



Information Law and Policy Lab

Policy brief on e-lending for public libraries

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Abstract

This policy brief was prepared by three master students of Information Law (“Informatierecht”) at the University of Amsterdam, in their capacity as members of the Glushko Samuelson Information Law and Policy Lab ([ILP Lab](#)) at the Institute for Information Law ([IViR](#)). This policy brief examines the practice of e-lending with a focus on public libraries. Currently, public libraries face legal uncertainty regarding the legality of lending e-books due to copyright issues and the implementation of the public lending right. This policy brief aims to further provide recommendations on how to improve legal certainty on public e-lending at EU level.

Methodology

The focus of this policy brief is on the practical side of e-lending. Therefore, we have conducted seven interviews with experts from the field, who could tell us more about the current e-lending practices. Another focus point within this policy brief is the Dutch e-lending situation. Therefore, we have conducted interviews with mostly Dutch experts. We approached the interviewees both through existing, internal contacts from the Institute for Information Law (IViR) as well as through external contacts. Our aim was to identify problems in the current EU-lending landscape, apart from the legal, theoretical problems that libraries face. Our aim was to understand the complexities of the e-lending system, from a legal perspective, identify practical challenges resulting therefrom and to advance a policy proposal for its improvement.

1. Introduction

Libraries play an important role in our society. For a vast majority of people who rely on libraries and their collections, libraries function as gatekeepers to the public's access to information and knowledge. Libraries also have an important role in facilitating this access in the online environment, a role which has been made clearer during the Covid-19 pandemic and the resulting challenges to the lending of physical books. As libraries could not open their facilities to the public, their patrons were allocated to the online services libraries were able to offer. Therefore, it is even more urgent to have a possibility for libraries to offer the lending of e-books. This would additionally lower the threshold for having to go to the premises of the library, as this can also involve time and costs for patrons. But regardless of the pandemic, e-lending plays a key role in making information and culture available to a larger audience. E-lending has the potential to strengthen access to information and culture for people with disabilities and people with a lower income, or socio-economic status in our society. It can be difficult for both groups of people to come to the premises of a library, but these are the people who are probably most dependent on libraries as a source of information. The future role that libraries can play in our society will be discussed in this policy brief, as this is an important part of our recommended policy solution.

Although public libraries can make use of the public lending exception in European Union (EU) copyright law, it remains uncertain to what extent lending of e-books (e-lending) is covered by the existing legal exception and how it should work in practice. Therefore, in the course of this project, we have researched not only the legal background of e-lending, but also the current e-lending practices in the EU, with a focus on our home country of The Netherlands. On this basis, we have examined different options to address the legal uncertainty public libraries face. This analysis provides the basis for our recommended solution on how to further stimulate e-lending.

2. Problem statement

Although libraries might want to fully fulfil their societal role of disseminating information to the public as they have done for thousands of years, copyright law does not make a digital variant of this informational process in our day and age easy. Currently, there is a problem of legal certainty surrounding e-lending in the EU.

Under EU law, acts involving the reproduction of works, their communication and/or making available to the public, and their distribution, generally require the consent of the rightsholder.¹ Authors/rightsholders also have an exclusive right to prohibit the rental and lending of their work.² There are however some derogations to those exclusive rights, specifically for libraries and the lending of books. For instance, libraries can make use of the public lending exception as a derogation on the “standard” lending regime via Article 6(1) of Directive 2006/115/EC (Rental and Lending Directive). Article 6 of this Directive allows EU member states to introduce a derogation to the exclusive right of lending. In particular, member states may exclude public lending by establishments from the obligatory prior consent of the author. These establishments, such as libraries, must at least pay the author a remuneration, unless member states have specifically exempted them from this obligation under national law. Because this public lending regime was designed to apply to physical books, it remains unclear to what extent and under what conditions e-lending also falls under the derogation as laid down in Article 6(1) of the Rental and Lending Directive. In other words, it is unclear whether the lending of e-books is permitted without the author's prior consent and to what extent libraries can make use of the public lending exception that is granted in EU copyright law for this purpose. In order to prevent unfavourable outcomes due to the possible threats of legal disputes and litigation, many libraries prefer to “play it safe” and not offer e-lending services without involving the author and/or the publisher (who is typically the rightsholder). In most cases, this will mean that an individual license by a publisher to whom the author has transferred their rights to is the only way for libraries to safely lend out e-books. Libraries are then dependant on the rightsholder's consent and the additional conditions that come with the license. This set-up naturally constrains libraries in their task of facilitating the public's access to culture.

¹ See Article 2-4 of [Directive 2001/29/EC](#).

² See Article 3 of [Directive 2006/115/EC](#).

This legal uncertainty results in a fragmented European e-lending practice. Several member states have implemented a public lending right (PLR), but not all. The PLR derives from the Rental and Lending Directive, which means that member states need to implement the Directive's provisions into their own national legislation.

Not all member states have done so, even though the Directive was first introduced in 1992.³ In the end, this means that not all EU citizens will have the same opportunity to gain access to literature, science, culture and information across different member states.

In the next section we discuss the legal framework around copyright and e-lending, the case-law from the Court of Justice of the European Union (CJEU) and their impact on fundamental rights. This analysis clarifies the complex legal background that gave rise to the legal uncertainty libraries are facing currently with regard to e-lending.

³ See PLR International, “How to Keep Writing Culture Alive Over the Years” (2020), available at <https://plrinternational.com/public/storage/resources-languages/October2020/500a5jgXCAQ2x4t4Vri8.pdf>.

Theoretical challenges

3. What can libraries do? The legal regime for e-lending

Before proposing solutions to the stated problem, we first set out the current legal framework surrounding e-lending and what libraries are allowed to do under it.

3.1 European legislation

As explained, there is no such thing as a specific right to e-lending for public libraries. E-lending is regulated through different rules in directives as interpreted by the CJEU.

Directive 2001/29/EC (“Infosoc Directive”)

[The Infosoc Directive](#) addresses the harmonization of certain aspects of copyright and related rights in the information society. The goals of the Directive include the provision of a high level of protection for authors, increased legal certainty and the fostering of creativity and innovation in the cultural industry. Furthermore, the Directive tries to harmonize European copyright rules and adapt them to new forms of exploitation in the digital environment.

