



# IFLA E-Lending Background Paper

## Introduction

Digital content has been an important component of library collections for over two decades. Until relatively recently this content largely comprised access to aggregated databases of journals, newspapers, popular magazines and technical and specialized monographs. In 2010 the huge and escalating increase in the consumer purchasing of eReaders and tablets in a few markets and the corresponding increase in the commercial availability of downloadable consumer trade eBooks in turn led to an increase in the availability of and demand for downloadable eBooks in public libraries.

There are a variety of technical, legal and strategic issues which arise from the addition of downloadable eBooks to library collections which have led to concern, confusion and frustration for libraries and their users, publishers and authors. The IFLA Governing Board formed a Working Group to prepare a background paper on the issues relating to eBook availability in libraries to assist in the formulation of a policy on the matter.

## Context

In the IFLA context, consideration of the issues surrounding eBooks is especially complex for a variety of reasons:

- The structure and operations of the publishing and library sectors country to country can differ substantially.
- In many countries digital library collections are underdeveloped and consumers do not have access to eReaders, tablets and eBooks.
- There is a diverse range of eBook platforms and standards in the market which are often not compatible and, in the case of library applications, not user friendly or accessible.
- Different types of libraries have differing requirements for digital content, most notably academic/research libraries and public libraries.
- Scholarly and trade publishing have fundamentally different business models and take very different approaches for digital sales to libraries.
- The transition from print to digital is raising new legal issues for policymakers to address, especially in the area of copyright and its underlying principles which have enabled library lending in the print era
- The same transition, and the potential for digital lending models to collect and store large amounts of information on users' reading habits, raises fears regarding the protection of user privacy

Of necessity, any initial IFLA position on eBooks in library collections will have a North American and English language focus given that this is where the digital market is most active and where concerns are first arising. This is already starting to change with expanding use of downloadable eBooks in countries such as China. South Korea is one notable exception with reported eBook sales which place it as the second largest global market for eBooks after the USA.

An ongoing research project<sup>1</sup> reported in late 2011 eBook market share as follows;

- North America – 18% (USA has 98% of these eBook sales)
- Asia – 2.4% (South Korea 45%, Japan 25% and China 25%)
- EU – 1.1% (UK 52%, Germany 28%, France 7%)

As would be expected eBook market share correlates with user friendly sourcing options, wide title availability in the local language and affordable availability of eReader and tablets. The global dominance of English language eBook title availability reinforced by eReader availability is starkly evident in the statistics on titles available by country: in the USA – 1,000,000; UK 400,000, Germany/France - 80,000 each; Japan – 50,000; Australia – 35,000; Italy – 20,000; Spain – 15,000; Brazil 6,000. Statistics such as these are a snapshot at one point in time of a rapidly changing environment and, while illustrative, should not be assumed to be representative of the situation moving forward.

It also should be noted that one supplier, Amazon, dominates the eBook market with an estimated market share of 60% of North American eBook sales. This market concentration is of special relevance to libraries, publishers and book retailers given Amazon's aggressive push for vertical integration with recent book publishing and lending initiatives layered on their dominant position in eReader and eBook sales. Amazon has consistently proven to be a formidable market force and its ability to influence eBook pricing and availability by type of customer (e.g. libraries) and by country cannot be ignored in assessing ways forward for library eBook collections.

## **Publishing Background**

Publishers are struggling to develop a business model which addresses the very different markets for print books and eBooks. On the digital side of publishing there is no market place consensus on the best way forward and current practices are being challenged on several fronts, not least by governments in the US and EU where there are active investigations of pricing models and anti-competitive practice. Publishers are focused on finding a financially sustainable approach to the eBook market while addressing the ever present danger of piracy. Of direct relevance to this paper is how publishers view the library market in the context of the emerging eBook market model. In considering eBooks and libraries it is important to note the different business models for scholarly and trade publishing.

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<sup>1</sup> A. T. Kennedy and Bookrepublic, *Do Readers Dream of Electronic Books*, Publishers Launch Conference, Frankfurt, 10 October 2011.

Several factors distinguish scholarly publishers from trade publishers:

- Their primary market is the research/academic library sector.
- They usually control global rights for their content and market it directly.
- Digital distribution is long standing and there are established protocols on the use of the content.
- Digital access is almost exclusively streamed via a live Internet connection and not usually downloaded to a hand held device.

