LENDING E-BOOKS IN LIBRARIES:

IS A TECHNOLOGICALLY NEUTRAL APPROACH THE SOLUTION?

Abstract:

This article examines the question of whether the public lending right (PLR) as harmonized under the EU Rental and Lending Directive 2006/115/EC should equally apply to both print books and e-books. This question has been answered in the affirmative by the CJEU in the recent VOB case. The paper argues that extending the PLR exception to e-book lending might be not the most appropriate solution. It would neither solve the problems that libraries face in relation to e-lending, nor would it ensure appropriate remuneration to authors. At this stage, other possible alternatives should be explored.

Keywords: public lending right, PLR, public lending exception, e-lending, e-books, copyright, ECJ, VOB

1. Introduction

E-book take-off in the European markets has been slow.[1] Despite (or because of) that, in recent decades e-lending has gained momentum in a number of European public libraries.[2] At the same time, the process has not been as smooth as one would have liked. Libraries are complaining about the unwillingness of publishers to provide e-books for loan, excessively high prices and unreasonable restrictions on e-book loans, while authors are arguing that they are not compensated at all for e-lending in public libraries.

From a copyright law perspective, e-book lending has been treated very differently from print book lending. As a result of the so called 'public lending right' (PLR) (sometimes referred to as the 'public lending exception'),[3] libraries can buy and simply lend print books without any further authorisation. Until recently, it had been assumed this exception did not apply to e-books. As a result, libraries wishing to lend e-books were required to seek permission from right holders, pay additional fees and comply with conditions imposed by right holders via licensing agreements.[4]

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[1] For example, in 2014, e-books comprised 5% of the total market in Germany, 1.1% in France, and 3-5% in Spain, compared with 11.5% in the UK and 13% in the US. See Rüdiger Wischenbart Content & Consulting, 'Global eBook: A Report on Market Trends and Developments' (2014) 21 <www.wischenbart.com/upload/1234000000358_04042014_final.pdf> accessed 15 December 2016

[2] Civic Agenda EU, 'A Review of Public Library E-Lending Models' (December 2014) 37 <www.lmba.lt/sites/default/files/Rapporten-Public-Library-e-Lending-Models.pdf> accessed 15 December 2016 (Civic Agenda EU)

[3] See the discussion below for an explanation of the two different terms

[4] Interestingly, the question of extending the PLR to e-lending has also been raised in several policy documents prepared by the European Commission. For example, see 'Public Consultation on the Review of EU Copyright Rules' (2013) 21 <http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/docs/consultation-document_en.pdf> accessed 15 December 2016. However, it has not been mentioned in the most recent policy

In the VOB case, [5] the CJEU established that the PLR applies to at least certain e-lending models. It applied the technological neutrality approach suggested in the opinion of AG Szpunar and concluded that the PLR exception applies in situations where e-books are lent by public libraries to one user at a time (single-user model) and where an e-book becomes inaccessible after a loan period expires.

The goal of this article is to examine whether the technologically neutral application of the PLR to e-lending, as suggested in the VOB case, is the most suitable solution to the issues pressing the public e-lending sector. When examining this question, firstly, I will overview the situation of e-lending in Europe and problems related to it. Secondly, I will examine the concept of technological neutrality as it is applied in court practice and develop a test that would help to apply the technological neutrality principle to new legal scenarios. I will then analyse whether this principle suggests that PLR should be extended to e-lending. After concluding that the technological neutrality principle does not require the extension of the PLR to e-lending, I will open the discussion on the alternative options available for e-lending sector.

2. E-books, e-lending and PLR

2.1 E-lending

With the growth of e-book markets around the world[6], e-book lending in public libraries (or e-lending) has been emerging and expanding in a number of countries.[7]

Recent studies demonstrate that e-lending practices vary from country to country.[8] E-lending models in the EU differ as to the source of the e-books (ie whether libraries run their own platforms or only access a platform that is run by an intermediary), how many e-titles they offer (from 109 in Estonia to 160,000 in Germany), what model they use to lend the books (single-user, pay-per-loan, or a combination of different models), any other restrictions they apply, their usage numbers, etc. The models are evolving rapidly and new ones are emerging.[9]

Stakeholders, especially public libraries, currently associate e-lending with a number of problems.[10] Firstly, libraries are often unable to access many e-books. Some publishers are

documents. For example, see. Commission, 'Promoting a fair, efficient and competitive European copyright-based economy in the Digital Single Market' (Communication) COM (2016) 592

[5] Case C-174/15 *Vereniging Openbare Bibliotheken (VOB) v Stichting Leenrecht* (ECJ, 10 November 2016)

[6] In 2012, e-books constituted 21% of trade in the US and 25% of trade in the UK. See Rüdiger Wischenbart Content & Consulting (fn 1) 21

[7] For example, in 2012/2013, the number of e-books in public libraries in England was 803,085. This was an increase of 80.6% on the previous year. See William Siehart, 'Independent Library Report for England' (18 December 2014) 19 <www.gov.uk/government/uploads/system/uploads/attachment_data/file/388989/Independent_Library_Report-18_December.pdf> accessed 15 December 2016; for overview of the situation in other countries see Civic Agenda EU (fn 2)

[8] See Civic Agenda EU (fn 2)

[9] For a more comprehensive description of e-lending, see Severine Dusollier, 'A Manifesto for an E-Lending Limitation in Copyright' (2014) 5 Journal of Intellectual Property, Information Technology and Electronic Commerce 5, 4-6 (Dusollier)

[10] For example, see International Federation of Library Associations, 'The Thinkpiece: Libraries, eLending, and the Future of Public Access to Digital Content' (2012) 20 <www.ifla.org/files/assets/hq/topics/e-

refusing to supply e-books to libraries, at any price. Other publishers are delaying the release of new titles to libraries so that not all publicly available e-book titles can be borrowed from libraries. Some e-book providers dictate what is included in a subscription package, thus limiting the capacity of libraries to develop their collections. Secondly, libraries indicate a number of procurement problems, the main issue being fair pricing. Libraries are often charged much higher prices for e-book titles when compared with retail prices.[11]

Thirdly, licensing agreements between libraries and publishers or distributors normally contain restrictions on e-lending. They often introduce so called 'frictions' that mimic print book lending. For instance, agreements often prescribe a 'single-user' model where, if one reader lends a book, other readers can access it only when the loan period expires. This model leads to artificial waiting lists for library patrons. Frictions were also introduced to address the issue that e-books do not naturally 'wear' or go missing. Some supply models dictate that an e-book license expires after a defined number of lending circulations or a period of availability (the so called 'wear and tear' provision). After such a term has expired, the library has to relicense the work. In addition, publishers or distributors often dictate for how long and in what format e-books can be borrowed, as well as any technical protection measures that may apply.[12]

At the same time, right holders are concerned about the potential of e-lending by libraries to undermine the value of their work, their income and their rights.[13] Many publishers are still grappling with e-book business models and licensing practices associated with the supply of e-books to libraries. Publishers and distributors are afraid that e-lending services by public libraries will directly compete with still emerging e-book markets and decrease revenue from e-book sales. Arguably, the abovementioned frictions have been introduced via publisher-library agreements in order to protect e-book markets and maintain the balance in the relationship between different players. If libraries were able to utilise all opportunities provided by new e-book technologies, such as the easy and free copying and distribution of e-books, it would arguably damage e-book markets that are still emerging in many countries.

Meanwhile, authors are complaining that they do not receive any payment for e-lending at all and blame publishers for not sharing revenue they receive from e-lending. Authors are campaigning for fair contracts, which would ensure they are remunerated for all uses of e-books, including e-lending.[14]

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lending/thinkpiece-on-libraries-elending.pdf> accessed 15 December 2016; EBLIDA, 'The Right to E-read' (May 2014) 12 <www.eblida.org/News/2014/EBLIDA_E-read_position-paper.pdf> accessed 15 December 2016

[11] For example, in January 2014 the fourth bestselling e-book on the New York Times fiction list, *The Goldfinch*, was available to consumers via Amazon for US$7.50. However, it was only available to libraries via aggregators Overdrive and 3M for US$90.00, a mark-up of 1200%, see Dan Mount, 'Elending Landscape Report 2014' (Australian Library and Information Association, 2014) 5 <www.alia.org.au/sites/default/files/publishing/ALIA-Elending-Landscape-Report-2014.pdf> accessed 15 December 2016

[12] For more, see Dusollier (fn 9).

