

A manifesto for an e-lending limitation in copyright

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Abstract: In the European Union, lending is an exclusive right for copyright and related rights, but Member States can transform public lending to a right of remuneration and even exempt some establishments from any payment. The making available of works online is not covered by the public lending right regime of the Rental and Lending Directive but is considered as an act of making available governed by the InfoSoc Directive. As a consequence, libraries are currently not allowed to digitally transmit works to their patrons as lending, but have entered into licenses with publishers to develop an offer of lending of e-books, also called e-lending, with the intermediation of dedicated platforms operated by commercial actors. Compared to physical lending, e-lending is not based on ownership of the book by libraries but on its provision by this intermediary. This paper discusses how the objective of enabling libraries to engage in e-lending should be achieved, and what is the proper dividing line between a market-based solution, as developing today, and a limitation to exclusive rights. The impact of an extension of the public lending right to e-lending should be assessed, but not based on

a criterion of direct substitution of a book on loan at the library to a book bought at a retailer. By definition, libraries are substitutes to normal trade. Instead, the overall effect of lending to the commercialisation of books and other works should be verified. Particular conditions for a limitation in favour of lending are also addressed, and notably the modalities of lending (a limited duration, one simultaneous user per title, ...), not to make e-lending through libraries easier and preferable to the normal acquisition of an e-book. 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. For the role of libraries is essential in providing access to works and culture to readers who would or could not rely only on normal acquisition of books or other items on the market, to works that are not provided by the market, and to material for research. Libraries are a third sector providing access to works, aside the market and non-market exchanges between individuals. This role should not lose its relevance in the digital context, or it would culturally impoverish future generations of readers.

Keywords: e-lending, public lending right, libraries, copyright limitation, licensing

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A. Introduction

1 With the outbreak of commercial exploitation of e-books due to the success of the Kindle by Amazon and, soon after, of tablets and other e-readers,

libraries have embarked on the practice of making e-books available to their patrons in what resembles the traditional activity of lending. Patrons are increasingly demanding to find e-books in their

libraries. While e-lending has become a reality in some countries-- such as the US, where thousands of libraries propose to download e-books-- experiments have started in many European States. In all of those cases, remote loans of e-books are organized by licensing between publishers and libraries, generally with the intercession of an intermediary offering a dedicated platform for e-lending. Indeed, the public lending exception that is known in the European *acquis communautaire* and allows the libraries to lend books in most countries does not apply to the on-line provision of an e-book, even for a limited time. Hence, offsite lending of digital content cannot, in principle, benefit from the regulatory frame that exists in most Member States and authorizes public libraries to engage in lending against a remuneration to authors (from which some establishments can even be exempted). Lacking an exception, libraries have chosen to develop e-lending that is based on licensing with copyright owners.

- 2 Not all libraries are satisfied with the interpretation against the coverage of off-site lending by the directive 2006/115 and its national transpositions. In the Netherlands, the Vereniging van Openbare Bibliotheken (Association of Public Libraries) has brought the matter before the courts. They started a test case against the collective management organisation in charge of the lending right to be allowed to provide e-books in libraries for download¹. Earlier this fall, the court of first instance of the Hague has referred preliminary questions to the European Court of Justice as to whether the making available of e-books by downloads by a public library can be considered as "lending"². It would be surprising if the UE court decides to include e-lending in the notion, save for an odd development around exhaustion (with the ECJ, you'll never know!). Only the European lawmaker could decide to open the field of public lending right to e-books.
- 3 This paper claims that the copyright limitation for public lending should be extended to the digital environment on the ground that it has too much democratic and cultural value to be left completely in the hands of market transactions. Due to the fact that copyright exceptions need to age and evolve with the digital transformations, public libraries should also embrace, to some extent, the shift from books to digital content. Otherwise, libraries will lose a great part of their role in society, and most of their soul.
- 4 E-lending that will be covered here stands for the making available of digital works by public libraries for a limited duration through the Internet or libraries' networks, by downloading, streaming, or similar modes of transmission³. It will not encompass the lending of e-books, by installation of e-books on devices of the user (tablets, smartphones or computers), that also occurs in libraries, nor by

lending an e-reader on which the library has loaded some content. Commercial book retailers have also started to develop e-lending services. A typical case is Amazon, that offers access to e-books for a premium yearly subscription⁴. Such business models have only the name of e-lending as they have not much to do with public lending right, but could rather be considered forms of rental. They will not be discussed further.

- 5 This paper is structured in three parts. It will start by giving a description of the context of the public lending, both in the practices of libraries and in a legal perspective (A.). Then, the shift to e-lending will be addressed (B.). The shortcomings of the current situation that leave too much leeway to the market will justify the need for an e-lending limitation in copyright, which we will develop in a last part (C.).

B. The context of public lending

I. Public lending in libraries

- 6 Libraries and other cultural heritage institutions carry out a discrete series of activities that, at different degrees, further the preservation and dissemination of knowledge, from acquiring and developing a collection, preserving it, indexing it, making it available on its premises, organising education activities, helping persons to find what they are looking for, to ultimately letting people checking out books to read, learn, and entertain themselves. As repositories for cultural artefacts produced by a society, libraries occupy a central place in the politics of access to culture, research and learning.
- 7 Public lending is one of the core activities of libraries⁵, but its intensity might significantly differ from one type of library to the other, with the consequence that the activity presents a varying impact on the practices of users, market of copyrighted works, and protection of rights holders.
- 8 Academic and research libraries, as institutions associated with universities or research establishments, aim at supporting scholarly or scientific research. Their main activity is to constitute a collection of scholarly books, journals, or databases that will be mostly consulted on the premises of the library. Acts of lending happen but are more limited than in general libraries. Researchers and students will check out books from those libraries when they need more time to search in the book. The objective of the lending is, thus, research and thorough consultation, without necessarily an extensive reading of the book. Academic and research libraries will also engage more often in interlibrary loans.

- 9 Similarly, in national libraries that are in charge of the legal deposit, the lending activity will be minimal compared to on-site consultation for research and the provision of materials to other institutions through the interlibrary loan. Besides, a significant part of their collection, consisting of documents, maps, manuscripts, newspapers, magazines, prints and drawings, music scores, photographs, or old publications, is not subject to lending, due to their historical importance, state of decay, or uniqueness.
- 10 On the contrary, general public libraries will largely engage in public lending, as their mission is to provide the public, with no discrimination, with materials for private study and entertainment. The consultation of their books or other items on the premises of the establishment is rather limited (except for reference books or magazines).
- 11 In addition to these two major categories, libraries can also serve special needs of a limited part of the public. For instance, social institutions such as hospitals, prisons, or schools might have a library that provides books or other works to the patients, inmates, or pupils. They will be reserved to a limited public. The main activity of such libraries will be to lend books to their specific users. Some libraries can also provide specialised documentation to professionals and no restricted conditions of admission. For instance, some libraries are operated by governments to the benefit of their civil servants, but can equally be open to individuals upon defined conditions. For example, the libraries of judicial courts generally admit professional lawyers who are registered at the bar. Usually, those types of libraries will not lend books beyond the members of the institution they serve. Other specialised libraries will not be open to the public, such as libraries of private companies or governmental libraries with restricted admission policies.
- 12 Within the public libraries, some distinction could also be drawn, depending on the type of cultural items subject to lending. Libraries generally refer to books in the general opinion, but public institutions deal with other types of content, as well, such as phonograms, DVDs, videogames, or audiobooks. Public libraries can have collections of different categories of works. Content other than books might be held and made available by dedicated multimedia libraries or *médiathèques*. Lending also occurs in those institutions, sometimes under adapted conditions.
- 13 The public that libraries target will depend on their category. In a broad sense, general public libraries, by definition, address the need of the general population to access cultural content, whereas academic and research libraries are primarily visited by the members of their institutions (students, professors, researchers for academic libraries) and researchers. They are, nevertheless, open to the

public and cater to the needs of professionals looking for specialised information (such as private lawyers visiting law libraries). Specialised libraries in social institutions will have a more limited audience. Public libraries also play an important role for people with reading disabilities. Dedicated libraries exist in many countries to provide books in Braille, audiobooks, or other adapted forms to visually-impaired people, but general libraries also try to have a collection of large print books and audiobooks.

