

Independent Secure Digital Lending (iSDL): The European Path Toward E-lending in Libraries

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In today's world, where digital access shapes the boundaries of learning, research, and civic participation, European libraries face significant legal and technical challenges in offering electronic book lending. While the shift from print to digital formats is progressing rapidly across many fields, libraries—long regarded as custodians of knowledge and champions of equitable access—are increasingly constrained by a complex and often restrictive legal framework governing e-lending.

A proposed solution to the legal challenges of e-lending within the European Union is the independent Secure Digital Lending (iSDL) model. At its core lies a clear legal and ethical premise: libraries should not be sidelined in the digital transition by outdated or overly restrictive interpretations of copyright law. On the contrary, they should be empowered to digitise lawfully acquired print books and make them available in digital form within a controlled and secure system. This approach enables libraries to preserve the continuity of their public mission in the digital age while safeguarding users' fundamental rights to culture, education, information, and privacy.

The iSDL concept is based on the digitisation of physical copies held by a library and their temporary digital lending under the “one copy – one user” principle. The legal foundation of this model is rooted in European Union law, particularly in the case law of the Court of Justice of the European Union (CJEU), including *Vereniging Openbare Bibliotheken* (C-174/15) and *Technische Universität Darmstadt* (C-117/13). It is also supported by relevant EU directives, most notably the Rental and Lending Directive (2006/115/EC) and the Information Society Directive (2001/29/EC, the so-called InfoSoc Directive).

This article presents the findings of a study examining the compatibility of the iSDL model with legal frameworks at the international, European, and national levels. The analysis, set out in *eBOOKS AND SECURE DIGITAL LENDING IN EUROPEAN LIBRARIES. Comparative Analysis under National and International Law* (hereinafter: the Report)¹, shows that although most European countries do not have explicit provisions regulating e-lending, there are nevertheless legal foundations that enable the implementation of the (i)SDL model in certain jurisdictions.

Keywords: Copyright, Digital Lending, E-Libraries, Digital Access, iSDL Model, CDL

Methodology: A Pan-European Legal and Empirical Exploration

The starting point for this study was the judgment of the Court of Justice of the European Union (CJEU) in the *Vereniging Openbare Bibliotheken* (VOB) case of 10 November 2016. The Court confirmed that under the Rental and Lending Directive, the concept of “lending” also covers the lending of digital copies of books — in other words, e-lending. Building on this interpretation, the report developed the independent Secure Digital Lending (iSDL) model, designed to assess the extent to which libraries may lawfully digitise and lend their collections under existing legal frameworks. The main objectives were, first, to determine whether e-lending under the iSDL model is permissible under international and EU law, and second, to examine whether national library laws

in the countries surveyed provide a basis for its implementation.

The research was carried out between September 2022 and May 2023, with an update in February 2024 for Finland, Lithuania, and Bulgaria. The Report covered 22 Council of Europe member states, including 20 EU countries, and relied on a combination of legal analysis, jurisprudence, and expert questionnaires. Its methodological approach followed the principle that fundamental rights of users — including access to culture, education, and information — should guide the interpretation of copyright exceptions and limitations relevant to libraries. While the scope of the report did not extend to all possible legal bases for online access to collections (such as education or research exceptions), it focused specifically on lending rights and the reproduction of works for this purpose.

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In each country, the Report examined three key aspects of iSDL: (1) whether libraries are legally allowed to digitise print books for the purposes of e-lending; (2) whether existing lending provisions can be interpreted as covering e-lending in light of the VOB judgment; and (3) how public lending right (PLR) schemes address remuneration for electronic lending. On this basis, countries were grouped into categories reflecting the scope of their legal provisions and the feasibility of implementing iSDL. Since no national jurisprudence or extensive doctrinal analysis currently addresses this issue, the Report's conclusions are necessarily theoretical. Nonetheless, the Report provides a comparative framework showing that, despite significant gaps and uncertainties in national regulations, international and EU law already allow for interpretations that can support the lawful introduction of iSDL in European libraries.

Terminology

E-lending can be defined as “making a digital object available for use for a limited period of time, without direct or indirect economic or commercial benefit.”² In the Report, it is indicated that such availability may involve allowing users to download e-books (so-called mimetic e-lending) or only providing access online without the option to download (quasi-mimetic e-lending). The Report also distinguishes between e-lending based on licensing agreements with copyright holders and e-lending based on exceptions and limitations to copyright. In the latter category, the Report identifies the Controlled Digital Lending (CDL) model (used in the U.S.) and the independent Secure Digital Lending (iSDL) model (developed in the EU).

Legal Bases for E-Lending: Licences or Copyright Flexibilities

Contemporary library practice shows that e-lending can be implemented in two ways: either through licensing agreements with publishers or content distributors, or by relying on copyright exceptions and limitations that permit certain forms of content sharing without the need for permission from rights holders. The Report provides a detailed analysis of the differences between e-lending based on licensing and the models that rely on copyright flexibilities.

The licensing-based e-lending model is currently the dominant approach in many European countries.