[13] Australian Publishers Association, 'Book Industry Collaborative Council Final Report 2013' (2013) 191 <http://www.publishers.asn.au/news-info/news/book-industry-collaborative-council> accessed 15 December 2016 (BICC Report 2013) 25

[14] See European Writers Council, 'Declaration Towards a Modern, More European Copyright Framework and the Necessity of Fair Contracts for Creators' (31 May 2016) <www.europeanwriterscouncil.eu/images/CC_declaration.pdf> accessed 15 December 2016

One of the solutions proposed by authors[15] and libraries, and supported by some publishers,[16] is the extension of PLR to e-lending. Authors hope that extended PLR would ensure adequate compensation for e-lending. Meanwhile, libraries expect that the extension of the PLR exception will ensure greater access to e-book titles as well as limit the ability of publishers to dictate restrictions on e-lending. The next section will discuss what PLR is and how it functions in practice.

2.2 Public Lending Right (PLR) and e-Lending

PLR system was first introduced in Denmark in 1946[17] and is currently provided for in the legislation of 33 countries, including almost all the EEA states**,** Australia, Canada, Israel, and New Zealand.[18] In the EU, the public lending right was harmonized in the Rental and Lending Rights Directive of 1992.[19] According to the Directive, Member States can introduce this right either as an exclusive right[20] ie the right to allow or prohibit public lending, or as a mere remuneration right.[21] Essentially all EU Member States have derogated from the exclusive right of public lending and have subjected public lending to mere remuneration. Therefore, in Europe the right has been often titled a 'public lending exception'. It essentially allows libraries, after legitimately acquiring the works, to publicly lend them without further authorization from the right holders. Meanwhile, authors (and in some countries publishers) are paid for the public lending. Remuneration is generally allocated from government funds and distributed by the collective administration societies, with no involvement from libraries in the process.[22]

It is interesting to note that the implementation of the PLR in the EU Member States has not been without issue.[23] In some EU member states PLR still does not function in practice (eg Romania). More importantly, in most member states the PLR payments are merely symbolic. For example, according to the UK PLR report of 2016, 74% of PLR recipients received less than 100 GPB, 15% received less than 500 GBP, and only 1.3% received the maximum

[15] This seems to be the position taken by author organizations in the VOB case. See Case C-174/15 *Vereniging Openbare Bibliotheken (VOB) v Stichting Leenrecht* (ECJ, 10 November 2016), Opinion of AG Szpunar, para 17

[16] E.g. UK Bill extending PLR to remote loans of e-books has received support across the publishing sector, see 'UK to become first country to extend PLR to remote ebook, audiobook loans', available at https://www.booksandpublishing.com.au/articles/2017/05/03/89854/uk-to-become-first-country-to-extend-plr-to-remote-ebook-audiobook-loans/

[17] For more about the history of PLR see IFLA, 'The IFLA Position on Public Lending Right' (2016) <www.ifla.org/publications/the-ifla-position-on-public-lending-right--2016-> accessed 15 December 2016

[18] Interestingly, there is no PLR in the United States where book markets are very strong and e-lending is most popular.

[19] It was initially harmonized by the Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property [1992] OJ L346/61, which was replaced in 2006 by Council Directive 2006/115/EC 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) [2006] OJ L376/28

[20] EU Rental and Lending Right Directive (fn 19) art 3

[21] Ibid art 6

[22] One exception is the Netherlands, where libraries negotiate the fees with right holders and pay them from their own budgets. See PLR International, 'Netherlands' <www.plrinternational.com/established/plr administrators/netherlands.htm> accessed 15 December 2016

[23] See Commission, 'The public lending right in the European Union' (Report) COM (2002) 502 final

available annual payment of 5,000-6,600 GBP.[24] In the majority of countries that have smaller PLR funds, the amounts paid to authors are accordingly smaller. Therefore, although authors generally seem to appreciate the system, the actual economic benefits of the PLR are limited.

Currently, the international legal discussion surrounding PLR is concerned with whether it should be extended to cover e-lending in libraries[25]. Whereas international library and authors' organizations have been hesitatnt whether this is the most appropriate approach, some countries have moved forward in extending PLR to e-lending. In particular, from 2016, the public lending scheme applies to e-books in Canada.[26] Currently if the book is available in any Canadian library, either in a print or digital format, right holders receive a certain predetermined fee. The extension was possible due to the rather simple structure of the Canadian public lending scheme that is independent from the copyright law system.[27] It is important to note that the extended PLR scheme in Canada does not affect the contractual arrangements between libraries and right holders. Namely, it does not affect right holders' ability to allow or prohibit libraries from lending certain e-titles, charge any prices or require libraries to introduce frictions in public e-lending services.

Inside the EU, the UK government made several attempts to extend PLR to e-lending.[28] However, it recognized that the action needs to be taken at the EU level[29]. Similar conclusions have been drawn by the governments of other EU Member States[30]. At the same time, the progress at the EU level has been slow. Although the issue has been brought to the attention of the European Commission on different occasions[31], the Commission has been reluctant to include this issue in their recent policy proposals.[32]

Recently, the CJEU has provided its opinion on the issue. In the VOB case, initiated by the Netherlands Public Library Association (VOB), the CJEU was asked to provide an opinion on

[24] See British Library, 'PLR News 2016' (March 2016) <www.plr.uk.com/mediaCentre/newsletters/2016RevisedNewsletter.pdf > accessed 15 December 2016

[25] EBLIDA, 'E-Lending and Copyright: EBLIDA' (5 June 2015) <www.eblida.org/news/e-lending-and-copyright-eblida-position.html> accessed 15 December 2016, Dusollier (fn 9)

[26] PLR International, (Proceedings of the 11th International PLR Conference, The Hague, 2015) <www.plrinternational.com/events/hague/proceedings.pdf> accessed 15 December 2016

[27] A similar extension has been suggested and is being discussed in Australia, see Australian Society of Authors, 'ASA Submission to the National Cultural Policy Consultation' (24 October 2011) 5 <www.asauthors.org/files/submissions/asa_submission_to_the_national_cultural_policy.pdf> accessed 15 December 2016; BICC Report (fn 13) 34

[28] Under the UK Digital Economy Act 2010, s 43, PLR schemes extended to on-site e-book downloads. However, since UK libraries were not offering onsite e-book downloads, this rule has not become effective in practice.

[29] William Siehart, 'An Independent Review of E-Lending in Public Libraries in England' (March 2013) <www.gov.uk/government/publications/an-independent-review-of-e-lending-in-public-libraries-in-england> accessed 15 December 2016

[30] SEO/Ivir, 'Online Lending of e-books by Libraries: Exploring Legal Options and Economic Impacts' (Dutch, 2012) <www.ivir.nl/publicaties/download/902> accessed 15 December 2016

[31] See 'Public Consultation on the Review of EU Copyright Rules' (2013) 21 <http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/docs/consultation-document_en.pdf> accessed 15 December 2016.

[32] E.g. Commission, 'Promoting a fair, efficient and competitive European copyright-based economy in the Digital Single Market' (Communication) COM (2016) 592

whether art 6 in the EU Rental and Lending Rights Directive[33] applies to the lending of e-books. In its opinion in the case, Advocate General (AG) Szpunar spoke clearly in favour of the technologically neutral treatment of PLR.[34] The CJEU followed the AG's opinion and concluded that at least some e-lending models should be subject to PLR.[35] Namely, the PLR exception applies in situations where e-books are lent to one user at a time (single-user model) and where an e-book becomes inaccessible after a loan period expires.

The goal of the next section is to examine whether a technologically neutral treatment of PLR is a necessary and appropriate solution to deal with issues facing e-lending market. For this purpose, I will first examine how technological neutrality principle is defined in doctrine and applied in court practice. This will allow me to extract the steps that courts undergo in deciding whether a particular pre-existing legal norm should be subject to the technological neutrality principle. Then, I will apply these steps in order to determine whether, under the technological neutrality principle, e-lending should be subject to the PLR regime, as it is currently established under the EU Public Lending and Rental Rights Directive.

