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## E-publishing and the challenge for libraries

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## Introduction

Electronic publishing presents libraries with a series of challenges if they shall be able to continue their core activities: Acquisition, lending or making available, and preservation.

The transition of publishing literary and artistic works on tangible media to e-publishing, i.e. publishing them as electronic files in databases accessible via the internet, also changes the rules by which libraries have so far operated. How libraries meet this challenge will decide whether and how libraries in the future will be able to fulfil their objective: to make a broad spectrum of published works available to the general public for the use of personal study and development, education and research.

## E-publishing and acquisition

Until recently printed books and journals were published as individual items and bought by libraries. Since the end of the 1990's scientific journals have been primarily published in electronic formats and distributed in packages, compiled either by the publisher or by distributing agencies. We see the same development with books. Acquisitions have been replaced by subscriptions. Libraries subscribe to an internet access-point at the publisher's or distributor's database.

Libraries are in the middle of a move from having collections to having connections. This move is not yet fully completed. We still have some printed journals, and books are still to a large extent acquired in print. However, the end of this period is in sight. With the development of reading devices, for the downloading of electronic books, we are approaching the end of the Gutenberg era.

This development is an immense improvement of services. It is convenient and it reduces transactions costs to subscribe to packages of journal and book databases. However, there are no free lunches.

The main problem is that the supplier decides what is in the package, and he may not be interested in including "bestsellers" or even very infrequently used material. The result is that the library may not be able to present to its users the very best literature or the most specialized literature on a subject. The library may become a distributor of mainstream products.

Another consequence is that libraries will no longer be able to control the authenticity of the content or to ensure that content is not removed from the databases. It is very difficult to detect whether content has been tampered with, but it regularly happens that content is removed from the databases. This may be due to technical problems or to commercial decisions made by the service provider and publisher. Sometimes the content will be available from another distributor, and sometimes it simply disappears.

Now, the library may want to include a provision in the licensing contract with the publisher, that material may not be changed or removed from the database, but this is subject to freedom of contracts. If the publisher judges that a book is so valuable to the users that he may obtain greater revenue from selling the work directly to the users rather than including it in the subscription package to the library, nothing can force the publisher to act otherwise.



## Change of legal basis

The works made available by the library are protected by copyright, and copyright legislation regulates how libraries may use the material they acquire. With the introduction of electronic publishing the legal basis for the library's activity changes dramatically.

As to printed works or works published on tangible media like CD, CD-Rom or DVD, the author has the exclusive right to decide whether to publish or not, but after the first sale the distribution right is exhausted and the library, having acquired it, can do with it as it sees fit. One usually says that the distribution right is exhausted after the first sale.

Works published in databases are not distributed; they are communicated to the public or made available to the public. Communication to the public or making available to the public is regarded as a service, and the question of exhaustion does not arise in the case of services. Therefore every on-line access is an act which is subject to authorisation. This right is non-exhaustible, and until the work becomes public domain – approximately 100 to 120 years after publication – libraries are dependent on the licence agreement with the author or other rights holders to whom the author may have transferred his copyright.

There are good reasons for the differences between the distribution right and the communication to the public right. The acquisition by the library of printed books does not prevent the bookseller from selling the same titles to other buyers. On the contrary, libraries stimulate interest in reading, and people who borrow many books also buy many books. Although publishers are not happy to admit it, libraries do not ruin the market. However, if a library could acquire an electronic publication and make it available on the server for everyone to access, obviously, there would be no need for anyone else to buy it. In order to prevent such a scenario the right to control the communication to the public or the making available to the public lies firmly with the author (or other rights holders to whom he may have transferred his copyright).

The basic principle regarding exceptions and limitations to author's rights is that the exceptions do not interfere with the rights holder's commercial exploitation of the works. The challenge, therefore, for libraries and publishers in the age of electronic publication, is to find ways and means as to how libraries may fulfil their societal objectives without compromising the legitimate commercial interests of the authors and publishers.

## Consequences

Because e-publishing is a service and the concept of exhaustion does not apply, the library can only acquire the digital object, the e-book or e-journal, by entering a licence agreement with the author (or other rights holders). The rights holders are free to decide whether they want to enter a licence agreement giving access to specific works and to decide on the terms for such access.

The consequence of this is that the acquisition policy may be decided by the publisher and not by the library. This is not a hypothetical danger. Libraries have actually experienced instances of publishers

- refusing to include certain titles of e-books,



- removing certain titles from the subscription packages in order only to sell the books to individual private customers,
- and prescribing the terms for access.

This is a direct challenge to the core activities and responsibilities of libraries. If this challenge is not met, it is difficult to see how libraries can fulfil their objectives in the future.

