



German Government e-Book Consultation June 2023

1.1 Bewerten Sie die aktuellen Rahmenbedingungen des E-Lending als „fair“? Bitte begründen Sie Ihre Antwort kurz.

No. Whereas the law provides for and allows libraries to lend analogue books, due to a failure by the state to update legislation in line with the CJEU case *VOB v Stichting Leenrecht* (C-174/15) German libraries are unable to undertake e-lending of eBooks without a licence. Despite lending being enshrined in copyright law for public policy reasons including freedom of expression, the right to education, the right to a cultural life etc, due to legislative inaction lending is now a monopoly right subject to the of publishers.

This monopoly results in a poorly functioning e-Book market that does not deliver for readers. As a result libraries experience:

- i) refusal to license,
- ii) long delays in public libraries being able to access new titles,
- iii) much higher prices for libraries,
- iv) negative impacts on budgets,
- v) bundling of titles so libraries have to buy titles they don't want,
- vi) secrecy around contracts.
- vii) Publishers routinely swap titles in and out of subscriptions with no notice to libraries meaning the creation of a stable collection is not possible.
- viii) fundamental functions that lie at the heart of what a library does are undermined. e.g. interlibrary loan, document supply etc.

On this last point, eBook licences frequently remove rights and activities that copyright law allows – most importantly arguably preservation (which may or may not be a problem due to §60e of UrhG), document supply and inter library loan of eBooks. Interlibrary loan is a backbone service of libraries across Germany and eBook licences hardly ever authorise these activities.

Furthermore, the use of technological protection measures makes these activities impossible. On this point, the means for circumventing technical protection in German law are impractical, time consuming and we would urge that they need to be revisited.

This all impacts on the ability of a library to fulfil its legislative and societal functions and in turn rights of citizens to access knowledge. It also means that authors are not receiving PLR payments from public loans of eBooks. Studies show that returns from publishers to authors from licences are poor, so authors are not receiving their fair reward. ¹

¹ <https://www.ereaders.nl/auteurs-verdienen-weinig-aan-uitlening-e-books-en-abonnementsdiensten/>

We believe issues like refusal to licence, eBundling, high pricing and secrecy of licensing raise potentially significant competition law issues and believe that the Bundeskartellamt should undertake a market investigation into eBook markets.

These issues are essentially the same across Europe hence the German Library Association (DBV) and many others signing and open statement calling for regulation of eBook markets:

<https://www.knowledgerights21.org/news-story/library-associations-across-europe-joint-call-for-action-on-ebooks/>

To this end, please find attached an interim report we have commissioned with the University of Glasgow on eBook lending.

In sum, eBook markets are not fair as they undermine and threaten the core functions of libraries – namely collection development, preservation, and lending. Without legislation libraries will be left behind, only able to function in the analogue world.

1.2 Welche (tatsächlichen) Gemeinsamkeiten und Unterschiede bestehen beim Verleih analoger und digitaler Bücher?

We see the lending of physical and electronic books as being the same thing, and equally core to the role of libraries in the modern world. As such, the procedure for lending analogue and digital books from libraries should therefore be completely the same to all intents and purposes. Technological protection measures can be used to allow many models including the model laid down by the CJEU in *VOB v Stichting Leenrecht* C-174/15 (one copy one user), which we believe should be enshrined in German law as a basic right for libraries. Yet too often, it is more difficult, given the issues set already. Contracts and technological protection measures serve to prevent, rather than enable, equal treatment of physical and electronic lending.

We would not that once such a guarantee of libraries ability to lend under a one-copy-one-user model is in place, publishers can license above this basic “back stop” to allow multiple copies. However, the law should guarantee the right for libraries to digitise or circumvent publisher technical protection measures and lend any book on a one copy one user basis in line with the *VOB* case.

Authors should receive PLR from all loans.

1.3 Gibt es Besonderheiten beim E-Lending in wissenschaftlichen Bibliotheken?

While open access offers a welcome approach for new works where there is support available, for everything else, broadly the issues are the same between academic and public libraries – refusal to license, long delays in public libraries being able to access new titles, much higher prices for libraries, negative impacts on budgets, bundling of titles so libraries have to buy titles they don’t want, secrecy around contracts, removal of core rights by licence such as preservation, interlibrary loan and document supply. It is worth underlining that in the academic space, writers’ salaries are typically covered by their employing institution already.

