. From licences to Mandatory Fair Licensing | 23 |
| II. Updating the EU Copyright Acquis | 24 |

Foreword

This paper is successor to the EBLIDA paper *E-publishing and the challenges for libraries*, April 2012 (Rev. July 2012 and April 2013).



The Right to e-read by EBLIDA is licensed under a Creative Commons Attribution 4.0 International License (CC BY 4.0 - <http://creativecommons.org/licenses/by/4.0/>).

Executive Summary

This paper focuses on the question of e-books and their access through libraries. The current developments in the e-book market are dramatically changing the way libraries are working. In addition to giving access to a broad range of content from scientific literature to leisure in all tangible formats (books, CDs, DVDs), since the 1990's libraries have provided access to content in electronic formats, firstly for journals and now e-books. Initially these developments mainly occurred in academic libraries but nowadays public libraries are very much involved as well. Libraries are in the midst of a transition from managing physical collections that they own to managing connections to e-content provided and owned by others.

The paper reviews and analyses several aspects of the current changes, including:

- The improved services libraries can now offer and how publishers' have used the power of their monopolies to make decisions about what digital content libraries may have access to and what they may lend to the public, creating obstacles to library acquisition policies and their exercise of professional expertise and impartiality, deeply compromising their core mission and leaving their patrons without the e-content they want.
- A quick analysis of the current trends in trade publishing which also highlights some of the most important threats posed to libraries as public interest institutions whose core purpose is to deliver access to information.
- A comparison between the lending of tangible material (printed books, CDs, DVDs etc) and the lending of intangible content (digital files for downloading or streaming).
- The developing legal uncertainty relating to e-books, e-lending and libraries is described and a snapshot is given of relevant current cases before European courts.
- Highlights national attempts to adapt and develop copyright law to meet the challenges of the digital age especially in relation to libraries and includes information on the recent European Commission Consultation on the EU Copyright Rules and EBLIDA's response to it.

Definition

For the purposes of this paper an electronic book (e-book) is defined as 'a book or text-based work composed in or converted to digital format for display on a computer screen or handheld device, which is made available as a separate entity'.

The problem

Libraries have a duty to promote a reading culture in the populations they serve and those which are public memory institutions also have a vital duty to preserve published and unpublished materials, including e-books which represent the future trend of publishing, in perpetuity for future generations – a duty that is inappropriate to transfer de facto to publishers which are mostly relatively short-lived commercial entities. Thus libraries need to be able to buy digital materials, such as e-books in such a way that a transfer of ownership takes place, so that the transactions would be deemed to be distributions in the meaning of Art 6.2. of the WIPO Copyright Treaty rather than the provision of a ‘service’. If that were so, the Rental and Lending Directive would also apply, so that e-books might be loaned to library patrons in accordance with the national implementation of the Directive. Alternatively these issues could be addressed by introducing a mandatory exception concerning libraries and e-books.

Usually libraries are not able to acquire the digital files themselves, but must subscribe under licence to publishers’ online platforms or databases containing e-books (or other types of digital works such as journals, sound recordings or film) so that their patrons may access the platform and download the works for a limited period (an e-loan). Such a scenario should be governed by mandatory and fair licence terms and conditions that ensure that the library is able to fulfil its public interest mission, but that is not the case. In the case of e-books, libraries are losing their freedom to choose the materials they want and to make them available in the most appropriate ways to meet the needs of the communities they serve.

The present legal framework is inadequate to deal with this corruption of libraries’ missions and until it does, many publishers will continue to use the power of their monopolies to make decisions about what digital content libraries may have access to and what they may lend to the public.

This is not a hypothetical danger: it is already happening. Libraries have actually experienced instances of publishers:

- refusing to include certain e-book titles of packages;
- subsequently removing certain e-book titles from subscription packages in order to sell the books exclusively to individual private customers; and
- prescribing the terms for access.

This is a direct challenge to the core activities and responsibilities of libraries. Librarians, who are governed by professional principles and codes of ethics to ensure the highest standards, are

being excluded from exercising the professional responsibilities entrusted to them by their patrons and funders.

If this challenge is not countered, it is difficult to see how libraries can fulfil their objectives in the future.

The solution

Libraries **must be able to choose** between:

1. Buying e-books (files) to be stored on the library's server and downloaded to a reading device for use by the patron. In this case, exhaustion would apply as it does in the analogue world since upon the sale a transfer of ownership takes place, and the lending would be regulated by the national implementations of the Rental and Lending Directive.
2. Subscribing to access points at the publisher's database for their patrons. In this case 'Mandatory Fair Licences' should apply.

Recommendations

EBLIDA makes two overarching recommendations:

- **To move from the current unsatisfactory licensing offer to libraries to a regime of 'Mandatory Fair Licences'**
- **That the European Copyright Acquis be updated to deliver fair access to information for European libraries and their patrons.**

I. 'Mandatory Fair Licences' for libraries to ensure that:

1. Licence terms and conditions for libraries include and do not undermine statutory exceptions and limitations permitted within the EU or its Member States.
2. Removal of technological protection measures is made compulsory for all legitimate uses.
3. Publishers do not refuse to sell digital content to libraries, impose or limit which titles they may acquire, or make any prohibition on library e-lending.
4. E-books and other digital content is offered to libraries at reasonable prices.
5. Licence terms and conditions support libraries' missions and activities.
6. Licences follow EBLIDA's key principles on the acquisition and access to e-books.

