Handbook of Comparative E-Lending Policies in European Public Libraries

EBLIDA EGIL
(Expert Group on Information Law)

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PART I: EBLIDA-EGIL RECOMMENDATIONS ON A SUSTAINABLE E-LENDING POLICY IN EUROPE
INTRODUCTION

Libraries encounter many difficulties in implementing e-lending. Those difficulties are of a variable nature - legal, technical, and financial. For some expert librarians, e-lending can be considered mainly under a legal perspective – the recognition of the derogatory status of digital library transactions in relation to copyright laws and the legitimisation of open access practices through customary fair use.

A valuable approach, this methodology nevertheless has some limits, since it does not take into account the perspective of the e-book chain and the respective roles played by each of the actors. The e-lending process is dependent on many variables of economic, legal and institutional nature (number of users, percentage of publications available in a digital format, purchasing power of libraries, the role of intermediate layers negotiating with publishers on behalf of libraries). Moreover, the part played by public authorities in promoting an (e-)book policy is determinant. All these factors should lead to what we call: sustainable copyright in e-lending transactions.

A digital book ecosystem is not a static enterprise, but should be represented as an expanding and attractive space where the public greatly benefits from the use of cultural products and services. The main and overall result of the EBLIDA Handbook confirms that e-lending is underdeveloped in all European countries and that several factors curtail further parallel growth of both e-lending and the e-book trade. A reduced commitment slows down the rise of a digitized society where technologies are diffused among all layers of population.

Why is digital publishing still floundering in a society where digital companies are touted as stars of the stock market? What should be done to reverse this trend and make the use of educational and cultural publications in digital form a well diffused and widespread practice? At the moment, even books in printed form do not fully exploit social media and other spaces where they have a life beyond their commercial life-cycle. They do not appeal to young generations and other layers of population. To promote e-lending is a possible means to fill the gap between producers and distributors and promote e-reading, thus raising digital literacy in all European countries. The following recommendations are addressed to all actors of the book chain.

RECOMMENDATIONS FOR THE EUROPEAN COMMISSION AND OTHER INTERNATIONAL ORGANISATIONS

At European level, lending in libraries is regulated by the Directive 2006/115/EC on rental right and lending right. E-lending has been the object of two decisions of the Court of Justice of the European Union. The first is the case opposing the Technische Universität Darmstadt (TUD) to Eugen Ulmer, a German publisher. The second decision concerns the already mentioned case opposing VOB, the Association of Public Libraries of the Netherlands, against Stichting Leenrecht, the Foundation administering Public Lending Right in the Netherlands. In both cases the CJEU clearly spelled out the prevalent role of public interest in promoting research and private study and the need for striking a fair balance between the rights and interests of rights holders on the one hand and, on the other hand, users of protected works.

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1 TUD had made available to the public a book published by Ulmer (and stored in its own collections) by terminals installed within the library. The book so digitised could be printed out on paper and/or stored on a USB stick. In this case CJEU used the three-step test regulating exceptions and limitations under Article 9(2) of the Berne Convention and Article 5(5) of Directive 2001/29/EC (InfoSoc) to make it clear that TUD practice did not prejudice the normal exploitation of the work and did not cause harm to the legitimate interests of the rights holder.
The EBLIDA Second Overview demonstrates that the number of e-lending transactions in Europe is ludicrously low; its level does not meet the priority included in the European Commission Work programme of “a Europe which is fit for the digital age”. More, much more can be done.

Within its programmes and activities having a cultural and educational scope, the European Commission should:

- set up as a priority the overall objective to increase the volume of e-lending transactions in Europe, so that they reach at least the current level of lending transactions (which are on average, ten times higher than e-lending transactions);
- reduce regional disparities in e-lending matters and implement programmes aiming to set up e-lending schemes in countries where they do not exist;
- give preference to projects which aim to create a digital ecosystem for e-books where libraries collaborate with those publishers (for instance, small and medium publishers) who cannot afford creating costly platforms for the conversion of their printed products into e-products;
- establish a European award for those e-lending schemes where public access to information is maximised and creators/honest brokers are fairly remunerated and there is no room for the “expensive distributor”, the actor which uses its strategic position to further commodify information.

RECOMMENDATIONS FOR NATIONAL AND LOCAL AUTHORITIES AND E-BOOK POLICY-MAKERS

Books are both commercial and cultural products, and so are e-books. The e-book trade is exempted from strict conformity to market laws thanks to a cultural policy where the production and spread of the written word guarantees the diversity of opinions and expressions as well as wide access of the public to cultural products and services. This policy machinery is built upon a mix of measures which are legal (respect of the rights relating to intellectual property), economic (reduced VAT rate, for example) and social (the existence of the non-commercial network of libraries guaranteed by public legislation and resources).

If legal, economic and social measures coalesce to enhance access to culture and information, a more holistic policy might envision whether a reduced VAT in the book trade should be conferred to commercial actors on the condition that they also stimulate access to libraries. Two principles should be enacted.