3. Technologically neutral approach to PLR: an appropriate solution to e-lending problems?

3.1 The concept of technological neutrality

With the emergence of new digital technologies, technological neutrality has become a widely used concept. It has been defined in a number of ways, in different contexts, by law makers, courts and academics. It is discussed in various fields of law, such as communication law,[36] privacy and data protection law,[37] and copyright law.

Generally, the technological neutrality of law can be understood as the ability of legal mechanisms to comprehend changes independently of specific technologies.[38] In copyright law, the principle of technological neutrality means that copyright law should apply in an equal manner to different technologies expressing the same work. Copyright law should not attach more, or less, liability based solely on the technology used.[39] For instance, a photocopy of a

[33] Council Directive 2006/115/EC 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) [2006] OJ L376/28 (EU Rental and Lending Right Directive)
[34] Case C-174/15 *Vereniging Openbare Bibliotheken (VOB) v Stichting Leenrecht* (ECJ, 10 November 2016), Opinion of AG Szpunar
[35] Case C-174/15 *Vereniging Openbare Bibliotheken (VOB) v Stichting Leenrecht* (ECJ, 10 November 2016)
[36] Ulrich Kamecke and Torsten Korber, 'Technological Neutrality in the EC Regulatory Framework for Electronic Communications: A Good Principle Widely Misunderstood'(2008) 29(5) ECLR 330; Matt Vitins and Andrew Ailwood, 'Reasserting Technological Neutrality' (2007) 25(3/4) Communications Law Bulletin 17; Winston Maxwell and Marc Bourreau, 'Technology Neutrality in Internet, Telecoms and Data Protection Regulation', in Hogan Lovells, *Global Media and Communications Quarterly – Winter 2014* (2014) 19
[37] Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice* (ALRC Report 108, 2008) paras 10.3-10.12
[38] Tatiana-Eleni Synodinou, 'E-books, A New Page in the History of Copyright Law?' (2013) 35(4) EIPR 220, 618
[39] Kevin P Siu, 'Technological Neutrality: Toward Copyright Convergence in the Digital Age' (2013) 71 U. Toronto Fac. L. Rev. 76, 80

book should, in theory, be equivalent to a digital copy of the same book for the purposes of copyright law.

The purpose of the technological neutrality principle is to ensure new technologies are not hindered by copyright law. On the one hand, it is designed to protect authors by ensuring that new methods of dissemination remain within the scope of their rights, so that emerging technologies cannot be used to avoid copyright liability. On the other hand, it should ensure consumers who are using new technologies to access existing works are not subjected to additional copyright liability.[40] Importantly, technological neutrality should guarantee that copyright law concepts apply equally to both copyright owners and users, regardless of the format of a work, whether it is analogue or digital.[41]

With the development of new technologies, courts in different jurisdictions have been requested to decide whether the pre-existing laws apply to these new technologies, i.e. whether the law should be applied in a technologically neutral manner. In the following sections I will analyse selected cases that explicitly or implicitly deal with the technological neutrality principle. For the purpose of this analysis, I will refer to the cases decided by the courts in the EU and in the US. US courts often deal with the technological neutrality principle more explicitly and therefore their decisions need to be taken into consideration when developing a systematic approach for technological neutrality.

3.1.1 Technological neutrality and digital exhaustion

The first set of cases that provide useful guidance on the application of the technologically neutral approach are cases dealing with the exhaustion of rights online. Under copyright law, after a work was brought into the market for the first time with the consent of the right holder, the right holder cannot further control its distribution and it can subsequently be redistributed (resold, etc) without their authorisation[42].

In the famous 2012 CJEU *Usedsoft* decision,[43] the court had to determine whether the exhaustion doctrine applies to software sold online. The CJEU adopted a technologically neutral interpretation of the EU Software Directive and suggested that the distribution right is exhausted both when the software is distributed in a tangible format (via DVD) and in a digital formal online. In its analysis, the CJEU first applied the literary interpretation of the definition of a distribution right under the EU Software Directive[44] and examined the legislator's intent. It concluded that the technologically neutral definition made 'abundantly clear the intention of the European Union legislature to assimilate, for the purposes of the protection laid down by Directive 2009/24, tangible and intangible copies of computer programs'.[45] The court then analysed what economic effects the exhaustion of right would have on the balance of rights of the different stakeholders involved. It concluded that non-exhaustion of rights online would

[40] Ibid 79-80
[41] Synodinou (fn 38) 618
[42] This is referred to as the 'right exhaustion' doctrine in the EU and as the 'first sale' doctrine in the US
[43] Case C-128/11 *UsedSoft GmbH v Oracle International Corp.* (ECJ, 3 July 2012)
[44] Council Directive 2009/24/EC of 23 April 2009 on the legal protection of computer programs [2009] OJ L111/16
[45] *Usedsoft* (fn 43) para 59

'allow the copyright holder to control the resale of copies downloaded from the Internet and to demand further remuneration on the occasion of each new sale, even though the first sale of the copy had already enabled the right holder to obtain an appropriate remuneration'.[46] Finally, the court looked at the functional equivalence between offline and online sales. It acknowledged the potential differences between online and offline sales and particular concerns related to the former, such as the difficulty in preventing the user who re-sells the second-hand digital copy of the software online from continuing to use the copy. However the court saw these differences as minor ones and not sufficient to justify a different treatment of offline and online sales.

The CJEU *Usedsoft* decision was met with controversy[47] and it was followed by the courts of the EU Member States to a varying degree. The Court of Appeal of Hamm (Germany) in its *e-Books* case[48] concluded that exhaustion does not apply when e-books are sold online. The court noted that the CJEU *Usedsoft* decision is strictly based on the EU Software Directive and, therefore, does not need to be followed in the case that concerns the resale of e-books. In contrast, in the *Tom Kabinet* case[49], the District Court of Amsterdam (the Netherlands) ruled that the unauthorised resale of used e-books was permitted based on the CJEU's *Usedsoft* ruling, despite the fact that it dealt with a different subject matter.[50] Recently, the Hague Court of Appeal has decided to ask the CJEU for an opinion on this issue.[51]

Importantly, German and Dutch courts seem to ask lightly different questions when analysing whether technological neutrality principle should apply to digital exhaustion cases. The Court of Appeal of Hamm in its decision focuses on the wording of the making available right under the EU Information Society Directive, including the recital explaining that exhaustion does not apply to the making available right. It also refers to the legislative history of the Directive and notes that legislators new about repeated communication of works but decided not to introduce the exhaustion doctrine with relation to the public communication right. Further, the court refers to the fact that online communication triggers a different set of interests as compared to offline distribution[52]. In comparison, the District Court of Amsterdam in its decision seems to

[46] Ibid para 63
[47] See, e.g., E Linklater, 'UsedSoft and the Big Bang Theory: Is the e-Exhaustion Meteor about to Strike?' (2014) 5 JIPITEC, available at https://www.jipitec.eu/issues/jipitec-5-1-2014/3903/?searchterm=usedsoft (15 September 2017); P Mezei , 'Digital First Sale Doctrine Ante Portas – Exhaustion in the Online Environment' (2015) 6 JIPITEC, available at https://www.jipitec.eu/issues/jipitec-6-1-2015/4173/?searchterm=usedsoft; Christopher Stothers, 'When is Copyright Exhausted by a Software Licence?: UsedSoft v. Oracle' (2012) *European Intellectual Property Review* 788; Lazaros G. Grigoriadis, 'The distribution of software in the European Union after the decision of the CJEU "UsedSoft GmbH v. Oracle International Corp." ("UsedSoft")' (2013) 8(3) Journal of International Commercial 198.
[48] OLG Hamm, Decision of 15 May 2014 Az. 22 U 60/13
[49] NUV v. Tom Kabinet, Court of Appeal of Amsterdam, ECLI:NL:GHAMS:2015:66, 20 January 2015
[50] *Nederlands Uitgeversverbond and Groep Algemene Uitgevers v Tom Kabinet*, Case C/13/567567/KG ZA 14-795 SP/MV, District Court of Amsterdam, 21 July 2014
[51] The decision of the Hague Court of Appeal that lists the questions to be submitted to the CJEU is available at https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2017:7543
[52] OLG Hamm, Decision of 15 May 2014 Az. 22 U 60/13, paras 17-18

rely on economic arguments that the CJEU applied in the *Usedsoft* decision.[53] Namely, the judge considers para 62 of the *Usedsoft* decision to be very important. Here, the CJEU explains that the goal of the exhaustion principle is to avoid partitioning of markets, by limiting the restrictions of the distribution of works to what is necessary to safeguard the specific subject-matter of the intellectual property concerned. Namely, as further explained in para 63 of the *Usedsoft* decision, right holders are given a possibility to derive profits from their products via the first sale, but the purpose of safeguarding intellectual property rights does not require that they receive a continuous revenue from any subsequent transfer of goods to third parties.