Two of the most important provisions of this Directive for e-lending are Articles 3 and 4. Article 3 is about the exclusive right of authors to communicate their works to the public including the making available of their works in such a way that members of the public can get access to these works at any time and at any place. Article 3(3) states that these exclusive rights of the author shall not be exhausted by any act of communication or making available to the public. In other words, once an author or the rightsholder of the copyright has made their work available to the public, this does not mean that the public can do whatever it wants with that work.⁴ This is because the rightsholder's right has not been (and cannot be) exhausted.

Differently, Article 4 is about the exclusive right of authors to distribute the original of their works or of copies thereof to the public by sale or otherwise. This provision is understood (and has been interpreted by the CJEU) to apply to tangible items, and therefore to physical distribution. According to Article 4(2), the exclusive right of distribution can be exhausted. This is the case when a tangible work or copy thereof has been put on the market, within the European Economic Area, by the author

⁴ Tweehuysen 2020, p, 219.

or with their consent. Briefly, the exhaustion rule applies to the distribution of tangible works, but not to the online communication or making available to the public of works.

Directive 2006/115/EC (“Rental and Lending Directive”)

[The Rental & Lending Directive](#) (R&L Directive) addresses the rental right, the lending right and certain rights related to copyright. According to Article 2(1) of this Directive, lending means the “making available for use”, for a limited period and not for direct or indirect economic or commercial advantage, when it is made through establishments which are accessible to the public. Rental means the making available for use for direct or indirect economic or commercial advantage. Article 6 of this Directive allows member states to introduce a derogation to the exclusive right of lending. In particular, member states may exclude public lending by establishments from the obligatory prior consent of the author. These establishments, such as libraries, must at least pay the author a remuneration, unless they are specifically exempted by member states from such an obligation.

Directive 2019/790 (“CDSM Directive”)

[The Copyright in the Digital Single Market \(CDSM\) Directive](#) addresses copyright and related rights in the Digital Single Market and amends the Infosoc Directive. The CDSM Directive builds on the earlier directives. Its Article 6 introduces an exception which allows libraries to digitize their collections, but not to make these available online. These collections can be made available through terminals at the library. The acts of reproduction carried out under this exception are subject to the condition that they are made for the sole purpose of preserving cultural heritage. Otherwise, reproductions by libraries would require consent from the author or, for out-of-commerce books, be subject to the regime of Article 8 CDSM Directive.

3.2 Case law by the Court of Justice of the EU (CJEU)

As e-lending has been on the agenda of policy makers and stakeholders for quite some time, there is also caselaw on this topic. The two main cases at EU level both started in the Netherlands, which is not entirely accidental, as we explain in section 5. Although the two cases are not directly contradictory, they do further complicate the legal framework for e-lending.

Vereniging Openbare Bibliotheken v. Stichting Leenrecht (Case C-174/15)

The first key case in this area is the case of the Association of Public Libraries, “[Vereniging Openbare Bibliotheken](#)” (VOB) *v. Stichting Leenrecht*⁵. Stichting Leenrecht is a foundation entrusted with collecting the remuneration due to authors under the public lending right. Libraries lend out physical books and pay a lump sum in return to Stichting Leenrecht. Stichting Leenrecht is a foundation that collects copyright remuneration from public libraries and distributes it to its member rightsholders.

The Dutch government drew up draft legislation to provide for the creation of a national digital library for the remote digital lending of electronic books. This draft legislation was based on the premiss that digital lending of e-books did not fall within the exception for public lending as enshrined in Article 15c of the Dutch Copyright Act.⁶ The VOB challenged this draft legislation before a national court, arguing that the current Dutch Copyright Act already covered digital lending. This would then mean that e-lending *did* fall under the scope of the public lending exception. The District Court of The Hague wanted to know whether “lending” within the meaning of the R&L Directive also covered e-lending in the sense that the patron can download the e-book from the server of a public library, but the e-book can only be lent to one person for a certain amount of time. After that period has expired, the downloaded copy can no longer be used by that patron. The District Court also asked the CJEU to explain whether Article 6 of the R&L Directive (or any other provision of EU law) must be interpreted as precluding a member state from making the application of Article 6(1) subject to the condition that the digital copy of a book (as made available by the public library) must have been put into circulation by a first sale or other transfer of ownership of that copy in the EU by the rightsholder or with his consent.

The CJEU mentions how digital copies of books that can only be lent to one person for a limited period of time (the “one user one copy” model) is very similar to the circumstances under which as physical book can be lent.⁷ The Court therefore concludes that “lending” as stated in R&L Directive also encompasses e-lending i.e., the lending of a digital book, provided that the main conditions of the digital equivalent are very similar.⁸

⁵ Court of Justice of the European Union, 10 November 2016, C-174/15 (*Vereniging Openbare Bibliotheken v. Stichting Leenrecht*).

⁶ Article 15c of the Dutch Copyright Act, “[Auteurswet](#)”, Wet van 23 september 1912, houdende nieuwe regeling van het auteursrecht.

⁷ Court of Justice of the European Union, 10 November 2016, C-174/15 (*Vereniging Openbare Bibliotheken v. Stichting Leenrecht*), paragraph 53.

⁸ Court of Justice of the European Union, 10 November 2016, C-174/15 (*Vereniging Openbare Bibliotheken v. Stichting Leenrecht*), paragraph 54.

According to the CJEU, Article 6(1) should be interpreted strictly in order to ensure a high level of copyright protection. But since public libraries and the lending of digital copies of books play such an important role in our society, digital books cannot be excluded from the derogation of Article 6 R&L Directive.

As a conclusion, the Court rules that public libraries could use the exception of public lending for their physical books, as well as their e-books, under certain conditions.

- The e-book can only be lent out to one user at the time (the one user one copy model);
- The e-book has not been obtained from an illegal source;
- Member states retain the ability of making the application of Article 6 of the R&L Directive subject to the condition that the e-book has been put into circulation by a first sale or other transfer of ownership by the rightsholder.

This would be “good news” for libraries, since they would be allowed to lend e-books, under the condition that the e-lending process has “has essentially similar characteristics to the lending of printed works”.⁹

But there is a catch to this seemingly positive outcome for libraries. According to the CJEU, member states are allowed to improve the protection of author's rights laying down additional conditions to the use of the public lending exception as laid down in Article 6(1) of the R&L Directive. One of those possible conditions, as was part of the national requirements in the *VOB* case, is that the digital copy of a book made available by the public library must have been put into circulation by a first sale or other transfer of ownership by the holder of the distribution rights or with his consent. So, member states can require that the distribution right must be exhausted by putting the book into circulation by a first sale or other transfer of ownership. The question here was, which was not clear in the *VOB* case, whether or not exhaustion applies to digital copies. If a digital copy cannot be exhausted, libraries would never be able to fulfil the possible additional condition of the exhaustion of the distribution right for digital books. Libraries then fall back on needing the transfer or licensing of rights, for which the rightsholder's consent is required.