II. Public lending in copyright law

- 14 Rental and lending rights were introduced as exclusive rights in the European copyright by a 1992 directive that has since been codified in the directive 2006/115⁶. Article 1 of the directive states that “in accordance with the provisions of this Chapter, Member States shall provide, subject to Article 6, a right to authorize or prohibit the rental and lending of originals and copies of copyright works, and other subject matter as set out in Article 3(1)”. The notion of lending contained in the directive only refers to acts of *public lending* since, according to its article 2 (1) b, “lending’ means making available for use for a limited period of time, and can not be for direct or indirect economic or commercial advantage when it is made through establishments which are accessible to the public”. The terminology of public lending right is, however, generally used to refer to the right of remuneration that the article 6 of the directive allows Member States to enact instead of the exclusive lending right stated as a principle. Certain categories of establishments can even be exempted from the payment of the remuneration.
- 15 Lending is covered by the directive when a work is made available for use⁷ for a limited period of time and not for direct or indirect economic or commercial advantage. This criterion distinguishes lending from rental and is further defined by the recital 11 of the directive that provides that “Where lending by an establishment accessible to the public gives rise to a payment the amount of which does not go beyond what is necessary to cover the operating costs of the establishment, there is no direct or indirect economic or commercial advantage within the meaning of this Directive”. Therefore, the payment of a fee for lending does not exclude the qualification of lending⁸. The last condition is that the establishment doing the lending is accessible to the public, a notion that is not defined in the directive⁹. The initial proposal for a directive included a list of the eligible establishments, encompassing “public libraries, research libraries, specialized libraries, school libraries, church libraries, collections of new media or of works of visual art, libraries organized or sponsored by public or private companies, and other collections of subject matter”¹⁰. The condition

of public accessibility should be broadly construed and include libraries open to a specified public.

- 16 Article 6 of the directive¹¹ allows Member States to replace the exclusive right by a remuneration right, and even to exempt certain categories of establishments from this remuneration, which has been done by most Member States¹². The exception for public lending right “reflects the compromise found at the time between complying with the Internal Market needs, on the one hand, and taking account of the different traditions of Member States in this area, on the other”¹³.
- 17 The objective of such derogation is, clearly, the promotion of cultural objectives, which is referred to in article 6(1) as justifying the leeway left to the States in determining the remuneration. Some establishments, e.g. university and school libraries, libraries in social institutions, or some public libraries, could be exempted from any remuneration, at the exception of lending of phonograms, films, or computer programs (if those categories of works are encompassed in the lending right). The European Court of Justice has, nevertheless, decided that Member States are not entitled to exempt all public libraries from the payment of the remuneration, as such a large-scale exemption would result in emptying the public lending right of any relevance¹⁴.
- 18 More recently, the European judges have decided that the remuneration to authors for public lending cannot be calculated solely on the basis on the number of borrowers of works, but that the amount of the remuneration should also take into account the works available to the public, so that the biggest public lending establishments pay more than the smaller institutions¹⁵.
- 19 The legal form of the derogation is left to the Member States¹⁶. The exemption of the exclusive right is often understood as creating an exception in the form of a statutory license, with a right to remuneration¹⁷. In other countries, the public lending right is just recognised as a remuneration right for the copyright and related rights owners. Books are always concerned with the exception but some States have extended the exception to other cultural content, such as musical or audio-visual works¹⁸.

C. From lending to e-lending

I. E-lending based on licensing

- 20 In many countries, libraries have started to make e-books available online to their members¹⁹. Lacking any legal authorization to undertake e-lending,

this development was made possible by licensing agreements with publishers and the intervention of dedicated platforms hosting and delivering e-books to libraries’ users.

- 21 Distribution models may vary, but the most common way of proceeding for a library is to have recourse to “an intermediary distributor (sometimes referred to as an ‘aggregator’), which sells access to e-books titles and copies of e-books, often from multiple publishers”²⁰. The distributor offers full-service packages to libraries, with the licensing rights to e-books and the hosting of the e-book collection²¹. Libraries can serve as an interface, through their websites, for their readers to get access to the collection of titles that are available for downloading. The e-book will then be sent by the platform operated by the distributor to the user that has requested it.
- 22 The primary model governing e-lending normally includes four actors: the publisher or copyright owner, the distribution platform, the public library, and the reader that is the end-user of the loan. The publishers license the rights for distribution with e-book distributors, a new type of actor on the book market that has emerged to provide services of e-lending to libraries²². They sublicense the rights to e-books to libraries for making them available online to their patrons, along with additional services, such as the operation of a web platform that hosts the e-books; provides a searchable interface for users; manages the availability to readers and the accounts of its library’s clients; and controls the conditions and duration of the loan. This requires the use of Digital Right Management tools embedded in the e-books that are made available; DRMs are generally developed and operated by the e-book aggregator. Platforms for lending are, for instance, “OverDrive” that dominates the English library market²³, NetLibrary, Ebscohost in the Netherlands²⁴, Dilicom in France, or Onleihe.net in Germany.
- 23 The relationship between the publishers and the distributors triggers the availability of the book on the platform. Publishers decide the format and conditions under which the book will be offered for lending in a way that tends to align the modalities of accessing e-books with the restraints usually endured by library readers. A license then applies to the relationship between the libraries and their patrons, and stipulates the conditions of access to e-content by the library and the terms of use. Due to the intercession of an intermediary, the public libraries do not host e-books as they do tangible books, for they are usually kept by the intermediary on its platform. The provision of a collection of downloadable titles can be organised in different models. The most common is the so-called ‘perpetual access’ model²⁵, by which libraries acquire an individual copy of an e-book title that

will be integrated in the e-collection of the library (in contracts with the subscription model where the access to the title terminates if the subscription is not renewed). In most cases, only one reader at a time can borrow the e-book (one copy/one user model)²⁶. It is a kind of “digital replication of the use pattern for a print-on-paper library book”²⁷.

- 24 Several licenses can be bought for popular works to be entitled to lend them to more users simultaneously. The number of licenses is the equivalent to the number of acquisitions of tangible books and its corresponding number of simultaneous readers. Other possibilities are the subscription model with unlimited number of loans per title and limited simultaneous users, or the pay-per-view model.
- 25 Books can be bought by individual titles or per packages by the library. Further conditions are laid down by the license and relate to the devices on which the e-book can be downloaded and read, the possibilities to print out and to what extent. Some licenses impose the renewal of the license after some delay or a certain number of loans (e.g. license valid for one year or for 30 circulations), so as to mimic the way tangible books wear out after a few readings and oblige libraries to buy a new copy. The e-books could be proposed in different formats, but they are usually in ePUB, which is a format dedicated to e-readers, or in pdf, which is readable on more devices.
- 26 The library owes a remuneration for the services performed by the e-book distributor and its platform, which is added to the remuneration agreed-upon remuneration for the loans, themselves.
- 27 The relationship between the library and the user follows the model put in place. The lending will generally be restricted to the users registered in a library. They will get access to the collection of available titles through the website of their library and can install the e-books on their computers or other devices (such as smartphones, tablets or e-readers). Only a maximum number of books for a determined period can be downloaded, and the book will be unavailable at the end of lending term—which is, generally, rather short (2 or 3 weeks). The duration is renewable if the book has not been reserved by another user. Once the book is installed on the device, it can be read offline. Usually, the readers only have access to the e-collection of their library, i.e. to the collection of titles for which the library bought a license. This is the model of the German Onleihe platform where patrons registered in one library only have access to the part of the platform hosting titles for which their library has a license. Other models include consortiums of local libraries (e.g. LibrariesWest in the UK) that have acquired a bulk license for e-books that they all propose to their registered patrons.

II. e-lending in EU copyright law

- 28 The directive on rental and lending does not explicitly exclude e-lending or lending of digital items from its scope. However, some elements point in that direction. The article 1 that provides the exclusive right of lending applies to “the original and copies of copyright works, and other subject matter”. This formulation is usually interpreted as encompassing the “first materialisation” of the work and further reproductions thereof²⁸. Since the on-line lending includes a transmission of a digital file, and not of a tangible item, it should be considered as being outside of the scope of the lending right²⁹.
- 29 In the proposal for a rental and lending directive, the European Commission referred to “objects (...) which incorporate protected works or performances”³⁰, indicating that it had tangible items in mind³¹. The question was addressed in the Council Working Group, during which the Member States did discuss the coverage of electronic rental or lending but decided that they did not want to deal with it at the time, considering that the topic was still premature³². Some scholars consider that the purpose of the directive was to cover the entire situation of rental and lending, including electronic forms thereof³³.
- 30 Yet, the inclusion of digital products in the public lending right was not completely closed as demonstrated by later documents from the European Commission. In the Green Paper on Copyright and Related Rights of 1995, it was discussed whether the lending and rental rights may be applied by extension to digital transmissions³⁴. It seems that the starting point for the reflection was the application of the rental right to services on demand, such as video-on-demand, that were emerging at the time. In its comparison between traditional lending and new forms of making available on-line, the Green Paper went as far as stating that “the definition [of lending] does, however, cover digital lending by establishments accessible to the public and the on-line consultation of a work from a public library comes to the same thing as borrowing a copy of the work”³⁵. The Commission document nonetheless acknowledges that such an extension should be confirmed in legislation and its details should be spelled out in order to reconcile “the cultural and educational functions of bodies such as public libraries and universities, which have the aim of ensuring the widest possible dissemination of works and data, (...) with the legitimate protection of rightholders”³⁶. True, the Green Paper warned against new forms of uses within libraries, with respect to the protection of the interests of copyright holders, but still stressed the interests of the different parties concerned: “authors must be able to control the use of their works, libraries must ensure the transmission of available documents and

users should have the widest possible access to those documents while respecting the rights or legitimate interests of everyone”³⁷. The European Commission then came to the conclusion that “the application of the lending right to electronic transmission should also be reviewed with a view to maintaining a balance between the interests of public libraries and those of rightholders”³⁸.

