

E-lending and a public lending right: is it really a time for an update?

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Abstract

This article examines the current status of e-lending in the EU and the potential impacts of the extension of the PLR scheme on e-publishing markets, libraries, and authors. It concludes that a legislative intervention in the area would be premature and, in a medium term, calls for a stronger dialog and cooperation between the stakeholders.

Introduction

E-book lending in public libraries (e-lending) and the need to extend public lending right (PLR)¹ to these practices has been recently discussed on several occasions. Following the Siehart report on e-lending in 2013², the UK government has extended the PLR to e-book downloads occurring in the premises of the UK libraries³. In 2013-2014 the Commission carried out a consultation on the Review of EU Copyright rules, with e-lending being one of the issues⁴. In 2015 the Dutch court has referred a request for a preliminary ruling to the Court of Justice of the European Union (CJEU) asking a number of questions related to e-lending, including the application of the PLR exception for e-books⁵. A number of studies on e-lending has also been increasing⁶.

¹ See art 3, Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version) *OJ L 376, 27.12.2006, p. 28–35* (EU Rental and Lending Right Directive).

² William Siehart, *An Independent Review of E-Lending in Public Libraries in England* (March 2013), available at <https://www.gov.uk/government/publications/an-independent-review-of-e-lending-in-public-libraries-in-england>.

³ The legal basis for the PLR extension to some e-lending practices was set in the Digital Economy Act 2010, s 43; this was implemented via The Public Lending Right Scheme 1982 (Commencement of Variation) Order 2014 (No 1457).

⁴ Public Consultation on the Review of EU Copyright Rules, p 21, available at http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/docs/consultation-document_en.pdf.

⁵ Request for a preliminary ruling from the Rechtbank Den Haag (Netherlands) lodged on 17 April 2015 — Vereniging Openbare Bibliotheken (VOB) v Stichting Leenrecht, (Case C-174/15).

⁶ See, e.g. a study ordered by Dutch government: SEO/Ivir, *Online lending of e-books by libraries: Exploring legal options and economic impacts* (2012), available at <http://www.ivir.nl/publicaties/download/902> (in Dutch); French IDATE report on e-book lending in libraries, available at <http://bit.ly/ZMIVLE> (in French); Civic Agenda EU, *A Review of Public Library E-Lending Models* (December 2014), available at

The emerging discussion on the topic has already shown divergent opinions on the matter. Whereas some commentators strongly argue in favour of treating e-books equally with print books and subjecting them to the PLR⁷, others are more sceptical about the suitability of this solution⁸. This article concludes that it might be too early for the EU law makers to consider the update of the PLR system with relation to e-lending. An emerging nature of the e-book and e-lending market suggests that more constructive dialog between stakeholders and market-based solutions could be a better medium-term option.

E-lending: legal and market situation

With the growing e-book markets across the world⁹ as well as in the EU¹⁰, e-lending in public libraries has become an increasingly important issue. There is no EU-wide statistics on the extent of e-lending. E-book availability in EU libraries varies significantly from country to country depending upon factors such as the funding available for library purchasing, indigenous publishing practice, library governance structure and preferred licensing regimes¹¹. In the EU, e-lending is most developed in Germany, Netherlands, Sweden, Norway, UK, and Denmark¹², with a number of other Member States experimenting with pilot e-lending projects. Although libraries still offer a small percentage of commercially available e-titles and e-loans still constitute a rather insignificant part of overall library loans¹³, e-lending is on the rise.

From a copyright law perspective, e-lending is quite different from ‘traditional’ print-book lending. In print-book lending, two exclusive rights of the right holder are triggered, an exclusive distribution right¹⁴ and public lending right¹⁵. When libraries buy a book, a distribution right is exhausted¹⁶, however, right holders retain a public lending right. Under the EU Rental and Lending Rights Directive, Member States should introduce either an exclusive right to allow or prohibit lending of their works in libraries, or at least a right to authors to get a remuneration for such lending¹⁷. A latter option, often referred to as a “public

<http://www.lmba.lt/sites/default/files/Rapporten-Public-Library-e-Lending-Models.pdf>; Dusollier, A manifesto for an elending limitation in copyright, *Journal of Intellectual Property, Information Technology and e-Commerce*, Vol 5 (2014), available at <http://www.jipitec.eu/issues/jipitec-5-3-2014/4096>.

⁷ For supporters of this position see Siehart, 2013; Dusollier, 2014.

