



INTERNATIONAL FEDERATION OF LIBRARY ASSOCIATIONS AND INSTITUTIONS
FÉDÉRATION INTERNATIONALE DES ASSOCIATIONS DE BIBLIOTHÉCAIRES ET DES BIBLIOTHÈQUES
INTERNATIONALER VERBAND DER BIBLIOTHEKARISCHEN VEREINE UND INSTITUTIONEN
FEDERACIÓN INTERNACIONAL DE ASOCIACIONES DE BIBLIOTECARIOS Y BIBLIOTECAS
МЕЖДУНАРОДНАЯ ФЕДЕРАЦИЯ БИБЛИОТЕЧНЫХ АССОЦИАЦИЙ И УЧРЕЖДЕНИЙ
国际图书馆协会与机构联合会

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IFLA 2014 eLending Background Paper

Introduction

The International Federation of Library Associations and Institutions (IFLA) released the *eLending Background Paper* in 2012 followed by a commissioned think piece and the *Principles for Library eLending*.¹ The *Background Paper* intended to:

- Provide an overview of the issues relating to eBooks in libraries;
- Summarise the current positions of publishers in both the scholarly publishing and trade publishing sectors;
- Summarise the differences in the way academic/research libraries and public libraries address the issue of digital collections;
- Address the legal context for eLending and library principles that must be upheld in any suitable models;
- Provide a detailed legal analysis of eLending.

The *Background Paper* acknowledged that the eLending environment is changing rapidly and that the paper would need to be reassessed in light of any significant developments.

Since 2012 the *Principles* have been updated twice in light of changes in jurisprudence and changing practice. This paper is intended to consider changes which have occurred since the *Background Paper* was issued.

What is an eBook?

An eBook is a digital version of a text-based work which is available publically (with or without payment) as a separate work.

For clarity an eBook may:

- be owned by an individual or library but is more commonly licensed from the publisher/vendor
- also be contained in a collection or bundle of eBooks marketed as one entity
- be augmented or supplemented by audio visual or other elements such as Global Positioning System (GPS) data as part of one file or through links to separate file(s)
- coexist with a print on paper book of the same text or have no physical equivalent
- be downloaded to a device or be streamed, which requires an Internet connection whenever the work is read
- be produced by a trade publisher or self-published for the general reader (the most common understanding) but may also be a scholarly or professional monograph published by entities such as university presses or professional organizations.

Digital audio versions of text works are often considered to be eBooks and are considered in the discussion below. Digital versions of journals and newspapers are not considered to be eBooks.

¹ <http://www.ifla.org/e-lending>

The Principles are reproduced as Appendix C.



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The intent of this definition is to focus on the creative content, text readable by the end user, irrespective of the reading device used to access the content.

Discussion

In discussions arising from the IFLA Background Paper on eLending and several iterations of the IFLA eLending principles, it became evident that there was no consensus in the library community on how to define an eBook. This is not surprising given that, as has been pointed out by Geoffrey Little, the *Oxford English Dictionary Online* provides sixteen definitions of book and two for eBook:

*...a hand held electronic device on which a book can be read. Also: a book whose text is available in an electronic format for reading on such a device or on a computer screen.*²

Little discusses the different perspectives on what is a book or an eBook: physical object (the print book or the eBook reader), text or computer code. For the purposes of this Paper, the focus is on the creative content, text readable by the end user.

In compiling statistics on library eBook holdings it was clear that different interpretations of the term eBook were being used. The above definition is an attempt to clarify what is intended to be addressed in this update.

It is challenging to address the issue of eBooks and libraries in the global context when on the one hand five billion people (70% of the world's population) do not have access to the Internet³, while in developed countries technological advances in the provision of digital content mean that the commonly held understanding of what is an eBook is viewed as already outdated by informed observers. This paper primarily focuses on the conventional understanding of what is an eBook in 2014 but it is understood that digital content provision is evolving rapidly and that it is possible, if not likely, that the current model of digital text produced by publishers as a single file and downloaded by individuals to hand held devices will be eroded.

The emergence of new content formats does not necessarily mean that old formats and technologies disappear. They may, but in a number of instances formats coexist. While there is much to anticipate with interest in the new digital ecosystems of creating and disseminating content, it is also probable that the current model of linear narrative contained in a single work, produced by a publisher and marketed to readers, will continue to have a significant commercial market and a place in library collections for some time to come.

² Cited in Geoffrey Little, "Introduction: What Is the History of (Electronic) Books? Or, This Page Intentionally Left Blank", *Papers of the Bibliographical Society of Canada*, Volume 51, #1, Spring 2013.

³ The estimate provided at the 2014 Mobile World Congress.



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What is eLending?

eLending is the temporary provision of an eBook by a library to a registered user for use away from the library premises and in the library should the user wish.

For clarity:

- the terms under which the eBook is lent may be dictated by purchase agreement, license or by the library itself, including number of simultaneous users, length of loan etc.
- The eBook may be supplied to the reader's device from a vendor, publisher or library server

Discussion

The term eLending is generally applied to the downloading of digital text from a library web site. In practice this most often involves the library user accessing the file from a location away from the library, which parallels how eBooks are purchased. The requirements not to have to travel to a library or bookstore and worry about open hours are both expected and viewed as a major convenience of the digital format. Books are available at anytime from anywhere where there is an Internet connection.

Remote access to library eBooks has been questioned in the UK referencing the EU Copyright Directive. UK publishers argued that a requirement that library users should be limited to downloading eBooks to their devices from within library premises was an appropriate "friction" in the same way that a limit of one user at a time was appropriate: i.e. both imposed limitations of borrowing print books on eBook collections despite the fact that there is no technological requirement for the limitations.

The UK Digital Economy Act 2010 defines "lent out" in the context of applying public lending right to eBooks:

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...⁴

The UK Government seems to be acknowledging that the transfer of the work to a library user's reading device must take place on library premises and that this copy may then be "lent out": i.e. taken away from the library by the library user. This is an interesting attempt to enable library lending of eBooks which also should satisfy the publisher's desire for "friction". It is most likely that such a requirement would be totally unacceptable to library users and would significantly suppress library eBook usage.

⁴ <http://www.legislation.gov.uk/ukpga/2010/24/section/43>



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A Statistical Overview

eBook Trends

Given the different stages of maturity of eBook publishing in different countries, it is not surprising that digital publishing statistics and trends vary substantially by region and country.

In the United States, the most developed market for eBooks, 2013 saw a significant decline in eBook sales growth. This is dramatically illustrated considering the Association of American Publishers' first quarter eBook sales growth (the peak selling period of the year) over the past 4 years:

2010	+252%
2011	+159%
2012	+28%
2013	+5%

When considering eBook sales it is now routine for English language market analysts to use terms like “matured”, “levelled off” and “plateaued”. Having said this it is evident that eBooks now form an important and still growing revenue stream for trade publishers. In the words of one commentator “The e-book may turn out to be more of a complement to the printed book, as audiobooks have long been, rather than an outright substitute”.⁵

In this context it should be noted that in 2013 overall US adult trade hardcover book revenue rose 9.7% in 2013, while adult eBook revenue rose by 3.8%. In 2013 in the US, overall adult eBook revenue accounted for 27% of all adult trade revenue. By comparison, 2013 eBook sales in Canada (a less mature market for eBooks) accounted for 17% of all book purchases. In non-English speaking EU countries eBook sales revenue is correspondingly much lower, numbering in the low single digits: e.g. in Norway eBook sales account for less than 1% of publisher revenue and in The Netherlands 2.2% of revenue.⁶

Trade fiction continues to dominate eBook sales in mature markets. Single blockbuster titles such as *50 Shades of Grey* and *The Hunger Games* series are now so significant for overall eBook sales results that year to year comparisons can be distorted: e.g. in 2013 US children's eBook revenue declined by 26.7% over 2012 due to the popularity of *The Hunger Games* series in 2012.

While the US, UK and Canada are experiencing a levelling off in eBook sales, the CEO of ePubDirect, “Europe's largest eBook distributor”, reports that “our publishers sold into a third more countries in 2013 than 2012”.⁷ The countries and regions reported to have significant eBook market growth are South America, Japan, Germany, France, Denmark, Norway, Switzerland and Belgium.

