

A Position Statement from Knowledge Rights 21 on eBooks and eLending

Summary

We are facing a situation where it is no longer guaranteed that libraries can fulfil their public interest mission of collection development and giving access to their collections. eBooks operate outside of the current copyright law that permits libraries to acquire, lend and preserve physical books.

Refusals to sell, embargoes, high prices, and restrictive licensing terms serve to frustrate libraries' ability to undertake collection development, hurting those who rely on libraries for education, research, and cultural participation.

At the European level, there is already recognition by the Court of Justice of the European Union that eLending should be treated like physical lending.¹ However, no country has yet taken concrete action to implement this ruling into national law. This needs to be corrected urgently, with libraries able to take copies of digital and physical works in their collections and lend them out on an 'owned to loaned' ratio. This should be accompanied by an extension of Public Lending Right payments to ensure that authors benefit in line with existing practices.

About this statement

This is a position statement produced by Knowledge Rights 21, an Arcadia funded project advocating for copyright and open access reform across Europe. eBooks are undermining the centuries old function of libraries to acquire, preserve and undertake collection development. We believe that European countries as well as the European Union should clarify where necessary the right of libraries to access and lend eBooks in line with a 2016 European Court of Justice ruling (*Vereniging Openbare Bibliotheken v Stichting Leenrecht*).

¹ *Vereniging Openbare Bibliotheken v Stichting Leenrecht*. Case C-174/15

There is growing concern about the impact that monopoly power in digital markets - and potential abuse of it - can have on businesses and consumers. So far, much of this has focused on the sort of natural monopolies that form around major platforms. For example, the Digital Markets Act. However, the excessive, monopolistic and abusive exercise of intellectual property rights is also a reality when it comes to consumers' day to day activities. The use of technical protection measures stop us from transferring digital songs and films we have bought across our multiple personal devices and storage platforms. As cars have turned into computers, copyright can be invoked to prevent independent garages from servicing your car, and prevent owners from repairing their own vehicles².

eBooks are another example where through excessive use of monopoly rights combined with inaction by governmental bodies, the rights that citizens and libraries have depended on for generations, and that are recognised on paper, have been removed in practice. This has consequences that reach to the core of what libraries are and do in supporting education, research, and cultural participation.

1. Undermining centuries-old public policy

Universities and public libraries are experiencing very serious problems with giving access to eBooks. Eye-watering price-rises are common (e.g., a 300% - 1000% uplift on the paper book for a single seat licence³), putting severe strain on library budgets⁴. Not only this, eBooks that are only licensed for a set time or number of loans usually mean that libraries must buy access to the same titles again and again. Certain publishers effectively refuse to license eBooks to libraries outright in some countries⁵, or require libraries to purchase bundles of eBooks. This forces them to buy books they have no need for just to access those they must have – for example because it is required reading for a particular course.

In the public library space, if you change your audio book platform you can lose access to all the audiobooks you have previously purchased. Another issue is what is called “windowing”. Publishers will sometimes hold back new titles resulting in members of the public who cannot afford them (or have no space for more books on their shelves) having to wait many months to read the book from their local library electronically.

Digital developments have turned access to knowledge and learning on its head. eBooks play havoc not only with library budgets, but the very principle of what

² <https://www.vox.com/2015/5/26/8656281/dmca-car-repair-rights>

³ <https://www.theguardian.com/education/2021/jan/29/price-gouging-from-covid-student-ebooks-costing-up-to-500-more-than-in-print>

⁴ <https://www.libraryassociation.ie/irish-librarians-call-for-action-on-the-electronic-content-crisis-facing-libraries-and-library-users/>

⁵ <http://informationr.net/ir/24-3/paper837.html>

constitutes a library. The public welfare function of a library is to provide free access to knowledge. Traditionally this has always been possible because they have been free to acquire any book and then lend it either directly to their patrons, or via other libraries as part of interlibrary loan. As such, libraries have been able to ensure that access to information, education and culture is not conditional on ability to pay.

