Kluwer Copyright Blog

Unlocking E-Lending in Europe: Is Independent Secure Digital Lending legal under EU and international law? – Report Summary (Part I)

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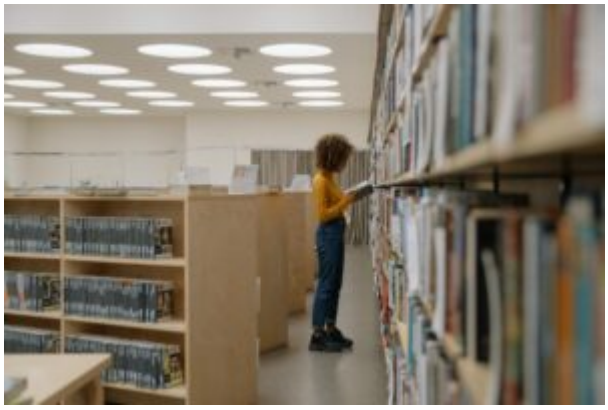

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In an era where digital access to knowledge shapes the frontiers of education, research, and participation, European libraries face significant legal and technical obstacles in lending electronic books. While the shift from paper to digital is well underway in many sectors, libraries — long seen as guardians of knowledge and enablers of equal access — are navigating a legal labyrinth when it comes to e-lending. A recent report led by the Future Law Lab at Jagiellonian University and the Centrum Cyfrowe Foundation, developed as part of the KR21 project, highlights this pressing issue and proposes a pragmatic, legally sound solution: the *independent* Secure Digital Lending (iSDL) model.

At the heart of this model is a legal and ethical argument: libraries must not be sidelined in the digital transformation due to outdated or overly restrictive interpretations of copyright law. Instead, they should be empowered to digitise legally acquired print books and lend them digitally within a secure framework. This approach preserves the continuity of their public mission in the digital age while safeguarding users' fundamental rights to culture, education, information, and privacy.

The report was developed in response to two key questions:

1. Is e-lending under the iSDL model permissible under international and EU law? (Part I)
2. Do the national laws of selected European countries allow libraries to implement iSDL? (Part II)

Two legal paths to e-lending: licences vs. copyright flexibilities

Digital lending in libraries follows two main legal paths. The first is based on licensing agreements

with publishers. In this model, libraries access e-books through contracts that define strict conditions—such as loan duration, number of users, and technical restrictions. While legally straightforward, this model limits library autonomy. It makes them dependent on commercial terms, which may restrict access, compromise user privacy, and undermine long-term access to digital collections.

The second path relies on copyright flexibilities—exceptions and limitations that allow certain uses without prior permission. From this perspective, public and academic libraries should be able to digitise books they lawfully own and lend them electronically, as long as they follow specific legal conditions. These include lawful source, time-limited access, and compliance with the three-step test, which balances user rights with the legitimate interests of authors.

CDL vs. iSDL: Two models of e-lending based on copyright flexibilities

Two distinct models of e-lending based on copyright exceptions have emerged: Controlled Digital Lending (CDL) in the USA and iSDL in Europe. Though technologically similar, they differ significantly in legal basis and justification. Both models allow libraries to digitize legally acquired physical books and lend digital versions using a one-copy-per-user system, with time-limited access and technical safeguards. CDL has been challenged in U.S. courts, notably in a case brought by publishers against the Internet Archive. While both CDL and iSDL use similar lending methods, their legal foundations are different. CDL relies on the U.S. First-Sale Doctrine and Fair Use, and does not require additional remuneration, assuming the purchase price covers lending. By contrast, iSDL is grounded in EU law—specifically Article 6 of the Rental and Lending Directive and Article 5(2)(c) of the InfoSoc Directive. iSDL also includes the Public Lending Right (PLR). These differences mean that legal arguments used against CDL in the Internet Archive case cannot be directly applied to iSDL.

Understanding e-lending through international law

When analyzing e-lending under international law, the WIPO Copyright Treaty (WCT) is especially relevant. Although the treaty doesn't directly regulate lending rights, it offers key guidance for understanding where e-lending fits in the broader legal context.

Article 7 of the WCT addresses the Right of Rental, but it applies only to specific types of works and physical copies—not to digital lending. Article 6, which governs the Right of Distribution, allows countries to define the conditions under which this right is exhausted. However, the most important article for digital lending is Article 8: the Right of Communication to the Public. This gives authors exclusive control over how their works are made accessible, including on-demand access—an essential element of e-lending.

