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## **Abstract**

This comment critically assesses the European Court of Justice's preliminary ruling in *Vereniging Openbare Bibliotheken v. Stichting Leenrecht*. It finds that the scope of the public lending right has always been a matter of interpretation, which used to be fairly traditional. In that light, the Court's current stance, allowing certain forms of e-lending which have similar characteristics to conventional book lending, constitutes a broader, functionally oriented approach.

## **Keywords**

Libraries; E-lending; Public lending right; EU law; Interpretation; Technological developments; Functional equivalence

## **Legislation**

Directive 2006/115 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version)

## **E-lending according to the ECJ: focus on functions and similar characteristics in *VOB v. Stichting Leenrecht***

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Libraries have landed a victory in the preliminary procedure on the legal definition of lending: the European Court of Justice held that some forms of e-lending fall within its scope (ECJ 10 November 2016, case C-174/15, *Vereniging Openbare Bibliotheken v. Stichting Leenrecht*). The decision is important, because it clarifies that the Rental and Lending Rights Directive does not necessarily exclude digital materials. More specifically, it means that the derogation of the exclusive lending right now enables libraries to perform particular ways of lending e-books without prior permission, provided that they pay remuneration. This line of reasoning hinges on a library activity's perception as 'functionally equivalent' to traditional lending. Clearly, legislative choices concerning the definition, subject matter and conditions of the public lending rights regime are inherently shaped by interpretational issues. The reason is that, as the ECJ recognizes, the law has always needed to respond to economic, societal and technological progress. Despite diverging viewpoints over time, it has led to the current stance in which traditional interpretations no longer suffice, yet offer inspiration: what is needed, is a broader perception of institutions and their functions which meets the realities of the digital networked environment.

## **Origins of the case and outcome**

The multitude of views on 'lending' shows first of all from the developments which would ultimately lead to the case between the *Vereniging Openbare Bibliotheken* (Netherlands

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<sup>1</sup> An earlier article of this author on the case of *Vereniging Openbare Bibliotheken v. Stichting Leenrecht* appeared at the *Kluwer Copyright Blog* on 21 November 2016. This comment elaborates some of the points made, informed by the PhD-thesis on copyright law and libraries she is currently finalizing.

Association of Public Libraries, VOB) and *Stichting Leenrecht* (Dutch Public Lending Right Office). Its roots lie in the Dutch library system's reorganization process from the late 1990s onwards, which resulted in the enactment of an updated Library Act in 2014. The new law lists the functions which are seen for libraries in a developing information society: 'reading and literature', 'development and education', 'knowledge and information', 'art and culture' and 'meeting and debate'. Or in short: 'reading, learning and informing'. Those functions extend to the digital domain and may obviously involve copyrighted content, but the copyright implications were kept out of the library policy reform. During the legislative process however, the then-State Secretary for Education, Culture and Science expressed the intention to commission an exploratory study on lending legislation in the digital domain (2011). Beforehand, he envisioned its scope traditionally as solely covering tangible copies. The joint study by SEO Economic Research and the Institute for Information Law sketched a more nuanced picture.<sup>2</sup> The legal part examined whether the existing lending regime in the Dutch Copyright Act (*Auteurswet*) encompassed e-lending; and if not, whether the European legal framework either left space to enable this activity, or could be altered in that direction. At the end of 2012, the study found that, under the prevailing understanding as evidenced in legislative history, the public lending right was reserved to tangible copies of works. The fact that both the Dutch and the European legislator appeared to acknowledge the value a diverse digital offering and the possibilities of electronic lending, did not change this. Though the national legislator was advised to wait with legislative initiatives, the study left open the possibility that an adequate copyright exception would be deemed desirable in the course of time. Space would then first need to be created at the EU level. This would require a restatement of the EU legislator's chosen interpretation. Reactions to the study perceived its conclusions as proclaiming that e-lending 'should' not be possible under the derogation possibility, overlooking that the central question was descriptive rather than normative. Nevertheless, the study's conclusions led the VOB to bring a test case against *Stichting Leenrecht* halfway 2013. The VOB sought to change the interpretation of the law, rather than its content, by pursuing a declaratory ruling to confirm that digital lending was already possible under the relevant legal provisions.