2. Verfügbarkeit von E-Books

2.1 Welcher Anteil an den E-Books, die am Markt käuflich zu erwerben sind, ist im Rahmen des E-Lending für Bibliotheken verfügbar?

According to the weekly updated list of the *Onleihe Verbund Hessen* (<https://lizenzinitiative.onleiheverbundhessen.de/spiegel-bestseller.html>), between 50% and 80% of new releases of e-books are not available for public libraries.

In academic libraries where the norms of eBook markets are international, given the dominance of English language scientific publishing, it will depend on the budget and whether a publisher wishes to sell to a library or believes cutting the library out and selling direct to students is more financially lucrative for them. An eBook title can be 1000% the price of a paper book and yet only allow for one user, or a publisher may refuse to license an individual title outside of a bundle mainly consisting of titles the majority of which they do not need or want.

Large publishers routinely withdraw titles also. See this article on Wiley:

<https://www.irishexaminer.com/news/arid-40966277.html>

As a result of the Wiley case, the eBookSOS Campaign and the Authors Alliance wrote to many of the authors whose titles had been removed from circulation in universities. Of those that responded almost all of them if not all of them were unaware that their books had been removed from library sale in regards to which they expressed shock and disappointment.

2.2 Welche Gründe führen dazu, dass bestimmte E-Books Bibliotheken für das E-Lending nicht zur Verfügung stehen?

Publishers believe they can maximise profits by not selling to libraries but direct to consumers, students etc. We believe some publishers are seeking to force the US model where course titles are bought by students as they cannot be bought by libraries. This raises serious equity issues in that during times of a cost of living crisis, not all students are able to afford such additional costs. Indeed, it is the unreasonableness of expecting all students to buy all of the books they might need that explains why libraries are so essential. Furthermore, individual licensing of eBooks raises concerns around violations of student privacy.

2.3 Welche Gründe führen dazu, dass ein Titel generell auf dem Markt nicht als E-Book, sondern nur als Print-Ausgabe verfügbar ist (z.B. Entscheidung des Autors, des Verlages oder andere)?

The decision is almost always made by the publisher alone. We believe it will normally be because the publisher does not believe that there is economic profit in providing and maintaining an eBook (despite the obvious benefits in terms of accessibility). This means that back list titles will not be available in electronic form unless libraries are able to digitise them and lend them.

As outlined above we believe in the main that authors are not aware of the decisions of publishers to license or not license titles to libraries. Furthermore as shown above, one study suggests that payments to authors from library lending are the minority.

2.4 Wie groß ist die Nachfrage in Bibliotheken nach E-Books für Titel, die sowohl als Print-Medium als auch als E-Book zur Verfügung stehen?

Due to the change in media, e-books are increasingly in demand. In academia eBooks are very popular and have become more so because of Covid.

3. Vergütung und Lizenzgebühr

3.1 Ist die Vergütung der Autoren und Verlage für das E-Lending aus Ihrer Sicht aktuell angemessen?

In contrast to the statutory regulation of the "library royalty" in Section 27 (2) UrhG, the remuneration of authors for e-lending is determined by the publishers. *VG Wort* is not involved in this. Therefore, it is reasonable to question whether, as was the case in the Netherlands in the Stichting Lira / Auteursbond study, trade authors receive any remuneration for the e-lending of their

works, or indeed receive information from publishers about the eLending of their works. If so, this would be a clear violation of the principles of copyright law (sec. 32 UrhG).

Academic authors in line with the market norms will generally receive no remuneration.

3.2 Wie hoch ist der Preis, zu dem E-Books für Bibliotheken angeboten werden, im Verhältnis zum Preis, zu dem E-Books für Endkunden auf dem Markt angeboten werden?

In academia titles can range from the same price up to more than 1000% higher for a single seat licence.

