Copyright and eLending in public libraries: an incomplete revolution?

by **Matteo Frigeri, Martin Kretschmer, Péter Mezei ***

Abstract: The central purpose of public libraries can be described as the need to meet the informational and knowledge needs of societies, which has both an economic and a cultural dimension. These fundamental policy concerns underpin the interventions at EU level, such as the Public Lending Right (Rental and Lending Rights Directive 92/100/EC, codified as 2006/115/EC), and the jurisprudence of the Court of Justice of the European Union (CJEU). However, the understanding has been muddied in subsequent rulings by the CJEU that address the new possibilities of digital libraries. While in VOB (C-174/15), the Court adopts a dynamic or evolving interpretation by extending the concept of Lending to eLending, Tom Kabinet (C-263/18) reduces the possibility of libraries to access digital copies of books by narrowing the scope for digital exhaustion. This article traces the policy context of the Public Lending Right in this light and assesses what lawful sources may be available for libraries to obtain access to digital copies of books for the purposes of eLending. The findings are bleak: Libraries following VOB are free to lend electronically to the public, however in practice they have been left without a digital collection. The article argues that it is in the public interest to maintain the equivalence of Lending and eLending and offers a range of possible interventions (under copyright, consumer and contract law) that may support the goals of libraries in the digital space.

Keywords: eLending, copyright, digital exhaustion, digitalisation, and communication to the public

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A. Introduction

1 The digitalisation of print media has radically reshaped the way literary works, notably books, magazines, and scientific papers, are disseminated and consumed, opening up fresh possibilities and challenges for access to knowledge.[1] The knock-on effects of this transformation have instigated a

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1 For an overview of an early account of the changes in the publishing industry brought by digitalisation, see generally Jean-Claude Guédon, *In Oldenburg's Long Shadow: Librarians, Research Scientists, Publishers and the Control of Scientific Publishing* (Association of Research Libraries, 2001).

shift in the prevailing social, economic, and legal paradigms (e.g., Open Access).[2]

2 The legal framework continuously strives to adapt to these advancements in technology and social practices. Reflecting these changes, new concepts are developed: 'digital exhaustion'[3] 'digital content',[4] and 'digital users',[5] are just a few examples. Similarly, the lending of eBooks ('eLending') has become increasingly more widespread.[6] From the perspective of libraries, pursuing their mission of promoting 'education, research and access to information'[7] requires them to offer eLending[8] as a service complementary to the lending of printed books. Nonetheless, while there is a general agreement among librarians that eLending should be part of the library's services, eLending is not a monolithic concept: different eLending models – e.g., one-copy/one-user - coexist in Europe[9] and beyond,[10] and its essential features still remain largely contested.[11]

3 There is no doubt eLending poses difficult questions, and is characterised by conflicting interests and views. It forces us to balance private and public interests. If the development of an eLending service is left entirely to a negotiation with publishers, there are questions on the economic affordability of this model, especially when the decreasing budgets of libraries are considered.[12] As a result, local libraries may be priced out of this service.[13] Even when libraries can afford to pay for the eLending licences, they still have no redress if publishers refuse to license access to the eBook,[14] with some recent examples symbolising the lack of legal redress in such cases.[15] Publishers, on the other

2 The principles of the Open Access Movement are outlined in the Declaration by the Budapest Open Access Initiative (BOAI) – BOAI, 'Declaration' (2002) https://www.budapestopenaccessinitiative.org/read/.

3 Broadly stated, digital exhaustion refers to the legal doctrine according to which the first sale or transfer of ownership of digital content (e.g., eBooks) exhausts the right of the rightholders to control further resales of the digital content. The first case recognising a form of digital exhaustion was C-128/11 UsedSoft (CJEU) ECLI:EU:C:2012:407. For an in-depth discussion of the doctrine, see Péter Mezei, *Copyright Exhaustion: Law and Policy in the United States and the European Union* (Cambridge University Press 2022); Caterina Sganga, 'A Plea for Digital Exhaustion in EU Copyright Law' (2018) 9 JIPITEC 211, para 1; Simon Geiregat, *Supplying and Reselling Digital Content – Digital Exhaustion in EU Copyright and Neighbouring Rights Law* (Edward Elgar 2022).

4 Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services.

5 L Oprysk and K Sein, 'Limitations in End-User Licensing Agreements: Is there a Lack of Conformity Under the New Digital Content Directive?' (2020) 51 IIC 594.

6 Andrew R Albanese, 'Frankfurt Spotlight: Library E-books Have Leveled Up' (*Publishers Weekly*, 2022) <Frankfurt Spotlight: Library E-books Have Leveled Up (publishersweekly.com)>.

7 WIPO, 'Objectives and principles for exceptions and limitations for libraries and archives' (Document presented to SCCR Committee, 2013) p. 2.

8 This mission was also stressed by AG Szpunar in his Opinion to C-174/15 - Vereniging Openbare Bibliotheken (AG Opinion C-174/15 VOB) ECLI:EU:C:2016:856, para 1-3.

9 Dan Mount, 'Research for cult committee – eLending: Challenges and opportunities' (EU Parliament, 2016) ('eLending Report').

10 O'Brien et al.., 'E-books in Libraries: A Briefing Document Developed in Preparation for a Workshop on eLending in Libraries' (Berkman Center Research Publication, 2012) ('US eLending report'), p. 29.

11 For example, publishers may consider that access to an eBook on the basis of a subscription model may act as a substitute for libraries, giving access to a collection of eBooks for a monthly fee. Similarly, platforms such as OverDrive may be deemed to already offer a viable lending model for eBooks.

12 This may be described as an "affordability" problem – see Manon A Ress, 'Open-Access Publishing: From Principles to Practice' in G Krikorian and A Kapczynski (eds.), *Access to Knowledge in the Age of Intellectual Property* (Zone Books 2010), p. 477-478.

13 AG Opinion C-174/15 VOB (n. 8), para 38.

14 Ibid. For libraries, eLending is framed as an existential crisis. This is well captured by the words of AG Szpunar in C-174/15 VOB, where he stated that 'If libraries are unable to adapt to this trend, they risk marginalisation and may no longer be able to fulfil the task of cultural dissemination which they have performed for thousands of years'. See AG in C-174/15 VOB (n. 8) para 3. A similarly ominous warning had also been raised by Sieghart: 'the inability to offer eLending will make libraries increasingly irrelevant in a relatively short time'. See William Sieghart, An Independent Review of eLending in Public Libraries in England ('Sieghart Review') (Report of Department for Culture, Media and Sport, 2013), p. 7. Iterations of this statement are widely found in the literature. See Séverine Dusollier, 'A Manifesto for an eLending Limitation in Copyright' (2014) 5 JIPITEC 213, para 3: 'libraries will lose a great part of their role in society, and most of their soul'.

15 See Wiley case for a recent example. Hohoyanna (2022) Wiley withdrawing key eBook titles from library collections – evidence required please available at: https://academicebookinvestigation.org/2022/09/07/wiley-withdrawing-key-ebook-titles-from-library-collections-evidence-required-please/.

hand, lament that by allowing the public to freely access books digitally, a displacement of sales will occur, thus negatively affecting the growth of their eBook markets.[16] More ambiguous is the position of authors – but this is mostly due to the opacity of their contractual arrangements with publishers; however, secondary evidence suggests that they may be worse off in terms of remuneration for digital consumption of their works when compared to print,[17] in a market that has long sinceshown a reduction in authors' long-term earning potential.[18]

4 These clashes are not new to the publishing industry. As an illustration, both 'private lending'[19] and 'dollar books'[20] have been similarly characterised as existential threats to publishers.[21] Such demands to resist economic and technological changes need therefore to be carefully assessed based on the available evidence.[22] The focus of this Article will move however in a different direction, looking at how the law regulates and adapts to these changes.

5 The context is based on the relatively recent judgments issued by the CJEU in C-174/15 VOB (2016)[23] and C-263/18 Tom Kabinet (2019).[24] The Court's decisions offered an interpretation of how copyright law regulates the temporary distribution of digital copies of books. As this Article demonstrates, these two decisions are closely interlinked; the piecemeal approach taken by the Court, which fails to regulate consistently temporary digital distribution of books – whether commercial or non-commercial – raises significant issues that need to be urgently addressed. No evidence is more telling than the fact that, despite that in C-174/15 VOB the Court offered Member States the possibility to allow libraries to offer eLending on the same basis as the lending of printed books, no Member States has seized that opportunity. While this may well be due to a lack of political appetite, this Article demonstrates how legal equivalence between lending of books and eBooks cannot be implemented in practice. Some policy recommendations will be canvassed at the end to redress this issue.

6 The scope of this Article will therefore be to evaluate the recent judicial interventions of the CJEU (C-174/15 VOB; C-263/18 Tom Kabinet) against the background of the wider EU policy on the lending of digital and physical books. In doing so, the implications of the Court's judgment in C-174/15 VOB on eLending will be assessed in light of C-263/18 Tom Kabinet judgment.

7 The analysis will be developed in different stages. The lending of books by libraries to the public will be the starting point of the discussion.[25] The Article

16 In particular, see Breemen et al., 'Online uitlenen van e-books door bibliotheken: verkenning juridische mogelijkheden en economische effecten' ('Dutch eLending report') (2012) AmsterdamSEO Economisch Onderzoek/IviR, p. 51-52.

17 In relation to eLending, see AG Opinion C-174/15 VOB (n. 8) para 34. The format of the books affects the share of royalty to which authors are entitled, including for sales of books. For paperback titles, earnings are divided in a 50-50 split, whereas standard contracts for eBooks entitles author to a 25% share of the list price. See The Authors Guild, 'Half of Net Proceeds Is the Fair Royalty Rate for E-Books' (*The Authors Guild, 9th July 2015*). <https://authorsguild.org/news/half-of-net-proceeds-is-the-fair-royalty-rate-for-e-books/>; Jane Friedman, 'What Do Authors Earn from Digital Lending at Libraries?' (*Jane Friedman*, 30th October 2021). https://www.janefriedman.com/what-do-authors-earn-from-digital-lending-at-libraries/.

18 See Thomas et al., 'Authors' Earnings in the UK' (PEC, 2023) p. 8. See also generally CREATe's ongoing Project monitoring of authors' earnings: 'Authors' Earnings and Contracts' <https://www.create.ac.uk/project/creative-industries/2022/12/08/authors-earnings-and-contracts/>.

19 'The fate of a book after it is sold is an important one for the book industry, reflecting as it does the possibility of lost sales' in L A Wood, 'The Pass-Along Market for Books: Something to Ponder for Publishers' (1983) Publishers Weekly.

20 'Dollar books' refers to the pricing policy adopted by new publishers on the market (including Simon & Schuster, founded in 1924) to 'reduce the price of their new hardcover fiction books to one dollar in order to compete with remainders and proliferating cheap reprint series'. At the time, a study carried out by the Book Publishers Research Institute forecasted that dollar books would result in the 'death of six thousand book retailers'. See Ted Striphas, *The late age of print: Everyday book culture from consumerism to control* (Columbia University Press 2009), p. 34-35, relying on the account provided in Edward L Bernays, *Biography of an Idea: Memoirs of Public Relations Counsel Edward L. Bernays* (Simon & Schuster 1965), p. 485.

21 A notable proponent of this narrative was George Orwell, who once described 'cheap books' as a 'disaster' for publishers. See Milton Friedman, *Price Theory* (New Brunswick 2008).

22 Access to data is a major obstacle in testing claims made on either side – whether libraries or publishers. However, several empirical studies focus on demand substitution in the book sector. As an example, see: Anindya et al., 'Internet Exchanges for used Books: An Empirical Analysis of Product Cannibalization and Welfare Impact' (2006) 17/1 Information Systems Research 3; K Kanazawa and K Kawaguchi, 'Displacement Effects of Public Libraries' (2022) 66 Journal of the Japanese and International Economies 101219.

23 C-174/15 – Vereniging Openbare Bibliotheken (VOB) [2016] (CJEU) ECLI:EU:C:2016:856.

24 C-263/18 Nederlands Uitgeversverbond and Groep Algemene Uitgevers ('C-263/18 Tom Kabinet') (CJEU) ECLI:EU:C:2019:111.

25 This practice has both long-established social and historical foundations and is a classic example of a form of non-

will describe how the EU regulated public lending, what policy goals the legislation was meant to promote, and the nature and the scope of the rights it established – first and foremost, the Public Lending Right (PL right)[26] in the Lending Right Directive.[27] A second crucial step is then to determine the extent to which the identified policy goals were intended to be exported into the digital world, adapting the PL right to new developments in 'technology, market, and behaviour'.[28] The policy and judicial developments reviewed in this section will culminate in the analysis of the CJEU's judgment in C-174/15 VOB, a landmark case in so far as the scope of the PL right was proactively extended to cover acts of lending of digital copies of books, subject to some conditions.

