consortium of national & university libraries

Regulatory Affairs Sub-Committee

Research Note on Digital Lending and Access

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Introduction

In the wake of the European Union (EU) *Vereniging Openbare Bibliotheken* (*VOB*) case of 2016,[1] permitting digital copying in public libraries for lending purposes under certain conditions, the concept of "controlled digital lending" is being increasingly advanced in international, EU and national contexts.[2] The purpose of this research note is to determine if there is a specific legal basis under copyright law for digital lending in Ireland. It will also examine and evaluate other potential routes to achieve the same or similar outcomes, specifically the alternative of digital access in a controlled form. Finally, the note will briefly consider conditions to assist practical implementation.

Current Irish law and practice on lending and digitisation

Section 58(1) of the Copyright and Related Rights Act 2000 (the 2000 act) states that lending of "copies" of a work by educational establishments and establishments to which the public has access does not infringe copyright, and that furthermore, such lending is exempt from payment of section 40(1)(g) remuneration to copyright owners. The Act does not specify whether a work is in print or digital form. Section 2(1) characterises a work as including the "typographical arrangement of a published edition". On the basis of the foregoing, it is clear that a print item acquired under normal circumstances can be loaned to a legitimate user community, and the proper manner of doing this is widely understood.

Access to digital items through lending is less clear. Digital versions of books, whether surrogates of existing print titles or born digital publications, are available from publishers. While the extent of the content offer is substantial, there are however major publication gaps for which there are no ready or affordable digital alternatives, but for which there is demand. Access to these publications is provided through on-site access, i.e. physical consultation or lending. There is, however, no explicit mechanism to accommodate digital provision of such material to general users who may need or prefer an online option.

[1] C-174/15 (*Vereniging Openbare Bibliotheken v Stichting Leenrecht*), ECLI:EU:C:2016:856.
[2] Prominently in an IFLA position paper originally developed in 2019. See footnote 8 below.

A small proportion of these online gaps is closed by specific, limited provisions which permit libraries to digitise or modify entire print works from their holdings, including for preservation of orphan works, suitable access for impaired users, and access through dedicated on-site terminals. However, Irish legislation does not extend to digitisation for other more general purposes, such as simple convenience-based consultation or lending.

Emerging practices and principles in the European Union

Digital lending in the Netherlands

The specific question of digital lending of electronic books has arisen in the Netherlands in the contexts of public libraries and the establishment of a wider national digital lending library. Public libraries pay a lump sum to a collective management organisation for the physical lending of books, which is distributed on to rightholders. The question as to whether this payment covers digital lending of an e-book was considered by the Stichting Onderhandelingen Leenvergoedingen (StOL), an organisation officially designated for setting lending right payments. StOL ultimately concluded that the payment did not cover digital lending. Subsequently, government proposed legislation to enable digital lending through a national digital library. Public libraries, acting through their representative body Vereniging Openbare Bibliotheken (VOB), challenged this proposal in domestic courts in 2015 on the basis that the existing law already covered digital lending.

The principal provisions of Netherlands copyright law (Auteurswet) in this instance are:

- Article 10 defining works, which includes books; and
- Article 12 stating that lending of a work is the act of making it "available for use, for a limited period of time […] through establishments which are accessible to the public".

Netherlands public libraries were already making electronic books available via the internet on the customary basis of licensing agreements. However, the specific practice being tested here was the placing of a reproduced digital copy on a library server to allow a user to download it in a further act of reproduction, with the download being usable by that user only for a limited period, i.e. in a manner argued to be analogous to lending. This matter was referred by the Hague District Court to the Court of Justice of the European Union (CJEU), which issued a judgment on 10 November 2016.[3]

The basis for digital lending at EU level

The principal finding of the CJEU in the *VOB* case was that the concept of lending also covers that of a digital book. The court noted that international copyright law (namely the WIPO Treaty) does not preclude the concept of lending from including certain lending carried out digitally. Neither is there a decisive exclusion of the lending of digital copies in EU legislation, namely Directive 2006/115 on rental and lending rights.[4] Furthermore the preamble to Directive 2006/115 states that copyright must adapt to new economic developments such as new forms of exploitation.[5] The court took this

[3] C-174/15 (*Vereniging Openbare Bibliotheken v Stichting Leenrecht*), ECLI:EU:C:2016:856.
[4] Directive 2006/115/EC on rental and lending right and on certain rights relating to copyright in the field of intellectual property (codified version). *Official Journal of the European Union*, L376/28, 27.12.2006.
[5] Recital 4 of Directive 2006/115/EC.