NUV & GAU v. Tom Kabinet (Case C-263/18)

As a result of the *VOB* judgement, absent permission of rightsholders – in particular publishers – libraries face legal uncertainty and potential liability risk for carrying out e-lending activities. Bear

⁹ Court of Justice of the European Union, C-174/15 (*Vereniging Openbare Bibliotheken v. Stichting Leenrecht*), paragraph 53.

in mind here that the Court ruled in *VOB* that member states can make the application of Article 6 of the R&L Directive subject to the condition that the e-book has been put into circulation by a first sale or other transfer of ownership by the rightsholder. Most of the time, this will mean that libraries will need the publisher's consent.

The case of [*NUV and GAU v. Tom Kabinet*](#)¹⁰ started, in the Netherlands again, a few years after *VOB*. The NUV (“Nederlands Uitgeversverbond”) and the GAU (Groep Algemene Uitgevers) are associations whose purpose is to defend the interests of Dutch publishers. Tom Kabinet offered a service lending out e-books and started a reading club (Toms Leesclub). In return for payment of a sum of money, the reading club offered its members “second-hand” e-books which have been either purchased by Tom Kabinet or donated to Tom Kabinet free of charge by members of the club. In the latter case, those members must provide the download link in respect of the book in question and had to declare that they have not kept a copy of the book. Tom Kabinet then uploaded the e-book from the retailer’s website and placed its own digital watermark on it, which served as confirmation that it was a legally acquired copy.

NUV and GAU applied to the District Court of The Hague for an injunction prohibiting Tom Kabinet from infringing the copyright of NUV’s and GAU’s affiliates by the making available or the reproduction of e-books. In their view, Tom Kabinet was, in the context of the reading club, making an unauthorised communication of e-books to the public. The District Court of The Hague, referred some questions to the CJEU, of which the most important one is if Article 4(1) of the Insofoc Directive should be interpreted as meaning that any form of distribution to the public of the original work or copies thereof includes the making available by downloading, for use for an unlimited period, of e-books at a price that is equivalent to the remuneration that the copyright holder receives based on the economic value of the work belonging to them.

In short, in *NUV v. Tom Kabinet* (C-263/18), the Court ruled that the distribution right is not exhausted if an online service provider purchases an e-book. The Court argued that Tom Kabinet did not implement technical measures that could have prevented that the e-book could only be downloaded by own person, ensuring the one copy one user-model.¹¹ According to the Court, this meant that the actions as conducted by Tom Kabinet should be regarded as a communication to the public, and not a distribution. This is the reason that the principle of exhaustion does not apply to

¹⁰ Court of Justice of the European Union, 19 December 2019, C-263/18 (*Nederlands Uitgeversverbond, Groep Algemene Uitgevers v. Tom Kabinet*).

¹¹ Court of Justice of the European Union, 19 December 2019, C-263/18 (*Nederlands Uitgeversverbond, Groep Algemene Uitgevers v. Tom Kabinet*), paragraph 69.

digital copies. This means that, if libraries would lend out the e-books, although legally purchased, they would infringe the copyright of rightsholders. Also, according to the Court, the distribution right as mentioned in Article 4 of the Infosoc Directive is not applicable to these online activities. The decision to qualify Tom Kabinet's conduct as a communication to the public caused some uncertainty. The Court only stated that this particular business model led to the qualification of their services as a communication to the public. It does not however answer the question that whether if certain technical measures were implemented to ensure the one copy one user model, the services in question would have been regarded as a distribution instead of a communication to the public.

According to the Court, the principle of exhaustion does not apply to digital products, only to physical/tangible goods. E-books cannot be “second-hand”, because they're dematerialised and digital; according to the Court e-books do not, unlike physical books, deteriorate with use. “Second-hand” e-books are therefore perfect substitutes for their original predecessor.

The Court adds that there are no additional efforts or costs to make to set up this second-hand e-book market. This new market then would likely affect the interest of the copyright holders in obtaining their appropriate reward for their works.

To cut a long story short, the principle of exhaustion does not apply to digital works (or copies thereof) covered by the Infosoc Directive, such as e-books. The result is that member states where national law imposes a requirement that the distribution right has been exhausted for libraries to carry out e-lending, it is difficult to envisage how such activities by libraries could be covered by the public lending exceptions. Put differently, where national law requires that e-lending is only possible under the public lending exception if the distribution right is exhausted, then libraries will always require the explicit permission of the copyright holder, to lend e-books, even if these were legally purchased. Without such permission, e-lending activities would amount to copyright infringement. So how are libraries supposed to make use of the public lending exception for e-lending as confirmed in the *VOB* case, if they cannot buy e-books with the intention of lending them to their patrons without getting the rightsholder's consent?

Practical challenges

4. Current European e-lending practice

As explained above, the *VOB* and *Tom Kabinet* judgements resulted in legal uncertainty regarding the permissibility of e-lending under EU copyright law. In the first case, the Court stated that the public lending exception applies to e-books, if among others the one copy one user model is used. In the second case, the Court states that the principle of exhaustion does not apply to digital goods. Assuming libraries cannot digitize physical books for subsequent e-lending without infringing copyright, this means that libraries would still need authorization from the rightsholders to lend e-books. From the publisher's perspective, the main concern with facilitating e-lending by libraries appears to be the fear of potential negative effect such activities by libraries might have on their business model, or at the very least the desire to fully control the online exploitation of the e-books for which they own copyright. Hence, it is unlikely that they will broadly facilitate e-lending activities for libraries through purely contractual means.

The rules regarding lending e-books and physical books differ significantly across Europe. Most of Europe has a working public lending right system (“PLR system”). Portugal, Switzerland and other countries have not yet implemented the PLR. Following the *VOB* judgement, the United Kingdom implemented a one copy one user model for e-books into their existing public lending system. A major downside of the one copy one user model is the technical difficulty to meet the requirements of the model. It is hard to establish a system in which it is guaranteed that the patron is the only one who can read the e-book during the lending period and that the e-book is not accessible to the patron afterwards. In addition, the model entails long waiting queues for popular books. There are also member states that do not want to work with the one copy one user model but want to use the one copy multiple users instead. An interesting solution, which will be explained further in the next section, is the approach in the Netherlands. In the Netherlands, the PLR system is bypassed by a multi-stakeholder agreement on e-lending between among other libraries, publishers and collective rights management organizations.