8 Despite the fact that this judgment promised to ensure legal equivalence between lending and eLending, little changed following this ruling. The third section will proceed with examining the causes of the lack of effectiveness of the Court's ruling. Emphasis will be placed on a specific condition introduced by the CJEU for extending the PL right to eLending: that libraries first obtain the digital copies of the books from a lawful source.

9 It is submitted that unless libraries are granted independent powers to obtain digital copies of books, eLending will remain largely shaped by market forces, potentially negatively impacting the public goals that the Lending Right Directive was meant to promote. To solve this, the Article will conclude by highlighting several policy options to either increase or even guarantee libraries independent means of access to digital copies when offering an eLending service.

commercial access to knowledge.

26 PL right refers to the right to authorise the making available for use to the public of copyright works, for a limited period of time and not for direct or indirect economic or commercial advantage, through establishments accessible to the public – see Art 1 and 2 of the Lending Right Directive. In simpler terms, it regulates the ability of publicly accessible libraries to lend copyright works (e.g., books) to the public.

27 Directive 2006/115/EC on rental right and lending right and on certain rights related to copyright in the field of intellectual property (2006) L 376/28 ('Lending Right Directive').

28 AG Opinion C-174/15 VOB (n. 8) para 27.

B. Regulating access to knowledge – the introduction of the Public Lending Right

I. The Origins of the Public Lending Right

10 The public lending of literary works, especially books, is one of the core activities of libraries.[29] Although part of a library's collection may be composed of public domain works, a considerable portion remains protected by copyright.[30] Following the harmonisation of the PL right[31] in 1992[32] across the EU, the lending of books to the public has been added to the exclusive rights of authors.

11 It is not altogether evident why authors should be able to prevent the public lending of books, an activity traditionally held to be a prerogative of libraries. Unsurprisingly, the justification for the creation of this right has been 'one of the most disputed issues' of the Lending Right Directive, with critics highlighting how lending does not create any additional economic value to be redistributed back to authors.[33]

12 Considering that, following C-174/15 VOB, this Directive may also regulate the lending of digital copies of books by public libraries ('eLending'),

29 Dusollier (n. 14) para 7.

30 The extensive duration of the term of copyright – extending to the life of the author + 70 years – means that almost all books written after 1950 are still currently protected by copyright; As acknowledged by Recital 10 of Commission, Recommendation 2006/585/EC on the digitisation and online accessibility of cultural material and digital preservation O.J.C.E. L 236/28, 31 August 2006. See also Commission, 'i2010:Digital Libraries' (Communication, 2005), p. 6.

31 The ''right to authorise ... the lending of originals and copies of copyright works', with lending meaning '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'. See, respectively, Directive (EU) 2006/115/EC on rental right and lending right and on certain rights related to copyright in the field of intellectual property ('Lending Right Directive') [2006] OJ L 376, artt 1(1) and 2(1)(b).

32 The lending right was harmonised by the Directive (EU) 92/100/EC, codified in Lending Right Directive (n. 27).

33 Silke von Lewinski, 'Rental and lending rights directive' in MM Walter and S von Lewinski (eds), *European Copyright Law: A Commentary* (OUP 2010), para 6.1.7; Ansgar Ohly, 'Economic rights' in Estelle Derclaye, *Research Handbook on the Future of EU Copyright* (Edward Elgar 2009), p. 224.

understanding its drafting history and the nature of the legislative compromise is essential.

13 The arguments in favour of harmonising the PL right at the EU level were first canvassed by Dietz in an Article in 1978.[34] In the Article he maintained that, unless authors are granted a non-exhaustible PL right, there is a 'high risk that editions of works would be greatly reduced' due to the growing resort to public libraries to access copyright-protected works'.[35] His concerns did not appear to be grounded in empirical evidence, being rather a matter of logical deduction from general principles: that copyright should cover 'mass utilization of works' and that authors be compensated for it.[36] Yet this does not automatically lead to a conclusion that authors should be granted an exclusive right to control lending; in fact, a remuneration right was considered equally satisfying by many Member States at the time[37].

14 Dietz's arguments were rejected by the Commission in the 1988 Green Paper.[38] The reasons were as follows:

15 1) minimal economic importance - public lending schemes generated small revenues, and, at the time, book rental was almost non-existent;

16 2) lack of consensus at the national level – only a minority of Member States had lending schemes in place at the time, and the Commission felt harmonisation would have interfered with national cultural policies;

17 3) the subject matter of harmonisation was considered inappropriate – the PL right was construed as involving the regulation of public financing of the cultural sector rather than harmonisation of the copyright system; and

18 4) the lack of a negative effect on the free circulation of books or on the development of the book publishing industry.[39]

19 The later decision to add the Lending Right Directive Proposal[40] ('the Proposal') to the legislative pipeline bears witness to a shift in the Commission's evaluation of the above factors. In particular, the Proposal describes lending as a 'considerable use' of copyrighted works both in terms of economic value and quantity of works affected, resulting in the 'displacement of sales'.[41] Despite the fact that a sufficient level of consensus had been gathered around the need for such a right, a division on exactly how this right should be defined and what exceptions should be provided persisted. The broadly worded definitions in the Directive and its permissive exceptions are a direct consequence of that.

II. Understanding the Public Lending Right

20 In the Lending Right Directive, lending is defined as 'making available for use, for a limited period of time and not for direct or indirect economic or commercial advantage, through *establishments ... accessible to the public*'.[42] As apparent from this definition, the PL right only covers a limited part of what we would normally define as non-commercial digital access to knowledge. For example, the policy of academic and research libraries more generally to allow users to permanently download full or part of eBooks would need to be reconsidered if such acts are to qualify as eLending, falling foul of the condition of temporary access.

21 Given what appears to be quite a demanding condition that the lending is of a non-commercial nature - 'not for direct or indirect economic or commercial advantage' - it should be noted that often these provisions have been subject to a more relaxed interpretation.[43] Interestingly, the lending right does not extend to inter-library loans, as specified by Recital 10 of the Directive.[44] Alongside a PL right, the Directive also introduced the possibility for Member States to allow libraries to carry out acts of public lending as long as authors received

34 Adolf Dietz, *Copyright Law in the European Community* (Alphen aan den Rijn 1978).

35 Ibid para 250.

36 Ibid.

37 In fact, several countries had already adopted 'library royalties': Germany, Denmark, and the Netherlands. Germany, for example, had introduced a 'sustainable compensation for hiring/loaning' of books under s 27, para 1 of the Federal German Copyright law of 1972. Other countries had similar system (Italy), and the UK was considering the enactment of a new regulation. See Dietz (n. 34) para 253-255.

38 Commission, 'Green Paper on Copyright and the Challenges of Technology' (Green Paper, 1988), COM(1988) 172.

39 Ibid para 4.4.4 to 4.4.10.

40 Proposal for a Council Directive on rental right, lending right, and on certain rights related to copyright (Lending Right Directive Proposal) COM/90/586 final.

41 Ibid para 9. The authors do not know whether the Commission relied on empirical evidence to draw such conclusions.

42 Lending Right Directive Art 2(b).

43 For example, it is generally accepted that the application of a yearly administrative fee for access to the library services will not be sufficient to give commercial character to the acts of making available. See Von Lewinski (n. 33) para 6.1.18-6.1.26.

44 Ibid Recital 10.

'remuneration' for such use[45] – a derogation from the PL right ('PL right exception').[46]

22 Notwithstanding its non-mandatory nature, the carving out of a specific PL right Exception for public libraries is an integral component of a harmonised PL right. In other words, the right and the exception work in tandem, resulting thus in the creation of a 'remuneration right'.[47] This means that rather than a right to control, the authors receive a right to obtain remuneration.

23 Since the explicit aim of the Lending Right Directive is to promote both economic and cultural values,[48] the exclusive nature of the PL right should not frustrate the ability of Member States to pursue their national cultural policies – for example, the promotion of access to works in public libraries.[49] Economic and cultural goals are deemed to complement each other: the remuneration of authors is considered to stimulate the creation of new works without limiting distribution.[50]

24 It is unclear whether this interpretation of the Directive coincides with the initial intentions of the Commission, which seemed to be more concerned about the negative impact of public lending on the ability of authors to exploit copyrighted works by rental.[51] However, the Court's expansive interpretation of the PL right in C-174/15 VOB shifted the emphasis on the importance of the cultural goals as a telos of the exception.[52]

25 It is also important to note that, while this paper and C-174/15 VOB focused exclusively on one category of works – namely, literary works in the form of books – the Directive is applicable more generally to different types of works, including films and recordings. It is therefore possible that a wider derogation in favour of eLending may be justified by the cultural and informative content of the work excluded from protection.[53] A flexible interpretation is also justified by the historic context of the Directive. At the time of its first entry into force, it represented an attempt to regulate the growing market for the renting of 'cassettes, CDs and DVDs'; shortly after being adopted, it increasingly became obsolete as the result of technological progress outstripping the pace of the legislative process.[54]

26 Even before harmonisation, some Member States already provided in their legislation for a PL right, either in the form of an exclusive right or a remuneration right[55] (most Member States had opted for the latter).[56] Public lending as a practice has long been 'deeply rooted in the national cultural traditions of the Member States'[57] and generally considered to strike a fair balance between the interests of the authors and the public – two notions which sometimes overlap. Its intrinsic connection with cultural policy makes it an area where the

45 Lending Right Directive Art 6(1). Some categories of establishment may be exempted from the need to provide remuneration - see Lending Directive Art 6(3).

46 There is an inherent confusion in the use of the term PL right. In fact, PL right may both cover the exclusive right under Art 2 and the remuneration right provided by Art5 of the Lending Right Directive. The right in Art 2 of could be described as a public Lending right in so far as it only applies to lending by publicly accessible establishments – it does not cover the lending by private parties (hence, a Public Lending right); the derogation in Art 6(1) of the Directive is more easily construed as an exception, although it contains a right to remuneration. For the sake of clarity, it would have been better had the legislation introduced a non-mandatory remuneration right, rather than this 'right + exception' configuration.

47 For some limited categories of establishments, Member States may even remove the obligation to remunerate authors (see Art 6(3) Lending Right Directive). This derogation should be interpreted restrictively – see *inter alia* C-198/05 Commission vs Italy [2006] ECLI:EU:C:2006:677 para 17-18. See 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 ('EU Report on PL right') (2002) COM(2002) 502 final, p. 5.

48 bid Recital 3: 'the adequate protection ... of lending rights ... [is] of fundamental importance for the economic and cultural development of the Community'.

49 Von Lewinski (n. 33) para 6.1.6.

50 Ibid Recital 5.

51 EU Report on PL right (n. 47) p. 4: 'the steady increase in public lending activities in the music and film sector might have a considerable negative effect on the rental business and thereby deprive the rental right of its meaning'.

52 C-174/15 VOB para 51: the extension of lending to cover digital lending was deemed justified by the 'the importance of the public lending of digital books' and 'the contribution of that exception to cultural promotion'. See also Lending Right Directive Art 6(1), which allows fixing the level of the remuneration in accordance with the Member State 'cultural promotion objectives'.

53 In other words, the recognition of the functional equivalence of digital and physical lending does not force us to recognise the equivalence between lending a videocassette and streaming music. Since its inception, some Member States were in favour of recognising lending rights only for some specific categories of media – Von Lewinski (n. 33) para 6.1.7.

54 The expression paraphrases the Opinion of AG in C-174/15 VOB at para 28.

55 The first country to introduce a PL right was Denmark in 1946. See EU Report on PL right (n. 47) p. 3.

56 Triaille et al., 'Study on the application of Directive 2001/29/EC on copyright and related rights in the information society' (Commission, 2013), p. 328.

57 Ibid p. 3.

Commission needs to exercise a degree of deference towards the competences of Member States.

