

# Ebooks & Libraries in Germany: Legal Issues and Models

**A study on the current legal situation of e-lending requires also a view on the background of analog lending and different (future) models for digital books. However, there is still no consensus on what "e-lending" means and how it can be dealt with de jure. Its lawfulness depends strongly on expected political and judicial decisions.**

## 1. Physical and non – physical media: The legal situation

Concerning works contained in *physical devices* like books, CD 's or USB-sticks, the legal situation is more or less cleared: Most countries of the world have established the so called "first sale doctrine" (or exhaustion principle). The exhaustion principle means, that after the first sale or other transfer of ownership of the original or a copy of the work with the authorization of the author, this item can be further distributed without authorization of the copyright holder<sup>1</sup>. Some examples of legal language on "exhaustion" (first sale):

### Art. 6 World Copyright Treaty (WCT):

(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.

### Art. 4 (2) EU copyright directive (2001/29/EC):

2. The distribution right shall not be exhausted within the Community in respect of the original or copies of the work, except where the first sale or other transfer of ownership in the Community of that object is made by the rightholder or with his consent.

### Art. 4 (2) EU software directive (2009/24/EC)

The first sale in the Community of a copy of a program by the rightholder or with his consent shall exhaust the distribution right within the Community of that copy, with the exception of the right to control further rental of the program or a copy thereof.

### Art. 17 (2) German Copyright Act:

(2) Where the original or copies of the work have been brought to the market by sale with the consent of the person entitled to distribute them within the territory of the European Union or another state party to the Agreement on the European Economic Area, their dissemination shall be permissible, except by means of rental.

The case of "lending" is dealt with in Art.6 of the rental right and lending right directive (2006/115/EC), "Derogation from the exclusive public lending right":

"Member States may derogate from the exclusive right ... in respect of public lending, provided that at least authors obtain a remuneration for such lending. ..."

Thus, in Germany, which has derogated this exclusive right in Art. 17 par.2 and 27 par.2 Copyright Act, libraries do not need authorization before they lend a book, but the 16 federal states and the central government are obliged to pay remuneration for the lending in publicly funded libraries to the Collective Society ("Bibliothekstantieme").

### Art. 27 German Copyright Act:

(2) The author shall be paid an equitable remuneration for the lending of those originals or copies of a work whose dissemination is permissible according to Article 17 (2) if the originals or copies are lent through a publicly accessible institution (library, collection of video or audio recordings or other originals or copies thereof). Lending within the meaning of the first sentence is the time-limited transfer for use which neither directly nor indirectly serves profit-making purposes.

<sup>1</sup> See Art. 6 par.2 WIPO Copyright Treaty (WCT)

At present, the portion of newly purchased library resources distributed as printed books or on other physical items is descending strongly in academic libraries. Financial resources spent for electronic media in Germany's academic libraries in average added up to nearly 60 % in 2014<sup>2</sup>, most of it for online media. As the latter does not imply physical distribution, one of the big questions for library services is: Can the exhaustion principle, as one of the basics of libraries after all, be applied on these media? That means, major part of library resources still be borrowed to library patrons? If not, the library character as distributor of works will change completely, because in a few years the share of online media will easily hit 80 % or more in the academic environment. Some Technical Universities already achieve even higher percentages.

## 2. Different models of electronic resources – different laws

Before taking a closer look on the possible legal situation of E-book- lending, we have to differentiate the variations of models for e-resources, because the classical "lending" model can possibly only be applied to e-resources, where it is comparable with the distribution of physical items to libraries. Currently, most of the e-resources are not purchased for download by the libraries themselves: Library patrons only get access to the provider's platforms and can view as well as download the contents (e.g. platforms like "Divibib GmbH's Onleihe", "Beck-Online" or "De Gruyter ebooks"). At the most if libraries and publishers agree on library's permission for an archival copy, the situation can be compared with the physical purchase and lending of a printed book by the library.

## 3. What is E-"Lending"

### a. Definitions

Is the provision of a digital copy "lending"? As the act of "lending" refers to the possession of a physical item, providing a digital copy to a library user via download does not literally fall under this expressive. On the other hand, the exhaustion principle and the allowance to lend library books should not be restricted to the literal meaning of the word "lending", if physical books are substituted by download versions. The exhaustion principle limits the right of the copyright holder after the first distribution. Libraries can buy physical books on the end-user market and lend them without agreement of rightholders. Or can the above mentioned legal language on "exhaustion" be interpreted also as "digital" exhaustion of versions, which are downloaded with the rightholders' consent?