The US case of *Capitol Records, LLC v. ReDigi, Inc.*[54] provides a further useful guidance on how courts outside the EU approach the question of technological neutrality in digital exhaustion cases. In contrast to the CJEU decision in the *Usedsoft* case, the US court decided that the 'first sale' doctrine does not apply to the resale of digital music files, even if the original file is deleted after the sale of it occurs. The court took the following steps in its analysis. It first considered the literary wording of the relevant provisions, in particular the reproduction and distribution rights, and found that the contested use fell within the scope of these rights. Second, when discussing the application of the first sale doctrine, the court examined the legislative history of the US Copyright Act and did not find sufficient argument to extend the first sale doctrine to digital sales. In contrast, it provided reasons as to why the extension of the right exhaustion doctrine to online platforms is not necessary justifiable. In particular, it referred to the fact that functionally online distribution of files is different from offline distribution and this is likely to lead to different economic consequences:

> '*the impact of the [first sale] doctrine on copyright owners [is] limited in the off-line world by a number of factors, including geography and the gradual degradation of books and analogue works (...) Digital information does not degrade, and can be reproduced perfectly on a recipient's computer. The "used" copy is just as desirable as (in fact, is indistinguishable from) a new copy of the same work. Time, space, effort and cost no longer act as barriers to the movement of copies, since digital copies can be transmitted nearly instantaneously anywhere in the world with minimal effort and negligible cost. The need to transport physical copies of works, which acts as a natural brake on the effect of resales on the copyright owner's market, no longer exists in the realm of digital transmissions. The ability of such "used" copies to compete for market share with new copies is thus far greater in the digital world.*'[55]

3.1.2 Technological neutrality and online retransmission of broadcasts

Another set of cases discuss scenarios involving retransmissions of broadcasts over the Internet and whether such online retransmission should be treated in the same way as similar offline

[53] See summary of the case of the district court: Míchel Olmedo Cuevas, 'Dutch copyright succumbs to aging as exhaustion extends to e-books', available at http://jiplp.blogspot.com.au/2014/10/dutch-copyright-succumbs-to-aging-as.html

[54] *Capitol Records, LLC v. ReDigi, Inc.* 12 Civ. 95 (March 30, 2013)

[55] Ibid 12-13

retransmission services. These cases seem to follow the same pattern of analysis as far as the application of the technologically neutral approach is concerned.

In the *Zatto* case,[56] the District Court of Hamburg (Germany) had to determine the question of whether Internet retransmission qualifies as 'cable retransmission' under art 20b of the German Copyright and Related Rights Act and is thus subject to the compulsory licensing scheme. The court initially looked at the literary wording of the provision and found that it is rather open. Then it analysed the legislative history of the provision and found there is insufficient evidence to conclude that art 6 of the EU Cable and Satellite Directive, as transposed in art 20b of the German Copyright and Related Rights Act, is a technologically neutral provision. Finally, the court also considered whether the new Internet technology is sufficiently similar, or equivalent, to a previous cable retransmission technology that was intended to be covered by the Directive. The court found significant functional differences between the two, such as ease and speed of Internet transmission as well as its potential reach. For these reasons, the court concluded it would not be reasonable to extend the application of the provisions on cable retransmission to Internet retransmissions.

In comparison, the US *Aereo* case[57] dealt with to some extent similar retransmission over the Internet services but the conclusions reached were different. Aereo offered subscribers broadcast television programming over the Internet, virtually as the program is being aired. Each subscriber was provided with individual antenna that recorded the TV program and enabled the individual subscriber to view the broadcast over the Internet. The main issue the courts had to consider was whether Aereo was performing broadcasts to the *public* within the meaning of 17 U.S.C. § 101 ('Transmit Clause').[58]

The US Supreme Court found that Aereo service, despite the intricate design, constitutes the retransmission to the public. The court analysed whether the Transmit Clause has to be given a technologically neutral application. In its analysis, the court first examined the history of the Transmit Clause and the intent of Congress to legislate community antenna television (CATV) services that were considered novel at the time. The court subsequently compared CATV and Aereo services and found that Aereo's activities are substantially similar to those of the CATV companies. The court did note that the Aereo service differs from traditional cable TV services. While cable TV programs are transmitted constantly and send continuous programming to each subscriber's television set, Aereo's system remains inert until a subscriber indicates they want to watch a particular program. However, the court concluded 'this sole technological difference between Aereo and traditional cable companies does not make a critical difference here'.[59] In this way, the minor functional differences were discounted and, as a result, Aereo services were subject to the same legal treatment as traditional retransmission services.

[56] District Court of Hamburg decision of 8. April 2009 Az. 308 O 660/08 ZUM 2009, 582
[57] *American Broadcasting Companies v Aereo* 573 U.S. __ (2014)
[58] The Transmit Clause defines the exclusive public performance right as including the right to 'transmit or otherwise communicate a performance… to the public … whether the members of the public capable of receiving the performance receive it in the same place or in different places or at the same time or at different times'
[59] *Aereo* (fn 57) 10

3.2 Technological neutrality: a five-step approach

The above cases assist us in identifying various techniques that are used by courts in different jurisdictions when interpreting legal texts and applying them with respect to new technologies and services.

Firstly, courts generally start with the literary interpretation of the statute in order to determine whether the new uses fall within the scope of the provision, or whether the statute is clearly or impliedly restricted to a certain technology.[60] Secondly, if the literary reading of the provision does not provide a clear answer, the courts consider the legislative history of the provision for the purpose of identifying whether legislators intended to make it applicable to future technologies.

Thirdly, some courts go one step further and compare technologies to determine whether old and new uses are functionally equivalent. If new technology leads to essentially the same effects as the previous use covered by the legal provision in question, then the new technology could also be covered by that provision. Here, the distinction should be drawn between physical reality and functional equivalence. New technologies may perform the function in a physically different way, but what matters is whether the functions are actually equivalent. For example, the physical reality of sending of an email is that a copy is reproduced several times while it is being sent across the world. However, from a functional perspective, it is equivalent to sending a letter by post.[61] This functional equivalence test was applied in the CJEU *Usedsoft* case where the court found that, despite certain technological differences, the online sale of software was functionally equivalent to offline sale. It was similarly applied in the US *Aereo* case where the court found that retransmission over the Internet, despite technological differences, led to essentially the same results as transmission using CATV services for which the Transmit Clause was designed.

Fourthly, one may go even further and elaborate on economic considerations ie whether new technologies, if treated the same as old ones, would impact markets and the interests of stakeholders. In the *Usedsoft* case, the CJEU found that applying the exhaustion principle to digital sales of software would not unreasonably harm the interests of right holders, as they had already been remunerated during the first sale of the software. At the same time, it is true that such economic considerations and the weighing of different interests is the prerogative of a legislator and therefore courts often avoid making conclusive remarks in this regard. For this reason, the court in the *ReDigi* case highlighted the potential economic impacts of digital distribution services but left it to Congress to determine how they should be treated. Similarly in the *Zatto* case, the court referred to the easiness, speed and wide reach of the Internet retransmission which arguably has economic implications in broadcasting sector and denied the application of the pre-existing legal provision to new Internet-based services.

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[60] An example of the provision that is clearly restricted to a particular technology could be found in the EU art 5(2)(a) Council Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167/10 art 3 (EU Information Society Directive) (reprographic copying)

[61] Siu (fn 39) 89

Generally, if new uses are found functionally and economically equivalent to previous ones covered by the legislation at stake, it would be logical to subject them to the same legal regime. Similarly, if new technologies are neither technologically nor economically equivalent to older uses, the pre-existing laws would not normally extend to the new uses. However, it is worth noting that exceptions remain possible. There may be a variety of policy reasons why particular digital services should be treated differently from similar analogue services, such as stimulation of competition in emerging markets and public security.[62] The technological neutrality principle only requires that policies and laws directly or indirectly distinguishing between technologies should have a proper justification. For example, although the EU Audiovisual Services Directive[63] generally applies the technological neutrality principle, it subjects linear and non-linear services to different rules. The distinct regulatory treatment of linear and non-linear services is justified by the different nature of both types of services, which are characterised by the level of user control and media persuasiveness.[64] Thus, the fifth step of the test is to consider all other policy considerations and assess whether a technologically neutral solution is the best available option in the given circumstances.