27 It is interesting to contrast the PL right with the Communication to the Public right ('CP right'), harmonised under Art 3 InfoSoc.[58] The latter contains a different set of exceptions and safeguards that, from the perspective of libraries at least, may well be considered as much narrower than their counterpart in the Lending Right Directive. As such, the achievement of important cultural and societal goals specifically supported by the PL right exception does not find a corresponding counterpart in any of the exceptions in the InfoSoc For this reason, it is worth spending a considerable amount of time discussing under which regulatory regime certain acts should fall and whether there is any overlap between the PL right and the CP right.

28 As an initial remark, it can be maintained that the PL right does not seem to have ever been originally intended to cover digital access to books, despite that the question was considered.[59] Undoubtedly, this is partly due to the belief that the market will satisfactorily regulate and provide incentives to digitalise, distribute and make available eBooks to libraries for eLending, and any regulation at the time could prematurely stifle those attempts.[60] It remains an open question whether this rather liberalist approach is still warranted in light of the significant developments both in the eBook and eLending market.[61]

III. Does the Public Lending Right regulate eLending? Policy discussion before C-174/15 VOB

29 Before the judgment in C-174/15 VOB, the Commission had explicitly ruled out the possibility that the PL right could extend to eLending.[62] While recognising that – 'in practical economic terms' – digital and physical lending are functionally equivalent, it is desirable that such an extension should be 'confirmed in legislation'.[63] At the same time, the Commission also warned about the importance not only of reinforcing copyright in the context of digital forms of exploitation but also to 'recognise the interests of the different parties concerned', including users and libraries.[64] It is remarkable that already at the time of drafting InfoSoc in 1995, thus before the development of an eBook market, the Commission was already considering the regulation of eLending by public libraries.

30 It should also be noted that the CP right – due to its 'umbrella nature'[65] – is generally deemed to exclusively regulate the 'on-demand transmission of works', a category also capable of encompassing eLending.[66] This conclusion is also supported by the international obligations to which the signatories of the WIPO treaties[67] are subject, and is further justified in light of the impact of eLending on the economic interests of rightholders.[68]

31 It is therefore without surprise that for a long time, this question was considered settled. Many Member States had long held eLending to fall beyond the scope of the Lending Right Directive.[69] In its Communication on Digital Libraries in 2005, the Commission expressed its belief that 'a substantial change in the copyright legislation, or agreements [with rightholders]' would be necessary for libraries to be able to provide digital access to their collection.[70] The academic literature also generally leaned towards such view, although never explicitly excluding this possibility.[71]

32 While recognising that eLending 'may well play a major role' for libraries in the future, for the

58 Directive (EU) 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society ('InfoSoc') [2006] OJ L 167.

59 Caterina Sganga, 'Public eLending and the CJEU: chronicle of a missed revolution foretold' (2016) 1/2 Opinio Juris in Comparatione, p. 10. In building her argument, she refers to Lending Right Directive Proposal, p. 4.

60 Von Lewinski (n. 33) para 6.1.28.

61 Giblin et al, 'Available, but not accessible? Investigating publishers' eLending licensing practices' (2019) 24 Information research, p. 16.

62 EU Report on PL right (n. 47) p. 12.

63 Green Paper on Copyright and Related Rights, COM(1995) 382, p. 58.

64 Ibid p. 59.

65 'Guide to the Copyright and Related Rights Treaties Administered by WIPO' (WIPO, 2003), p. 207.

66 Commission, 'Follow-up to the Green Paper on Copyright and Related Rights in the Information Society' (Policy Document, 1996) COM(1996) 568, p. 12-14.

67 WIPO Copyright Treaty (WCT) art 10 and WIPO Performances and Phonograms Treaty (WPPT) art 16.

68 Commission, 'Travaux préparatoires for the Proposal for a Directive on the harmonization of certain aspects of copyright and related rights in the Information Society' ('Commission travaux préparatoires') (1997) COM(97) 628, p. 31.

69 See Sieghart Review (n. 14) p. 9 and 'Government response to the public consultation on the extension of the Public Lending Right to rights holders of books in non-print formats' (Department for Culture, Media & Sport, 2014), p. 10. See also Dutch eLending report (n. 16) p. 11.

70 i2010:Digital Libraries (n. 30) p. 6.

71 Dusollier (n. 14) para 28; Dutch eLending report (n. 16) p. 35.

Commission the organisation of this service was better regulated on a 'contractual basis, whether individual or collective agreements'.[72] At the same time, it was also recognised how the provision of digital access by '*public libraries* should not be subject to undue financial or other restrictions'.[73] Along the same line also follows Recital 40 InfoSoc, which while echoing the desire to leave the regulation of 'on-line delivery of protected works' to private ordering,[74] also reiterates that 'specific contracts or licences should be promoted which, *without creating imbalances*, favour such establishments and the disseminative purposes they serve'.[75]

33 Nonetheless it remains an open question which instruments are available to reconcile the possible negative effects of private ordering and IP rights with wider societal interests in access to knowledge. Even more so, considering that the CP right does not foresee any exception to support libraries in offering digital access to eBooks.[76]

34 At the time of writing, these policy aspirations seem to remain largely unachieved; undue restrictions and imbalances remain a prominent feature of the eLending market(s).[77] The tendency of private ordering to override rather than promote limitations and exceptions is also a process that would require a reconsideration of the effectiveness off market-based solutions.[78]

72 Ibid.

73 Ibid p. 32: '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'.

74 This is partly due to the lack of exemption to the benefit of libraries for the exclusive CP right for online delivery of protected material to remote users, the economic importance of these uses and what at the time were considered 'new promising involving licenses, based on contracts' which showed the potential to arrive at mutually satisfactory solutions for all parties involved, including libraries'. See Commission travaux préparatoires (n. 68) p. 17-18.

75 InfoSoc Recital 40.

76 See ibid: 'Such an exception or limitation should not cover uses made in the context of on-line delivery of protected works or other subject-matter'.

77 Daniel A. Gross, 'The Surprisingly Big Business of Library E-Books' (The New Yorker, 2nd September 2021) <https://www.newyorker.com/news/annals-of-communications/an-app-called-libby-and-the-surprisingly-big-business-of-library-e-books>; Giblin et al, 'What can 100,000 books tell us about the international public library eLending landscape?' (2019) 24/3 Information research.

78 Lucie Guibault, 'Why Cherry-Picking Never Leads to Harmonisation The Case of the Limitations on Copyright under Directive 2001/29/EC' (2010) 1 JIPITEC 55, para 33.

79 See eLending Report (n. 9).

80 Sieghart Review (n. 14) p. 9.

81 The following principles are a summary of the recommendations made in the Sieghart Review. See Sieghart Review (n. 14) p. 8-9.

82 At the moment, the 'metered by loans' is a widely model adopted to calculate the duration of the license. This reflects both the nature of the right (e.g., each individual act of eLending is subject to authorisation) and the desire to implement a set of 'frictions' into eLending.

C. C-174/15 VOB – the Evolution of the Concept of Lending from Print to Digital

I. Prequel to the judgment in C-174/15 VOB

35 When the CJEU issued its judgment in C-174/15 VOB, different forms of eLending had already been tested in Europe. As eLending moved from concept to operation, a body of evidence and studies have emerged attempting to map the different models of eLending and how these work in practice, with one report being commissioned by the EU parliament.[79]

36 The salience of these studies lies in the fact that they all contributed to developing a conception of what eLending should be, defining the common principles that should underpin the provision of this service. Notable in this regard is the independent review of eLending carried out in England, where it was recommended that PL right should be extended to the lending of eBooks – in the words of the author, a critical step to 'allow libraries to progress with their digital strategies'.[80]

37 Among the variety of existing models, the study also extracted a common set of principles[81]:

- eLending should emulate its printed counterpart, in terms of 'friction' and the non-commercial nature of the lending books;
- eLending should allow access to books remotely, beyond the library premises;
- to reduce its economic impact on rightholders, the one-copy-one-user model should be adopted;
- to reflect the deterioration to which printed books are subject, the number of loans of digital copies of books should also be capped accordingly;[82] and
- the remuneration of authors should be ensured by the extension of PL right to both physical and digital

formats.[83]

38 As will be shown, these same principles were later to inform the notion functional equivalence between lending and eLending developed in C-174/15 VOB. The judgment refrains from citing directly any of these studies, yet they constitute an argumentative space within which the Court had to operate. Interesting in this respect is a study by the University of Amsterdam, that looked specifically at whether the (at the time) existing EU legislative framework could be relied upon to introduce an exception, and therefore enable, eLending by public libraries.[84]

39 The findings of the study – arguing, in contrast with the judgment in C-174/15 VOB, that the Lending Right Directive applies exclusively to physical copies of books – further cement the conclusion that the decision of the CJEU was surprising in its outcome,[85] and may be regarded as a remarkable instance of judicial activism. In light of what has so far been discussed, it is difficult not to see implicit in the Court's reasoning an impatience vis-à-vis the lack of legislative intervention in the regulation of eLending in Europe.

II. The interpretation of the concept of lending in C-174/15 VOB - a missed r/evolution?

40 The CJEU's judgment in C-174/15 VOB has already been the object of extensive analysis.[86] We will focus only on the most important elements relevant to the present discussion. In a nutshell, the CJEU held that the concept of lending in the Lending Right Directive extends to the 'lending of a digital copy of a book', provided that only one copy can be downloaded and that such a copy is made inaccessible after the expiry of the lending term.[87] The salience of the judgment stems from the promise to relieve libraries from reliance on publishers for offering their eLending service in so far as it will allow Member States to develop a governance framework within which eLending can be carried out under substantively the same conditions as the lending of printed books ('ePL right scheme').[88] However, the fulfilment of such a promise requires a degree of political goodwill from the national legislature, with little progress having been made so far.

41 The CJEU reached this judgment on the basis of a negative reasoning: it held that there is no decisive ground for excluding, *in all cases*, the lending of digital copies from the scope of the Lending Right Directive.[89] This conclusion was reached by looking at both international law,[90] and the drafting history of the Directive. The arguments in favour of a broader interpretation of the concept of 'lending a digital copy' were considered:

- the adaptation of copyright to 'new economic development' is presented as an explicit aspiration of the Directive – and, in the words of the CJEU, eLending 'indisputably forms part of those new forms of exploitation';[91]
- the extension of the scope of the Lending Right Directive to eLending is considered important both for ensuring the effectiveness of the PL right exception and meeting the objectives of the Directive - the promotion of culture;[92] and
- the recognition that assimilation of digital and physical lending cannot be ruled out in light of eLending's characteristics, which are 'essentially similar to the lending of printed books'.[93]

83 Sieghart Review (n. 16) p. 8-9.

84 Dutch eLending report (n. 16).

85 For an overview of C-174/15 VOB in the context of the Dutch eLending report, see Breemen (n. 16).

86 Breemen (n. 16) p. 249-253; Emma Linklater-Sahm, 'The Libraries Strike Back: The "right to e-Lend" Under the Rental and Lending Rights Directive: Vereniging Openbare Bibliotheken' (2017) 54/5 Common Market Law Review 1555; Caterina Sganga (n. 3); Rita Matulionyte, 'Lending e-Books in Libraries: Is a Technologically Neutral Approach the Solution?' (2017) 25/4 Int. J. Law Inf. Technol. 259.

87 C-174/15 VOB para 54.

88 Public Lending schemes for printed books exist in several Member States countries, including Germany, France, and Italy. See EU Report on PL right (n. 47) p. 7-10. for an updated and international view of countries having established PL schemes, see 'Established Schemes' (*Public Lending Right International*) <https://plrinternational.com/established>.

89 Ibid para 39-40.

90 The Court found that neither the WIPO Treaty nor the agreed statement did preclude the concept of lending to include the lending of intangible (digital) copies. In doing so, it treated the lending right as independent of the rental right which, on the contrary, under international law cannot be interpreted as extending to digital copies (WIPO Treaty art 7 and agreed statement). See C-174/15 VOB para 31-39.

91 C-174/15 VOB para 45.

92 Ibid para 51.

93 Ibid.

42 The reasoning of the Court is not free from criticism. Contrary to the account provided in the judgment,[94] the Proposal was quite explicit in its desire to exclude all forms of immaterial exploitation from the scope of the Directive, believing rather that questions 'related to the economic data transmission' should be regulated by a different legislative framework to ensure consistency (see InfoSoc).[95] While the CJEU correctly states that the 'explanatory memorandum finds no direct expression in the actual text of the proposal',[96] the Court fails to recognise that: 1) eLending had been harmonised by Art 3 InfoSoc, providing 'authors with the exclusive right to authorise or prohibit any communication to the public of their works'; and – as previously shown - 2) the common understanding, shared by the Commission, Member States, and the academic literature, that the extension of the PL right regime to eLending would require a legislative intervention.