II. EU copyright reform to ensure that:

1. Provisions are introduced to prevent contract terms from undermining statutory exceptions and limitations permitted within the EU or its Member States.
2. Removal of technological protection measures is made compulsory for all legitimate uses.¹
3. Libraries are granted a 'right to acquire' any work legitimately made available to the public² (including the right to acquire digital files) so that transfer of ownership takes place and the principle of exhaustion applies.³
4. A new mandatory exception is introduced granting libraries the 'right to lend' (including 'e-lend' remotely) any work in any format.
5. An open flexible 'fair use' type of norm is introduced to enable exceptions and limitations to keep pace with technological changes within the existing copyright framework.

¹ So that the workaround systems introduced in Member States to implement Art. 6.4 of the Information Society Directive Art. 6.4 ensure either that circumvention of TPMs for legitimate uses is permitted and/or that the rightholder must supply TPM free copies for the permitted purpose.

² That means published for textual documents and released for audiovisual documents..

³ In this case the national implementations of the Rental and Lending Directive would also apply.

Introduction

For some years, electronic publishing (e-publishing) has presented libraries with a series of challenges to overcome if they are to be able to continue their core activities of acquisition, lending, making available and preservation of works.

One of a library's objectives is to make a broad range of published works available to the general public for personal study and development, education and research. However, the transition from publishing literary and artistic works in tangible media to e-publishing⁴ has changed the environment for reading and also the rules by which libraries had operated until now. Although libraries provide access to all kinds of analogue and digital content, this paper will focus on e-books because of the specific challenges they present in legal, technical and strategic terms.

EBLIDA commissioned its E-books Task Force and its Expert Group on Information Law to review the situation in Europe regarding e-books in libraries. This paper aims to provide a better understanding of the context and to facilitate e-book availability in libraries.

Definition

For the purposes of this paper, an electronic book (e-book) is defined as 'a book or text-based work composed in or converted to digital format for display on a computer screen or handheld device, which is made available as a separate entity'.

E-publishing and acquisition

Until recently copies of printed books and journals were published as individual items and purchased by libraries. Upon purchase, the ownership of the copy of the book or journal transferred to the library. Since the end of the 1990's scientific journals have primarily been published in electronic formats and distributed to libraries as predetermined multi-title packages, compiled either by the publisher or by distribution agencies and library access is by licence. We now see the same development with books. Acquisitions have been replaced by subscriptions for access whereby libraries subscribe to access works via an internet gateway to the publisher's or distributor's database under licensed conditions.

Currently library collections contain a mix of printed books (content as tangible objects) and e-books (content in a non-tangible format). Libraries are in the midst of transition from building

⁴ i.e. publishing them as electronic files in databases accessible via the internet.

physical collections that they own (and can preserve for future generations) to merely managing connections.

In public libraries, the majority of the books and journals offered is still in print format, whereas in university, college and research libraries a large and increasing proportion of their holdings is digital. Nevertheless, in some cases collections still include some printed journals, and for the time being books are still to a large extent acquired in print. This situation is changing inexorably, since the development of reading devices and services for downloading or streaming e-books is bringing the Gutenberg era to a close, with several consequences as identified below.

Improvement of services

This development is an immense improvement in services. It is not only convenient for library users but also reduces transaction costs. However, the main problem is that currently it is the supplier, not the purchaser, who is deciding what is in the package of titles available for subscription and whether or not to include bestsellers or even very infrequently used material. The result is that the library is put in a position whereby it becomes unable to provide its users with the very best literature or the most specialised literature on a subject. Libraries run the serious risk of becoming mere distribution channels of products chosen by the supplier and not by the skilled librarians who know which is the best literature, what users want to read and what are the needs of the communities they serve.

Loss of control of authenticity of content

Another consequence is that in the electronic environment libraries are losing their ability to control the authenticity of the content and to ensure that content is not removed from databases. It is not only very difficult to detect whether content has been tampered with, but removal of content from databases has become a regular occurrence. This may be due to technical or licensing problems between third parties or to commercial decisions made by the service provider and/or publisher. Sometimes the content will be available from another distributor, and sometimes it simply disappears.

Imbalance of power

The library may want to include a provision in the licensing contract with the publisher that the material to which it subscribes may not be changed or removed from the database. However, libraries often are the weaker parties in such negotiations with little, if any, serious bargaining power to negotiate appropriate amendments to supplier contracts: they are often offered boilerplate licensing, in practice on a take-it-or-leave-it basis. It typically can take up to a year or

more to renegotiate a licence agreement and libraries which manage several licences simply do not have the resources to enter into detailed negotiations of this kind.

Enforced change to libraries' collection development policies

Under the current licensing terms and conditions they are offered, libraries and their librarians lose their ability to select what fits best into their collections. The reality is that the acquisitions policy of libraries is being decided by publishers to suit their own business models. The libraries as customers have no freedom of choice of content other than 'take it or leave it'. This is resulting in libraries no longer being able to guarantee freedom of access to the wide range of content, information, and culture that European citizens currently enjoy in the analogue world. It is not acceptable that the library's public mission of freedom of access to knowledge is being taken over by and made subservient to private commercial enterprise. This is indeed a censorship and a democracy issue.

The e-book market: trade and trends

Attitudes and strategies differ from one publisher to another. Some publishers are willing to work in good understanding with libraries, but not all. Some existing commercial offers are well established: e.g. Divibib in Germany, elib and Atingo in Sweden and Public library Online (developed by Bloomsbury) and Overdrive.

