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Public E-Lending and the CJEU: Chronicle of a Missed Revolution Foretold

by

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Abstract

On November 10, 2016, the Court of Justice of the European Union (CJEU) released its judgment in the *Vereniging Openbare* case, intervening in the debated issue of the extension to e-lending of the public lending derogation provided by Article 6(1) of Directive 2006/112. The decision was long-awaited by copyright scholars, for the CJEU was called upon to decide whether to leave the field to self-regulation and market forces, or to intervene and apply an exception by analogy in pursuance of public interest goals. Several other issues were at stake, such as the definition of digital exhaustion.

This paper provides an overview of the fast development of e-lending, describing its legal and socio-economic implications, analyzing the few reactions from national legislators, and sketching the EU sources involved in its regulation of the practice (§1). Then, it offers snapshots of the doctrinal debate, the arguments advanced in support and against the introduction of a public lending derogation, and the alternative regulatory options proposed to tackle the problem (§2). On this basis, the article analyzes and comments on AG Szpunar's Opinion (§3) and the CJEU's decision (§4), concluding with an assessment of, on the one side, its positive traits and effects, and on the other side its omissions and missed opportunities for the coherent development of EU copyright law.

Keywords: e-lending, e-books, UsedSoft, digital exhaustion, Directive 2006/115, public lending, exceptions, *Vereniging Openbare Bibliotheken*

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I. INTRODUCTION

On November 10, 2016 the Court of Justice of the European Union (CJEU), through the pen of Rapporteur Malenovsky, released its judgment in the *Vereniging Openbare* case,¹ intervening in the fiercely debated issue of the extension to electronic books of the public lending derogation provided by Directive 2006/112/EU on rental and lending rights (RLD)² for public establishments such as libraries and archives.

The decision was long-awaited by copyright scholars and activists for multiple reasons. First and foremost, the CJEU was called upon to decide whether to leave the field of digital public lending to self-regulation and market forces, or to intervene and regulate it as it has for the lending of printed books, in light of the analogous public interest goals at stake. Through this question, the Court could have taken a stance in the dichotomy between a value-laden and a market-based interpretation of EU copyright norms. At a more general level, the answer provided by the Court was expected to have an impact on important, unsolved interpretative knots affecting EU copyright law, such as, *inter alia*, the tangible or also intangible meaning of the notions of “original”, “copy” and “object”, the judicial adaptability of exceptions to ensure their effectivity in the digital environment, and the scope of digital exhaustion beyond software programs, four years after the *Usedsoft* decision.³

In light of its potentially far-reaching implications, especially with regard to the principle of exhaustion, commentators had little confidence in the willingness of the Court to take the lead and declare the functional equivalence of physical and electronic lending under EU copyright law, instead of leaving the issue to the discretion of the EU legislator.⁴ The Opinion of AG Szpunar and his axiological approach weakened this belief in June. Five months later, the Court decided to include e-lending under the public lending exception, but to formulate the decision so

¹ Case C-174/15, *Vereniging Openbare Bibliotheken v Stichting Leenrecht*, 10 November 2016, ECLI:EU:C:2016:856.

² Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental and lending right and on certain rights related to copyright in the field of intellectual property (codified version), OJ, L 376 of 27 December 2006, p. 8.

³ Case C-128/11, *UsedSoft GmbH v Oracle International Corp.*, 3 July 2012, ECLI:EU:C:2012:407.

⁴ Contrary to what was foreseen by S Dusollier (2014), *A manifesto for an e-lending limitation in copyright*, JIPITEC, Vol. 3, pp. 213-229, who believed that “it would be surprising if the UE court decides to include e-lending in the notion, save for an odd development around exhaustion (with the ECJ, you’ll never know!)”. For this reason, she argued that “only the European lawmaker could decide to open the field of public lending right to e-books”.

as to very much limit the secondary effects of its ruling, and to exclude the issue of digital exhaustion.

This paper provides an overview of the fast development of e-lending, describing the characteristics of the phenomenon in its legal, economic and social implications, analyzing the few reactions from national legislators and sketching the EU sources potentially involved in the regulation of the practice (§1). Then, it summarizes the main points of the doctrinal debate, sketching the arguments advanced in support and against the introduction of a public e-lending derogation, and the alternative regulatory options proposed to tackle the problem (§2). On this basis, the article analyzes and comments on AG Szpunar's Opinion (§3) and the CJEU's decision (§4), concluding with an assessment of, on the one side, its positive traits and effects, and on the other side its omissions and missed opportunities for the coherent development of EU copyright law.

II. E-LENDING: SOCIO-ECONOMIC IMPLICATIONS AND EXISTING LEGISLATIVE FRAMEWORK

In the last decade, particularly after the commercial launch of dedicated devices and e-commerce platforms, the market for e-books has dramatically increased. Its figures show an outstanding worldwide growth in a few years,⁵ and this has paved the way to new experiences for readers, broadened the accessibility of titles, and in certain cases decreased the sale price compared to printed books. Following a business model that proved to be successful in the music market, e-commerce giants like Amazon have launched platforms that offer the rental of substantial catalogues of e-books for a yearly subscription fee.⁶ Predictably, libraries also started engaging in the practice of e-lending. The phenomenon originated in the United States, where it is now consolidated, and soon spread to several EU countries, with different models adopted and with differing degrees of success.⁷

⁵ For an overview on US data, which show a massive three-digit growth (with a peak of +252% in 2010) see eLending Group, IFLA 2014 eLending Background Paper, p.3, available at <http://www.ifla.org/publications/node/8852> [last accessed 4 December 2016]. The EU development is less fast, with the highest market share in the UK (25% in 2014), as reported in R. Wischenbart, Global eBook: A Report on Market Trends and Developments, April 2014, p.21, available at http://www.wischenbart.com/upload/1234000000358_04042014_final.pdf [last accessed 4 December 2016].

⁶ Kindle books can only be loaned one time, and only one at a time. Amazon gives also the possibility to borrow e-books from friends. More details on the options available can be found on https://www.amazon.com/gp/help/customer/display.html/ref=hp_rel_topic?ie=UTF8&nodeId=200549320Fn [last accessed 4 December 2016].

⁷ See the detailed analysis provided by IDATE Consulting, Etude sur l'offre commerciale de livres numériques à

The most widely used business model sees the intervention of an “aggregator”, which offers from an online platform titles from various publishers,⁸ taking advantage of economies of scale and operating as a single point of contact for libraries and rightholders.⁹ Aggregators have developed on a national basis, although some of them soon scaled up to the international market.¹⁰ Publishing houses enter into licensing agreements with them, determining the conditions of the lending by using frictions that imitate the constraints of the lending of printed books.¹¹ Intermediaries then provide access to e-books through sub-licensing agreements that also include other services, such as internal search engines. In addition, they enforce via technological protection measures (TPMs) the duration of the lending and conditions such as the “one copy, one user” rule, which ensures that the e-book copy is lent to only one library member at a time, or the “wear and tear” clause, which obliges the library to acquire another license after the e-book has been lent to a certain number of users, again to imitate the natural consumption of the physical copy of a book. TPMs may also forbid the printing or copying of the e-book or its parts, and define the devices on which the file may be downloaded.¹²

Usually, libraries may pick and choose the titles they want to add to their virtual collections, as is the case for physical book acquisitions. For different prices, they may acquire the title perpetually or for a limited period of time; analogously, they may decide how many simultaneous accesses they want to have, and the fee will increase as the price would with the increase in the number of tangible copies bought. Less frequently, they opt for packages for which they pay a basic periodical fee, and are charged separately for each access to a title.¹³ Since the system is based on carefully tailored licenses which set their price on the basis of the number of titles and uses, libraries tend to give access to their e-book collections only to their members. To share costs,

destination des bibliothèques de lecture publique, Study commissioned by the French Ministry of Culture and Communication, Final Report, 2013, available at www.culturecommunication.gouv.fr/Disciplines-et-secteurs/Livre-et-lecture/Actualites/Etude-IDATE-sur-les-livres-numeriques-en-bibliotheque [last accessed 4 December 2016].

⁸ Id. at p. 79 ff. The most common schemes are described in D. O’Brien, U. Gasser & J. G. Palfrey Jr. (2012), *E-books in Libraries: A Briefing Document Developed in Preparation for a Workshop on E-lending in Libraries*, Berkman Center Research Publication, n° 2012-15, available at <http://ssrn.com/abstract=2111396> [last accessed 4 December 2016], and *IFLA*, *Les fondements du prêt de livres électroniques (E-books)* (2012), available at www.ifla.org/news/ifla-releases-background-paper-on-e-lending [last accessed 4 December 2016].

⁹ See O’Brien et al. (n 6), p.8.

¹⁰ IFLA (n 6), pp. 7 ff, referring to platforms such as, e.g. Ebscohost in the Netherlands, OverDrive in the UK, Onleihe.net in Germany and Dilicom in France.

¹¹ Broadly on the mimic of physical lending P. Whitney (2011), *EBooks and Public Lending Right in Canada*, submitted to the Public Lending Right Commission, available at www.canadacouncil.ca/en/council/research/find-research/2011/ebooks-and-public-lending-right, p. 10 ff, [last accessed 4 December 2016].

¹² The various clauses are described and commented on by Dusollier (n 4), p. 223, R Matulyonite (2016), *E-lending and a public lending right: is it really time for an update?*, 38(3) *EIPR* 132, p. 133; EBLIDA Position Paper, *The Right to E-read* (May 2014), available at <http://www.eblida.org/e-read/the-right-to-e-read-position-paper-and-statement.html> [last accessed 4 December 2016], pp. 12 ff., describing also the most common technological protection measures.

