



*e-Books and library / interlibrary loan – the legal side*

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**Meeting:**

**202 — e-Books and interlibrary loan — Document Delivery and  
Resource Sharing Section**

**Abstract:**

*Millions of printed books are lent out by libraries each year, and when the first e-Book appeared on the market libraries immediately started to offer this new item to their clients too. With the classical loan service of libraries before their eyes librarians from the very beginning labeled their new activity as ‘e-Book lending’. But to quote America’s great poet Bob Dylan: “Something is happening here, but you don’t know what it is!”<sup>1</sup> Almost nobody knows the legal side of library book lending. It is quite possible that the lending of printed books does not fall under the same legal regulations as any library service regarding e-Books. This presentation tries to light up the legal side of e-Books in libraries.*

**1. Library lending of printed books**

To understand the legal side of lending a book from a library a look at the actual scenario is essential. A printed book is a tangible object, which means you can hold it in your hands. During the loan process of a library the object gets taken from the library stacks into the hands of the library user, who schlepps it to his home and after reading brings it back to the library. The item gets moved from library to user and back. Normally the book is a copyright protected work. In copyright law the moving of a work from one person to another is labeled as distribution. The right of distribution as one of the central rights of an author is regulated in the WIPO World Copyright Treaty (WCT) (adopted in Geneva on December 20, 1996):

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<sup>1</sup> Ballad of a Thin Man (1965). <http://www.bobdylan.com/songs/ballad-of-a-thin-man>

## **Article 6** **Right of Distribution**

*(1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their works through sale or other transfer of ownership.*

*(2) Nothing in this Treaty shall affect the freedom of Contracting Parties to determine the conditions, if any, under which the exhaustion of the right in paragraph (1) applies after the first sale or other transfer of ownership of the original or a copy of the work with the authorization of the author.*

The article first describes the exclusive distribution right of an author and in the second part makes the way free to implement in national copyright law conditions for an exhaustion of the distribution right after the first transfer of ownership, done mostly by sale. The lending of a printed book by a library affects the distribution right of the author, because in the language of the law a copyright protected work will be redistributed without explicit permission by the author. To solve all the problems with further distribution of works (resale, second hand market, gifts etc.), the art. 6 (2) regulation offers a solution. In almost all the countries of the world the 'exhaustion' or 'first sale' doctrine has been implemented into national copyright law.

### a) European Union

In Europe the right of distribution is laid down in the Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society:

### **Article 4** **Distribution right**

*1. Member States shall provide for authors, in respect of the original of their works or of copies thereof, the exclusive right to authorise or prohibit any form of distribution to the public by sale or otherwise.*

*2. The distribution right shall not be exhausted within the Community in respect of the original or copies of the work, except where the first sale or other transfer of ownership in the Community of that object is made by the rightholder or with his consent.*

The wording is very similar to the WCT. The most interesting aspect applies to the territorial effect of art. 4. The first sale of a work in one EU member state will exhaust the distribution right of the author in all other member states too. Nothing is said about the rest of the world.

b) Germany

The lending of objects is described in some national copyright laws with a direct reference to the exhaustion doctrine. Following the requirements of the EU Directive 2001/29/EC the German copyright law regulates the exhaustion doctrine in § 17 (2), directly after the description of the distribution right:

**§ 17 Right of distribution**

*(1) The right of distribution is the right to offer the original of a work to the public or to place them on the market.*

*(2) If the original or copies of a work have been placed on the market within the territory of the European Union or another Contracting State to the Agreement on the European Economic Area by way of sale with the consent of the party entitled to the right of distribution, their further distribution shall be admissible except for the hiring out of the original or copies thereof.*

And the lending gets mentioned in § 27 (2) German copyright law with these words:

*Lending means making available for use, for a limited period of time and not for direct or indirect economic or commercial advantage, when it is made through establishments which are accessible to the public.*

The German copyright law contains a word by word implementation of art. 2 (1 b) EU Directive 2006/115/EC (2006) on rental right and lending right and on certain rights related to copyright in the field of intellectual property.

c) USA

In the USA the first sale doctrine is fixed in US Code TITLE 17 > CHAPTER 1 >

*§ 109. Limitations on exclusive rights: Effect of transfer of particular copy or phonorecord:*