43 By not acknowledging how the eLending of books is, even before the CJEU's intervention, an act fully governed by copyright (under InfoSoc), the Court was able to claim that excluding 'eLending entirely from the scope of Directive 2006/115 would run counter to the general principle requiring a high level of protection for authors'.[97] *Ex contrario*, the non-extension of the PL right to eLending did not leave an unregulated legal void. Rather, had the authors' PL right not been recognised to extend to eLending, they would simply have exercised control on eLending via the very expansive CP right.[98] At least, this was how eLending operated – and still operates – in practice. eLending in public libraries is built on licensing agreements with publishers – exercising the rights conferred by copyright law – and with commercial digital platforms – granting licences to allow library's members to access eBooks for a limited period of time.[99]

44 The judgment then moves on to provide further guidance on how a PL right for eLending may be implemented in national law. Member States have the option of setting additional conditions to PL right beyond the minimum threshold of protection for authors envisaged by the Directive.[100] For example, national legislation could incorporate the requirement of consent of authors in order to reduce the risk of prejudicing 'the legitimate interests of authors'.[101] Beyond the specificities of the referred question, this implies an obligation on Member States to consider how the PL right may affect the interests of authors and to minimise any prejudice thereof.[102] It follows from this – inter alia – that the application of the PL right exception is precluded when *a digital copy of a book* has been obtained from an unlawful source.[103]

45 Two important observations are drawn. First, a specific assessment is called for to determine how a national ePL right scheme specifically affects the legitimate interests of the authors.[104] This determination will be particularly challenging for Member States: while eLending and lending may be objectively considered functional equivalents,[105] it is a much more complex question to ask in what different ways they affect the interests at stake.[106] It also remains unclear to what extent and how the interests of authors should be balanced with the interests of libraries – and the public, by extension – for example by ensuring that the substance of eLending is not eroded by overriding contractual terms,[107] by adding unnecessary frictions or compromising the privacy of libraries' digital users.

46 Secondly, a condition of obtaining a copy from a lawful source effectively ensures that eLending remains largely regulated by the CP right, and subject exclusively to the exceptions and limitations in InfoSoc. This is a point of significant importance, and it will be fully explored later.[108]

94 C-174/15 VOB para 41-42.

95 Lending Right Directive Proposal p. 34-35.

96 C-174/15 VOB para 43.

97 Ibid para 46.

98 See C-466/12 Svensson and Others (CJEU) EU:C:2014:76, para 32; C-351/12 OSA (CJEU) EU:C:2014:110, para 41. See more generally Péter Mezei, 'Enter the matrix: the effects of the CJEU's case law on linking and beyond' (2016) 10 JIPLP 778.; J p. Quintais, 'Untangling the hyperlinking web: In search of the online right of communication to the public' (2018) 21/5-6 J. World Intellect. Prop. 385.

99 Dusollier (n. 14) para 22.

100 Ibid para 51.

101 Ibid para 63.

102 Ibid para 61-64

103 Ibid para 66-72.

104 It remains unestablished to what extent account should also be taken of the interests of other parties in the eLending market – most notably, the interests of publishers.

105 AG Opinion C-174/15 VOB (n. 8) para 30-31.

106 Chris Reed, 'Online and offline equivalence: Aspiration and achievement' (2010) 18/3 Int. J. Law Inf. Technol. 248, p. 260-261; AG Opinion C-174/15 VOB (n. 8) para 73.

107 Linklater-Sahm (n. 86) p. 1567.

108 Discussed later in section 3(d) – 'Communication to the public or lending right - lex specialis to the rescue?'

III. ePL right after C-263/18 Tom Kabinet – a timeline of the rise and fall of a Public Lending Right for eLending

47 While in some respects lending and eLending may be considered functionally equivalent, they are not legally equivalent. The regulation of the material exploitation of copyright enjoys a conceptual and analytical coherence that finds little correspondence in its digital counterpart. In other words, the distribution and use of physical and digital copies are treated very differently by the law, as the distinction between the right of distribution (physical works) and CP right (digital works) well exemplifies. The exclusive rights afforded by copyright are particularly far-reaching in the digital world; while historically the use of a work (e.g., reading) and specific acts of distribution (e.g., private lending) were considered as prerogatives of users and direct expression of their ownership over these works, and therefore unregulated by copyright, the digital transition significantly alters the legal analysis and results in a more extensive control of users' relationships with the literary works they consume.[109] This control is exacerbated by the use of private law instruments such as contracts to further erode the liberties of users and their conception of digital ownership.[110]

48 In the context of physical copies, copyright distinctly regulates different uses of a work. Rightsholders have the right to control the (first) sale of a book under the public distribution right,[111] as long as it takes place within the EU. Ignoring for present purposes the expansive interpretation of the concept of distribution by the CJEU, the kernel of this right could be considered to be the transfer of ownership of the physical copy.[112] Regardless of exhaustion, the owner of a book does not need the rightsholder's permission to lend a copy of that book. In fact, it should be noted how the lending right discussed in this paper only refers to the making available through '*establishments accessible to the public*'.[113] The exhaustion of the distribution right and the liberty to lend books have positive effects on the dissemination of books.

49 The rental of the same book, on the other hand, would require the author's permission, even in those circumstances when the distribution right has been exhausted by a first transfer of ownership of the physical copy of the book.[114] There is, in other words, no exhaustion for the right to rent a book.

50 Both rental and lending exclusively refer to a temporary use of the work – namely, access is provided to the copy only for 'a limited period of time'.[115] This limited temporal dimension constitutes an important distinction with the distribution right, thus ensuring there is no possible overlap between distinct rights and legal regimes. The two regimes coexist without interfering with each other. This is summarised in the below table.

109 G Greenleaf and D Lindsay, *Public Rights: Copyright's Public Domains* (Cambridge University Press 2018) p. 280. See also Jessica Litman, 'The Exclusive Right to Read' (1994) 13 Cardozo Arts & Ent LJ 29; and Martin Kretschmer 'Digital Copyright: The End of an Era' (2003) 25/8 EIPR 333, p. 340.

110 A Perzanowski and J Schultz, The End of Ownership: Personal Property in the Digital Economy (MIT Press 2017).

111 Art 4(2) InfoSoc.

112 C-456/06 Peek & Cloppenburg (CJEU) ECLI:EU:C:2008:232 para 34- 36; although see the wide interpretation of 'transfer of ownership' in C-5/11 Donner (CJEU) ECLI:EU:C:2012:370 para 26 as well as in C-516/13 - Dimensione Direct Sales and Labianca (CJEU) ECLI:EU:C:2015:315 para 33; and C-572/17 Syed (CJEU) ECLI:EU:C:2018:1033 para 25-33.

113 Lending Right Directive art 2(1)(b).

114 Lending Right Directive art 1(2).

115 Lending Right Directive art 2(1)(b).

51 As mentioned, the legal treatment of 'functional equivalent' uses of physical and digital copies of book differs significantly.[116] A first question which arises is whether a digital copy of a book can be sold or whether ownership can be transferred. This point has only recently been adjudicated by the CJEU in C-263/18 Tom Kabinet.[117] Rather than speaking of 'sale of an eBook', the Court characterises this act as 'the supply to the public by downloading, for permanent use, of an e-book'.[118] Such acts would be covered by the CP right, more specifically the 'making available to the public right'.[119]

52 Prior to the Court's decision, some specific forms of permanent access to an eBook were considered by several scholars to be better conceptualised as a distribution to the public,[120] mostly drawing analogies to the recognition of *de facto* transfer of ownership in contracts for the licensing of software sanctioned by CJEU in C-128/11 UsedSoft.[121]

53 On the other hand, before C-174/15 VOB eLending was regulated by the CP right, regardless of whether such lending was carried out through publicly accessible establishments or by private parties. Similarly, the rental of a digital copy of a book was also covered by the CP right, not the rental right.[122] In other words, InfoSoc was the sole instrument regulating immaterial forms of exploitation.[123] Prior to C-174/15 VOB, the situation could be thus summarised as follows:

Table summarising how different acts are construed by InfoSoc and Lending Right Directive

	Making available for use for limited period physical copies of a book (via public establishment)	**Transfer of ownership in physical copies of a book**
Non-commercial	Lending	Private use/Distribution (e.g., donation)[116]
Commercial	Rental	Distribution

54 The conceptual clarity of this *summa divisio* was altered by the extension of the PL right to eLending. In this discussion, it should be made clear that by eLending we exclusively mean 'the lending (making available for a limited time without any commercial/economic advantage by public establishment) of a digital copy of a book'. Accepting this premise, it should be already clear that C-174/15 VOB did not establish an eLending right; more correctly, it only recognised the extension of the PL right to eLending whenever the functional equivalence of the lending of digital and printed books is preserved. We will henceforth refer to this newly recognised right as 'ePL right'.

55 According to the Court, this functional equivalence is present when four conditions are met:

- a digital copy is placed on the server of a public library;
- the digital copy is then downloaded to a new computer;
- only one copy can be downloaded during the lending period (One-copy/One-user model, ensuring no multiplication of copies);
- the copy can no longer be used after the period expires.

56 The clarification on the further conditions that Member States may add in implementing the PL right exception are not relevant for the assessment of the scope of PL right in Art 1(1) of the Lending Right Directive and can therefore be ignored for present purposes. Our focus is on the following question: what is the scope of the PL right, as interpreted by the CJEU in C-174/15 VOB?

57 The Court held that 'it cannot therefore be ruled out that … [the lending right] may apply where the operation carried out by a publicly accessible library … has essentially similar characteristics to

116 While recognising the legal uncertainty that surrounded the legal interpretation of the sale of eBooks, as well as the developing jurisprudence of the CJEU expansively interpreting the right of communication to the public, in the following analysis we will take into account the CJEU's clarification of the rights conferred by the InfoSoc

117 C-263/18 Tom Kabinet (n. 24).

118 Ibid para 72.

119 Ibid.

120 Péter Mezei, 'Digital First Sale Doctrine Ante Portas: Exhaustion in the Online Environment' (2015) 6 J Intell Prop Info Tech & Elec Com L 23; Sganga (n. 3).

121 C-128/11 UsedSoft (CJEU) ECLI:EU:C:2012:407 para 45-46.

122 Rental right cannot be extended to immaterial forms of exploitation due to how such a right is interpreted in international law – see WIPO Copyright treaty art 7, which refer 'exclusively to fixed copies that can be put into circulation as tangible [physical] objects', stated in C-174/15 VOB para 31-35. This interpretation has been criticised in Linklater-Sahm (n. 86) p. 1564.

123 See InfoSoc Recital 20: 'This Directive is based on principles and rules already laid down in the Directives currently in force in this area … and it develops those principles and rules and places them in the context of the information society'. For further development of this argument in the context of C-174/15 VOB, see Catherine White, 'Backlash over CJEU's "dangerous" eLending decision', (2017) Intellectual Property Magazine 14.

the lending of printed works'.[124] The characteristics to which the Court is referring here are: 1) the constant ratio between acquired copies and lent copies – whether physical or digital, and 2) the ability to ensure that access to the copy remains limited in time.

58 Despite Courts treating these two conditions as distinct, they arguably refer to one property shared by the lending of both physical and digital copies: the non-multiplication of usable copies. When lending books, there is no reproduction and no multiplication of the book itself. With ePL right, on the other hand, there is a reproduction but there is no multiplication of usable copies.[125] Therefore, it is submitted that as long as there is no simultaneous 'multiplication of usable copies', the lending right should cover all forms of eLending.

59 The condition of 'limitation in time' of lending is not intrinsically connected with the notion of functional equivalence nor with the property of physical and digital copies; rather, it is just a condition for lending, as important as all other conditions (e.g., 'no economic advantage' etc.). It follows directly from the non-multiplication of usable copies that, after the lending period expires, such a copy can no longer be used. Focusing on the concept of ''non-multiplication of usable copies'' also explains why eLending has generally not been considered to fall within the PL right: in the words of AG, only recent advancements in technological protection measures have ensured that risks associated with eLending are 'substantially reduced'.[126]

60 Part of the difficulty in extracting broader principles from the CJEU's judgment is that the discussion of the PL right, and the corresponding PL right exception, is intrinsically connected: by giving a more expansive interpretation to the lending right, the Court sets the ground for the implementation of the PL right exception, transforming thus a right to control (CP right) into a remuneration right (under an ePL right scheme). To some extent, this directly results from the nature of the PL right which, as discussed, has always been considered to coexist and be justified by the possibility of Member States to derogate in pursuit of their cultural policy.