The first is that existing practices in libraries related to analogue formats should also be valid in the digital environment, with the principle of public access being safeguarded and not limited by the exclusive right given to authors and producers. The second is that the application of copyright provisions in libraries (and possibly also in educational and cultural institutions) should be regulated and not left to free negotiations between the public and the private sector.

E-reading and digital literacy are hardly a business for commercial actors and library activities are a way to repair what is a typical market failure. Therefore, it would be important not only for libraries, but for all actors to assess how libraries contribute to the sustainability of the book and information chains through the creation, maintenance and enrichment of reading skills. Monitoring the spread of digital literacy in libraries would also show the economic and cultural implications of critically assessing networked information.
PLR is another issue whose effects should carefully be analysed. In strict economic terms PLR only seems a transfer of remuneration from libraries to authors. In cultural terms, it is thanks to (e-)lending schemes that authors may depart from short publishing life-cycles and enjoy long tail mechanisms which support the longevity of their works. They should also realise that the internet is challenging traditional certified authorship with innovative examples of user-generated content and the emergence of “prosumers” (consumers becoming producers of content themselves).

**National and regional authorities and e-book policy makers should:**

- constantly promote the production and spread of the written word through e-books where the diversity of opinions and expressions is guaranteed as well as a broad access of the public to cultural products and services;
- harmonise a policy machinery built upon a mix of measures which are legal, economic and social, ensuring that e-lending in public libraries is guaranteed by public legislation and resources;
- ensure that practices in libraries related to analogue formats are also valid in the digital environment, with the principle of public access being safeguarded and not limited by the exclusive right given to authors and producers;
- provide a concrete follow up to the application of copyright provisions in public libraries through regulatory measures and no free negotiations between the public and the private sector;
- be aware that e-reading and digital literacy are hardly a business for commercial actors and library activities are a way to repair what is a typical market failure;
- promote digital literacy in libraries so as to consolidate individual abilities to contrast misinformation and disinformation.
- stimulate (e-)lending schemes which help authors depart from short publishing life-cycles and enjoy long tail mechanisms supporting the longevity of their works;
- fund and stimulate creativity rooms and other initiatives facilitating meetings between authors and their e-users and other forms of interaction between authors and their e-readers.

**RECOMMENDATIONS FOR AUTHORS**

Authors are the main link in the book and e-book value chain. Without their creative effort, no artistic and cultural work would be produced and therefore no chain would exist. Nevertheless, they are also the least influential agent and enjoy very little, or no consideration at all, in e-lending mechanisms. In very few countries – Denmark, The Netherlands – royalties are collected from e-lending transactions and authors are remunerated, also in cooperation with collecting agencies. In all other countries, instead, remuneration for authors is linked to the contract they pass with the publisher. Normally, e-lending is funded through public money; nevertheless, there is very little transparency in the allocation of financial resources and how they are redistributed.

Authors should recognise the vital role libraries play in supporting consolidated literary models and “quality” publishing. They should also realise that interaction with readers is now taking place through social media in renewed forms of creativity. Through virtual labs, creativity rooms, and other cutting-edge endeavours, libraries promote the appropriation of e-books and consolidate practices around them. The “open text” is not only a semiotic concept developed by Umberto Eco. It is a practice very much rooted in the philosophy of sharing and in the act to create in a cumulative way, where readers are not passive interpreters of the text but active and talented diffusers.

The German Library Association conducted a campaign on e-books aiming to align e-book procedures to those enacted for analogue books. The legal problem concerns especially the issue of “library royalties”
(Bibliothekstantiemie) that are paid to authors for the lending of e-books as appropriate remuneration for e-lending. The German Library Association requests that e-books are given full legal equality with the printed book, in line with measures facilitating the development of the e-book trade, such as fixed book price and reduced VAT. Through this campaign e-lending is brought back under the umbrella of traditional copyright laws.

Authors and authors’ associations should:

- Request that royalties are collected from e-lending transactions;
- Require full transparency in all steps of the e-lending process, and in particular the last mile, where royalties are redistributed to authors;
- Request libraries to diffuse information about their works in social media and create opportunities for “meet the author” webinars and other forms of dissemination;
- Be aware that (e-)lending schemes create opportunities for longer publishing life-cycles and long tail mechanisms which support the longevity of their works;
- Ally with libraries in creating innovative rooms, where contacts with e-readers are established and new life is given to literature through creative forms of assimilation and diffusion of their works.

RECOMMENDATIONS FOR PUBLISHERS

The e-book system is far from being a communication vessel where e-books lent immediately translate into loss of sales. For their own advantage, publishers (and in particular, small and medium publishers) should mobilise to remove embargos, windowing exercises, multiple licensing schemes and mechanisms which expose the e-lending system to “frictions”. Decreasing turnover in the book system is generated by broad cultural practices such as the emergence of alternative forms of entertainment, competition from literary subscription services (such as Amazon’s Kindle Unlimited) and increasing sales in other formats, such as audiobooks. During the Covid crisis, theories about e-lending were put to the test: e-book sales and e-lending simultaneously increased and this is undisputable evidence that links between the commercial (book trade) and the non-commercial (e-lending) networks are tenuous; growth may simultaneously be expected on both sides.

