

Court of Justice of the European Union ruling on e-lending: what impact for libraries in Europe (and beyond)

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Abstract:

This paper aims at underlining the impact, if any, of the ruling on e-lending by the Court of Justice of the European Union on libraries in Europe and beyond. It provides:

- a summary of the Court case and the ruling;
- examples of the impact in some EU countries;
- an example outside of Europe;
- What is currently happening in Europe;
- Next steps.

Keywords: Court of Justice of the European Union, Court, CJEU, eLending, Copyright, Exceptions, Copyright Exceptions, European Copyright Acquisition

A word of thanks to the people who made this paper possible (in alphabetical order): Annemarie Beunen (NL), Jan Braeckman (BE); Christina de Castell (CA), Xavier Galaup (FR), Oliver Hinte (DE), Alexandre Lemaire (BE), Ariadna Matas (NL), Bruno Vermeeren (BE).

Special thanks Barbara Stratton (Chair of EBLIDA Expert Group on Information Law) for her support in helping writing the briefing documents that are used in the first part of this paper (the Court Case and the Ruling).

EBLIDA in brief

The European Bureau of Library, Information and Documentation Associations is an independent association representing the + 70.000 libraries of all types, their 400.000 professionals and 100 million users in 36 countries in Europe since 1992. EBLIDA promotes unhindered access to information for all, defends the interests of the library and information science sector and lobbies at European level on their behalf.

The court case C-174/15¹

The case opposed the Dutch Public Library Association versus the Lending Right Foundation, an organisation in charge of collecting the money from libraries lending on behalf of authors and publishers in the Netherlands.

At the heart of this Dutch case is the question whether public libraries need a licence permitting them to lend e-books, or whether they can lend them without a licence in the same way as they lend physical books in their collections.

The CJEU (hereafter 'the Court') was asked by the Dutch court, Rechtbank Den Haag (District Court of the Hague, Netherlands), to answer [4 questions](#) concerning interpretation of Articles 1, 2 and 6 of the Rental and Lending Directive 2006/115/EC and Article 4 of the Information Society Directive 2001/29/EC.

Taken together, in effect **the questions** put to the Court **were asking whether the Rental and Lending Directive permits libraries to lend e-books in their collections and, if yes, under what conditions.**

The ruling

The judgement of the Court was issued on 10 November 2016.

In answer to Question 1, the Court decided that *"Article 1(1), Article 2(1)(b) and Article 6(1) of Directive 2006/115 must be interpreted as meaning that the concept of 'lending', within the meaning of those provisions, covers the lending of a digital copy of a book, where that lending is carried out by placing that copy on the server of a public library and allowing a user to reproduce that copy by downloading it onto his own computer, bearing in mind that only one copy may be downloaded during the lending period and that, after that period has expired, the downloaded copy can no longer be used by that user."*¹

To sum-up, **the Court said that 'lending' in the Rental and Lending Directive does include certain kinds of e-lending if the lending is compliant with the Directive.** Thus, provided that they pay remuneration at least to authors as required by the Directive, libraries do not need prior permission to lend e-books in their collections on a *one-copy-one-user* basis.

Additionally, **the e-books must have been obtained from a lawful source** in order to be able to lend them. In reality, the ability to lend them to the public may be affected by the terms of the accompanying licence, unless national legislation for e-lending also ensures that any licence terms and conditions to the contrary are rendered unenforceable.

In answer to Question 2, the Court decided that *"EU law, and in particular Article 6 of Directive 2006/115, must be interpreted as not precluding a Member State from making the application of Article 6(1) of Directive 2006/115 subject to the condition that the digital copy of a book made available by the public library must have been put into circulation by a first sale or other transfer of ownership of that copy in the European Union by the holder of the right of distribution to the public or with his consent, for the purpose of Article 4(2) of Directive 2001/29."*²

¹ This section and the following of the paper are issued from the EBLIDA briefing note accessible at <http://www.eblida.org/news/eblida-briefing-on-the-e-lending-judgement-of-the-cjeu.html>.

Actually, the answer to Q2 was to a direct question whether EU law precludes “Member States from imposing...a condition that the copy of the work made available by the establishment....must have been brought into circulation by an initial sale or other transfer of ownership of that copy within the European Union by the rightholder or with his consent...”. The question was asked because Dutch law imposes such a condition.