- 31 Such a generous position in favour of libraries might seem surprising. It should be remembered that this Green Paper was released at a time prior to the mainstream development of the Internet and without any digital products yet commercially available on-line for consumers, such as e-books or movies. The economic impact or the development of digital libraries could not have been anticipated in 1995.
- 32 That view was given up in the Follow-Up to the Green Paper in 1996. Even though it was therein reiterated that on-demand transmissions, such as VOD, enter in the field of application of the rental right³⁹, the opinion of most Member States against an extension of the rental right and distribution right to on-line transmission was followed. No reference was made to on-line lending.
- 33 The European Commission preferred to cover all forms of on-line transmission, whether on-demand or not, under a broadly-defined right of communication to the public, and it was the direction that the discussion took that would become the WIPO Copyright Treaty of 1996, which opted for a right of making available that would cover on-demand services. The fate of on-line rental and lending as falling out of the box of those rights was sealed. The adoption of the Information Society Directive and its communication to the public right should then be considered as being a *lex specialis* for all forms of making available right and would prevail over an extensive interpretation of the rental and lending rights in the earlier directive of 1992⁴⁰.
- 34 The recital 40 of the Information Society Directive that recommends that acts of making works available on demand by libraries be subject to licensing with rights holders could also be interpreted as rejecting e-lending outside of the right to remuneration for which most Member States opted by transposing the lending directive⁴¹.
- 35 This interpretation will be challenged before the European Court of justice, thanks to the preliminary questions referred thereto by a Dutch court seized by libraries. Beyond the question as to whether or not the notion of ‘lending’ also covers the online downloading of e-books, the relationship between the lending and the principle of exhaustion is part of the referral. The Dutch court wonders whether the acquisition of an ebook by libraries is subject

to exhaustion and hence, gives them the privilege to distribute it to their patrons in lending. This detour by the principle of exhaustion is probably an offspring of the UsedSoft decision and follows a similar economic logic, more than a legal one. Indeed, it makes sense that the acquisition of a product, whether analogue or digital, entitles its owner to dispose thereof. That is what the EU court has decided for software whose owner could resell. In some legal systems such as the United States, the authorisation of public lending flows from the application of the first sale doctrine or exhaustion principle: once the book is bought by the library, its further distribution, including lending to library patrons is not an infringement of copyright. On the contrary, the European Union law interposes an exclusive right of lending, generally transformed at State level into a right of remuneration, that annuls the exhaustion rule. The act of distribution is legally qualified as an act of lending that is not exhausted but re-enters into the field of control of copyright owners (either through an exclusive right or a right to remuneration). This is clearly stated by the recitals 28 and 29 of the Information Society Directive that preclude the application of the distribution qualification and of the rule of exhaustion to rental and lending⁴².

- 36 The UK Government has also commissioned a review of e-lending that has resulted in a recommendation to extend the public lending right to remote e-lending⁴³. Following that report, the British Government has announced its intention to make libraries able to offer digital books to their readers, by revising the Public Lending Right in two stages⁴⁴. First, and it was started by the Digital Economy Act of 2010⁴⁵, the Public Lending Right Act 1979 was modified to include audio-books and e-books in the notion of “books”⁴⁶. However, this does not extend to the making available of an e-book by means of electronic transmission⁴⁷. Only the provision of e-books on readers have been included in the public lending right⁴⁸. More precisely, “copying or issuing a copy of the e-book as an act incidental to lending it” shall not be considered as infringing the rights conferred by copyright or related rights. In a second stage, the Government contemplates to enable public libraries to offer remote e-lending services to their readers and to recommend further legislative changes accordingly, while acknowledging that the EU directive 2001/29 probably stands in the way⁴⁹.

D. The need and challenges of a copyright limitation for e-lending

I. The democratic relevance of e-lending

- 37 The growth of e-lending experiments based on licensing between libraries and publishers, in lack of any certainty as to the status of e-lending, demonstrates that the market is capable of providing literary works, and sometimes other types of cultural content, to libraries and their readers. In our opinion and despite the capability of copyright owners to license their works for offsite lending by libraries, the public interest of entitling libraries to autonomously provide access to cultural content to the public would still beg for a legislative intervention to make a limitation of copyright prevail on or subsist aside market-based initiatives.
- 38 The cultural promotion objectives referred to in the provision of the Rental and Lending Directive authorizing Member States to limit the exclusive right of lending are rooted in the need to ensure circulation of works in the public sphere and beyond the mere operation of the market⁵⁰. Its democratic value is to ensure that people are offered access to culture, whatever their social situation.
- 39 Public lending right broadens access to works in different ways. Firstly, libraries provide access to works to a *larger public* of readers, enabling access by some populations who cannot afford buying all the works they read, view, or listen to. This lack of access can be grounded on, but is not restricted to, economic reasons. For instance, libraries will cater to the cultural needs of low-income populations, children, and teenagers, but also of people having difficulty traveling to a bookshop or living in remote places (public lending can then be ensured by mobile libraries or by post), as well as people staying in institutions (e.g. prisons, hospitals, nursing homes, etc.). More generally, libraries complement the commercial offer by making books available to the general public, whatever their financial means or access restrictions to books. They bring authors and readers together in a different way than the market. Many big readers often go to libraries to fulfil their reading habits, while equally buying many books in bookshops and retailers. Secondly, libraries provide *larger access to works* than the market. Whereas bookshops have only a limited percentage of published books in stock and the average life of a book in bookshops is less than one year, public libraries, through their preservation mission, might offer a more extensive collection, depending on their size and budget⁵¹. Another limitation of the market in providing books is absent in the way libraries operate.

Whereas the market will mostly obey to a demand-rule, libraries tend to choose the works they acquire on other criteria (namely cultural ones, notably a selection of local and national authors), or in an exhaustive way, if they are in charge of legal deposit, which can lead to more cultural diversity in the offer. Finally, libraries provide access to sources *for research* (mostly in academic and research libraries) as they hold extensive collections of publications on scientific topics. Researchers who need to consult many sources of documentation could not afford to buy all the relevant books published in their field and rely on consultation within the library, and, additionally, on lending to get access to the material they need. Academic libraries also provide scientific books to students to carry out research required for specific assignments or papers.

- 40 Transposed to e-books and e-lending, these objectives could still be sustained for the most part. Some segments of the libraries' readers will still need access to works by libraries, as they could not afford to access culture otherwise, or only partially. This is the case of younger people, low-income populations, or people in institutions with no access to culture but by the library of such institution (hospitals, prisons, ...), but also of 'big' readers. On the other hand, e-lending will require to get access to e-readers, which could constitute a new hurdle to access culture for some categories of people and increase the cost of access through libraries, except in the case where libraries also provide the device to read the e-book. Not all works will be offered by the market in e-book format or some e-books might not be commercialized after some time. Libraries could keep their role of preserving works and providing them to the public long after they have been put off the market, even though the development of e-books has also lengthened the period of availability of e-books in a catalogue of a publisher. As for access for research purposes, academic and research libraries are accustomed to dealing with digital resources. Besides, scientific books or textbooks might be amongst the types of content that will be more systematically proposed in an electronic format. The access to such works for research, that includes episodic lending to researchers or students, will not decrease with the shift to e-books.
- 41 Libraries argue for some preservation of their role as providers of culture and information and demand that they could offer e-books under reasonable terms and conditions⁵². The Sieghart Review on e-lending, commissioned by the UK Government, warns that "whatever analysis you make about the impact of remote digital borrowing on the physical footfall in libraries, it is plain that an inability to offer digital lending will make libraries increasingly irrelevant in a relatively short time"⁵³. Similarly, the Lescure Report in France acknowledges that libraries constitute a "third sector" for the dissemination of

culture and information, between the commercial sector of cultural industries and non-market exchanges between individuals⁵⁴. The key role of libraries in our societies is to guarantee some collective use and dissemination of creation and culture. That does not mean that an exception or limitation should necessarily cover e-lending but that the objectives of maintaining some alternative of provisions of books, by the channel of public libraries, is still justified for digital content. The second channel of dissemination of books cited by Lescore, i.e. the sharing between individuals, might also decrease as an e-book, at least in a proprietary format such as Kindle, can usually not be transmitted to someone else⁵⁵.

- 42 The public interest role of libraries justify, from our point of view, that public lending should not be completely left to the market operation. When discussing the public lending right in 1992, most Member States wanted to carve out some space for public libraries from the exclusive right conferred to copyright and related rights holders. It is doubtful that their position will change today and that the public space in which libraries operate be closed for e-lending. Should lending under a copyright limitation be reserved to books made of paper and ink, a large part of the cultural and scientific production will not enter in the privilege granted by copyright laws. E-books will form a significant part of the literary production of the years to come and will sometimes have no paper equivalent. Soon, some specialized books will only be commercialized in an electronic version. But e-books have also gone beyond the mere literary form and have been developed as multimedia products for smartphones and tablets. Early examples of such new types of digital creation, particularly children's books, include features that would not fit on paper, such as animated images or interactive narration⁵⁶. As far as music and movies are concerned, they might soon be released only as downloadable digital products. Excluding this new digital content altogether from the public mission of libraries to make cultural items available to the public in a non market-mediated transaction would deprive their users of a significant part of culture and creations.