Additionally, some programmes such as the eReolen association in Denmark or MLOL, a private aggregator in Italy involve librarians in the development of e-lending models. However, in France, Prêt Numérique en Bibliothèques (PNB), a collaborative model being developed by the State, publishers, booksellers, distributors and library consortia, is raising concern among library consortia as it seems to be failing to address the needs of all library users.⁵

Alternatively, pilot projects are developing. The UK government has set up e-lending pilots in four public library authorities which are being reported on, yet in other countries some pilot projects seem to be conducted in near secrecy⁶.

⁵ Couperin Press Release 14th March 2014 (in French): Le projet 'Prêt Numérique en Bibliothèques' n'est pas adapté aux besoins de l'enseignement supérieur et de la recherche.
http://www.couperin.org/images/stories/CeB/Communiqu%20Couperin_PNB%202014%2003%2014.pdf

⁶ A presentation of a Finnish project on 27 e-books titles was made at a seminar of FEP-EWC.

Licences

All these projects are based on licences. Over-reliance on licensing threatens the success of any alternative proposal for accessing e-books. Our experience has enabled us to identify the following issues with licences:

- Many licensing terms and conditions are barely negotiable by libraries;
- Friction-based licensing models that mirror analogue lending and fail to exploit digital opportunities;
- Unaffordable e-lending models at prohibitively high costs, or yearly subscription packages where the libraries have no freedom to select the titles they want.

Freedom to develop library collections for the benefit of patrons

EBLIDA maintains that each and every e-lending model should fully accommodate libraries' missions and needs. Major publishing houses have shown themselves to be clearly reluctant to permit libraries to freely select titles from their whole e-book catalogue. As shown below, the Bestseller list of October 2013 (source: CIANDO) gives a snapshot of the situation in Austria and Germany:

| List | Number physical Book titles | Number of eBooks for Individuals | Number of eBooks for Libraries |
|-------------------------------------|-----------------------------|----------------------------------|--------------------------------|
| Hauptverband d. österr. Buchhandels | 75 | 59(=100%) | 34(=57,6%) |
| Spiegel-Bestsellerliste | 40 | 38(=100%) | 19 (=50%) |
| ORF-Bestenliste | 10 | 4(=100%) | 3(=75%) |

- In the UK⁷ some trade publishers view library availability of e-books as a direct threat to their economic interest and are withholding titles. Research by Shelf Free⁸, conducted in February 2013, found that 85% of e-books aren't available to public libraries.
 - Out of the top 50 most borrowed adult fiction books of 2012 only 7 were available for public libraries to buy as e-books – even then it depended on which supplier the library service was signed up to. One supplier only made just two titles available to libraries.
 - Only six titles in *The Bookseller* official top 50 ranking for e-books (August 2013⁹) were available for libraries to purchase. Five of these were by the same author published in 2012 (i.e. not new titles).
- If a publisher judges that an e-book is so commercially valuable or is becoming so popular with library users that there is the possibility of increasing revenue by making it available only by direct sale to individual purchasers, it can refuse to include it in library subscription packages or even withdraw it from library e-book packages. The publisher has no obligation to behave otherwise and respect library subscriptions.
- Even publishers that do offer e-books through library suppliers, withhold front list e-book titles from libraries: for example, Dan Brown's *Inferno* published by Bantam Press¹⁰ is available as an audio-book for sale to the UK library market, but not in e-book format.
- Libraries lose access altogether to titles provided on the Overdrive platform for which they had paid, if they choose to change platform and stop future subscriptions to Overdrive.
 - NB. On the other hand, in the case of e-journal subscriptions, upon terminating a subscription, libraries traditionally have been able to retain access in perpetuity to the specific issues of the journals to which they had paid to subscribe.

The above examples illustrate the instability of the environment, the inadequacy of library users' access to new literature, and the risks posed by the loss of titles when a subscription ends.

There is a tendency for the publisher community to misrepresent libraries as direct competitors to themselves and to bookshops, claiming that library e-lending to the public would impact on

⁷ This section comes from the EBLIDA survey on e-books, 2013 (unpublished, survey under review).

⁸ <http://shelffree.org.uk/2013/02/19/did-you-know-that-85-of-e-books-arent-available-to-public-libraries/>

⁹ <http://www.thebookseller.com/feature/official-e-book-sales-ranking-august-2013.html>

¹⁰ Bantam Press is an imprint of Transworld Publishers, a UK publishing division of Random House.

https://en.wikipedia.org/wiki/Bantam_Press

e-book sales. There is no evidence that supports this theory, whereas there is evidence from the US and the UK that demonstrates the opposite.¹¹

This attitude indicates a complete misunderstanding of the major role of public libraries in stimulating interest in reading by introducing authors and their works to users, thereby promoting a strong reading culture that ensures the steady sale of books direct to readers in the commercial market.

EBLIDA calls for publishers and other stakeholders in the e-book market to clearly acknowledge the important role of libraries in developing a reading culture which actively fosters the sale of books and e-books.

Developing a strong and vibrant reading culture that forms nations of readers is the major public interest mission of public libraries. This library mission is entirely in the interest of the public and the market.

Change of legal basis: from lending to e-lending

Since many of the works made available by libraries are in copyright, legislation regulates how libraries and their patrons may use the materials they hold. Because digital media is accessed by subscription and regulated by licence, the advent of e-publishing has dramatically changed the legal basis by which libraries operate with regard to an increasing proportion of their holdings.