Publishers should creatively get out of the totem (stick to the copyright as a totem) / taboo (the philosophy of content sharing) dilemma. They should not see libraries as their counterparts, but – as is the case in the analogue book trade – their allies in increasing the general level of digital literacy. The construction of platforms where innovative experiences are carried out with users / consumers is an exercise which can be afforded only by big publishers having extended distribution networks, and certainly not by small and medium publishers, the most talented and risk-taking category of publishers. Digital literacy is considered an extended concept of reading consisting of the ability to locate, evaluate and critically and effectively use the needed information.

For their own advantage, publishers, and in particular small and medium publishers, should:

- Ally with libraries to find best ways of promoting e-books through social media and platforms;
- Remove barriers now creating frictions to wider dissemination of their works;
- In collaboration with libraries, find creative ways of disseminating “closed” works and allow for the organisation of cumulative creativity.

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2 Twenge-Martin-Spitzberg (2019).
3 Albanese (2020); Guren-Sieck (2021).
RECOMMENDATIONS FOR LIBRARIES

Libraries and publishers are seen on opposite sides in the digital environment. In order to incentivise the impossible mission of transforming publishers into fans of e-lending, libraries should be able to demonstrate that they are able to provide services not only to users, but also to authors and publishers. Libraries promote titles in the e-book trade, as the Panorama project has clearly demonstrated. They can also organise “meet the author” webinars and other occasions where readers and creators get into a productive dialogue. It also means setting up experimental services in collaboration with authors, where library patrons are agents of diffusion and stimulate new forms of creativity among other users.

To achieve this objective, the position of libraries in the book and information chains should be reinforced as well as their relevance in the distribution segment. This is easier said than done. The current architecture of e-lending is based on the decentralisation of activities and centralisation of data. Aggregators sometimes retain data concerning users and usage data and unintendingly exclude libraries from monitoring and governing the process of inter-relation with users. Another problem in libraries is that data and catalogues recording analogue and digital e-books and e-audiobooks are not interlinked. So far, libraries have failed to create a unified environment for digital and printed products and services.

Paradoxical though it may seem, libraries do their best to attract and retain users in the e-lending environment; once they have succeeded, however, they do not know anything about them. Libraries are starting to lose contact with the communities they serve.

Finally, libraries should advocate for a general revision of the constraints now put by publishers on their operations. E-Books should be made available for e-lending through simplified and streamlined mechanisms; user’s privacy should be preserved; remote online services should be permanently allowed in standardized formats and licenses.

Another aspect concerns the nature of the advocacy libraries should carry out. To convince publishers to mobilise for e-lending is no obvious objective unless public libraries develop a specific copyright strategy which is different from that of university libraries and is linked to book policies carried out by decision-makers.

Public libraries, and library associations, should:

- be able to provide services not only to users, but also to authors and publishers;
- organise “meet the author” webinars and other occasions where readers and creators get into a productive dialogue through experimental services and creativity rooms;
- retain valuable metadata that are now centralised – they are usefully implemented in enriching contacts with the communities they serve;
- advocate for a general reduction of windowing practices and for simplification and streamlining of the business models now permeating e-lending models;
- develop specific copyright strategies which serve their own interests and are complementary to those of university libraries;
- closely link public library copyright strategies to book and e-book policy-making;
- Promote digital literacy so as to consolidate individual abilities to contrast misinformation and disinformation.
RECOMMENDATIONS FOR AGGREGATORS

Aggregators are essential links in the e-book chain. Some of them negotiate with publishers on behalf of libraries; others confine themselves into the role of agents providing data cumulation and information retrieval. As distributors of information, aggregators centralise records and process an incredible amount of data concerning both the publishing and library sectors. In many cases, they subcontract the technological parts to specific companies.

Their role is determinant in creating avenues where e-lending information is channelled and disseminated. They also facilitate access to information. In many cases, they contribute to normalising e-lending business models and licensing schemes. They act as honest brokers between libraries and publishers, although the mechanisms of their functioning are not always transparent. Agreements with publishers do not always follow explicit patterns. Since the turnover of aggregators is originated through public funding, often after public tenders, the legal arrangements they set, as well as their institutional profiles and policies should be open and clearly identified by their customers.

Data and metadata processed by aggregators are of fundamental importance for libraries, especially branch libraries which nurture intense relations with the communities they serve. Aggregators should analyse, in collaboration with public libraries, what kind of metadata are needed to engage users, enhance public access to information and reinforce the social action of libraries.

Aggregators should:
- Set up transparent e-lending schemes, with business models and services clearly identifiable;
- Together with public libraries, study and analyse the sets of metadata that should be transferred to libraries in order to facilitate their interaction with local communities;
- Provide regular and complete statistics of the transactions taking place within their platforms with direct input into local, national and European statistical reports.