### b. Legal model: Licence or statute?

There are three basic legal solutions: The first is the well known model of individual licensing, the second one would be a statutory exhaustion, and the third one a compulsory license. Especially in the case where exhaustion cannot apply to E-Books, the latter two could provide a reasonable solution. The German Library Association proposed<sup>3</sup> - already in 2012 - to broaden the scope of the above cited Art. 27 par.2 Copyright Code: It should also apply to e-books. A similar initiative was launched by the parliamentary group of "DIE LINKE"<sup>4</sup>. Furthermore, the current governing coalition agreed to analyze this issue<sup>5</sup>.

## 4. The present legal situation for e-"lending" in EU

An e-book can be a mix of software, database and "normal" copyright protected contents. At the least it is, substituting a physical book, a protected "work". Hence, one requirement for exhaustion is the "first sale or other transfer of ownership" (Art. 4 (2) Infosoc-directive<sup>6</sup>). In the time of writing this article, the Court of Justice of the European Union (CJEU) has not yet decided, if this applies also to e-books.

However, a preliminary CJEU ruling on this issue is expected in spring 2016 in the Dutch case "Vereniging Openbare Bibliotheken v Stichting Leenrecht" (Case C-174/15)<sup>7</sup>.

The referred questions of this case are, among others, if the term "lending" in Art.6 of the above cited EU lending right directive " includes the digital provision of the work per download, and if Article 4(2) of Directive 2001/29 "[...] " construed as meaning that the initial sale or other transfer of ownership of material as referred to in that provision also means making available remotely by downloading".

In the "Usedsoft" case<sup>8</sup> from July 2012, CJEU had decided on the exhaustion of software: It ruled, that a license can be classified as a "sale" in the sense of Art. 4 (2) of the software directive, if the right to use a computer program lasts (a)

<sup>2</sup> Deutsche Bibliotheksstatistik, <https://www.hbz-nrw.de/angebote/dbs/>

<sup>3</sup> Positionspapier des Deutschen Bibliotheksverbandes e.V.: Gleichstellung von gedruckten Büchern und E Books, [http://www.bibliotheksverband.de/fileadmin/user\\_upload/DBV/positionen/dbvPositionspapier\\_EBooks\\_Ausleihe\\_kurz\\_2014\\_02.pdf](http://www.bibliotheksverband.de/fileadmin/user_upload/DBV/positionen/dbvPositionspapier_EBooks_Ausleihe_kurz_2014_02.pdf)

<sup>4</sup> BT-Dr. 18/5405, <http://dip21.bundestag.de/dip21/btd/18/054/1805405.pdf>

<sup>5</sup> Coalition Treaty, P. 134, [http://www.bundesregierung.de/Content/DE/\\_Anlagen/2013/2013-12-17-koalitionsvertrag.pdf](http://www.bundesregierung.de/Content/DE/_Anlagen/2013/2013-12-17-koalitionsvertrag.pdf)

<sup>6</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:167:0019:EN:PDF>

<sup>7</sup> <http://curia.europa.eu/juris/document/document.jsf?docid=164990&doclang=EN>

<sup>8</sup> Case C-128/11, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=124564&pageIndex=0&doclang=EN>

for an indefinite period and (b) "in return for payment of a fee designed to enable the copyright holder to obtain a remuneration corresponding to the economic value of the copy of the work of which he is the proprietor".

In Germany, courts refused the application of the *Usedsoft* judgement on downloaded e-books or audiobooks and gave the following reasons<sup>9</sup>:

The exhaustion principle, set in Art. 4 (2) of the *Infosoc-Directive*<sup>10</sup> and § 17 par. 2 German Copyright Code (*UrhG*), can not be applied to the download of E-books as an analogy. Different from software, respective to the courts decision, the download of other works does not imply the transfer of ownership, because there is no "substance" transferred. In software, because of its specialties, this is different. The court refers to the difference between software and other works: "Everybody can read a book, watch a film, listen to a record, view a painting. (But) the mode of operation and function of the program cannot easily be determined on the basis of the data carrier."

The mentioned expected CJEU decision "*Vereniging Openbare Bibliotheken*" can change the game completely.

## 5. The present situation in German public libraries

All libraries acquire their media at the prevailing market terms, thereby paying a great deal of money to publishers and authors for printed and electronic media. In 2014, the total media budget of German libraries came to EUR 416 million. In addition, the remuneration for lending paid by the federal states and central governments, adds up to about 10 Mio Euro annually.

Lacking clarity about statutory ebook-exhaustion, e-"lending" in Germany is provided by licensing, in the case of public libraries via so-called aggregators, the dominant one being the private company *Divibib GmbH* with a business model called "Onleihe". In recent years, also the US company *Overdrive Inc.* and the mainly end-user company *Ciando* offer their services to public libraries in Germany, however, on a much smaller scale (only a handful of libraries use *Overdrive* mainly for foreign literature and about 200 libraries use *Ciando*). *Divibib GmbH* already started back in 2007 and works mainly for public libraries. A library card is needed before a reader can use the service.