The interviews carried out for this project confirmed the fragmented European landscape.¹² A few examples illustrate the point. In the United Kingdom, mentioned above, there is a fixed amount for

¹² A list of interviewees can be found in Annex 1.

the remuneration of authors, which has been the same for more than 25 years and now includes e-books. The Scandinavian member states have a social-cultural system. For example, Denmark has government funding for the people who write a book in the Danish language. The situation in Germany was depicted as a “hardcore” copyright-based system, where rightsholders claim that public lending of e-books is cannibalising the free trade of e-books and are more in favour of negotiating conditions and prices.¹³

Thus, there is no EU approach to e-lending. However, the situations in the different member states can be distinguished in two ways. These categories are not strict and they can overlap, meaning that member state may fall into multiple categories.

Firstly, the following categories can be distinguished: there are copyright-based systems, where the right to lend is an exclusive right which belongs to the rightsholders. Germany is an example of such a system with few exceptions to this exclusive right. The lending of e-books by public libraries is not based on a statutory legal framework but on the negotiated terms and conditions of licenses.¹⁴ There are member states where the PLR is recognized in law as a separate remuneration right. For example, in Spain, the digital lending of books digitalized in library holdings is regulated by Spanish Copyright law. The public lending of e-books and physical books can also be part of state support for culture. That is the case in Norway, where several funding schemes based on the Norwegian Cultural Fund ensure that there is a collection of books and that all public libraries receive one copy of the books in this collection.

Secondly, it surfaced from our interviews that there are differences between member states in the way e-books are offered. In many member states, American parties such as Overdrive and Amazon offer e-books to libraries which subsequently offer them to their patrons. In Germany, Divibib GmbH and Overdrive Inc. are the two aggregators that offer technical infrastructure for the e-lending and are involved in the negotiations. The public libraries do not directly negotiate with the rightsholders but with aggregators. However, the publishers set out the conditions for the individual licenses.¹⁵ In

¹³ EBLIDA EGIL (Expert Group on Information Law), “First European Overview on E-lending in Public Libraries: An interim report”, European Bureau of Library, Information and Documentation Associations (EBLIDA), June 2022, available at: <http://www.eblida.org/News/2022/first-european-overview-elending-public-libraries.pdf>.

¹⁴ EBLIDA EGIL (Expert Group on Information Law), “First European Overview on E-lending in Public Libraries: An interim report”, European Bureau of Library, Information and Documentation Associations (EBLIDA), June 2022, available at: <http://www.eblida.org/News/2022/first-european-overview-elending-public-libraries.pdf>.

¹⁵ EBLIDA EGIL (Expert Group on Information Law), “First European Overview on E-lending in Public Libraries: An interim report”, European Bureau of Library, Information and Documentation Associations

other member states still, like Spain, libraries negotiate directly with publishers.¹⁶ In some member states, the American parties mentioned above do not even play a role in offering the technical platform in e-lending. For example, in the Netherlands there is one central online library that directly offers the e-books to the patrons.

As illustrated above, each member state has their own approach to the public lending of e-books. As resulted from the interviews, whereas in some member states the system appears to be satisfactory for the stakeholders we consulted with, in other member states it is not. In the next section, we focus on the specific situation in the Netherlands.

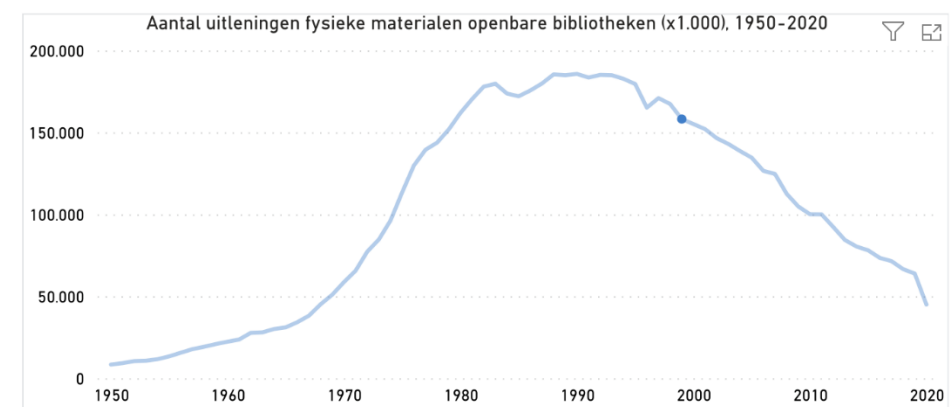
(EBLIDA), June 2022, available at: <http://www.eblida.org/News/2022/first-european-overview-elending-public-libraries.pdf>.

¹⁶ EBLIDA EGIL (Expert Group on Information Law), “First European Overview on E-lending in Public Libraries: An interim report”, European Bureau of Library, Information and Documentation Associations (EBLIDA), June 2022, available at: <http://www.eblida.org/News/2022/first-european-overview-elending-public-libraries.pdf>.

5. Situation in The Netherlands

5.1 The public library landscape in the Netherlands

The public library landscape within the Netherlands is changing. Physical materials lending has been declining fairly consistently since 1999; this is true for both books and audiovisual materials, for adult and juvenile books, and for fiction and nonfiction books. According to research conducted by Van de Burgt and Van de Hoek, over the past 15 years, lending declined by an average of 5% annually, but during the Covid-year 2020 they noticed a much larger decline.¹⁷ Overall, lending in 2020 was almost one-third less than in 2019.¹⁸ The graphic below depicts this in the period 1950-2020 and shows a decrease in the lending of physical books since the 1990s.



Source: Van de Burgt & Van de Hoek, 2021.