In public libraries we are not sure as comparison can be difficult due to the lending models. Based on international studies it suggests that the price is on average over 3-4 times the price for a public library compared to a consumer. We are aware, nonetheless, that the primary concern among German public libraries is around availability of eBooks.

3.3 Welchen Anteil an der von den Bibliotheken für das E-Lending gezahlten Vergütung erhalten Autoren, Verlage und ggf. sonstige Personen?

We refer you to the response from Urheberrecht für Bildung und Wissenschaft e.V. and the Stichting Lira / Auteursbond study referenced above.

3.4 Sind die gegenwärtigen Lizenzmodelle beim E-Lending aus Sicht der wissenschaftlichen und öffentlichen Bibliotheken praktikabel?

No. eBook market pricing and terms of access are unsustainable for libraries and their patrons. They undermine the societal function of libraries and as a result damage education, research, science and access to culture. In sum they damage public welfare.

Currently, as shown above libraries are even refused the ability to license an eBook.

When access is given the titles are generally expensive, need to be purchased again and again and undermine exceptions in the German copyright act such as inter library loan and document supply.

In public libraries, windowing also is common for the more popular titles meaning no library licence is available for many months.

3.5 Welche Rolle spielen sog. Lizenzbundles bzw. E-Book-Lizenzpakete?

License bundles are very common and require libraries to buy titles they are not interested in.

Publishers change titles without permission from libraries meaning no collection development is possible. Also at the end of the licence period the titles disappear and have to be repurchased. The public purse is paying hundreds of millions of euros a year on content which “evaporates” at the end of the licence period meaning that there is nothing to show for the large investment made annually by the public sector in science, learning and knowledge.

As shown by the Wiley example above it is standard practice for publishers to remove titles libraries have paid for so there is no stable development of a collection. This undermines the core role of a library – collection development.

3.6 Gibt es für wissenschaftliche Titel andere/besondere Lizenzmodelle im Vergleich zu öffentlichen Titeln?

The license models are all imposed by the publisher and are all different. This makes managing titles impossible for libraries and is also confusing for library users as the terms of access for each book are different, including different combinations of restrictions of typical library activities mentioned above (lending, inter-library loan, preservation).

Licences are also in the main not negotiated and therefore constitute contracts of adhesion. In essence, they are an imposed licence “not to negotiate”.

4. Rolle der Aggregatoren

4.1 Welche Aggregatoren sind in Deutschland im Rahmen des E-Lending tätig?

Public libraries in Germany use two aggregators for their e-lending (*Divibib GmbH, Reutlingen* and *Overdrive Inc., Cleveland*), which negotiate licenses for e-media with publishers on behalf of libraries and make them available on a technical platform for libraries.

In academia access to eBooks is through a mix of direct access to publisher platforms and aggregators. The main aggregators are EBSCO and ProQuest, which are both US companies, and much smaller is Schweitzer and Ciando, which part of the Mediengruppe Stein.

4.2 Welche einzelnen Aufgaben übernehmen die Aggregatoren im Zusammenhang mit dem E-Lending?

They negotiate licenses for e-media with publishers on behalf of libraries and make the books available to libraries on a technical platform. Sometimes libraries get a platform licence to cover all content, sometimes the individual publisher licence must be referred to although that is not necessarily provided or accessible to the library and / or the student, researcher or member of the public.

This means that terms of use of eBooks are not standardised. Thus, what you can and cannot do with an individual title varies. Neither libraries or patrons can manage such an overwhelmingly heterogenous terms of access to eBooks. Copyright (and in this case, copyright exceptions) by contrast creates simple, universal and standard terms of use.

4.3 Wie und von welcher Seite werden die Aggregatoren dafür jeweils bezahlt?

In addition to the acquisition costs that the public libraries pay to the aggregators, there are other costs that have to be paid by local authorities. For example, to procure access to the platform for the first five libraries that joined the *Onleihe* in Rhineland-Palatinate, the authority has had to pay ten cents per inhabitant, with a further five cents per year in subsequent years. Every new library joining *Onleihe* has to pay the same which comes from the acquisition budget.

In addition to acquisition costs in academia platform costs are also payable.