⁸ See SEO/Ivir, 2012.

⁹ In the US, the fastest growing market for e-books, the growth rate in 2010 was +252%, in 2011 – 159%. In 2013 in the US, overall adult eBook revenue accounted for 27% of all adult trade revenue, see IFLA 2014 Elending background paper, p 3, available at <http://www.ifla.org/publications/node/8852>.

¹⁰ In 2014, a share of e-books in trade market was: UK – 25%; Germany – 10.6%; France – 3%, Spain – 8%., see Rüdiger Wischenbart, *Global eBook: A Report on Market Trends and Developments*, p 21.

¹¹ IFLA 2014 Elending background paper, p 6.

¹² See Civic Agenda EU, 2014, tables on pp 86-89.

¹³ For various statistics see Civic Agenda EU 2014, p 86-103.

¹⁴ Harmonized in art 4 of 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, *Official Journal L 167*, 22/06/2001 P. 0010 – 0019 (EU Information Society Directive).

¹⁵ Art 3 EU Rental and Lending Rights Directive.

¹⁶ Art 4(1) EU Information Society Directive.

¹⁷ Arts 3 and 6 EU Rental and Lending Rights Directive.

lending right exception”, was implemented in essentially all EU Member States.¹⁸ In case of e-books, most commentators agree that making e-books available online does not trigger a distribution right. Rather, selling and buying e-books online lead to the exercise of reproduction right and a communication to the public (or making available) right¹⁹. None of these rights are exhausted after the book is acquired by a library²⁰. The subsequent lending of e-books to patrons again triggers a public communication right (libraries are making e-books accessible for their patrons online) and a reproduction right (copies of e-books made during an online transmission process and on a patron’s device). Each of these acts requires licenses from right holders. In this way, right holders retain the full control over the use of e-books by libraries. Also, most commentators agree that a public lending right does not apply to e-books²¹. It is still to be seen whether this assumption will stand the legal check.²²

E-lending commercial practices also differ significantly from traditional lending. First, while in the print world libraries have no issues in acquiring any books they wish, a number of publishers have been quite reluctant in licensing e-books to libraries since they fear that e-lending will cannibalize e-books sales and lead to the increased e-book piracy. Therefore, many e-titles, especially new releases and bestsellers, are unavailable for libraries in some countries²³ or available only on prohibitive prices²⁴. Second, when libraries buy an e-book from publisher’s website or subscribe to an e-book database run by an intermediary, publishers do not normally assign to libraries any rights to e-books but merely license them under certain conditions.

Licensing means that libraries do not own books to which they subscribe and they cannot add it to their own collections. If a publisher judges that an e-book is so commercially valuable or is becoming so popular with library users that there is a possibility of increasing revenue by making it available only by direct sale to individual purchasers, it can withdraw it from library e-book packages²⁵. Also, libraries can lose access to the licensed titles when the publisher or the intermediary closes their business or when a library decides to switch from one intermediary to another. Furthermore, licensing contracts often set restrictions on how libraries can lend e-books. For instance, many licensing contracts allow lending only one copy to one user at a time (one copy – one user rule). In such cases users cannot access the e-book if it is ‘borrowed’ by another user and have to wait until it is ‘checked out’. After the e-book was borrowed a number of times, library often needs to renew a license, i.e. buy a ‘new’ e-book (‘wear and tear’ condition). Also, patrons can borrow a book only for a period defined

¹⁸ For a comparative overview of different schemes in the EU see <https://www.plrinternational.com/established/established.htm>.

¹⁹ See, respectively, arts 2 and 3(1), EU Information Society Directive.

²⁰ See art 3(3) EU Information Society Directive.

²¹ For a detailed analysis see Dusollier, 2014, pp 6-7; SEO/Ivir, English summary, chapter 3.2; Silke von Lewinski, ‘Rental right, lending right and certain neighbouring rights: the EC Commission’s proposal for a Council Directive’, *E.I.P.R.* 1991, 13(4), 117-123, at 119.

²² See request for a preliminary ruling CJEU Case C-174/15, *VOB v Stichting Leenrecht*.

²³ E.g. in the UK, a research by Shelf Free8, conducted in February 2013, found that 85% of e-books aren’t available to public libraries in the UK, see EBLIDA Position Paper: The right to e-read, May 2014, p 12, available at <http://www.eblida.org/e-read/the-right-to-e%E2%80%90read-position-paper-and-statement.html>

²⁴ EBLIDA Position Paper 2014, p 11.