In contrast, trade publishers operate with a fundamentally different business model:

- Their primary market is retail sales to individuals through bricks and mortar or online booksellers.
- Their distribution right for a work (print or digital) is most often regional.
- Market demand for trade eBooks is a recent development directly tied to the explosion in eReader sales in 2010.
- Piracy of popular eBook titles is an overriding concern given the perceptions on what happened to the recorded music industry.
- Their digital eBook distribution has presented unique challenges for both publishers and the consumer due to the access control wielded by the small number of eReader platforms available to customers (the Amazon Kindle and Apple iPhone/iPad primarily).
- Their understanding of the library market is variable at best and some view library availability of eBooks as a direct threat to their and their author's economic interests and they therefore withhold library sales of titles.
- Major eBook platforms such as Amazon's Kindle do not enable library "circulation" of eBooks to their eReaders, or if they do, this functionality is not consistently applied in different countries.
- At present a US based company OverDrive dominates the English language market for library sales of downloadable eBooks and imposes licence terms and conditions (some set by OverDrive and some by publishers) which establish the policy parameters for how libraries make eBooks available including loan regulations and borrower eligibility. Despite OverDrive's success in the library market and the limitations it places on library use, it should be noted that the majority of multi-national trade book publishers have not agreed to make their titles available to it for sale to libraries.

There are different interests at play when considering the publishing, distribution and library availability of eBooks and in the words of industry observer Mike Shatzkin: "Our problem is the interests don't align and what I think people sometime have trouble accepting is that it is possible they never will"<sup>2</sup>. Shatzkin notes in the same post that "These aren't moral

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<sup>2</sup> The Shatzkin Files, "Libraries and publishers don't have symmetrical interest in a conversation", posted 22 Feb 2012; <http://www.idealogy.com/blog/category/libraries>

decisions, they're commercial ones". Publishers worry that, in the words of Macmillan President Brian Napack, "The fear is I get one library card and never have to buy a book again"<sup>3</sup>. In this context it is worth citing from an ongoing European Economic and Social Committee review of the publishing industry where the writing, publishing and availability of written works are viewed as serving functions well beyond the economic:

*As the largest cultural industry in Europe, book publishing is a crucial player in the economic, social, political, ethical, educational and scientific development of Europe. European literature is one of Europe's key artistic heritages, the cornerstone of the cultural development of a continent, embodying the vast diversity of each country as each European language, region, minority is represented and recorded for posterity in books. Book publishing has also the responsibility of working towards addressing the lack of understanding between different cultures.*<sup>4</sup>

It should be noted that in numerous countries the indigenous publishing industry receives government support in recognition of the societal good served by the production and distribution of written culture. Libraries are seen as an integral part of this ecosystem of reading and the withholding of eBooks from library collections has the potential to weaken the perception of publishing as a benefit to society as a whole.

## **Library Background**

Librarians are struggling with a series of challenges to long-held principles which has been initiated by the migration of the print book to the downloadable eBook. For the first time the ability to acquire commercially published books for library collections is constrained. This brings into question at the library's role in ensuring freedom of access to information for all which has at its core the belief that ability to pay should not dictate who can read or view specific works. The principle of privacy for library users in their use of library collections and services is now more difficult to ensure given the nature of eBook distribution. A range of practices and policies which were under the exclusive control of the library are now with eBooks a matter of negotiation with publishers and/or distributors.

As is the case with scholarly and trade publishers, there are differing requirements in digital content licences, including those for eBooks, between academic/research and public libraries. Many academic/research libraries include extensive collections of trade published titles in their collections and a number of public main branches are major research libraries in their

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<sup>3</sup> Karen Springen, "Reaching the e-Teen", *Publishers Weekly*, 21 February 2011, page 23.

<sup>4</sup> European Economic and Social Committee, « Book Publishing on the Move, Document prepared for Second Study Group Meeting », Brussels, 2011.

own right. However academic/research library requirements for digital collections generally vary from the requirements of public libraries in that they usually<sup>5</sup>:

- provide digital content to their users via a live Internet connection.
- often have access to a robust technology infrastructure and extensive experience in licencing electronic products.
- have specific requirements for uses of content such as eReserves and course packs.
- place a high priority on inter-library lending.
- are accustomed to consortia purchasing, sometimes national or even international in scope.
- have options to pursue alternate approaches to collection development such as supporting open access journals and promoting Creative Commons licencing.
- have a more clearly limited set of users than public libraries.

In contrast public libraries:

- serve users whose overriding preference is for downloadable trade titles, both fiction and non-fiction (while often also providing streamed magazine, newspaper and technical monograph content).
- place a greater emphasis on the acquisition of newly published titles.
- often have access to limited technology infrastructure.
- may lend eReading devices to users which come with “pre-loaded” eBooks.