to mean that in the circumstances before it "[l]ending carried out digitally indisputably forms part of those new forms of exploitation and, accordingly, makes necessary an adaptation of copyright to new economic developments".[6] The court recognised the importance the of public lending of digital books. To maintain the effectiveness of the public lending derogation in article 6(1) of Directive 2006/115 including its cultural promotion objective, digital lending by a publicly accessible library could not be ruled out where it has "essentially similar characteristics to the lending of printed works".[7]

The court further noted that a digital copy being made available must have been put into circulation by a first sale, or other transfer of ownership in the EU by the holder of the right of distribution. Also, under the Directive 2006/115 public lending exception, the authors must receive remuneration for the lending. Finally, the public lending exception precludes digital copying from an unlawful source.

Accordingly, the *VOB* case appears to comprise the following elements supporting the digital lending of works held in collections:

- A national legal foundation for lending;
- An EU legal provision governing lending; and
- An EU legislative recognition of transformations in economic development and forms of exploitation.

Once these elements are present, the digital transmission must then replicate the essence of the act of lending as normally understood. The digital copy to be loaned must mimic the manner of physical lending of an item, with for instance time-limited (loan period) access to a single copy (i.e. no simultaneous multiple downloads), with adequate technological protection. The strict control of numbers of available copies is also expressed through the so-called "owned-to-loaned" ratio, which is a practical mechanism for managing digital loans.[8]

Does the principle of digital lending apply to academic and research libraries?

'Public library' basis of VOB

The *VOB* case arose from the public library sector, where particular criteria apply, such as the application of the public lending right mechanism, a feature which does not apply to educational and research institutions. This understanding is reflected in the reasoning of the judgment which observed that the derogation at EU member state level from the author's right of distribution for public lending purposes is predicated on the provision of remuneration which takes account of cultural promotion objectives.[9] By way of practical illustration, the specific subject material of the

[6] Paragraph 45, *VOB*.
[7] Paragraph 51, *VOB*.
[8] See International Federation of Library Associations and Institutions. "IFLA Position on Controlled Digital Lending", page 4. Accessed at: https://www.ifla.org/wp-content/uploads/2019/05/assets/clm/statements/ifla_position_-_en-_controlled_digital_lending.pdf. In that document, the following example is given: "[…] if a library has one copy of the book in paper form it can digitise it, put the paper copy beyond public access, and only lend the eBook to a single user at a time. If the library has two paper copies the same principle should apply that no more than two copies (irrespective of the format) should be available at any one time to the public."
[9] As opposed to education and research objectives.

VOB case is "copyright-protected novels, collections of short stories, biographies, travelogues, children's books and youth literature", cultural publications typically available in public libraries. While some or all of these materials will also be available in academic and research libraries, they do not represent the totality of material types present in their holdings.

Economic and technological developments under EU law

In reaching its conclusions, the CJEU also took the dynamics of technology and commerce into account, developing an approach that could have broader application concerning lending and access in other non-public library circumstances. The reference in recital 4 of Directive 2006/115 to new economic developments and forms of exploitation closely mirrors that of recital 5 in the EU's earlier framework Information Society (InfoSoc) directive of 2001.[10] The InfoSoc directive sought to harmonise copyright law in the EU internal market, setting out the full range of permissible exceptions to and limitations on protected rights. Recital 5 refers to adapting current law to economic realities and to new forms of exploitation. Accordingly, there are strong grounds to contend that the *VOB* case could be extended to other lending and access contexts, including the activities of academic and research libraries. These grounds would be strengthened by the identification of an instance under the InfoSoc directive which would demonstrate the application of a new exploitation principle to the broad range of not-for-profit library types. As shall be outlined below, it so happens that there has been another case before the CJEU involving an educational establishment which addresses just such a scenario.

Communication to the public through dedicated terminals

No EU copyright provision specifically refers to lending by academic or research libraries. However, article 5(3)(n) of the InfoSoc directive does provide for "use by communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises of establishments referred to in paragraph 2(c) [which includes educational establishments] of works and other subject-matter not subject to purchase or licensing terms which are contained in their collections".

If recital 5 of the InfoSoc directive ("copyright must adapt to new economic developments such as new forms of exploitation") is applied to article 5(3)(n), it is a short step to extend the concept of availability through a dedicated terminal to one of remote, secure access to the same material subject to analogous conditions. Strictly speaking, this is access, not lending, but once properly controlled the outcome is the same.