61 The cogency of the conclusions of the Court may also be criticised for effacing the significantly different characteristics between lending and eLending. For example, it is accepted that digital copies do not deteriorate as physical books; it is therefore possible to lend a copy for an infinite amount of time without any form of deterioration. Another example is the lower transaction costs involved in eLending – eBooks can be read directly from home and can better be adapted to the specific preferences of the reader (e.g., font size can be increased), not to mention the additional potential functionalities offered by eBooks.

62 From this perspective, it could be claimed that the ePL right is functionally but not technically equivalent to the lending of printed books.[127] Notwithstanding these considerations, it would be quite undesirable to adjust and redefine the scope of protection of the PL right based on whether the degree of functional equivalence is met. A better approach would be either 1) to recognise the unique features of eLending and regulate it as such, or 2) to identify the essence of the equivalence of ePL right and lending to clearly define the scope of the right in all circumstances.

63 The condition of 'non-multiplication of usable copies' could serve exactly that purpose, thus instilling a sufficient degree of legal certainty in the scope of the ePL right. This does not mean however that the characteristics of eLending (e.g., no marginal decrease in the quality of the copy) should be completely ignored. On the contrary, as demonstrated by the reasoning of the Court, these are important considerations for Member States when implementing a PL right exception, assessing how best to safeguard the legitimate interests of authors. The table below summaries the legal taxonomy of eLending after C-174/15 VOB. The conceptual and practical issues raised by the judgment are discussed in the sections to co

Table summarising how different acts are construed by InfoSoc and Lending Right Directive before C-174/15 VOB

	Supply to the public by downloading of copy of book, for temporary use (acts carried out by 'public establishment')	**Supply to the public by downloading of copy of book, for permanent use** ('public establishment')
Non-commercial	CP right	CP right
Commercial	CP right	CP right

124 C-174/15 VOB para 51.

125 While there is no multiplication of *usable copies,* there is a reproduction of copies in so far as two copies exist: one on the library's server and one on the reader's server.

126 AG Szpunar's Opinion in C-263/18 Tom Kabinet ('AG Opinion C-263/18 Tom Kabinet') ECLI:EU:C:2019:697, para 73.

127 Matulionyte (n. 85) p. 273.

Table summarising how different acts are construed by InfoSoc and Lending Right Directive after C-174/15 VOB

Functional equivalent of....	**Making available for limited time**		**Making available for unlimited time**	
	Physical	Digital copy	Physical	Digital copy
Non-commercial	Lending[129]	ePL right and CP right	Private use/Distribution	CP right
Commercial	Rental	CP right	Distribution	CP right

IV. Communication to the public or lending right - lex specialis to the rescue?

64 As clear from the above table, there seems to be a degree of overlap between the CP right and the ePL right. C-174/15 VOB left the conceptual boundaries of this right undefined. Due to divergence in the set of exceptions and limitations applicable to CP right and ePL right, this overlap risk rendering any ePL right scheme ineffective in practice. In fact, no corresponding exception in InfoSoc enables public libraries to offer digital access to eBooks to the public. This conflict is acknowledged in the AG Opinion to C-174/15 VOB.[128] The AG maintains that the Lending Right Directive, in so far as it codifies the earlier 1992 Directive, constitutes a *lex specialis* vis-à-vis InfoSoc – a conclusion reinforced by Recital 20 and Art 1(2)(b) InfoSoc. In essence, this means that, similarly to what the CJEU held in C-128/11 UsedSoft,[129] the later directive 'in no way affects provisions of EU law *already in force*'.[130] A contrary interpretation would render the PL right exception impossible to implement – unless new exceptions are introduced to the CP right.

65 The argument is sound: the exercise of the CP right is pre-empted whenever an act falls within the scope of the PL right. A few difficulties nevertheless remain. First, it is legitimate to question the extent to which the eLending right was *already in force* at the time of the enactment of InfoSoc. The expansive interpretation of the lending right was achieved through what the AG defined as a 'dynamic or evolving' interpretation – thus considering the developments in technology, markets, and behaviour.[131] Such an approach is explicitly supported by Recital 4 Lending Right Directive, which affirms that copyright protection 'must adapt to new economic developments such as new forms of exploitation'.[132]

66 Despite never acknowledging so in the judgment, it is difficult to maintain that ePL right was not covered by the CP right; the Court in C-174/15 VOB can be assumed to be aware of this. From this perspective, it thus appears that the CJEU was not merely extending the scope of the right to cover a new form of exploitation; on the contrary, it removed acts that had hitherto been considered to fall within the scope of the CP right, and declared that from now on those specific acts should be regulated by the eLending right. For this reason, the doctrine of *lex specialis* cannot be used to interpret the scope of the PL right.

67 The entry into force of InfoSoc did not cause 'prejudice to the provisions' of the Lending Right Directive by introducing a CP right.[133] On the contrary, the expansive interpretation of the PL right proactively created such conflict, despite that InfoSoc was considered to extend the principles of the Lending Right Directive and develop them 'in the context of the information society'[134] – InfoSoc specifically addresses the issues of digital uses of works left open by the Lending Directive.

68 Moreover, the reliance in C-174/15 VOB on the arguments elaborated in C-128/11 UsedSoft[135] conceals important differences between these judgments. In C-128/11 UsedSoft, the CJEU invokes the *lex specialis* principle merely to assert that even if 'the contractual relationship at issue (...) or an aspect of it might also be covered by the concept of 'communication to the public' the principle of exhaustion of the distribution right of that copy still subsists' – not to the exclusion of the CP right, rather in addition to it.[136]

69 In that case, the potential conflict between these two rights was resolved on the interpretative level, not by applying the *lex specialis* doctrine: the CJEU, relying on the analysis of the AG, argued that the wording of Art 6(1) of the WIPO Copyright Treaty ('WCT')[137] is 'unequivocal' and 'the existence of a transfer of ownership clearly changes a mere act of communication to the public into an act of distribution'.[138] Drawing a comparison with C-174/15 VOB, it is far from 'unequivocal' that the PL right covers acts of eLending – even when conceding that such a right may retain a *lex specialis* priority. On the contrary, a literal interpretation of both Art 8

128 AG Opinion C-174/15 VOB (n. 8) .

129 C-128/11 UsedSoft (CJEU) ECLI:EU:C:2012:407.

130 Ibid para 55.

131 AG Opinion C-174/15 VOB (n. 8) para 28.

132 Lending Right Directive Recital 4.

133 InfoSoc Recital 20.

134 Ibid.

135 C-128/11 UsedSoft.

136 Ibid para 51.

137 WIPO Copyright Treaty, 1996.

138 AG Opinion C-128/11 UsedSoft, para 73; C-128/11 UsedSoft para 52.

WCT[139] and InfoSoc seems to unequivocally point to the fact that eLending is to be considered an act of communication.

70 After C-174/15 VOB, this conflict remains mostly unresolved, especially as the ePL right constitutes a test of the limits of the CJEU's judicial discretion in the creation of new rights. Regardless of how this matter will be determined, it is argued that without any form of digital exhaustion a PL right exception is an impossible proposition in practice. This controversial argument will be explored in the next section.

D. eLending without digital ownership – a legal Chimera?

71 In C-174/15 VOB, the CJEU held that an eBook cannot be made available under the PL right exception unless that 'copy was obtained from a lawful source'.[140] Again, this proposition is justified by the duty of Member States not to 'unreasonably prejudice copyrightholders'.[141] This conclusion was reached rather summarily. The public nature of the establishments to which such derogation is addressed – libraries – 'may legitimately be expected' to respect the law.[142] While it is difficult to disagree with this point, its consequences were difficult to gauge at the time; in fact, the CJEU may have reasonably assumed that libraries had multiple options for lawfully sourcing digital copies of books. For example, by digitising part of their collection or introducing a form of digital exhaustion, thus creating a secondary market for digital copies of books. In the following sections, options available to libraries will be assessed to determine their compatibility with EU law.

I. Could libraries digitise literary works in their collections under Art 5(2)(c) Info Soc?

72 A first option is for libraries to digitise a book in their collection, an act that would normally require the permission of the rightsholders. The AG in C-174/15 VOB maintained that libraries have a right to digitise their physical collection by relying on the reproduction exception in Art 5(2)(c) InfoSoc, as long as such reproduction is carried out for the purpose of offering an eLending service.[143] The application of this exception in this scenario is not uncontroversial, and its application needs to be further qualified.

73 First, the wording of Art 5(2)(c) states that this exception applies only 'in respect of specific acts of reproduction'. In interpreting this 'condition of specificity', the CJEU clarified that 'as a general rule, the establishments in question may not digitise their entire collections'.[144] This is a considerable limitation, at least in so far as it limits the potential impact of this exception in allowing libraries to build a substantial collection of digitised resources independently from agreements with rightsholders.

74 At the same time, considering that library's users are likely to be interested in only a portion of the catalogue of libraries – typically only the most recent/famous titles – a mass-digitisation of the collection may be desirable but not necessary. While it is clear that mass-digitisation projects cannot be carried out on the basis of this exception, the term 'specific acts of reproduction' does not prescribe any threshold beyond which the exception can no longer be used. A more careful look at the jurisprudence of the CJEU, therefore, is needed to shed more clarity on the extent to which libraries can rely on the exception to carry out their digitisation strategy.

75 The essential question to ask is whether the specific purpose to be pursued justifies the digitisation of the *individual* work, requiring thus an *individual* assessment of the necessity of its digitisation;[145] it is not possible to treat automatically the whole collection as fulfilling the condition of specificity. However, it is also important to state that the judgment does not rule out *a priori* such a possibility, as long as such an individual assessment is carried out. Yet, admittedly, it is unlikely or exceptional for the condition of 'necessity for a specific purpose' to be met for the whole collection.[146]

76 A few examples can be found when specific acts of digitisation may be justified. The AG's Opinion in C-117/13 Ulmer refers to instances when a digital copy of the work does not yet exist[147] – a proposition that forces us to consider whether the possibility of licensing the use of an already

139 See WIPO Copyright Treaty Art 8.

140 C-174/15 VOB para 72.

141 C-435/12 ACI Adam and Others (CJEU) EU:C:2014:254, para 31, 35, 40.

142 AG Opinion C-174/15 VOB (n. 8) para 88.

143 Ibid para 57.

144 C-117/13 Eugen Ulmer (CJEU) ECLI:EU:C:2014:2196 para 45.

145 AG Opinion in C-117/13 Ulmer para 38.

146 See C-117/13 Ulmer para 46: 'the digitisation of some of the works of a collection is *necessary for the purpose ... of research or private study*'.

147 AG Opinion C-117/13 Ulmer para 37. In the same paragraph, the AG provides a further example: when the printed version would otherwise be subject to disproportionate wear due to repetitive use.

digitised copy may render reliance on the exception unjustified.[148] Dealing with a similar question, the Commission hinted that this condition may be met if the digitisation is 'necessary for the preservation of works contained in the libraries' catalogue'.[149] These examples are illustrative, yet they should not be considered to remove all the uncertainty over the application of the 'condition of specificity'.

77 Not only does the limited scope of the exception raise some concerns; InfoSoc also seems to indicate that the reproduction exception was never intended to apply to acts of digitisation carried out for the purpose of granting digital access. This prospect will be now confronted and discussed.

78 Recital 40 InfoSoc states that while exceptions for libraries for 'certain special cases covered by the reproduction right' should be provided for, they should not extend to 'uses made in the context of on-line delivery of protected works or other subject-matter' – a description that seems perfectly to fit eLending.[150] Finally, the Recital concludes by saying that 'specific contracts or licences should be promoted which, without creating imbalances, favour such establishments and the disseminative purposes they serve'.[151] In light of the specific wording of the recital, it is difficult to dismiss the conclusion that InfoSoc explicitly prohibits to rely on an exception to digitise books in the library's collection for the purpose of offering an eLending service. Despite not being legally binding, this Recital may carry significant interpretative weight in case such a question is in the future referred to the CJEU.