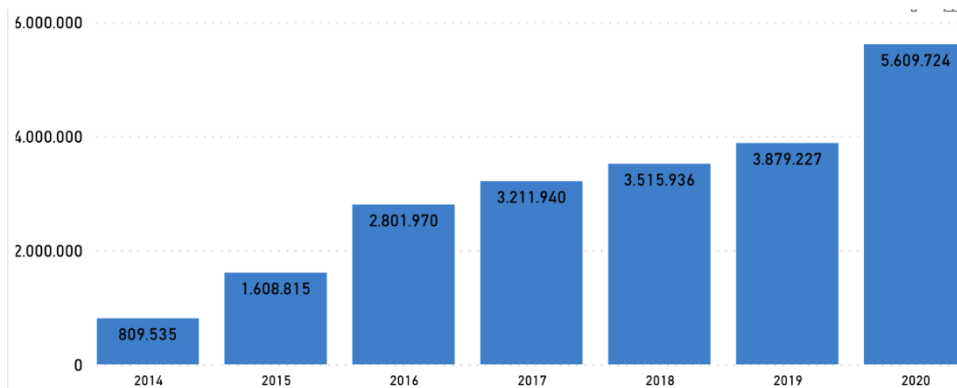
E-books

However, for e-books the opposite is true. The demand for e-books has been consistently increasing during the last 7 years in the Netherlands. In 2016, 2.8 million e-books were lent by the online Library; in 2019, 3.9 million e-books were lent by the online Library. By 2020, this increased in part due to the additional promotion and actions of the online Library in corona time to approximately 5.6 million loans.¹⁹ The graphic below depicts the increase in the number of e-book loans from the online Library between 2014-2020.

¹⁷ A. van de Burgt & S. van de Hoek, *Bibliotheekstatistiek 2020*, Koninklijke Bibliotheek 2021.

¹⁸ Van de Burgt & Van de Hoek, 2021; CBS, 2021a.

¹⁹ Van de Burgt & Van de Hoek, 2021; CBS, 2021a.



Source: Van de Burgt & Van de Hoek, 2021.

Nationwide: KB, VOB, VNG and OCW

The Dutch library sector currently has a national, provincial and local layer. The national organisations involved in the library field include the “Koninklijke Bibliotheek” – the Royal Library (KB), the Association of Public Libraries (VOB), the Association of The Netherlands Municipalities (Vereniging van Nederlandse Gemeenten, VNG) and the ministry of Education, Culture and Science (Onderwijs, Cultuur en Wetenschap, OCW). Since the introduction of the *Wsob* (*Wet stelsel openbare bibliotheekvoorzieningen*) or Law system of public library facilities, the KB has had a guiding role within the network and offers national support to all public library organisations.²⁰ The KB is also responsible for the digital supply and for drawing up a national collection plan. The VOB is the sector association for public libraries. The VNG supports municipalities and provides them with advice on, among other things, the implementation of local library work. Finally, the ministry of OCW is responsible for legislation and financing relating to the Dutch library sector.²¹

5.2 E-lending covenant

In order to counter the problems described above and to make e-lending possible, the relevant stakeholders in Netherlands have drawn up a contractual framework arrangement under the form of a Covenant containing agreements about the lending of digital works by the KB on behalf of public libraries in the Netherlands (“e-lending Covenant” or “Covenant”).²² The goal of this Covenant is to promote the use of e-books, give users access to as many e-books as possible, and ensure that

²⁰ Article 17 *Wsob*.

²¹ Kempen e.a., *Emerald Insight* 2020, p. 167-183.

²² *Convenant houdende afspraken over het uitlenen van digitale werken door de Koninklijke Bibliotheek ten behoeve van de openbare bibliotheken in Nederland (e-lending Convenant)*, available at: <https://zoek.officielebekendmakingen.nl/stcrt-2018-59302.html>.

authors receive fair compensation. Key players in the Dutch library field came together in 2018 to sign this e-lending Covenant.

One of the interviewees explained that there was a lot of backlash from the publishers when the idea of drafting a Covenant was first introduced. The reason, we were told, was that publishers resisted efforts that could lead to them losing control over their business. One of our interviewees told us that this was a result of the stigma that everything you put online is immediately lost and, on the internet, forever. However, the interviewee stated that the Netherlands had one big advantage. This is that the Netherlands is a small country and all key players in the lending of e-books are familiar with each other and were therefore able to win each others trust and begin negotiating the right terms. This is what led to the e-lending Covenant. Parties of the e-lending Covenant are:

- Koninklijke bibliotheek (KB)/Royal library;
- De Vereniging Openbare Bibliotheken (VOB)/The Association of Public libraries;
- Stichting LIRA/LIRA Foundation;
- Stichting Pictoright/Pictoright Foundation ;
- De Auteursbond/The Authors' Union;
- De Groep Algemene Uitgevers (GAU)/The General Publishers Group;
- Het ministerie van Onderwijs, Cultuur en wetenschap (OCW)/the Ministry of Education, Culture and Science (OCW).

In 2020 the KWINK group (a Dutch research and consulting firm for social pressing issues) published research on the working of this Covenant in practice.²³ Based on this research, the interviews conducted and literature research, we provide below a description of some of the key elements of the Covenant and its development:

- **Scope of the covenant**

The Covenant ranges from rights relates to copyrighted contributions of authors, translators and image makers to foreign titles translated into Dutch in the general book category published by Dutch publishers.²⁴ Consequently, the Covenant does not cover, e.g., books by American publishers in English.

- **Standard agreement/contract**

²³ Mulder a.o. 2021.

²⁴ Article 1.2 E-lending Covenant.

In the interviews it came forward that the involved parties that make use of the Covenant also make use of a standard agreement/contract. This is a contract between the KB and a publisher. The contract is a license agreement. In the recitals, it is stated that the publisher has been granted the intellectual property rights from the author or the rights holder. The publisher then grants to the KB a license for two rights: 1) the reproduction right²⁵, and the right to make the work available to the public.²⁶ Users (i.e. patrons), who are a member of the online Library or a local library, can then download the e-book for a period of three weeks, after which the e-book becomes automatically unavailable. Users can lend ten e-books at the same time.

- **One copy-multiple user model**

The Covenant is based on a one copy multiple user principle. The GAU represents the interests of Dutch book publishers of literature, children's books and non-fiction. The one copy multiple user model entails that the GAU will make every effort to ensure that its members grant a non-transferable licence to the KB as soon as possible after the marketing of an e-book they have published, so that the national digital public library can lend the book digitally to users. In any event, the GAU will make every effort to ensure that its members grant a license to the KB no later than six to twelve months after the marketing of an e-book they have published.²⁷ The abovementioned license includes the lending of one digital copy of the book to multiple library users at the same time. This is what is called the one copy multiple users model.²⁸ In the Netherlands, users were already used to this model so going to a one copy one user model would not have made sense for the libraries. Indeed, the KB had already been working with the one copy multiple users model since 2014. For example, if a writer wins a literature prize the title is often already a part of the collection of the library. The book will be borrowed much more after an event like this. This does not pose any problems to the library because of the one copy multiple users model. This example shows that there are significant advantages to using this model.