Publishers are arguing that e-lending by libraries will lose them direct sales but there is no evidence that the acquisition and lending of printed books or e-books by libraries has adversely impacted on direct sales of the same titles by booksellers. On the contrary, surveys and studies¹² prove that in fact libraries stimulate interest in reading, and that people who borrow many books also buy many books.

¹¹ <http://blogs.overdrive.com/reports/2012/11/15/survey-says-library-borrowers-also-buyers/>;
<http://goodereader.com/blog/e-book-news/uk-ebook-lending-program-a-success-for-libraries-publishers>

¹² See Footnote 8. Additionally -

The Pew Internet Report shows that libraries and librarians are a prominent source (21%) for owners of ereading devices to get recommendations for reading materials (Source: Pew Research Center's Internet & American Life Project, April 2012. The rise of e-reading).

50% of all library users in the USA report purchasing books by an author they were introduced to in the library (Source: Andrew Albanese, 2011. Survey Says Library Users Are Your Best Customers);

OverDrive reported that, during March 2012, 5.02 million visitors viewed 146 million pages over 12.6 million visits to OverDrive hosted digital catalogues. Visitors experienced more than 630 million digital book cover images while browsing.

Libraries do not ruin the market, as ever they support and enhance it.

Distribution right, exhaustion and lending right

The author has the exclusive right to decide whether or not to publish a work and make it available for sale. In the case of printed works or works published on tangible media such as CD, CD-Rom or DVD, after the first sale the distribution right is exhausted.

This principle of exhaustion, laid down in Art. 6(2) of the World Copyright Treaty 1996, is implemented in the national legislation of all Contracting Parties. Thus, the library that acquires it can do with the media as it sees fit, for instance lending the material to its patrons, since the transfer of ownership with the consent of the author has exhausted the author's distribution rights.

However, in EU legislation 'lending' is not defined as an act of distribution since there is no transfer of ownership so the library continues to own the analogue work. The EU lending right is thus not exhausted. The EU Rental and Lending Directive (2006/115/EC) grants authors and other right holders the exclusive right to authorise or prohibit the rental or lending of their works to the public. However, Member States may derogate from the exclusive right provided that at least the authors are remunerated. Lending right does not as yet apply to the lending of e-books to the public although it is to be introduced in the UK in a limited form.

Furthermore, unlike individual consumers, libraries are often not being allowed to 'buy' e-books, but only to subscribe to access a platform, no transfer of ownership or exhaustion of the distribution right takes place and the licences they are offered reflect this concept. Thus libraries also may not e-lend except if, and how, the licence should permit.

E-Lending

The situation for libraries lending works made available as digital files (by download or streaming) remains unclear.

The problem

Given that the Information Society Directive¹³ had introduced the communication to the public right into European copyright law, the purchase of access to and the subsequent online lending of digital files (e-lending) is generally regarded as a communication to the public requiring au-

¹³ *Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society*

thorisation by the author (or other rights holder). Since such transactions are being regarded as a ‘service’ rather than a sale, they are not subject to exhaustion after the first communication, or making available, of the work to the public.

However the *UsedSoft* ruling by the CJEU in 2012¹⁴ has introduced in Consideration 52¹⁵ the concept that exhaustion applies to software since a transfer of ownership takes place. Therefore it is possible that exhaustion applies to other digital media as well, provided there is a transfer of ownership.

Libraries have a duty to promote a reading culture in the populations they serve and those which are public memory institutions also have a vital duty to preserve published and unpublished materials, including e-books which represent the future trend of publishing, in perpetuity for future generations – a duty that is inappropriate to transfer de facto to publishers which are mostly relatively short-lived commercial entities. Thus libraries need to be able to buy digital materials, such as e-books in such a way that a transfer of ownership takes place, so that the transactions would be deemed to be distributions in the meaning of Art 6.2. of the WIPO Copyright Treaty rather than the provision of a ‘service’. If that were so, the Rental and Lending Directive would also apply, so that e-books might be loaned to library patrons in accordance with the national implementation of the Directive. Alternatively these issues could be addressed by introducing a mandatory exception concerning libraries and e-books.

Usually libraries are not able to acquire the digital files themselves, but must subscribe under licence to publishers’ online platforms or databases containing e-books (or other types of digital works such as journals, sound recordings or film) so that their patrons may access the platform and download the works for a limited period (an e-loan). Such a scenario should be governed by mandatory and fair licence terms and conditions that ensure that the library is able to fulfil its public interest mission, but that is not the case. In the case of e-books, libraries are losing their

¹⁴ CJEU Case C-128/11 *UsedSoft v Oracle* on the resale of software acquired as an electronic download <http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=C-128/11&td=ALL>

¹⁵ 52: “Moreover, as stated in paragraph 46 above, in a situation such as that at issue in the main proceedings, the copyright holder transfers the right of ownership of the copy of the computer program to his customer. As the Advocate General observes in point 73 of his Opinion, it follows from Article 6(1) of the Copyright Treaty, in the light of which Articles 3 and 4 of Directive 2001/29 must, so far as possible, be interpreted (see, to that effect, Case C- 456/06 *Peek & Cloppenburg* [2008] ECR I- 2731, paragraph 30), that the existence of a transfer of ownership changes an ‘act of communication to the public’ provided for in Article 3 of that directive into an act of distribution referred to in Article 4 of the directive which, if the conditions in Article 4(2) of the directive are satisfied, can, like a ‘first sale ... of a copy of a program’ referred to in Article 4(2) of Directive 2009/24, give rise to exhaustion of the distribution right.”

freedom to choose the materials they want and to make them available in the most appropriate ways to meet the needs of the communities they serve.