In 2014, the court of the Hague concluded that the case depended on the question of whether 'e-lending' signified 'lending' in the legal sense.<sup>3</sup> The court indicated that arguments both pro and contra found support in legislative history, while the functional equivalence of both types of lending evoked different opinions as well. Thus, the court decided that the question had to be approached from the perspective of the Rental and Lending Rights Directive and referred questions of interpretation to the ECJ in 2015.<sup>4</sup> The fundamental issue is whether 'lending' in the sense of Directive 2006/115 (artt. 1(1), 2(1)(b) and 6) comprises the making available of electronic copies, for temporary use, by publicly accessible institutions via a so-called 'one copy one user' model. If so, the next question is whether the copies involved need to have been brought into circulation by first sale, or derive from a lawful source. Depending on the answer, the third and fourth questions deal with the permissibility of other additional conditions, concerning the source of the copy and the scope of the exhaustion doctrine under the Copyright Directive with regard to digital copies (art. 4(2)).

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<sup>2</sup> R. van der Noll, K. Breemen, V. Breemen, B. Hugenholtz, M. Brom & J. Poort, *Online uitlenen van e-books door bibliotheken*, Amsterdam, SEO/IViR 2012 (summary in English on p. iii-iv). See on the report: K. Breemen & V. Breemen, 'Can e-lending land itself a spot under the public lending right?', *Kluwer Copyright Blog* 4 March 2013.

<sup>3</sup> Court of The Hague 3 September 2014, no. C/09/445039 / HA ZA 13-690, ECLI:NL:RBDHA:2014:10962.

<sup>4</sup> Court of The Hague 1 April 2015, no. 445039 HA ZA 13-690, ECLI:NL:RBDHA:2015:5195.

Advocate-General Szpunar was the first to offer his view on the e-lending issue.<sup>5</sup> He made a case for the library's continued role in the dissemination of culture: this institution's position had become established in society over time and should extend to the *networked digital* society. Thus, despite valuing the library as an institution for historical reasons, he moved beyond a traditional-institutional reading. He emphasized the library's digital task and argued that the "functional equivalent" of lending, namely its digital counterpart, should be brought within the public lending rights regime (par. 30, 59-61, 73). He even introduced a "dynamic" interpretation of the Rental and Lending Rights Directive, which should enable libraries to keep performing their functions in a modern world (par. 28). Such an interpretation beyond grammatical, historical or systematical interpretation was called for in view of technological developments, resulting in the modernization of libraries. In his view, this interpretation did not run counter to the text and structure of the directive; rather, it would greatly add to the objectives of adapting copyright to the information society and ensuring access to culture in the digital age (par. 41 ff.).

The European Court subsequently issued its judgment last November. It chose to adhere to the AG's vision in many respects, concluding that digital lending should not be ruled out from the scope of the Rental and Lending Rights Directive *per se* (par. 44). The Court bases this conclusion on the preparatory work and wording of Directive 92/100, as codified in Directive 2006/115 (par. 28 ff). For example, the European Commission may have indicated to exclude electronic data transmission from the scope of the lending regime and to let member states regulate it as 'public performance', but the ECJ notes that a) this regarded films rather than books, and b) this desire did not directly land in the text of the proposed Rental and Lending Rights Directive. On a related note, artt. 1(1) and 2(1)(b) do not determine unambiguously whether the concepts of 'originals and copies' and 'lending' either extend to or exclude digital objects. For 'rental', this is another story: according to the Court, rental solely involves fixed copies when interpreted in conjunction with international copyright law (and more specifically: the agreed statement to art. 7 WIPO Copyright Treaty on the rental right). This reading does however not automatically apply to lending, which is, also in the Rental and Lending Rights Directive, defined separately. These observations lead to the conclusion that, in appropriate cases, 'lending' can be understood to encompass certain forms of e-lending. This conclusion ties in with the AG's proposed dynamic interpretation of the directive given its objectives – namely to adapt copyright to new economic developments and new forms of exploitation (Recital 4) and to ensure author protection (implicitly Recital 5). E-lending is such a new form of exploitation. Thus, even if the ECJ does not expressly use the term 'functional equivalence' as appeared in the AG's conclusion, the Court's reasoning with regard to e-lending certainly showcases a focus on functions which warrants to be assessed more closely.