*a) Notwithstanding the provisions of section 106 (3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.*

The words “lawfully made under this title” could be understood as a territorial regulation, an interpretation of the law which is currently under discussion before US courts.

d) Library loan of printed books

Of course neither books nor library loan is directly mentioned in all these copyright laws. But any loan activity of a library without explicit authorization by the author nevertheless is legal, because the author has lost the right to allow or to prohibit distribution of his work. His right

has been exhausted after first sale of the work. There are even some countries where the copyright law gives a legal definition for a book. In Canada the Copyright Act R.S.C., 1985, c. C-42 offers this definition:

*2. In this Act,*

*“book” means a volume or a part or division of a volume, in printed form, but does not include*

*(a) a pamphlet,*

*(b) a newspaper, review, magazine or other periodical,*

*(c) a map, chart, plan or sheet music where the map, chart, plan or sheet music is separately published, and*

*(d) an instruction or repair manual that accompanies a product or that is supplied as an accessory to a service;*

A printed book is a tangible object in analog format. It should be without doubt that an e-book could not be labeled as ‘printed’. So the Canadian copyright law seems to cover only printed books. But what about other countries? At first sight in almost all countries the national copyright law does not differ between physical and digital works.

## **2. Library activities with e-books**

To begin with, the actual scenario of library activities with e-books shows that the object called ‘book’ is in fact a digital file in standard format (EPUB, PDF etc.). Any user interested to read it will get it ‘transferred’ to his reading device (computer, i-pad, smart phone, kindle etc.) for a limited period of time. After the end of the reading period the file disappears somewhat, gets erased or dissolves. There is no giving back of the file. At a technical level this means, the user gets a copy of a copyright protected work, which is up/downloaded into his reading device, and not the original file.

Copyright law calls this transaction ‘reproduction’. The reproduction right of an author is laid down in art. 9 of the Berne Convention.<sup>2</sup> The first sale / exhaustion doctrine is nonapplicable. And the reproduction right does not differ between analog or digital objects. The regulation of the law is the same for both.

At the national level copyright law remains silent about e-books. But a close look at the WIPO Copyright Treaty shows a footnote at the end of art. 6:

*Agreed statements concerning Articles 6 and 7: As used in these Articles, the expressions “copies” and “original and copies,” being subject to the right of distribution and the right of rental under the said Articles, refer exclusively to fixed copies that can be put into circulation as tangible objects.*

The e-book may be a fixed copy, but it can never be a tangible object. So it looks like that the right of distribution plus the first sale /exhaustion doctrine is not applicable to digital objects.

The European Union Directive in recital 29 states about the exhaustion doctrine:

*The question of exhaustion does not arise in the case of services and on-line services in particular. This also applies with regard to a material copy of a work or other subject-matter made by a user of such a service with the consent of the rightholder. Therefore, the same applies to rental and lending of the original and copies of works or other subject-matter which are services by nature. Unlike CD-ROM or CD-I, where the intellectual property is incorporated in a material medium, namely an item of goods, every on-line service is in fact an act which should be subject to authorisation where the copyright or related right so provides.*

Here digital objects without any material fixation are labeled as ‘services’ or ‘on-line services’. The EU Directive says it very clearly that these ‘services’ cannot become the object of lending. At the moment copyright law worldwide grants the exhaustion or first sale doctrine only to tangible objects as for example printed books. Digital objects don’t fall under this legal construction as they are seen as “services” or they are not mentioned in copyright law at all. So from a legal point of view e-books cannot be lent by libraries. There is no statutory legal instrument for e-book loan activities by libraries available. Instead these services are subject to authorization by the author.