79 An alternative interpretation of the Recital however exists. It is possible to read in the inclusion of this Recital simply an intention to specify that the exception contained in Art 5(2)(c) only covers the reproduction right, without extending to the right 'to make available over the Internet the works held by libraries', which is – in some specific circumstances – covered instead by Art 5(3)(n).[152] Although this point cannot be conclusively established, the ambiguity of the Recital may be fertile ground for an expansive interpretation of the provision in order to ensure the effectiveness of the PL right exception.

80 After all, a blanket exclusion of eLending from the purposes of the reproduction right seems unnecessary and unwarranted, especially in those cases when reliance on the exception is necessary to guarantee non-commercial access to copyrighted works and the cultural promotion objectives enshrined in Art6(1) of the Lending Right Directive.

81 In light of this, it is useful to speculate about circumstances when such a digitisation may be permissible and sufficiently specific, and how it may contribute to relieving the pressure off libraries. Assuming that an ePL right scheme for eLending exists, Member States may provide for a digitisation exception under Art 5(2)(c) InfoSoc in those cases when the license offered for the supply of the digital copy of the file is unfair or the price is excessive, provided these concepts are operationalised ex ante to ensure a sufficient level of legal certainty. Such legislation would incentivise publishers to better balance the interests of all parties in determining the terms and conditions of the license, as well as to digitise their own catalogue to pre-empt acts of external digitisation by public institutions.

82 Going back to C-117/13 Ulmer, the assessment of the 3-step test under Art 5(5) encourages the idea that such conditions are likely to be met. In fact, the CJEU states that such acts of reproductions do

148 In this respect, it is submitted that the CJEU in C-117/13 Ulmer ruled that the concept of 'purchase or licensing terms' in Art 5(c)(n) InfoSoc does not extend to the 'mere offering to conclude a licensing agreement' is immaterial to the interpretation of the question at hand. The reason to exclude 'works ... subject to purchase or licensing terms which are contained in their collections' is likely to be to avoid the sanctioning by national legislation of infringement of existing contracts. For example, this means that in those cases when libraries have obtained access to a digital copy of a book under a licensing agreement, the exception in question should not be used to override the license. Art 5(2)(c) does not include any wording to such effect and the context of the exception is different. For this reason, the possibility to obtain access to a digital copy under a license could be consistently considered as sufficient for disapplying the exception to the reproduction right.

149 Commission, 'Report on the harmonisation of certain aspects of copyright and related rights in the information society' (Commission Staff Working Paper, 2007) SEC (2007) 1556, p. 5.

150 Admittedly, this phrase is then followed by claim that this 'should be without prejudice to the Member States' option to derogate from the exclusive public lending right'. However, the *Travaux* reveal that the inclusion of that specification only reflects the understanding of the drafters that – in descriptive terms – this limitation does not 'of course' causes prejudice to the PL right Exception. The Recital is almost reproduced *verbatim* in the Travaux (n. 68) p. 32. See also ibid p. 31: 'This exception does not apply to the communication to the public right. In view of the economic impact at stake, a statutory exemption for such uses would not be justified ... the making available of a work or other subject matter by a library or an equivalent institution from a server to users on-line *should and would require a licence* of the rightholder or his intermediary *and would not fall within a permitted exception*'.

151 InfoSoc Recital 40.

152 Support for this interpretation comes from the Commission Staff Working Paper (n. 151), p. 5.

not prejudice the normal exploitation of the work or cause unjustified harm to their legitimate interests in so far as 1) the ratio between the analogue and digital copy of the book remains constant – again, giving due weight to the property of non-multiplication, and 2) an obligation to adequate remuneration for the further use of the work enabled by the digitisation.[153] Both conditions seem to comply with how an ePL right scheme reflecting the conditions of ePL right will work in practice.

83 While the prospect of the introduction of such a measure surely is cause for hope for many libraries in Europe, its implementation depends on the political goodwill at the national level. The authors are not aware of any such legislation having been yet proposed – whether due to lack of willingness or awareness, it is hard to judge.

II. Recognising digital exhaustion to increase competition in the market for digital copies of books

84 In the present system, the requirement of 'lawful source' is automatically translated into an obligation to license the supply of the digital copy; no exception in fact exists to cover the necessary digitisation to render the source lawful. In other words, Member States are mandated to introduce a requirement which – regardless of how it is formulated – 'is likely to restrict the scope of the derogation'.[154] This creates an internal conflict between the principle of effectiveness and the need to safeguard the legitimate interests of rightsholders.

85 It is argued that this is the major limitation of the C-174/15 VOB judgment, rendering an effective PL right system for eLending a legal chimera. In practice, eLending will therefore continue to be based on the licensing mechanisms that characterise the current eLending market, frustrating what the AG saw as a solution to liberate the lending of electronic books from 'the laws of the market' and allowing libraries to benefit, in the digital environment, from 'the same favourable conditions' enjoyed for the lending of physical books.[155] Yet the judgment of the CJEU in the C-174/15 VOB case was difficult to predict and, when reading through the arguments of the Court, it is reasonable to assume that the CJEU considered exhaustion to provide a third possible lawful source of digital copies of eBook, on which libraries could rely on to build an eLending service.[156]

86 A recognition of digital exhaustion, as well as a notion of digital ownership on which such a concept must necessarily be based, would be therefore instrumental in increasing competition for the supply of digital copies, and reduce the undue influence of publishers of libraries eLending practice. In addition, digital exhaustion does not seem necessary in antithesis with the author's interests, at least not more detrimental than the doctrine of exhaustion with regard to printed copies. As clear from the analysis so far, the legitimate interests of authors may be respected by the ability to control the multiplication of copies offered by technology, an attribute on which the CJEU has relied to provide an expansive interpretation of exception in both C-117/13 Ulmer and C-174/15 VOB. In light of the issues, in the eLending market, it is worth discussing future potential developments on digital exhaustion. From a copyright perspective, this seems one of the only solutions currently available to solve some of the issues identified in the eLending market.

1. The role of exhaustion in the C-174/15 VOB case – a difficult balance that can no longer be avoided

87 In the EU, most eBooks are provided as a service on the basis of the licensed access model, often within closed ecosystems (e.g., Kindle books). It is an open question whether it is legally possible to transfer or claim ownership of an eBook; so far, it appears that publishers do not consider this a suitable business model. Reflections on digital ownership now need to confront C-263/18 Tom Kabinet, where the CJEU said that 'the supply to the public by downloading, for permanent use, of an e-book',[157] cannot be characterised as a distribution to the public but an act of communication, covered by the CP right. An important consequence is that each supply of the digital copy of the book will give rise to an independent new act of communication, requiring permission from the owner. There is therefore no 'digital exhaustion'.

153 In the case at hand, this use consisted in the subsequent making available of that work in digital format, on dedicated terminals, gives rise to a duty to make payment of adequate remuneration. See C-117/13 Ulmer para 48.

154 AG Opinion C-174/15 VOB (n. 8) para 88.

155 Ibid para 79.

156 Later AG Szpunar in his Opinion to C-263/18 Tom Kabinet considered the effects of the judgment in C-174/15 VOB, adding that the 'Court seems to have accepted the exhaustion of the distribution right as regard eBooks', and if 'the Court were to rule, in the present case, that the distribution right does not apply to the supply of works by downloading, that condition [of exhaustion of the distribution right in the digital copy, which the Court accepted as lawful] would be rendered meaningless'. AG Opinion C-263/18 Tom Kabinet (n. 127) 697, para 72.

157 Ibid para 72.

88 Without digital ownership, copyright law shifts the focus from digital content to digital access, relegating the eBook market to a market for the provision of a service.[158] This however does not directly follow from a literal interpretation of InfoSoc. As stated by Recital 29 InfoSoc, rental and lending of copies of work are 'services by nature', independently of whether such copies are physical or digital.[159] The fact that lending is treated as a service, does not affect the possibility that the sale of an eBook may be construed as the sale of a 'digital good', thus covered by the right of distribution. Vice versa, 'the lending right is completely independent of the exhaustion of the distribution right'.[160] This is probably why the CJEU in C-174/15 VOB never dealt with the complex issue of digital exhaustion and the scope of the distribution right.

89 Reading the AG's Opinion, it is apparent that exhaustion only creeps in when discussing the importance of the consent of the author as a mechanism to safeguard his legitimate interests.[161] This led the CJEU to conclude that Member States may include a condition that the 'digital copy of a book (...) must have been put into circulation by a first sale'[162] – a proposition which, after the judgment in C-263/18 Tom Kabinet, has become plainly legally incorrect or 'meaningless'.[163] Alternatively, despite the exercise of self-restraint in its answers, and its paucity, we could read into the judgment an assumption operating underneath the surface of the explicit text: the possibility for libraries to obtain digital ownership in copies.[164]

90 Whether we interpret the judgment as not tackling the question or implicitly supporting exhaustion, we are confronted with the same quandary: how does C-263/18 Tom Kabinet affect the assessment carried out by the CJEU in C-174/15 VOB? Specifically, would a condition that a copy is obtained from a lawful source still be justified in a world without exhaustion? How do we balance the principle of effectiveness of the PL right Exception and the legitimate interests of rightsholders 'not to tolerate infringements of their rights'? The CJEU stated that the requirement of lawful source follows from one of the objectives of the Directive, namely, to combat piracy.

91 Without exhaustion, another objective of the Lending Right Directive – the promotion of access to knowledge – is under threat. Member States lack the means to resolve this conflict; the EU copyright acquis now significantly limits how copyright-relevant acts are to be construed under national law. Despite that no stare decisis rule strictly binds the EU judiciary, the breadth and contested nature of the questions at hand makes the CJEU unfit to solve this impasse. With no prospect of legislative reform in sight, we will nonetheless consider the status of exhaustion in EU law, and what arguments may be available to the CJEU to open up lawful sources of access to digital copies of eBook.

2. The future of digital exhaustion in the case law

92 It is not altogether clear how the concept of sale and ownership can be translated in the digital world, partly due to the ease with which data can be duplicated at no marginal cost. Albeit data can be easily reproduced, it does not necessarily mean that we lack the means to exercise control. In fact, it is arguable that in the digital environment rightsholders have more far-reaching means to control uses of digital content. Lack of digital ownership does not stem from our inability to control data; on the contrary, it is premised on the considerable capabilities of digital technologies to enable the exercise of control.[165] Physical copies can be owned *by default;*[166] digital copies cannot be owned *by design*.

93 Several options are open to publishers desiring to market eBooks, allowing them to choose if and on how many devices it can be downloaded, its functionalities (e.g., ability to write notes on it,

158 Kevin Dong, 'Developing a Digital Property Law Regime' (2020) 105 Cornell L Rev 1745, 1764-1766.

159 The Recital exclusively refers to a 'material copy of a work'; this point becomes obvious once it is recognised that, at the time of enactment of the Directive, the concept of lending covered only physical copies of a work. The inclusion of digital copies under the lending right does not alter the legal analysis.

160 AG Opinion C-174/15 VOB (n. 8) para 83.

161 AG Opinion C-174/15 VOB (n. 8) para 81-88.

162 C-174/15 VOB para 62.

163 AG Opinion C-263/18 Tom Kabinet (n. 127) para 72.

164 AG Szpunar is more explicit in considering the issue of digital exhaustion, hinting to the fact that 'a simple solution to the problem' does not exist (see AG Opinion C-174/15 VOB para 52). However, he fails to recognise the importance of digital exhaustion for libraries in creating alternative lawful sources of access to digital copies of books.

165 Both the judges and AG in C-263/18 Tom Kabinet exclusively focus on the opposite narrative, namely that distribution of digital copies carries an inherent risk of uncontrolled multiplication of perfectly substitutable copies. See AG Opinion C-263/18 Tom Kabinet (n. 127), para 91-92, a reading supported by the Court at para 57-58 of their judgment.