There are increasing predictions that dedicated eBook readers will be supplanted by the use of multi-use tablets for accessing eBooks. From a library perspective this may well be a helpful trend as with tablets, readers are more likely to be able to access library digital collections and not have to contend with technological barriers put in place in some countries by eReader suppliers such as Amazon. In a 2014 Canadian survey, 34% of respondents

⁵ Neil Irwin, “E-book sales are leveling off. Here's why.”, *Washington Post*, 8 Aug 2013, <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/08/08/e-book-sales-are-leveling-off-heres-why/>

⁶ Dan Mount, *elending Landscape Report 2014*, Australian Library and Information Association.

⁷ Gareth Cuddy, “Five Reasons the Worldwide eBook Market Saw Huge Growth in 2013”, *Digital Book Wire*, posted January 9, 2014, <http://www.digitalbookworld.com/2014/five-reasons-the-worldwide-ebook-market-saw-huge-growth-in-2013/>



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owned a tablet, an increase of 14% from 2013, and 29% owned a dedicated eReader, up 2% from 2013.⁸ The 2013 Pew Research Center's Internet & American Life Project⁹ found that as of January 2014 50% of Americans now have a dedicated handheld reading device (both tablets and dedicated eReaders). From December 2011 to January 2014, tablet ownership increased from 10% to 42% and dedicated eReader ownership increased from 10% to 32%. As more readers buy tablets, more of them are using those tablets to read e-books. Although cell phone and laptop/desktop computer ownership remained steady through the end of 2013, e-reading on those devices increased.

Of greater concern to everyone involved with books is evidence that less time may be spent reading than in the past, in part reflecting both less leisure time and increased “competition” for leisure time. A recent Canadian longitudinal poll of book buyers shows that their free time devoted to reading has declined from 25% in 2012 to 21% in 2014.¹⁰

Having said this, there is no doubt that book reading is an important activity for many and in the US there is evidence that it is increasing. According to the Pew study, more people are reading in the United States, apparently due to eReading. 76% of American adults read a book in some format in 2013. The typical adult read or listened to 5 books, a figure remaining steady over the past several years. Though print continues to dominate American reading habits (just 4% of readers are “eBook only”), eBook and audiobook reading are on the rise, with 28% of adult readers in 2013 reporting eBook use, a five point increase from the previous year. The sharpest increase occurred among readers aged 18-29, with nearly half (47%) reading an eBook in the past year.

eBook Holdings and Use in Library Collections

Introduction

It is challenging to obtain comparable multinational library data on eBooks as statistics often appear to be based on varying definitions, measuring use for streamed titles varies (logins, page views etc.) and retail and library availability can differ substantially from country to country. For this reason, the most useful statistics to indicate trends are changes over time for the same libraries.

To illustrate the wide divergence in eBook statistics:

- Toronto Public Library 2013 (the largest public library system in North America):
 - eBook title holdings = 96,020 (includes downloadable text and audio books and streamed bundles)
 - eBook “volume” holdings = 170,105
 - annual circulation = 1,620,638 (excludes streamed bundles)
 - annual circulation per volume = 12 (excludes streamed bundles)
 - annual circulation per title = 26.6 (excludes streamed bundles)
- Singapore 2012 (both a national and public library)
 - eBook title holdings = 3,062,002
 - eBook circulation = 8,247,966

⁸ Noah Genner, “Canadian Book-Buying & Reading Behavior”, BookNet Canada presentation.

⁹ (Zickuhr, K., & Rainie, L. (2014, January 16). “E-Reading Rises as Device Ownership Jumps.” Pew Research Center's Internet & American Life Project. Retrieved on March 25, 2014 from <http://www.pewinternet.org/2014/01/16/e-reading-rises-as-device-ownership-jumps>.)

¹⁰ Noah Genner, “Canadian Book-Buying & Reading Behavior”, BookNet Canada presentation.



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annual circulation per title = 2.7

- Hong Kong public libraries 2013
 - eBook title holdings = 186,497
 - eBook circulation = 164,054
 - annual circulation per title = 1.1

The dramatic variations in reported data are no doubt attributable to a number of different factors including differing publishing practice, the prevalence of reading devices and differing library capacity and practice.

When statistics for eBook collections in university libraries are considered the situation gets even more complicated. The statistics which university libraries have reported include unpublished theses and streamed lectures which do not fall within standard definitions of an eBook.

The following sections of the paper provide brief overviews of eBooks in libraries by region.

Africa

The International Publishers Association estimates that 90% of overall publishing revenue in Africa is derived from education markets. It is not a surprise that the availability of eBooks from African libraries is limited largely to university collections with an emphasis on streamed scholarly publishing content originating outside the continent. The 2013 South African Book Fair had as its focus “The future of eBooks: the impact of the digital eBook phenomenon” and the comments from publishing executives solely dealt with the education market and the potential for acceptance of digital textbooks.

Asia

eBook data reported from Asian countries indicates wide variations in library availability and use.

Apabi Chinese eBooks are published in Mainland China and its content emphasises more scholarly rather than leisure reading content.

Hong Kong public libraries report 186,497 eBook titles in their collections, 72,500 which are Apabi eBooks. The balance is made up of streamed bundle services including ebrary Academic Complete and EBSCOhost. The relatively low use of eBook collections (annual use of 1.1 per title) is attributed by library staff to the lack of leisure reading titles available and the confusing access requirements for the different databases.

A large majority of Japanese public libraries do not provide eBooks at this time.

Korean public libraries report over 3 million eBook titles available and annual expenditure of 3.6 million US dollars (2012).

Singapore reports 3,062,002 eBook titles, circulation of 8,247,966 and annual expenditure of \$1,268,857 US (all 2012).

Taiwan public libraries report eBook title holdings of 255,278 (2012) and annual circulation of 562,482 (2013).



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Australia/New Zealand

Public libraries in Australia and New Zealand report sustained and continuing growth in eBook provision and use:

- State of Victoria public libraries report 298,809 eBook downloads in 2011/12 and 497,045 downloads in 2012/13 (+66%)
- Users of the State Library of Western Australia downloaded 9,130 eBooks in January 2013 and 21,564 eBooks in January 2014 (+136%). The January 2014 loans constituted 1.4 loans per title available.
- Users of Brisbane City Libraries downloaded 4,212 eBooks in 2008 and 116,272 eBooks in 2012.
- New Zealand public libraries report 2012/13 holdings of 111,336 (growth of 1,762% in two years), downloads of 354,066 (growth of 1,968% in two years) and expenditure of \$1,038,543 NZ [\$900,868 US/€654,011] (growth of 363% in two years).

Canada

Five large urban public libraries¹¹ in Canada with mature digital collections serving a combined population of 8,402,000 reported the following combined digital use statistics:

- Downloadable eBook circulation in 2013 was 2,871,514 downloads or 0.34 per capita.
- This is a 1,313.3% increase over 2010 downloads and a 60.9% increase over 2012 downloads.
- 139,023 downloadable eBook titles were in their collections (an increase of 526% over 2010) and 244,951 eBook “volumes”¹² or 1.8 “volumes” per title.
- In 2013 the average annual downloads per volume was 12.
- The libraries provide access to 37,369 downloadable audio titles.

In Quebec, 71 public libraries belong to BIBLIOPRESTO.CA.¹³ Library users downloaded 661,598 eBooks in 2012/13 and it is projected that downloads will double in the next 12 months. Individual library data is indicative of strong growth in eBook availability and use:

- Montreal Public Library downloads grew from 9,559 in 2012 to 31,708 in 2013 (+232%)
- Quebec City Public Library downloads grew from 27,417 in 2012 to 69,951 in 2013 (+155%).

Europe

As is the case with the publishing sector, libraries in the European Union have been slower to adopt eBooks, especially in non-English speaking countries. eBook availability in EU libraries varies significantly from country to country depending upon factors such as the funding available for library purchasing, indigenous publishing practice, library governance structure and preferred licensing regimes. EU national initiatives are discussed by country in the next section of the paper.

¹¹ Edmonton, Hamilton, Ottawa, Toronto, Vancouver.

¹² Given that the major trade eBook publishers require only one reader at a time of licenced or purchased eBooks, libraries purchase or licence multiple volumes or “copies” of the same title to meet user demand.

¹³ see page 19.



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United States

According to *Library Journal*'s "2013 Report on E-Books in Public Libraries"¹⁴, where 89% of US public libraries offer eBooks, collection size and circulation have increased:

- 45% increase in median number of e-books between 2012 (5,080) and 2013 (7,380)
- 145% circulation increase from 2011 to 2012 (with anticipated 2013 increase of +38.9%)

These numbers reflect all points of access, including those directly licensed or purchased by an individual library and those available through a consortium.