The prevailing model presumes that libraries acquire access to e-books primarily through individual licensing agreements or via content aggregators. Its main advantage is legal certainty, as the terms of use are clearly defined. However, this model also entails significant limitations. Most notably, libraries are not free to shape their collection policies independently. They can only lend books made available for licensing by publishers. Publishers may also offer licensing packages that include books in which a given library has no interest. In this model, libraries do not acquire ownership of books but merely obtain temporary access to licensed content. Within this model, libraries serve primarily as intermediaries between patrons and content providers, rather than as autonomous institutions ensuring direct access to knowledge. As a result, the terms of e-lending—such as the number of possible loans or periods of availability—are fully controlled by the publishers.

Additionally, publishers or aggregators may remove individual e-books or entire collections from a library's offering, or refuse to grant a licence altogether. This undermines the ability of libraries to collect and preserve materials on a long-term basis, which is one of their core missions. Publishers may also impose embargo periods, delaying the availability of certain titles in libraries. Moreover, licensing terms can vary significantly between countries, resulting in a lack of harmonized e-lending standards across Europe. Libraries are also exposed to high licensing costs and must comply with restrictive technological protection measures (TPMs), which may limit their ability to use the content within the scope of copyright exceptions. Another concern is the collection of user data. Licensing models often require sharing user information with rights holders, which may infringe on privacy rights or academic freedom.

As an alternative to the licensing model, libraries may engage in e-lending based on copyright flexibilities.³ This allows them to digitize and make their collections available within the boundaries of permitted uses. Under this model, libraries can independently decide which books to include and when. They may purchase books on the primary or secondary market without relying on publisher licences. This approach offers libraries greater autonomy in building and managing their collections and ensures long-term access to content. The absence of licence negotiations also eliminates the risk of

discriminatory treatment based on a library's budget or negotiating capacity. It helps avoid problems related to licence withdrawal. By controlling lending practices under the principle of "one copy – one user," libraries can ensure compliance with copyright exceptions. A key advantage of this model is user data protection. Unlike licensing solutions, which often require transferring user information to rights holders, e-lending under copyright flexibilities enables libraries to maintain full control over such data. In this model, the library serves as an autonomous source of access to content—beyond it, no one receives information about who reads what and when. Such knowledge remains solely between the library and its patrons. In practice, this model ensures greater stability in access to collections and allows libraries to offer content under the same conditions in both physical and digital formats. Despite certain legal and technical challenges, this approach provides an effective tool for libraries to fulfill their public mission while respecting copyright law.

E-Lending Models Based on Copyright Exceptions: CDL and iSDL

In the Report, we identified two models of e-lending based on copyright exceptions: Controlled Digital Lending (CDL),⁴ developed in the United States, and independent Secure Digital Lending (iSDL), adapted to the European legal framework. Although both models are technologically similar, they differ significantly in their legal foundations and justifications. Both CDL and iSDL allow libraries to digitize lawfully acquired physical books and lend the resulting digital copies under a controlled one-copy-per-user system. Access must be time-limited, and appropriate technical protection measures should be implemented.

While both models employ a similar method of e-lending, the legal frameworks underpinning them are markedly different. CDL is grounded in the First-Sale Doctrine (17 U.S. Code § 109) and Fair Use (17 U.S. Code § 107), with no separate remuneration provided, as lending is considered covered by the original purchase price of the book. In contrast, iSDL is based on Article 6 of the Rental and Lending Directive and Article 5(2)(c) of the InfoSoc Directive. Unlike CDL, iSDL includes the right to separate remuneration for library loans under the Public Lending Right (PLR) established in Article 6 of the Rental and Lending Directive.

It should be noted that a specific implementation of the CDL model was challenged in U.S. courts in a case brought by a group of publishers against the Internet Archive.⁵ At the same time, the differences in legal foundations demonstrate that the arguments raised in that case cannot be directly applied to the assessment of the iSDL framework. Moreover, the way the Internet Archive conducted e-lending differs significantly from the approach based on the iSDL model. As noted in the court ruling, "IA asks this Court to bless the large scale copying and distribution of copyrighted books without permission from or payment to the Publishers or authors."⁶ As will be explained later, in the case of the iSDL model, there is no large-scale copying, nor is there a lack of remuneration, since the model is based on the Public Lending Right (PLR).

Understanding E-Lending through International Law

When analyzing e-lending from the perspective of international law, the WIPO Copyright Treaty (WCT) assumes a central role. While the treaty does not explicitly regulate lending rights, it offers essential guidance for understanding how digital lending fits within the broader copyright framework and how exceptions and limitations may be applied in the digital environment.

The Report provides a comprehensive examination of this issue. Article 7 of the WCT addresses the right of rental, but its scope is limited to specific types of works and physical copies, and it does not extend to digital formats. Similarly, Article 6, which governs the right of distribution, permits Contracting Parties to define the conditions under which this right is exhausted, making it particularly relevant for lending and resale of physical materials. In the context of e-lending, however, the most directly applicable provision is Article 8: the right of communication to the public. This article confers upon authors the exclusive right to control how their works are made accessible to the public, including on-demand access over digital networks. By establishing this principle, Article 8 effectively provides the international legal foundation for e-lending practices, while also setting boundaries for exceptions and limitations that libraries may rely upon in providing digital access to their collections.