1. A copyright limitation over a market-based licensing

- 43 Current projects of e-lending developed by public libraries and publishers demonstrate that the offer of e-books in lending is possible and not prevented by copyright law. So why not let the normal operation of the market prevail and organise, through licensing and the exercise of exclusive right of lending, the making available of e-books and other digital content to libraries' users? One could argue

that copyright does not need to assume the cultural value and cost of providing access to cultural content by libraries, but that this is an obligation and charge for the States towards their citizens.

- 44 That remark hides two issues: on one hand, the relationship between copyright exceptions and contract; on the other hand, the specific shortcomings of a market-based system of e-lending.

a.) The space left for exceptions by normal market operation

- 45 A difficult issue in copyright is the line that should be drawn between the market space where exclusive rights could lead to transactions over uses and the reserved space for exceptions where the use would not need an author's authorisation.
- 46 Without analysing the uneasy relationship between copyright exceptions and contract⁵⁷, this raises a more general question as to the borders between the statutorily defined exception and the exercise of copyright by the rightholders. A related issue is whether the exception could substitute the provision of works on the market. For some exceptions, copyright law carves out works that are still available on the market or could be provided by the rightholders, from the scope of an exception, as it is the case for the exception of on-site consultation benefiting libraries⁵⁸. This gives some preference to the market and the exploitation of works by rightholders over the exception. The recent diversification of rules and situations in the European and national copyright lawmaking between out-of-commerce and commercially available works also indicates that the ambit of the authorised uses varies according to the economic reality of the work exploitation and is increasingly thought in gradual shades, from works not available in the market to works that are still exploited.
- 47 The question is whether the exception should only occupy the space where the market cannot provide the benefit of the use. It could be read as a follow-up to the scrutiny by the three-step test that copyright exceptions should successfully pass, and notably the second step consisting in the absence of some harm to the normal exploitation of the work. This criteria of the normal exploitation should not however be construed as meaning that any market possibility would overcome the exception⁵⁹. To define the criteria of 'normal exploitation', the WTO Panel decision on the three-step test has referred to the ways that right holders normally extract economic value from that right to the work (i.e., the copyright) and thereby deprive them of significant or tangible commercial gains⁶⁰. It also points at the fact that the absence of a licensing system would not be determinant in deciding whether the

use in question does not take part to the normal exploitation of the work⁶¹, but it cannot be inferred that the provision of a license for a specific use would exclude the application of the exception⁶². This opinion is substantiated by the preparatory work of the Stockholm Conference that has introduced the three-step test into the Berne Convention. It mentions « all forms of exploiting a work, which have, or are likely to acquire, *considerable economic or practical importance* »⁶³, this formulation being found also in the WTO Panel Report⁶⁴. In our opinion, this indicates that the single possibility to provide the work to the user benefiting from the licence would not be enough in itself to consider that the exception counters the normal exploitation of the work. The scrutiny of the second step should rather look at the overall economic importance of the exploitation forms with which the exception would enter in economic competition.

- 48 It is only if the systematic use of the exception could divest authors from major sources of revenues that are significant within the overall commercialization of works, that it would contradict the normal exploitation of works. In our view, the fact that some works are commercially available is therefore not sufficient to include in the relevant exception a general exclusion of works that could be acquired through normal trade.
- 49 A reverse conclusion would mean that the exception is dictated by the functioning of the market and only answer to a market failure justification. Market failure has been regularly advanced, particularly in the writings of the Chicago school of law and economics⁶⁵, as a justification for exceptions. It could be defined as the principle according to which the exception would only be valid if the market is not capable, through provision of the work or licensing, to supply the demand of the user.
- 50 This justification, though it can apply to some exceptions, has now been rejected by the majority of scholarship that considers that exceptions are grounded on diverse reasons, which cannot be always solved by the market⁶⁶. The analysis of the market failure as a valid explanation of *fair use* in the United States has been particularly addressed by W. Gordon, who was regularly misunderstood in that regard⁶⁷. In a later paper⁶⁸, W. Gordon distinguishes two categories of justifications for *fair use*: the market failure or malfunction, when the market cannot license the use due to high transaction costs, and the market limitation when non-economic values prevent to rely solely on the market and on economics to enable the use, thereby justifying a rule of exception. The exception will fall in the second category if the exception pursues public interests that cannot be overcome by leaving the market decide on the use. Then the beneficiary of the exception should be transferred some control over the use⁶⁹.
- 51 Both the European and the international lawmakers refer to public interest as a key justification of copyright exceptions⁷⁰. This motive should imply that the relationship between the existence of the exception and the market, but also between the condition of the exception and the market, should be tackled with due care.
- 52 Therefore, a criterion of market substitution should not be the only guide to draw the boundaries of an exception, even though the triple test includes the consideration of an adverse market effect. We will come back to the assessment of the three-step test later on.

b.) Shortcomings of e-lending licensing

- 53 Another reason not to entrust e-lending completely to publishers and copyright owners is the different 'product' that publishers are offering to library patrons and its shortcomings compared to a publicly organised lending.
- 54 Relying only on the market to deliver e-books to library readers could potentially dictate unreasonable terms and conditions to libraries or transform public lending into another commercial service provided by the publishers. Apparently, this is not the case right now and all studies on the models of e-lending rather show an apparently balanced relationship between libraries, publishers and intermediaries and conditions that seem reasonable and fair both for libraries and for readers. In the United States, though, where the commercial model of e-lending is more developed, some concerns have been voiced about the independence of libraries from the intermediaries and the infringement of some key principles and values applied by libraries, notably concerning privacy issues⁷¹ and some terms imposed by the publishers to the intermediaries⁷². For instance, Amazon had achieved a deal with Overdrive that is the leader platform for e-lending in US libraries according to which a reader will receive an hyperlink towards the website of Amazon where the book she has borrowed would be available for sale. This will also enable Amazon to know which Kindle owners are library borrowers and possibly, which types of books they like to read, which is a very valuable information for the leader in the e-book market. This entails some processing of personal data of libraries patrons that would be strictly regulated under the European Union data protection law. Libraries have also a tradition of being very protective of the privacy of their readers.
- 55 Another consequence of leaving e-lending to the market is that it could limit the content available

for e-lending to e-books that are licensed for that purpose by publishers and would prevent to some extent libraries from deciding which books should be offered to their readers⁷³. Some publishers are also reluctant to allow e-lending by libraries and have not developed e-lending models yet.

- 56 E-lending also change the legal position of libraries. Traditional lending does not require any intervention from the right holder or intermediary. Libraries buy books from publishers, bookstores or specialised intermediaries and become full owners of those books. Even if the act of lending has to be authorised or compensated, the ownership of the copy by the library gives it some autonomy in the lending activities. The overall picture of e-lending is radically different. E-books are acquired under licensing conditions and digitally transmitted to libraries⁷⁴. They are usually not 'bought' and no transfer of ownership occurs at the benefit of the libraries. That explains that in the United States, e-lending could not be developed on the ground of the first sale doctrine⁷⁵ but that exclusive rights of copyright regained their primacy.
- 57 E-books are acquired by libraries from publishers or intermediaries that have emerged to play the role of 'e-books aggregators'. Models of purchase differ greatly depending on the type of the digital product, from electronic journals, scientific publications or textbooks to more mainstream e-books. Vendors propose either an outright purchase, that will result in the downloading of the e-book by the library, or a subscription model where e-books are stored on the intermediary's platform and can be downloaded by the user when the book is checked out. In all cases, a license agreement is entered into and defines the applicable terms of use, that are usually embedded in the digital file by digital rights management (DRM) features. In most cases, the library does not actually 'buy' books but acquires access to a platform and a number of book titles from various publishers.
- 58 Such recourse to a platform is useful for all the parties involved. Publishers, especially the smaller ones, are saved the cost of developing and operating a dedicated platform and technological tools (such as the DRM needed to secure the terms of use). Likewise, libraries do not have to develop a platform to make e-books available to their users. The users of the library can then access and search the titles covered by the license through a single interface, whatever the library they are subscribed to, and get access to e-book in a format compatible with their e-reader.
- 59 However, this change of model has consequences for libraries as the book remains in control of the intermediary or platform and largely escapes from library choices or control. The terms of use are enforced by digital rights management systems

embedded by publishers and intermediaries and not anymore by the rules and governance of the libraries⁷⁶. More importantly, not all published books are available for lending, but only the titles available as e-books (that will certainly increase in the future to cover the whole catalogue of publishers), formatted to a non-proprietary format⁷⁷ and compatible with the platform⁷⁸ (which in theory could limit the offer compared to the offer of traditional lending).

