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Can e-lending land itself a spot under the public lending right?

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"However, in none of the studied countries, e-lending activities rely on a statutory copyright or lending right exception."

By Kelly Breemen and Vicky Breemen, Institute for Information Law, Amsterdam (IViR).

Public libraries in various countries are increasingly involved in e-lending practices. Thus far, these practices are largely based on contractual agreements between the parties concerned rather than on a copyright exception or limitation. But why would public libraries not be allowed to lend e-books under the same conditions that apply to physical books, that is, without prior authorization but against equitable remuneration?

In the context of plans for developing a national digital library, the Dutch Minister of Education, Culture and Science commissioned a study on the legal possibilities for e-lending under the present public lending right provisions at both national (i.e. Dutch) and European level. The study was jointly carried out by SEO Economic Research and the Institute for Information Law (IViR). On 26 February 2013, the

Minister formally submitted the report ('E-lending by public libraries: exploring legal possibilities and economic effects') to the Dutch Parliament.

The study defines 'e-lending' as the digitally and temporarily making available of e-books by public libraries by way of an online lending facility, through downloading, streaming or comparable transmission methods. In the first part of the study, current practices in the Netherlands, the United States, the United Kingdom and Germany are briefly discussed to examine what is already happening with regard to e-lending.

Apparently, e-lending is most advanced in the US, but practices are also rapidly developing in Germany and the UK. However, in none of the studied countries, e-lending activities rely on a statutory copyright or lending right exception, although in the UK recent amendments to the definitions of the Public Lending Right Act by the Digital Economy Act seem to enable a (limited) form of e-lending by public libraries under the Public Lending Right Scheme. The implementation of the new rules has however been postponed.

Secondly, the legal part of the report analyses whether the existing public lending right system of the Dutch Copyright Act (Auteurswet) covers e-lending by public libraries. This system converts the exclusive lending right of the rightholder into a remuneration right. The study examines both the legislative history and the wording of the relevant provisions. This makes clear that, although the subject matter of the lending right has been gradually expanded to other materials than books (such as CD-ROMs), still only information carriers in physical form ('exemplars') are covered by the public lending right.

Next, the study assesses whether the European copyright framework allows for the introduction of an exception at the national level. Interestingly, the proposal for the Rental and Lending Right Directive explicitly excluded making available by way of downloading from its scope, despite recognizing electronic lending as a future possibility. In addition, the European Commission described the object of the lending right as objects that incorporate protected works or performances, which points in the direction of physical reproductions. Moreover, the subject matter of the lending right refers to originals and copies of protected works. In scholarly literature, this has been interpreted as material exemplars.

In sum, the current derogation from the exclusive lending right does not seem to

accommodate e-lending. Therefore, since e-lending can be classified under the general making available right, the report also looks at the specific library exceptions of the EU Copyright Directive ('Infosoc'), which provides for a closed catalog of exceptions. Yet, only making available on site via terminals in the library seems to be covered by Article 5(3)(n), which leaves no space for the introduction at the national level of a copyright exception for online e-lending (that is, borrowing over the Internet from the home).

In conclusion, neither current Dutch copyright law nor the EU legal framework seems to leave room for e-lending without rightholder permission. Of course, this does not mean that libraries cannot lend e-books, merely that this practice is not covered by a copyright exception at the moment and therefore requires agreements with authors and other right holders.

Lastly, the economic part of the study examines both potential positive and negative consequences of e-lending for market players. On the one hand, the study considers that e-lending by public libraries might present economic risks for commercial parties. On the other hand however, the report asserts that libraries' online offer might help to familiarize library patrons with e-books. By attracting new groups of consumers, e-lending could therefore also have a positive effect on the market.

The report finally recommends that the Dutch government refrain from legislative action at this early stage, and that e-lending be facilitated through contractual agreements between the parties involved, as is already the case abroad. An important role is seen for collective rights management with regard to these contractual solutions. Furthermore, the statutory instrument of extended collective licensing (ECL) is put forward as a suggestion if the mandate of collective rights organizations would prove to be structurally deficient to lead to reliable contractual solutions permitting e-lending by public libraries.

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