### **Focus on functions as a minimum safeguard for all interests**

Taking the origins and outcome of the case together, the remainder of this comment highlights some further observations which I read into the Court's ruling on the scope of 'lending'. They concern the ECJ's perceived efforts to effectuate the lending function and its purposes in the online environment, while the decision does not entirely let go of the library's institutional mission.

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<sup>5</sup> Advocate General Szpunar 16 June 2016 (opinion), case C-174/15 (*Vereniging Openbare Bibliotheken v. Stichting Leenrecht*).

First, the Court clearly values a teleological interpretation. The judgment stresses “the importance of the public lending of digital books” (par. 51), which is not defined, but presumably refers to the contribution to cultural promotion. That rationale of the public lending derogation should, as the Court explains, be extended to the digital domain. It supports the conclusion that e-lending should be legally facilitated, something the AG expressly advocated. Nonetheless, the Court reiterates the need to interpret exceptions strictly, apparently regarding the derogation as such. In consonance with the ECJ’s earlier case law, the ruling also underscores that the provision in question should remain effective in practice – hence, the lending regime should apply to those activities of publicly accessible libraries which have “similar characteristics” to traditional lending.

Second and related, the ambiguous concept of ‘functional equivalence’ plays a central role in this case. Throughout the Court’s case law, it appears in various meanings. For instance, with respect to the sale of a computer program, the ECJ regarded the on-line transmission and the supply of a material medium as functionally equivalent from an economic perspective. The principle of equal treatment subsequently informed the legal outcome in that case (ECJ 3 July 2012, case C-128/11, *UsedSoft GmbH v. Oracle International Corp.*, par. 61). Another example is the potential functional equivalence between national provisions and the requirements laid down in an EU directive (see the Court’s brief reference in ECJ 14 November 2013, Case C-617/12, *Astrazeneca AB v. Comptroller General of Patents, Designs and Trade Marks*, par. 52). And an entirely different meaning is expressed in a case on an application for a community trade mark by Lego, in which the Court assessed the functionality of the characteristics of a Lego brick (ECJ 12 November 2008, Case T-270/06, *Lego Juris A/S v. OHIM*, par. 59). The meaning of ‘functional equivalence’ in the present case comes close to the first example, yet is of a more fundamental nature: the AG invoked the notion to indicate that, despite the different format of the works involved, he regarded e-lending as the modern counterpart of the traditional lending of printed books. He contended that the essence of both types of lending is that users wish to inform themselves about the content of the book without wanting to possess a copy of it. The result of the Court’s decision amounts to the same, but under a different name: some forms of e-lending by public libraries may qualify to be lent under the same conditions as traditional lending, provided that they have “essentially similar characteristics”.

In this sense, the Court’s choice to treat ‘similar’ acts of lending the same is a good example of what at first sight could be called a ‘functional approach’. That is, where a privileged position under copyright law used to be justified for one function, in this case lending, this proposition extends to functional equivalents where suitable, also in the digital sense. In casu, the Court designates the proposed ‘one copy one user’ model as such: one user at a time can access a work, which is placed on the library’s server and reproduced by downloading it on the user’s computer. The use is bound by the lending period; access is denied thereafter. Considering the factors deriving from art. 2(1)(b) Rental and Lending Rights Directive, this constitutes non-commercial use for a limited period of time as well, via a publicly accessible establishment. This comparability should be reflected in the legal treatment. In my view, the advantage of a functional approach is that it fosters flexibility in light of technological advances. Furthermore, it enables critical distance from the library institution as such.<sup>6</sup>