How can libraries change this situation?

## **Acquisition**

### ***Human Rights***

Libraries have an obligation (in most countries) to supply citizens with information..The difference between a library and commercial services is not merely in the absence of the commercial purpose, but the *public mission* that consists in specific responsibilities towards the community: to provide access to information without discrimination against users and/or documents, promoting intellectual freedom and preventing any form of exclusion or divide.

Because of this special mission that libraries have, one sometimes hears the view that it is a violation of human rights if the library is prevented from making a free choice of material to be made available to citizens.

It may perhaps not be a violation of HR if specific books or journals, are not available in libraries because publishers will not let them have them. However, there are serious issues of human rights, or society rights, at stake in the changed copyright framework. These need serious discussion at governmental and supra-governmental level. Politicians are unaware of the changed balance of power; or at least, they are unaware of the guarantees provided by the print system that have vanished in the e-system.

### ***DRM and TPM***

When content is under the control of an external provider, DRM and technological protection measures are beyond library or user control, and so publishers can define permitted uses which may be even more restrictive than those set by the law or by licence agreements. Although Directive 2001/29 and national laws authorize the removal of TPM to allow legitimate uses if necessary, actually such removal is often impossible without the cooperation of the supplier. Moreover, the technology allows the traceability of user's behaviour. The greater the control over the behaviour of individuals, the more it threatens to encroach on the individual freedom. In a democracy, personal freedom should be inviolable, and this includes the right to anonymity. Libraries should be able to ensure the respect of these rights.

### ***Competition law***

Most countries have legislation to prevent market failures, e.g. to prevent producers from misusing a dominant position or establish a monopoly. Is it possible to claim that publishers should not misuse a monopoly, and that the refusal to include certain titles in the book package to be subscribed to by the libraries is a misuse of a monopoly?



One may argue that publishers cannot select their buyers, this is against art. 82 (2) (c) EEC Treaty: "applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage"; the counter argument may be that the transactions are not equivalent. There is a difference between selling works to private individuals for their personal, private consumption, and selling works to libraries for lending purposes.

It is hard to apply competition law to the individual monopoly which exists in the author's exclusive rights over one novel or one poem (for example) that he or she has written. Competition law deals in supply and demand on a broad scale.

### ***Market forces***

May the problem be solved by the forces of the market?

When publishers sell works to the public, the normal transaction is selling one item at a time to individual users. This means that you need many transactions before you have a substantial income. Contrary to this, libraries buy on a large scale, often being able to pay large sums in advance. Libraries have a considerable purchasing power – at least regarding certain types of works. This means that library purchases and down payments on licence contracts may enable publishers to have their production costs covered at a faster pace than would otherwise be possible. This power may be used to negotiate standard agreements giving access to all library relevant materials.

Even though university libraries spend very large sums of money in advance on scholarly journals, their bargaining power has always been weakened by the universities themselves. The academic staff have always been more keen to sustain the flow of journals to their libraries, than to take a realistic bargaining position. The reason for this is that the decisive element of such a bargaining position has to be: to stop buying the journals until the price is agreed at a lower level.

Universities, which control their libraries, never contemplate this for the simple reason that this may seriously impede their research programmes. There is a fierce competition between universities and other research institutions, and no responsible administrator could allow the library to take a position *vis a vis* publishers that might impede the institution's research programmes.

In order to improve their bargaining situation institutions often establish consortia. And consortia agreements are, indeed, often better than the standard contracts offered by publishers, but also their bargaining power is generally limited: publishers, even small ones, hold a monopoly on content necessary for users, which means that they are the stronger party in any negotiation.

Market forces do not operate well in a situation of exclusive rights, which really means a situation of monopolies.

### ***Compulsory licenses***

Is a possible solution in national law to have specific provisions so that publishers may not refuse to sell e-books to libraries for e-lending?



## E-lending

### *Statutory exception*

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 a pc or reading device, so that the file is destroyed after a pre-determined period of time.

As mentioned above, e-lending is an online service and therefore any communication or making available to the public requires authorisation by the author (or other rights holders).

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

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

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

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

The Infosoc directive has 15 exceptions to the communications to the public right, but they do all comply with the Three Step Test in being restricted to certain special cases. The decisive question is whether an exception allowing for e-lending to the general public may also pass the Three Step Test.

According to the Green paper on copyright of 1995, ““The application of the lending right to electronic transmission should also be reviewed with a view maintaining a balance between the interests of public libraries and those of rightholders<sup>1</sup>.” And according to art. 2 (1)(b) of Directive 2006/115/EC, “lending’

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<sup>1</sup> **Green Paper on Copyright and Related Rights in the Information Society**, European Commission Green Paper of 27 July 1995 on Copyright and Related Rights in the Information Society [[COM\(95\) 382](#) final - Not published in the Official Journal], citation last paragraph p. 59.