The present legal framework is inadequate to deal with this corruption of libraries' missions and until it does, many publishers will continue to use the power of their monopolies to make decisions about what digital content libraries may have access to and what they may lend to the public.

This is not a hypothetical danger: it is already happening. Libraries have actually experienced instances of publishers:

- refusing to include certain e-book titles in packages;
- subsequently removing certain e-book titles from subscription packages in order to sell the books exclusively to individual private customers; and
- prescribing the terms for access.

This is a direct challenge to the core activities and responsibilities of libraries. Librarians, who are governed by professional principles and codes of ethics to ensure the highest standards, are being excluded exercising the professional responsibilities entrusted to them by their patrons and funders.

If this challenge is not countered, it is difficult to see how libraries can fulfil their objectives in the future.

The solution

Libraries **must be able to choose** between:

1. Buying e-books (files) to be stored on the library's server and downloaded to a reading device for use by the patron. In this case, exhaustion would apply as it does in the analogue world since upon the sale a transfer of ownership takes place, and the lending would be regulated by the national implementations of the Rental and Lending Directive.
2. Subscribing to access points at the publisher's database for their patrons,. In this case Mandatory Fair Licenses should apply.

Court cases and legal uncertainty

Additionally, legal uncertainty has increased in the past months with the development of a number of court cases.

We have identified a number of pertinent legal cases, including:

- CJEU Case C-128/11 *UsedSoft v Oracle* on the resale of software acquired as an electronic download;¹⁶
- *Vereniging Openbare Bibliotheken (VOB) v Stichting Leenrecht*¹⁷ to establish whether lending rights are applicable to the making available of e-books through downloading;
- *Verbraucherzentrale Bundesverband e.V. v Buch.de Internetstore AG*, Landgericht (Regional Court) Bielefeld, Germany 2013 to decide whether a license clause prohibiting the resale of used books and other digital media is violating the law of ownership.¹⁸

The *UsedSoft* ruling was handed down in July 2012 and potentially sets a precedent concerning the exhaustion principle and digital materials. The *VOB* case has requested the reference of certain points to the European Court of Justice (CJEU) but the full process can take years. This legal uncertainty is serious as it prevents libraries from building attractive e-book-services for the public.

What is lacking at present is a legal solution for libraries that supports a truly robust and legal digital access for users with the same benefit of stimulating interest in reading that libraries successfully achieve in the analogue environment. In that context, some European countries have been reviewing their copyright laws and the need to adapt the legal framework for copyright to the digital environment.

Review of current legislation and other initiatives in Europe

The European Union (EU)

The European Commission DG Internal Market recently conducted its [Public consultation on the review of the EU copyright rules](#).¹⁹ Its purpose was to gather input from all stakeholders on reviewing and updating EU copyright legislation. The consultation featured 80 questions address-

¹⁶ <http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=C-128/11&td=ALL>

¹⁷ Netherlands Public Library Association (VOB) v Netherlands Public Lending Rights Office (Stichting Leenrecht) http://www.leenrecht.nl/en/Court-case-e-lending_2

¹⁸ Federation of German Consumer Organisations – vzbv: <http://www.vzbv.de/11533.htm>;
http://www.buchreport.de/nachrichten/verlage/verlage_nachricht/datum/2013/04/22/schutzzaun-fuer-den-primaermarkt.htm

http://www.medi-ip.de/lg-bielefeld-weiterverkauf-heruntergeladener-e-books-unzulaessig/id_1366908738

¹⁹ Closed 5 March 2014: http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/index_en.htm
Scroll down for link to the responses.

ing a range of issues grouped by topics, including e-lending. More than 11,000 responses were submitted.

In addition to what is described above in the section, [The e-books market: trade and trends, EBLIDA's response](#)²⁰ to the consultation provides detailed and pertinent information concerning e-lending in answer to Questions 36-39 - and stated that none of the current e-book licensing models and pilots pay any attention to libraries' public missions and needs:

"[...] Libraries should have a 'right to e-lend', which will give the library users a 'right to e-read'. An exception allowing e-books and e-journals to be purchased and loaned for lending virtually through remote downloads or by streaming is required. The format and technology must not be a hindrance for access to books. Legal mechanisms and terms should be equivalent for analogue and digital lending [...]"

United Kingdom (UK)

The UK government had commissioned several reports in the past years on intellectual property (IP), including copyright and libraries and archives:

1. [Digital Opportunity. A review of Intellectual Property and Growth](#) by Professor Ian Hargreaves, May 2011²¹ (commissioned by the Intellectual Property Office).

Recommendation 5: Limits to copyright (pp8 and 99): *"Government should firmly resist over-regulation of activities which do not prejudice the central objective of copyright, namely the provision of incentives to creators. Government should deliver copyright exceptions at national level to realise all the opportunities within the EU framework, including format shifting, parody, non-commercial research, and library archiving. The UK should also promote at EU level an exception to support text and data analytics. The UK should give a lead at EU level to develop a further copyright exception designed to build into the EU framework adaptability to new technologies. This would be designed to allow uses enabled by technology of works in ways which do not directly trade on the underlying creative and expressive purpose of the work. The Government should also legislate to ensure that these and other copyright exceptions are protected from override by contract"*.

