Kluwer Copyright Blog

Copyright against culture: Do restrictions on e-book availability and use undermine library laws? Part 1

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This two-part blog looks at the provisions that exist in library laws across European countries concerning the building of collections and what libraries can do with them. It then assesses how far the achievement of these mandated functions is frustrated by a lack of access to eBooks. This first part introduces the issue and covers the broad principles that apply to collection building.

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The question of the terms under which libraries are able to acquire or access and then lend e-books is arguably illustrative of the situation facing these institutions more broadly in the digital world.

For well over a decade, libraries have sought to develop their offer of e-books, driven both by demand from users and the understanding that they represent an opportunity to offer books in new ways and to new populations.

In the university sector, the shift has been dramatic, with digital materials (both journals and monographs) coming to dominate. While the change has not been so far-reaching in the public library sector, e-books have come to represent an important part of many libraries' offer to users.

This is not to say that this process has been easy or painless. The copyright laws that enable

libraries to lend in the physical world (either through explicit provision for this, or by allowing lending to take place under the exhaustion doctrine) have not kept up with the shift to digital.

The Court of Justice of the European Union in *VOB vs Stichting Leenrecht* offered an incomplete solution. While it established equivalence in the treatment of physical and digital works for the purpose of public lending, it failed to allow for the circumvention of technological protection measures or the disapplication of contract terms, for example those preventing lending or inter-library document supply, as well as the taking of preservation copies or other standard library activities.

The result is that the ability of libraries to acquire (or access) and lend e-books is largely dependent on the willingness of rightholders (typically publishers) to let them. Over and above questions about the terms imposed on libraries, there is the more fundamental question of whether e-books are available at all to libraries.

There is already an argument under copyright law that there is an implicit right of access. This is derived from the logic that other activities foreseen under law (such as preservation, education and research uses, and lending) can only happen if there is access in the first place. And of course, there is also precedent for addressing contract override, not least through Article 7 of the Directive on Copyright in the Digital Single Market, even if this does not apply to eLending (yet).

However, we do not only need to look in copyright law for arguments in favour of access. This article looks rather at 36 library laws across 20 different countries in Europe in order to explore what they say about how libraries can build collections. It then assesses how these provisions fit with copyright regimes that leave choices around collection building to rightholders.

The article is organised around the different ways in which library laws talk about collection building. This echoes the call in documents such as the International Federation of Library Association's 1999 Statement on Intellectual Freedom that:

> *Libraries shall ensure that the selection and availability of library materials and services is governed by professional considerations and not by political, moral and religious views.*

A full list of the laws consulted, with relevant excerpts and links, is available here.

Common themes relating to collections policies across laws analysed

Library collections have a special role in delivering on the right of access to information

A number of laws, in particular those at the regional level in Germany, place the work of libraries in the context of the wider right of access to information that German citizens enjoy in line with the Federal Constitution. This provides a very strong legal grounding for the work of libraries in being able to acquire and give access to works. In this vein, the law in Nord-Rhein Westfalen therefore notes that:

> *[Libraries] contribute in a special way to the realisation of the fundamental right under*

> *Article 5 paragraph 1 sentence 1 of the Basic Law to be able to obtain information from generally accessible sources without hindrance.*

There are similar provisions in Thuringen and Rheinland-Pfalz. Meanwhile, the Estonian law sets out that:

> *The purpose of public libraries is to ensure free and unrestricted access to information, knowledge, achievements of human thought and culture for inhabitants*

The Spanish law states:

> *Public libraries are the means by which the public authorities make possible the effective exercise of the right of all citizens of Access to Information, Education and culture in the context of the Information and Knowledge Society.*

A number of Italian laws also connect the work of libraries to the right of access to information.

Library collections should be responsive to the needs of the public

A common theme across countries is that a central driver of collections policies for public libraries is the need to respond to the needs of local communities. There is a duty on libraries to ensure the relevance of their offer. This is the case for Belgium (both Flanders and Wallonia), England, Estonia, Greece, Moldova, Northern Ireland, and Norway. Slovenia and Denmark simply talk about an appropriate range of material.