Article 5(3)(n) has been the subject of another significant ruling of the CJEU, the *TU Darmstadt* case of 2014. [11] German law provides for digital access to published works at dedicated points on the premises of publicly accessible libraries, in terms broadly analogous to Article 5(3)(n). The number of copies available at those points is not to exceed the number held by the establishment, with equitable remuneration being paid to a collecting society.[12] TU Darmstadt, operating a "regional and academic library", made a scientific textbook that it had digitised itself available at such a point in

[10] Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society. *Official Journal of the European Union*, L167/10, 27.6.2001.
[11] C-117/13 (*Technische Universität Darmstadt v Eugen Ulmer KG*), ECLI:EU:C:2014:2196.
[12] *TU Darmstadt*, paragraph 9.

the manner legislated for.[13] Users were allowed to print out the textbook or store it on a USB stick to take off the premises, both practices a domestic court in 2011 required the university to cease.

When the case ultimately reached the CJEU, the court determined that article 5(3)(n) effectively presupposed a right to digitise works in an establishment's collection, provided "specific acts of reproduction" were involved, i.e. some works, not "entire collections", and that the communication of those works was to individuals for research or private study.[14] Moreover, the court emphasised that digitisation and its communication must not prejudice the normal exploitation of a work, nor cause unjustified harm to the legitimate interests of the rightholder.[15] The latter conditions were deemed to be satisfied by the limitation of digital access to reflect that provided by copies in analogue form, combined with access giving rise to a duty to provide remuneration. The issue of printing off and storage and removal on USB sticks was also addressed by the court, which determined that both acts were new "reproductions" and would only be permissible if national legislation provided for "fair compensation" as required by Article 5(2)(a) of the InfoSoc directive.

Discussion on *VOB* and *TU Darmstadt*

Article 5(3)(n) is transposed into Irish law by section 69A(1) of the Copyright and other Intellectual Property Law Provisions Act 2019 (the 2019 act). This permits, in the context of fair dealing, the communication by libraries of copies of works in their permanent collections to members of the public for the purpose of education, teaching, research or private study through dedicated terminals on library premises. This enables libraries to mediate digitised copies of holdings to researchers on site through parent institution servers and closed access hardware, but not through the internet.

Neither the *VOB* nor *TU Darmstadt* cases formally resolve the issue of digital lending in educational establishments. However, they do suggest that because of developments in technology and greater reliance on the internet, the ground rules for access have fundamentally changed. Access previously permitted through dedicated terminals can now arguably be extended to access through the internet once the manner of communication achieved is limited to that delivered through a terminal. These limits have not yet been defined, but it is reasonable to assume that some form of protected content, read-only access to the extent of availability through dedicated terminals would form the likely basis of a practical equivalence.

If this reasoning stands up, the difference between secure, limited online access through educational institutions and "controlled digital lending" through public libraries is negligible. Accordingly, academic or research libraries have a strong basis to provide digital access to digitised copies of works in their collections, so long as they comply with the limitations laid out in the *VOB* and *TU Darmstadt* cases. In practice, this means the copies must be legally acquired, made available for learning or research purposes, protected in such a manner that full reproduction by the user is not possible, and that the equivalent of an owned-to-loaned ratio is maintained. In the latter case, this means whole collections cannot be digitised and made available, and that a pattern of normal exploitation is adhered to, for instance by matching access to some form of normal demand.

[13] Ibid., paragraph 10. It should also be noted that TU Darmstadt did not purchase an available and offered e-book version of the textbook concerned.
[14] *TU Darmstadt*, paragraphs 43-46.
[15] Ibid, paragraph 47.

Other potential mechanisms

The EU's DSM directive

The EU has developed a new copyright approach through its so-called Digital Single Market (DSM) directive.[16] Under this directive, detailed mandatory EU-wide solutions to specific copyright-related activities are outlined. One of these concerns the use of works in digital and cross-border teaching. In this instance, article 5 of the directive recognises the non-commercial nature of education provision, and the "digital use of works" through secure electronic environments, subject to the conditions that use is "accompanied by an indication of source" and that licences for use of such works are visible. The option of providing for fair compensation for rightholders at member state level is recognised, although not mandated.

In digital and cross-border teaching, many learners need access to a broad range of materials beyond those already available through licensed digital products such as e-books and e-journals. This could conceivably open ground for providing digital access to individually requested works. Bearing in mind the case law discussed, this access would need to be subject to strict limitations on secure, controlled communication and respect for "normal exploitation". The matter of compensation would also need to be considered.