²⁵ EBLIDA Position Paper 2014, p 12.

in the contract with a publisher and often cannot ‘return’ the book before the term expires. These so called ‘frictions’ mimic the traditional lending practices and are supposed to reduce possible harm that e-lending may cause on e-book markets. In addition, publishers sometimes provide books compatible only with certain reading devices but not with others and they apply to e-books technical protection measures that do not allow moving an e-book from one reading device to another, copy or share it²⁶.

On the one hand, such control from the side of publishers can be understood since e-book markets in the EU are still emerging and an unrestricted e-lending could potentially undermine these markets. If a library could acquire an e-book and make it available for free access in an unrestricted way, there would subsequently be no need for anyone to buy it.²⁷ On the other hand, libraries complain that such a system makes it difficult for libraries to fulfil their public missions to form their collections, preserve digital books for future generations, provide a free and easy access to a wide range of information and materials and to encourage reading culture in local communities.²⁸ Apart from libraries, authors are also unsatisfied with e-lending practices²⁹. In particular, since the PLR applies to print books only, authors of e-books do not get PLR remuneration for e-lending. Also, there is a lack of transparency as to how revenues that publishers generate from e-lending are distributed between publishers and authors. It is questionable whether e-publishing contracts explicitly mention the share of revenues that authors receive from e-lending and whether this share is fair.

As a result, the question arises whether the current situation sets a reasonable balance between the interests of different stakeholders or whether a state intervention might be needed to resolve some of the issues in the emerging e-lending market.

Should PLR exception be extended to e-books?

The extension of the PLR exception to e-books has been suggested as one of the ways to address certain problems of e-lending. Namely, a corresponding “e-lending exception” would allow libraries make e-books available for remote lending, while right holders would be compensated under the national PLR schemes³⁰. This idea was for the first time implemented in the UK, though with a limited success. The Digital Economy Act 2010 has extended the PLR exception to e-books, however, only to those downloaded in library premises³¹. As a result, since none of the UK libraries provides e-book lending onsite, the extended PLR

²⁶ For an outline of e-lending practices in public libraries see, e.g., IFLA 2014 E-lending Background paper; Dusollier 2012; EBLIDA Position Paper 2014.

²⁷ See also EBLIDA, Information paper on E-publishing and the challenges for libraries (6 July 2012), p. 3, available at http://www.eblida.org/Experts%20Groups%20papers/EGIL-papers/02_EBLIDA_E-publishing%20and%20the%20challenge%20for%20libraries_Background_information_Public_version.pdf

²⁸ See also IFLA 2014 E-lending background paper, p 19.

²⁹ E.g. in order to discuss this question, in 2013 European Writers Council established EWC-FEP E-lending Working Group, see <http://www.europeanwriterscouncil.eu/>

³⁰ Such exception could be implemented in at least two ways: by extending the PLR right/exception, as harmonized in the Rental and Lending Right directive, to e-books; or by introducing an additional exception to the reproduction and making available rights under the EU Information Society Directive.

³¹ Digital Economy Act 2010 (UK), s 43.

scheme is not functioning in practice. Meanwhile, the UK government is not able to extend the e-lending exception to remote downloads since the exclusive making available right and exceptions to it are harmonized under the EU Information Society Directive and the introduction of additional exceptions would require an EU-level action.

Arguments in favour

Several arguments speak in favour of such an e-lending exception. As suggested by the UK government,³² first, the extension of the PLR to e-books would benefit authors by providing “greater clarity and consistency in the arrangements governing remuneration of authors for the lending out of their works by public libraries, and provide an independent means of ensuring that they and other rights holders receive appropriate remuneration for the free loans of their works”. This would arguably solve the problem of authors not getting a fair share from publishers for e-lending. Second, the scheme would “mirror the system for printed works in the PLR Scheme”. This refers to technological neutrality principle that requires that equivalent technologies (e.g. books and e-books) should not be discriminated by law and should be awarded the same legal treatment. Third, it “will remove the burden of making contractual arrangements”, which would arguably facilitate the situation of both libraries and publishers in e-lending. Finally, the expected benefit for libraries is that the PLR exception “may encourage greater acquisition and lending of such works by public libraries”. Namely, it was expected that the extension of PLR to e-books would make it easier for libraries to acquire books and lend them to the public.