91% of library eBooks are accessed one user at a time comprising:

- 70% downloaded copies
- 21% web-based access copies

9% are unlimited, simultaneous access.

Public demand for eBooks in the US public libraries has held steady at 6:1 holds-to-copy eBook ratio (unchanged from 2011-2013).

Library eBook Licence and Purchase Models

Overview

The overriding eBook issues for libraries continue to be the withholding of content and the imposition of problematic and differing licence terms and conditions by major trade publishers. From an IFLA perspective, a further complication is the lack of consistency by individual multinational trade publishers in eBook licensing practices from country to country. Having said this, there have been improvements in library title availability in some eBook markets, most notably the US. At the time of writing, all of the Big Six multinational trade publishers¹⁵ are supplying eBooks to US libraries (in the case of Simon & Schuster this is presently limited to a small number of libraries as pilot projects). The situation is volatile with the potential for improvement or erosion in eBook availability ever present. One notable case of erosion occurred when Penguin withdrew titles from OverDrive in 2012, with widespread protests following this move.

The following licence models dominate library access to eBooks:

- Multiple User Access/Limited Time: most commonly used for streamed eBook title bundles this approach permits multiple simultaneous users for a fixed licence term. This approach also applies to the "pay per loan" model in use in several EU countries such as Sweden and Denmark where publishers and libraries agree on a fixed payment per eBook download.
- Single User Access/Perpetual Term: this approach limits the use of a specific "volume" to one reader at a time and there is a one-time purchase with no requirement to repurchase (e.g. Random House, Hachette).

¹⁴ Available for download at <http://www.thedigitalshift.com/research/ebook-usage-u-s-public-libraries-2013-report/>

¹⁵ Hachette, Harper Collins, Macmillan, Penguin, Random House and Simon and Schuster. Despite the 2013 merger of Penguin and Random House, the companies have not yet standardized their library eBook licence terms hence the continued use of the term the "Big Six" in this context.



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- Single User Access/Limited Term: this approach limits the use of a specific “volume” to one reader at a time and requires the library to renew the licence when the term expires or the library will lose access (e.g. Macmillan, Simon and Schuster and Penguin).
- Single User Access/Limited Circulation: this approach limits the use of a specific “volume” to one reader at a time and limits availability to a set number of loans (e.g. Harper Collins).

In the United States, public libraries have accepted these models, although with continued concern over pricing and licence terms. For trade titles, US public libraries’ purchasing is as follows:

- 62% license eBooks with a set number of circs (up from 24% in 2012)
- 58% purchase with perpetual access (up from 48% in 2012)
- 38% purchase subscriptions (up from 37% in 2012)

There are significant variations in library pricing practice among the Big Six ranging from the retail price to three times the retail price or more¹⁶. In the case of Random House, the higher price is linked to providing permanent access.

The use of embargoes (withholding library availability of selected titles, typically new bestsellers) continues to be implemented by some, but not all, of the Big Six.

Netflix pioneered a hugely successful monthly subscription service which provides access to a large selection of streamed movies and television programmes, which has reduced reliance on older supply models: video rental stores, broadcast television, libraries.... This digital content delivery model is starting to emerge as a means of supplying the general public with access to magazines and eBooks. While the marketing to libraries of eBook “bundles” of scholarly, technical and professional content has existed for decades, the concept of a subscription service for mainstream trade book titles is new. Subscription eBook bundling companies targeting individual readers include:

- Oyster – 200,000 titles available. Up to 10 books can be “borrowed” at one time for a monthly charge of \$9.95 US (€7.20)
- Epic! – streaming 2,000 international children’s titles for an annual subscription of \$79.99 US (€58.05)
- Mofibo.com – a Danish streaming and download service providing 8,500 eBooks for 99DKK (€13.25 or \$18.25 US) per month.

Such bundling services may well come to dominate the distribution of certain categories of eBooks with the likelihood of success more probable for areas such as mystery and romance fiction (categories which are among the most successful with downloadable eBook sales) where substitutability is more prevalent and where readers are more likely to read a large number of titles. As far as trade eBooks are concerned, such services present a serious challenge to the role of libraries as the bundling services are more likely to view libraries as direct competition. The tension between commercial content providers with a profit motive and libraries with a free access to information motive will intensify when the service provided, a large curated collection of eBooks, appears to be the same. Libraries will face a major challenge if rightsholders continue to restrict their access to

¹⁶ The Australian Library and Information Association report *eLending landscape report 2014* cites Donna Tartt’s *The Goldfinch* which is available to individuals from Amazon for \$7.50US and is available to libraries through OverDrive for \$90.00US (+1,200%).



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titles while preference is given to for-profit bundling services which present a better ongoing revenue stream for their books.

The use of a “buy button” has been promoted as a means of encouraging publisher supply of eBooks to libraries. A “buy button” provides users of library eBook collections with the option of purchasing a digital copy from a third party. This is controversial for some as it constitutes public sector competition with the private sector and the issue of where the order is placed puts the library in the position of favouring a single eBook distributor. Where a “buy button” has been enabled in libraries the resulting sales have been minimal.¹⁷ Libraries argue, with support from public opinion polling, both that library users are book buyers and that libraries are an important discovery tool for readers in promoting both reading and book purchases. Whether this will translate into widespread use of direct book purchasing through library web sites remains to be seen.

When the 2011 IFLA Background Paper was issued, the US-based company OverDrive was the predominant distributor of trade eBooks to libraries with little competition. While OverDrive still dominates the library eBook market, in 2014, seven distributors¹⁸ were ranked in the *ReadersFirst Guide to eBook Vendors*. It is reasonable to assume that competition will continue to increase for library eBook distribution encouraged in part by publishers wishing to avoid “Amazon-like” distribution monopolies for their books. In the case of publishers based outside the United States, subjective, economic¹⁹ and (in some cases potentially) legislative concerns motivate the wish for domestic eBook distribution which parallels print book distribution.

A review of a number of specific initiatives to integrate trade eBooks into library collections follows. In considering the very different approaches which have been taken it becomes clear that the national and/or regional context is crucial including variations in: the library and publishing capacity and culture, the government will and its ability to engage in and fund initiatives, the legal context and the licensing culture.

Taken globally, the current situation is patchwork at best. While clearly progress has been made in furthering the availability of eBooks in libraries in some jurisdictions, it often also appears to be examples of “two steps forward, one step back” or even in some cases lost ground.

The Danish Model

In Denmark, public libraries provide their cardholders with access to streamed and downloadable eBooks through a service called eReolen (eShelf)²⁰ which was launched in 2011 and is managed by a government ministry. Licence agreements are negotiated with individual publishers to contribute titles to a database accessible to library users. Payment to rightsholders is on a per use basis. Despite high per loan compensation, the majority of large Danish publishers pulled out of eReolen after one year. These publishers launched their own eBook licence

¹⁷ New York Public library loaned 1.1 million eBooks in 2012 and estimates that approximately 1,200 eBooks were purchased resulting in \$700 revenue (6% of sales revenue).

¹⁸ EBSCO eBooks, Gale Virtual Reference Library, Ingram MyiLibrary, Overdrive, ProQuest ebrary, 3M Cloud Library.

¹⁹ In the case of “branch plant” operations of multinational publishers (e.g. Penguin India, Random House of Canada...) significant revenue is derived from the domestic sale of foreign editions produced by their parent company. If the eBook version of such a title is purchased outside their country of operation they will not be credited with the sale despite the fact that they hold distribution rights for their market.

²⁰ <https://ereolen.dk/>



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platform for libraries which was subsequently shut down due to low use. Negotiations on larger publisher participation in the library provision of eBooks are ongoing.

The Dutch Model

In 2014, Dutch libraries introduced an eBook library service similar to eReolen. Access is provided to 5,000 Dutch eBook titles and payment to publishers is on a per loan basis with the amount declining for older books. The Dutch Government is establishing a centralised budget for the acquisition of eBooks by public libraries and a programme of digitising Dutch books in the National Library is underway in partnership with Google. The intent is to provide library users free access to a large body of public domain works while library users would pay to access current eBook titles. Dutch residents pay an annual charge to use the public library so the notion of “user pay” for eBooks is not a foreign concept.