3.3. Technological neutrality meets PLR

The next step is to apply the above developed five-step approach in determining whether PLR has to be subject to technological neutrality and, thus, should be applied to public e-lending services.

3.3.1 Literary interpretation

Firstly, I will adopt the literary interpretation of the lending right provision as found in the EU Lending and Rental Rights Directive.[65] According to art 2(1)(b) of the Directive, '"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'. At first glance, the definition seems to be broad enough to embrace e-book lending in public libraries, as long as the loan is time-limited. The definition is technologically neutral and does not mention the format of the subject matter that could be made available for public lending. Article 3(1) of the Directive refers to 'original and copies'. Although the provision is expressed in a technologically neutral way, some authors argue this formulation encompasses the 'first materialisation' of the work as well as further reproductions thereof.[66] However, this assertion is not convincing. In the VOB case, the AG adopted the

[62] Kamecke and Korber (fn 36) 331
[63] European Parliament Directive 2010/13/EU of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive (AVMSD)) Off. J. L. 95 (2010) 1
[64] Oliver Castendyk and Kathrin Bottcher, 'The Commission's Proposal for a New Directive on Audiovisual Content – A Feasible Solution?' (2006) 17(6) Ent. LR 174, 176
[65] For an interpretation of the Directive, see J Reinbothe and S von Lewinsky, *The EC Directive on Rental and Lending Rights and on Piracy* (Sweet & Maxwell, London, 1993) 41, 42
[66] Dusollier (fn 9) 6

following technologically neutral interpretation of copies, which was subsequently accepted by the ECJ:

> '*copies, for the purposes of the provision under consideration, must not be equated solely with physical copies of a work. Indeed, a copy is merely the result of an act of reproduction and a work exists only in the form of the original and the copies thereof, which are the result of the reproduction of the original. While traditional copies, in the case of books in printed form, are necessarily contained in a physical medium, that is not so of electronic copies*'.[67]

3.3.2 Legislator's intent

Secondly, legislative history and the legislator's intent must be examined. It raises more serious concerns as to whether the Directive was intended to cover digital lending. The European Commission clarified the following concepts that appeared in the proposal for the Rental and Lending Directive: that 'the making available for use within the meaning of paragraph 2 always refers to material copies only'; and the 'acts for making available by use of electronic data transmission have been excluded from the scope of this Directive'.[68] Member States also discussed the coverage of electronic rental or lending at the Council Working Group. However, they decided they did not want to proceed with the issue, considering the topic to be premature at that point in time.[69] Thus, most commentators seem to agree that the legislative history restricts the application of the public lending right to print books only.[70]

In contrast, the AG suggested that the Explanatory Memorandum of the Directive does not sufficiently support the exclusion of e-books from the PLR. Namely, the Commission explicitly mentioned the online lending of videos only and not e-books, yet they did not even exist at the time.[71] The CJEU again agreed with the AG's opinion that the Commission never directly expressed the desire to exclude digital copies in the actual text of the Directive.[72] It also highlighted the need for copyright law to adapt to new economic developments and new forms of exploitation, as well ensuring high levels of protection for authors.[73]

However, the CJEU's analysis of the legislative history of the Directive is not without criticism. Firstly, the CJEU seem to simply disregard a clear intention by the European Commission and Council to exclude the 'making available [of works] by use of electronic data' from the scope of the public lending right. E-books clearly fall within the literary concept of electronic data. Furthermore, on-demand transmission of digital files is covered by the Information Society

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[67] See Case C-174/15 *Vereniging Openbare Bibliotheken (VOB) v Stichting Leenrecht* (ECJ, 10 November 2016), Opinion of AG Szpunar, para 44

[68] Commission, 'Proposal for the Council Directive on rental right, lending right, and on certain rights related to copyright' COM (1991) 586 final 34-5

[69] Dusollier (fn 9) 6-7

[70] Silke von Lewinski, 'Rental Right, Lending Right and Certain Neighbouring Rights: The EC Commission's Proposal for a Council Directive' (1991) 13(4) EIPR 117, 119

[71] Case C-174/15 *Vereniging Openbare Bibliotheken (VOB) v Stichting Leenrecht* (ECJ, 10 November 2016), Opinion of AG Szpunar, para 25

[72] Case C-174/15 *Vereniging Openbare Bibliotheken (VOB) v Stichting Leenrecht* (ECJ, 10 November 2016), para 43.

[73] Ibid paras 45-6

Directive, which harmonizes the 'making available' right.[74] Secondly, the CJEU correctly identifies the Directive's intention to grant high levels of protection to authors. However, the CJEU seems to misunderstand the true impact of their ruling. The extension of the PLR exception to e-books reduces the scope of rights enjoyed by the right holders. Before the decision, e-book lending was considered to fall within the scope of the making available right, allowing authors to control e-book lending and negotiate appropriate fees. By extending the PLR to e-lending, the CJEU removed this right to control e-lending. Instead, right holders were subjected to PLR schemes that, in most cases, merely provide symbolic payments to authors. Thus, the CJEU has effectively created an exception to the making available right that favours libraries over authors or publishers.

3.3.3 Functional equivalence test

Thirdly, the e-lending model should be assessed from the perspective of the functional equivalence test. For the purpose of this analysis, we need to distinguish between two different types of e-lending. 'Friction-free' e-lending allows libraries to lend e-books without any restrictions by making use of all functionalities provided by digital technology. Another form of e-lending involves restricting technological features. From the outset, e-lending services in public libraries have been restricted by the agreements between libraries and publishers and distributors that supply the e-books. As discussed earlier, libraries have been applying various restrictions to their e-lending services, such as 'single-user' and 'wear and tear' clauses. For the purpose of this analysis we will focus on one of the restricted models, the single-user e-lending model. This model still seems to be the most popular in current e-lending practice[75], and it was the focus of the discussion in the CJEU *VOB* case.

As far as friction-free e-lending model is concerned, it is obvious that it is not functionally equivalent to print book lending. Unrestricted e-lending has several significant technological differences when compared with the lending of print books. In the case of traditional lending, a copy of a book that the library owns is physically transferred to the possession of the patron for temporary use. In the case of e-lending, an e-book that is being lent remains in the possession of the library. An electronic copy of the book is made and sent via the Internet to the patron, who then downloads it by making another copy on his/her device.[76] This technological difference, if fully enabled in public e-lending practice, would have significant consequences. Since the initial copy remains in the collection of a library, it could be simultaneously 'lent' to other patrons (ie by making further copies). It does not deteriorate or get lost, nor do users need to 'return' it to the library. This demonstrates that traditional lending and 'friction-free' e-lending are not functionally equivalent.

On the other hand, the single-user e-lending model aligns much more closely with print book lending. From a physical perspective, a digital copy is still made and transmitted to the computer of the patron who placed the order while the original copy remains with the library. However, an e-book is not 'lent' again until the existing loan expires. This friction mimics the

[74] EU Information Society Directive (fn 60) art 3
[75] According to the Civic Study, of the 18 e-lending models reviewed, nearly 40% operate solely on the basis of single-user licenses, see Civic Agenda EU (fn 2) 95
[76] This is similar to the sale of digital files online, as discussed in *Usedsoft* and *Redigi* above

traditional borrowing of printed books by artificially creating a waiting list for a particular title. Such model of e-lending is similar to print book lending, as library loans would potentially be limited to the same number of loans that could occur in relation to print books.[77]

At the same time, certain differences remain between print book lending and the restricted e-book lending model. Patrons do not need to visit the library to collect or return the e-book. They can choose their titles at any time and from any place they want, thus facilitating 24/7 service.[78] The copy in the 'possession' of the library does not deteriorate or get lost, regardless of the number of loans taken out, nor does the library need storage space for new titles. Keeping these differences in mind, it is difficult to argue that a restricted single-user e-lending model entirely meets the technical equivalence requirement. The essential question is whether these differences are substantial enough to deny the application of the technical neutrality principle, or alternatively whether the differences are insignificant and could thus be disregarded. Previous analysis of case law shows that such a qualitative assessment is subjective. In cases dealing with essentially the same technologies, some courts found they were equivalent with previous uses, while other courts reached the opposite conclusion. For instance, in cases dealing with the sale of digital files online,[79] the US court found substantial differences between offline and online sales (*Redigi* case), while the ECJ considered them to be insignificant (*Usedsoft* case).