- **Appropriate lending compensation for authors, translators, image makers and publishers**

In exchange for an e-lending license, the KB pays a fee per loan. For original Dutch titles the popularity of the title concerned plays a part in the amount of this fee. The KB pays 50% of this

²⁵ There's no mentioning to any law, but it seems to refer to the reproduction right as laid down in Article 2 of the Infosoc Directive and the reproduction right in the Dutch Copyright Act.

²⁶ Idem, Article 3 of the Infosoc Directive.

²⁷ Article 1.2 E-lending Covenant.

²⁸ Article 2.2 E-lending Covenant.

lending fee to the publisher in question and 50% to the collecting rights management organisations Lira and Pictoright jointly.²⁹ For protected contributions by authors, translators and image makers to foreign titles translated into Dutch the KB pays a lending fee per loan, to be agreed upon, to the publisher who published the title. This includes the fee for the foreign authors involved. In addition, the KB will pay 50% of the lending fees mentioned to Lira and Pictoright for the copyright contributions made by authors, translators and image makers for the Dutch edition.³⁰

- **Transparency about the number of loans**

At least twice a year the KB will give Lira, Pictoright and public libraries access to the lending figures for e-books at title level, as well as the associated rates, to the extent necessary for issuing the fees as mentioned above.³¹

- **Financial contribution of the ministry**

In article 5 of the Covenant, it is stated that (and by which amount) the minister increases the state contribution the KB receives each year.

- **Duration, evaluation and dissolution**

Article 6 of the Covenant states that the parties will evaluate the covenant at a joint meeting one year after it takes effect. However, this agreement was not achieved. Due to the impact of Covid-19 and other priorities, the evaluation took place almost three years after entry into force. This meeting has already taken place.³² If one of the parties does not comply with the agreements laid down in the Covenant, the parties shall attempt to reach a solution by mutual agreement. If no solution is found, either party, also on behalf of the other parties, may give the defaulting party a reasonable period of at least two months to comply with the Covenant by means of a written notice of default.

In the event of dissolution of the Covenant, the rights and claims conferred by the Covenant shall lapse automatically for the period commencing on the date on which the Covenant ends, save for rights and claims based on the period during which the Covenant was in force when it was being wound up.

²⁹ Article 3.1 E-lending Covenant. Lira is a copyright organization for and by writers, translators and freelance journalists. Pictoright is a non-profit foundation designated by the government for the collection and distribution of collective rights.

³⁰ Article 3.2 E-lending Covenant.

³¹ Article 4.1 E-lending Covenant.

³² Mulder a.o. 2021.

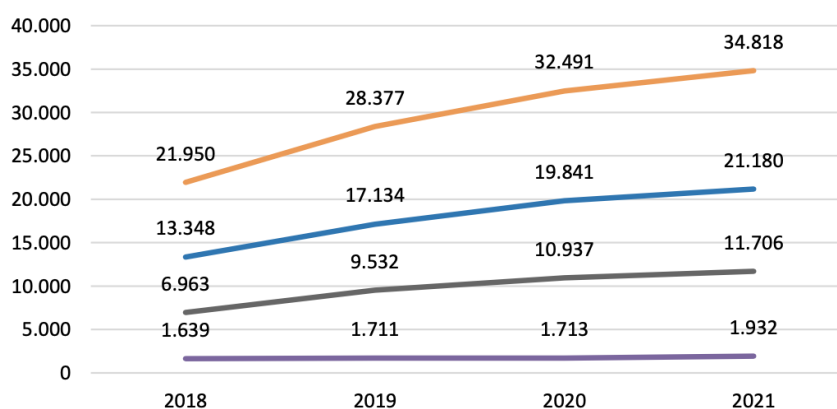
5.3 Consequences and results of the covenant

Increase in the collection of e-books

The e-book collection is available through the online Library.³³ The online Library is managed by the KB. The KB indicates that it aims to offer the most diverse range of e-books on the website (and mobile application) of the online Library.

The total collection of e-books in the online Library has grown between 2018 and 2020. As visible in the figure below, the collection grew mainly between 2018 and 2019. This suggests that the collection has grown as a result of the coming into force of the Covenant.

In the graphic below the orange line depicts the total growth in the number of e-books in the collection of public libraries. The blue depicts the growth in the number of Dutch e-books in this collection. The grey line depicts the translated e-books, and the purple line depicts the remaining e-books in the collection. Before the Covenant was signed in 2019, the collection of e-books in the online Library consisted of 21,950 copies. After signing the Covenant, this collection has grown to over 32,000 titles by the end of 2020 and to 34,818 titles by the middle of 2021. It is thus likely that the signing of the Covenant has resulted in a significant increase in the e-books collection of public libraries. However, non-Dutch books do not fall within the scope of the covenant and are therefore not available to public libraries in the form of an e-book under this regime.



Source: Mulder e.a. 2021.³⁴

³³ De Bibliotheek online, e-books, available at: <https://www.onlinebibliotheek.nl/>

³⁴ J. Mulder, L. Janssen, B. van Mil, *Evaluatie Convenant e-lending*, KWINK groep 2021.

The first evaluation of the Covenant³⁵ has advanced the following conclusions regarding the efficacy of the Covenant:

- Parties succeeded in ensuring a broad and easily accessible digital offer. The digital offering has grown since the Covenant entered into force from 21,950 e-books to 32,491 e-books. This involves both a growth in Dutch works and a growth in works translated into Dutch, published by Dutch publishers. The collection has also grown in diversity (in every category). This includes both fiction and non-fiction and e-books for adults and youth.
- It is more difficult to make statements about the timelines of the collection. It has been agreed that the GAU will try to make e-books available within six to twelve months of their publication. The KB, however, is the party conducting the negotiations with the individual publishers. This should also take account of the individual wishes of authors, image-makers and libraries for the use of e-books. There is no uniform approach by all publishers to making current and other e-books available. However, based on the figures available, it can be said that most titles that are available in the publisher's catalogue will, within twelve months of publication, also be available in the online Library (This increased from 56% of the titles available in the catalogue in 2019 to 89% of the titles available in the catalogue in 2020).
- The fee per title has been increased and, unlike before the Covenant was signed, authors are given insight into the fee they receive per title. The fee per e-book loaned has increased by almost 50% on average from € 0,60,- to €1,03.
- The number of e-lending has increased since the Covenant (as mentioned above). However, there has not been a significant increase in the number of accounts used to borrow e-books since the signing of the Covenant.