The English Speaking Canadian Model

In 2011 the Association of Canadian Publishers, representing Canadian-owned publishing companies, formed an arm’s length not-for-profit agency eBOUND “to advance any publisher’s digital engagement, no matter their size or their level of expertise”.²¹

The Canadian Urban Libraries Council (CULC) initiated discussions with the Association of Canadian Publishers and eBOUND to explore options for distributing Canadian published eBooks to libraries, and eBOUND initiated complementary discussions with the research library sector.

Public Libraries

Working with a consultant retained by eBOUND, a Working Group was established made up of representatives from the Canadian Urban Libraries Council (CULC) and eBOUND to explore options for improving the discoverability of and access to Canadian eBooks. During 2013 the Working Group focused on the development of a platform for the distribution of eBooks. A request for proposal was issued and the selection process continued to the point that negotiations were initiated with a preferred supplier. In the end it was determined that “the conditions were not favourable” to proceed with platform implementation as the ongoing costs would not be sustainable based on the terms of sale and the need for libraries to maintain multiple platforms and pay associated fees.

Despite this setback, CULC pointed to the considerable progress in improving access and discoverability of Canadian content as a result of ongoing collaboration between libraries, publishers and vendors. Plans are now underway to improve the distribution and promotion of Canadian eBooks through existing commercial platforms.

Research Libraries

Parallel to the public library/publisher discussions, a subset of eBOUND members, The Association of Canadian University Presses (ACUP) engaged in discussions with university library representatives to explore how to expand library access to “Canadian digital scholarly monograph content within a sustainable publishing environment”. Arising from these discussions, a package of approximately 4,000 titles from 13 Canadian university presses was made available and implemented in Ontario on a pre-existing Ontario-based library hosting service. Negotiations for expansion to nation-wide availability are

²¹ <http://eboundcanada.org/about-us>



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underway through the Canadian Research Knowledge Network. Newly published titles are sold in separate collections by year of publication.

The German Model

With Onleihe²², divibib GmbH provides the leading online digital loan platform for libraries in Germany. Through a special Onleihe internet portal, customers can legally borrow eBooks, e-audio, e-papers, e-magazines and e-music – via mobile devices and round the clock. The e-media are downloaded and can then be used for a limited period.

The Onleihe apps for Mac iOS and Android allow eBooks in EPUB format and audio files in WMA format to be borrowed online, downloaded and used on mobile devices. The software makes it possible for DRM protected media from the library to be used directly on mobile devices. The iOS version enables e-audio streaming without download.

divibib has currently made available for Onleihe around 160,000 titles from more than 1,200 well-known publishing houses. Individual Onleihe portals are already offered by more than 1,700 libraries in the German-speaking world and by Goethe Institutes worldwide.

The Norwegian Model

Aided by Norway's extended collective licensing regime and the country's affluence, the National Library has launched an extensive digitisation initiative with the intent of making over 250,000 pre-2001 copyright protected works freely available to citizens through streaming. Rightsholders can withdraw titles from the database and this has happened, most commonly with textbooks.

The Quebec Model (Canadian French Language Titles)

The PRETNUMERIQUE.CA platform was established in 2011 as part of a pilot project initiated by a consortium of Quebec public libraries (Association des bibliothèques publiques du Québec, Réseau BIBLIO du Québec et Bibliothèque et Archives nationales du Québec) – in collaboration with the Quebec City-based company De Marque. This pilot project was made possible by an agreement reached with Quebec-based publishers, digital depositories and bookstores²³ regarding the lending of eBooks purchased from available Quebec-based publishers' catalogues. To operate and manage the development of the PRETNUMERIQUE.CA platform, a non-profit organization, BIBLIOPRESTO.CA, was created in 2012 by the consortium.

eBooks purchased through the BIBLIOPRESTO.CA licence have a maximum loan limit of 55 with no annual limit. On site reading in libraries is permitted and falls outside the loan limit. Individual libraries set their circulation policies including the number of eBooks which can be borrowed at one time, the length of the loan period etc. Providing library users the option to purchase the eBook from a Quebec bookseller can be implemented at the discretion of the library. eBooks are sold to libraries at the same price they are offered to the general public.

²² www.onleihe.net

²³ Quebec legislation requires public libraries to purchase print books through local bookstores. There was agreement to retain the spirit of this approach for eBooks although this is not required in law.



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BIBLIOPRESTO.CA is presently negotiating with European publishers to include their publications in what is available to Canadian libraries. It is projected that the titles available through BIBLIOPRESTO.CA will double in 2014.

Russia

Russian libraries report that they do not purchase commercial eBooks at this time with the exception of those intended for use by persons with print disabilities.

US Models

Two US public library eBook initiatives provide examples of what can be achieved when libraries develop their own platform to host eBook collections. The strength of this approach is that the library or consortium controls the integration of eBooks into the library's catalogue and circulation process. Controlling the eBook platform also provides libraries with greater flexibility in dealing with smaller publishers and self-published works by circumventing aggregators. Ownership of eBook files can be guaranteed with a library controlled platform, unlike content licensed from aggregators or publishers where long term access can be dictated by license terms and/or the continuation of a business relationship with the aggregator.

Common problems which have been identified in the models discussed here are that the approach can be costly (which is not to say that there are not also substantial costs associated with using intermediaries to host the library's eBooks) and the withholding of titles and imposition of problematic terms and conditions by large publishers remains the same as for libraries using intermediaries.

Califa

The Califa Group is a non-profit multi-type library consortium with over 220 member libraries, largely in California. Califa brokers and facilitates the delivery of a range of products and services to member libraries leveraging savings through bulk purchasing. Included in Califa's offerings is the ENKI collection, a consortium-owned eBook platform created in partnership with Contra Costa County Library (CCCL) which currently provides access to over 20,000 titles. Califa requires ownership of the digital files added to ENKI.

As has been the case with other eBook consortia models, the largest eBook aggregator OverDrive stopped supplying eBooks through ENKI and now requires Califa members to acquire their eBooks individually resulting in higher operating costs.

Douglas County

Douglas County Library (DCL) in Colorado established its own eBook platform building on a base of titles published by Colorado publishers and self-published works represented by the packager/distributor Smashwords. The DCL eBook collection now numbers over 35,000 titles, approximately 10,000 of which are self-published titles supplied by Smashwords. DCL is recognized as a pioneer in demonstrating how libraries could take greater control of their eBook acquisition and hosting and the model is being actively pursued by other libraries, recognising that significant resources are required.



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Government Reviews

The UK

In 2012 the UK Government launched *An Independent Review of E-Lending in Public Libraries in England* undertaken by representatives from authors, librarians and publishers. The panel's final report was issued in March 2013.²⁴

The Review summarised its recommendations as follows:

- The provisions in the Digital Economy Act 2010 that extend PLR [Public Lending Right] to audio books and loans of on-site e-books should be enacted.
- Further legislative changes should be made to allow PLR to take account of remote e-loans.
- The overall PLR pot should be increased to recognise the increase in rightsholders.
- A number of pilots in 2013 using established literary events should be set up to test business models and user behaviours, and provide a transparent evidence base: all major publishers and aggregators should participate in these pilots.
- Public libraries should offer both on-site and remote E-Lending service to their users, free at point of use.
- The interests of publishers and booksellers must be protected by building in frictions that set 21st-century versions of the limits to supply which are inherent in the physical loans market (and where possible, opportunities for purchase should be encouraged). These frictions include the lending of each digital copy to one reader at a time, that digital books could be securely removed after lending and that digital books would deteriorate after a number of loans. The exact nature of these frictions should evolve over time to accommodate changes in technology and the market.

While welcoming the review's recommendations for guidelines for eLending in public libraries, the Government's response did raise concerns regarding PLR payments for remote digital lending in the context of the EU Copyright Directive and the call for increased funding support for the compensation of PLR payments for eBooks.

Australia

In June 2012, the Australian government established the Book Industry Collaborative Council (BICC) to implement recommendations from the earlier Book Industry Strategy Group. The Australian Library and Information Association (ALIA) was a member of the BICC which also included authors, publishers and booksellers amongst others in the book supply chain.