In addition, Dusollier suggests that a PLR exception needs to be introduced in order to preserve the public interests that public libraries pursue: “[public lending] has too much democratic and cultural value to be left completely in the hands of market transactions”³³. Dusollier points to the shortcomings of the market based e-lending discussed above. In particular, due to restrictive licensing practices, libraries do not get access to many e-titles or are charged excessive prices; subscription models do not allow libraries to choose which titles they want to acquire and loan; since libraries do not own e-books, they cannot keep them for preservation purposes or use for inter-library loans; also, these are not libraries but publishers or intermediaries who decide how users will access e-books lent by libraries, for what duration and what restrictions will apply, i.e. libraries lose control of their user experience³⁴. As a result, Dusollier argues that the current licensing environment leaves public libraries in the discretion of commercial publishers and impedes the possibilities of public libraries to carry out their public missions in the digital age.

Libraries certainly support this public interest idea. According to the European Bureau of Library Information and Documentation Associations (EBLIDA),

³² UK Department of Culture, Media and Sport, Consultation on the extension of the Public Lending Right to Rights of holders of books in non-print formats, para 30 (February 2014), available at <https://www.gov.uk/government/consultations/consultation-on-the-extension-of-the-public-lending-right-to-rights-of-holders-of-books-in-non-print-formats>.

³³ Dusollier, 2014, p 2.

³⁴ Dusollier, 2014, pp 4-5.

*“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 un-published 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.”*³⁵

Similar concerns have been raised by the International Federation of library associations and institutions (IFLA).³⁶

Arguments against

At the same time it is questionable whether the introduction of a remunerated e-lending exception is the most appropriate and timely solution to tackle the abovementioned problems.

First, according to the economists, giving an unlimited freedom for libraries to acquire and lend e-books is likely to disrupt the still emerging e-publishing markets³⁷. The danger of e-lending is that there is potentially a direct substitution between buying or borrowing an e-book via an online store and borrowing an e-book via the library’s website. This was not an issue in case of tangible books because buying and borrowing of a print book is quite different: the bought book is new; a buyer can keep it for an unlimited time, borrow it to a friend, or make notes on the book; there is no need to visit a library to pick up the book and return it on time. These differences decrease with regard to e-books: e-books borrowed from the library are the same ‘new’ as those bought from an online store. Due to technical measures applied to e-books, even the books that are bought cannot normally be given to a friend or annotated. E-lending does not anymore require visiting library premises and the e-loan expires automatically. Also, some new commercial subscription services lend books for a limited time only instead of selling them³⁸, which makes them even more similar to library e-lending services. Thus, e-books lent by libraries may serve as a direct substitution of e-books sold or lent in the market. When the library offers e-books of the same quality but, due to subsidies, charges a much lower price than the online bookstore (or no price at all), a market disruption is likely to occur.³⁹

On the other hand, libraries argue that by e-lending they are “promoting a strong reading culture that ensures the steady sale of books direct to readers in the commercial market.”⁴⁰. The economists agree that e-lending may also result in the increase in the distribution of

³⁵ EBLIDA Position Paper 2014, p 15.

³⁶ See also IFLA 2014 Elending background paper, p 8-9 (“Libraries will face a major challenge if rightsholders continue to restrict their access to titles while preference is given to for-profit bundling services which present a better ongoing revenue stream for their books.”).

³⁷ See SEO/Ivir, 2012, chapter 4.2.

³⁸ Subscription-based eBook bundling companies targeting individual readers include Oyster, Epic! And Mofibo.com; see IFLA 2014 Elending background paper, p 8.

³⁹ If publishers license these books to libraries via free voluntary agreements, one could assume that publishers will not suffer from libraries activities. Still, online retailers will eventually suffer, unless libraries lend titles that are not available with online retailers (eg older titles, rare titles, self-published titles). See SEO/Ivir, 2012, chapter 4.2.

⁴⁰ EBLIDA Position Paper 2014, p 13.

ebooks as e-lending enables consumers discover e-books in the library and thus consume more ebooks⁴¹. For instance, it is possible that the library offered an e-book that is not offered by bookstores. In that case, the author can take advantage of e-lending and reach a greater audience. Also, when an e-title is offered by both a bookstore and by a library, the sampling effect may occur. A reader can ‘try’ a title through the library and then purchase it from a retailer. However, this effect occurs only when the reader sees advantages in purchase, after the book has been viewed through the library. Thirdly, e-lending familiarizes users with the phenomenon of e-books; this leads to an increase in the population of e-book readers who then can go and buy e-books⁴². Several studies analysing the impact of e-lending on e-book markets have not shown any direct negative effects of e-lending on e-sales. In contrary, some surveys indicate that e-lending serves the interests of publishers⁴³. For instance, a survey of the German book industry showed that many German publishers use Onleihe e-lending platform to promote their digital branch.⁴⁴ The effects of e-lending on e-book sales thus need further study⁴⁵.