Yet, the connection of lending to the library’s institutional mission, as especially expressed in the AG’s opinion, makes things a bit more complicated: can libraries be seen separately from

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<sup>6</sup> Cf. F. Huysmans & C. Hillebrink, *The future of the Dutch public library: ten years on*, The Hague: Netherlands Institute for Social Research 2008.

their functions and vice versa? This question emphasizes that not all functions are exclusive to libraries. Then, it is not about the label of ‘library’, but about how the access-related functions are fulfilled: as a public service and on the basis of values such as accessibility, equality and trustworthiness, which constitutes the library’s added value in comparison to commercial actors. One step further, therefore, the specific issue of creating a privileged position for libraries and their functions under copyright law seems to necessitate a *combined* institutional and functional approach. That is, because of the potential impact on right holder interests, the scope of the privilege must be delineated somehow, for example by requiring that a function contributes to a public service mission of equal access for all. What counts, is that such a combined institutional and functional approach is in any case not traditional, hence looks further than the library’s conventional physical appearance. The Court’s reasoning in the case at hand seems to meet those principles: the ECJ underlines the library’s involvement in lending practice and its contribution to cultural promotion; consequently, its argumentation to extend the legal treatment of ‘lending’ to the digital counterpart amounts to a broader, combined institutional-functional approach. Though various commentators have called the ruling ‘good news for libraries’, it should therefore be kept in mind that it is not about protecting the institutions as such, but their societal missions and functions insofar as these remain useful in the networked information environment. Lending is only one manifestation of the overarching mission of providing access to information, knowledge and culture, in an equal and low-threshold fashion, helping users to educate themselves. This decision contributes to answering the question of whether lending is a function we still want to assign to libraries as a society in furtherance of their mission. For even if commercial parties offer e-books as well, an alternative infrastructure for low-threshold, electronic access to information and culture remains desirable as a counterweight to commercial motives.<sup>7</sup>

However, the ECJ’s ruling on e-lending does not give libraries a *carte blanche*: the decision’s implications are limited to the ‘one copy one user’ model – and, arguably, other lending systems with similar characteristics. It must therefore be seriously questioned whether the preliminary procedure’s result is in harmony with current library practice of online lending which is often based on ‘a one copy multiple users’ model as agreed on in contractual arrangements. Apparently, this is the Court’s attempt to balance all interests involved, which is a widespread consideration in copyright law. In casu, it concerns authors’ interests on one side and the general interest in the promotion of culture on the other. Inevitably, libraries’ online lending activities cannot be unlimited. To meet that concern, the one copy one user model imposes restrictions on the scope and intensity of digital lending.

This privileged but not unrestricted position of e-lending under copyright law could be seen as a “minimum safeguard” approach for all sides: due to the Court’s construction, libraries can at least to some extent offer e-lending services without authorization, while authors are guaranteed remuneration. And if libraries would want to go beyond the ‘one copy one user’ model, they could negotiate with publishers, as is the practice now. At the same time, as hinted at, libraries’ privileged acts cannot be boundless as that would be unfeasible in view of both right holder interests and the availability of published works in the long term. Again, it is an effort to take all interests into account, especially against the background of technological opportunities and challenges (cf. par. 45). This logic fits the idea that copyright must be adapted to advancing societal circumstances in order to meet its purposes.

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<sup>7</sup> Cf. S. Dusollier, ‘A manifesto for an e-lending limitation in copyright’, *JIPITEC* 5(3) 2014, p. 213-229.