Currently, altogether 2652 public libraries in Germany, Austria and Switzerland, with participation in Germany alone of about 1400 public libraries (of 2100 professionally run public libraries) participate in the service. In 2015, about 8 Million e-media (e-magazines, e-papers, e-books, audio-books, music and videos) were borrowed by library readers compared to 375 Mio physical media that were borrowed at the same time in public libraries.

*Divibib GmbH* offers a complete service with all components to the library: the implementation of an online platform as "digital library branch", an Internet based service without installation in the library needed, technical support for running the services, the negotiation of licences with publishers and distribution of digital contents but also subject indexing and delivery of catalogue entries in *MAB2*.

For library users, the offer is simple and straight-forward: registered library users visit the website of their local library, log-in with their personal data, browse the digital content (searchable by format, topic, full text), place interesting materials into their library basket and download materials to their PC or e-book reader (no streaming). There is a *Digital Rights Management* system installed. The library determines the length of lending (between 2-4 weeks) and the number of items that can be borrowed at the same time.

The underlying business model of *Divibib GmbH* contains one supplier that negotiates on behalf of all libraries, that a single platform for the delivery of the e-book to the user is offered, that packages are possible for libraries (e.g. the whole offer by a certain publisher), but libraries could also licence individual titles. The currently most common licence is a so-called *M-Licence*, where one digital copy is lend to one reader at a certain time. In addition, there are other licensing models, like the *L-Licence* which gives broader availability for titles that are 2 years or older, and the *XL-Licence*, where parallel downloads for current titles is possible for an extra price.

Almost all books are available to public libraries for more or less the same price as for the end customer of the market, there are window times for some titles, but altogether more than 3900 publishers are currently cooperating with the *Divibib GmbH*. Unfortunately some big and very important publishing houses especially for fiction titles are missing as they developed their own commercial offers.

The integration into the library environment works well: some library software producers offer interfaces to the library catalogue and *Divibib GmbH* offers *MAB* & *MARC* data and media covers for the integration into library catalogues. In this way, the maximum visibility of the digital offer is reached.

Additionally, Apps are available for iPad, iPhone and Android platforms. Various marketing tools are also available like digital frames, bookmarks, posters, stickers and labels on media, give-aways, flyer, or postcards.

However, there are still major problems with e-lending in public libraries, e.g. important publishers refuse to negotiate licenses for libraries, licenses are only available for a specific time span and have to be re-negotiated or might

<sup>9</sup> (OLG Hamm) // OLG Hamburg: <http://www.telemedicus.info/urteile/Rundfunkrecht/Urheberrecht/1551-OLG-Hamburg-Az-10-U-511-Weiterveraeusserungsverbot-in-AGB-fuer-digitale-Gueter-ist-wirksam.html>

<sup>10</sup> 2001/29/EC

disappear afterwards, therefore licenses for digital media can be much more expensive for libraries than analogue media. Often, copyright exceptions are not reflected in terms of the licenses, and the long-term availability of E-media is not guaranteed.

According to the Federal Government Commissioner for Culture and the Media, this contradicts the cultural policy interest in broad, comprehensive access to cultural assets.<sup>11</sup> The widespread accusation within the publishing world, that libraries would offer free flat-rate services that compete with the publishing houses, is simply not true. Because access to e-books in public libraries is, as shown above only possible to a limited extent: consecutive loans make simultaneous access by many readers impossible, because as soon as an e-book is borrowed, it is no longer available to anyone else. There can still be no talk of supplying the entire population with e-books from a single library, as public libraries are funded by municipalities and their services is only provided for their registered citizens.

Book shops, publishers and libraries all advocate the equality of book prices and VAT. Whilst there is already draft legislation for controlling book prices, politicians also criticize the unequal treatment of VAT: "Be it digital or analogue – it is the content that distinguishes a book and not the format in which it is made available to the reader. A book is a book, regardless of how it is supplied."<sup>12</sup>

## 6. Next legislative steps on EU level?

At the moment, there are no serious steps taken towards EU legislative on E-lending. The Commission's Communication "Towards a modern, more European copyright framework"<sup>13</sup>, from 9th December 2015 includes altering and harmonization of exceptions for research and libraries. It does not promise anything about e-lending. However, the EU Parliament's Resolution on Copyright, adopted on 9th July 2015<sup>14</sup>, in its Art. 53, "Recognizes the importance of libraries for access to knowledge and calls upon the Commission to assess the adoption of an exception allowing public and research libraries to legally lend works to the public in digital formats for personal use, for a limited duration through the internet or libraries' networks, ...". This proposal has the function of an opinion and is not binding in any case, though.

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