### **3. E-books, libraries and private companies**

More and more libraries offer e-books to their users. But libraries don’t get permission for offering e-books from the author or the publisher directly. In fact all the time there is a private company involved. In Germany it’s a service called ‘onleihe’<sup>3</sup>, in the UK a service operates as ‘public library online’<sup>4</sup> and in the USA most libraries work with OverDrive<sup>5</sup>. In all cases the library has to sign a licence contract with the company, which works as an agent between

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<sup>2</sup> [http://www.wipo.int/treaties/en/ip/berne/trtdocs\\_wo001.html#P140\\_25350](http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html#P140_25350)

<sup>3</sup> <http://www.onleihe.net>

<sup>4</sup> <http://publiclibraryonline.wordpress.com/uk/contact-us/>

<sup>5</sup> <http://overdrive.com/Solutions/>

the publishers of e-books and the libraries. Everything is based on contract law; nothing is regulated by copyright law. The EU Directive 2001/29/EC calls this ‘authorisation’, the author can allow or prohibit library loan activities with his e-book, which stands in absolute contradiction to his legal power regarding a printed book.

#### **4. Licences, a burden for libraries**

Libraries don’t like licence contracts. The EU Commission wrote about the problem in a document with title “Copyright in the knowledge Economy”<sup>6</sup>:

*„Libraries and universities underline the complexity and fragmentation of the current system of licensing agreements with publishers. A typical European university is required to sign a hundred or more licenses governing the use of digital research material supplied by various publishers. Examining what each of these individual licenses permit with respect to e.g. access, printing, storage and copying is a cumbersome process.“*

And the next steps should be:

*“The licensing burden encountered by a typical European university should be reduced. The Commission will consult relevant stakeholders on best practices available to overcome the fragmented way by which universities acquire usage rights to scientific journals.”*

The perfect remedy would be a restriction or limitation in copyright law. For printed books as well as for e-books there should be same legal solution available. At the moment no legal instrument, neither on the international, nor on the national level offers anything. There is only a draft text published.

The WIPO Draft Treaty on Copyright Exceptions and Limitations for Libraries and Archives TLIB (April 2011) describes library lending in art. 6:

*1) It shall be permissible for a library to lend a lawfully acquired copyrighted work, or matter subject to related rights, to a person, or to another library for subsequent loan to a person, by any means. It is understood that lending that gives rise to a payment the amount of which does not go beyond what is necessary to cover the operational costs is a non-commercial service.*

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<sup>6</sup> COM (2009) 532 final

Up to this point the wording of the article harmonizes completely with the WIPO Copyright Treaty (WCT) and subsequent national copyright laws. But in an explanatory note to art. 6 one reads this sentence:

*New technologies enable digital lending and parallels lending of physical books.*

As we have seen, ‘lending’ is a phrase from the analog world, used in copyright law for tangible objects only. The TLIB authors use the same wording for library activities regarding printed books and e-books. But this is definitely not covered by existing copyright law. Lending in the context of copyright law means the distribution of a tangible object from a library to a user and giving it back after a limited period of time.

So in my opinion the wording in the TLIB text should be changed. The word ‘access’ could be taken into consideration. Libraries are giving access to digital information like e-journals, databases etc. Or the phrase ‘e-book service’ could be used with a look at the EU directives. If a regulation for e-books should be contained in art. 6, the title should be expanded too, maybe to ‘Library Lending and Access Services’.

It could even be that art. 6 TLIB is the wrong place to mention e-books in any case. A library e-book service could have more similarities to document supply than to book lending. So maybe e-book access could be regulated more properly in art. 7 TLIB.

## **5. Conclusion**

E-book ‘lending’ is not regulated by copyright law, it requires authorisation from the rights holder. But the necessary licence contracts are a burden for libraries. Libraries need a statutory solution for their e-book activities.

As Wilma Mossink & Marian Koren<sup>7</sup> wrote in their 2011 IFLA poster:

*“Libraries request national and European authorities to monitor the efforts of stakeholders to find reasonable solutions; to make workable agreements, and/or to publish a Directive/legislation to guarantee libraries their work in a digital environment.”*

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<sup>7</sup> Digitisation and e-books in the Netherlands: Legal aspects, models and solutions.  
<http://conference.ifla.org/ifla77/poster-sessions>

### **Suggested readings**

1. First Sale Doctrine.

<http://www.aallnet.org/main-menu/Advocacy/copyright/firstsale.html>

2. Paul Whitney: EBooks and Public Lending Right in Canada.

<http://www.plr.ca/PLR/documents/FinalreportinEnglish.pdf>

3. Barbara Schleihagen : E-books in German Public Libraries.

<http://www.slideshare.net/fesabid/1200-1215-h-barbara-schleihagen>

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