



# The eBook Dilemma

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Knowledge Rights 21

#eBookSOS

# Societal Function of Libraries for Millenia

1. Collection Development & Management
2. Access to that collection (including interlibrary loan)
3. Preservation

# Libraries – Publishers: Imbalance of power

- Every book is unique – often there is **no substitute**.
- Libraries **have to buy** books to reflect the needs of their patrons.
- Copyright creates a **monopoly** off which licensing takes place.
- Contracts of adhesion – imbalance of power.

**Not a free market.**

# Market Failure - Competition Issues

- Refusal to license e.g. Hachette
- Refusal to engage with consortia – will only deal with individual libraries
- Refusal to allow interlibrary loan
- Bundling of titles
- High prices
- Loss of material purchased (HE) and public libraries (audiobooks)

# Libraries Have Rights and Obligations in an Analogue World

1. Copyright acts as an incentive to write.
2. Libraries can acquire (“exhaustion principle” in copyright law)
3. Libraries can lend (exception to copyright law)
4. Libraries can preserve (exception to copyright law)
5. Public Lending Right Payments to authors (obligation in copyright law)

All undermined by licensing as the rights provided by copyright law are irrelevant.

# Open Access – HE Tunnel Vision?

- Great strides but only a real solution in HE sector
- Very article focussed – Open Educational Resources
- Unless Gold Open Access the rights are often unclear and uncertainty over rights creates a chilling factor

# Gold Open Access - Societal Function of Libraries for Millenia

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# Reasonable Terms

- Being advanced in Germany and the US
- Who decides what is reasonable when by definition bargaining power is imbalanced?
- What is the mechanism for challenging unreasonable terms?
- Libraries risk averse – will they use such mechanisms?

# Reasonable Terms = Reasonable Behaviour?

## Court Blocks Maryland's Library E-book Law

By Andrew Albanese | Feb 16, 2022

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In a rebuke to Maryland state legislators, a federal judge has granted the Association of American Publishers' motion for a preliminary injunction, blocking Maryland officials from enforcing the state's new library e-book law.

# Reasonable Terms - Societal Function of Libraries for Millenia

1. Collection Development & Management ?
2. Access to that collection (including interlibrary loan) ?
3. Preservation ?

# Vereniging Openbare Bibliotheken v Stichting Leenrecht 2016 (CJEU)

Dutch Public Library Association argued that libraries could buy any eBook on the market-place and lend it on a One Copy One User basis, subject to payment of the Public Lending Right payments already under the existing Rental and Lending Directive. (92/100/EC +)

# Vereniging Openbare Bibliotheken v Stichting Leenrecht 2016 (CJEU)

**Libraries are one of civilisation's most ancient institutions**, predating by several centuries the invention of paper and the emergence of books as we know them today. In the 15<sup>th</sup> century, they successfully adapted to, and benefited from, the invention of printing and it was to the libraries that the law of copyright, which emerged in the 18<sup>th</sup> century, had to adjust. **Today we are witnessing a new, digital revolution, and one may wonder whether libraries will be able to survive this new shift in circumstances. Without wishing to overstate its importance, the present case undeniably offers the Court a real opportunity to help libraries not only to survive, but also to flourish. (Advocate General)**

# Vereniging Openbare Bibliotheken v Stichting Leenrecht 2016 (CJEU)

Article 1(1), Article 2(1)(b) and Article 6(1) of 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 **must be interpreted as meaning that the concept of 'lending', within the meaning of those provisions, covers the lending of a digital copy of a book, where that lending is carried out by placing that copy on the server of a public library and allowing a user to reproduce that copy by downloading it onto his own computer, bearing in mind that only one copy may be downloaded during the lending period and that, after that period has expired, the downloaded copy can no longer be used by that user.**

# Does the ruling allow scanning in of eBooks? This specific question wasn't asked but:

1. Did allow copies of books to be made and placed on libraries servers (final ruling)

*“placing a digital copy (**reproduction A**) on the server of the establishment”*

2. The Advocate General specifically refers to the reproduction right in the Copyright Directive

56. It has also been argued that the lending of electronic books implies, in addition to the act of lending in the strict sense, **acts of reproduction on the part of both the library and the user**, which could infringe the exclusive right of authors to authorise or prohibit such reproduction, enshrined in Article 2 of Directive 2001/29.

57. However, in so far as concerns reproductions made by libraries, they are, in my opinion, covered by the exception to the reproduction right provided for in Article 5(2)(c) of Directive 2001/29, read in the light of the Court's judgment in *'Technische Universität Darmstadt'*. (31) That provision provides for an exception to the reproduction right for 'specific acts of reproduction made by publicly accessible libraries ... which are not for ... economic ... advantage'. In the abovementioned judgment, the Court held that that exception could apply so as to enable libraries to complete acts of communication to the public under another exception, provided for in Article 5(3)(n) of Directive 2001/29. (32) **By analogy, the exception under Article 5(2)(c) of the same directive ought to come into play to enable libraries to benefit from the derogation from the lending right provided for in Article 6(1) of Directive 2006/115.**

# Vereniging Openbare Bibliotheken v Stichting Leenrecht 2016 (CJEU)

- Rejected licensing - irrespective of licences libraries can lend books electronically on a OCOU model
- Creates a baseline for public libraries and their patrons to operate within
- Good for authors - PLR

# Controlled Digital Lending

- Library can scan in paper book, article etc
- Put paper item beyond public access
- Upload copy to library server
- Lend on a one copy one user basis using Adobe Digital Editions
- TPM creates the loan environment (as with a licensed eBook)

# Allowing a Library to be a Library Again

- Creates a guaranteed stable baseline for libraries and patrons
- More reasonable and stable pricing - sustainable
- No refusal to license / embargoes / disappearing / no unwanted bundles / no lock-in / allows per title acquisition etc
- Allows public lending right fee for authors (public libraries)

# Allowing a Library to be a Library Again

- Encourages innovation in supplier / solution markets
- Encourages innovation and a healthier market as publishers license on top of the OCOU model
- Supports education, research and library public policy aims

# CDL - Societal Function of Libraries for Millenia

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# CDL Legal in EU countries?

- Will depend on how existing member state laws are crafted; and
- A libraries risk tolerance regarding the ruling

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1. Hot off the Press: Check out Knowledge Rights 21 eBook Position Statement

2. Please sign: <https://academicebookinvestigation.org>

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