In short, physical lending relates to Article 6, where rights may be exhausted and supported by exceptions under the three-step test in Article 10. Digital lending, however, is covered by Article 8, where the exhaustion principle does not apply. Still, e-lending may be allowed under specific exceptions and limitations—if they meet the conditions of the three-step test. The report provides a detailed assessment of how the iSDL model aligns with this test.

The qualification of e-lending from the perspective of EU law

European copyright law does not explicitly regulate e-lending. Before the VOB ruling, it was generally seen as possible only through licensing agreements. This was because EU law lacked specific exceptions for e-lending. The practice was treated as part of the "making available to the public" right under Article 3 of the InfoSoc Directive. Additionally, the term "copy" was traditionally interpreted to mean only physical, tangible objects.

The landmark *VOB* judgment significantly changed how lending rights are interpreted. It adopted a broader view, stating that there's no clear reason to exclude digital copies from the scope of the Rental and Lending Directive . This means a "copy" can also be digital. This distinction matters because lending rights are based on different legal grounds than rental rights and allow more flexibility.

Crucially, if the Court had classified e-lending as "making available", libraries would need licenses from rights holders, since no exception exists for that under the InfoSoc Directive. Instead, the ruling made it possible to allow e-lending under Article 6 of the Rental and Lending Directive, which significantly reshapes the legal basis for digital lending in libraries. According to the ruling, the concept of lending:

covers the lending of a digital copy of a book, where that lending is carried out by placing that copy on the server of a public library and allowing a user to reproduce that copy by downloading it onto his own computer, bearing in mind that only one copy may be downloaded during the lending period and that, after that period has expired, the downloaded copy can no longer be used by that user (para. 54).

VOB ruling: open issues and practical problems

Although this ruling was a major breakthrough in recognising that digital lending by libraries can fall under EU lending rights, it left several important questions and practical challenges unanswered. One of the key issues is how libraries can legally obtain digital copies of books for e-lending. There are two main approaches, each with its own complications.

1. **Licensing from publishers**

In theory, libraries can legally acquire e-books by purchasing them from authorized sources. However, this becomes problematic when the accompanying licenses prohibit e-lending or when the files are locked with technical protection measures (TPMs). The *VOB* ruling does not explicitly grant libraries the right to override license terms or circumvent TPMs. Moreover, in practice, even acquiring e-books can pose significant challenges. Publishers may outright refuse to license digital books to libraries or impose restrictive conditions—such as charging prices far higher than those available to individual consumers. Frequently, libraries are prevented from purchasing individual titles and are instead offered large, bundled collections that may not align with local needs. These limitations severely restrict libraries' autonomy, making it difficult to curate collections based on user demand and fulfil their public mission in the digital environment.

However, it is also conceivable that publishers might offer individual e-books to libraries at reasonable prices, with licensing terms that do not restrict e-lending and without applying TPMs that would block it. For this reason, this model of e-lending is best described as *dependent* Secure Digital Lending—it relies heavily on publishers' goodwill to provide access on fair terms. Without such cooperation, libraries face significant legal and practical obstacles in delivering effective e-lending services.

2. **Digitisation of print books**

Another possible route for libraries is to digitize the paper copies they already own. However, this raises a distinct legal question: Is digitization for the purpose of e-lending permitted under EU law? The *VOB* ruling did not provide a clear answer, leaving some legal uncertainty around this practice.

In the report, we present an argument supporting the permissibility of libraries digitizing books to conduct *independent* Secure Digital Lending. Our approach draws inspiration from the Opinion of Advocate General Szpunar in the *VOB* case, who stated that:

the exception under Article 5(2)(c) of the same directive ought to come into play to enable libraries to benefit from the derogation from the lending right provided for in Article 6(1) of Directive 2006/115 (point 57)

This aligns with the Court's earlier ruling in the Technische Universität Darmstadt case. There, the CJEU determined that the exception in Article 5(2)(c) can be used to enable libraries to make works available to the public under Article 5(3)(n). The report analyses the extent to which applying similar reasoning to e-lending effectively establishes a legal framework that permits libraries to create the digital copies necessary to carry out the e-lending process under copyright exceptions. This approach forms the basis for recognizing *independent* Secure Digital Lending or iSDL as lawful under EU law.

The second part of this post will explore whether the national laws of selected European countries allow libraries to implement iSDL.

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