The BICC final report noted that:

Libraries are struggling with the variety of supply models, and the constantly changing scenarios, licences and contracts, compounded by increases in pressure on library budgets. This is often further complicated by the fact that major suppliers are overseas and the terms and conditions of supply relationships are often dictated by corporations operating in the United States and the United Kingdom. Balancing the needs of creators/producers/distributors on the one hand and libraries/library patrons is a challenge. Sustainable

²⁴ <https://www.gov.uk/government/publications/an-independent-review-of-e-lending-in-public-libraries-in-england>



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*models for ebook supply to libraries are at the heart of this balance, as is the inclusion of ebooks in the lending rights schemes.*²⁵

The work of the BICC was largely undertaken by Expert Reference Groups. One such group was the Lending Rights Expert Reference Group which developed *Principles for consistent models for supply of ebooks to libraries* to underpin recommendations for a lending right for eBooks. These eight principles, collaboratively developed and agreed by authors, publishers and librarians are :

- **Libraries' role in promoting a reading culture.** The Australian book industry should remain committed to enhancing readers' access to Australian books through libraries and encouraging reading, in all formats.
- **Models for the supply of ebooks to libraries** should be as consistent and transparent as possible; they should aim to simplify access for readers while providing measurable data for authors, publishers and libraries, and enough flexibility to be commercially sustainable for all parties.
- **Availability of ebooks through libraries.** The industry aims to improve the availability of content, providing libraries with a variety of terms for acquisition and re-use, at a minimum consistent with the Australian *Copyright Act*. Finding viable and sustainable models that support concurrency of market release and the interests of publishers and libraries is a priority.
- **Continuity of access.** The industry will undertake its best endeavours to provide access to purchased or licensed titles for library users even if the distributor/publisher ceases business.
- **Fair remuneration for authors and publishers.** Authors and publishers should receive fair remuneration, including a lending right through an extension of the Lending Rights schemes, for each ebook title licensed or sold to libraries.
- **Fair pricing.** Libraries should expect to pay fair and reasonable prices for ebook titles and distribution services.
- **Rights protection.** All digital models should uphold Australian copyright law and strike a balance between ensuring adequate and proper rights protection for authors and publishers against illegal use of their work, and allowing libraries and their patrons to enjoy reasonable use of purchased titles.
- **Device-neutral ebooks.** The industry should aim to give all library users access to ebooks on a range of devices from across all platforms, in such a way as to facilitate discovery and maximise choice.²⁶

While these principles contained compromises, multi-stakeholder collaboration and agreement was an important step forward. It had been hoped that the Australian industry would work towards these principles. The BICC provided an important opportunity for libraries, authors and publishers to openly explore and discuss our varying concerns and to work out mutually acceptable ways to progress.

²⁵ http://www.senatorcimcarr.com/uploads/1/8/8/8/18881120/book_industry_collaborative_council_final_report_2013.pdf

²⁶ http://www.senatorcimcarr.com/uploads/1/8/8/8/18881120/book_industry_collaborative_council_final_report_2013.pdf



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Although the BICC was created by the Australian Government, the final report was never formally released because of the timing of the pending September 2013 national election. As a result, the report has received little attention within or outside of the industry.

In line with the recommendations from the BICC, it was anticipated that an organisation representing the book industry supply chain, including libraries, would be created as a successor to the BICC to progress recommendations from the report. There are currently no indications that such a group will form.

Library Advocacy Initiatives by Region

The American Library Association Engagement with Multinational Publishers

In the spring of 2011, HarperCollins was the first of the Big Six publishers to take the dramatic step of announcing its intention to license and not sell eBooks to libraries. Licence terms dictated that after 26 circulations, the library would be required to buy another 26 circulations to retain access to the work. Librarians across the country were outraged to learn that they would not own the eBooks they would purchase. A few libraries boycotted HarperCollins and others demanded that the legality of the licensing model be investigated. The licensing model drew substantial media coverage fuelled by announcements that Simon & Schuster and Macmillan would no longer sell eBooks to libraries under any conditions.

The American Library Association in response to the concerns raised by both librarians and the public chose to first negotiate with the trade publishers. Initial meetings with the Association of American Publishers (AAP) and trade publishers were difficult. The publishers believed that eBook sales would be cannibalised by public library free lending. Meanwhile, Penguin pulled back from the library market, and Random House increased eBook prices to levels over three times the consumer price.

The ALA delegation continued its effort to reach out to publishers by convening four meetings in 2012. Molly Raphael, then ALA President, participated in the AAP's annual meeting, and ALA convened two receptions with the trade publishers at its Midwinter and Annual meetings. Many conversations continued by phone with another round of publisher visits. Nevertheless, the conflict between ALA and the publishers increased and ALA members were increasingly dissatisfied. President Maureen Sullivan published an "open letter" more aggressive in fashion that put the publishers on notice (Appendix B). Librarians were eager to advocate in their local communities. ALA prepared the E-Book Media and Communications Toolkit²⁷ to meet the demand. In addition, other groups within ALA developed business models that could be pitched to publishers, recognising that both the libraries and publishers would have to compromise if eBook lending through public libraries was possible.

The tide changed by 2013 after more delegation meetings. Publishers became more willing to at least test business models with libraries to assess the effect of library lending on eBook sales. At this time, all of the Big Six trade publishers are selling eBooks to libraries (as noted above, with restrictions in place with some). Librarians continue to be dissatisfied with licence terms and pricing.

ALA continues to make eBook lending a priority and has continued its efforts, expanding its discussions with other publishers, authors, literary agents, and their associations.

The EBLIDA Right to eRead Campaign

²⁷ <http://www.ala.org/transforminglibraries/ebooktoolkit>



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During its 20th annual conference in Copenhagen on 11 May 2012, EBLIDA initiated its European Campaign for eBooks in libraries. This was followed by a call for a Europe-wide joint action between library associations for “The Right to e-Read” on 15 May 2013 at the 21st annual conference in Milan. EBLIDA launched *The Right to eRead* campaign in mid-January 2014 with a day of action in many EU capitals on 23 April 2014 (coinciding with World Book Day and World Copyright Day). Press events were held to promote *The Right to e-Read* campaign and make policymakers and the public aware of the licensing issues governing eLending by libraries. Support was received from some Members of the European Parliament, and a petition for the right to e-read was launched in 21 European languages.²⁸ In less than one month, the petition collected thousands of signatures and is planned to last until the new European Commission is in place on 1st November 2014.

The campaign calls on the EU Commission:

...for a clear copyright framework that allows libraries to acquire and lend e-books with an adequate remuneration to authors and other rights holders. Just as with printed books, an updated copyright framework should allow libraries to continue to provide their services for the benefit of all European citizens.

A position paper “The Right to eRead” was produced by the Expert Group of Information and will be released before the end of May. The paper reviews and analyses several aspects of the current changes, including:

The improved services libraries can now offer and how publishers’ have used the power of their monopolies to make decisions about what digital content libraries may have access to and what they may lend to the public, creating obstacles to library acquisition policies and their exercise of professional expertise and impartiality, deeply compromising their core mission and leaving their patrons without the e-content they want.

A quick analysis of the current trends in trade publishing which also highlights some of the most important threats posed to libraries as public interest institutions whose core purpose is to deliver access to information.

A comparison between the lending of tangible material (printed books, CDs, DVDs etc) and the lending of intangible content (digital files for downloading or streaming).

The developing legal uncertainty relating to e-books, e-lending and libraries is described and a snapshot is given of relevant current cases before European courts.

Highlights national attempts to adapt and develop copyright law to meet the challenges of the digital age especially in relation to libraries and includes information on the recent European Commission Consultation on the EU Copyright Rules and EBLIDA’s response to it.

“The Right to eRead” contains two overarching recommendations:

- *To move from the current unsatisfactory licensing offer to libraries to a regime of ‘Mandatory Fair Licences’*

²⁸ <http://www.change.org/en-GB/organisations/ebllida>



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- *That the European Copyright Acquis be updated to deliver fair access to information for European libraries and their patrons.*

The Swedish “Say Hello to Your New Librarian” Campaign

The Swedish Library Association launched an advocacy campaign in 2012 aimed at both the general public and politicians. Citing the UN Universal Declaration of Human Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms, the campaign positioned barriers to the acquisition of eBooks by libraries as detrimental to an individual’s right of freedom of opinion and expression.²⁹ At the time of the campaign launch it was estimated that approximately 5,000 eBook titles were available in Sweden. Libraries paid publishers approximately 20 Swedish Kroner per loan (€2.25 or \$3.10 US). All titles made available to libraries were subject to the same pricing model. The SLA argued that pricing should be linked to date of publication with older titles having a lower price per use. In support of this position the SLA noted:

...libraries make available all eBooks, even those that do not have a commercial market. In 2011, about 1,500 eBook titles were never loaned from public libraries, and about 100 titles accounted for half of all eBook lending.³⁰

The advocacy piece concluded with a call for politicians to work with public libraries to broaden public access to eBooks.