¹³ On the different access models (perpetual, temporary, cherry-picking et al.) see EBLIDA (n 12), pp. 3-4.

they have developed the practice of subscribing to such services through consortia, already existing or constituted for the purpose.¹⁴ However, compared to the percentage of the market share e-books have managed to gain in the overall book market, the adoption of e-lending schemes by public establishments has progressed at a much lower pace.¹⁵

The reasons for the delayed and relatively slow adoption of e-books by libraries are manifold. In the first place, the lack of a clear regulatory framework has created doubts around, and in most of the cases excluded, the applicability to e-lending of the EU and national copyright law provisions that derogate from the exclusive lending right, and allow public establishments to lend available works to their patrons, provided that authors receive remuneration. This has resulted in the attribution to the market, and thus to license agreements, of the task of regulating the field. As could be expected, high prices have had chilling effects on libraries' subscriptions, particularly in disadvantaged areas.¹⁶ More generally, libraries with limited budgets have not found e-book collections to be a safe enough investment, since the titles remain in the possession of the intermediary or the publisher, which may terminate the subscription – and thus the access to e-books – at any time; a similar outcome may occur in case of a change of provider or withdrawal of the company from the market.¹⁷ To the contrary, the acquisition of a printed book grants full and permanent control over the copy, and in particular circumstances the possibility to digitize it and store it for preservation purposes – a possibility now fully legitimized as an exception to copyright by the CJEU in *Ulmer*.¹⁸ At the same time, the number of e-books available for e-lending to libraries has been significantly less than the number of titles available for private purchases, for publishers are afraid of the negative impact that the first practice may have on their sales, both directly and as a trigger for piracy threats.¹⁹ Such a fear does not seem to be lessened even if rightholders use TPMs, or introduce "frictions" to constrain e-lending as much as is necessary to make it closely resemble its traditional, tangible counterpart.²⁰

The effects of the self-regulation of e-lending practices have raised several concerns among libraries and authors. The former argue that the different legislative treatments given to

¹⁴ Like the LibrariesWest consortium in the UK; in Germany, the Onleihe platform gives tailored access restricted to the titles one own's library has stipulated a license for. See Dusollier (n 4), p. 215.

¹⁵ According to the Civic Agenda EU (2014), A Review of Public Library E-Lending Models, pp-86-89, available at <http://www.lmba.lt/sites/default/files/Rapporten-Public-Library-e-Lending-Models.pdf> [last accessed 4 December 2016], the practice is spread in Northern Europe (Germany, Netherlands, Sweden, UK and Denmark), yet with a limited number of titles available (as shown by the numerous statistics reported in the Review).

¹⁶ Cf. Matulyonite (n 12), p. 133. The problem is described in the EBLIDA (n 12), p. 12.

¹⁷ Ibidem.

¹⁸ Case C-117/13, Technische Universität Darmstadt v Eugen Ulmer KG, 11 September 2014, ECLI:EU:C:2014:2196.

¹⁹ The numbers are reported also in this case by EBLIDA (n 12), pp. 11-12.

²⁰ Id., p.3, and Matulyonite (n 12), p. 133, who notes that the practice is even more understandable if one considers that the e-book market is still in its infancy and can be easily undermined.

electronic and printed books under public lending has a highly negative impact on their capability to serve their public mission of guaranteeing access to culture, and ensuring its preservation and dissemination in the digital environment.²¹ On their side, authors do not obtain any remuneration from e-lending if the practice is not covered by the public lending exception, while the royalties they receive as a share in the revenues obtained from the e-book licenses remain negligible.²²

It does not come as a surprise, then, that already since the end of the last decade the debate on the opportunity to intervene in the market for the lending of e-books, and on which regulatory option should be used, has animated both the EU and Member States. Several national governments started discussions and commissioned studies to evaluate the policy opportunity and legal feasibility of regulating e-lending in public establishments. In the UK, the positive feedback of the Sieghart report,²³ which plainly underlined that “an inability to offer digital lending will make libraries increasingly irrelevant in a relatively short time”,²⁴ supported the Government’s decision to extend the public lending right and the related exception to e-books in two subsequent steps.²⁵ The first one was accomplished with the Digital Economy Act of 2010, which modified the Public Lending Right Act of 1979 by allowing the lending of e-books and audio-books within the library premises, thus excluding their making them available online.²⁶ The plan to include remote downloading remained unrealized,²⁷ due to its doubtful compatibility with the InfoSoc Directive (2001/29/EU), leaving the derogation with such a narrow scope that its actual use and positive impact was much more contained than expected. In the same time period, the French Lescure report maintained that the role played by libraries in the preservation

²¹ This has been pointed out, *inter alia*, by ELending Group (n 5), p. 19

²² Matulyonite (n.12) p. 134. The issue seems to be particularly felt by authors, as shown by the fact that the European Writers Council has constituted an *ad hoc* working group to tackle it already in 2013 (the EWC- FEP E-lending Working Group, see http://www.europeanwriterscouncil.eu/index.php?option=com_content&view=article&id=16&Itemid=114 [last accessed 4 December 2016]).

²³ W. Sieghart (2013), An independent Review of E-Lending in Public Libraries in England, available at www.gov.uk/government/publications/an-independent-review-of-e-lending-in-public-libraries-in-england [last accessed 4 December 2016].

²⁴ *Id.*, p. 8.

²⁵ As in the governmental response in Dept. for Culture, Media & Sport (2013), Government Response to the Independent Review of E-Lending in Public Libraries in England, available at www.gov.uk/government/publications/an-independent-review-of-e-lending-in-public-libraries-in-england [last accessed 4 December 2016]

²⁶ Art. 43, Digital Economy Act 2010, available at www.legislation.gov.uk/ukpga/2010/24/contents [last accessed 4 December 2016], which intervened on the definition of book by including audio-books and electronic-books ((a) a work recorded as a sound recording and consisting mainly of spoken words, and (b) a work, other than an audio-book, recorded in electronic form and consisting mainly of (or of any combination of) written or spoken words or still pictures), and extended the notion of lending to cover the making “available to a member of the public for use away from library premises for a limited time, but (b) does not include being communicated by means of electronic transmission to a place other than library premises”.

²⁷ Dept. for Culture, Media & Sport (n 25), pp. 6-7.

and dissemination of cultural materials required an intervention that could allow them also to perform their functions fully in the digital environment.²⁸ The debate also reached the Commission, which included three questions on e-lending in its 2013 public consultation on the review of EU copyright rules.²⁹ The feedback came mostly from rightholders and institutional actors such as library associations, and in small numbers from collective management organizations, while users showed much less interest in the topic. Due to the apparently less pressing need to intervene on the issue in comparison to other areas, the EU Commission did not consider any intervention necessary. Yet, the legislative framework was anything but clear and easy to interpret.

The most important source of EU copyright law regulating the field is the Rental Directive 2006/115, which codified Directive 92/100 without any relevant amendment. The Directive requires Member States to protect rightholders' exclusive right to authorize or prohibit "the rental and lending of originals and copies of copyright works, and other subject matter" (Article 1). Subsequently, it distinguishes the two rights, by defining lending as the "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" (Art. 2(1)(b)), as opposed to rental, which has a purely economic nature.³⁰ Obviously, as recalled by Recital 11, it is not possible to consider as an economic or commercial advantage the case "where lending by an establishment accessible to the public gives rise to a payment the amount of which does not go beyond what is necessary to cover the operating costs of the establishment".³¹ The Directive uses the label "public lending", which would more properly characterize the right, only to indicate the exception to the exclusive lending right that, according

²⁸ P. Lescure, (2013) Mission « Acte II de l'exception culturelle », Contribution aux politiques culturelles à l'ère numérique, available at <http://222.culturecommunication.gouv.fr/Actualites/Missions-et-rapports/Rapport-de-la-Mission-Acte-II-de-l-exception-culturelle-Contribution-aux-politiques-culturelles-a-l-ere-numerique> [last accessed 4 December 2016] p. 185. The Report defines libraries as the "third sector" for the dissemination of culture, the first being the commercial supply by cultural industry and the second being the non-market exchange between individuals (p.185). Absent digital exhaustion, it has been argued that e-books negatively impact also on the second channel, since in their proprietary form they usually cannot be transferred to someone else. See Dusollier (n 4), p. 221.

²⁹ See Public Consultation on the Review of EU Copyright Rules, p.21, http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/docs/consultation-document_en.pdf, which inquired about the perceived difference between lending and e-lending in terms of accessibility and problems, and about the issues encountered in the negotiation of agreements to enable e-lending (questions 36-38).

³⁰ For a comment on the Directive see M. Walter and S. Von Lewinski (2010), European Copyright Law, A commentary, OUP, n° 6.1.28 ff. The initial proposal of the Directive included a list of establishments eligible to the derogation, which was removed to grant more flexibility. See also J. Krikke (2006), "Council Directive 92/100/EEC (Rental and Lending Right Directive) of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property", in Th. Dreier and B. Hugenholtz (ed.), Concise European Copyright Law, Kluwer Law International, p. 239 ff.