The UK Government's policy statement, *Modernising Copyright: a modern, robust and flexible framework* in December 2012, set out its proposals to implement Prof Hargreaves' recommendations for copyright reform, including expansion of copyright exceptions and protection from

²⁰ http://www.eblida.org/News/2014/EBLIDA_response_to_Public_Consultation_on_EU_Copyright_rules.pdf

²¹ <https://ipo.gov.uk/ipreview.htm>

contract override of certain of the exceptions.²² Legislation to achieve reform of the UK's copyright exceptions and limitations was laid before Parliament on 27th March 2014. It is expected that these copyright reforms arising from Prof. Hargreaves' recommendations should come into force on 1st June 2014, with further legislation concerning orphan works following in October 2014.²³ **In particular, the UK is introducing provisions to ensure that specific statutory copyright exceptions may not be undermined by contract terms.**

2. [*An Independent Review of E-Lending in Public Libraries in England*](#) by William Sieghart, March 2013²⁴ (commissioned by the Department of Culture, Media and Sport) made a number of recommendations based on the following principles:
 - Public libraries should be able to offer a remote E-lending service to their readers, free at the point of use;
 - The interests of publishers and booksellers must be protected through 'frictions' that limit the supply of E-books in the same way that physical book loans are controlled;
 - Pilot projects later in the year should test business models and help gather evidence of best practice; and
 - The Public Lending Right should be extended to on-site e-loans, with consideration further ahead to including remote e-loans.

In his Introduction to the Government Response to the Independent Review of E-Lending in Public Libraries in England (March 2013)²⁵, Ed Vaizey MP, Minister for Culture, Communications and the Creative Industries wrote "*Libraries services are evolving, and E-Lending represents one of many technological developments that can help them meet the increasingly high expectations of their membership. Many library authorities have been quick to embrace early E-Lending solutions, and others are investigating provision that meets local demand*".

The Government welcomed the report and supported most of the recommendations. It also announced funding from the British Library Trust to undertake a number of pilot projects looking at possible business models for e-lending. However it was more reticent on extending Public Lending Right to remote e-loans as it remained concerned it might not comply with EU copyright law.

²² <http://ipo.gov.uk/types/hargreaves.htm> (scroll to December 2012)

²³ *ibid.* (scroll to March 2014); for details see <http://ipo.gov.uk/types/hargreaves/hargreaves-copyright/hargreaves-copyright-techreview.htm>

²⁴ <http://www.gov.uk/government/publications/an-independent-review-of-e-lending-in-public-libraries-in-england>

²⁵ *ibid.*

Sweden

The new Library Act²⁶ (2013:801) entered into force on 1 January 2014. *Inter alia*, it expands the provisions for free lending by public libraries to the public. This means that the public may borrow literature free of charge regardless of the form of publication, i.e. regardless of whether it is provided in physical analogue form or digitally, for example this includes e-books.

Under the new Library Act, public libraries must also promote knowledge about how information technology can be used for knowledge acquisition, learning and participation in cultural life.

However, e-lending agreements²⁷ are to be based on free negotiations between libraries and rightholders to conclude licensing agreements on e-lending. Currently the two largest distributors of e-books to libraries are Elib²⁸ and its new competitor, Atingo.

Ireland

The Irish Government published its consultation report *Modernising copyright: report of the Copyright Review Committee*, in October 2013.²⁹ Zoe Melling (Librarian, Research & Information Unit, Legal Aid Board) informed EBLIDA that:

"[...] the report recommends expanding the current fair dealing provisions in Irish law to allow for a wider range of exceptions than those listed in the legislation, and introducing a new specifically Irish 'fair use' exception which does not go as far as the US version but aims to give the courts greater flexibility in certain limited circumstances. A draft amendment Bill is included in the report, with a view to progressing legislative change in the first half of 2014. Section 16 of the draft Bill relates to fair dealing and section 29 to fair use."

"[although there] is no specific reference to e-lending [...] the committee recommends introducing the full range of exceptions permitted by EU law, which would cover e-lending if it becomes an EU-wide exception [and that a provision in Irish Law stated that] contracts/licences cannot override exemptions in the copyright legislation (section 2(10) of the Copyright and Related

²⁶ <http://www.regeringen.se/content/1/c6/21/94/07/8d4e828b.pdf>

²⁷ The Swedish Association of Local Authorities and Regions, SALAR, who is the responsible authority for public libraries will represent the local authorities in trying to negotiate a model agreement for e-lending with the publishers. The discussions have just started so simultaneously the libraries still have their agreements with either elib or Atingo or both (the agreements are not exclusive). Both companies plan to have a lot of different acquisition models.

²⁸ Elib plans to release new models for library lending in the first quarter of 2014.

²⁹ <http://www.enterprise.gov.ie/en/Publications/CRC-Report.pdf>

Rights Act 2000)”. Additionally, the report proposes “[...] expanding this protection considerably, including the problem of unfair terms where the balance of power lies with one party. (see page 138) [...].”