4.4 Warum gibt es aus Ihrer Sicht nur wenige Aggregatoren am Markt?

We believe, as we see with many e-commerce platforms like Google, Apple, Amazon, FaceBook etc the costs of establishing platforms requires high levels of investment and is complex. As with GAFAM, once the investment is made, and a two sided market has been created, the cost for new entrants is extremely high to enter the market thus leading to high levels of concentration.

4.5 Treffen die Aggregatoren aus dem Verlagsangebot eine eigene Auswahl der Titel, die für Bibliotheken lizenziert werden, oder liegt die Auswahl bei den Bibliotheken oder den Verlagen?

The publishers alone make the selection.

4.6 Welche Form / welches Dateiformat eines E-Books erhalten die Aggregatoren von den Verlagen?

PDF, EPUB, MP3, MP4.

4.7 Welche Nutzungsrechte werden im Rahmen der Lizenzierung von E-Books den Aggregatoren von den Verlagen eingeräumt und welche Nutzungsrechte räumen die Aggregatoren den Bibliotheken ein?

The publishers grant the aggregators the right to make reproductions of files and to provide the libraries with temporary access.

For users, this means that e-books, e-videos, e-audios, e-magazines, e-papers and e-music can be downloaded and transferred to devices after identification with the library user card, regardless of opening hours and location. In universities, IP authentication-based protocols are used to identify affiliates.

Digital rights management (DRM) is used to control the loan period. Once the loan period has expired, it is no longer possible to use the e-media file. If a title has not already been reserved by other users, it can be borrowed again as often as desired.

5. Restriktionen beim E-Lending

5.1 Welcher Anteil der für Bibliotheken lizenzierten E-Books ist von Sperrfristen für den Verleih (Windowing) betroffen?

The German Library Association states 70% in the case of trade eBooks (i.e. those primarily used by public libraries). This is not an issue so much in universities, where the issue is the permanent refusal to license to universities and the constant removal and replacement of titles that comprise subscription packages.

5.2 Wie lang sind die in der Praxis vorkommenden Windowing-Fristen?

Between six to twelve months from the first publication of the book.

5.3 Kommt Windowing in allen oder nur in bestimmten inhaltlichen Teilgebieten / Genres vor?

Across trade eBooks – we see no patterns by genre.

5.4 Werden wissenschaftliche Werke und Sachbücher hinsichtlich sonstiger Beschränkungen anders behandelt als etwa Unterhaltungsliteratur?

Broadly the issues are the same. For decades, scientific publishers in particular have been trying to prevent "legally permitted uses" under the Copyright Act in their license agreements for e-media. This is one of the reasons why the law has been amended several times, namely the principle "law makes contract ineffective" has been extended (sec. 32 para. 3 p. 1, 38 para. 4 p. 3, 45d, 55a, 87e UrhG).

Where an eBook licence is available it is almost unheard of to have licences that allow fundamental library functions such as preservation, inter library loan and document supply. Technological protection measures are used to impose extremely complex and restrictive copying limits.

5.5 Gibt es aus Ihrer Sicht Alternativen zum Windowing, mit denen man den dahinterstehenden wirtschaftlichen Interessen gerecht werden könnte?

Unlike with printed books, authors and publishers do not receive any additional remuneration from the federal and state governments for e-lending (the so-called "library royalty"). Library associations and academia have therefore been calling for years for the library royalty, which every author and publisher receives when lending a book, to be increased and extended to the lending of e-books. This is a matter for the Conference of Ministers of Education and Cultural Affairs (KMK), which finances this library royalty.

We believe that this should only be done however if laws are introduced that guarantee that a library can both acquire and lend eBooks, as well as digitise and lend digital copies of physical books on a one copy one user basis. If this is not done, publishers and authors will receive more tax-payer money but with zero benefit to libraries, universities and their patrons in terms of a wider access.

5.6 Welche anderen Limitierungen (z.B. maximale Anzahl an Ausleihen pro E-Book; Maximalausleihdauer pro E-Book) sind üblich und in welchem Umfang sind dies Teil der aktuellen Verträge?

Every loan of a media work from a library is limited in time. This is true for print works as well as for e-books. Only in the case of e-books do some publishers stipulate a maximum number of loans in their licence agreements or a maximum period, after which libraries currently are obliged to re-license.