- 60 These differences rooted in the technical features of the digital format and digital transmission, are both a source of concern for publishers that fear that e-lending will potentially undermine their emerging business models related to e-books, and a new landscape where the legal rules and the traditional roles of libraries and publishers do not fit in the same way as for public lending. The case initiated by the Dutch libraries equally reflects such concern. To a similar end, the European Association of Libraries, EBLIDA, is advocating the adoption of "Fair Licensing Models" for e-lending⁷⁹.

2. Towards a public e-lending limitation to copyright

- 61 Adopting an exception for e-lending, probably in the form of a statutory license with fair compensation for authors, could be justified by the public interest that underlies the provision of access to works that is one key mission of libraries. No market failure happens here as the market is capable to organise and license e-lending, but the copyright limitation would be explained by a market limitation, for normative reasons related to the central role of public libraries.

a.) The form of limitation

- 62 The current system of lending is not conceived strictly as an exception in the *acquis communautaire*. The directive 1992/100, then codified in 2006, affirms the exclusive right of lending of authors and related rights owners, then allows Member States to reduce it to a right of remuneration. In a last movement, it also permits to national legislation to exempt certain public institutions from the payment of some remuneration.
- 63 The enactment of a limitation to the exclusive right is thus left to the discretion of national laws and could take several forms: a right of remuneration granted to authors, a legal license with fair compensation, or with no compensation for exempted libraries.
- 64 From a legislative point of view, the situation is exactly the reverse of the exceptions listed in the article 5 of the directive 2001/29. There, the

parameters and boundaries of the exception are imposed to the Member States that cannot extend the exception but could restrict its scope even further. Revising some exception of that list entails to spell out the details of the conditions of the exception that the national law should conform to, in order to increase harmonisation and ensure that the objective of the exception be attainable. Public lending right is slightly different. The conditions that are enumerated in the directive 2006/115 (as to the beneficiaries, the aim of the making available) are not strictly speaking related to the exception that Member States can opt for, but pertain to the definition of what lending is. It is only indirectly that they become conditions of the limitation/exception when the Member States decide not to implement the public lending right as an exclusive right. Precise conditions for the lending are then determined at national level with no overall European guidance.

65 As a consequence, the decision to extend the regulatory frame of lending to off-site lending (should this option be chosen) will probably require a legislative intervention that might need to transform the system of an exclusive right that can be qualified and attenuated by the Member States into a limitation of copyright and related rights with precise conditions. This will have some effect on the principle of subsidiarity and on the principle of a high protection of copyright and related rights that should not be neglected. Another target for revision might be the Information Society Directive as the off-site lending is most often considered as an act of making available covered by that later directive. Therefore, creating an exception to such right could be done by inserting a new exception of the list of article 5. However it would create a hybrid system of lending divided into two EU directives.

b.) The scrutiny of the three-step test

66 Whatever the legislative route taken, compliance with the three-step test should be addressed. The first criterion of a “special case” consists in verifying whether the exception or limitation corresponds to a clearly defined case and pursue some particular objectives⁸⁰. All opinions converge on the view that the requirement stems from a qualitative understanding and favours exceptions that are of public interest⁸¹. As regards the digital public lending, there is no doubt that public libraries act in the public interest when offering access to works to their readers. Public lending right is furthermore restricted to not-for profit institutions and should not aim at any direct or indirect economic or commercial advantage, which pleads in favour of the “special case”.

67 As to the possible harm to normal exploitation of works, it cannot be contested that public lending

has an impact on retail sales of books as readers can have access to books without buying them. However, this individual and potential impact of each act of lending needs to be substantiated and extended to an assessment of the overall impact of lending activities, including e-lending, on the market for e-books and their normal exploitation.

68 It might seem contradictory to admit that the market is capable to provide works for e-lending, as demonstrated by current collaborations between publishers and libraries, and afterwards verify whether e-lending by libraries does not interfere with the normal exploitation of works. Yet public lending right is a peculiar case, particularly when considering its extension to e-lending. Indeed most copyright exceptions authorize acts of reproduction or communication to the public that are ancillary to another legitimate activity. For instance, works are reproduced to enable their preservation by libraries, extracts of works are communicated to pupils to illustrate teaching or a work is transformed to perform a parody. The provision of the work is authorised under the exception to enable a broader legitimate activity. Comparatively, the very purpose of lending is to provide the work to the user and is thus in direct confrontation with the exploitation of the work on the market. Its normal effect is to replace the acquisition of the work. Users get access to works by public lending and are dispensed then to buy the work (even though they might still buy the work after having read it by a library loan).

69 Public lending by libraries aims at providing an alternative way of getting access to published works for reading, viewing, research, private study, or enjoyment. The assessment of the effect of the exception on the market and normal exploitation of copyrighted works is hence delicate, as some market substitution will necessarily flow from public lending. It is not sufficient, then, to affirm that borrowing a book avoids buying it and would necessarily decrease sales of that book⁸², for the very effect of public lending is to act as an alternative to the market. The economic assessment of the impact of public lending should, instead, focus on the overall competition between lending and retail market⁸³. The activities of lending by libraries should not go as far as making the access to books and other copyrighted works through libraries more convenient compared to access from the regular market for such content. The possibility for the copyright owners to deliver the work for lending is therefore not enough to preclude the public lending by libraries under the limitation of the exclusive right (with or without compensation). The lending activities by libraries could not conversely, due to their ease for the users, avert the public from buying works from commercial platforms and publishers.

70 This is why any extension of the public lending right to e-lending should carefully weigh its conditions to mitigate this impact on the market for books and reduce the possible attractiveness of e-lending over an acquisition of the work on the market⁸⁴.

71 The last test consists of the absence of an unreasonable prejudice to the legitimate interests of the right holder. With regards to digital public lending, the prejudice towards the right holders, as already explained, seems to be justified by the public interest the public libraries pursue. That being said, as for the analogue world and in order not to raise discrimination between analogue works and digital works, right holders should perceive remuneration for the public lending exception⁸⁵. Other conditions could apply to e-lending, if governed by a copyright limitation, so as to accommodate the legitimate interests of copyright owners, such as the imposition of release windows or embargo period, during which books could not be subject to lending in order to leave some head start to the market.

c.) The conditions of the limitation and the constraints of lending

72 The assessment of the three-step test and the extent of the substitution effect between lending and buying a book will depend on what e-lending actually allows readers to do.

73 In traditional public lending, there are differences between borrowing a physical book at a public library and buying it that still tilts the balance towards bookshops for the readers who can afford to buy a book; for instance:

- the need of a library membership;
- the need to physically go to a library during its opening hours to check out and, most of all, to return the book by its due date;
- the unavailability of books for lending due to simultaneous demands by other readers, to the number of copies owned by the libraries, or to the application of an embargo period. Getting the last novel of Harry Potter at the time of its public release might be easier in a bookshop than in a library;
- the number of simultaneous readers/listeners/viewers of the same book/CD/DVD depends on the number of copies of the work owned by the library, which diminishes the harm to the market for the work;
- the sometimes poor quality of books that have been frequently borrowed;

- the limited collection of the library, compared to the possibility to order any book from its publisher;
- the lack of unlimited possession and ownership of the book, which suggests that the comfort of reading it is not as great as that for an acquired book, due to the deadline for returning the book, or the impossibility to annotate the book or keep it for further reference.

74 Some of those differences between lending and buying, also called ‘frictions’, might be attenuated or may well disappear for e-books and on-line delivery⁸⁶. For instance, the journey to the library’s premises is not required anymore as the e-lending services will be available 24/7, and no specific act of returning the book will occur if it is automatically disabled at the expiration of the lending term. Due to their electronic format, e-books can be sent to several readers simultaneously, hence reducing the wait for the book to be available. Another consequence of the digital format is that e-books will not wear out by the number of readings. Finally, buying a book gives possession of a tangible good to its acquirer, whereas borrowing a book from a library is only for a limited time. Even though the same difference exists between a purchased e-book and a borrowed e-book, the immateriality of the e-book might reduce the perception of such a difference, as the acquisition of e-books give few elements of possession to the buyer, as well. From a legal perspective, the provision of an e-book by download could be defined not as a sale⁸⁷ but as the provision of a service, and no transfer of ownership would occur⁸⁸.

75 Therefore, in terms of comfort, the gap between e-lending and buying an e-book might be reduced, which would ultimately have an impact on sales if the modalities of e-lending are not constrained. This justifies to imposing some conditions on e-lending to maintain its lower attractiveness.

76 The extension of public lending privilege enjoyed by libraries in most Member States with regards to e-lending should consider these tensions and mimic, to some extent, the frictions brought by lending a tangible book that makes it only subsidiary to its acquisition on the market. E-lending should not be made as easy, in terms of comfort and ease, as downloading an e-book from a commercial website.