Germany

The [work program of the German CSU-CDU-SPD Coalition](#), *Shape Germany’s future*³⁰ includes a number of references to library and information issues as follows:³¹

Page 133: “Copyright reform

*We want to adapt copyright to the needs and challenges of the digital age taking account of digital use practices. The aim must be to achieve a fair balance between the interests of authors, exploiters and users. In order for the value of the creative industries to become pivotal to the copyright debate, awareness of the value of intellectual property in society must be strengthened. The coalition will therefore support appropriate measures [...]”.*³²

Page 134: “[...] We will examine whether public libraries should be given the legal right to take out licences for electronic books [...]”.³³

“[...] At European level, the coalition will work to ensure that on e-books, e-paper and other electronic information media may in the future attract a lower rate of VAT. Essential for maintaining the diversity of books and bookshops are fixed book prices, which are also needed in European law to with regard to safeguarding e-book prices [...]”.³⁴

³⁰ *Deutschlands Zukunft gestalten. Koalitionsvertrag zwischen CDU, CSU und SPD: 18. Legislaturperiode*
http://www.bundestag.de/dokumente/textarchiv/2013/48077057_kw48_koalitionsvertrag/koalitionsvertrag.pdf

³¹ <http://blog.ronald-kaiser.com/2013/11/27/eine-kurzanalyse-des-koalitionsvertrags-deutschlands-zukunft-gestalten-der-18-legislaturperiode-zwischen-cdu-csu-und-spd-hinsichtlich-der-bedeutung-fuer-archive-bibliotheken-und/>

³² German original: “Wir wollen das Urheberrecht den Erfordernissen und Herausforderungen des digitalen Zeitalters anpassen. Dabei werden digitale Nutzungspraktiken berücksichtigt. Ziel muss ein gerechter Ausgleich der Interessen von Urhebern, Verwertern und Nutzern sein. Damit der Wert kreativer Leistungen stärker in den Mittelpunkt der Urheberrechtsdebatte rückt, muss das Bewusstsein für den Wert geistigen Eigentums in der Gesellschaft gestärkt werden. Die Koalition will deshalb entsprechende Maßnahmen unterstützen.”

³³ German original: “Wir werden prüfen, ob den öffentlichen Bibliotheken gesetzlich das Recht eingeräumt werden sollte, elektronische Bücher zu lizenzieren.”

³⁴ German original: “Auf europäischer Ebene wird die Koalition darauf hinwirken, dass auf E-Books, E-Paper und andere elektronische Informationsmedien künftig der ermäßigte Mehrwertsteuersatz Anwendung finden kann. Essentiell für die Erhaltung der Vielfalt der Bücher und Buchhandlungen ist die Buchpreisbindung, die europarechtlich auch im Hinblick auf E-Books abzusichern ist.”

Concerning fixed book prices, on 19 February 2014, France and Germany recognised, among others, the merits of national regulation of e-book prices³⁵. They invited other Member States to join them and called on the European Commission, the European Parliament and the EU Presidency to consider the importance of cultural, industrial and economic issues of the book in the digital age and to make it a priority in their work program in 2014.

France

Aurélie Filippetti, the French Minister of Culture and Communication declared [2014 the year of libraries](#) in a speech made on 21 January 2014: *“To meet new needs is for libraries to be open in line with the availability of the public [...]. To respond to new uses [...] is to see public libraries evolve into a digital public library service accessible remotely. To enable everyone to better ‘circulate’ in the digital environment, to be oriented, trained, and educated in the abundance of information and knowledge. Our libraries should be open to these new uses, to all the public, open to the maximum number of people the maximum amount of time”*.³⁶

Austria

The [Work program of the Austrian Federal Government 2013-2018](#)³⁷ includes the development of an ‘Austrian library plan’ for the development of a modern, nationwide library network, including e-media, promotion of digitization activities (p49).³⁸

³⁵ French Minister of Culture, press release, 14 February 2014: *Aurélie Filippetti et Monika Grütters, ministres française et allemande de la culture, appellent à une vision européenne du livre à l’ère numérique*. <http://www.culturecommunication.gouv.fr/Presse/Communiqués-de-presse/Aurelie-Filippetti-et-Monika-Gruetters-ministres-française-et-allemande-de-la-culture-appellent-a-une-vision-europeenne-du-livre-a-l-ere-numerique>

³⁶ French original: *“Répondre aux nouveaux besoins, c’est, pour les bibliothèques, permettre une ouverture lorsque tous les publics sont disponibles [...]. Répondre aux nouveaux usages [...], c’est voir évoluer les bibliothèques vers un service public numérique de proximité. Pour permettre à tous de mieux “circuler” dans le numérique, c’est à dire être orienté, formé, éduqué au foisonnement des informations et des savoirs. Nos bibliothèques doivent être ouvertes à ces nouveaux usages, à tous ces publics, ouvertes au maximum de gens un maximum de temps.”* <http://www.culturecommunication.gouv.fr/Presse/Discours/Discours-des-Voeux-a-la-presse-d-Aurelie-Filippetti-ministre-de-la-Culture-et-de-la-Communication>

³⁷ Arbeitsprogramm der österreichischen Bundesregierung 2013–2018 <http://www.bka.gv.at/DocView.axd?CobId=53264>

³⁸ German original: *“Erarbeitung eines ‘Österreichischen Bibliotheksplans’ zum Ausbau eines zeitgemäßen, flächendeckenden Büchereinetzes unter Berücksichtigung von E-Medien, Forcierung von Digitalisierungsaktivitäten”*

Recommendations

I. From licences to Mandatory Fair Licensing

The EU must develop legal mechanisms to ensure that licence clauses for information goods may not undermine statutory exceptions and limitations and that the removal of technological protection measures should be made compulsory for all legitimate uses.