Secondly, one should recall one of the goals of the PLR schemes, which is to compensate authors and publishers for the potential economic loss that they experience when their works are lent for free in public libraries⁴⁶. It is questionable whether such loss could be established in case of e-lending, at least as far as current e-lending practices are concerned. As mentioned above, publishers often sell e-books to libraries on higher prices in order to cover potential losses in e-sales. Libraries are often requested to pay for an e-book three or more times than its retail price⁴⁷. Even when a price that library pays corresponds a retail price, it could be assumed that voluntary and freely negotiated agreements between publishers and libraries set a price that does not lead to loss by parties. Thus, PLR remuneration would mean that e-lending is paid for twice: first, by libraries when acquiring an e-book and, second, via a PLR scheme.

At the same time, it is true that revenues that publishers generate from e-lending are not necessarily fairly shared with authors. However, it is questionable whether extending PLR exception to ensure more transparent remuneration for authors is the most appropriate and reasonable solution to this problem. PLR remuneration schemes are still not well established in a number of EU member states⁴⁸ and in many cases they provide with minimum, rather

⁴¹ SEO/Ivir, 2012, chapter 4.3.

⁴² SEO/Ivir, 2013, chapter 4.3.

⁴³ E.g., the US Pew Internet Report shows that libraries and librarians are a prominent source (21%) for owners of e-reading devices to get recommendations for reading materials, see Pew Research Center’s Internet & American Life Project, *The rise of e-reading*, April 2012. According to another research, 50% of all library users in the USA report purchasing books by an author they were introduced to in the library, see Andrew Albanese, *Survey Says Library Users Are Your Best Customers*, 2011.

⁴⁴ SEO/Ivir, 2012, chapter 4.4.

⁴⁵ In the UK, the recent pilot projects on remote e-book lending have not provided clear answers either, see The Society of Chief Librarians and The Publishers Association Report on the remote Ebook Lending Pilots, 2015, available at <http://www.publishers.org.uk/policy-and-news/news-releases/2015/pilot-study-on-remote-e-lending/>

⁴⁶ For more on the goals of the PLR see Paul Goldstein, P. Bernt Hugenholtz, *International Copyright: Principles, Law, and Practice* (Oxford University Press 2012), p. 317.

⁴⁷ See IFLA Elending background paper 2014, p 8.

⁴⁸ As of 2010, PLR was not yet fully implemented in Bulgaria, Cyprus, Greece, Malta, Poland, Portugal and Romania, see Question for written answer for the Commission on 22 July 2010, Rule 117, by Zuzana Roithova.

‘symbolic’, remuneration to authors⁴⁹. One should ask whether this problem could be better addressed by encouraging a dialog between publishers and authors on the equitable distribution of revenues from e-lending and setting best business practices in the area. An alternative and more intrusive approach would be to consider the introduction of an author-protective provisions with regard to rights transfer/licensing in e-book publishing contracts⁵⁰.

Thirdly, a technological neutrality principle, that was referred to by the UK government, would have limited application in this situation. Generally, technological neutrality of law can be understood as the ability of legal mechanisms to comprehend changes independently of specific technologies⁵¹. In copyright law, the principle of technological neutrality means that copyright law should apply in an equal manner to different technologies that express the same work⁵². For instance, a photocopy of a book should, in theory, be equivalent to a digital copy of the same book for the purposes of copyright law.

An important feature of technological neutrality is that it is not an absolute principle. Only technologies that lead to equivalent functions, or effects, should be treated equally (the so called “functional equivalence” principle). Meanwhile, e-lending appears to be quite different from traditional lending, from both technical/functional, economic as well as legal perspectives. From a technical perspective, in traditional lending, a copy of a book that library owns is transferred to the possession of the patron for temporary use. In e-lending, an e-book that is being lent remains in the possession of the library; rather, an electronic copy of a e-book is made and sent via internet to the patron which is then downloaded into his/her device. This leads to different exclusive rights being attributed to different lending practices: distribution and public lending rights in case of traditional lending, and reproduction and public communication (making available) rights in case of e-lending. Further, digital technology provides libraries with opportunities that they did not have before, that lead to important economic consequences. Technically, libraries could lend the same e-book (i.e. different copies of it) simultaneously to unlimited number of users. They do not need to store books on shelves, which allows libraries to offer a broader range of titles. E-books do not wear or get lost. Library patrons do not need to visit a library to borrow a book or return it; it can be downloaded online 24 hours/7 days per week, which makes library e-lending more attractive and more similar to the acquisition via online stores. These and other differences are sufficient to argue that lending and e-lending are not functionally equivalent services and, therefore, there is no legal obligation under the technological neutrality principle to treat them equally and subject both of them to the PLR.