77 A number of constraints are already applied to the conditions of use in order to replicate such “frictions” in the e-lending developments based on licensing, with the objective to mitigate the impact that lending could have on the normal market for books and e-books. They are comprised of:

- *a limited duration*: this is a defining feature of lending that should apply for e-lending, as well;

- *the limitation of one user per title*: this is the model of one book / one user that prevails on current e-lending services. Libraries can only lend the book to one user at a time for each license it has concluded with the publisher or platform. It does create waiting lists, making the e-lending less attractive than the acquisition of the book at online bookstores. This could be a condition of a copyright limitation for e-lending;
 - *emulation of deterioration*: some providers of e-books force libraries to renew their license after a certain number of loans to replicate the deterioration of a paper book. This condition is not well-accepted by libraries. Its objective is dubious, as the price for an e-book could, instead, reflect the greater number of uses and loans without any loss of quality;
 - *recourse to technical protection measures*: e-books are products that have been developed and marketed with embedded DRM. Without such a technical protection, the e-lending initiatives developed between libraries and publishers would not have been possible. The digital format of an e-book exposes it to further copying, manipulation, and transmission. Therefore, securing and limiting the lending on-line should be aided by technical measures that prevent printing, copying, and further lending, and that enforce the principle of a limited duration by disabling the access to the book at the expiration of the term. If e-lending is authorized by a copyright limitation, some technical protection could be imposed to the libraries benefiting from the protection, even though that would create some difficulty and cost for libraries in implementing e-lending. The scope of technically prohibited acts might depend on the type of work (e-book, music or audio-visual file) and on the type of libraries. For instance, one can imagine that borrowing a scientific book for research or study from a research or academic library could allow for printing or copying of limited portions or making notes that could be then extracted from the book;
 - *application of an embargo or windows release period before a work can be available for e-lending*: the principle of a prohibition to lend the work during some period after its commercial release is applied in many national laws on public lending right. The idea is also known in the exploitation of audio-visual works that applies successive dates of availability from the release of the movie in theatres, in DVDs to VOD services. As 75% of the revenues yielded by a book are generated in the first six months after its publication⁸⁹, an embargo period of a few months makes the commercial exploitation of a work prevail. New e-books will not be immediately available on libraries' websites for download, and a significant part of readers will not wait for public lending to get access to their favourite authors. The fixation of an availability date applies in the e-lending models in many countries. For instance, in the United States, the publisher Penguin requires a delay of 6 months before making e-books available to libraries. In Sweden, the embargo is about 3 or 4 months and could be extended to 12 months; as in the Netherlands, it may vary from one to three years⁹⁰.
- 78 This principle has some downsides, though. Such windowing has namely been increasingly given up for audio-visual works, as the lack of availability of new releases has resulted in more piracy. However, a key difference between movies and e-books is that the film was not available in a legal downloadable format months after its release in cinemas. The first exploitation of a book would be in an e-book format that could be lawfully acquired by a reader. In the United States, the inclusion of recently published materials for e-lending has contributed to increase the demand from the public⁹¹. Besides, the rule of embargo might not be justified in all cases, namely for scientific works whose e-lending in academic and research libraries could occur sooner as such loans, as seen above, are not in the same competing relationship with sales.
- 79 Beyond those constraints that should reduce the impact of a limitation of exclusive right for public e-lending, and make this avenue to gain access to works only subsidiary to the market, the traditional conditions applicable to public lending would apply, as well, in terms of definitions of libraries benefiting from the limitation, the eligible type of works (only books or other types of works), and the modalities of a remuneration to rights owners⁹².
- 80 Digital libraries are also potentially transnational while libraries normally cater to the needs of the local population. When making e-books available on-line, they would offer their services to the whole world. That explains that current e-lending pilot experiments are restricted either to registered members of a library or to residents of a country. This requirement applies, for instance, in the Norwegian e-lending project in which the Norwegian literature of the 20th century is available on-line for lending to any resident of Norway upon verification of his or her IP address⁹³. This restriction to residents of a country or likely users of a local library even though it negates the non-territorial dimension of the Internet, could be justified by the cultural promotion and social objectives of public lending, as well as by the language of the cultural content proposed for lending. It could be imposed through a secure log-in.

- 81 A last remark pertains to the challenge of giving some autonomy to libraries to perform e-lending services in a technical context that impedes, to some extent, such autonomy. As said above, e-books are released in a DRM-protected format that secures the work on an authorised device and to an authorised user with no possibility of further installation on another e-reader. This makes it difficult for libraries to undertake acts of reproduction, distribution, and making available autonomously. Extending a possible existing limitation to e-lending, the exception might be vain if it cannot be exercised by the libraries without the collaboration of publishers or intermediaries. For the sake of technical compatibility, the exception might become irrelevant, and recourse to a licensed copy might be the sole option.
- 82 Such limitation to copyright should hence impose on publishers the provision of e-books in a format enabling their being made available on-line by libraries. That does not mean that such e-books will be devoid of any protection against further use. A non-proprietary or open format does not mean an unprotected format. At least the possibility of making the work available to several users successively should be possible. To achieve such an objective, the solution of the article 6(4) of the directive 2001/29 on copyright in the information society could be applied by analogy. This provision encourages the voluntary initiatives of rights holders to allow for some authorised uses of their works, despite the presence of DRM, and requires that Member States provide some remedies for the beneficiaries of the exceptions frustrated by DRM in lack of voluntary measures by rights holders⁹⁴. Publishers could be incited to provide interoperable and platform-neutral e-books to public libraries in order to be integrated in their information systems and be capable of online access by the public and reading by with many applications and e-readers.
- 83 A recent document of the International Federation of Libraries (IFLA) on the Principles of e-lending licensing further insists that eBook licensing/purchase options must respect copyright limitations and exceptions available to libraries and their users in national law, namely the copying of a portion of the work, the reformatting of the work for preservation purposes if licensed or purchased for permanent access or to enable access for people with print disabilities⁹⁵. This raises the issue of the contracting over copyright exceptions. But, fundamentally, this demand underlines that libraries are now increasingly acquiring e-books in licensing terms with the objective of making them available through lending and might have no other copies on which they can undertake their other tasks of preservation or archiving.

E. Conclusion

- 84 Libraries undergo dramatic changes in the digital environment and dream of an extended ambit to enhance accessibility of their collection that could challenge the models of exploitation by rights holders. Libraries used to be only limited competitors to the normal acquisition of works, as works could only be consulted on the site of the institution, or through public lending limited in time and availability. By making works available on-line, libraries could become cultural entrepreneurs, competing with copyright owners or providing users a substitute to gain access to works. To some extent, the lines between libraries' activities and on-line commercial exploitation of works can be seen as blurring, except for the different motive that still distinguishes both activities. This renewed confrontation between the public interest of preserving knowledge and access thereto and the protection of copyright and related rights owners and of the normal market for works, entails some reassessment of the dividing line between the exclusive rights and the limitations in favour of libraries. It would be too simple to entrust the market to provide cultural content to the public, as it would obliterate a key mission of libraries that is to provide works to all, irrespective of their financial means, age, or social status.
- 85 Copyright is not only a market creature. It is fundamentally rooted in the public sphere where works should circulate and provide meaning for all members of society⁹⁶. True, the shift to digital format entails new risks and fears, but digital works should not be taken away from democratic imperatives that force us to maintain some access thereto that would not be mediated by the market and the copyright owners. Copyrighted works are not mere commodities. Particularly at a time when rising precariousness and poverty in a Europe in crisis means, for an increasing number of people, saving the cost of culture to ensure more basic needs, the risk of creating a commodified culture that only the rich could afford would lead to an unjust fracture.
- 1 See www.informatieprofessional.nl/nieuws/9848-proefproces-om-uitlenen-van-ebooks-door-bibliotheken.html.
 - 2 Dutch Court refers preliminary questions on the lending of e-books to ECJ, *Future of Copyright Blog*, 4 September 2014, <http://www.futureofcopyright.com>.
 - 3 This definition is taken from R. van der Noll, K. Breemen, V. Breemen, B. Hugenholtz, M. Brom & J. Poort, *Online uitlenen van e-books door bibliotheken. Verkenning juridische mogelijkheden en economische effecten*, in opdracht van het Ministerie van Onderwijs, Cultuur en Wetenschap, Amsterdam, 2012, www.ivir.nl/publicaties/poort/Online_uitlenen_van_e-books.pdf, p.2.
 - 4 In the Amazon model, the 'lending' is not bound by a limited duration but one borrowed book can only be replaced by a new one when returned.