The Court’s answer was that, yes, **Member States may apply additional conditions beyond those specified in the Rental and Lending Directive to improve the protection of authors’ rights**. Its answer also confirmed that the Dutch condition that **if the e-book has been sold or licensed to the public in the EU, libraries may purchase it for e-lending to the public, is compliant with the Directive**. Thus other Member States may also impose such a requirement with regard to e-lending within their own jurisdictions.

In answer to Question 3, the Court decided that “*Article 6(1) of Directive 2006/115 must be interpreted as meaning that it precludes the public lending exception laid down therein from applying to the making available by a public library of a digital copy of a book in the case where that copy was obtained from an unlawful source.*”³

Where a copy of an e-book was obtained from an unlawful source, allowing the lending of such a copy would be liable to unreasonably prejudice rightholders since an objective of the Rental and Lending Directive is to combat piracy. Consequently, the public lending exception does not apply to a digital copy of a book made available by a public library that had been obtained from an unlawful source.

The Court declined to answer Question 4 about digital exhaustion applying to the sale of e-books because it considered that, given its answer to Question 2, exhaustion is not relevant to the purchase of e-books by remote download.⁴

In brief, the concept of ‘lending’ [...] covers the lending of a digital copy of a book [...] under the 3 conditions below:

- 1 copy/1 user;
- remuneration of the author;
- copy from a lawful source.

The impact

Less than a year after the case, its concrete impact on libraries in Europe remains debatable. However, considering the importance of the topic for policy-makers, librarians and library users, the fact that the case was taken-up by the CJEU helped in maintaining the e-lending issue under the spotlight.

Since the start, library professionals had a lot of questions and different interpretations of the case. The main being “is the Court case directly applicable in my country?”. As always in Europe, there is no clear-cut answer to a question.

For that reason, and also to build up on the result of the Court case and to encourage its members to take action in their countries, Eblida produced a short briefing note² underlining the main issues of the

² <http://www.eblida.org/news/eblida-briefing-on-the-e-lending-judgement-of-the-cjeu.html> (14.08.2017).

case. The briefing note provides guidance and answer to some of the key questions although it doesn't constitute a legal advice.

Example of actions in 7 European countries

1. The Netherlands

The judgement can be applied immediately provided that a lending fee has been determined.

This proves to be one of the obstacles.

In the Netherlands, the lending fee must be negotiated among stakeholders within a special negotiation body called Stichting Onderhandeligen Leenvergoedingen (StOL), in accordance with article 15d of the [Dutch Copyright Act](#). In the StOL, public libraries are represented on the one hand and authors and publishers on the other hand. The parties in the StOL have different opinions on the CJEU decision, so that a lending fee for e-books has not been determined yet.

A second obstacle comes from the fact that Dutch e-books on the market are not technically suitable for e-lending.

The result is that the situation for e-lending has not changed yet, and that negotiations between library organisations and authors and publishers organisations continue.

2. Germany

In Germany, Copyright depends of the Minister of Justice and Consumer protection that is currently discussing a new copyright law.

In that context, the German copyright coalition addressed the question of e-lending to the Minister hoping that it will be part of the new law.

The coalition noted and informed the Minister that the CJEU ruling leaves aside some key issues such as the question of remote access to ebooks or contract override and that other issues are numerous, such as a smaller of e-book than of printed book.

3. France

The Minister of Culture (in charge of copyright for public libraries), first considered that the CJEU ruling was not applicable whereas some independent lawyers consider it was.

However, the French Library Association issued a statement³ claiming that the Court case was applicable in France. To further support its claim, the association commissioned an analysis to a lawyer who concluded that the ruling should be directly applicable. However, it remains a lawyers' interpretation and unless a library decides to apply the ruling and is sued by a publisher, there is little chance for any changes to apply.

The new government seems to look more favorable to libraries, although the question of copyright remains a source of division between different interests.

4. Italy

³ http://www.abf.asso.fr/fichiers/file/ABF/prises_position/communique_livre_numerique_achat_en_librairie.pdf (14.08.2017).

The ruling didn't brought any change, and the country has no plan to update its copyright law at present.

5. Spain

There is currently no change based on the ruling, and the government looks opposed to any introduction of change in any new law (even at Eu level).

In terms of access to library ebooks, there are several platforms that are managed by Spanish provinces, such as EBIBLIO (<http://madrid.ebiblio.es/opac/#index>) for the Madrid region or GALICIALE (<https://www.galiciale.gal/>) for Galicia. The Basque country has developed its own platform with its own data ELIBURUTEGIA (<http://www.eliburutegia.euskadi.eus/?locale=eu>).

