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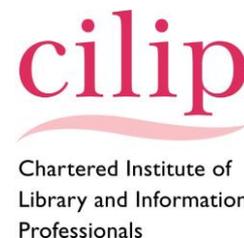
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## WORLD INTELLECTUAL PROPERTY ORGANIZATION

WIPO Standing Committee on Copyright and Related Rights (SCCR/31) 7-11 December 2015

### **Intervention by CILIP: the Chartered Institute of Library and Information Professionals**

#### LIBRARIES AND ARCHIVES LIMITATIONS AND EXCEPTIONS

##### **Topic 4 Lending**

Lending books has always been a core service of the modern publicly accessible library and is a fundamental component to libraries' role in the development and maintenance of a reading culture and in supporting research and education. The advent of e-books should mean that libraries can meet their users' expectations in the digital age by extending lending services beyond the confines of bricks and mortar, so the registered borrower can borrow an e-book at a time and from a place of their choosing. However, many libraries are finding that publishers are using licensing to curtail their ability to independently choose books to lend to their patrons because they fear that library e-lending might affect direct sales to the public, ignoring the very major spending that libraries themselves place with publishers and booksellers.

The difference in the legal treatment of print media and e-books has led to legal uncertainty for libraries. If a hard copy book or other tangible material is offered for sale, publishers cannot control who buys it or what they do with the physical object, since the 'first sale' or 'exhaustion' doctrine applies at the point of sale. However, with digital objects, publishers may license e-content rather than sell it outright. E-books are in fact 'communicated to the public' rather than distributed, so they become a 'service' and exhaustion does not apply to services.<sup>1</sup> This interpretation means libraries must enter into licence agreements for e-books with the rightholders who completely control whether to give access and on what terms. Unlike print media, libraries cannot loan digital media without permission from the rightholders. Publishers are thus able to discriminate against libraries as purchasers of e-books for lending.

The following situation has emerged in many developed countries including those in Europe and North America, especially with regard to libraries and 'trade' e-books which particularly affects public libraries. As more and more textbooks go purely digital (as research journals already have), the danger is that research institutions, national and university libraries, colleges and schools will also be affected.

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<sup>1</sup> The CJEU ruled in *UsedSoft* (C-128/11) that for software purchase the principle of exhaustion applies to both electronic downloads as well as physical media. Subsequently the *Allposters* ruling (C-419/13) indicated that for works protected by the InfoSoc Directive the exhaustion principle is tied to the physical medium that carries the work's expression, implying that exhaustion was not intended to apply to works made available by online, intangible means, such as downloads. Several test cases are now before the Court, including *Vereinigung Openbare Bibliotheken* (C-174/15) concerning e-lending, - see <http://ipcuria.eu/details.php?t=2&reference=C-174/15> and <http://ipkitten.blogspot.co.uk/2015/04/breaking-dutch-court-refers-questions.html>

A number of publishers, including major international publishers, are: refusing to sell digital content to libraries, imposing or limiting which titles they may acquire, prohibiting or unfairly restricting library e-lending, imposing disadvantageous licence terms, or charging unreasonable non-market related prices.<sup>2</sup> As a result, independent and professional library collection development policies for e-books are being severely distorted by the widely varying business strategies of individual publishers.

Some 2014 figures from the UK:

- 90% of the 50 most borrowed printed books (i.e. 45 titles) were available as e-books for direct sale to consumers, however
- only 3 of these popular titles (7%) had been made available to libraries for e-lending.
- A year earlier, 15% of e-books had been available to libraries for e-lending, so availability has actually decreased by 8%.
- Top international publishers such as Macmillan, Penguin and Simon & Schuster would not make any e-titles available for the UK library market.<sup>3</sup>

The legal framework for library lending urgently needs to be adapted to the digital reality so that the reading culture propagated through libraries is maintained, and in turn the continuance of public library services and also the livelihoods of authors, publishers and booksellers through direct book sales, since not only libraries buy books and represent a big market for publishers, but also library users because they are readers.

Publishing is international; the e-book purchase and lending problems described above are adversely affecting libraries in several countries and will spread like a virus from the developed world to more countries as their library services become more digitally focussed, since library users will increasingly have access to electronic devices and will wish to borrow e-books.

The solution should therefore be international, such as

1. A new international level 'right to acquire' at normal market prices, any work legitimately made available to the public (whether 'published' or 'released'), including the right to acquire digital files whenever relevant.
2. A new international level exception granting libraries a 'right to lend', including to 'e-lend' remotely, to their patrons, books in any format for a limited period of time and not for direct or indirect economic advantage; and
3. Extending the first sale or exhaustion principle to e-books.

Thank you Mr Chairman.

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<sup>2</sup> E.g. in the UK: (1) Limiting loans to one user at a time for each e-book licence purchased, resulting in long waiting lists. (2) Limiting the number of loans so the library must repurchase the same title after a defined number of loans. e.g. HarperCollins metered access only allows 26 checkouts. (3) Pricing some popular titles in excess of the print price. New and popular titles available through OverDrive cost c.£42.50 - the public can buy some of these titles from booksellers for just £0.99. (4) Imposing a holdback (embargo) period following publication lasting from a few weeks to several months or more. e.g. Random House offers e-books through the OverDrive platform but withholds its front list titles. Source: Chartered Institute of Library and Information Professionals (October 2014), Ebook Acquisition and Lending in Public Libraries. <http://www.cilip.org.uk/cilip/advocacy-campaigns-awards/advocacy-campaigns/ebooks/briefings-and-resources/ebooks-and-publi-0>

<sup>3</sup> Chartered Institute of Library and Information Professionals (October 2014) Op. cit.