- 5 Other activities can be legally assimilated to lending, such as interlibrary loans or lending for an exhibition, as they imply the transfer of a tangible copy of the work for a limited duration. However, they have been excluded from the legal definition of public lending in the copyright context. See recital 10 of the Directive 2006/115 on Rental and Lending, that provides that lending “should not include making available between establishments which are accessible to the public”.
- 6 Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental and lending right and on certain rights Related to copyright in the field of intellectual property (codified version), *OJ*, L 376 of 27 December 2006, p. 8.
- 7 Recital 10 excludes from the lending (and the rental) right certain acts of making available such as for example “making available phonograms or films for the purpose of public performance or broadcasting, making available for the purpose of exhibition, or making available for on-the-spot reference use”.
- 8 J. Krikke, “Council Directive 92/100/EEC (Rental and Lending Right Directive) of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property”, in Th. Dreier and B. Hugenholtz (ed.), *Concise European Copyright Law*, Alphen aan den Rijn, Kluwer Law International, 2006, p. 244.
- 9 V.-L. Benabou, *Droits d’auteur, droits voisins et droit communautaire*, Bruxelles, Bruylant, 1997, n° 501 who explains that this condition excludes from the scope of the directive private lending which is not subject to the exclusive rights of the authors.
- 10 Article 1(4) of the Proposal for a Council Directive on rental right, lending right, and on certain rights related to copyright, COM(1990) 586 final. See M Walter & S. Von Lewinski, *European Copyright Law, A commentary*, Oxford, Oxford University Press, 2010, n° 6.1.30.
- 11 Article 6 « Derogation from the exclusive public lending right Member States may derogate from the exclusive right provided for in Article 1 in respect of public lending, provided that at least authors obtain a remuneration for such lending. Member States shall be free to determine this remuneration taking account of their cultural promotion objectives.
- Where Member States do not apply the exclusive lending right provided for in Article 1 as regards phonograms, films and computer programs, they shall introduce, at least for authors, a remuneration.
- Member States may exempt certain categories of establishments from the payment of the remuneration referred to in paragraphs 1 and 2 ». See the developments of M Walter & S. Von Lewinski, *op. cit.*, n° 6.5.8 and followings.
- 12 See The Report from the Commission to the Council, the European Parliament and the Economic and Social Committee on the Public Lending Right in the European Union, 12 September 2002, COM(2002) 502 final. For an analysis of the transpositions of the public lending right in a dozen of Member States, see J.-P. Triaille et al., *Study on the application of directive 2001/29/EC on copyright and related rights in the information society*, Study commissioned by the European Commission, October 2013, p.343-345.
- 13 **Report from the Commission of 12 September 2002 to the Council, the European Parliament and the Economic and Social Committee on the public lending right in the European Union**, *op. cit.*, n° 3.3. See also the history of this compromise as related by M. Walter & S. Von Lewinski, *op. cit.*, n° 6.5.1.-6.5.6.
- 14 E.C.J., 26 October 2006, C-198/05, *Commission / Italy*, ECR, 2006, I-107; E.C.J., 26 October 2006, C-36/05, *Commission / Spain*, ECR, 2006, I-10313; E.C.J., 6 July 2006, C-53/05, *Commission / Portugal*, ECR, 2006, I-06215.
- 15 E.C.J., 30 June 2011, *VEWA*, C-271/10, ECR, 2011, I-5815.
- 16 M. Walter & S. Von Lewinski, *op. cit.*, n° 6.1.16.
- 17 Ch. Alleaume, “Le droit de prêt public (en France et au-delà)”, *Propri. intell.*, 2004, n° 12, p. 726.
- 18 See the comparative analysis in J.-P. Triaille, *op. cit.*, p. 343 et seq.
- 19 See the following studies or a comprehensive overview of the e-lending situation in Europe and beyond: IDATE Consulting, *Etude sur l’offre commerciale de livres numériques à destination des bibliothèques de lecture publique*, Study elaborated for the French Ministry of Culture and Communication, Final Report, 2013, www.culturecommunication.gouv.fr/Disciplines-et-secteurs/Livre-et-lecture/Actualites/Etude-IDATE-sur-les-livres-numeriques-en-bibliotheque, 79 p.; R. van der Noll et al., *Online uitlenen van e-books door bibliotheken*, *op. cit.*; D. O’Brien, U. Gasser & J. G. Palfrey Jr., *E-books in Libraries : A Briefing Document Developed in Preparation for a Workshop on E-lending in Libraries*, Berkman Center Research Publication, n° 2012-15, 2012, <http://ssrn.com/abstract=2111396>, 29 p.
- 20 D. O’Brien, U. Gasser & J. G. Palfrey Jr., *op. cit.*, p. 8.
- 21 *Ibidem*, p. 10.
- 22 Some publishers do sell e-books to libraries and allow them to provide them directly to their members, but the proportion of sales is rather small compared to licensing and remote access for libraries.
- 23 IFLA, *Les fondements du prêt de livres électroniques (E-books)*, 2012, www.ifla.org/news/ifla-releases-background-paper-on-e-lending, p. 7.
- 24 R. VAN DER NOLL ET AL., *Online uitlenen van e-books door bibliotheken*, *op. cit.*, p. 5.
- 25 As explained by IFLA, *Les fondements du prêt de livres électroniques (E-books)*, *op. cit.*, p. 7: « in effect, the typical “in perpetuity” purchase of an eBook through a distributor such as OverDrive using this model only will provide access on an ongoing basis as long as the library maintains a relationship with the distributor or, indeed, as long as the distributor continues to operate ».
- 26 R. van der Noll et al., *Online uitlenen van e-books door bibliotheken*, *op. cit.*, p. 6.
- 27 P. Whitney, *EBooks and Public Lending Right in Canada*, submitted to the Public Lending Right Commission, 2011, www.canadacouncil.ca/en/council/research/find-research/2011/ebooks-and-public-lending-right, p. 12.
- 28 M Walter & S. Von Lewinski, *op. cit.*, p. 277.
- 29 See for a discussion of the different arguments, R. van der Noll et al., *Online uitlenen van e-books door bibliotheken*, *op. cit.*, p. 32-33.
- 30 COM (90) 586 final, p. 4.
- 31 R. van der Noll et al., *Online uitlenen van e-books door bibliotheken*, *op. cit.*, p. 35.
- 32 M Walter & S. Von Lewinski, *op. cit.*, « Chapter 6: Rental and lending rights directive », n° 6.1.28.
- 33 J. Reinbothe & S. von Lewinski, *The EC Directive on Rental and Lending Rights and on Piracy*, London, Sweet and Maxwell, 1993, p. 41-42.
- 34 Green Paper on Copyright and Related Rights, COM(1995), 382 final.
- 35 *Ibidem*, p. 58.
- 36 *Ibidem*.
- 37 *Ibidem*.
- 38 *Ibidem*, p. 59.