³¹ Krikke (n 30), p. 244.

to Article 6(1) RLD, Member States are free – and most of them did so³² – to enact in favor of public establishments, in order to allow them to lend protected works without obtaining the preventive rightholders’ authorization, “provided that at least authors obtain a remuneration”. Member States enjoy also broad discretion in determining the amount of remuneration “taking account of their cultural promotion objectives”, and even to exempt certain categories of establishments from the obligation, although their identification should be specific and limited to the extent strictly necessary.³³ The provision, considered a compromise between internal market goals and opposite national traditions, transforms the exclusive right into a remuneration right or, as other national legislators put it, into a remunerated statutory license.³⁴

No reference is made to e-lending, and while this made sense in 1992, when the phenomenon had just started to spread, it was much less understandable in 2006, especially in light of the uncertainties that the terms “the original and copies of copyright works” created over the tangibility but also potential intangibility of the subject-matter of the lending right. The strict interpretation of the statutory language as referring to the first materialization of the work seemed to exclude public e-lending, which instead implies the presence of a digital, immaterial file.³⁵ In addition, also a look at the proposal of the Directive shows how the Commission had tangible supports in mind (“objects (...) which incorporate protected works or performances”),³⁶ while other preparatory works, such as the Council Working Group, indicate that Member States took into account electronic rental and lending, but believed that it was premature to regulate the issue at such an early stage of development.³⁷

The topic returned in the Green Paper on “Copyright and Related Rights in the Information Society” of 1995, which covered the extension of rental and lending to digital transmission,³⁸ stating that “the definition [of lending] does, however, cover digital lending by establishments accessible to the public and the on-line consultation of a work from a public library comes to the

³² As documented by the Report from the Commission to the Council, the European Parliament and the Economic and Social Committee on the Public Lending Right in the European Union, 12 September 2002, COM (2002) 502 final.

³³ The CJEU has intervened several times on the issue of the calculation of authors’ remuneration in case of public lending. In case C-271/10, *Vereniging van Educatieve en Wetenschappelijke Auteurs (VEWA) v Belgische Staat*, 30 June 2011, EU:C:2011:442, the Court held several times (C-198/05, *Commission v Italy*, 26 October 2006, EU:C:2006:677; C-36/05, *Commission v Spain*, 26 October 2006, ECLI:EU:C:2006:672; C-53/05, *Commission v Portugal*, 6 July 2006, EU:C:2006:448) that the amount of remuneration should be based not only on the number of library users but also on the number of titles offered. As to the possibility for Member States to exempt public establishments from the remuneration duty, the CJEU requested a strict reading of the provision, and the application of the benefit to a limited number of entities.

³⁴ On the theoretical classification see, more broadly, Dusollier (n 4), p. 216.

³⁵ See Walter and Von Lewinski (n 30), n.6.1.37.

³⁶ Proposal for a Council Directive on rental right, lending right, and on certain rights related to copyright. COM (90) 586 final, p. 4.

³⁷ Walter and Von Lewinski (n 30), n. 6.1.28 ff.

³⁸ European Commission, Green Paper “Copyright and Related Rights in the Information Society”, COM (95) 382 final.

same thing as borrowing a copy of the work".³⁹ Yet, the ultimate decision on the extension was left to the legislator, it having the greatest entitlement to take care of the balance between the libraries' cultural function to disseminate materials with the legitimate interests of various rightholders.⁴⁰ It is possible that such a flexible approach was dictated by the still unclear perception of the phenomenon of e-lending and the implications of e-commerce and of a new market for digital copyright.

It took little for this hint to disappear, though. Already in the Follow-up to the Green Paper in 1996, the only reference remaining was that of video-on-demand; every form of online transmission was excluded from the scope of rental and distribution.⁴¹ Through the EU delegation, the idea that such instances should have been categorized under the right of communication to the public reached the WIPO Copyright Treaty (WCT). The same approach was followed in the Information Society Directive (InfoSoc, 2001/29/EU), which implemented the WCT in 2001, creating the first horizontal intervention of EU harmonization in the field of copyright.⁴² Several of its provisions have been interpreted as reinforcing the exclusion of e-lending, in view of the divide between rights insisting on material supports and rights regulating the circulation of intangible works with particular characteristics, as in the case of the right of communication to the public and the making available right.

Due to the interplay of strong economic arguments, uncertain legal texts and important public functions performed by libraries, scholars and stakeholders have been heavily divided as either advocates or enemies of the extension of the public lending derogation to e-books. Their arguments not only adopt opposite readings of the legislative language, but disagree also on the regulatory option to be adopted at this stage, and on the impact of such a decision on the market.

III. WHICH REGULATORY OPTION? A HEATED SCHOLARLY DEBATE

The first source of discord among scholars is the legal classification of e-lending practices, and the suitability of the current legislative framework to regulate them by analogy, and with which

³⁹ *Id.*, p. 56

⁴⁰ "Authors must be able to control the use of their works, libraries must ensure the transmission of available documents and users should have the widest possible access to those documents while respecting the rights or legitimate interests of everyone" (*ibidem*).

⁴¹ Communication from the European Commission, Follow-up to the Green Paper on Copyright and Related Rights in the Information Society, COM(1996) 568 final, pp. 11-12.

⁴² Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167, 22.6.2001, p. 10.

output. Here, however, only a minority of commentators believes that the lending right, and thus the public lending exception, may be adapted to cover e-books with a plain extension of the terms “original”, “copy” and “object” used by Artt. 2 and 6 RLD to cover intangibles.⁴³ To the contrary, most of them believe in the inadaptability of the current provisions to fit the conducts under scrutiny, mostly arguing that e-lending and physical lending differ from the perspective of the exclusive rights involved.⁴⁴ According to this view, the lending of printed books triggers the right of distribution – exhausted when the library acquires the book – and the right of public lending, which is subject to the Rental Directive and remains always with the rightholder. This exclusive right may be transformed into a remuneration right by Member States under Article 6 RLD.⁴⁵ In the case of e-lending, no distribution right is involved, for the support of the work is intangible; instead, the commercialization of the e-book entails the exercise of the reproduction right and the making available right (or the right of communication to the public). When a user accesses the file, the library makes another communication to the public, while the user performs an act of reproduction when he loads the file on his device. Absent a specific exception, rightholders have to authorize each and any of these acts.

From these points, stakeholders and scholars diverge on the preferred regulatory option. The debate predominantly revolves around the opportunity of introducing a public e-lending derogation and, in case of a negative response, around the desirable level of public intervention on market dynamics which should be envisioned in order to ensure a proper balance between the opposing interests at stake and the achievement of public goals, such as the dissemination and preservation of culture.

Those who advocate the adoption of an e-lending exception do so on two main, intertwined grounds. One of the most important arguments is the increased protection guaranteed to authors, who would receive a fair remuneration under Article 6(1) RLD and its national applications. This revenue would most probably be higher and fairer than the share authors get from the licensing fees that publishers and/or intermediaries collect from libraries under a contract-based system of e-lending.⁴⁶ The regulatory intervention over market forces would thus

⁴³ See the overview provided by SEO/Ivir (2012), *Online lending of e-books by libraries*, available at www.ivir.nl/publicaties/download/902 [last accessed 4 December 2016]

⁴⁴ On the point, more extensively, see Matulyonite (n 12), p. 133.

⁴⁵ More details on national implementations in a comparative perspective can be found in “Established PRL Schemes”, available at www.plrinternational.com/established/established.htm [last accessed 4 December 2016].

⁴⁶ See UK Dept. of Culture, Media and Sport (2014), *Consultation on the extension of the Public Lending Right to Rights of holders of books in non-print formats*, available at www.gov.uk/government/consultations/consultation-on-the-extension-of-the-public-lending-right-to-rights-of-holders-of-books-in-non-print-formats [last accessed 4 December 2016], § 30: “greater clarity and consistency in the arrangements governing remuneration of authors for

bring more transparency and balance between rightholders, and would also create more coherence and consistency in the treatment of the various forms of lending, in full respect of the principle of technological neutrality. Last, it would eliminate the need for licensing, and thus the effects of the unbalanced bargaining power of the parties involved, with particular regard to libraries, which are often forced to renounce to the benefit of e-lending because of the unnegotiable harsh conditions and the prohibitive prices set by rightholders.⁴⁷

Closely linked to the last assumption is the second argument in favor of a public e-lending exception, which looks at libraries, the societal role they play, and the importance of reading and access to culture for the development of individuals and the healthy functioning of democratic societies.

Libraries pursue different specific goals according to their nature, and this determines the activities they engage in.⁴⁸ Academic institutions focus on scientific research, and offer access to a broad range of sources which are usually consulted at their (virtual or real) premises by a narrow group of researchers. General libraries serve a much larger public, are the main actors responsible for local access to knowledge and the developing of a reading culture, play the role of aggregation points and educational centers with *ad hoc* activities and events, and often represent the only source of cultural materials for people with disabilities, given the high price of books and other works in Braille. National libraries, instead, perform a key preservation function, and work also as "banks" for documentary and historical materials. "As repositories for cultural artefacts produced by a society, libraries occupy a central place in the politics of access to culture, research and learning."⁴⁹

The role played by lending and its size vary according to the library's function, audience and main activities. For national libraries the on-site consultation is more widespread, while for general libraries it represents the main tool to fulfil their institutional purpose.⁵⁰ In light of the institutional goals of the latter, it is understandable why those who advocate in favor of public

the lending out of their works by public libraries, and provide an independent means of ensuring that they and other rights holders receive appropriate remuneration for the free loans of their works".