As a result, whereas friction-free e-lending model is clearly not functionally equivalent with print book lending, single-user e-lending model could arguably satisfy this test, despite certain functional differences.

3.3.4 Economic equivalence test

Fourthly, economic equivalence test asks to examine how subjecting novel e-lending practices to the pre-existing PLR schemes would affect the balance of interests of different right holders.

The traditional lending and friction-free e-lending would not meet the economic equivalence test. That is, friction-free e-lending is likely result in an imbalance of economic interests for different stakeholders. If libraries were able to make full use of technological possibilities e-lending provides, this would certainly make their job easier and their services would be much more attractive to users. As mentioned earlier, e-lending technology permits libraries to lend a single e-book to an unlimited number of users simultaneously. In such a case, libraries would never run out of stock and users would not need to wait until the borrowed item is returned to the library. Also, since e-books do not deteriorate or get lost, libraries could keep a 'single'

[77] Potentially, the number of e-loans could still be higher as the new loan would start immediately after the previous one expired, without the need to put the book back onto shelves or for a new patron to come and collect it

[78] Some studies show that this attracts a new audience to libraries. For example a survey conducted by Tallinn Central Library in Estonia in October 2013 found that 58.7% of all e-book loans occurred outside the library's opening hours, 36.8% took place on Sundays, and 58% of loans were made between 8:00pm in the evening and 8:00am in the morning. This demonstrates that the ELLU e-lending service satisfies user demand, which simply could never have been addressed under the printed book lending model. See Civic Agenda EU (fn 2) 99-100

[79] Although *Usedsoft* dealt with the online sale of software and *Redigi* concerned the online sale of music, the difference in subject matter does not have a significant impact as the distribution right that is being examined applies in respect of both subject matter

copy of an e-book for an unlimited time without the need to buy new copies, even for the most popular titles.[80] Patrons could download e-books online at any time and from any place. Loans could be extended indefinitely or libraries could even choose to offer perpetual loans.[81] From a functional perspective, libraries could always produce and lend a 'new' digital copy of any e-book. 'Friction-free' e-lending could lead to lower acquisition costs, as libraries would only need to buy one copy of an e-book to satisfy unlimited demand. It could mean lower storage costs as no physical storage space is needed,[82] which could subsequently lead to lower service costs as fewer people would need to actually visit the library.[83] Users would be able to acquire any book at any time from any place essentially for free and possibly for an unlimited time.

However, the impact of such a friction-free e-lending on right holders' markets is likely to be disruptive. Essentially libraries would become direct competitors in e-book markets, offering the same products and services as publishers and online distributors, but for free.[84] This would discourage publishers from publishing e-books and would only lead to the stagnation, if not collapse, of e-book markets. As a result, e-lending, if taken in its unrestricted model, meets neither the functional nor economic equivalence test. For similar reasons, all commentators seem to agree that friction-free e-lending would not be a viable option.[85]

On the other hand, one could argue that a 'single-user' e-lending model could withstand the economic equivalence test. It is clear that additional features available under a single-user e-lending model (e.g. 24/7 e-lending service online; no need of physical storage space, etc.) are designed to benefit libraries and users. However, it is not entirely clear how such e-lending models affect the interests of right holders. Publishers tend to argue even restricted e-lending models, such as the single-user model, are likely to detrimentally impact the sale of e-books. However, the evidence seems to support the opposite conclusion. In Europe, most e-lending models included in the agreements between libraries and publishers contain a single-user clause.[86] This means that publishers do not consider such an e-lending model to be a threat to their e-book markets. If there is the risk of a certain loss, publishers can eliminate or reduce it by charging libraries higher prices at the point of sale. Further, studies in the US[87] and in the

[80] Obviously, formats can become out-dated and libraries may need to either change the format themselves or, if this is not possible, buy new versions of the same e-books

[81] This is currently accepted practice in academic libraries. Research articles can be downloaded for an unlimited time and can be reproduced further or even shared to a certain extent for study and research purposes.

[82] However, platform establishment and maintenance could attract significant costs.

[83] Yet we should not ignore the argument that some users visit libraries for human contact. See Case C-174/15 *Vereniging Openbare Bibliotheken (VOB) v Stichting Leenrecht* (ECJ, 10 November 2016), Opinion of AG Szpunar, para 30

[84] For example, in Denmark, the public library e-lending platform eReolen managed to maintain higher demand for its e-lending service than competing commercial platform eBib.dk.

[85] See Dusollier (fn 9) 1: 'This paper argues in favour of *some and controlled* extension of the public lending right to cover the lending of e-books and other digital content'. – Italics by RM). On the other hand, such a 'free' e-lending model could be possible if libraries were to pay market price for e-lending. This would mean their services would become comparable to commercial e-lending services, such as Skoobe in Germany

[86] See Civic Agenda EU (fn 2) 95

[87] For example, the US Pew Internet Report highlights the fact that libraries and librarians are a significant source for owners of e-reading devices to get recommendations for reading materials (21%). See Pew Internet, 'The Rise of e-reading' (5 April 2012) <libraries.pewinternet.org/files/legacy-pdf/The%20rise%20of%20 e-reading%204.5.12.pdf> accessed 15 December 2016. According to other research, 50% of all library users in the USA report purchasing books by an author they were introduced to by the library. See Andrew Albanese, 'Survey

UK[88] have shown that single-user or similar restrictive e-lending models did not have a discernable negative impact on e-book sales. Instead, such restricted e-lending seems to have operated as a promotional service for right holders, actually helping to increase sales in some circumstances.[89] Therefore it is possible to conclude that some restrictive e-lending models, such as the single-user model discussed in the *VOB* case, meet the economic equivalence test.

As a result, whereas friction-free e-lending would be both functionally and economically too different from print book lending, certain restricted e-lending models, such as single-user model, more closely resembles traditional lending. The close similarity between the single-user model and traditional lending has arguably been the basis for the CJEU decision in the *VOB* case.

3.3.5 Policy considerations

Before concluding the analysis of the technological neutrality principle we need to take the last step and look at the policy considerations that arise when discussing the suitability of PLR to e-lending. Namely, is the partial application of PLR to single-user e-lending model only, as suggested by the CJEU, a most viable solution to e-lending problems? Alternatively, would the extension of PLR to all models of e-lending, even if they are not functionally or economically equivalent to traditional lending, be a reasonable solution from a copyright policy perspective?

The goal of the copyright law is to provide a balanced system where right holders are provided with exclusive rights to control the use of their works and are rewarded for the use of their works, while users have an access to works via the exceptions provided under copyright law. In order to determine whether a particular exception is reasonable from a copyright policy perspective, we need to assess whether it would achieve the intended public policy goals[90] and whether it meets the so-called 'three-step test'. According to the three-step test, Member States should confine limitations and exceptions to exclusive rights to (i) certain special cases (ii) which do not conflict with a normal exploitation of the work and (iii) do not unreasonably prejudice the legitimate interests of the rights holder.[91]

As far as restricted e-lending practices, such as a single-user model, are concerned, they could potentially meet the three-step test. Firstly, a single-user e-lending model could be considered as a 'certain special case' since it is limited to certain specific types of public e-lending services. Secondly, it would arguably not conflict with the normal exploitation of the work. As the

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Says Library Users Are Your Best Customers' (*Publishers Weekly*, 28 October 2011) <www.publishersweekly.com/pw/by-topic/industry-news/publishing-and-marketing/article/49316-survey-says-library-users-are-your-best-customers.html> accessed 15 December 2016

[88] The Publishers Association, 'Pilot Study on Remote E-Lending' (5 June 2015) <www.publishers.org.uk/policy-and-news/news-releases/2015/pilot-study-on-remote-e-lending/> accessed 15 December 2016

[89] For example, the German e-lending platform Divibib preceded the uptake of the e-book market in Germany, and to some extent encouraged it. For more information about the German Divibib platform, see Civic Agenda EU (fn 2) 37-9

[90] This test has been applied in recent CJEU cases, see e.g. C-360/13 – *Public Relations Consultants Association*, at 24, 35 (short references to public interest); C-117/13 *Darmstadt*, at 27, 31; C-201/13 *Deckmyn*

[91] Art 5(5) EU Information Society Directive (fn 60); see also Art 13 Agreement on Trade-Related Aspects of Intellectual Property (TRIPS)

previous analysis has shown, single-user model could be considered functionally and economically equivalent to the traditional print book lending.[92] Meanwhile, it has been accepted that traditional lending does not interfere with commercial exploitation of books. Thirdly, one could argue that single-user e-lending model does not unreasonably prejudice the interests of right holders either. The extension of the PLR exception to single-user e-lending model would mean that right holders lose an opportunity to allow or prohibit the lending of e-books and to negotiate the fee with the library for e-lending. However, right holders would be entitled to receive a compensation under PLR schemes that corresponds to the remuneration received for the analogous print book lending.