ReadersFirst

ReadersFirst, launched in June 2012, currently has 292 member libraries. Most ReadersFirst members are based in North America but there are also European and Australian members. ReadersFirst exclusively works with eBook distributors to address the fragmented, disjointed and cumbersome user experience arising from current eBook platforms. ReadersFirst set out the following expectations for library users of eBooks:

- *Search and browse a single comprehensive catalogue with all of a library’s offerings at once, including all eBooks, physical collections, programs, blogs, and donor opportunities. Currently, content providers often only allow searches within the products they sell, depriving users of the comprehensive library experience.*
- *Place holds, check-out items, view availability, manage fines and receive communications within individual library catalogues without the requirement to visit separate websites (libraries, not distributors, should be enabled to manage all interactions with users).*
- *Seamlessly enjoy a variety of e-content. To do this, libraries must be able to choose content, devices and apps from any provider or from multiple providers, without bundling that limits a library’s ability to serve content they purchase on platforms of their choice.*

²⁹ <http://www.biblioteksforeningen.org/wp-content/uploads/2012/08/Say-hello-to-yor-new-librarian-120906.pdf>

³⁰ *Ibid.*



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- *Download eBooks that are compatible with all readers, from the Kindle to the Nook to the iPad and so on.*³¹

In January 2014 ReadersFirst issued the *Guide to Library eBook Vendors* ranking seven library eBook vendors and outlining best practices for the distribution of eBooks. Michael Santangelo, ReadersFirst coordinator stated:

*...the full potential of lending e-books in libraries is being held back by technological confusion that even library staff members, as well as their library patrons, have trouble navigating. We advocate for giving libraries the proper tools, real choices, and open systems as concerns the discovery, circulation, and downloading of e-books and in order for these libraries to select or create user-friendly e-lending systems for their respective institutions.*³²

The Emerging Legal Framework

Overview

There have not been court rulings to date which specifically address the library provision of eBooks.³³ A key emerging issue is how digital exhaustion should be applied to content such as eBooks, digital music and computer programs. In most countries exhaustion is the principle whereby a rightsholder loses the right to control further distribution of the copy of the work following the first sale of a physical object such as a print book. After the first sale the rightsholder cannot prevent actions such as lending and resale of the physical object. Hence the ability of libraries to both have a choice of supplier when purchasing print books and to lend them without constraints. The rightsholder does retain a reproduction right which, with the exception of legislative exceptions, restricts the right to duplicate a work. The question which is increasingly being considered is whether there can be digital exhaustion which would give a purchaser of an eBook the same rights to lend and sell a copy in the same way as a physical book is treated.

There is growing interest in ramifications of recent legal cases considering digital exhaustion:

- In an EU case brought by a consumer rights organisation, the European Court of Justice has ruled that exhaustion applied in some cases after the first sale of a computer program.
- In a US case brought by a record company against a reseller of digital music, a lower US court found that digital exhaustion did not apply even though it appeared that one copy of the music file remained one copy.

Both cases are considered at length in Appendix A of this paper.

A key issue which is likely to dominate the legal and political debate moving forward is the differing ways in which eBooks are made available to libraries through licensing (the norm to date) or through sale. A central question which will have to be addressed is whether rightsholders should have the option to exclusively license

³¹ <http://readersfirst.org/>

³² <http://readersfirst.org/PressRelease--ReadersFirst-Guide-to-Libraries-Jan-8-2014.pdf>



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access to content giving them the ability to impose terms and conditions of use should they wish: i.e. a library is faced with the choice of either agreeing to non-negotiable terms and conditions or not being able to provide access to the work. Despite progress in negotiations with some trade publishers, it appears inevitable that libraries and other consumers of digital content will remain in a weakened position in the absence of political and/or judicial intervention.

A majority ruling by the Canadian Supreme Court in 2012, (in a case unrelated directly to digital exhaustion) contained the following statement of principle regarding technological neutrality as it applies to accessing digital content:

There is no practical difference between buying a durable copy of the work in a store, receiving a copy in the mail, or downloading an identical copy using the Internet... Absent evidence of Parliamentary intent to the contrary, we interpret the Act in a way that avoids imposing an additional layer of protections and fees based solely on the method of delivery of the work to the end user. To do otherwise would effectively impose a gratuitous cost for the use of more efficient, Internet-based technologies. The Internet should be seen as a technological taxi that delivers a durable copy of the same work to the end user. The traditional balance in copyright between promoting the public interest in the encouragement and dissemination of works and obtaining a just reward for the creators of those works should be preserved in the digital environment.³⁴

It is worth noting that Amazon and Apple have applied for patents for software to enable the re-selling of digital files. Rightsholders argue that given there is no degradation when a digital file is transferred as is the case with physical books, digital reselling would undermine the new sale market.

The principle of technological neutrality points to the rationale for a library and consumer position advocating for the application of digital exhaustion to eBooks.

³⁴ ESA vs SOCAN: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/9994/index.do>



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Conclusion

Since the writing of the 2011 IFLA Background Paper there has been a general improvement in library access to trade eBooks in some mature eBook markets. Having said this, the situation remains far from ideal in all regions and in some regions there has been minimal if any improvement in access. The major concern for libraries continues to be an inability to guarantee library user access to otherwise commercially available eBooks with reasonable pricing and acceptable use conditions.

Licensing rather than purchase remains the most prevalent business model employed by publishers for providing digital content access. This means that libraries continue to have to deal with imposed and inflexible terms and conditions, some of which impede legislated copyright exceptions. As a result, efforts are underway in university libraries to retain the right to interlibrary loan through piloting controlled access to researchers outside the institution with the content licence.³⁵ Such pilots have sought publisher consent.

There are indicators that the downloadable eBook as the format currently exists will not endure in its present form in the marketplace. The incorporation of audio-visual components will increasingly present file size challenges pointing to streaming rather than downloading being preferable for access. One byproduct of this shift is likely to be more fluid content with continuous updating, reader comments etc.

Dedicated eReaders appear to be becoming more of a niche product with multi-application tablets (or enhanced eReaders) being the hardware of choice for readers. If “Netflix-like” subscription services become more established, it is anticipated that it will be very difficult to negotiate access for library users.

These changes raise the spectre of solving eBook library access issues only to find that the format has morphed in such a way that new access issues arise. This underlines the importance of the concept of technological neutrality when advocating for support for library access to content.

With continuing difficulty in ensuring library user access to all commercially available eBooks, the need for political and judicial engagement increases. There are fundamental issues of principle at stake including the preservation of society’s written record and the right of individuals to access information irrespective of issues such as ability to pay. The crucial societal role played by libraries in ensuring the realisation of these principles must be recognized and enabled. To deny libraries access to commercially available content is to undermine these fundamental principles.

Negotiation and collaboration with publishers and other rightsholders are important and can result in significant progress in ensuring library access to eBooks. Important as stakeholder consensual problem solving can be, it is evident that it will never provide a complete solution. As a result, politicians need to be aware of what is at stake and provided with options for exerting pressure to ensure access whether through incentives and/or legislation. Efforts through the courts to promote technological neutrality by means such as recognising digital exhaustion need to be supported or initiated.

Efforts by IFLA and other library and archive organisations at the World Intellectual Property Organization promoting the necessity of an international treaty on exceptions and limitations for libraries and archives offers another potential means of both raising government awareness of the challenges facing libraries with eBooks and other digital content and proposing solutions.

³⁵ E.g. The Great Western Library Alliance ILL pilot Occam’s Reader. <http://www.americanlibrariesmagazine.org/blog/sharing-ebooks-razor-s-edge>



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Now more than ever, libraries must advocate on behalf of their users and communities for universal access to information for all, irrespective of content format or restrictive business practices.



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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 authorising 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 after the first sale or other transfer of ownership of the original or a copy of the work with the authorisation of the author. In some situations exhaustion may not apply when a work is imported and, in those countries where this is applicable, this is generally limited to the sale of the work (i.e. transfer of ownership) and not lending.

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.