⁴⁷ Ibidem, adding that the exception "may encourage greater acquisition and lending of such works by public libraries".

⁴⁸ Dusollier (n 4), pp. 213-215, offers a broad overview of the most common types of libraries, emphasizing the differences in their goals, users, functions and activities. Aside from those mentioned in the text, the Author also refers to libraries that serve special needs of a limited part of the public, such as hospital, prisons or schools, libraries that provide documentations to professionals, and others that are operated by governments for specialized services – all of them characterizes by a restricted number of users and targeted activities.

⁴⁹ Id., p. 214.

⁵⁰ Ibidem, who engages in a broader analysis of existing types of libraries to emphasize the different role played by public lending in their mission and activities.

lending⁵¹ argue that it “has too much democratic and cultural value to be left completely in the hands of market transactions”,⁵² and underline the effects of the restrictive clauses set by publishers (blocked catalogues, several forbidden uses, strict use regulations, and so forth) to point out how the self-regulatory approach has resulted in the denaturation of libraries’ lending practices.⁵³ According to this view, the extreme unbalance in the bargaining power of rightholders and libraries makes it impossible for the latter to keep on fulfilling their function in the digital environment, and leaves in the hands of private entities, motivated purely by commercial goals of maximization of profits, the task “to promote a reading culture in the populations (...) and to preserve published and un-published materials, including e-books which represent the future trend of publishing, in perpetuity for future generations”.⁵⁴

Other scholars reject the idea that an exception like the one provided under Article 6(1) RLD is the most appropriate policy option to tackle e-lending. Their core argument points at the potentially devastating effects of the exception on the growing e-book market, since there is no real difference between buying an electronic title from an online platform and accessing it through a library service.⁵⁵ In the case of printed books there was, and is, a substantial trade-off between purchasing and lending a copy, from its quality and allowed to the duration of the possession, topped by the need to visit the library’s premises to borrow and return it. In the case of e-books, the digital file never gets consumed due to use, it is possible to download it from any place, and the technological measures used in order to decrease the risk of piracy limits the actions allowed somewhat similarly to what happens in the case of physical lending. In addition, several publishers and online platforms have started exploring the market for e-lending, offering titles for a definite period and a cheaper price.⁵⁶ In this sense, the library e-lending is a direct substitute, and competitor, for the market sale and e-lending, and the fact that libraries may offer access for free cannot but have a direct negative impact on the commercial distribution of e-books.⁵⁷ However, part of this argument has already been rebutted by a number of empirical studies and economic modelling, which proved that public lending has a positive impact on the market, since readers discover and try unknown or difficult-to-access content and are stimulated to buy new titles;⁵⁸ in the case of e-books, they also become acquainted with a new technology

⁵¹ See, e.g., EBLIDA (n 12), p. 15; similarly eLending Group (n 5), p. 9.

⁵² As in Dusollier (n 4), p. 213.

⁵³ *Id.*, p. 215.

⁵⁴ In the words of EBLIDA (n 12), p. 15.

⁵⁵ This is one of the key arguments of SEO/Ivir (n 43), which devotes to it Chapter 4. Fn 37

⁵⁶ The ELending Group (n 5), p. 8, refers to platforms such as Mofibo.com, which aggregate the catalogues of multiple publishers and offer them at a retail level to private users.

⁵⁷ In this sense SEO/Ivir (n 43), Ch. 4.2.

⁵⁸ Economic studies prove exactly the opposite, showing that e-lending may be useful for publishers insofar it

and start using it more intensively.⁵⁹

According to its critics, despite its potentially positive impact, public e-lending would still not be capable of guaranteeing remuneration for rightholders that effectively takes into account and internalizes the harm it causes to sales. Due to the wide variety of e-lending schemes available, it is hardly possible to structure a general remuneration scheme that covers them all, as shown by the high number of different licensing packages offered to libraries for different fees.⁶⁰ And while it cannot be denied that authors are not the greatest beneficiaries of the profits arising from e-lending, the remuneration descending from the exception may easily be as low and lacking transparency as its private counterpart.⁶¹ On this basis, it has been argued that it would be more effective to foster a better dialogue between authors and publishers, to target a more equal distribution of licensing revenues, or to introduce legislative protection tools in publishing contracts.⁶²

In response to the argument that used the principle of technological neutrality⁶³ as justification for the extension of the public lending derogation to e-books, some authors have underlined that its application is limited to instances of "functional equivalence" between different technologies, and that this requirement would not be met in the case of lending compared to e-lending. In fact, they differ on several grounds, from the possession of the copy and the types of rights involved to the opportunities offered to readers, which in the case of e-books include other features such as translation and text-to-speech. In addition, libraries are theoretically free to lend the same copy to multiple users, which is impossible in the case of printed books, need no space to collect and preserve the titles, and may "host" many more patrons, who do not even need to

introduces new titles to readers. For the US see Pew Research Center Internet & American Life Project (2012), The rise of e-reading, <http://libraries.pewinternet.org/files/legacy-pdf/The%20rise%20of%20e-reading%204.5.12.pdf> [last accessed 4 December 2016]. As reported by SEO/Ivir (n 43), Ch 4.4, many German publishers use the Onleihe platform as a marketing tool to increase access to their digital offers. Along the same lines, library associations underline that e-lending promotes reading, which in turn stimulates the sale of books. See EBLIDA (n 12), p. 13; for further comments see also Matulyonite (n 12), p. 135.

⁵⁹ As in SEO/Ivir (n 43), Ch 4.3.

⁶⁰ Similar questions are expressed by *Society of Chief Librarians and Publishers Association (2015), Pilot Study on Remote E-Lending*, available at <http://www.publishers.org.uk/policy-and-news/news-releases/2015/pilot-study-on-remote-e-lending>, p. 5 [last accessed 4 December 2016].

⁶¹ This is because the remuneration schemes are still in their infancy in many Member States, while in others they provide only symbolic amounts. See the overview provided by Established PLR Schemes (n. 45)

⁶² Such a legislative measure should be based on an adequate study of the remuneration level and the protection already granted by national contract law to authors in publishing contracts. See Matulyonite (n 12), p. 136, who correctly refers to a similar study performed for the music industry in EU Study (2015), Commission gathers evidence on remuneration of authors and performers for the use of their works and the fixations of their performances, available at <http://ec.europa.eu/digital-agenda/en/news/commission-gathers-evidence-remuneration-authors-and-performers-use-their-works-and-fixations> [last accessed 4 December 2016].

⁶³ On which see T.Eleni Synodinou (2012), The principle of technological neutrality in European copyright law: myth or reality?, 34 EIPR 618-627.

go to the library to borrow a book. Treating the two types of lending similarly would improperly ignore this great divide.⁶⁴

All these observations, however, do not exclude that leaving public e-lending completely to market forces risks not giving enough space and consideration to the social function of public libraries, and frustrates their capability to achieve their public interest goals due to their weak bargaining power and passive reception of contractual conditions set by rightholders. The question, then, is which regulatory option to choose so that “libraries may fulfil their societal objectives without compromising the legitimate commercial interests of the authors and publishers.”⁶⁵

As a potential solution to the negative impact of free public e-lending, economists have suggested the introduction of technological obstacles (also called “frictions”), which could eliminate its advantages and create a much clearer differentiation between e-books lent by libraries and e-books acquired on the market, as already happens for printed books.⁶⁶ Frictions, as we saw, are already a consolidated and tested part of licensing contracts, and closely resemble the characteristics of physical lending, as in the case of the “wear and tear” condition – which imitates the natural consumption of the copy – and the “one copy, one user” condition – which mirrors the rivalry in the use of the e-book by limiting access to it to only one reader at a time. These “obstacles” are usually coupled with a delayed offer of the e-book for lending, which is used to protect the profits usually deriving from the sale of a title in the first months after its publication. For some scholars, these features could be implemented in a legislative e-lending exception to bring in the benefits of public lending without disrupting the e-book markets.⁶⁷ Yet, the opportunity and extent to which these “frictions” should be part of the derogation remains debatable. Some commentators argue that such obstacles and the imitation of physical lending fail to exploit digital opportunities,⁶⁸ others, instead, observe that the lack of frictions would allow publicly funded libraries to offer for free works that private market players must sell or license at a price that is high enough for them not to suffer losses. This would create a clear competitive distortion, which can be cured either with restrictions that limit the negative impact of public e-lending on the market, or by withdrawing public funds from libraries in order for them to compete equally with commercial providers.⁶⁸ However, even those who propose the

⁶⁴ According to Matulyonite (n 12), p. 136.

⁶⁵ In the words of EBLIDA (n 12), p. 3.

⁶⁶ On the economic effects of frictions, in more details, see SEO/Ivir (n 43)

⁶⁷ In this sense, Dusollier (n 4), p. 219.