Where a work has been published or otherwise made available to the public, the exclusive rights that exist with regard to the distribution or communication to the public of published works should not include the right to refuse to sell e-books to libraries, to offer e-books at prices designed to discourage sales, or to limit library e-book services, in the digital environment.

Licences for libraries should include the uses and respect the exceptions and limitations presently permitted by the Information Society and Database Directives.

If licence terms and conditions undermine the library's mission and the activities designed to fulfil it, then the introduction of and transition to e-material will result in reduced availability of publications to library patrons.

To support the development of a robust legal offer to library patrons, we recommend that the [EBLIDA principles on the acquisition and access to e-books by libraries](#) be followed.³⁹ In particular:

- All e-book titles available for sale to the public should be available to libraries to buy and access;
- All e-books titles should be available to libraries at the time of first publication;
- Publishers should deliver e-books in interoperable formats, or cooperate with libraries in making interoperable formats;
- Libraries should be permitted to make available acquired or licensed e-books for a limited period of time to a user (to e-lend);
- It should be possible to use the same e-book title simultaneously;⁴⁰
- Authorised users should be able to download an e-book either in the library or by way of remote access via secure authentication systems.

³⁹ http://www.eblida.org/Special%20Events/Key-principles-acquistion-eBooks-November2012/GB_English%20VersionKeyPrinciples.pdf

⁴⁰ i.e. The licence should permit simultaneous use In return for appropriate payment.

Importantly, the role of libraries in delivering free promotion of publishers and authors in their mission should also be clearly acknowledged. Some authors recognise this role and support libraries in it, for example the members of authors' groups such as [Fiktion](#).⁴¹

Recommendations: 'Mandatory Fair Licenses' for libraries to ensure that:

1. Licence terms and conditions for libraries include and do not undermine statutory exceptions and limitations permitted within the EU or its Member States.
2. Removal of technological protection measures is made compulsory for all legitimate uses.
3. Publishers do not refuse to sell digital content to libraries, impose or limit which titles they may acquire, or make any prohibition on library e-lending.
4. E-books and other digital content is offered to libraries at reasonable prices.
5. Licence terms and conditions support libraries' missions and activities.
6. Licences follow EBLIDA's key principles on the acquisition and access to e-books.

II. Updating the EU Copyright Acquis

A European copyright framework delivering fair access to information for libraries and their patrons

To better meet the challenges libraries are facing, EBLIDA seeks a clear copyright framework to enable libraries **to fulfil their enduring mission into the 21st century to provide all EU citizens with access to the riches of human knowledge and imagination, whether in the library onsite or online.**

Copyright law reform at European level is absolutely necessary to simplify the current complicated regime and overlapping of different Directives. Licensing initiatives alone will not achieve this. A minimum floor of norms for limitations and exceptions is needed throughout Europe to ensure a level playing field for users of copyright works and to assist cross-border access to knowledge in the digital environment.

European Union copyright legislation comprises 28 different national laws under the umbrella of the EU copyright Acquis consisting of several Directives and recommendations, etc.. This fragmentation of legislation does not give European citizens equal rights when it comes to copyright limitations and exceptions. For instance, a library exception in one country might be illegal in the neighbouring country. This creates inequality.

⁴¹ <http://fiktion.cc>

The lack of minimum norms for copyright limitations and exceptions throughout the European Union might create social dumping as access to knowledge is unequal. This is detrimental to the development of the Knowledge Society.

As stated throughout this paper, libraries should be able to benefit from a **‘right to acquire’** the content they choose and the **‘right to e-lend’**, giving the library patrons the **‘right to e-read’** whatever they want, whenever they want and wherever they want through their libraries.

Format and technology must not be a hindrance for access to e-books. **The impact of legal mechanisms and terms should be equivalent for both analogue and digital lending, i.e. the legal principle of exhaustion should be applied to the sale of e-books and other digital works. As publishers themselves have acknowledged “A book is a book regardless of its format.”⁴²**

Recommendations: EU copyright reform to ensure that:

1. Provisions are introduced to prevent contract terms from undermining statutory exceptions and limitations permitted within the EU or its Member States.
2. Removal of technological protection measures is made compulsory for all legitimate uses.⁴³
3. Libraries are granted a ‘right to acquire’ any work legitimately made available to the public (including the right to acquire digital files) so that transfer of ownership takes place and the principle of exhaustion applies.⁴⁴
4. A new mandatory exception is introduced granting libraries the ‘right to lend’ (including ‘e-lend’ remotely) any work in any format.
5. An open flexible ‘fair use’ type of norm is introduced to enable exceptions and limitations to keep pace with technological changes within the existing copyright framework.

- END -



The Right to e-read by EBLIDA is licensed under a Creative Commons Attribution 4.0 International License (CC BY 4.0 - <http://creativecommons.org/licenses/by/4.0/>).

⁴² EWC, FEP and EBF. *Manifesto for the 2014 European elections* (Para.2) <http://www.fep-fee.eu/IMG/pdf/ebffepewcmanifesto-3.pdf> (consulted 21 March 2014).

⁴³ So that the workaround systems introduced in Member States to implement Art. 6.4 of the Information Society Directive Art. 6.4 ensure either that circumvention of TPMs for legitimate uses is permitted and/or that the rightholder must supply TPM free copies for the permitted purpose.

⁴⁴ In this case the national implementations of the Rental and Lending Directive would also apply.