⁴⁹ For a short overview of different national PLR schemes and amounts paid to right holders see <https://www.plrinternational.com/established/established.htm>.

⁵⁰ Remuneration of authors and performers in music and audiovisual industry has been recently discussed in an EU Study on Remuneration of authors and performers for the use of their works and the fixations of their performances, available at <http://ec.europa.eu/digital-agenda/en/news/commission-gathers-evidence-remuneration-authors-and-performers-use-their-works-and-fixations>. It might be useful to have a similar comparative study with regard to book authors and their compensation mechanisms.

⁵¹ Tatiana-Eleni Synodinou, ‘E-books, a new page in the history of copyright law?’, *E.I.P.R.* 2013, 35(4), 220-227, at 618.

⁵² Kevin P Siu, ‘Technological Neutrality: Toward Copyright Convergence in the Digital Age’, 71 *U. Toronto Fac. L. Rev.* 76 2013, at 80.

Finally, it is true that leaving libraries and e-lending in the discretion of publishers may undermine libraries' ability to fulfil their public missions in the digital age, such as an encouragement of reading culture, promotion of local authors, and others. This speaks in favour of ensuring libraries with certain guarantees with regard to e-lending, such as a possibility to choose what titles they want to acquire for their collections and whether they wish to acquire them on a permanent or temporary basis. There is also a need to ensure that patrons get access to e-books in a sufficiently convenient manner and on reasonable terms. However, these needs should be balanced with publishers' interests to have sustainable e-publishing markets and as little market distortion as possible. As EBLIDA acknowledges, "The challenge, therefore, for libraries and publishers in the age of electronic publication, is to find ways and means as to how libraries may fulfil their societal objectives without compromising the legitimate commercial interests of the authors and publishers."⁵³

'Frictions' as a compromise?

Keeping in mind the possible disadvantages of an unrestricted e-lending by libraries, the next question is what compromise solution could be reached that would accommodate the interests of all stake holders.

One of the potential solutions is to allow *restricted* e-lending by libraries, which would arguably reduce the potential risks on e-publishing markets. According to the economists, the negative market effects of e-lending practices on retailers and publishers could be softened if e-book supply of the library is relatively poorly accessible, unattractive or incomplete for consumers. In particular, when 'frictions' are introduced in e-lending practices, the products by libraries and retailers are vertically differentiated and there is a lower substitutability of two products and thus less competition.⁵⁴ Similarly, Dusollier suggests that libraries should be allowed to lend e-books, however, on the condition that certain 'frictions' are introduced in e-lending practices that would mimic the limitations in traditional lending practices⁵⁵.

As discussed above, such 'frictions' have already been introduced in most e-lending contracts. According to Dusollier, at least some of them could be transposed in the law as restrictions to the e-lending exception. For instance, e-books should be lent for a limited duration only. Libraries should be able to lend the e-book on one-license one-user model only. This would create waiting lists, making the e-lending less attractive than the acquisition of the book in online bookstores. Further on, it may be reasonable to introduce "wear and tear provisions", requiring libraries to renew their license after a certain number of loans. In order to secure and limit the e-lending, libraries might be required to implement technical measures that prevent printing, copying, and further lending, and that enforce the principle of a limited

⁵³ EBLIDA, Information paper 2012, p 3.

⁵⁴ SEO/Ivir, 2012, chapter 4.2; see also Weda, J., R. van der Noll, I. Akker, J. Poort, S. van Gompel & J. Leenheer, 'Digitale drempels: Knelpunten voor legaal digitaal aanbod in de creatieve industrie', (Amsterdam, June 2012).

⁵⁵ Dusollier, p 14-15.

duration by disabling the access to the book at the expiration of the term. In addition, an embargo or a window's release period could be applied before a newly released work can be available for e-lending. This would allow publishers to collect the profits from new releases in the first months⁵⁶. The UK government in its discussion on e-lending also considered possible limitations to the e-lending exception⁵⁷.