On the other hand, extending PLR exception to a single-user e-lending model seems to serve only very limited public goals. Although single-user model has been one of the most popular e-lending models so far,[93] it has obvious disadvantages. For some patrons, single-user licenses can seem like artificially imposed restrictions when contrasted with their experiences of accessing other forms of digital media. It also prevents libraries from making use of new capabilities of digital technologies and artificially mimics the features of print lending. For these and other reasons, many libraries have moved from the single-user model to the pay-per-loan model. Apart from the German Divibib platform, the remaining top three e-lending models in Europe are all pay-per-loan, simultaneous user models.[94] Pay-per-loan licensing models offer a positive e-lending experience for patrons, as they do not contain the restriction on simultaneous users like the single-user license models. Thus, they can be a cost-effective solution for libraries.[95] It is therefore questionable whether it would be reasonable legally to sanction a single-user e-lending model while leaving other more progressive e-lending models outside the scope of the PLR exception. This might also encourage libraries to keep or even move back to a single-user model, which is less convenient for patrons and may be regarded as an out-dated version of e-lending.

Further, it is questionable whether extending PLR to certain e-lending models would solve the main problems the libraries are facing, namely, the lack of access to e-book titles and high prices that some publishers or aggregators charge[96]. The PLR exception, as it currently stands, comes into effect once the library has acquired a book and thus does not affect right holders' choice to withhold certain e-titles from libraries or charge libraries excessive prices for all or certain e-titles. Competition law may provide some answers as to whether publishers are allowed to continue with such practices. However, even supporters of the extended PLR exception agree that it might be practical to allow publishers to withhold new titles for a certain

[92] See analysis above

[93] According to the Civic Study, of the 18 e-lending models reviewed, nearly 40% operate solely on the basis of single-user licenses. See Civic Agenda EU (fn 2) 95

[94] 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 (fn 2) 11

[95] Civic Agenda EU (fn 2) 12

[96] See a good summary of problems by AG Szpunar, Case C-174/15 *Vereniging Openbare Bibliotheken (VOB) v Stichting Leenrecht* (ECJ, 10 November 2016), Opinion of AG Szpunar, paras 33-6

period of time.[97] Also, it might be reasonable for publishers to charge higher prices for e-books that will be offered for lending, especially for new and popular titles.

At last but not the least, this solution would provide limited, if any, benefits to authors. As mentioned earlier[98], PLR schemes provide only symbolic payments, rather than an adequate compensation for the use of works. Also, it is unlikely that states would increase PLR budgets in the foreseeable future. Further, even in countries with most advanced public e-lending services, e-lending constitutes no more than 3% of all titles lent out by libraries.[99] This means authors are unlikely to feel any increase in their compensation from PLR, at least in the immediate future.

In conclusion, although the extension of PLR exception to single-user e-lending models is likely to withstand the three-step-test, it is unlikely to reach its public policy goals, such as providing libraries access to e-book titles, ensuring high quality experiences for the users of e-lending services, and remunerating authors for the use of their works.

The next question is whether it would be reasonable, from a copyright policy perspective, to extent PLR to all types of e-lending services, including friction-free e-lending models. The answer is likely to be negative. Firstly, even though friction-free e-lending models are likely to open more opportunities to libraries and users (i.e. no artificial waiting lists or other friction), the public benefits of the PLR exception would still be limited. Namely, it would have no impact on libraries' ability to get access for e-titles at the first place, neither it would be able to influence pricing conditions imposed by right holders. Secondly, the extension of the PLR exception to all models of e-lending is unlikely to meet the three-step test. Under the friction-free e-lending model, libraries were able, after acquiring a single copy of an e-book, to freely lend the e-book to unlimited number of users simultaneously for unlimited time period. They could potentially make new copies in case the initial copy gets lost or damaged, without the need to buy a new copy, etc. Such models of e-lending would arguably conflict with the normal exploitation of the work. Libraries would be offering the services that are identical to those of e-book retailers, and right holders are likely to lose sales as a direct result of such library practices. Also, such e-lending models would unreasonably prejudice the legitimate interests of right holders. Even if such e-lending would be subject to PLR remuneration schemes, as explained above, PLR schemes provide a merely 'symbolic' remuneration for lending in public libraries. This is likely to be inadequate in cases where libraries offer e-books under friction-free e-lending models. Advocates of the extended PLR exception[100] and AG Szpunar in the VOB case[101] agree that restriction-free e-lending is not a viable option and that certain frictions are needed to ensure that e-lending by public libraries does not directly compete with online e-book sales.

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[97] Dusollier (fn 9) 15
[98] See supra 2.2
[99] See, e.g. Australian Library and Information Association, *20:80 by 2020,* (19 December 2016) <https://www.alia.org.au/sites/default/files/documents/ALIA-8020-by-2020.pdf>.
[100] Dusollier (fn 9) 14-5.
[101] Case C-174/15 *Vereniging Openbare Bibliotheken (VOB) v Stichting Leenrecht* (ECJ, 10 November 2016), Opinion of AG Szpunar, para 73.

In conclusion, the analysis has demonstrated that the technological neutrality principle does not itself require the extension of PLR to e-lending. Although the extension of PLR to single-user e-lending models could be justifiable, it appears to provide a very limited solution to the problems pressing the e-lending sector. At the same time, the extension of PLR to all e-lending models would neither satisfy functional and economic equivalence tests nor be reasonable under general copyright policy considerations.

4. Potential alternatives

So far, the focus of this article has been the question whether technologically neutral treatment of PLR, as suggested by the CJEU, is a suitable solution to the problems facing the public e-lending sector. The previous sections have demonstrated that it could provide a limited, though not optimal, solution in certain e-lending scenarios (such as a single-user model) but would not solve the major problems related to e-lending. Therefore, the alternative options need to be discussed. The purpose of this section is to shortly introduce several possible options that could be considered at the European level, leaving the comprehensive analysis of these options for future discussion.

4.1 Stakeholder dialog

One potential solution to the issues surrounding e-lending is the encouragement of national or EU-wide dialogs between publishers and authors with the goal of establishing standards and best business practices in the sector.

It should be noted that the continuous negotiations between stakeholders have already improved the situation of libraries. In countries with a longer experience of e-lending, such as the US, more and more publishers agree to license at least some titles for e-lending and on less restrictive terms.[102] Newer e-lending models, especially in continental Europe, allow concurrent access subscriptions under which a certain population of patrons can access a title at the same time, or a catalogue service that grants patrons access to a defined collection of titles.[103]

Further, it is interesting to note the differences between academic and non-academic e-lending. In academic libraries e-lending has become a rule, mainly for articles, but also increasingly for books.[104] Academic libraries face much fewer problems than public ones. There is no issue of publishers refusing to supply new titles. Access restrictions that were initially much more stringent are gradually being lifted.[105] This could be explained to a certain extent by the

[102] In the US, three out of the big six publishers were still refusing to make their e-books available to libraries in 2012. By 2013, all but one of these major publishers had revised their position to make at least some of their digital titles available to libraries. See Mount (fn 11) 5

[103] See Civic Agenda EU (fn 2) 96

[104] The digital academic publishing market is more extensive than non-academic publishing in many countries. For example, in the UK 72% of the digital publishing market was academic/research digital products. See OECD, 'E-books: Developments and Policy Considerations' (OECD Digital Economy Papers, No. 208, 2012) 12 <www.oecd-ilibrary.org/docserver/download/5k912zxg5svh-en.pdf?expires=1481793486&id=id&accname=guest&checksum=04816799C4FEF14CA144649A1E7CAAE3> accessed 15 December 2016

[105] For example, instead of consulting e-publications in library premises, academic library users can now access titles remotely, save publications to multiple devices, print copies, share it with colleagues, etc

traditionally different role of libraries in the distribution of academic books.[106] On the other hand it signals that, over time, publishers and libraries are finding a mutually agreeable method of distribution that is more convenient for all parties.