⁶⁸ This is the opinion of Matulyonite (n 12), p. 139, who argues that “libraries have an option of either losing public subsidies and competing with online businesses on equal terms, or restricting their services to the extent that their

introduction of frictions do not agree on the type, particularly in light of the different licensing practices developed in different sectors, with significant variations between scientific subjects and literary works with regards to, *inter alia*, the duration of the lending or use restrictions imposed via TPMs.⁶⁹

In consideration of the high degree of uncertainty, it has been suggested that a rigid exception, predetermined in its structure and requirements, would not guarantee the flexibility needed to satisfy all the needs and protect all the interests at stake. To the contrary, a controlled private negotiation with standardized and transparent licensing solutions would offer more adaptive schemes, matching a broader range of situations, instead of "freez[ing]" the existing e-lending practices, hampering their further development and search for innovative solutions".⁷⁰ In addition, commentators also argue that the public lending exception would not tackle the problem of the scarce availability of e-books, caused by the rightholders' reluctance to offer their titles in digital format, since the most common public lending exception always requires the book to be lawfully acquired by the establishment before being offered for lending.⁷¹ Circumventing this barrier by allowing the exception to operate without a preventive legitimate acquisition from the rightholders, or imposing on the latter an obligation to release their titles to libraries,⁷² would run against the main tenets of copyright law, which grant to authors the ultimate authority to decide over the publication and dissemination of their works on the market. In any case, rightholders would remain free to set the sale price of their e-books, and nothing but a compulsory licensing scheme would be able to avoid implementation price discrimination and charge high sums to buyers-libraries to make up for the expected losses⁷³. Along the same lines, the public lending exception would not be able to control the conditions under which e-books are made available to libraries, and thus to remedy the "defects" attributed to the market-based licensing systems.⁷⁴ In this sense, the development of transparent, common and standardized best licensing practices, possibly defined by stakeholders with the involvement of public

effects on the digital book market are minimal".

⁶⁹ For instance, academic libraries tend to give permanent access to their materials. On the debate see IFLA (2013), *Libraries, eLending, and the Future of Public Access to Digital Content*, p.23, available at www.ifla.org/node/7447 [last accessed 4 December 2016]

⁷⁰ *Id.*, p. 24.

⁷¹ *Id.*, p. 20.

⁷² *Id.*, p. 21: "If some publishers and rights holders continue to see e-lending as a threat to their primary business models then even legislation which compels them to make all digital content available for library licensing/purchase will not necessarily prevent them from applying pricing structures and terms/conditions designed to discourage that form of public access.". According to Matulyonite (n 12), fn 60, "refusal to supply e-books by publishers to libraries could be better tackled under competition law".

⁷³ Price regulation is not part of copyright law, but it has been considered in several Member States as a way to make printed books more affordable and protect the "right to read".

⁷⁴ EBLIDA (n 12), p. 6; similarly Civic Agenda EU (n 15), p. 12, which suggests that each format (purchase and license) carries its own advantages and disadvantages.

institutional actors, would still be the best solution for the characteristics of the market involved, and ensure the consideration of public needs and goals while relying on the natural market mechanism.⁷⁵ In the face of a framework where no argument has an absolute force, and confusion and uncertainties are so high, the discussion and decision in the *Vereniging Openbare* case could not fail to appear as a long-awaited savior.

IV. THE CASE

As had already been done by the UK and French governments, to orient their policy decisions on e-lending, the Netherlands Ministry of Education commissioned a study by SEO, a consultancy firm, and the Institute for information law (Ivir) of the University of Amsterdam,⁷⁶ asking them to assess whether electronic books were covered by the public lending right protected by the national provisions implementing Directive 2006/115 on rental and lending right (RLD), and thus whether they could be included within the scope of the derogation provided by Article 6(1) RLD in favor of public libraries. On the basis of the negative response of the study, the government explicitly excluded e-books from the objects of public lending in the new draft law on libraries prepared in 2014.

In order to highlight its disagreement and prevent the approval of the bill, *Vereniging Openbare Bibliotheken* (VOB), a Dutch association to which all public libraries adhere, decided to launch a strategic litigation against *Stichting Leenrecht*, the entity in charge of the collection of remuneration due to authors under the public lending exception⁷⁷ and set by a foundation appointed by the Ministry of Justice,⁷⁸ before the District Court of The Hague. With a broad and overarching request for declaratory judgment, the plaintiff demanded a ruling that not only confirmed that e-books were covered by the exclusive lending right and its related derogation, but also that the making available of e-books for an unlimited period of time should have been

⁷⁵ Of this view see Matulyonite (n 12), who points at the positive effects of stakeholders' dialogue in the US, which is the most thriving e-lending market. According to Civic Agenda EU (n 15), p. 12, "getting publishers to the negotiating table and then progressively nudging the needle towards better licensing terms and access to a wider range of titles is a strategy which has paid dividends for many of the e-lending models"; similarly in IFLA (n 71), p.21.

⁷⁶ SEO/Ivir (n 43)

⁷⁷ The proceedings collected by *Stichting Leenrecht* are then distributed to collective management organizations representing specific categories of works. Two of these entities are interveners in the case: *Stichting LIRA*, responsible for the management of rights relating to literary, dramatic and dramatic-musical works, and *Stichting Pictoright*, responsible for visual works. See VOB, para 19.

⁷⁸ The *Stichting Onderhandeligen Leenvergoedingen*, whose management board decided to exclude digital lending from the scope of the public lending exception already in May 2010.

considered akin to a sale for the purpose of the application of the principle of exhaustion. VOB referred to a lending scheme where the e-book was available only for one user at a time ("one copy one user"), and the types of works covered were limited to "novels, collections of short stories, biographies, travelogues, children's books and youth literature",⁷⁹ with the aim of preventing all the potential objections raised against e-lending by scholars and stakeholders. Faced with claims that inevitably touched upon the interpretation of several provisions of the Rental Directive and the InfoSoc Directive – and this was exactly VOB's intention – The Hague District Court had to refer four questions to the CJEU.

The first question reflects the careful delimitation of the scope of the lending scheme. The Hague court asks whether it is possible to interpret Articles 1(1), 2(1)(b) and 6(1) RLD as to include the making available of works such as the ones listed by the plaintiff, by uploading the digital copy on the establishment's server and allowing only one user at a time to download it onto her own device, and by making sure that the copy becomes unusable after the expiry of the lending term.⁸⁰ In case of an affirmative response, the second question challenges the compatibility with Article 6 RLD of the Dutch law provision which makes the operation of the public lending exception subject to the fact that the copy has first been put into circulation by a first sale or other transfer of ownership by the rightholder or with his consent, within the meaning of Article 4(2) InfoSoc.⁸¹ Should the CJEU rule for the admissibility of such a condition, this would imply that the establishment would need to acquire the ownership of the e-book in order to enjoy the exception. The fourth question, then, which cannot be avoided any longer, is whether Article 4(2) should apply also to the making available of the e-book by download and for an unlimited time, *id est* whether digital exhaustion exists also beyond software programs, along the same path traced by the CJEU in the *Usedsoft* case.⁸² Only residually, and in case of rejection of the condition set by Dutch law, the fourth question asks whether Article 6(1)

⁷⁹ Opinion of Advocate General Szpunar in C-174/15, *Vereniging Openbare Bibliotheken v Stichting Leenrecht*, 16 June 2016, ECLI:EU:C:2016:459, point 16.

⁸⁰ *Id.*, point 18.

⁸¹ According to Article 15c(1) of the Dutch copyright law: "Lending, as defined in Article 12(1)(3°), of all or part of a copy of a literary, scientific or artistic work, or a reproduction thereof, put into circulation by the rightholder or with his consent, shall not constitute an infringement of the copyright in that work, provided that fair remuneration is paid by the person who carries out that lending or arranges for it to be carried out"

⁸² *UsedSoft* (n 3). On the issue, and more generally on digital exhaustion, see *inter alia* V. Breemen (2016), A matter of interpretation: libraries land a 'victory' in CJEU's judgment on e-lending, *Kluwer Copyright Blog*, 21 November 2016, available at <http://kluwercopyrightblog.com/2016/11/21/matter-interpretation-libraries-land-victory-cjeus-judgment-e-lending> [last accessed 4 December 2016]; G. Spedicato (2015), *Online Exhaustion and the Boundaries of Interpretation*, in R. Caso, F. Giovanella (eds.), *Balancing Copyright Law in the Digital Age*, Springer, p. 27 ff.; A. Perzanowski, J. Schultz (2015), *Reconciling Intellectual & Personal Property*, 90 *Notre Dame Law Review* 1121; ID. (2011), *Digital Exhaustion*, 58 *UCLA Law Review*, 889; N. Elkin-Koren (2011), *The Changing Nature of Books and the Uneasy Case for Copyright*, 79 *George Washington Law Review* 1712.

RLD implies any other requirement to operate, such as the fact that the copy has been lawfully acquired from, or under the consent, of the rightholder.

1. THE AG SZPUNAR'S OPINION

The Opinion of AG Szpunar is a remarkable piece of axiological interpretation of EU copyright law, backed up by literal, systematic and teleological considerations.⁸³ It is worth pinpointing its basic propositions, especially in comparison to the quite concise judgment, in order to identify the issues and arguments that were left unanswered, to understand the reasons underlying such omissions and to define their implications.

After having broadened the scope of the analysis to cover all types of e-books, arguing that any differentiation would not be justified on the basis of objective criteria, the AG structures his analysis around three pillars. The first one – axiological in nature – aims at interpreting the Rental Directive so that it can still “meet the needs of contemporary society”⁸⁴ and reconcile the various interests involved. The second verifies the compatibility of the new reading with the relevant EU copyright Directives, with a semantic, systematic and teleological analysis. The last performs the same check *vis-à-vis* the EU's international obligations under the WCT.