On balance, however, the prospect for this route to digital access is perhaps less promising than that offered by *VOB* and *TU Darmstadt* as it depends on a substantive expansion of the understanding of the concept of "use for the sole purpose of illustration for teaching or scientific research",[17] a longstanding arrangement which goes back as far as the original Berne Convention of 1886, and one which implies only partial use of works.

The national route

Perhaps the simplest formula to support digital lending is a direct application of *VOB* to national provisions. This approach would require national and EU courts to accept that there is no difference in principle between analogue and digital books, and between physical and digital lending. National provisions on lending by libraries are practically universal. In Ireland's case the underlying legal basis for lending by educational establishments is section 58(1) of the 2000 copyright act. A simple application of the *VOB* rationale to that sub-section would provide a firm legal basis for securing a conversion of the unstated intention of the legislature on lending as traditionally understood into digital lending in a manner which replicates standard features of the activity.

[16] Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC. *Official Journal of the European Union*, L130/92, 17.5.2019.
[17] Article 5(3)(a), InfoSoc directive.

Conclusions

Lending

On the basis of EU law relating to digital lending, the following are reasonable working assumptions:

- Under *VOB*, there is in principle and in practice no difference between the acts of print and digital lending, once digital lending equates to physical lending practices and outcomes;
- The conditions for digital lending have been explicitly confirmed in the *VOB* case for public libraries with the recognition that compensation is due to rightholders under the public lending right provisions of Directive 2006/115. This confirmation is not explicitly replicated for libraries in educational establishments, which are not covered by the compensation requirement under the public lending right;
- There is, however, an implicit rationale under *VOB* for applying international and EU conditions to update national provisions in the information society environment. This may need to be judicially tested. However, the presumption that digital lending applies to not-for-profit libraries generally is a strong one.

Access

A viable alternative to digital lending can be discerned from EU case law and legislation, i.e. that of digital access. Access through the internet could be based on the following considerations:

- Educational establishments can, within certain constraints, digitise titles from their own holdings and make them available in digital form through a dedicated on-site terminal;
- The rationale for (i) extending lending to digital mode developed in *VOB* can be equally applied to (ii) the extension of consultation through an on-site terminal to access through the internet. Again, this access is subject to certain constraints which have not been clarified, but the outline is discernible;
- As the dedicated terminals provisions are not subject to rightholder compensation, the same would apply to equivalent access through the internet in a manner which would ensure that a remote user would not be able to reproduce the work concerned, for instance through digital copying or physical printing.

Towards an implementation in practice

Where libraries in Irish educational establishments wish to provide digitised content off-site, two viable options present themselves: the “dedicated terminal adapted to internet access” option and the “national lending provision adapted to new technologies” option. In either case, the following steps should be taken in order to minimise risks of conflict with the rights of authors:

1. Ensure the work to hand has been legitimately acquired;
2. Ensure the “owned-to-loaned” or ”owned-to-access” ratio is strictly maintained, i.e. that there are no more copies available for loan or for dedicated terminal and digital access than are owned in print;
3. Ensure that digital security measures are in place to guarantee that digital copies replicate the behaviour of physical lending or access on a terminal;

4. Ensure that the extent of digitisation constitutes normal exploitation, such as relating to individual research or study needs, and not constituting the digitisation of entire collections.

There is a judgement call to be made on various types of "normal exploitation" of analogue books and how these might translate into digital services, for instance concerning short loan, multiple lending, reference materials, and how to reflect "normal" patterns of main lending. On a practical level, the extent of digitisation and access will likely also be determined by technical factors such as storage and security, and by administrative aspects of managing "owned-to-loaned" ratios. Libraries may also have to deal with expectations of users who may be inclined to see availability of e-books in terms of ready access, as opposed to regulated lending.

Once libraries apply a due diligence approach to formal and practical considerations, it is reasonable to conclude that academic and research libraries in educational establishments are in a strong position to deliver controlled digital lending of or access to works in their collections without recourse to compensation.

Future developments

In conclusion, it is conceivable that case law in Ireland or at EU level may rule specifically on digital lending or access for education or research purposes, in a manner that removes any ambiguities arising from *VOB*. Irish copyright legislation, which generally tends to closely follow EU directives, might also be adjusted to reflect new behaviours in the online environment. One route to this end could be an amendment of section 58(1) of the 2000 act to recognise the phenomenon of digital lending. In the alternative, existing text could be rephrased either to clarify that a copy of a work includes that in a digital format, or to introduce format-neutral terminology.