166 In other words, often ownership is not a choice and cannot be designed. After transfer of a physical copies, the original owner retains little actual control over further uses of such copies; potential control is exercised through personal (contract) and quasi-property rights (intellectual property).

highlighting, searching functions etc); it is difficult to imagine any limits that cannot be imposed on the user's ability to use an eBook. Digital ownership therefore reflects the rights of the user, and its terms and conditions are dictated by a licensing agreement.[167] Once a certain threshold of rights and liberties is reached, then a substantive notion of digital ownership can emerge and be recognised by the law.[168] This process is well-illustrated by recent examples of recognition of digital ownership in computer programs,[169] and videogames.[170]Given its intrinsic link with consumer rights, it is unsurprising that consumer protection legislation appears often more advanced and sophisticated in dealing with this question than, for example, copyright law.[171]

94 Despite being a pressing issue, it is not the purpose of this section to reflect on whether digital exhaustion should be introduced in the EU copyright framework. Here digital exhaustion is discussed considering the specific issues faced by libraries: there is currently no mechanism for libraries to obtain a copy of a book from a lawful source which guarantees sufficient independence from publishers. Without such a mechanism, it is argued that eLending remains subject to 'the laws of the market'. This status quo is unlikely to be an issue Courts alone can help solve. As also recognised by AG Szpunar, some of the arguments made refer to 'general economic policy',[172] and it would be unfitting for the CJEU to be led in its adjudication by such considerations.[173]

95 On the other hand, legislators are not so constrained. Yet lack of legislative intervention may force Courts to adopt a more dynamic interpretation and proactively extend the scope of the existing legal provisions if such an outcome is warranted by the specific factual situation of the case – following its own precedent in the VOB case. The following analysis will be divided into two sections. First, we will consider the limits of digital exhaustion under the current legal regime; in the second part, the limits of the judgment will also be acknowledged to assess what is the possible future of digital exhaustion.

3. Limits to digital exhaustion

96 It is difficult to overstate the importance of the WCT in the interpretation of the rights conferred by InfoSoc, which must be interpreted in compliance with international law. Art 6(1) WCT covers the right to distribute a work to the public. As specified in the Agreed Statements annexed to it, the distribution right refers 'exclusively to fixed copies that can be put into circulation as tangible [physical] objects'.[174] Nevertheless, and as acknowledged by the AG, the WCT establishes a minimum level of protection and does not preclude *per se* the extension of the distribution right to cover the transfer of ownership in a digital copy.[175]

97 However, contradicting his previous statement, the AG then proceeds with stating that substituting the CP right with the distribution right would entail a lower level of protection and thus be inconsistent with its obligations under the WCT. This statement, in so far as it is understood as ruling out future recognition of digital exhaustion, is problematic on two fronts. First, the validity of that proposition depends on the characterisation of 'sale of an eBook' as 'making available to the public'; it does not conclusively mandate the categorisation of all forms of online distribution as 'making available'. Secondly, adopting such an interpretation would

167 Given the connection between ownership and user's rights, it is possible to 'create' a de facto digital exhaustion by granting rights to consumers. In certain instances, refusal to recognise exhaustion may breach consumer protection law or be considered an unfair terms & conditions as in TGI de Paris UFC-Que Choisir vs Valve (2019) N° RG 16/01008. However, it is unclear whether this judgment should be reinterpreted in light of C-263/18 Tom Kabinet.

168 This is well expressed by AG Szpunar when he says that 'modern technical means allow copyright holders to exercise a very firm control on the use which purchasers make of their works (...) and permit the development of commercial models which, often without openly saying so, transform the full enjoyment of the copy of a work into a mere limited and conditional right to use it'. See AG Opinion C-263/18 Tom Kabinet (n. 127), para 6. In his monograph, Mezei argued that the combination of two technological solutions might guarantee the proper control of the downstream market of used digital files. These are the use of a unique ID number for each lawfully sold file; and, second, the application of a functioning forward-and-delete technology. See Mezei (n. 3) p. 191.

169 C-128/11 Usedsoft.

170 Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada, 2012 SCC 35, [2012] 2 R.C.S. 283.

171 See, for example, the Consumer rights Directive 2011/83/EU. For a more detailed analysis, see S Ghosh and p. Mezei, 'The Elusive Quest for Digital Exhaustion in the US and the EU-The ruling of the CJEU in Tom Kabinet Ruling a Milestone or Millstone for Legal Evolution?' (2020) 8/1 Hungarian Yearbook of International Law and European Law 249, 256-257. See also Geiregat (n. 3).

172 AG Opinion C-263/18 Tom Kabinet (n. 127) para 85.

173 See also AG Opinion C-263/18 Tom Kabinet (n. 127) para 86, where he says that copyright should not 'serve as a corrective factor of the alleged dysfunctions for the market for the supply of works'.

174 WIPO, 'Agreed statements concerning the WIPO Copyright Treaty' (Geneva, 1996).

175 AG C-263/18 Tom Kabinet para 33-34.

violate the essence of the 'umbrella solution' on which the agreement on the right covering instances of 'making available' was built. The Guidelines, in fact, specify that the 'Contracting Parties are free to implement the obligation to grant an exclusive right to authorize such ''making available to the public'' also through the application of *a right other than the CP right* [...] as long as the acts of such 'making available' are fully covered by an exclusive right (with *appropriate exceptions*)'.[176]

98 The interpretation suggested by the AG would, in practice, mandate signatories to the WCT to protect such acts with a right substantively identical to the CP right, which seems not to be the approach adopted in the Guidelines. This is therefore not a limit to a recognition of digital exhaustion in EU law. Therefore, it is open to legislation to harmonise such a right. Nonetheless, without a legislative intervention, the CJEU is correct in pointing to the unambiguous language of Recital 28, which limits the application of the distribution right to tangible [physical] copies.[177] Despite that the Recitals of InfoSoc contain 'certain ambiguities',[178] Recital 28 directly reproduces and thus incorporates the Agreed Statement; it is possible to extract an intention not to diverge from the minimum interpretation of the right of distribution as contained in the WCT.

99 Another fundamental challenge to digital exhaustion is the technical dependency of the distribution of the digital file to its reproduction; in other words, there is an overlap between the concept of transfer of ownership – distribution – and the downloading that is necessary to transfer the file – the reproduction, that would require the author's permission. There is currently no exception covering the right of reproduction in all circumstances, and the right cannot be exhausted.[179] The problem identified is the result of the extreme level of control that rightsholders can exercise online, which extends over control of the 'use a copy'. For this reason, Art 5(1) of the Software Directive provides for an exception to the right of reproduction of a computer program whenever such reproduction is necessary to 'the use of the computer program by the lawful acquirer in accordance with its intended purpose'.[180]

100 In C-128/11 Usedsoft, this provision was broadly interpreted to ensure the effectiveness of exhaustion of the distribution right.[181] In particular, the CJEU was ready to emphasise the 'invisible link' between the copy and the licensing agreement, and the 'invisible whole' constituted by the act of downloading a copy on the customer's server and the conclusion of the user's license agreement.[182] In contrast, there appears to be no such exception in InfoSoc, possibly further reinforcing the distinction drawn between physical distribution and digital communications to the public. The lack of such a provision will likely significantly hinder the ability of the CJEU to recognise digital exhaustion.

101 Finally, even the extension of the right of distribution to digital copies may not result in libraries obtaining alternative lawful sources of access to eBooks. In fact, we discussed how the classification of a licensing agreement as 'sale' may depend on the terms & conditions of the agreement; since most publishers are likely possess a sufficient degree of bargaining power, it will not be difficult for them to exclusively promote business models whereby users are provided with on-demand access to the eBooks, never upgrading the status of the digital consumer to owner of these items. In practice, this will allow publishers to keep exercising control over acts of communication by strategically defining 'in different ways the modes of use of the copy of the work' to rule out the possibility of distribution of copies.[183] A related point has been made by AG in C-263/18 Tom Kabinet , where the Court emphasised that exhaustion cannot limit 'the scope of freedom of contract',[184] and that such rule may not 'automatically have the consequence of cancelling all the contractual terms governing the use of that copy'.[185]

102 Again, consumer protection seems to have a role to play in ensuring stronger rights for digital consumers, thus indirectly benefiting the emergence of a secondary market for eBooks on which libraries can rely on. Another solution would be to alter the scope of the reproduction right of digital copies to

176 'Guide to the Copyright and Related Rights Treaties Administered by WIPO', (WIPO, 2003), p. 209.

177 C-263/18 Tom Kabinet (n. 24) para 51.

178 AG Opinion C-263/18 Tom Kabinet (n. 127) para 38.

179 Ibid, para 45-49. This point was also raised in the questions of the referring Court. See C-263/18 Tom Kabinet (n. 24) para 30.

180 Directive (EU) 2009/24/EC on the legal protection of computer programs (Software Directive) OJ L 111 art 5(1).

181 C-128/11 UsedSoft para 78-85.

182 C-128/11 UsedSoft para 84.

183 AG C-263/18 Tom Kabinet para 44.

184 Ibid.

185 AG C-263/18 Tom Kabinet para 87; citing as further support for his position: Agnès Lucas-Schloetter, 'La revente d'occasion de fichiers numériques contenant des œuvres protégées par le droit d'auteur', in Bernault et al. (eds), *Mélanges en l'honneur du Professeur André Lucas* (LexisNexis, 2014). This opinion might be not without criticism. The doctrine of exhaustion has historically played a role to limit author's right to control redistributions that take place following the conclusion of the initial contract for the sale of goods. As such, exhaustion worked as a safety valve against extensive contractual stipulations. Compare to Mezei (n. 3) p. 11.

cover only 'multiplication of usable copies'. This remains particularly challenging, despite that some jurisdictions have come close to such an interpretation.[186]

103 Before canvassing a list of concrete policy solutions, the limitations of C-263/18 Tom Kabinet should be highlighted. At the same time, it is also possible that further development in technologies and business models may address remaining concerns over digital exhaustion, altering 'the interests of the rightsholders in obtaining appropriate reward for their works'.[187]

4. Limits to the judgment in C-263/18 Tom Kabinet itself

104 Despite the difficulties outlined above, C-263/18 Tom Kabinet does not conclusively rule out digital exhaustion. On the contrary, it considers the advances that the Court has made in 'recognising the exhaustion of copyright in the digital environment', adjudicating however on the specific facts of the case that the acts in question fall fully under the CP right.[188] In that sense, the judgment has a limited scope of application. For a start, the judgment only deals with the conduct of the platform rather than individual users. Desptie this, the judgment also highlights the limits of the CP right vis-à-vis new forms of one-to-one distribution of digital content - e.g., sale of an eBook.

105 These limitations come to the fore at para 69 of the judgment. In considering whether making an eBook available amounts to a communication directed to ''an indeterminate number of potential recipients' – the public – the Court implicitly accepts the possibility that not all forms of digital distribution – of communication of a work – will necessarily involve the public. Relying on C-174/15 VOB, the Court leaves open the possibility that in some circumstances – namely when, as a result of technological measures ensuring that there is no multiplication of usable copies, the eBook is not made available to a substantial number of people – such an act may fall beyond the scope of the CP right.[189]

106 This raises the question of how we should construe acts of digital distribution when the digital copy is made available to one individual only – thus, not a public. Is this the sign of a black hole in the harmonisation of digital copyright, and would the distribution right occupy that space?

107 The Court is able to sidestep this issue in C-263/18 Tom Kabinet by concluding that, due to the lack of 'technical measures' limiting access to the digital copy, the work should be treated as having been communicated to a sufficiently large amount of persons, especially considering 'how many of them may access it in succession'.[190] Despite this, the limits of the CP right is undoubtedly an issue likely to surface again and may offer to the CJEU to refine the taxonomy of digital copyright protection.

108 Finally, assessing the implications for and possible reinterpretation of C-174/15 VOB in light of the judgment in C-263/18 Tom Kabinet is a difficult task. The *lex specialis* approach harms consistency and coherence, in so far as it prevents a broader conceptualisation of how digital copies are to be regulated by copyright – whether as part of software, eBooks, or any type of literary work.

109 In future judgments, there is arguably a greater scope for the principle of effectiveness to be used as a tool to mitigate the negative effects of the strict interpretation of the law.[191] The principle was used in C-128/11 Usedsoft to give a broad interpretation to the concept of sale in the Software Directive in order to safeguard the effectiveness of the provision against attempts by suppliers 'to circumvent the rule of exhaustion'.[192] In C-174/15 VOB, the AG highlighted the role of effectiveness in ensuring that 'the anachronistic character of obsolete legal rules' remain updated in front of 'rapid technological and economic development';[193] this led ultimately the AG to advise in favour of extending lending right

186 A notable example is Canada. In Théberge v. Galerie d'Art du Petit Champlain Inc., [2002] 2 S.C.R. 336 para 50, the majority held that a multiplication of copies is an essential element of the 'reproduction' right of copyright owners. This is the opposite of the judicial interpretation provided by the U.S. District Court in *ReDigi* - Capitol Records, LLC v. ReDigi Inc., 934 F. Supp. 2d 640 (S.D.N.Y. 2013). For an in-depth analysis, see Ariel Katz, 'Digital exhaustion: North American observations' in John A. Rothchild, *Research Handbook on Electronic Commerce Law* (Edward Elgar, 2016).