Such restricted e-lending exception could be a way towards a compromise solution between the needs of libraries and interests of right holders in respect of e-lending. However, several considerations should be kept in mind when considering such an option.

First, it is questionable whether such restrictive e-lending exception would solve one of the main problems that libraries are currently facing, namely, publishers' unwillingness to supply e-titles for the purpose of e-lending.⁵⁸ Under the current national PLR exceptions, libraries have a right to lend print books *after* they have legitimately bought them; the PLR exception does not require publishers selling books to libraries at the first place. In their current campaigns libraries require a right to acquire all e-books available on the market⁵⁹. However, it would be quite unreasonable if a copyright exception would go as far as to impose a duty on behalf of publishers to sell or license e-books to libraries.⁶⁰ Furthermore, if such a duty to sell e-books to libraries was introduced in any form, right holders would still retain a possibility to control sales to libraries via pricing policies. As IFLA has noticed, "If some publishers and rights holders continue to see e-lending as a threat to their primary business models then even legislation which compels them to make all digital content available for library licencing/purchase will not necessarily prevent them from applying pricing structures and terms/conditions designed to discourage that form of public access."⁶¹ Regulating prices in e-lending contracts would also fall outside the scope of copyright law⁶².

Similarly, it is questionable whether the e-lending exception would address the libraries' need to have a choice to either permanently download books and include them in their own collections or merely subscribe to e-lending platforms run by third parties.⁶³ Commentators suggest that both owning and licensing e-books have their own advantages and disadvantages⁶⁴. It is questionable whether the e-lending exception could solve this problem.

⁵⁶ Dusollier, 2014, pp 14-15.

⁵⁷ UK Government Department for Culture, Media and Sport, Government, Response to the Independent Review of E-Lending in Public Libraries in England (March 2013), p 5.

⁵⁸ See IFLA thinkpiece on 'Libraries, eLending, and the Future of Public Access to Digital Content' (2012), p. 20, available at <http://www.ifla.org/node/7447>.

⁵⁹ EBLIDA, Position paper 2014, p 23.

⁶⁰ Potentially, refusal to supply e-books by publishers to libraries could be better tackled under the competition law.

⁶¹ IFLA thinkpiece 2012, p 21.

⁶² At the same time, regulation of retail prices in a book sector is quite well known in some EU Member States and is being considered in e-publishing sector as well, see Sébastien Respingue-Perrin, 'Too early, too fast? The regulation of the eBook market in France and its possible effects on EU libraries', *Liber Quarterly*, Vol 23, No 2 (2013).

⁶³ EBLIDA Position Paper 2014, p 6.

⁶⁴ Civic agenda EU 2014, p. 12.

It seems that it could be better addressed via negotiating and establishing good business practices between the right holders and libraries⁶⁵.

The second question is whether the introduction of ‘frictions’ is justified at all and, if so, which ‘frictions’ should be a part of the e-lending exception. Looking from a technological perspective, one could argue that “friction-based licensing models that mirror analogue lending (...) fail to exploit digital opportunities.”⁶⁶ That is, the introduction of frictions that mimic the analogue world may remind us of times when horses were put in front of motor cars in order to reduce the risks of these at-the-time new technologies. On the other hand, digital technologies enable publicly subsidized libraries to offer essentially the same services as offered by other market players but for free, which causes the danger of market disruption. Thus, libraries have an option of either both lose public subsidies and compete with online businesses on equal terms, or they should restrict their services to the extent that their effects on a digital book market are minimal.

If the idea of frictions was considered as generally acceptable, another difficult issue is which frictions would be most reasonable as a part of an e-lending exception. During the first years of e-lending, different e-lending models have been tried out and ever new ones are being introduced. For instance, ‘one-copy one-user’ rule has been applied quite extensively in some countries. At the same time, subscription models that allow simultaneous use by multiple users (‘pay per use’ models) have become a rule in academic book e-lending and is also getting more popular in public libraries⁶⁷. Similarly, the “wear and tear” provision, combined with a lower price, might be quite acceptable for some libraries in some cases (e.g. for less popular titles). However, for some titles libraries might be willing to acquire rights into a book for unlimited time, even if this is associated with a higher price. Both models have been exercised in e-lending practice. Similarly, the application of technical protection measures preventing users from further copying and communication has been an accepted practice in a commercial book sector. However, in an academic e-lending, which has a longer history than e-lending in public libraries, many technical restrictions have been gradually abandoned allowing users to make individual copies for research and educational purposes or even communicate them to a third person⁶⁸. The same applies to the requirement of temporary lending. Although it is generally accepted that e-loans should be temporary, academic libraries normally allow patrons to make permanent copies that are not time-restricted. It is to be seen whether these practices in academic e-lending will get to some extent adopted in e-lending by public libraries.