Hence, recent studies have suggested a negotiation where all stakeholders are allowed to participate would promote the best balance with regard to availability of e-titles, their pricing and conditions of e-lending.[107] These studies suggest that legislative intervention might be premature and that "flexibility will remain a key ingredient for future successes across all e-lending models, and for the overall continued development of e-lending in Europe".[108]

In addition, an interesting parallel could be drawn between the relationship involving publishers and libraries who lend their e-books to public, and the relationship involving music/film owners and online services (such as Spotify or Netflix) that make their works available to the public. If libraries were to fully enter the e-lending sector and start offering e-lending services similar to those that commercial e-lending services providers offer (eg Amazon's Kindle's Owners Lending library, German Skoobe service), then they would need to build commercial relationships that are useful for all stakeholders. In these cases, the business models developed by music/film owners and online services like Netflix and Spotify could serve as examples from which stakeholders in publishing sector could learn. However, this parallel might be less useful if we see libraries not like another player in the e-lending market but as a public institution with strictly limited budget and resources that are intended to serve certain public functions.

Despite certain advantages of stakeholder negotiations, such as flexibility and market-proven solutions, such negotiation are generally not a cost and time effective solution, especially for libraries with limited financial and staff resources. Also, libraries may often find themselves in a weaker bargaining position, especially when negotiating individually with large publishers or aggregators. In these situations, libraries may have no option but to accept terms dictated by another party. Keeping in mind the importance of the public functions that libraries serve, such unilateral dictation of e-lending terms by right holders might be not justifiable and a legislative intervention might be needed.

4.2 Compulsory collective licensing

Another option would be considering compulsory collective licensing of e-lending. Compulsory licensing was for the first time introduced at the EU level via the EU Cable and Satellite Directive[109] and applies to cable retransmission of works and other subject matter. In case of e-lending, compulsory licensing would mean that right holders were able to exercise their rights to make e-books available in public libraries only via collective management organizations (CMOs). The advantage of such solution for right holders is that they formally

[106] As libraries are the main players in the distribution of academic books, relationships and cooperation between academic libraries and academic publishers have traditionally been stronger. See Mount (fn 11) 5
[107] Civic Agenda EU (fn 2) 103
[108] Ibid 12
[109] Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission *OJ L 248, 6.10.1993, p. 15–21*

retain an exclusive rights to allow or prohibit e-lending; the restriction would only be imposed on how they exercise this right (via CMOs, not individually). Also, right holders could potentially negotiate higher licensing fees, as compared to symbolic payments received under the PLR schemes. Also, law makers would be free to determine which part of licensing fees would be allocated to authors, and which part to publishers. This would address the problem of authors not receiving any remuneration for e-lending.

Libraries would benefit from this solution since they would be able to secure licenses for any e-lending model. Also, they would need to approach a single entity, a responsible CMO, to negotiate licensing contracts ('one-stop-shop'). Licensing tariffs and conditions are also likely to be more reasonable since they would have to be negotiated by organizations representing stakeholders, rather than by individual libraries, and approved by state authorities supervising the work of CMOs.

The potential disadvantage for right holders would be that fees received via collective licensing may be smaller than those received via individual licensing, which may result in a general decrease of lending-related revenue on behalf of right holders. Since e-book market in the EU is still an emerging one, any decline of revenue in e-lending section may significantly affect the e-book market, and cause right holders opting out from the compulsory licensing schemes.

From the perspective of libraries, the disadvantage of compulsory licensing model is the remaining ability of right holders to withhold e-titles from libraries. Compulsory licensing model does not require right holders to grant licenses for the use of their work; it merely suggests that if right holders want to license a work, they can do it only via the collective management network, but not individually. Therefore, this model would not fully solve a problem of access to e-titles that some European libraries are currently experiencing[110]. The other disadvantage is that libraries would have to continuously pay for e-lending. In case of traditional lending they would normally incur a single acquisition fee, instead of a continuous licensing fee, which may accumulate to significant amounts.

4.3 Remunerated e-Lending Exception

A third option could be an introduction of a remunerated e-lending exception. Currently, the Information Society Directive contains (optional) remunerated exceptions for reprographic reproduction of works and for private copying.[111] A remunerated e-lending exception would mean that libraries would be allowed to lend e-books, however, they would have to pay remuneration for this. Similarly to compulsory licensing, the remuneration that libraries would pay to right holders, including authors and publishers, would be administrated via CMOs.

The advantages and disadvantages of a remunerated e-lending exception are largely similar to those of compulsory licensing. Right holders would be remunerated via CMOs, with licensing fees potentially higher than a compensation under PLR schemes. Libraries, meanwhile, may expect easier licensing process via one-stop-shop facility provided by CMOs, and fairer prices

[110] 'Extended collective licensing' would be more suitable to address this problem.
[111] Art 5(2)(a) and (b) Information Society Directive (fn 60)

and licensing conditions collectively negotiated between the representatives of stakeholders and approved by state authorities.

At the same time, the remunerated exception is more favourable for libraries and puts more pressure on the interests of right holders. Under the exception, right holders would lose the exclusive right to allow or prohibit the lending of e-books. They will not be able to control e-lending by removing their e-titles from the list of works suggested in this exception. This would strengthen the position of libraries as they would get a possibility to lend any e-titles that are available on the market.

At the same time, it is unlikely that libraries would be granted a blank exception allowing them to lend e-books without any restrictions[112]. Law makers would have to discuss frictions that libraries should introduce in their services in order to qualify for the exception. At the same time, determining which frictions are reasonable remains a complicated question. E-lending models vary greatly and are constantly evolving, with new types of restrictions continually replacing previous ones.[113] Dusollier has suggested a number of frictions that need to be added as limitations to the e-lending exception if it is implemented as law. These include limited duration, limitation of one user per title, emulation of deterioration, recourse to technical protection measures, and the application of embargo or windows release period.[114] In contrast, Siehart suggested only the single-user-per-title and emulation of deterioration restrictions were required.[115] Since providing a final and exhaustive list of restrictions to e-lending might be unreasonable, law makers may develop an exemplary list and request collective societies to determine which of the frictions libraries would have to apply and how this would correlate with the licensing fees they pay.

The above discussion indicates that these are a number of options that could address e-lending problems in a possibly more effective way that the extension of PLR to e-lending would do. This paper invites further discussion on which of the alternative options would provide best solutions for e-lending sector.

5. Conclusion

As e-book markets are becoming more stable and e-lending is gaining traction in Europe, it is reasonable to question whether e-lending should be subject to the same legal treatment as traditional lending in public libraries. European libraries and some authors hope that the technologically neutral treatment of e-lending, namely the extension of PLR to e-books, will solve most of the libraries' problems with regard to e-lending, as well as ensuring authors receive reasonable remuneration.

[112] AG Szpunar also agrees that certain frictions would be reasonable, see Case C-174/15 *Vereniging Openbare Bibliotheken (VOB) v Stichting Leenrecht* (ECJ, 10 November 2016), Opinion of AG Szpunar, para 73
[113] See a variety of models described in Civic Agenda EU (fn 2)
[114] Dusollier (fn 9) 14-5
[115] Siehart (fn 29) 8-9

However, this paper demonstrates that this solution is not as promising as it might seem. While extending PLR to friction-free e-lending models does not appear to be a viable option, the more restricted e-lending models, such as single-user model, seem to come closer to traditional public lending. However, following the assessment of policy arguments in the e-lending market, it is clear that the technologically neutral treatment of the PLR exception under EU law is not the most suitable solution. It would hardly solve any of the existing problems in the area of e-lending, and would in fact create additional uncertainties and risks. Therefore, a further discussion on other available options, such as a facilitated stakeholder dialog, compulsory collective licensing of e-lending or a remunerated e-lending exception, should be encouraged.