Libraries argue that the availability of printed and digital books in their collections is an important asset for publishers and authors by both promoting discoverability and thereby sales, and by providing access to works long after their retail life span is finished. Long term access to out of print titles can generate revenue for authors in countries in the European Union and Australia and Canada through public lending right (PLR) payments. While it is unclear how, if at all, PLR programs will treat eBooks, library availability of books, irrespective of their format, is an important aspect in promoting awareness of authors and specific works. It should also be noted that the availability of eBooks from libraries may act as a deterrent to piracy as readers who cannot or will not pay for an eBook may prefer to source the digital file from a trusted intermediary such as a library.

While publishers are most likely to align with Shatzkin’s previously noted assertion that the negotiations on eBook availability don’t involve moral decisions but rather commercial ones, libraries continue to seek licence and legislated solutions to address the principles which have been the foundation of their collection development for over a century. A major problem in the way of this is the current refusal of the majority of the “Big Six” trade publishers to sell

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<sup>5</sup> Emphasis here is place on academic/research libraries and (further below) public libraries in developed countries

eBooks to libraries<sup>6</sup>. It should be noted however that many smaller trade publishers, along with scholarly publishers, do see the library market as an indispensable component of their eBook business model. For a while it even seemed that there was at least one advocate for the library market for eBooks among the “Big Six”: Random House Executive Ruth Liebmann is on record as saying that "a library book does not compete with a sale. A library book is a sale." She also noted that libraries are comparable to independent booksellers as a percentage of business, and they "never send books back."<sup>7</sup> Welcome as this stance is, in March 2012 Random House raised the price of eBooks for sale to libraries by 300%<sup>8</sup>.

## eBooks

Often there is confusion over what is an eBook and the process by which they are supplied to readers by libraries.

At the outset it is understood that policy guidelines applying to acquisition and dissemination of eBooks only apply to works under copyright protection. It is also a given that some forms of a Creative Commons licence can limit constraints on how libraries treat eBooks. In discussing eBooks it is important to distinguish among the different formats which are commercially available and in public library collections. Two formats predominate for text eBooks: EPUB and PDF<sup>9</sup>. EPUB is emerging as the preferred solution for retail and library eBook use with the exception of books with high graphic content.

Publishers report that PDF is cheaper to produce. Some publishers do limit availability to libraries to the PDF format. Other eBook formats are emerging often to address specific

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<sup>6</sup> The “Big Six“ are Random House, Harper Collins, Penguin, Simon&Schuster, Hachete Book Group, Macmillan and Penguin. Harper Collins sell libraries eBooks that can only be loaned out 26 times before having to be repurchased, and Random House has increased its prices for libraries significantly to “the high value placed on perpetuity of lending and simultaneity of availability for our titles“ (See FN8 below)

<sup>7</sup> Peter Osnos, “Library Wars“, The Atlantic, 506 December 2011.

<http://www.theatlantic.com/technology/archive/2011/12/library-wars-amazon-and-publishers-vie-for-control-of-e-book-rentals/249544/#.Tt5zNoHkszY.twitter>

<sup>8</sup> Michael Kelly, « Librarians Feel Sticker Shock as Price for Random House Ebooks Rises as Much as 300 Percent”, The Digital Shift, March 2 2012.

<http://www.thedigitalshift.com/2012/03/ebooks/librarians-feel-sticker-shock-as-price-for-random-house-ebooks-rise-as-much-as-300-percent/>

<sup>9</sup> **EPUB:** Short for electronic publication, EPUB is an open source eBook standard adopted by the International Digital Publishing Forum in 2007. The format is designed to serve as a single application which can be used by publishers, conversion companies, distributors and retailers at all stages of the eBook’s existence. As EPUB uses reflowable content (i.e. the text adapts its presentation to the reading device), it means that text display can be adjusted to suit different devices. EPUB is now available in version 3 which among other attributes is closely aligned with the DAISY format for use by the print disabled and provides embedded support for non-Roman alphabets including Chinese characters. <http://en.wikipedia.org/wiki/EPUB>

**PDF:** Developed in 1993 by Adobe, PDF (Portable Document Format) became an open source file format in 2008. It is page oriented and provides a fixed image of text and image on the device screen and therefore is the preferred format for books with visual content, including graphic novels. PDF is not considered to provide an acceptable image on handheld eBook readers such as the Kindle.