187 C-263/18 Tom Kabinet (n. 24) para 58, perfectly reflecting the Opinion of the AG at para 89.

188 AG Opinion VOB para 77.

189 C-263/18 Tom Kabinet (n. 24) para 69. The conditions are the same as in C-174/15 VOB: 1) only one copy of a work may be downloaded in the period during which the user of a work actually has access to the work; 2) after that period has expired, the downloaded copy can no longer be used by that user.

190 C-263/18 Tom Kabinet (n. 24) para 69, applying C-610/15 Stichting Brein (CJEU) EU:C:2017:456 para 41.

191 AG Opinion C-174/15 VOB (n. 8) para 47. See also C 403/08 and C 429/08 Football Association Premier League and Others (CJEU) EU:C:2011:631 para 163, and C201/13 Deckmyn (CJEU) EU:C:2014:2132 para 23.

192 C-128/11 UsedSoft para 44.

193 AG Opinion C-174/15 VOB (n. 8) para 28.

to cover the lending of digital copies, a conclusion supported by the Court.

110 It remains to be seen how this principle will be exploited to secure the ability of Member States to set up an ePL right scheme without the need to resort to commercial licensing with publishers. C-263/18 Tom Kabinet per se does not make digital exhaustion more difficult, as the most important arguments contained in the judgment were already well established in the literature and hinted at by previous Courts. On the contrary, the judgment provides an additional reason to rethink EU copyright approach to digital exhaustion by showing the limits of the CP right. When digital exhaustion and eLending are considered together, the urgency of such a reform is apparent and it is unclear whether Courts can really solve this or if they will merely add to the confusion.

E. Looking forward: avenues to ensure the effectiveness of CJEU's judgement in VOB

111 This paper has reviewed the evolving EU regulatory framework on eLending. It contributes to the existing literature by revealing how, despite the judicial efforts to interpret dynamically the PL right in the Lending Right Directive, an effective PL right exception – allowing libraries to offer eLending independently of the market in functionally equivalent terms as the lending of printed books – is not possible. Member States are prevented from developing ePL right schemes, which would entitle authors to a remuneration right while allowing libraries to carry out acts of eLending without the need for negotiating a license with rightholders (publishers). In other words, eLending is still controlled by the exclusive rights of authors, and any attempt to transform it into a remuneration right is foiled by the extensive control that rightsholders can exercise on digital copies of books under the CP right.

112 This finding calls for a more comprehensive evaluation of how a PL right Exception under Art6(1) Lending Right Directive could be implemented in practice. It would require a reflection on how libraries can get access to digital copies of books, the rights they enjoy over such copies, and the level of control that rightsholders (e.g., publishers) still retain over the provision of eLending services when this is carried out within the scope of a PL right Exception. In very simple terms: the 'right' of libraries to lend eBooks to the public will be completely ineffective unless they can get access to the digital file necessary for such lending. Drawing a parallel with the physical world, it is similar to expecting libraries to offer a lending service without possessing any physical book. Currently, publishers fully control the provision of any eLending service.

113 This situation is unfortunately not the outcome of a well-defined policy; instead, it was brought about by a doctrinal issue at the core of copyright: the conceptualisation of the right to the temporary or permanent transfer of digital copies of works – respectively, eLending and sale of digital content.

114 Despite the efforts of the CJEU in C-174/15 VOB to afford Member States more manovure in defining their national cultural policies by recognising an eLending right (temporary transfer of a digital file), the judgment remains an incomplete revolution. This is not to underestimate its significance, which represents a positive precedent in ensuring that EU legislative instruments retain relevance and cogency in front of new technological developments. Nonetheless, it is apparent how subsequent developments in C-263/18 Tom Kabinet significantly limited the effectiveness of Art 6(1) of the Lending Right Directive. C-174/15 VOB needs to be reconsidered in light of this. In particular, after C-263/18 Tom Kabinet it is difficult to imagine how libraries could get a sufficiently permanent control of digital copies to be able to develop an independent eLending service – to independently and temporarily make a digital copy of a book accessible to the public. While solving these doctrinal issues seems to go beyond the power of the CJEU, less ambitious but effective solutions are possible.

115 The first step is defining the goal that is intended to be achieved. Member States should be able to create ePL right scheme in a way that 'has essentially similar characteristics to the lending of printed works'.[194] This is particularly desirable in light of the important public goals served by eLending, most notably cultural promotion. While various eLending models are currently offered by commercial actors, they may not sufficiently guarantee the (non-market) cultural objectives that eLending promotes. Therefore, measures should be introduced in order to ensure its effectiveness; specifically, 'to safeguard ... the effectiveness of the PL right Exception referred to in Art 6(1)' of the Directive.[195]

116 Considering the non-territorial nature and potential for cross-border use of digital content, a more convincing solution would be to have a harmonised eLending policy at the EU level. This would ensure that there is no discrimination between citizens across Member States in terms of access to knowledge, avoiding the implementation of geo-

194 VOB para 51.

195 Ibid.

blocking. Given well-known counterarguments relating to the limited competence of the EU in matters of cultural policy and the fact that any eLending policy will be influenced by national language and other idiosyncrasies, the most realistic solution appears to be to ensure the effectiveness of Art 6(1) of the Lending Right Directive.

117 It is the core argument of this paper that the limited current scope of exceptions available for libraries and the extensive control of digital forms of consumption by rightsholders hamper the full realisation of the cultural values underpinning the Directive. There are possible legislative and judicial interventions that could make the PL right Exception in Art 6(1) effective, and to these we will now turn to.

I. Judicial intervention

118 A so-minded Court would be able to dynamically interpret the existing EU copyright acquis to realise a more balanced copyright system. Strong arguments have been raised in favour of the recognition of some forms of digital exhaustion. The CP right, as demonstrated in this Article, cannot and should not be expected to cover all forms of digital distribution; this point is reinforced in light of the need for copyright to adapt to ''new forms of exploitation'' (e.g., sale of digital content). Developments in this direction would steer copyright towards promoting a more balanced notion of digital ownership.

119 In light of the conflicting interests at stake and the political significance of such developments, the intervention of the legislative bodies would be the most welcome solution. However, the CJEU could still play a considerable role as there is scope to interpret the existing exceptions and limitations more favourably towards public libraries. In particular, if given the opportunity the Court should:

- clarify that Art 5(2)(c) of InfoSoc allows libraries to digitise physical books in their catalogue for the purpose of carrying out eLending in all those specific instances either when:

  a) no genuine commercial access to the digital copy of the book exists at the time of digitalisation, or

  b) such access is subject to the acceptance of unfair terms and conditions.

- clarify that an act of making available a copy of a work to one single user, as opposed to a public is not to be considered a communication to the public; it is therefore not covered by InfoSoc. In other words, it is an area as yet not harmonised either by EU or international law. Not only is this consistent with earlier case law but it would enable the Commission – or individual Member States – to introduce a new form of copyright covering the distribution or sale of digital content.

120 A judicial intervention depends on referral by a national Court in the context of national proceedings,[196] which means that doctrinal issues may only be partially solved by the judgment of the Court; instead, the interventions of the CJEU are generally tailored to clarifying a point of law necessary to enable the national Court to give judgment. Pending a reference to the CJEU, Member States may be discouraged or reluctant to introduce such an exception; not only would a legislative intervention require significant political goodwill – after all, defining what terms are unfair is inherently controversial – but would expose the legislative body to potential infringement proceedings by the Commission.[197] In order to restore legal certainty and provide an authoritative – yet not binding – interpretation of EU law, the Commission may instead consider to intervene pre-emptively) supporting such an interpretation of Art 5(2)(c) of the InfoSoc.

II. Legislative intervention

121 At the EU level, a general legislative intervention in the field of copyright is unlikely in the immediate future. More specific interventions are likely to be considered by the next legislature.[198] The policy interventions here considered are limited in scope and aim solely to make Art 6(1) effective in the context of digital lending, mostly by allowing libraries independent access to digital copies.

1. Consumer protection

122 A mandatory clause could be introduced in consumer contracts for eBooks allowing resale/donation of eBook to public libraries for the purpose of eLending. In practice, this could take the form of a contractual right to consumers to grant a non-exclusive license in eBooks contracts for the benefit of public libraries, allowing them to store a copy of such an eBook on their server and lend it digitally to the public in

196 Treaty on the Functioning of the European Union (TFEU) art 267. See Chalmers et al., *European Union Law: Text and Materials* (Cambridge University Press, 2019), p. 328-363.

197 TFEU art 258. See Chalmers (n. 198) p. 328-363.

198 Tsakonas et al., 'Secondary Publishing Rights in Europe: Status, Challenges and Opportunities' (2023) Knowledge Rights 21; See WIPO, 'Proposal by African Group for a Draft Work Program on Exceptions and Limitations' (Document submitted to SCCR, 2023) SCCR/43/8 p. 3.

the context of an ePL right scheme on a one-copy/one-user basis. The expected outcome is to enable independent access to digital copies of books.

2. Contract law

123 An obligation could be introduced for publishers to ensure that, whenever licensing access to digital copies for the purpose of eLending, all terms of the license are reasonable and fair, taking due account of the cultural objectives pursued by ePL right schemes in Art 6(1). This suggestion follows a similar example of US State legislation (e.g., Maryland).[199] It would maintain the publishers' role as exclusive lawful source of digital copies of books while also ensuring that the conditions demanded for such access does not frustrate the purpose of the PL right Exception in Art 6(1) - e.g., a remuneration grossly exceeding the cost of digitalisation of the books and extending to potential loss sales due to the eLending.

3. eBook altruism

124 This solution is more complex as it requires the setting up of a governance framework for eBooks, involving both legislative and non-legislative interventions. A legislative measure may be used to introduce a form of digital exhaustion applicable only for eBooks; it would be however a limited form of exhaustion, allowing private parties to transfer their copies of eBooks to public libraries whenever they have acquired them in pursuit of a contract of sale. In order to do so, it would be necessary to set up a secured infrastructure – similar to the one set up by the Tom Kabinet platform (cf. case C-263/18) – where eBooks can be stored after purchase.

125 In practice, it would allow ''owners'' of eBooks to donate them to an ePL right scheme after they read it in essentially a similar way that they would do for physical books, which could then use them as a source of digital copies for carrying out eLending. The one-copy/one-user approach seems recommended in light of its functional equivalence with physical books and its more limited impact on the interests of publishers and authors (the latter, and potentially even the former – see suggestion below – could still receive a remuneration for each act of eLending in the context of an ePL right scheme). This solution takes inspiration from the notion of data altruism (leveraging on eBook altruism), an emerging concept in data legislation (Data Governance Act).[200]

III. Concluding thought

126 Intellectual property law is premised on a paradox: it is a system that aims to promote knowledge dissemination by restricting it. This article explored the changing conditions for knowledge dissemination in one crucial and under-researched setting: the digital lending of books, or 'e-lending'. We show that libraries are no longer able to build stable collection over time. Rather, the informational needs of societies increasingly are regulated by complex licensing mechanisms, granting different levels of access to the public, often in bundles and limited in time. Following the CJEU's ruling in Tom Kabinet (C-263/18), the lack of digital exhaustion appears to entrench licensing as the sole option available to public libraries. This state of affairs leaves user interests particularly vulnerable, with no agreed standard available to define reasonable conditions of access and control.[201] We offer a range of possible solutions, reflecting different kinds of juridical and political appetite for change in this area. We argue that proportionate and feasible interventions are possible under copyright, consumer and contract law.

199 A Albanese and J Milliot, 'With New Model Language, Library E-book Bills Are Back' (*Publishers Weekly*, 23rd February 2023) <https://www.publishersweekly.com/pw/by-topic/industry-news/libraries/article/91581-with-new-model-language-library-e-book-bills-are-back.html#:~:text=Passed%20unanimously%20in%20March%20of,of%20tension%20in%20the%20digital>.

200 Data Governance Act art 2(16). See also in particular Recitals 45, which explains that data altruism taps into the potential for serving ''objective of general interest in the use of data made available voluntarily''.

201 Natali Helberger, 'Standardizing consumers' expectations in digital content' (2011) 13/6 info 69.