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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.³⁶

E-Lending

Within the conceptual system of copyright legislation e-Lending has been regarded as constituting a subgroup under the category of "communication to the public or making available to the public". 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 a place and at a time chosen by the user.

The author (and other rights holders) has an exclusive right of authorising 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 has been regarded as 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 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.

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.

Exhaustion and the sale of digital files

Library organisations and consumer groups have been interested in questioning that exhaustions may not apply in the case of sale of digital files. The consumer's prime interest has been in enabling a second hand market for computer programs and music files. The libraries are interested in being able to lend digital files, which they have purchased, to their patrons without having to ask the rights holders for permission. There have been two important cases which have bearing on this question, one in Europe and one in USA.

³⁶ 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.



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The European Court of Justice has ruled that exhaustion might apply after the first sale of computer programs.³⁷ In Europe the copyright of computer programs is regulated by a special directive, Directive 2009/24, and the court warned that the result might not be the same with regard to other types of copyright protected works. Nevertheless, the Court has made an important observation regarding other types of works falling under the Infosoc Directive (Directive 2001/29). In Observation 52 the court says that:

.. it follows from Article 6(1) of the Copyright Treaty, in the light of which Articles 3 and 4 of Directive 2001/29 must, so far as possible, be interpreted ... that the existence of a transfer of ownership changes an ‘act of communication to the public’ provided for in Article 3 of that directive into an act of distribution referred to in Article 4 of the directive which, if the conditions in Article 4(2) of the directive are satisfied, can ... give rise to exhaustion of the distribution right."

The point of the consideration is that the act of communication to the public (Infosoc art. 3) changes into an act of distribution (Infosoc art. 4) if there is a transfer of ownership. This follows from art. 6(1) of the WIPO Copyright Treaty (WCT), and WCT is a legal source of a higher order than the Directives. Therefore the Infosoc Directive should be interpreted by the application of this treaty.

This implies that in the EU, if a digital work is sold to a library, vendor or individual and the purchaser takes possession of the digital file, that exhaustion may apply and the work may be subsequently lent, resold or donated without rightsholder permission. This is the subject of ongoing litigation. When a work is licensed by the rightsholder (in many such situations the library or vendor may not possess the digital file at any time), transfer of ownership has not taken place and digital exhaustion does not apply. The issue of digital exhaustion is the subject of ongoing litigation and it is probable that there will be increased clarity on the subject in the coming months and years. Changes in the application of digital exhaustion may also be introduced through legislation.

The District Court, Southern District of New York, was presented with a case regarding the legality of re-sale of music files.³⁸ ReDigi had set up a system where sellers could upload music files they wanted to sell, and from where buyers might download them. The system was designed so that only one file existed at a time. ReDigi claimed that the reproductions involved were legal under Fair Use, and that the First Sale statute applied, i.e. that the author’s right to control distribution of the files had been exhausted.

The judge ruled that the reproductions were not legal under the Fair Use provision. Moreover he denied that exhaustion after the First Sale applied. The reasoning behind this is interesting. While the European Court of Justice went into higher levels of abstraction in interpreting the legal concept in the light of WCT, Judge Sullivan of the District Court entered into the technical details of the matter:

When a user on a network downloads a song from another user, he receives into his computer a digital sequence representing the sound recording. That sequence is magnetically encoded on a segment of his hard disk, and this segment of the hard disk is therefore a “phonorecord” within the meaning of the copyright statute...

³⁷ European Court of Justice C-128/11

³⁸ UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK. No. 12 Civ. 95 (RJS). CAPITOL RECORDS, LLC, versus REDIGI INC., MEMORANDUM AND ORDER. March 30, 2013. RICHARD J. SULLIVAN, District Judge.



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Here, a ReDigi user owns the phonorecord that was created when she purchased and downloaded a song from iTunes to her hard disk. But to sell that song on ReDigi, she must produce a new phonorecord on the ReDigi server. Because it is therefore impossible for the user to sell her “particular” phonorecord on ReDigi, the first sale statute cannot provide a defense. Put another way, the first sale defense is limited to material items, like records, that the copyright owner put into the stream of commerce. Here, ReDigi is not distributing such material items; rather, it is distributing reproductions of the copyrighted code embedded in new material objects, namely, the ReDigi server in Arizona and its users’ hard drives.

Judge Sullivan concludes that “The statute plainly applies to the lawful owner’s “particular” phonorecord, a phonorecord that by definition cannot be uploaded and sold on ReDigi’s website.”

Conclusion

It is very uncertain how the question of exhaustion of the distribution right of digital files may ultimately be decided. The approaches of the European Court of Justice and the New York District Court are very different but not necessarily contradictory. The European Court of Justice is interested in drawing the line between “communication to the public or making available to the public” on one side and “distribution” on the other. The conclusion is that if there is a transfer of ownership then it is distribution. The New York District Court focuses on what exactly is distributed, and finds that this is not the particular phonorecord, embedded on the first customer’s hard disk, but a new reproduction. The first sale statute would apply if the first customer (the lawful owner) would sell her hard disk with the embedded phonorecord. But this is not the business model of ReDigi.

The ReDigi case boils down to whether it may be legal to make and distribute reproductions when the previous reproduction is destroyed after the new has been created. What they actually needed was the acknowledgement that a digital reproduction which replaces the original may be regarded as being the original. The court refused to do this on the grounds that 1) the present rules may be regarded as unsatisfactory, but they are not ambiguous, and 2) such an amendment of the copyright legislation is a legislative prerogative.

It will be interesting to see whether other courts demonstrate the same degree of restraint.

Harald von Hielmcrone / 9-3-2014



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Appendix B

ALA President's Letter to Publishers

The following open letter from American Library Association President Maureen Sullivan was released in September 2012. At that time Penguin, Macmillan and Simon & Schuster were not making eBooks available to libraries.

It's a rare thing in a free market when a customer is refused the ability to buy a company's product and is told its money is "no good here." Surprisingly, after centuries of enthusiastically supporting publishers' products, libraries find themselves in just that position with purchasing e-books from three of the largest publishers in the world. Simon & Schuster, Macmillan, and Penguin have been denying access to their e-books for our nation's 112,000 libraries and roughly 169 million public library users.

*Let's be clear on what this means: If our libraries' digital bookshelves mirrored the New York Times fiction best-seller list, we would be missing **half** of our collection any given week due to these publishers' policies. The popular "Bared to You" and "The Glass Castle" are not available in libraries because libraries cannot purchase them at any price. Today's teens also will not find the digital copy of Judy Blume's seminal "Forever," nor today's blockbuster "Hunger Games" series.*

Not all publishers are following the path of these three publishers. In fact, hundreds of publishers of e-books have embraced the opportunity to create new sales and reach readers through our nation's libraries. One recent innovation allows library patrons to immediately purchase an e-book if the library doesn't have a copy or if there is a wait list they would like to avoid. This offers a win-win relationship for both publishers and library users since recent research from the Pew Internet Project tells us that library users are more than twice as likely to have bought their most recent book as to have borrowed it from a library.

Libraries around the country are developing mobile applications and online discovery systems that make it easier to explore books and authors on the go. Seventy-six percent of public libraries now offer e-books — double the number from only five years ago — and 39 percent of libraries have purchased and circulate e-readers. Public libraries alone spend more than \$1.3 billion annually on their collections of print, audio, video, and electronic materials. They are investing not only in access to content and devices, but also in teaching the skills needed to navigate and utilize digital content successfully.

Librarians understand that publishing is not just another industry. It has special and important significance to society. Libraries complement and, in fact, actively support this industry by supporting literacy and seeking to spread an infectious and lifelong love of reading and learning. Library lending encourages patrons to experiment by sampling new authors, topics and genres. This experimentation stimulates the market for books, with the library serving as a de facto discovery, promotion and awareness service for authors and publishers.



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Publishers, libraries and other entities have worked together for centuries to sustain a healthy reading ecosystem — celebrating our society’s access to the complete marketplace of ideas. Given the obvious value of libraries to publishers, it simply does not add up that any publisher would continue to lock out libraries. It doesn’t add up for me, it doesn’t add up for ALA’s 60,000 members, and it definitely doesn’t add up for the millions of people who use our libraries every month.

America’s libraries have always served as the “people’s university” by providing access to reading materials and educational opportunity for the millions who want to read and learn but cannot afford to buy the books they need. Librarians have a particular concern for vulnerable populations that may not have any other access to books and electronic content, including individuals and families who are homebound or low-income. To deny these library users access to e-books that are available to others — and which libraries are eager to purchase on their behalf — is discriminatory.