- 39 Communication from the European Commission, Follow-up to the Green Paper on Copyright and Related Rights in the Information Society, 20.11.1996, COM(1996) 568 final, p. 12.
- 40 M Walter & S. Von Lewinski, *op. cit.*, n° 6.1.29.
- 41 R. van der Noll et al., *Online uitlenen van e-books door bibliotheken*, *op. cit.*, p.37.
- 42 See recital 28 *in fine* (The distribution right provided for in this Directive is without prejudice to the provisions relating to the rental and lending rights contained in Chapter I of that Directive) and 29 (The question of exhaustion does not arise in the case of services and on-line services in particular. (...) Therefore, the same applies to rental and lending of the original and copies of works or other subject-matter which are services by nature).
- 43 W. Sieghart, *An independent Review of E-Lending in Public Libraries in England*, 2013, www.gov.uk/government/publications/an-independent-review-of-e-lending-in-public-libraries-in-england, 24 p.
- 44 Department for Culture, Media & Sport, *Government Response to the Independent Review of E-Lending in Public Libraries in England*, 2013, www.gov.uk/government/publications/an-independent-review-of-e-lending-in-public-libraries-in-england.
- 45 Article 43 of the Digital Economy Act 2010, www.legislation.gov.uk/ukpga/2010/24/contents.
- 46 The definition of book has been modified as follows : “book” includes (a) a work recorded as a sound recording and consisting mainly of spoken words (an “audio-book”), and (b) a work, other than an audio-book, recorded in electronic form and consisting mainly of (or of any combination of) written or spoken words or still pictures (an “e-book”).
- 47 The Act states that the notion of “lent out” (a) means made available to a member of the public for use away from library premises for a limited time, but (b) does not include being communicated by means of electronic transmission to a place other than library premises.
- 48 That modification entered into force in June 2014.
- 49 Department for Culture, Media & Sport, *op. cit.*, p. 5-7.
- 50 See S. Dusollier, *Droit d’auteur et protection des œuvres dans l’univers numérique – Droits et exceptions à la lumière des dispositifs de verrouillage des œuvres*, Bruxelles, Larcier, 2005 n° 279 et seq.
- 51 This might read as an excessive statement as libraries will also need space on their shelves and might get read of some books quite regularly. Their collection will be based on the selection of the librarian and not offer everything that exists on the market. The development of on-line retailers, with a larger catalogue and with longer period of availability (and unlimited availability fo e-books) has also changed the comparison with libraries.
- 52 See IFLA, *IFLA Principles for Library eLending*, August 2013, www.ifla.org/node/7418, 3 p.
- 53 W. Sieghart, *op. cit.*, p.8.
- 54 P. Lescure, *Mission « Acte II de l’exception culturelle », Contribution aux politiques culturelles à l’ère numérique*, 2013, www.culturecommunication.gouv.fr/Actualites/Missions-et-rapports/Rapport-de-la-Mission-Acte-II-de-l-exception-culturelle-Contribution-aux-politiques-culturelles-a-l-ere-numerique, p. 185.
- 55 Except if the ECJ decides to extend its UsedSoft decision allowing transfer of second-hand digital copies of works to other works than software, which is probable. The market could also mitigate that untransferrability of the digital book, as demonstrated by Amazon that allows its readers to lend a book to a friend for 14 days (with the advantage of solving the problem of the friend who never returns your book!).
- 56 See the famous *Alice for iPad* by Atomic Antelope.
- 57 L. Guibault, *Copyright Limitations and Contracts. An Analysis of the Contractual Overridability of Limitations on Copyright*, The Hague, Kluwer Law International, 2002.
- 58 See the article 5(3) n of the Infosoc Directive that excludes the exceptions for works that are “subject to purchase or licensing terms”. On the interpretation of that condition, see ECJ, 11 September 2014, *Technische Universität Darmstadt*, C- 117/13, spec. §24-35; J.P. Triaille, *op. cit.*, p. 324-325.
- 59 See the analysis by M. Senftleben, *Copyright Limitations and the three-step test*, Kluwer Law International, 2004, p.181 et seq.
- 60 Report of the WTO Panel, *United States- Section 110 5) of the US Copyright Act*, 15 June 2000, WT/DS160/R, § 6.183.
- 61 *Ibidem*, § 6.188
- 62 See S. Dusollier, *op. cit.*, n° 595 et seq.
- 63 *Records of the Intellectual Property Conference of Stockholm*, Genève, OMPI, 1967, p. 112
- 64 Report of the WTO Panel, *op. cit.*, § 6.180.
- 65 W. Landes & R. Posner, “An Economic Analysis of Copyright Law”, *Journal of Legal Studies*, 1989, Vol. XVIII, p. 357 et suiv.; W. Gordon, “Fair Use As Market Failure: A Structural And Economic Analysis of the Betamax Case and its Predecessors”, *Colum. L. Rev.*, 1982, Vol. 82, p. 160; T. Bell, “Fair use v. fared use : the impact of automated rights managements on copyright’s fair use doctrine”, *N. C. L. Rev.*, 1998, Vol. 76, p. 558-618.
- 66 See B. Hugenholtz, “Fierce creatures – Copyright exemptions: Towards extinction ?”, in *Rights, Limitations and exceptions : Striking a proper balance*, Conference IFLA/IMPRIAMTUR, Amsterdam, 30-31 Octobre 1997, disponible sur <http://www.ivir.nl>
- 67 W. Gordon, “Fair Use as a Market Failure...”, *op. cit.*
- 68 W. Gordon, “Excuse and Justification in the Law of Fair Use : Commodification and Market Perspectives”, in N. Netanel & N. Elkin-Koren (eds.), *The Commodification of Information*, The Hague/London/NewYork, Kluwer Law International, Information Law Series, n°11, 2002, p. 149-192.
- 69 For a similar reasoning, see T. Dreier, “Musées, bibliothèques et archives : de la nécessité d’élargir les exceptions au droit d’auteur”, *Propr. intell.*, 2012, n° 43, p. 190.
- 70 See the Recitals of the Information Society Directive; Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled done in Marrakesh on the 27th of June 2013.
- 71 The role of Amazon in authorizing e-lending for Kindle has been regularly criticised as the commercial retailer technically seems to intervene in the operation and can thereby collect personal data of the people borrowing e-books, data related to the borrowed titles and connected to the identification of their Kindle device and Amazon account. See www.infodocket.com/2011/09/27/8350/.
- 72 <http://librarianbyday.net/2011/02/25/publishing-industry-forces-overdrive-and-other-library-ebook-vendors-to-take-a-giant-step-back/>.
- 73 IFLA, *Les fondements du prêt de livres électroniques (E-books)*, *op. cit.*, p. 7.
- 74 D. O’Brien, U. Gasser & J. G. Palfrey Jr., *op. cit.*, p. 10.
- 75 It seems improbable in the wake of the ReDigi decision of a District Court of New York (*Capital Records v. ReDigi Inc.*, S.D.N.Y., 30 March 2013, No. 12 Civ. 95) that the first sale doctrine be applied to digital products downloaded on the internet.
- 76 The extent of the negotiation capacity of libraries is difficult to assess, it could increase with time, as libraries will be more accustomed to e-lending practice.
- 77 ePub and pdf are non-proprietary formats that are accepted on most e-readers. Kindle on the contrary is a proprietary format that can only be read on Kindle and devices equipped with the Kindle application. For instance E-books are lent for Kindle

by OverDrive, one of the main e-lending platforms, due to an agreement with Amazon. It seems that part of the lending process is to be completed on the Amazon website which led to sever critics as the commercial platform processes personal data of e-borrowers.

- 78 The e-books made available for e-lending will not be generic but adapted to the conditions imposed on the lending.
- 79 EBLIDA, *European libraries and the challenges of e- publishing. An e-book policy for libraries in Europe*, May 2012, www.eblida.org/news/european-libraries-and-the-challenges-of-e-publishing.html.
- 80 Case C5/08, opinion delivered by Advocate General Trstenjak on 12 February 2009, *Infopaq International*, paragraph 135. See also Report of the WTO Panel, United States– Section 110 5) of the US Copyright Act, 15 June 2000, WT/DS160/R.
- 81 M. Senftleben, *Copyright Limitations and the three-step test*, Kluwer Law International, 2004, p. 137 ; M. Ficsor, *The Law of Copyright and the Internet*, *op. cit.*, p. 133.
- 82 Economic studies could also assess whether users of libraries are not buying more books than non users and whether young people having acquired their reading habits in libraries will not become regular customers of bookshops and other retailers.
- 83 In a recent study on e-lending commissioned by the Dutch government (see R. VAN DER NOLL ET AL. *Online uitlenen van e-books door bibliotheken*, *op. cit.*, spec. p.44), economists have distinguished four impacts of lending on the market that should be assessed: (1) the effect of a development of e-lending through licensing which would create new licensing revenues for publishers and authors; (2) the direct substitution between the buying of an e-book through an online commercial platform and its borrowing through public lending ; (3) the indirect positive effect of e-lending on sales of e-books, due to the increased diffusion of e-books in the general public; (4) the indirect substitution between e-lending and sale of published books (as tangible goods). The ‘direct substitution’ factor is understood as an investigation as to whether the lending of an e-book by a public library will offer an attractive alternative to its acquisition on the retail market. It will certainly for some people offer an alternative to the market, but the real question is whether, in general and not only theoretically for one book, the e-lending offer by public libraries would have a significant impact on the overall market. On that basis, an economic study should assess the real competition between libraries and booksellers and the overall effect of public lending on retail sales, notably by taking into account the attractiveness of lending versus buying.
- 84 In terms of the economic impact of e-lending, the differences between types of libraries could also matter. Indeed the situation of research and academic libraries is rather specific compared to general public libraries. Such libraries are the main market of scientific publishers, in contrast with general publishers who rely mostly on the retail market. This might have an effect of the extent of the substitution effect, as the readers of the research libraries do not constitute the major market for scientific publishers. Fears of piracy are also higher for mainstream books than for scientific ones and academic libraries have a long time habit of managing electronic resources licenses by scientific publishers, two reasons that might give more confidence to scientific publishers to allow for e-lending in research and academic libraries.
- 85 Such remuneration should compensate the harm done to the authors as reminded by the European Court of Justice (see E.C.J., 30 June 2011, *VEWA*, C-271/10, *ECR*, 2011, I-5815).
- 86 It will depend on the technical modalities that will be chosen for the e-lending model.
- 87 That could be challenged by the decision in the *UsedSoft* case (E.C.J., 3 July 2012, C128/11, *UsedSoft*), if one considers that its reasoning is not limited to computer programs but could be applied as well to e-books or other types of digital content provided online with no limited duration of use. In such a case, on a legal point of view, there would be some difference between a sale of an e-book and a lending in terms of ownership.
- 88 The transfer of ownership will depend of the terms of the contract, but it could be perceived in any case as not similar to the transfer of property in a physical object.
- 89 R. van der Noll et al., *Online uitlenen van e-books door bibliotheken*, *op. cit.*, p. 28-29.
- 90 IDATE Consulting, *op. cit.*
- 91 IDATE Consulting, *op. cit.*
- 92 On the objectives, beneficiaries and other elements of a possible exception, see J.P. Triaille, *op. cit.*, p.362 et seq.
- 93 K. Vevele, Welcome to the library Anytime – Anywhere, presentation at the workshop organized by FEP, Helsinki, 10th May 2013.
- 94 On that provision, see S. Dusollier, “Exceptions and Technological Measures in the European Copyright Directive of 2001”, *I.L.C.*, 2003, vol. 34, p. 62-83.
- 95 IFLA, *IFLA Principles for Library eLending*, *op. cit.*
- 96 On that argument see S. Dusollier, *Droit d’auteur et protection des oeuvres dans l’univers numérique*, *op. cit.*, n°273 et seq.