The evaluation of the Dutch Covenant thus shows positive results.³⁶ This is consistent with our analysis and interviews, which suggest that the parties involved are generally satisfied with the Covenant.

However, the evaluation also shows that there is a need for more information and transparency for all parties involved. The complaints about lack of information concern mostly the lending

³⁵ Rijksoverheid, Documenten, Rapporten, Evaluatie Convenant e-lending, available at: <https://www.rijksoverheid.nl/documenten/rapporten/2021/11/30/evaluatie-convenant-e-lending>.

³⁶ Mulder a.o. 2021.

figures/numbers, insights into the collection and insights in the remuneration towards the authors.³⁷ There are also concerns about the financing of e-lending.

- Firstly, although the remuneration that authors receive (via Lira and Pictoright) has almost doubled since 2018, the amount of money is still circa EUR 1,00 per loan.³⁸
- Secondly, it is the publisher that does the negotiations over the fee that is remunerated to the author. This happens for every book that's added to the online Library. Even though it is plausible that for most books there will be a standard fee (as we've seen in the standard model), this system can cause uncertainty for authors, who lack predictable information about their potential revenue. Although you can also describe this system as flexible (some books “sell” better than others), the key point here is that the power lays with the publisher and there is a dependency on the publisher.
- Also, it appears to not be exactly clear how the offer of available books is determined. There are no guidelines on which the decision to make a book part of the collection is based.
- Lastly, regardless of the publisher's power, the whole system is eventually dependent on the budget that the government sets aside for e-lending. This could affect authors also for example, when there's a great demand for the author's book, but there's no budget anymore to pay the remuneration.

5.4 Conclusion

The Netherlands have partly overcome the European problem of e-lending by the drafting of an e-lending Covenant. They have chosen a contractual agreement against the backdrop of legal uncertainty regarding the statutory lending exception. This Covenant was drawn up by sitting around the table with the largest players in the e-lending practice. The covenant appears to be working well as is stated in its evaluation. This is, for example, shown by the increasing collection of e-books available. However, there are some disadvantages. For example, the covenant only applies to Dutch books. Also, it remains somewhat unclear how the offer of books is determined within this system.

³⁷ Mulder a.o. 2021, p. 21.

³⁸ Mulder a.o. 2021, p. 14.

6. Recommendations

6.1 The need for a European Solution

Our research did not reveal a consensus as to what would be the best policy option going forward at EU level. For instance, one respondent stated that this issue will not be important enough to be handled at a European level. Presumably, this would refer to the reduced economic significance of e-lending practices. A few interviewees pointed out the option that publishers will start their own subscription-based platforms, comparable to for example, Spotify. On these platforms a lot of e-books will be provided against a small monthly payment. In this way, libraries will be excluded from the e-lending chain. One of the respondents however countered that such a scenario would be difficult to implement. The respondent pointed out that it is naïve to assume that publishers are a homogeneous group with a corporate culture of solidarity. Publishers are very much divided. It is hard to see how the gap can be filled between big publishers – with their extended distribution networks and clout in the book trade – and small and medium sized publishers, often the most risk-taking category of publishers. The opinions on this subject thus seem to be divided. However, the research pointed out that the importance for lending e-books from libraries increased drastically during the pandemic. In the Netherlands there was also an increase in the lending of e-books since the e-lending Covenant became effective.

Besides, it must be noted that libraries have an important function in society. The Public Library Facilities System Act (Wsof) identifies five social functions that every library organization must fulfil:

- making knowledge and information available;
- providing opportunities for development and education;
- promoting reading and introducing people to literature;
- organizing meetings and providing a space for debate;
- introducing people to art and culture.

The fact that the world is evolving and becoming more digitized will not exclude libraries from these important functions. In our view, it is crucial that people retain the option of lending e-books in exchange for a lower price than potential commercial subscription models offered by publishers. In other words, there is a strong case for a European intervention to improve the situation as regards e-lending.

6.2 A European covenant

The Dutch covenant model seems, as discussed above, to be a good solution for the Netherlands. However, a lot of respondents pointed out that this is a “typical” Dutch system and can therefore not be as easily transplanted to other countries. This is because the “poldermodel” is used while drafting the covenant. This model entails the method of consensus-decision-making based on the Dutch version of consensus-based economic and social policymaking in the 1980s and 1990s. Cooperation between the members of the book chain has taken a long time to develop, and you see this in the Covenant, which reflects this balance. This form of cooperation seems hard to envision in other countries with different cultures and socio-economic fabrics, a point that was also made by many of our interviewees. There are a few main characteristics of the e-lending Covenant that are essential for it to work properly, as one of the respondents told us. There must be money from the government, short lines between parties involved and a central library. These are all features of the Covenant that seem hard to implement on a European scale.

7. Policy options

This policy brief suggests that a “one size fits all” solution is not feasible. It is however of the utmost importance that children as well as adults have access to information, literature and culture of all sorts. Even though the future is unpredictable, there is still a very important role for libraries in the future. As described in section 6, libraries are more versatile and can take on many different roles in order to serve their purpose. Norway, as well as the Netherlands, for example, has already laid down the versatile role of libraries into their legislation, see Article 1 of The Public Libraries Act:

“The task of public libraries is to promote the spread of information, education and other cultural activities through active dissemination and by making books and other media available for the free use of all the inhabitants of Norway. Public libraries are to be an independent meeting place and arena for public discussions and debates.”³⁹

It seems that libraries will increasingly play such a role, rather than being “just” a place for the gathering of information. This means that, even though it is possible that publishers will come up with a commercial “streaming” model for e-books, a public e-lending system in which libraries play a central role would be desirable. In this way all citizens, regardless of their budget, are able to access literature, culture and any information they need in all kinds of ways (reading, debate, workshops etc.). The importance of this role of libraries for Europe's literacy should not be forgotten.

In our research, we have focused on the Dutch solution to this problem, the aforementioned covenant. Although a “EU covenant” might not be realistic, the model provided by the Dutch covenant identifies some core characteristics to be considered for any future EU-wide solution. These characteristics are the following:

- **A money funder**

The Covenant works because of the fact that a large party (in this case the government) provides the KB with a sum of money which enables them to pay their licenses with publishers etc. For a solution in the lending of e-books it is therefore important that there is a money funder to enable the process. Member states implementing a working public e-lending system should allocate sufficient funding to it.