6. Belgium

In Belgium there is a federal law on lending. However, the remuneration differs between Flanders and Wallonia.

In Dutch-speaking Belgium, Flanders, there is an existing platform to lend ebooks to library patrons that is based on agreements with publishers. Should a library in Flanders be willing to lend an e-book without negotiating with a publisher, this would require the library to buy directly from a bookseller, and so would mean Technological Protection Measures (Digital Rights Management). As a result, technical issues make it impossible for libraries to fully exploit their rights. For those reasons, the ruling hasn't have any direct effect for libraries in Flanders. Librarians and publishers have scheduled negotiations for Fall 2017 in the absence of a formal position of the Minister.

In French-speaking Wallonia, the current use of ebooks by library patrons is made through the online platform Lirtuel (that includes booksellers). As we speak, the lawyer of the French-speaking library association hasn't yet provided an opinion. In the absence of a lawyer's opinion, the body in charge of managing the libraries in the French-speaking community can't take further action, and therefore the ruling hasn't any effect on the system.

7. United Kingdom

The UK took action but not directly in relation to the CJEU case. In fact, the UK implemented a system as a follow-up of consultations and studies done at national level in the previous years. As the system stands, libraries are required to obtain a licence. So the CJEU ruling didn't have any impact there.

In addition, it is unclear what the consequences of Brexit will be, and the question of e-lending is clearly not a priority in the current context.

And beyond ?

Although the constituencies of EBLIDA are based in Europe, the question of e-lending has a strong impact at international level. Therefore any move on the old continent might have an impact in other countries worldwide, especially first in the EEA countries.

Actually, as long as there won't be further activities within Europe, it is difficult for the case to impact on other countries, especially those operating with a different regime, i.e. where there is not a regime of public lending right. This is true for instance for Switzerland and the United States of America.

Could this impact on countries that have a public right provision in the law, such as Canada? It could, but so far it didn't.

In Canada, the question of how legislation affects e-book lending remains the same. However, the country is preparing a review of the Copyright Act to start in late 2017, and librarians are asking for two relevant changes:

1. Allowing libraries to bypass TPMs for permitted uses
2. Ensuring protection of copyright exceptions in licenses.

Both demands are similar to the ones that are asked by library associations in Europe.

I believe it is not the only country beyond Europe interested in this, but I guess this part could be addressed in the Q&A session after the speech.

What's going on?

2 months before the CJEU issued its ruling on e-lending, the EU Commission released on 14 September 2016 its Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market⁴ containing 47 Recitals and 23 articles

There is nothing on eLending so far. But the topic has been pushed hard by librarians towards policy-makers in Europe, and we are hopeful to make a breakthrough in the next months.

What's next?

The next step for librarians is to convince policy-makers to act for change.

At European level, EBLIDA in cooperation with IFLA and other partners is working hard in reaching out to the European Parliament Legal Affairs Committee Members, Individual Members of the European Parliament and EU Commission's staff.

Our coalition includes a special provision to include e-lending in the current Copyright Directive proposal. The point was taken up positively by the rapporteur of the European Parliament Committee on Internal Market and Consumers Protection and included in its final report. Unfortunately, this provision disappeared from the final amended version of the text.

In any case, the library coalition will continue to claim the recognition of e-lending as part of the copyright acquis in the EU, and at least to obtain guarantees that when licences are signed, they cannot impede library patrons to enjoy the exceptions that are recognized in their national law.

The national level remains a key piece in the e-lending jigsaw. National Governments' positions are fiercely negotiated in the Council of the European Union that represents the interests of the Member-States. And there is a strong need of actions at national level to ensure that the legislation at European level follows the same path.

Without the support of member-states, expectations of positive changes cannot be really high.

⁴ <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52016PC0593&from=EN> (14.08.2017).

That is the reason why actions are needed in each member-states. The strategic approach of the Dutch Public Library Association could be seen as a source of inspiration for other countries in Europe and in the world. Even if the concrete result of the ruling remains complicated to assess, the victory in the Court remains a positive sign.

However, there will be a time where European and global policy-makers will need to further address the questions of how digital developments change our lives. And it won't be to the Court only to name the law.

Not having a proper law doesn't mean that you don't have rights. Soon it will be time for those rights to be enjoyed by library users.

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