We have met and talked sincerely with many of these publishers. We have sought common ground by exploring new business models and library lending practices. But these conversations only matter if they are followed by action: Simon & Schuster must sell to libraries. Macmillan must implement its proposed pilot. Penguin must accelerate and expand its pilots beyond two urban New York libraries.

We librarians cannot stand by and do nothing while some publishers deepen the digital divide. We cannot wait passively while some publishers deny access to our cultural record. We must speak out on behalf of today’s — and tomorrow’s — readers. The library community demands meaningful change and creative solutions that serve libraries and our readers who rightfully expect the same access to e-books as they have to printed books.

So, which side will you be on? Will you join us in a future of liberating literature for all? Libraries stand with readers, thinkers, writers, dreamers and inventors. Books and knowledge — in all their forms — are essential. Access to them must not be denied.

AAP Response

The Association of American Publishers issued the following response to the ALA letter September 2012.

On September 24, the recently-elected president of the American Library Association, Maureen Sullivan, released a harshly critical open letter to the US publishing industry about e-lending. The following is a statement from the Association of American Publishers:

Publishers and local libraries have had a lifelong partnership dedicated to increasing literacy and nurturing the love of reading. The publisher members of AAP provide libraries with innumerable free resources, programs and services — all designed to serve their cardholders, inform their librarians and sustain the vitality of their institutions.

Publishers recognize libraries’ interest in serving their customers and we want books to have the widest distribution possible. The issues surrounding e-lending, however, are not as simple as Ms. Sullivan claims. Publishers support the concept of e-lending but must solve a breadth of complex technological, operational, financial and other challenges to make it a reality. Each publishing company is grappling individually with how to



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best serve the interests of its authors and readers, protect digital intellectual property rights and create this new business model that is fair to all stakeholders. And while the 9000-plus library systems' non-profit status permits them to convene, debate and reach consensus on these issues, commercial publishers cannot likewise come together due to antitrust restrictions.

Within the narrow scope of our authority as a trade association, AAP has tried to help advance the dialogue on e-lending between libraries and publishers. The session we organized for former ALA leadership at our Annual Meeting remains our most-watched online video. In that spirit, AAP is set to host an event to be held in a few days welcoming Ms. Sullivan and providing her with a platform to speak to more than 100 members of the publishing community.

At a time when individual publishing houses are more actively engaged than ever in exploring viable solutions to e-lending, we are disappointed that the new leadership at ALA chose this path, with this particular timing, to criticize those efforts.



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Appendix C

IFLA Principles for Library eLending

Background

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 newspapers, scientific and technical journals and specialised monographs. Since 2010 the huge escalating increase in the purchase of eReaders by consumers in some markets, and the corresponding increase in the commercial availability of trade eBooks³⁹ in turn has led to increased demand for eBooks in public libraries.

Library acquisition and usage of digital databases, typically published by scholarly publishers, was addressed in the IFLA *Licensing Principles* (2001) which presented “a set of basic principles that should prevail in the contractual relationship and written contracts between libraries and information providers”.⁴⁰ While some areas of concern are common to both types of digital content, issues of library access to trade eBooks differ fundamentally from databases that assume a willing information provider and where the focus is usually on negotiated access. Trade eBook publishing, which is evolving rapidly, presents libraries with different technical, legal and strategic challenges which have led in some cases to confusion and frustration for libraries and their users, as well as publishers and authors.

In 2011, the IFLA Governing Board tasked a Working Group to propose actions which IFLA and its members should consider to address the situation. In April 2012, the eLending Working Group produced a [background paper](#) and commissioned a “think-piece”, “*Libraries, e-Lending and the Future of Public Access to Digital Content*” that formed the basis for discussion at an [expert meeting](#) in November 2012. In February 2013, [Principles for Library eLending](#) were approved by the Governing Board to assist libraries in addressing issues relating to the inclusion of downloadable eBooks in library collections.

The eBook environment is rapidly changing and IFLA has updated the IFLA *Principles for Library eLending* to reflect this. The revised *Principles* maintains a focus on the acquisition of eBooks, the importance of copyright exceptions and limitations, accessibility, continuity of access including the ability to preserve and user privacy with a revised preamble and more concise wording.

Preamble

The arrival of the internet age and the proliferation of digital content have heralded a new and exciting phase in the democratisation of information, ideas, and knowledge – arguably at least as potent and transformative as any other event in recorded history. However, despite the myriad of innovative social and economic benefits attached to widespread digital distribution and access to information and content, there are disturbing signs that in the realm of public access, the clock is turning back in certain areas.

At this stage in the evolution of digital dissemination of text-based content, libraries and their users wish at a minimum to be able to obtain and use an eBook in the same way they can obtain and use a print book. However, libraries are facing the new reality where they are often constrained from acquiring commercially available eBooks for their collections under acceptable terms and conditions. For example, some trade

³⁹ Trade books are usually distributed through retail channels for sale to a general audience.

⁴⁰ <http://www.ifla.org/publications/ifla-licensing-principles-2001>



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publishers and authors are withholding sales when they believe that access to eBooks by libraries may undermine retail sales and thereby reduce royalties.

The exhaustion of rights for digital content is an issue of increasing legal debate and uncertainty. Rights holders operate on the assumption that they can control all subsequent uses of digital works following initial access by the purchaser. This assumption has been the subject of legal proceedings in several countries. Should an consensus emerge that exhaustion should be applied for digital works in the same way it applies to physical objects (i.e. that reselling and lending is permissible without rightsholder approval as long as one copy of the same work remains one copy) a number of the IFLA principles will be achievable. Should the rightsholders interpretation prevail that they can control all post-first sale uses of digital works, the library's public service mission of ensuring societal access to written culture over time will be undermined.

The *IFLA Principles on eBooks in Libraries* is based on the assumption that it is necessary for libraries and publishers/authors to agree to reasonable terms and conditions for the library acquisition of eBooks, thus allowing libraries to fulfil their mission of guaranteeing access to knowledge and information for their communities. While we need solutions that support the publisher's and author's financial viability, it is not acceptable for a publisher or author to restrict a library's ability to license and/or purchase otherwise commercially available eBooks for library collections.

If the practice of withholding eBooks from libraries continues, publishers/authors should be required in legislation to make eBooks available to libraries under reasonable terms and conditions. In countries where publishers and authors receive public financial support, the argument for government mandated public access to published works through libraries is especially strong.

Libraries worldwide operate with a fundamental mission of providing access to information and, while acknowledging that regional differences exist in technological capacity and maturity of the eBook marketplace, this mission is universal and should prevail.

Principles

- 1. A library must have the right to license and/or purchase any commercially available eBook without embargo.** If titles are withheld from the library market by publishers and/or authors, national legislation should require such access under reasonable terms and conditions. Libraries must be able to determine their own acquisitions by choosing specific titles from publisher or distributor listings in support of their mandate to provide community access to information and knowledge.
- 2. A library must have access to eBooks under reasonable terms and conditions and at a fair price.** Terms of access should be transparent and costs predictable to enable the library to operate within its budget and funding cycles.
- 3. eBook licensing/purchase options must respect copyright limitations and exceptions available to libraries and their users in national law, such as the right to:**
 - a. Copy a portion of the work
 - b. Re-format the work for preservation purposes if it is licensed and/or purchased for permanent access
 - c. Provide a temporary copy of the work to another library in response to a user request
 - d. Reformat a work to enable access for people with print disabilities
 - e. By-pass a technological protection measure for the purpose of exercising any non-infringing purpose.



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4. **eBooks available to libraries should be platform neutral and developed with standards for accessibility.** Content should be capable of integration into library systems and online public access catalogues, and interoperable across platforms, applications and e-reader devices that the library or library patron has chosen to invest in.
5. **Strategies must be in place to ensure the long term preservation of eBook titles by libraries.** Long term availability of eBook titles should not be compromised by factors such as a publisher ceasing to operate. This can be addressed through measures including the collaborative development of archival databases by publishers and libraries and legislative solutions which require the legal deposit of digital content with specified agencies.
6. **eBook services must protect the privacy of library users.** Libraries and their users must be able to make informed decisions about the control and use of personal information including reading choices.

These Principles were endorsed by the IFLA Governing Board in February 2013. 1st Rev April 2013, 2nd Rev August 2013.