It is worth underlining that claims that eBooks last forever are undermined by the fact that changing file formats do limit the life of eBooks in ways that do not apply to physical books as well.

6. Ausblick

6.1 Wie wirken sich kommerzielle Abonnement-Modelle und Streaming-Angebote auf die Verfügbarkeit von und die Nachfrage nach E-Books in Bibliotheken aus?

We refer you to the responses provided by the Aktionsbündnis and the DBV, but stress that such models automatically favour those with the resources to take advantage of them and so do not impact the relevance of the work of libraries. ***6.2 Wie wirken sich andere mediale Angebote (z.B. Hörbücher) auf die Nachfrage nach E-Books in Bibliotheken aus?***

We refer you to the responses provided by the Aktionsbündnis and the DBV. We note, however, that in academia other formats are irrelevant.

6.3 Gibt es aus Ihrer Sicht sonstige Aspekte, die für das Verständnis und die Bewertung der aktuellen Rahmenbedingungen für das E-Lending bedeutsam sind?

We believe that existing eBook markets are unaffordable and unsustainable. From a legal perspective we believe they conflict with fundamental rights such as the right to education, to enjoy culture, and therefore freedom of expression.

We also believe the Bundeskartellamt should undertake an investigation into eBook markets as there are strong indications of behaviours associated with market dysfunction. The small number of aggregators also raises significant concerns. (See University of Glasgow paper attached.)

Issues include – refusal to license, high pricing, bundling, contracts of adhesion which are subject to strict confidentiality clauses and therefore transparent pricing is not possible.

6.4 Welche Schritte sollten aus Ihrer Sicht unternommen werden, damit die Rahmenbedingungen für das E-Lending fair ausgestaltet sind?

The lending of e-books must be given the same legal status as the lending of printed books. While traditional copyright law has created information monopolies, it has also then regulated them to ensure that libraries and their users can undertake activities as diverse as buying and lending books, preserving, allowing research copies and inter library loan and document supply. None of these public interest activities are now guaranteed and are all dependent on the goodwill of publishers, through the licences they offer.

Such, licences are not the result of equal bargaining partners because libraries have no other choice but to acquire books. Information monopolies, contracts of adhesion, unequal bargaining powers all speak to the need for legal regulation.

We believe that the government should introduce a law based on the CJEU VOB case which as a minimum allows:

1. A library to purchase any eBook on the market *or* digitise a paper book.
2. A library to lend the result of 1 on a one user one copy basis only using technological protection measures (i.e. if two copies are purchased only two copies only can be lent at any one time)
3. Allow the result of 1 to be used in line with all limitations and exceptions and therefore allowing preservation, interlibrary loan, document supply etc.
4. None of the above to be undermined by contract or technological protection measures.
5. Payment of PLR to authors for the above activities in line with existing analogue law.

6.5 Halten Sie ein gesetzgeberisches Tätigwerden im Urheberrecht für erforderlich? Bitte begründen Sie Ihre Antwort kurz.

Yes, otherwise the function of libraires as set out in national and international law will be increasingly undermined, in turn undermining the fundamental rights of access to education, research, science and culture.

Licences have created a monopoly undermining the public interest and legislative intervention is required to guarantee access to eBooks on fair and affordable terms.

As pointed out above this is not a unique issue to Germany. Library associations across Europe, including the Deutsche Bibliotheksverband have called for legislative intervention to allow libraries to digitise / or use eBooks on the market in line with the CJEU ruling on a one user one copy basis:

<https://www.knowledgerights21.org/news-story/library-associations-across-europe-joint-call-for-action-on-ebooks/>

Further reading:

Position statement on eBooks: <https://www.knowledgerights21.org/wp-content/uploads/2022/06/eBookPositionPaper150522.pdf>

[The Finnish Government's Consultation on eBooks: The Curious Case of Cherry Picking and Mistaking Lending for Renting](#)

Attached:

University of Glasgow interim findings on eBooks from a competition and copyright angle. (Not for publication).

For further information please contact: info@knowledgerights21.org