[http://en.wikipedia.org/wiki/Portable\\_Document\\_Format](http://en.wikipedia.org/wiki/Portable_Document_Format)

market needs including CBE developed by Apabi for Chinese character downloadable eBooks.

The format of an eBook is a key factor in its utility for readers and therefore a major factor in a library's decision to purchase or not. In considering an IFLA policy on eBooks different formats should be considered but it should be remembered that in the perception of the general public and many librarians "eBook" refers to text downloadable to a hand held device.

While it is understood that a variety of different licencing models are emerging internationally for accessing eBooks, OverDrive dominates the English language library market. Under the OverDrive model, when a library licences access to an eBook an agreement is reached on how library card holders are validated based on specified criteria set by OverDrive and/or the publisher. The validation may be done by the library, a library consortium or contracted to the distributor for a fee. Access may be "in perpetuity", on a time limited basis, or for a specified number of loans. It is important to note that once access is agreed to, the library card holder downloads the eBook file from the distributor's server (or possibly the publisher's server). Typically the eBook file is never in the possession of the library which has significant implications when considering the library's ability to carry out functions such as preservation or interlibrary loan. In effect, the typical "in perpetuity" purchase of an eBook through an 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.

There are examples where libraries have purchased eBooks as digital files which are transferred to the library or a library consortium and operations such as making preservation back-up copies and migrating content to different platforms for preservation purposes are feasible. These types of transactions have been largely limited to research/academic libraries or their consortia and usually are for streamed PDF files not EPUB files downloadable to a hand held device or computer.

## **Legal Context for E-Lending**

The library circulation of physical objects (books, DVD's, CD's etc.) is enabled by the legal concept of exhaustion, sometimes referred to as the first sale doctrine. This means that the rightsholder (usually a publisher who has received delegated distribution rights from the author) loses certain rights once a book is sold. These "lost" rights relating to the book as physical object include the right to control subsequent lending or re-sale of the physical item. Certain other rights relating to the book's content such as the reproduction right continue after the first sale.

When an eBook is 'purchased' the concept of exhaustion as found in print sales does not apply – which affects libraries' legal right to subsequently lend the content without approval

from the rightsholder. For the purposes of enabling e-Lending libraries presently require license solutions: e.g. agreements with publishers on licensing terms and conditions which enable libraries to make available to their users works chosen by the library published in electronic formats.

While these deliberations are underway and libraries are entering into very different licence agreements for eBooks, the World Intellectual Property Organization (WIPO) Standing Committee on Copyright and Related Rights (SCCR) in November 2011 began formal deliberations on a Treaty Proposal on Limitations and Exceptions for Libraries and Archives (TLIB)<sup>10</sup>. A number of TLIB clauses if incorporated in an international WIPO treaty have the potential to influence eBook licence agreements.

A more detailed legal analysis of e-Lending prepared by Working Group member Harald von Hielmcrone is appended to this report (Appendix A).

## **Maintaining Library Principles in e-Lending**

As has been noted, librarians are struggling with how to maintain core principles such as unfettered access to information for all in the context of restricted access to eBooks and imposed eBook licence requirements. A key challenge facing libraries in providing access to eBooks is to arrive at licence agreements which provide sufficient reassurance to publishers and authors that library availability of their work supports rather than undermines their business model while at the same time permitting the library to continue its core functions including:

- preserving works for posterity
- lending of works to library card holders
- copying of portions of works for non-infringing purposes (fair use, fair dealing)
- interlibrary lending
- providing alternate formats for the use of the print disabled

The emphasis placed on these rights in concluding contract negotiations will vary by type of library. Each of the core functions listed above present specific concerns for publishers which if not addressed in licence terms or conditions could result in their deciding not to make specific titles or full lists available for library collections.

### **Preservation**

The need to preserve our written culture is hard to deny and it will not be that controversial for many publishers. Having said this, there may well be sensitivity over issues such as making back-up copies, legal deposit and bypassing Technological Protection Measures (TPMs), especially if a copy of the work in question continues to

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<sup>10</sup> <http://www.ifla.org/en/node/5856>



be commercially available at a reasonable price and in an acceptable format. Research/academic libraries will place a much greater emphasis on long term preservation while public libraries are more likely to focus on the need to lend newly published eBook titles rather than preservation over decades.

