

E-Lending

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Background

In a world where information is increasingly accessed digitally, library users expect and need access to e-books. However, libraries face significant barriers to transition their lending practices from analogue to digital.¹

In recent years, it has become increasingly common for publishers and aggregators to limit access to e-books through libraries, by imposing highly restrictive licensing conditions, demanding excessive prices, or simply denying e-book licences to libraries altogether.

To overcome these obstacles, libraries could digitise “independently” and e-lend works in their collections. Yet e-lending based on digitised physical books lacks a clear legal framework.

The mission of libraries is to democratise access to information and to socialise the associated cost of offering the public broad access to information. If libraries are not permitted to develop an adequate digital offering that corresponds to the general shift towards online services, they will increasingly be at risk of not fulfilling their crucial

¹ The barriers to the implementation of e-lending vary in nature: they can be legal, technical, and financial. In this paper we only focus on the legal and contractual impediments.

public service mission. Equitable access to culture and reliable information is as important as ever. Libraries must be allowed to evolve along with our society.

In this policy paper, we address areas where the current European legal framework falls short, and present policy recommendations to protect libraries from harmful e-book licensing practices and to provide a clear legal framework for libraries to digitise “independently” and e-lend works in their collections.

E-lending enables exercise of fundamental rights

Libraries play a long-standing part in connecting European citizens to, and enabling their use of, information resources. The role of libraries is not only to structure and organise information. They promote a diversity of sources, facilitate access to reliable sources and offer independent meeting places and platforms for discussion, making them “a necessary force in sustaining and developing democracy.”²

The services provided by libraries are vital to the enjoyment of fundamental rights. This is recognised in many foundational conventions on human rights and fundamental rights. Library services, particularly the lending of books, are essential to uphold the rights of members of their communities to participate in cultural life³ and to freedom of expression.⁴ They also contribute to the enjoyment of the right to education⁵ and the freedom to conduct scientific research⁶ in the digital environment. Importantly, the mission of libraries goes beyond more classical conceptions of freedom of expression and extends to cultural content, including pure entertainment.⁷

² Council of Europe/EBLIDA Guidelines on Library Legislation and Policy Europe, [Appendix to Recommendation CM/Rec\(2023\)3 of the Committee of Ministers to Member States on library legislation and policy in Europe](#).

³ The [International Covenant on Economic, Social and Cultural Rights](#) (ICESCR) refers to the human right of free participation in cultural life (Art. 15, 1a) and points to libraries as key institutions to guarantee the availability of cultural works.

⁴ The importance of libraries in guaranteeing the right to freedom of expression is featured in Art. 10 of the [European Convention of Human Rights](#), Art. 19 ICESCR and Art. 12 of the [Charter of Fundamental Rights of the European Union](#) (CFREU).

⁵ See Art. 13 ICESCR and Art. 14 CFREU.

⁶ See Art. 15 ICESCR and Art. 13 CFREU.

⁷ Freedom of expression is not only relevant to texts or documents necessary for political or scientific debate but also to works intended purely for entertainment.

Last but not least, libraries support authors and promote creativity, by promoting reading, facilitating research, connecting writers and readers, and through the acquisition of books and royalty payments. In fact, a number of studies show that free access to books via libraries, regardless of format, may even have a positive impact on book and author discovery, and boosts commercial sales.⁸

In light of our society's digital turn, the lending of digital books is just as important as that of printed books, as it permits all citizens to access reliable information in a timely manner free of charge or at the lowest possible cost.

E-lending of e-books is subject to harmful licencing practices

One way for libraries to obtain the right to e-lend is through a licence. In practice, however, licence-based e-lending is often far easier said than done. This model, as its name suggests, requires the conclusion of an appropriate licence. Due to the massive imbalance of power in licence negotiations, rightsholders can abuse their dominant position to impose restrictive licensing terms or unreasonable pricing, forcing libraries to pay up to ten times the consumer prices for the same e-book.⁹

They can also influence the building of library collections, by including titles in subscription bundles over which libraries have no control, delaying the availability of individual titles in libraries,¹⁰ forcing libraries to repurchase licences for the same e-books on a regular basis after a certain number of loans or years,¹¹ withdrawing titles from the collection, or simply refusing to licence certain works altogether.