Under an axiological perspective, the AG notes that the Rental Directive is a recodification of Directive 92/100/EC, where the lending right remained largely untouched. Back in 1992, the legislator excluded from the scope of its intervention the making available of works via download, but limited the scope of the provision to videograms and phonograms – a sign that the then very young phenomenon of electronic books was not really taken into account. There are three reasons why, according to Advocate Szpunar, this circumstance should not lead to the exclusion of e-lending under the 2006 Rental Directive. First and foremost, in a field where technology develops much faster than the law can, a dynamic, evolving and flexible statutory interpretation is required to avoid the negative effects caused by the obsolescence of legal rules, as also hinted at by Recital 4 RLD, according to which “copyright (...) must adapt to new economic developments”.⁸⁵ Functionally similar situations should be treated analogously for EU

⁸³ In the AG's words: “It is, in my opinion, vital that the interpretation of Directive 2006/115 should meet the needs of contemporary society and make it possible to reconcile the various interests at stake. At the same time, that interpretation must be consistent with the European Union's international obligations and the reasoning underlying other acts of EU law in the field of copyright” (Opinion, n.79, point 23).

⁸⁴ *Ibidem*.

⁸⁵ *Id.*, point 29. The Advocate General recalls also Recitals 2, 5 and 8 InfoSoc as indication of the “same desire to adapt to new technological and economic development”. In particular, Recital 5 states that “while no new concepts

copyright law to continue realizing its goals. In this sense, the fact that e-books are technologically capable of offering additional features, such as text-to-speech reading, translation, or remote access, impacts only on their ability to answer to a wider range of users' subjective preferences, but does not affect the functional equivalence of lending and e-lending, which are both used to access the content of a book without having the need to buy it.

A second, important axiological reason to extend lending rights to e-books lies in the greater protection this approach would ensure to authors. The exclusion of public e-lending forces libraries to enter into license agreements with publishers in order to offer access to electronic titles to their patrons, and to pay a periodic license fee that reaches authors only in a minimal part. If e-lending was covered by Article 6 RLD, the remuneration paid by libraries would go directly to authors, on top of the royalties they receive from publishers, thus granting them higher revenues and a higher protection of their interests than market mechanisms would otherwise offer. The last value-laden argument looks at the key role that libraries and books have played since time immemorial to preserve and give broad access to culture, which has always justified the regulatory prevalence of social considerations over purely economic goals. Current trends demonstrate the insufficiency of self-regulatory market tools to maintain the same balance in the digital environment. In fact, the high cost of e-book licenses makes access unaffordable for public libraries, especially if located in disadvantaged areas, while publishers are reluctant to offer full access to their catalogues in electronic form, fearing a negative impact on their sale figures and piracy threats. The application of Article 6(1) RLD would address the deficiencies of the self-regulatory mechanism with a legislative exception, making sure that the social goals of the Rental Directive and its lending right are still pursued *vis-à-vis* new technologies.

According to the AG, this axiological interpretation would not be precluded by the language of the Directive. The doubt arises from the reference made by Article 1(1) RLD to the lending of "original and copies" of copyright works, which may suggest a limitation to the tangible medium in consonance with the interpretation given to the same terms in the InfoSoc Directive. Although he seems to limit the observation to Article 6 RLD, Advocate Szpunar rejects the strict reading, arguing that the meaning of copy is the result of an act of reproduction,⁸⁶ and that straightjacketing the concept to the world of tangibles would be "contrary to the logic underlying

for the protection of intellectual property are needed, the current law on copyright and related rights should be adapted and supplemented to respond adequately to economic realities such as new forms of exploitation".

⁸⁶ As visible, *inter alia*, in the use of the word "reproduction" instead of "copie" in the French version of the Directive (COM(90) 586 final (OJ 1991 C 53, p. 35)). The Advocate General uses also the example of the German-language version of the Rental Directive, which uses the term 'Vervielfältigungsstück', evoking the act of reproduction (Article 2), and cites in support the similar, reasoned opinion of P. Gaudrat (2008), *Prêt public et droit de location: l'art et la manière*, *RTD Com.*, p. 752.

copyright”.⁸⁷ Nor would the use of the word “object” in the French translation play host to this interpretation, for most of the language versions use the term “lending”, while the word “object” is in any case used to refer also the subject-matter of other rights covered by the Rental Directive – a circumstance that confirms its neutral meaning.

The terminological problem emerges more vividly if this checking for compatibility moves to other EU copyright sources, and particularly to the InfoSoc Directive. Here, the particular use of the words “copy” and “object”, and the presence of “dematerialized” entitlements such as the making available right and the right of communication to the public seem to inherently oppose the notion of digital lending. As already maintained by several commentators, the conduct entailed by the lending of e-books falls within the scope of the making available right, to which no exception is provided which would resemble the derogation introduced by Article 6 RLD. Interestingly, the AG opinion leverages on the *Usedsoft* decision to exemplify how the CJEU had already attributed to the notion of “copy” an intangible meaning, on that occasion under Directive 2009/24 on software programs. The principle of terminological consistency, if followed, would require also extending to intangibles the concept of “copy” used in the InfoSoc Directive, opening the door to digital exhaustion for every work protected by copyright. Should the Court believe that the *UsedSoft* decision is limited to the field of computer programs, since Directive 2009/24 is a *lex specialis* in respect of the InfoSoc Directive, then the principle of terminological autonomy ought to be maintained in this case as well. Under the same *lex specialis* principle, confirmed by Recital 20 InfoSoc, the lending right protected under the Rental Directive would not be touched by the InfoSoc provisions, and thus its broadening to cover e-lending would not be hampered either by Article 3 InfoSoc and its right of communication to the public. This argument should also be capable of excluding that the actions of reproduction necessary for the library to upload material onto its server and for the user to download it onto her device could amount to a violation of Article 2 InfoSoc. Yet, the AG adds an additional reason in support of their legitimacy, citing the CJEU’s decision in the *Ulmer* case,⁸⁸ where the Court held that the exception introduced by Article 5(2)(c) InfoSoc covered also acts of reproduction undertaken by the library in order to exercise the exception to the right of communication to the public of its collection which it enjoyed under Article 5(3)(n) InfoSoc. Nothing prevents the application of this conclusion – the AG argues – to the exception of Article 6 RLD and to the acts of reproduction necessary to enable e-lending.⁸⁹

⁸⁷ Opinion (n 79), point 44.

⁸⁸ *Ulmer* (n 18).

⁸⁹ The AG also argues, albeit with very little details, that the reproduction made when downloading an e-book borrower from a library, that is covered by the mandatory exception provided by Article 5(1) Infosoc. The

Risks of inconsistency do not only come from EU copyright directives. The provisions related to VAT, for instance, consider digital supplies as services, thus excluding e-books from the reduced rate provided for printed books, with a distinction that was upheld by the CJEU in the past.⁹⁰ In response, the Opinion underlines that the case at stake requires an assessment of the functional equivalence of lending and e-lending, and not of books and e-books. On top of that, the Commission has already announced its intention to remove the VAT discrimination, confirming the full equivalence of the two formats before the law.

EU sources should also ensure their compliance with international conventions, particularly when the Union is a contracting party, as in the case of the WCT. A progressive interpretation of the definition of lending should not fall foul of its provisions in order to be admissible. Now, while the Treaty contains a provision on rental rights, limited to software, phonograms and cinematographic works, no reference is made to the lending right. From this lacuna the Opinion deducts that e-lending should be considered as covered by Article 8 WCT on the right of communication to the public. While within the EU the provision, implemented by Article 3 InfoSoc, does not find application in the matter due to the *lex specialis* status of the Rental Directive, e-lending under the Treaty has to be considered as an exception to the right protected by Article 8, and thus subject to the limitations set by the three-step test, enshrined in Article 10 WCT. This means that the derogation should be contained within special cases, not conflict with a normal exploitation of the work, and not unreasonably prejudice the rightholder's legitimate interest.

The Opinion goes through each of the three prongs, and thereby finds the opportunity to answer most of the objections moved by stakeholders on the negative effects of e-lending on the market in printed books. The first prong is easy to comply with, once the technical features of the e-lending practice are well defined. As to the impact on the normal exploitation of the work, rightholders argue that the lending of e-books presents characteristics (remote accessibility, quality of the copy, reproduction without loss of quality, and so on) that make it likely to act as a substitute for the purchase of the good, with a much higher impact on the primary market of e-books than traditional lending has ever had on the market of printed books. The answer of the AG is paradigmatic: the development, by publishers, of business models relying on digital renting is not enough to exclude a public lending derogation for e-books, since the latter pursues

reproduction is temporary "since the copy made on the user's equipment will be deleted or deactivated automatically at the end of the loan period"; the other two requirements (incidental and an integral part of a technological process; having as only purpose to enable a lawful use of the work; the lack of any independent economic significance) are taken as *res ipsa loquitur*.

⁹⁰ C-479/13, *Commission v France*, 5 March 2015, EU:C:2015:141, and C-502/13, *Commission v Luxembourg*, 5 March 2015, EU:C:2015:143.

“a legitimate objective in the public interest that cannot be restricted to areas that are not touched by economic activity”. In a broader perspective, the argument takes a strong stance against the judicial trend of compression of exceptions and limitations on the basis of their economic impact on the market of the protected work, asking for the assessment to focus again primarily on the public interest purpose underlying the derogatory norm. Should this not be enough, economic studies proving the increase in book sales caused by lending and e-lending, coupled with the publishers’ increasing engagement in license agreements on digital lending with libraries, provide ample empirical evidence of the fact that an e-lending derogation would comply without any problem with the second prong of the three-step test. To ensure functional equivalence between tangible and intangible lending, however, Member States are expected to complement their public e-lending exception with specific frictions such as, *exempli gratia*, the “one copy one user” scheme, enforced through effective technological protection measures. As to the third prong, the application of Article 6 is undeniably more favorable to authors, for it does not depend on their bargaining power against publishers.