- **Central library**

³⁹ Section 1, Act relating to public libraries.

In the Dutch covenant, the KB plays a big part. The KB has a guiding role within the network and offers national support to all public library organisations.⁴⁰ The KB is also responsible for the digital supply and for drawing up a national collection plan. It is neither feasible nor desirable for each local library to set up its own infrastructure. Also, publishers need only negotiate with one central party instead of each local library. It is also said that because all libraries participate in a digital infrastructure, the online Library strengthens the power of its network. Also, the central party provides a technical platform, so parties like Overdrive Amazon etc. are not needed. All in all, a central library is crucial in order for the system to be effective. Member states should appoint such libraries, where they do not exist already, and afford them this competence in the context of e-lending. Those parties could be instructed to cooperate at EU level. This would foster cross-border use.

- **One copy multiple users model**

The Dutch digital public library operates according to the system of one copy multiple users, whereby a purchased digital title can be read simultaneously by multiple library members. This functionality is crucial for usability and contributes greatly to the success of the Dutch digital library. In contrast, many European countries work with a system of one copy one user, where a purchased digital title can only be used by one library member at a time. This provides for a limited user value. Based on the abovementioned characteristics of the Dutch model, we propose the following options.

Option 1. Reform of PLR: one copy, multiple user model

The first option is to adjust the PLR at EU level to the characteristics of the Dutch covenant. As this works in The Netherlands, this system has potential for other member states as well. The Dutch covenant seems to find a nice balance between the different interests involved; those of the author, the publisher, the libraries and the public. For this option to be feasible, member states should be able and most of all willing to fund e-lending. It is therefore important to remind member states of the values of a well-informed public and the public's right to receive and impart information. A PLR framework at EU level also harmonizes the EU's internal market: one of the key goals of the EU.

In order to help other member states with the implementation of a PLR system, member states that have already implemented a PLR system with a one copy multiple user model, should draft codes of good practices. These codes can contribute to the cross-border sharing of information on how to successfully implement a framework for e-lending.

⁴⁰ Article 17 Wsob.

A final aspect of this option could be to install an EU wide e-lending observatory. A perfect candidate for this position is the European Union Intellectual Property Office (EUIPO). The EUIPO also runs an Observatory on the infringement of intellectual property rights and the Orphan Works Database.⁴¹ This new observatory should consist of among other copyright experts and specialist stakeholders, representing publishers, authors and libraries.

Option 2. Incentivize member states

In case the first option of implementing an EU-wide PLR based on the Dutch covenant, the European Commission or Council should incentivize member states to implement their own PLR system. This could be done by publishing a Recommendation or a Communication. These policy documents are standard setting and can guide member states in implementing their own system while harmonizing the different systems at EU level. These Recommendations or Communications could encompass best e-lending practises based on collective licensing, or types of agreements such as the Dutch covenant. Member states could then adjust the PLR system to their own national needs and circumstances, while retaining the core shared characteristics across all member states. These PLR systems should at least entail a central library and the member states should allocate sufficient funding to the PLR system.

8. Conclusion

Although this policy brief does not provide one European solution, it hopefully still contributes to a European approach towards e-lending practice of copyright protected works. The Dutch covenant seems to be a good starting point for member states that haven't implemented the public lending right. This policy brief can be regarded as an encouraging and explanatory document with a specific point of view from the Netherlands, with concrete policy recommendations for harmonization of e-lending practices across the EU.

⁴¹ European Union Intellectual Property Office (EUIPO), Observatory, available at: <https://euipo.europa.eu/ohimportal/en/web/observatory/home>.

Bibliography

Legislation

- Act relating to public libraries (The Public Libraries Act), Norway.
- Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, (“Infosoc Directive”).
- Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental rights and lending rights and on certain rights related to copyright in the field of intellectual property (codified version) (“Rental and Lending Directive”).
- Directive 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (“CDSM Directive”).
- Wet stelsel openbare bibliotheekvoorzieningen (Public Library Facilities System Act).

Caselaw

- Court of Justice of the European Union, 10 November 2016, C-174/15 (*Vereniging Openbare Bibliotheken v. Stichting Leenrecht*).
- Court of Justice of the European Union, 19 December 2019, C-263/18 (*Nederlands Uitgeversverbond, Groep Algemene Uitgevers v. Tom Kabinet*).

Other sources

- Convenant houdende afspraken over het uitlenen van digitale werken door de Koninklijke Bibliotheek ten behoeve van de openbare bibliotheken in Nederland (Dutch e-lending Covenant), available at: <https://zoek.officielebekendmakingen.nl/stcrt-2018-59302.html>.
- De Bibliotheek online, e-books, available at: <https://www.onlinebibliotheek.nl/>.
- EBLIDA EGIL (Expert Group on Information Law), “First European Overview on E-lending in Public Libraries: An interim report”, European Bureau of Library, Information and Documentation Associations (EBLIDA), June 2022, available at: <http://www.eblida.org/News/2022/first-european-overview-elending-public-libraries.pdf>.
- European Union Intellectual Property Office (EUIPO), Observatory, available at: <https://euipo.europa.eu/ohimportal/en/web/observatory/home>.
- Rijksoverheid, Documenten, Rapporten, Evaluatie Convenant e-lending, available at: <https://www.rijksoverheid.nl/documenten/rapporten/2021/11/30/evaluatie-convenant-e-lending>.

- The Glushko & Samuelson Information Law and Policy Lab, available at: <https://ilplab.nl/>.

List of interviewees

- Christiaan Alberdingk Thijm – lawyer involved in both *Tom Kabinet* and *VOB* judgements, teacher at Institute for Information Law (IViR);
- Annemarie Beunen – legal consultant copyright law at the Dutch Royal Library
- Martijn David – chairman at Mediafederatie (former GAU)
- Bart Jeroen Kiers – manager e-commerce Atlas Contact uitgeverij
- Arjen Polman – chairman at Stichting Leenrecht, chairman at PLR International
- Petra Rijkelijkhuisen – strategic account manager at the Dutch Royal Library
- Joschka Selinger – lawyer and procedural coordinator Gesellschaft für Freiheitsrechte
- Dirk Visser – lawyer involved in the *VOB* case, professor intellectual property at Leiden University
- Giuseppe Vitiello – director of European Bureau of Library, Information and Documentation Associations (EBLIDA)