### **e-Lending**

The most common constraint that is usually applied to the library lending of downloadable eBooks is that there only be one reader at a time permitted to access a title (the OverDrive model). While the rationale for this constraint is not understood by and discourages library users, there is a logic to the rightsholder concerns that unlimited library provision of eBooks while a work is commercially available and being purchased by individuals would be detrimental to their revenues. It is harder to justify when retail sales have ceased. A few publishers and distributors are experimenting with other models including micro-payments per individual loan, a pre-determined number of loans on a “volume” and delayed release to the library market (embargo). As the number of eBook titles available and vendors supplying them to libraries increases, libraries should have the ability to negotiate different terms and conditions for eBook titles, either purchased individually or in aggregated collections.

Given that the lending of an eBook is not constrained by geographic distance, publishers have insisted that there are limits on how the library defines its users. It is now the norm in licences for the public library lending of eBooks to be limited to card holders who are residents of the community, property or business owners in the community or students enrolled in an educational institution located in the community. For school and research libraries the qualified card holders are usually defined as students, teachers and staff of the institution. For streamed eBooks access may be negotiated for anyone who is present in the building.

### **Non-Infringing Copying of a Portion of a Work**

Libraries and their users have legislated rights in a number of jurisdictions to copy portions of copyrighted work for purposes such as research and private study. Given that most eBooks are protected by TPMs which have the capability to restrict any copying, a licence for eBook availability would need to enable copying of agreed to amounts of the text.

### **Interlibrary Lending**

Publishers have noted their concern that if they sell one copy to a library it has the potential of being available in perfect copies, instantaneously supplied to library users anywhere in the world. Librarians understand the societal importance of individuals having access to a work they require for formal or informal research when the work is not available from their local library. The right to interlibrary loan an eBook could

require both negotiated licence conditions and a technical capability which may be beyond what many libraries have access to.

### **Alternate Formats for the Print Disabled**

While digital does not automatically or even often equate with accessible, when considering serving the needs of print disabled library users there is no question that the availability of digital text works has improved access for them. However, publisher restrictions on re-formatting digital text can impede access to the text by the print disabled readers. An example would be restricting the functionality of text to speech software with eBooks. Libraries will have to ensure that they and their print disabled users can exercise whatever legal rights they may hold in order to serve the print disabled wishing to access eBook content. Failure to do so places the library and publisher/distributor at risk of a successful human rights challenge. In the absence of legal rights there is a moral imperative requiring equal access.

### **Next Steps**

As IFLA considers the development of policy guidelines for eBooks in libraries it is inevitable that the relevant technological and business models will continue to change rapidly. Any resulting policy will of necessity need to be at a high-level in focus. Discussions between library associations and publishers are underway concurrently in several countries and it appears likely that some form of national consensus on eBook licence terms and conditions will emerge in different jurisdictions. IFLA can play a role in consolidating and providing information on successes in securing library access to eBooks. It is clear that more research and dialogue needs to take place in preserving core library principles in the context of digital library collections, especially for downloadable trade eBooks.

Following on from this, it is inevitable that an international model for the inclusion of eBooks in library collections will take time, especially in underdeveloped and developing countries. We need to build on the trusted and enduring relationship which has existed for centuries between publishers and libraries. Open and constructive dialogue among the stakeholders is essential if progress is to be made in ensuring library availability of eBooks globally. However, there are broad negative societal implications if digital content is withheld from library collections. With this outcome all parties will suffer: authors, publishers, libraries and especially readers. Libraries need to be prepared to draw society's attention to the problem and push hard to preserve our role in providing public access to information.

There clearly is a need to raise awareness in the library community of the issues inherent in making eBooks available through library collections. There are too many references to libraries entering into licencing contracts for digital content without understanding the terms and conditions or in extreme circumstances even reading the licence. Library associations

including IFLA need to focus on continuing education on licencing and legal issues pertaining to eBooks in library collections.

No matter the nature of the deliberations, any emerging solution ensuring wide access to eBooks through libraries must be acceptable to library users. Without their engagement and support demonstrated through use, the outcome will not be sustainable.

## **Appendix A: E-Lending – Detailed Analysis**

### **Legal concepts**

From a legal point e-Lending has nothing to do with lending. The basic legal concepts are derived from article 6 and 8 respectively of the WIPO Copyright Treaty (WCT), adopted in Geneva on December 20, 1996.

#### Article 6: Right of Distribution

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

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

#### Article 8: Right of Communication to the Public

Without prejudice to the provisions of Articles 11(1)(ii), 11bis(1)(i) and (ii), 11ter(1)(ii), 14(1)(ii) and 14bis(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.