Lastly, the first preliminary question lists various types of works as part of the envisaged privilege for e-lending, namely “copyright-protected novels, collections of short stories, biographies, travelogues, children’s books and youth literature” (par. 26). Once more, it is one manner to determine which method of e-lending can qualify for the derogation. The particular form of these works is not specified, which raises the question of whether publishers could then circumvent this list by adding functionalities to create works outside of the mentioned ones. The AG found the list subjective, stating that any decision on the scope of ‘lending’ should apply to “works of all types that exist in the form of an electronic book”. In turn, the Court does not elaborate on this point, though recalls the AG’s argument that the derogation could affect the interests of authors more with regard to certain works, such as those that were never intended to be published. Therefore, both the AG and the Court deem it justified that the works to be lent must satisfy certain criteria. Another question in this respect is that member states are in principle free to choose to which “categories of objects” the derogation of art. 6 Rental and Lending Rights Directive applies.<sup>8</sup> Would that imply that they can still subject e-books to the exclusive right, or do the observations of both the AG and the ECJ in this case hint at the need to apply the same rules to comparable acts of lending, irrespective of the format of the published work involved? Then, books and computer programs would for example constitute different categories of objects, while distinct formats of books would still fall within the same category – books – hence be regulated by the same legal regime. Any derogation pertaining to ‘books’ would accordingly involve paper and digital versions.

### **Additional criteria and outlook**

Apart from the scope of ‘lending’, the European Court of Justice addresses the validity of criteria which member states impose on top of those from the Rental and Lending Rights Directive. While the exhaustion doctrine is generally found irrelevant for lending, the Court nevertheless elaborates on a ‘first sale’ requirement. It concludes that member states may introduce the criterion that the digital copies of books made available by public libraries must have been disseminated by a first sale or other transfer of ownership by the right holders, or with their consent. The rationale is connected to mitigating the risk of impairing the authors’ interests. In addition, the ECJ confirms that a second additional criterion is also allowed, namely that the copies involved in the e-lending process derive from a lawful source. This is not made explicit in the directive, but it is in line with its objective to combat piracy and with the ECJ’s earlier case law, albeit with regard to the Copyright Directive (see ECJ 10 April 2014, case C-435/12, *ACI Adam* on private copying). Where appropriate, states may thus exceed the minimum threshold of author protection as established by the directive, even if this will likely result in differences between the member states. Other than that, the Court does not get to clarify the digital exhaustion doctrine in the context of the Copyright Directive. This is a result of the way the preliminary questions had been formulated.

In conclusion, the Court’s considerations in *Vereniging Openbare Bibliotheken v. Stichting Leenrecht* are a step in making copyright work in the digital age, though it raises questions on its own. Where the AG openly advocated that the Court should help libraries flourish, the ECJ apparently agrees that libraries still have a role in the current society which should be legally facilitated. To that end, the Court extends the existing rationales for the public lending rights regime to the digital counterpart. In doing so, it unfolds a line of reasoning which not only aspires to tailor the law towards present and future developments, but also takes account of

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<sup>8</sup> See Commission of the European Communities, COM(92) 159 final, Amended proposal for a Council directive on rental right and lending right and on certain rights related to copyright in the field of intellectual property, Brussels, 30 April 1992, p. 27, under ‘Article 4 Derogation from exclusive lending right’.

the interests of libraries, their users, and authors. Thus, the displayed focus on functions in conjunction with the library's continuously relevant mission of access and education (though executed differently) leads to the establishment of a minimum safeguard: library's may legally e-lend via a 'one copy one user' model, provided that they pay; other forms of digital lending remain subject to agreements. This is a combined institutional and functional approach which moves beyond the library's traditional appearance of brick-and-mortar building: under conditions, its digital counterpart is now also legally covered.

Though the European Court of Justice has now spoken, this is not the end of the case. The court of the Hague still needs to issue a decision along the lines of the preliminary ruling. And then, library practice must be attuned to the newly determined scope of the public lending right. In any case therefore, this latest interpretation will affect the library practice of e-lending – not only in the Netherlands, but community-wide, insofar as the derogation has been implemented.