As a result of these practices, many libraries face challenges in developing their own permanent digital collections. For example, in Germany only 7% of recently published

⁸ [A case study explored by the Panorama project](#) showed that, when promoted by libraries, an individual title saw a 818% growth in e-book sales and 201% growth in print sales. A [survey of 75,000 patrons](#), conducted by the American Library Association's Office for Information Technology Policy, showed that library e-book borrowers purchase an average of 3.2 books per month (including print and e-books), that 53% would consider purchasing a book they discovered through the library's website and that 35% have purchased a book (print or e-book) after borrowing that title.

⁹ While libraries pay wholesale prices for physical books, e-books licences in the United States can [cost a library three to ten times the consumer prices](#) for the same e-book.

¹⁰ Windowing practices [have been identified](#) in Denmark, Finland, Germany, Greece, Ireland, with embargo periods going up to 12 months.

¹¹ Caps in the number of loan transactions per licence are a [current practice in Belgium](#). In the United States, [e-books need to be repurchased after 24 months](#), even if the book is never checked out.

e-books are available to library users; the majority of the digital catalogue available to library users comprises only e-books published in the mid 2010s or before that.

In order to address these challenges, library associations across the globe have been calling for a regulatory intervention in the e-book market.¹² The Council of Europe has also recently recommended that Member States “facilitate the acquisition by libraries of licences for digital books, on reasonable terms, as soon as they are published.”

E-lending of digitised books is subject to legal uncertainty

In contrast to licence-based e-lending, digitisation-based lending has libraries practising e-lending of digitised works from their physical collections.

Libraries hold important collections of – generally copyright-protected – works, the vast majority of which are not commercially available in digital form. Digitising and making available these works through e-lending allows libraries to empower communities to access and explore these works remotely.

Furthermore, conducting e-lending autonomously allows libraries to free themselves from the aforementioned licensing practices and regain control over their digital collections. It stabilises the costs of e-lending, which in turn ensures the stability of individual titles in digital collections. It further allows libraries to build collections independently, without commercial or other influences.

Another advantage of lending digitised books is that library users can use those copies privately, without providing any data to publishers or aggregators. There is a trend of publishers using more and more data collection and prediction products, effectively turning them into data analytics businesses. This has significant consequences for data privacy, as e-book platforms and book-reading apps can collect usage data for a variety of purposes (e.g. to recommend books, display ads, adjust prices, offer subscription-based services). On top of that, connected devices also track the daily habits of the reader, increasing the scale of possible data collection even further.

¹² In June 2022, libraries in the United States issued [a call for legislative action](#) to equitize the e-book market. In April 2023, library associations across Europe issued [a call for government action](#) “to ensure that eBook markets work in ways that allow libraries to do their job and to fulfil their public interest responsibilities.”

However, for libraries to conduct e-lending of digitised books without the authorisation of rights holders, their right to e-lend and to digitise books for the purpose of e-lending must first be established under copyright law.

Legal framework

The EU legal framework for the lending of physical books¹³ does not contain an explicit reference to lending of books in digital form. In spite of that, the Court of Justice of the European Union (CJEU) has asserted the library's right to e-lend books in digital form, provided that libraries employ a model that is essentially similar to traditional lending of paper books.¹⁴

According to this ruling, e-lending is a functional equivalent to physical book lending when (i) the work is lent by a public establishment (i.e. publicly accessible libraries, educational establishments, archives and museums) with no direct or indirect economic or commercial advantage, (ii) the digital version of the work is obtained from a lawful source, (iii) the work is made available to the user under the “one-copy, one-user” model, meaning that the number of copies lent must correspond to the number of copies purchased by the library, (iv) the work is lent only for a limited period of time, and (v) the authors can obtain equitable remuneration.¹⁵

The requirements put forward by the CJEU in this judgement allow libraries to e-lend licensed books in digital form. However, these conditions have yet to be codified in national laws. Furthermore, the ruling leaves open a number of other important questions: can libraries simply disregard the terms and conditions of the e-book licence? And can they override technological protection measures preventing the lending of the e-book according to the legal framework designed by the Court?

The CJEU case law also provides a model for libraries to independently digitise and e-lend works in their collection in a way that complies with the three-step test.¹⁶ Such

¹³ Lending is an exclusive right protected under the Rental and Lending Directive (RLD), but Member States can transform public lending by libraries to a right of remuneration and even exempt some establishments from any payment.