### **Lending**

Within the conceptual system of copyright legislation lending constitutes a subgroup under the category “distribution”. Only tangible objects can be distributed.

Lending may be defined as “making a tangible object available for use for a limited period of time and not for direct or indirect economic or commercial advantage” As opposed to “rental”, which is “making a tangible object available for use for a limited period of time and for direct or indirect economic or commercial advantage”

The author of a work has the exclusive right of authorizing the making available to the public of the original and copies of their works through sale or other transfer of ownership.

This right is normally exhausted (within a defined territory) after the first sale or other transfer of ownership of the original or a copy of the work with the authorization of the author.

Because the distribution right is exhausted whoever buys the work, e.g. the book, may distribute it further, e.g. lend it to someone else. Lending is not an exception to the distribution right. There is no need for an exception.

The exhaustion of the author's distribution right is the legal basis for libraries being able to lend books to their users. This is the general rule following from WCT.<sup>11</sup>

## **E-Lending**

Within the conceptual system of copyright legislation e-Lending constitutes a subgroup under the category of "communication to the public or making available to the public".

More specifically, a "communication to the public" takes place when the sender decides when the communication takes place. This typically applies to broadcasts.

"Making available to the public" typically applies when a provider uploads a work in a database and gives users the possibility to access the database, and thereby the works, from all places and at a time chosen by the user.

The author (and other rights holders) has an exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.

E-Lending might be defined as "making a digital object available for use for a limited period of time and not for direct or indirect economic or commercial advantage"

In practice e-Lending is done

- Either by giving the user access to the work for a period of time, after which the access is denied,
- Or by letting the user download a self destructive version of the work to his own PC or reading device, so that the file is destroyed after a pre-determined period of time.

Contrary to lending, which is a form of distribution, e-Lending is an online service and not subject to exhaustion after the first communication or making available of the work to the public. Therefore any communication or making available to the public requires of authorisation by the author (or other rights holders). This also applies to material (tangible) copies of works made by a user of such a service: e.g. when works are downloaded on reading devices.

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<sup>11</sup> EU has in 1992 issued a Directive on rental and lending ((92/100/EEC), giving authors (and other rights holders) the exclusive right to authorize lending and rental of their works. However, Member States may derogate from the exclusive right in respect of public lending, provided that at least authors obtain remuneration for such lending. The effect of this is that the author's "lending right" is in reality a right to be remunerated for public lending undertaken by libraries.

The need of authorisation by the author (or other rights holders) can only be avoided to the extent that there are applicable exceptions to the Communication to the Public Right. However, all exceptions have to pass the Three Step Test, WCT article 10 which reads:

Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty

- 1) in certain special cases
- 2) that do not conflict with a normal exploitation of the work and
- 3) do not unreasonably prejudice the legitimate interests of the author.

For an exception regarding e-Lending to be included in national legislation it should be able to pass the Three Step Test. This means that e-Lending must be restricted to “certain special cases that do not conflict &c. ...”

Such restrictions on e-Lending will not solve the general problem libraries face vis a vis electronic publishing and lending, and a provision for e-Lending restricted in this way will be useless – except for certain special cases that do not conflict etc.

This means that the library’s general e-Lending activity will require a license agreement with the author (or other rights holders).

### **Consequences**

The perhaps most important consequence of the legal differences between lending and e-Lending is that

1. Because of the exhaustion of the distribution right after the first sale, the library may buy published works, e.g. books, at the bookseller and use the copies for lending to the library’s patrons. The author (or other rights holder) cannot deny this right to the library. In consequence, the library decides in accordance with its acquisition policy what books to buy and use for public lending.
2. Because e-Lending is a service, the concept of exhaustion does not apply, and the library can only acquire the digital object, the eBook or eJournal, by entering a license agreement with the author (or other rights holders). The rights holders are free to decide whether they want to enter a licence agreement giving access to a specific work, and to decide on the terms for such access. The consequence of this is that the acquisition policy may be decided by the publisher and not by the library.

That the acquisition policy of libraries may be decided by the publisher and not by the library is unacceptable, and the challenge for the libraries is to find solutions to this problem.

For the purpose of enabling e-Lending we need licensing solutions, e.g. via agreements with publisher’s organizations on standardized licensing terms, which enable libraries to make

available on reasonable and fair conditions to their users all works published in electronic formats chosen by the library.

For the purpose of preserving the cultural heritage we need legal support to collect, preserve and make available all works published in electronic formats. This work has already started with TLIB being presented in WIPO.

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