As an example, Wallonia states that collections should be:

> *Quantitatively and qualitatively meaningful for the population served, and representative of contemporary socio-cultural needs inherent to the public character of the institution.*

The Greek regulation on the operation of public libraries sets out:

> *The identification, analysis, and evaluation of the audience's informational needs form the foundation of the Library's collection development policy. This identification is based on public research methods (such as questionnaires, usage statistics of materials, etc.). It is essential to note that the fundamental principle of this process is that "all user groups, regardless of age, gender, race, religion, nationality, language, or educational background, must be able to find material relevant to their needs and interests."*

In the case of Puglia, the adaptation of laws to needs is underlined as being key to realising the potential of libraries as drivers of social inclusion. This becomes possible when it is ensured that all members of a community can find books relevant for them, and so all are able to benefit from taxpayer-funded services such as libraries:

> *Inter alia […], the region promotes actions and agreements directed towards social and multicultural integration and the development of library and documentary collections and of library services focused on the needs of disadvantaged user groups.*

In Saxony Anhalt, the specific role of libraries in building collections that meet the needs of

employment seekers is highlighted.

The ability of libraries to build a relevant collection or not can also have financial implications. For example, Wallonia underlines that libraries can only receive support for engagement in reading promotion activities in line with the quality and relevance of their collections. The level of support depends, inter alia:

> *On the offer of documentary and cultural resources, in terms of the […] adaptation [of the collection] to the population and the five-year development plan.*

A connected point is that around the need for regular renewal of collections in order to keep them up to date. This is highlighted in the laws of Wallonia, Czecha, Finland, and Norway.

Libraries should be independent in building their collections

Some laws, echoing the IFLA Statement, stress that libraries need to be independent in their decision-making. In practical terms, this means that they should be able to deploy collections budgets in line with professional principles.

The laws in Flanders all underline the need for independence, including from commercial interests, as do those in France, Schleswig Holstein, Hesse, Nord-Rhein Westfalen, and Rheinland-Pfaltz.

For example, the law in Rheinland-Pfalz includes a section on the independence of media selection:

> *2. Independence in Media Selection: Libraries intended for public use are independent in the selection of their media content.*

In France, the library law underlines that:

> *[Libraries] must be exempt from all forms of ideological, political or religious censorship, or commercial pressures.*

Latvia's law sets out:

> *Printed materials, electronic publications, manuscripts and other documents in library collections, regardless of the political, ideological, religious or other orientation of their authors or the information therein, shall be accessible to any person in accordance with the procedures established by the libraries.*

Meanwhile, in Croatia, the law simply underlines that collections and holdings should be built up in line with generally accepted professional criteria.

Libraries should promote pluralism, diversity and quality in their collection building

While this is a goal most often associated with national or major university libraries, some laws also expect public libraries – individually or collectively – to aim for a universal collection,

providing information on all possible topics. This is the case in Czechia, Estonia, and Spain. In France, for example, the law sets out:

> *The collections of public libraries and their networks are pluralistic and diversified. They represent, at their level or in their area of specialisation, the multiplicity of knowledge, currents of thought and opinion, and editorial production.*

Linked to this, the law in Rheinland-Pfalz suggests even that libraries, through their work, should contribute to the knowledge commons:

> *Libraries are service providers in the modern knowledge society, which understands knowledge as a common good in which every member of society can participate and contribute.*

Elsewhere, the goal is simply to build the widest possible collection (as in Trento), or to have one that is versatile (as in Sweden). Sweden's law also puts a strong emphasis on 'quality' as a goal, with the explanation of the law underlining that:

> *it is, for example, not possible for a municipality to decide that the libraries in the municipality should have a distinctly limited or lopsided range of media.*

In summary, library laws are clear that their work to build and give access to collections is closely aligned with the (sometimes constitutional) right of access to information. In delivering on this, the importance of independence, responsiveness to needs and diversity is clear.

The second part of the blog will explore additional principles that apply, and how these relate to restrictions on access to e-books.

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