⁶⁵ If however PLR exception would apply to e-lending, the question would remain for which titles – only bought permanently or also for temporarily licensed ones – the PLR exception would apply and how the remuneration would be calculated. A similar question is currently under consideration in the CJEU, see request for a preliminary ruling in Case C-174/15, *VOB v Stichting Leenrecht*.

⁶⁶ EBLIDA Position Paper 2014, p 11.

⁶⁷ Apart from the German *divib* platform, the remaining of top 3 e-lending models in Europe are all pay-per-loan, simultaneous user models: the Dutch Digital Library (launched in January 2014), Denmark’s *eReolen* (launched in 2011) and Stockholm Public Library’s Digital Library; see *Civic Agenda EU 2014*, p 11

⁶⁸ Such practices are generally allowed under copyright exceptions for research and education and thus might be unjustified in case of commercial books.

Thus, frictions related to simultaneous use, number of loans, duration of licences and others could be used as means to offer libraries a range of lower priced licencing options suitable to their size and budget⁶⁹. However, libraries and publishers should be also allowed to experiment with friction-free e-lending models. Further, it is reasonable to request that different licencing options be harmonised into a predictable menu of standardised and transparent alternatives which enable libraries to make rational choices⁷⁰. However, it is questionable whether this harmonization should take place in the form of a copyright exception. Keeping in mind the quickly evolving e-lending business practices, it would be very difficult for the law maker to decide which practice should be codified in the law as a copyright exception. In other words, the e-lending exception accompanied with several frictions might either get quickly outdated and not used in practice or “freeze” the existing e-lending practices hampering their further development and search for innovative solutions⁷¹.

A way forward

As a conclusion, it appears that it might be too early to discuss a possible update of the public lending right to e-lending. Both e-book market and e-lending are still at early stages of their development and it is little clear what direction they will take and what e-lending models will become a common practice. It is a time for law makers to wait and see. Meanwhile, certain industry initiatives could be initiated to encourage the dialog between publishers, authors, libraries and user groups where concerns from all sides could be better expressed and discussed. This could lead to the exchange of best practices among Member States which would help to identify the European trends in the area, as well as learn from experiences internationally. It is now time for libraries to reconsider their role in the digital environment and find a niche where libraries could both fulfil their mission to facilitate access to knowledge and would not unreasonably prejudice emerging e-publishing markets. At the same time, libraries need to work together with publishers and authors to develop self-regulatory frameworks and voluntary codes of practice which attempt to address a number of problems in the area. Stake holder dialog has led to positive developments in the area of e-lending in the strongest e-lending market, the US⁷². In Europe the studies showed that “[g]etting publishers to the negotiating table and then progressively nudging the needle towards better licensing terms and access to a wider range of titles is a strategy which has

⁶⁹ At the same time it is important that it is not used as a strategy for discouraging e-lending in general by the injection of artificial friction from the side of publishers, see IFLA thinkpiece 2012, p 24.

⁷⁰ IFLA thinkpiece 2012, p 24.

⁷¹ As mentioned earlier, the UK PLR scheme was extended to on-site downloading services that do not exist in libraries and is therefore ineffective in practice.

⁷² For more about the e-lending market in the US see ‘The Big Shift: Public Library Strategies for Access to Information in Any Format’, available at http://www.oclc.org/content/dam/campaign-landing-pages/en/214936_the-big-shift.pdf.

paid dividends for many of the e-lending models (...).⁷³ Even if this step might be slow, it seems to be the indispensable one before any EU-wide legislation could be considered.⁷⁴

⁷³ CIVIC Agenda EU 2014, p 12.

⁷⁴ See IFLA thinkpiece 2012, p 21; EBLIDA also suggests some self-regulatory measures, such as a memorandum of understanding with the Federation of European Publishers for “Fair Licensing Models”, see EBLIDA, ‘An e-book policy for libraries in Europe’, available at http://www.eblida.org/Special%20Events/EN_European-Libraries-and-the-challenges-of%20e-publishing.pdf.