Once the compatibility was ascertained of an e-lending derogation with the three-step test provided for by Article 10 WCT, it still remained for the AG to evaluate the implications of the Diplomatic Conference’s Agreed Statement, according to which the terms “original” and “copies” used with regards to the right to distribution and the rental right (Articles 6 and 7 WCT⁹¹) should be understood as referring only to “fixed copies”. For the AG the limited reference to the two provisions allows for a different interpretation of the terms when an exception under Article 8 WCT is involved. In addition, he believes that it would be at least questionable if the statement would straightjacket the interpretation of Article 6 RLD, which is not even covered by it, while the *UsedSoft* decision could fully disregard the limitation and extend the exhaustion of the right of distribution to digital copies of software programs.

With a more cautious approach compared to the previous bald statements, the AG gives short shrift to the extendibility of digital exhaustion to e-books, by underlining the independence of the rental and lending rights from the right of distribution. Article 1(1) RLD is clear in stating that the former are not exhausted with the exhaustion of the latter, so that the authorization of the rightholder will always be required to rent or lend a lawfully acquired copy. This independence becomes even more visible if one considers that the public lending derogation may also cover works that were never published. It is exactly in this circumstance that a

⁹¹ In fact, the Agreed Statement Concerning Article 6 and 7 WCT specifies in its incipit “As used in these Articles” (“As used in these Articles, the expressions “copies” and “original and copies”, being subject to the right of distribution and the right of rental under the said Articles, refer exclusively to fixed copies that can be put into circulation as tangible objects”).

provision like the one introduced in the Netherlands, which requires that the book has been put into circulation by the rightholder or with her consent before public lending may take place, acquires full sense. In fact, the condition prevents public establishments from prejudicing authors' interests by making available to the public works that they never voluntarily published. Reasonably, the AG suggests considering the rule justifiable and not precluded by the Rental Directive.

The last question is probably the easiest to address in light of the CJEU's case law. In *ACI Adam* the Court ruled that the obligation to pay remuneration arising from the provision regulating the private copy exception does not apply to copies made from unlawful sources, since rightholders cannot be expected to tolerate infringement of their rights. By analogy, and especially since the beneficiaries of the derogation are public establishments which are supposed to lead by example in their compliance with the law, Article 6 RLD should be read as referring only to the lending of e-books obtained from a lawful source.

The Opinion, very detailed in most of its parts and extremely concise in others, took a clearly value-oriented stance in the interpretation of the Rental Directive, and offered to the Third Chamber and to Rapporteur Judge Malenovský the possibility of solving important interpretative knots that might have had an important impact on the construction of EU copyright law. Looking at the outcome, the opportunity has been partially – but most probably voluntarily – missed.

2. THE DECISION OF THE COURT

Compared to the AG Opinion, the decision of the Court is drier, and mostly uses a literal and systematic interpretation. To address the first question, the Court's starting point is Recital 7 RLD, which requires the legislation of Member States to be fully harmonized in respect of international conventions, among which the WCT seems to play a key role according to the CJEU's case law.⁹² Since there is no doubt that the agreed statement demands limiting the concepts of "original" and "copies" covered by the rental right to tangible objects (Art. 7 WCT and Art. 2(1)(a) RLD), the basic interpretative knot to solve is whether the same reading should be applied to the lending right. Opting first for a literal interpretation, the CJEU notes how the

⁹² As explicitly stated, among the most recent decisions, in C-135/10, *Società Consortile Fonografici (SCF) v Marco Del Corso*, 15 March 2012, ECLI:EU:C:2012:140, which cites the consolidated case law on the matter.

Directive refers to rental and lending as “rights”, with the significant use of the plural,⁹³ and regulates the two entitlements in two separated provisions, with this suggesting that their objects may well be different. In this light, nothing prevents the adoption of a reading that admits the possibility of e-lending. The Court finds support for this conclusion in the teleological interpretation of the preparatory work of Directives 92/100 – the unmodified predecessor of the Rental Directive. At the time when the explanatory memorandum was written, e-books were still in their infancy, and the only exclusion the Commission made was related to the electronic transmission of films; significantly, though, nothing in the text of the Directive reflects this legislative intent – a circumstance that AG Szpunar omitted to underline.

If Recital 4 RLD also suggests the need to adapt copyright and its rules to new economic developments, which in this case results in new formats and consequently in new forms of exploitations, the most important systematic element which advocates for a broader reading of the scope of the lending right is the principle of a high level of protection for authors that, according to the Court, underlines the whole EU copyright framework, and emerges also in Recital 9 RLD. Interestingly, the CJEU seems to follow the approach indicated by the AG, which aligns to a recent trend that sees the judicial focus shifting towards the protection of creators over other rightholders, which are generally more at the center of the attention of the EU legislator. Yet, while Szpunar devotes more paragraphs to explaining why the e-lending derogation is important to reset the tilted balance between authors and publishers, and control the detrimental effects of an unregulated market for authors in light of their weak bargaining power, Judge Malenovsky’s eight lines limit the analysis to systematic considerations, omitting any further axiological reference.

The only moment where the Court gives space to a policy, value-oriented reasoning is when it has to justify the stretching of Article 6 RLD(1) to cover e-lending, as a derogation to the strict interpretation of exceptions required by the CJEU’s settled case-law, but in line with the lesson of *Football Association Premier League*,⁹⁴ which requires the interpretation to still ensure that “the effectiveness of the exception (...) is safeguarded” and “its purpose [is] observed”.⁹⁵ This is the point where, since the focus moves to the purpose of the derogation, the Court can emphasize the importance of e-lending and its inclusion under Article 6(1) RLD to make sure that the provision can still perform its role of cultural promotion. Here, like in *Usedsoft*, the key element

⁹³ Particularly in Recitals 3 and 8 RLD.

⁹⁴ Joined cases *Football Association Premier League Ltd and Others v QC Leisure and Others (C-403/08)* and *Karen Murphy v Media Protection Services Ltd (C-429/08)* [FAPL] 4 October 2011, ECLI:EU:C:2011:631.

⁹⁵ FAPL, paragraph 50.

allowing a positive decision and the abandonment of purely formalistic, strict approaches is the functional similarities of the two forms of lending. In this sense, the "one copy, one user" scheme and the introduction of other frictions to ensure that e-lending has "essentially similar characteristics" to the lending of printed books is fundamental to admit the extensive interpretation. Significantly, not a single reference is made to the acts of reproduction performed by the library and by the user in respectively uploading and downloading the e-book.

In line with the AG Opinion and exactly for the same systematic reasons, the Court excluded the presence of any connection between exhaustion under Article 4(2) Infosoc and the rental and lending rights. The issue of digital exhaustion, then, is not even mentioned. In turn, instead, a major emphasis is put on the aim of ensuring a high level of protection to author, and the obligation to pay a fair remuneration set by Article 6(1) RLD is only the "minimum threshold of protection" that Member States are required to provide. Aside from that, national legislators are free to include additional conditions to make sure that the interests of authors are adequately taken into account. The Dutch law, as the AG explained, goes exactly in that direction. Decreasing the risk of unwanted circulation of unpublished works goes to the advantage of authors, and should thus be considered admissible under Article 6(1) RLD. Again as in the AG Opinion – with the exception of a stronger emphasis put on the need to combat piracy and the circulation of counterfeited copies,⁹⁶ the precedent set in *ACI Adam* is extended by analogy to state that the public lending exception does not apply where the e-book was acquired from unlawful source.

Compared to Advocate Szpunar's analysis, the CJEU's decision omits several aspects, is short of details, and rejects the idea of setting general principles. Despite its positive notes, which will hopefully be elaborated on more in the future, the decision represents a foretold missed opportunity, as the following pages will briefly explain.

⁹⁶ As in paragraph 67 ("In that regard, first of all, although the wording of Article 6(1) of Directive 2006/115 does not expressly set out any requirement that the source of the copy made available by the public library must be lawful, nevertheless one of the objectives of that directive is to combat piracy, as can be seen from recital 2 thereof") and 68 ("To accept that a copy lent out by a public library may be obtained from an unlawful source would amount to tolerating, or even encouraging, the circulation of counterfeit or pirated works and would therefore clearly run counter to that objective").

V. IMPLICATIONS AND OMISSIONS OF THE CASE: E-LENDING AND THE FATE OF DIGITAL EXHAUSTION FOUR YEARS AFTER *USEDSOFT*

For the second time after *Ulmer*, the CJEU intervenes on the framework of exceptions and limitations to EU copyright law with a forward-looking, adaptive interpretation of existing rules inspired by public interest goals. In *Ulmer* the Court admitted the possibility for Member States to grant public libraries the ancillary right to digitize their collections (and thus to commit an unauthorized act of reproduction) if such act is necessary to make works available to individual users, for the purpose of research or study, by dedicated terminals within their premises, as allowed under Article 5(3)(n) InfoSoc. In simpler terms, the CJEU extended the scope of an exception listed in the InfoSoc Directive through a joint reading of two of its provisions, with the aim of ensuring that the exception itself may fully perform its role. This approach constituted a step forward compared to the indications of *Football Association Premier League* and *Painer*, where the Court pointed out that while it is true that Member States and courts should ensure a high level of protection of copyright, and thus give a strict reading to the exception according to settled case law, it should still be possible for the provision to perform its function and to reach the goal for which it was granted.