¹⁴ See the 2016 CJEU decision in the [Vereniging Openbare Bibliotheken \(VOB\) case](#). According to this ruling, lending of books in digital form is permitted under Art. 6 of the RLD and Art. 5(2)(c) of the InfoSoc Directive, provided that libraries employ a model that is essentially similar to traditional lending of paper books.

¹⁵ Although Art. 6(3) of the RLD Directive does leave member states with the possibility of exempting certain categories of beneficiaries such as universities and schools from this obligation.

¹⁶ The 2016 CJEU decision in the VOB case read together with the 2014 CJEU decision in the [TU Darmstadt case](#) enable libraries to practise e-lending based on digitised copies of works in their collections. While the VOB case recognizes the right to e-lend, the TU Darmstadt case asserts the library's

interpretation has not, however, been translated into national legislation. A forthcoming [study commissioned by Knowledge Rights 21](#) evaluates the possibility of e-lending based on digitised physical books by looking at three requirements, the right to digitise, the right to e-lend and the existence of a remuneration provision. Out of the 20 member states analysed, none explicitly allowed digitisation-based e-lending, and only the national laws of Germany, Croatia and Poland can be interpreted as providing a legal basis for it.

Conclusions and Recommendations

The lack of a clear legal framework for e-lending is forcing European libraries to negotiate on the open market over an issue that was in the physical world considered to be fundamental, the right to lend books to their patrons. If libraries were forced to negotiate for that right in the physical world, they also would have lacked the market power to obtain it. It is only because the EU law set up a framework for the lending of physical books that libraries across the EU are able to further their mission in the physical world.

E-lending is increasingly important for the functioning of libraries, enabling them to continue to fulfil their public interest mission in the digital environment. A legislative intervention is needed to ensure that licence-based e-lending is adequate to the needs of libraries and to clarify that digitisation-based e-lending can also take place. Case-law alone is unlikely to convince libraries, as notoriously risk-averse institutions, that they have a sound legal basis for e-lending.

We propose an intervention to codify the requirements found in the case law of the CJEU as a minimum backstop to guarantee fundamental rights through the proper exercise of libraries' public service mission in the digital environment.

These interventions will provide a solid legal basis for libraries to continue to guarantee fundamental rights going forward. However, resolving these issues would ideally be part of a more comprehensive regulation, a Digital Knowledge Act, which addresses the needs of libraries and other knowledge institutions in the digital environment more broadly.

[ancillary right to digitise paper books in its collection in the context of making works available to the public on dedicated terminals on the premises of the library.](#)

RECOMMENDATION 1

Introduce mandatory EU-wide exception for e-lending of works in digital form

We call on the EU to introduce an EU-wide exception clarifying that libraries have the right to conduct e-lending of works in digital form, in accordance with the requirements found in the CJEU case law. The exception should apply to (i) digitally born works that are owned or held by the library, for example because the library has signed a licence agreement, has permanent custody, or holds the work under legal deposit rules, as well as to (ii) digitised works in their collections.

The exception should be protected against contractual overrides and libraries should be granted the right to circumvent technical protection measures. It should also have a cross-border effect within the EU Member States.

The EU legislator should further clarify that libraries have the ancillary right to digitise works in their collections.

RECOMMENDATION 2

Make unfair terms and conditions in e-book licences unenforceable

The EU legislator should introduce legislation requiring e-book licensing offers to libraries to be adequate to their needs.¹⁷

This legislation should, at the very least, provide that a term and condition in a e-book licence agreement for libraries is unenforceable if it (i) precludes or restricts the library from performing their public interest missions, (ii) restricts lawful uses of works, (iii) limits the number of times a library may lend the e-book over the course of the agreement, (iv) requires the transfer of library users' usage data, including personal data, or (v) charges the library more for one e-copy than the list price for the public for the same item.


¹⁷ An intervention might also be needed to address the issue of refusal to licence e-books for e-lending. We will address this issue in an upcoming policy paper.

About COMMUNIA

The COMMUNIA association advocates for policies that expand the Public Domain and increase access to and reuse of culture and knowledge. It acts as a network of like-minded activists, researchers and practitioners based in Europe and the United States who seek to limit the scope of exclusive copyright to sensible proportions that do not place unnecessary restrictions on access and use.

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