Accessible at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:1995:0382:FIN:EN:PDF>



means making available for use, for a limited period of time and not for direct or indirect economic or commercial advantage, when it is made through establishments which are accessible to the public.” Although the directive covers the distribution right and not the right of communication to the public, the definition of public lending could apply to any form of making available to the public.

We need to develop a model for public lending to be adopted also in the digital environment. A model that is fully complying with the three step test and the “traditional” public lending exception, while the only difference would be that users can access the service in a place and at a time individually chosen by them.

A first step would probably be to define the minimum conditions for libraries when e-material is delivered according to licence agreements.

### ***Licensed solutions***

University and research libraries have a great number of licensing agreements providing unlimited access to subscribed content to their institutional users at a place and time individually chosen. Some of these contracts also include post-cancellation and archival rights. Very few of these contracts permit e-lending to non-institutional users or interlibrary loan. Meanwhile, a number of public libraries subscribe to an aggregation platform provided by a private service provider through which their registered users can download for a limited time e-books from publishers, music and other content.

In the present situation when libraries face many different licensing models there is a need to develop agreements with publishers’ organizations on standardized licensing terms, which would enable libraries to make available on reasonable and fair conditions to their users all works published in electronic formats chosen by the library.

An *unconditional* “lending right” might undoubtedly lead to the situation described above: that there is no need for anyone else to buy a work which is bought and made available to the public via internet. So obviously, there is a need to restrict the use of works made available as digital files in a way that prevents this scenario. Publishers have presented different ways to control e-lending in order to create a replication of the use pattern for a print-on-paper library. Many librarians have reacted strongly against such restrictions. However, if we are to succeed it is necessary to analyse them and determine which are compatible with the library’s objective and normal operations, and which of them are unacceptable. Below there are lists examples of requirements from both publishers and libraries

#### ***Publisher requirements***

- One file = one user at the time (Single user v multi user)
- One file = only use for 26 loans. (equal to the number of loans before a book is worn out)
- Perpetual purchase / limited purchase (limited in time or number of uses)
- Only for registered library users (living in the community or registered as students or teachers of university)



- Download to reading device, only on the library premises. No remote online service
- Possibility for publisher to monitor and control use
- Restrictions on number of pages printed
- Retention period after publication (In Denmark 4 months for recorded music)
- Time limited loan period
- Buy button directing to publisher's website

#### *Library requirements*

- Protection of user's privacy
- Remote online service
- Standardized formats
- Inter library loans (e.g. a specified number of times to the same library)
- No restrictions on Out of Commerce books
- All published eBooks should be made available for e-lending
- Copying allowed to a certain extent and/or for certain purposes (fair use)
- Annotations should be exportable after expiry of loan period

#### **Preservation**

Long-term preservation can only be safeguarded if the (National) library has physical control over the files. This means that it must own copies of all published works in electronic formats.

If the publishers alone have the files there is no guarantee of their long term preservation and availability. Publishers have no obligations and they will delete files when there is no commercial value in keeping them. It may happen that an author may want to retract published works. If the work is published in print, the author can do nothing about it. However, if it is published electronically in a database, the work may simply be removed or be replaced by a new edition.

For the purpose of preserving the cultural heritage libraries need legal authority to collect, preserve and make available all works published in electronic formats. In practice this can only be done via international cooperation over the legal deposit of electronic files and by amendments to copyright legislation to allow legal deposit libraries to make the files available on defined terms conforming to fair practice. Such legislation is in place in a few countries but in most countries legal deposit only includes electronic files published on tangible media like e.g. CDs and DVDs.

Such legislation ought not to be controversial, but experience shows that publishers in most countries object strongly to it.

#### **Questions:**

1. Is this in general a correct description of the legal situation?
2. Acquisitions: what remedies do libraries have?



- a. Is there a human rights issue if publishers refuse to sell to- or to provide access via libraries?
  - b. Is it possible to argue from competition law?
  - c. Do libraries have to rely on market forces?
  - d. Are compulsory licences a possible solution?
3. E-lending
- a. Is it possible to have a statutory exception regarding e- lending (i.e. the temporary making available of an electronic file), and if so, how should such a provision be construed within the limits of the Three-Step-Test?
  - b. If only licensed solutions are possible, what types of publisher requirements and library requirements would be acceptable or desirable?
4. Preservation
- a. Can we imagine other realistic solutions except for legal deposit, and an exception to the communication to the public right?

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