Many, if not all the problems described above stem from the fact that libraries no longer have the right in law to acquire and lend eBooks as they can with paper books. Libraries also have no choice but to provide access to books for their users to fulfil their mandates, and therefore the sector does not function as a free market - in effect, there is very little demand elasticity. This in turn results in contracts of adhesion⁶. With the advent of digital, the equilibrium that used to exist in book markets has been upset – something policy makers need to understand more fully. Because copyright law has not been updated, publishers are now entirely free via licence to determine if, when and how a library can access their electronic titles.

This means libraries have lost almost all the independence and agency that they once had and are no longer able to freely develop their own digital collections and give access to them accordingly.

2. Copyright law and eLending

Copyright law runs through all of these issues. In copyright law, libraries have been able to acquire any physical item because of what is known as the “exhaustion” or “first-sale” doctrine. (This means that a rightsholder cannot control the sale of a book or other material containing their intellectual property once sold with the permission of the rightsholder.) This enables a library to undertake “collection development”, where it builds and creates collections that reflect the specific needs of their users.

Lending is also regulated by copyright law in Europe⁷, as an exception to the monopoly rights the law grants rightsholders. These two provisions – exhaustion and legislated lending exceptions – have a key public interest function.

As outlined above, libraries however do not have the right in law to either acquire or lend eBooks as they are not subject to the exhaustion doctrine under copyright law. Their acquisition and lending are therefore regulated by contract law – i.e. everything depends on whether and what the publisher is willing to offer. With no clear legal right to lend electronic material, the ability of a library to function and exist

⁶ A contract of adhesion is one where there is such disproportionate bargaining power that one party cannot negotiate the provisions they reasonably require.

⁷ 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.

in the digital environment is entirely at the behest of publishers, with libraries rarely able to negotiate the contracts they are offered on terms that work for them as they have little if any bargaining power.

The undermining of the rights of citizens to access knowledge through a library irrespective of their capacity to pay for it, raises serious public policy questions for governments. In the United States some states have started to enact legislation to guarantee reasonable access to eBooks for schools and libraries⁸. However, other than eBooks being an issue for investigation as agreed in the coalition agreement of the current German government, we are unaware of any concrete legislative developments in Europe on this front.

3. Authors should be able to benefit from eBook Lending

It is not only the world of libraries that has been turned upside down. Authors too are not necessarily benefitting adequately from public library eBook markets. Whilst under the Rental and Lending Directive as enacted in most European countries, authors have the right to receive payments for loans by public libraries (called the public lending right (PLR)). This does not apply to licensed eBooks, which are currently not accessed under the terms of the Directive, but rather under contract.

As a result of eBook lending being regulated not by contract law and not the Rental and Lending Directive, authors are not receiving PLR payments for loans of their eBooks. Not only this, a study by Auteursbond and the Lira Foundation found that 68% of authors received no royalty payments from publishers at all for licensed-based loans of eBooks⁹. In spite of this, in the topsy-turvy world of eBooks, a coalition of book industry organisations including prominent authors themselves¹⁰ are campaigning against proposed library eLending legislation in Germany that would actually provide them with a stream of income in the form of PLR payments guaranteed in law for library loans.

Principles for a Law on eBooks

Knowledge Rights 21 believes governments must wake up and act now before the rights of citizens to access information and learning through libraries are eroded any further.

⁸ <https://www.publishersweekly.com/pw/by-topic/industry-news/libraries/article/88403-illinois-rhode-island-introduce-new-library-e-book-bills.html>

⁹ <https://www.ereaders.nl/auteurs-verdiennen-weinig-aan-uitlenen-e-books-en-abonnementdiensten/>

¹⁰ <https://www.knowledgerights21.org/news-story/publishers-authors-and-booksellers-should-not-become-your-librarians/>

Although eBooks have the potential to democratise access to knowledge irrespective of where you live and your ability to pay for it, we are in reality far from any such democratic ideal. Publishers and booksellers should not be your new librarians¹¹ and should not be able to sideline centuries-old activities that exist to support the public interest. Library users should be able to enjoy the possibilities that eBooks bring to access more diverse or local content irrespective of their ability to pay for it. Those who are unable to travel to libraries (for reasons of distance or mobility for example) should not be denied the opportunity that eBooks provide to be able to access information from where they are.