Along the same lines, and by using the same policy-oriented tool of functional equivalence as in *UsedSoft* to justify a stretched interpretation by analogy, in *Vereniging Openbare* the CJEU extends Article 6(1) RLD to cover the lending of e-books. Apart from the contingent output, the case carries two important implications. First, it reinforces an interpretative trend that the Court seems to have adopted to counterbalance the strict reading of exceptions⁹⁷ and their additional straightjacketing caused by the three-step test, which has long been read by several national courts,⁹⁸ and recently by the CJEU's decision *ACI Adam*,⁹⁹ as an *ex post* filter to the application of existing exceptions, creating additional rigidity in a system already characterized by sclerosis and scarce adaptability to changes.¹⁰⁰ The Luxembourg Court seems to be more open to axiological

⁹⁷ From FAPL (n 94) to C-201/13, *Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others*, 3 September 2014, EU:C:2014:2132, *Ulmer* (n 18); C-360/13, *Public Relations Consultants Association Ltd v Newspaper Licensing Agency Ltd and Others*, 5 June 2014, EU:C:2014:1195.

⁹⁸ On the restrictive reading offered by national courts see C. Geiger, F. Schönherr (2014), *The Information Society Directive (Article 5 and 6(4))*, in P. Torremans, I. Stamatoudi (eds.), *EU Copyright Law: A Commentary*, Edward Elgar Publishing, pp. 434-484

⁹⁹ C-435/12, *ACI Adam BV and Others v Stichting de ThuisKopie and Stichting Onderhandelingen ThuisKopie vergoeding*, 10 April 2014, EU:C:2014:254.

¹⁰⁰ See, *inter alia*, C. Geiger, *The Three-Step Test, a Threat to a Balanced Copyright Law?*, 37 IIC, pp. 683-696; C. Geiger, D.J. Gervais, M. Senftleben (2014), *The Three-Step-Test Revisited: How to Use the Test's Flexibility in National Copyright Law*, 29(3) *Am Univ Int'l LR*, pp. 581-626; M. Senftleben (2010), *Bridging the Differences between Copyright's Legal Traditions – The Emerging EC Fair Use Doctrine*, 57 *J Cop Soc USA*, 521; P.B.

interpretations, and to a broader understanding of the institutional functions of copyright, which have to be pursued not only at a legislative level but also in the implementation of existing rules, as was held in *Promusicae* with regard to the respect of fundamental rights in copyright matters. Second, the CJEU reiterates the higher emphasis it wants to place on the protection of the author and the role he must return to playing in the EU copyright arena, where he had progressively lost ground and centrality in favor of other commercial rightholders.¹⁰¹ Rules granting a fair remuneration ensures that creators receive a transparent share of the revenues arising out of the commercial exploitation of their work – a result that is not always achieved if the determination of the author's royalties is left to publishing contracts where he tends to be the party with the weaker bargaining power.

Yet, if compared to the AG Opinion, the Court already exercises significant self-restraint. Although the issue at stake would have allowed the expression of broader principles, its arguments are limited to what is strictly necessary to the resolution of the case; the language used is neutral and the reasoning deprived of any axiological statement; the interpretative criteria are mostly literal and systematic, and teleological for a limited part. In front of two positive steps ahead, in *Vereniging Openbare* the CJEU misses three important opportunities to advance its case law and contribute with more overarching principles to the fragmented patchwork constituting EU copyright law.

In the first place, the Court does not elaborate on the principle according to which "copyright must adapt to new economic developments such as new forms of exploitation", expressed in Recital 4 RLD. The decision neither explains nor even hints at the criteria to be used in order to identify the areas that require an intervention, and to proceed with the adaptation. No explicit reference is made, for instance, to principles such as functional equivalence or technological neutrality, which scholars have long debated. In addition, since the Rental Directive is considered *lex specialis*, it remains unclear whether the direction set by Recital 4 RLD is to be followed also in other areas, or only with regards to a rental right, lending right and related rights.

On the side of e-lending, the careful self-restraint of the Court implies also that the decision is strictly limited to the scheme delineated by the plaintiff, with no further elements analyzed. Only two requirements are set for the lending to be admissible under Article 6(1) RLD, that is the "one user, one copy" rule, and the termination of access to the file with the expiry of the lending

Hugenholtz, M. Senftleben (2011), Fair use in Europe: in search of flexibilities, available at <http://ssrn.com/abstract=2013239> [last accessed 4 December 2016].

¹⁰¹ On the loss of centrality of the author in EU copyright law see, explicitly, J.C. Ginsburg (2002), How Copyright Got a Bad Name For Itself, 26(1) Columbia J. L. & Arts, p. 61 ff.; S. Nérison (2012), Ownership of copyright and investment protection rights in teams and networks: need for new rules?, in J. Rosén (ed.), Individualism and Collectiveness in Intellectual Property Law, Edward Elgar, pp. 129 ff.

period.¹⁰² No other reference is provided to other frictions or common conditions set by e-lending licenses. Now, since every lending should be preceded by the lawful acquisition of the title, and since every acquisition happens through the stipulation of a license agreement, it remains unclear what space is left for freedom of contract, that is how far may publishers go in determining the features of the lending scheme. The reason of this additional layer of complexity lies in the fact that the principle of exhaustion of the distribution right provided by Article 4(2) InfoSoc applies only in case of sale or other transfer of ownership, and only to tangible goods, according to the reading offered by the WCT. As a consequence, while in the case of a purchase of a printed book the library acquires full control over the copy, the acquisition of an e-book through license does not have the same effect. It is true that the derogation of Article 6(1) RLD crosses out the right to authorize e-lending, and thus to determine its conditions, but from nowhere may it be deducted that the rightholder also loses the right to determine the allowed uses of the e-book when granting access to it, absent digital exhaustion. The conditions set in the licensing agreement between library and publisher will then inevitably impact on the conditions of the public e-lending. As Tomasi di Lampedusa would say, “Se vogliamo che tutto rimanga come è, bisogna che tutto cambi” (“If we want things to stay as they are, things will have to change”).¹⁰³

This interpretative problem would have been easily solved if the CJEU had decided to return to the highly debated issue of digital exhaustion and solved it once and for all. Since 2012, when in *UsedSoft* the Court held that the licensing of a software was functionally equivalent to a sale, and that there was no difference between tangible and intangible supports for the application of exhaustion, scholars and courts have struggled to determine whether the decision should be intended as limited to computer programs, in light of the *lex specialis* nature of Directive 2009/24, or whether the same functional approach could lead to analogous results in other areas. In *Art & Allposters* – a decision holding that exhaustion does not apply in a situation where the copy of a protected work, after its first authorized sale, has undergone an alteration of its medium and is commercialized in the new format – the CJEU clearly stated that “the EU legislature, by using the terms ‘tangible article’ and ‘that object’, wished to give authors control over the initial marketing in the European Union of each tangible object incorporating their intellectual creation.”¹⁰⁴ The conclusion was based, once again, on the Agreed Statement of the WCT, which declares that Articles 6 and 7 of the Treaty define the terms “copy” and “original and copy” as

¹⁰² VOB (n 1), paragraph 54.

¹⁰³ The translation is taken G. Tomasi di Lampedusa, *The Leopard*, translated by A. Colquhoun (trans.), London: Fontana, 1963, p.40.

¹⁰⁴ Case C-419/13, *Art & Allposters International BV v Stichting Pictoright*, 22 January 2015, EU:C:2015:27

referring only to tangible objects.¹⁰⁵ In fact, the decision confirmed a number of national precedents which had excluded digital exhaustion and limited the CJEU's ruling in *Usedsoft* exclusively to computer programs.¹⁰⁶ The Court had the opportunity to clarify its position in VOB, and the referring Court even cited, in an indirect manner, Article 4(2) InfoSoc in its second question. Yet, and despite the explicit, tricky reference of AG Szpunar in his Opinion, the CJEU decided to cut short on the issue and, by stating its irrelevance to the interpretation of Article 6(1) RLD, to avoid a ruling on the matter. The Agreed Statement seems to leave little room for maneuver, but its cogency is debatable, so that the functional equivalence dictated in *Usedsoft* may perform the same role in other areas. The question is whether and to what extent digital exhaustion is a principle which is required, today, by the necessary adaptation of copyright law to the evolution of technology and the market, and by the pursuance of goals that go beyond the mere "high level of protection" of rightholders. The CJEU could have given some hints on the issue, but preferred to radically omit it, leaving it hazy and subject to the uncertainties of the relationship between *lex generalis*, and *lex specialis*, and the extent and scope of functional interpretation in EU copyright law.

Two significant points on the interpretation of exceptions and the role of authors and three important opportunities missed is the final score in the e-lending match. Since none of these subjects have been taken into account and addressed by the Commission in its recent proposal for a reform of EU copyright law, the Court will surely be called upon soon to address them again. In light of the puzzle of decisions that it has built up in the last four years, escaping – probably for institutional courtesy – will not be so easy next time.

¹⁰⁵ *UsedSoft* (n 3).

¹⁰⁶ See the interesting overview provided by M. Savic (2015), *The legality of resale of digital content after UsedSoft in subsequent German and CJEU case law*, 37(7), pp-414-429, with a number of cases particularly focusing on the impossibility to extend *UsedSoft* to e-books.