Significantly the European Court of Justice agrees with this. In the landmark case *Vereniging Openbare Bibliotheken v Stichting Leenrecht* the court ruled that under the existing Rental and Lending Directive, libraries have the right to acquire and lend any eBook available on the market on an “owned to loaned” ratio. (This means for example if a library acquires one copy, they can only give access to the public to one copy only. If they acquire two, they can only give access to two copies etc). The CJEU strongly supported the public interest in saying:

“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 15th 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 18th 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.¹²”

The CJEU has clearly decided in favour of libraries being able to acquire and lend eBooks. It is now time for European governments to make this landmark ruling a reality by addressing any gaps that may exist in current copyright frameworks.¹³

To this end we propose that where necessary governments amend copyright and other related laws in line with the CJEU ruling, in order to clarify that existing derogations in law permit the lending of eBooks by European libraries. This should include inter alia:

¹¹ <https://www.knowledgerights21.org/news-story/publishers-authors-and-booksellers-should-not-become-your-librarians/>

¹² See opinion of Advocate general delivered on 16 June 2016 (1) Case C-174/15 *Vereniging Openbare Bibliotheken v Stichting Leenrecht*

¹³ Amongst the issues already highlighted, the possibility for libraries to buy works on the market, at a price and on terms that allow them to use them, and protection from override of the possibility to lend by contract terms or technological protection measures.

1. The right for libraries to acquire, preserve and make a digital reproduction of an analogue and / or an electronic book / audiobook that has been made available in the market under sale or licence;
2. No more copies than have been acquired under 1 above, shall be loaned to members of the public at any one time. Libraries should have the right to lend directly to users, as well as via other libraries as part of interlibrary loan;
3. Neither contracts nor technical protection measures shall be enforceable to prevent this;
4. Any loans made under this shall require the payment of PLR monies by public libraries in line with existing practice with paper and or audiobooks.

No doubt publishers and some authors will prophesise the end of the world if such changes come into force. Yet there is nothing that would prevent a publisher from providing the sector with competitive and attractive licences, so a library prefers to use the offering from the publisher rather than exceptions¹⁴. Lending under copyright law also guarantees remuneration to authors which the Auteursbond study found, in the majority of cases, is not happening under licence-based schemes.

All this clarification in copyright law does is return us to the status quo – the ability for libraries to lend books in their collection to the same ratio that they have purchased them. Importantly for authors it also creates guaranteed remuneration. This is nothing new or radical, just continuing what libraries have done for centuries.

Moreover, the European Court of Justice agrees with us. As the Advocate General said, now is high time to let libraries “not only ... survive, but also to flourish.”

Recommendations

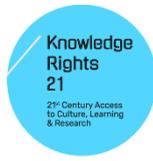
1. At the European Level

The European Union should amend the Rental and Lending Directive to reflect the ruling of the Court of Justice of the European Union, in *Vereniging Openbare Bibliotheken v Stichting Leenrecht*.

2. At the National Level

EU Member States: Evaluate national law and if current law is unclear, or it contradicts *Vereniging Openbare Bibliotheken v Stichting Leenrecht*, update national law accordingly.

¹⁴ For example, the one-copy-one-user model may well be ill suited for best-sellers, when a library may prefer multiple-use licences early on.



Non-EU Member States: In order to ensure that libraries can continue to undertake collection development and lend their collections to patrons, as well as undertake interlibrary loan, update national law to allow digitisation and lending of eBooks on an “owned to loaned” ratio.

Further Reading

[IFLA Position on Controlled Digital Lending](#)

[What can 100,000 books tell us about the international public library e-lending landscape?](#) Rebecca Giblin, Jenny Kennedy, Charlotte Pelletier, Julian Thomas, Kimberlee Weatherall, and Francois Petitjean

[European Libraries and eBooks - RIP the public library as we know it?](#)
Benjamin White

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