In essence, physical lending is regulated under Article 6, where the exhaustion of distribution rights

may permit certain uses, supported by exceptions aligned with the three-step test in Article 10. In contrast, digital lending falls under Article 8, where the principle of exhaustion does not apply. Nevertheless, e-lending can still be justified under specific limitations and exceptions, provided they meet the conditions outlined in the three-step test. The three-step test, rooted in the provisions of the Berne Convention, provides a framework for introducing new exceptions and limitations within copyright law. According to the Agreed Statements to Article 10 of the WCT, *these provisions should be interpreted as allowing Contracting Parties to develop new exceptions and limitations that are suitable for the digital network environment*⁷ (see below).

The Qualification of E-Lending from the Perspective of EU Law

European copyright law does not explicitly regulate e-lending. The Rental and Lending Directive (RLD) distinguishes rental rights—commercial access to works for a limited time—and lending rights, which allow access without direct or indirect economic gain, typically through publicly accessible establishments. However, neither right directly applies to the use of works in digital form. As a result, prior to the VOB ruling⁸, e-lending could be considered to fall under either the right of making available (Art. 3 InfoSoc Directive)⁹ or the lending right (Art. 2(1)(b) RLD).¹⁰ It seems that the first interpretation was the dominant one. Consequently, e-lending was considered possible only through licensing agreements. This was because EU law lacked specific exceptions for e-lending. Additionally, the term “copy” was traditionally interpreted to mean only physical, tangible objects.

However, the *VOB* judgment significantly shifted this interpretation.¹¹ The Court confirmed that, for rental rights, the notion of a “copy” refers exclusively to physical items, such as printed books or DVDs, in line with WIPO Copyright Treaty. But when it comes to lending rights, the Court adopted a broader view. It held that “there is no decisive ground allowing for the exclusion, in all cases, of the lending of digital copies and intangible objects from the scope of Directive 2006/115”.¹² A “copy” does not have to be physical—digital copies can also fall under lending rights. This distinction matters because lending rights rest on a different legal basis than rental rights, allowing for greater flexibility.

This represented a major legal development. If the Court had classified e-lending as “making available,”

libraries would have required explicit licenses from rights holders, since no exception exists for that right under the InfoSoc Directive. Instead, the judgment paved the way for e-lending to be permitted under the exception in Article 6 of the Rental and Lending Rights Directive, fundamentally reshaping the legal framework for digital lending in libraries. This judgment therefore established an additional autonomous concept under EU law,¹³ whereby the notion of lending is defined as:

covers the lending of a digital copy of a book, where that lending is carried out by placing that copy on the server of a public library and allowing a user to reproduce that copy by downloading it onto his own computer, bearing in mind that only one copy may be downloaded during the lending period and that, after that period has expired, the downloaded copy can no longer be used by that user.¹⁴

VOB ruling: open issues and practical problems

The *VOB* ruling by the CJEU marked a significant development in recognising that libraries may lend digital copies of books under EU lending rights, yet it left several important questions and practical challenges unresolved. It seems that these very uncertainties have contributed to the limited development of e-lending practices based on flexibility across Europe¹⁵ A particularly pressing issue concerns the lawful acquisition of digital copies by libraries for e-lending. In practice, there are two main pathways for obtaining such copies, each accompanied by its own legal and logistical complexities. The first relies on using electronic versions of books provided by rights holders, while the second involves libraries creating digital copies themselves by copying physical books.

Dependent SDL based on electronic copies of books provided by rights holders

One possible approach for libraries is to legally obtain e-books by purchasing them from authorized sources. Yet in practice, this strategy often encounters significant obstacles. Many licenses explicitly prohibit e-lending, or the digital files are protected by technical protection measures (TPMs) that prevent copying.¹⁶ Such restrictions, in light of the applicable law, may be considered legally effective, and the *VOB* ruling does not grant libraries any authority to override these license conditions¹⁷ or to circumvent TPMs imposed by rights holders.

Moreover, in practice, even the simple act of acquiring e-books can present significant

challenges for libraries. Many publishers may refuse to license digital works to libraries altogether or impose highly restrictive conditions, including pricing schemes that are far higher than those available to individual consumers. In some cases, libraries are prevented from purchasing individual titles and are instead offered large bundled collections, which may not align with the specific needs or interests of their local communities.¹⁸ These limitations severely constrain libraries' autonomy, making it difficult for them to curate collections that reflect user demand, support educational and cultural goals, and fulfill their broader public mission in the digital environment. Additionally, navigating complex licensing agreements and negotiating fair terms can require substantial administrative effort and legal expertise, further complicating the process of providing equitable access to digital resources.¹⁹

It is, however, possible that publishers might make individual e-books available to libraries at reasonable prices, with licensing terms that explicitly allow e-lending and without TPMs that would restrict access. In such a scenario, e-lending functions as a form of dependent Secure Digital Lending, relying heavily on the goodwill and cooperation of publishers to ensure that digital content is accessible under fair and workable conditions. Without this level of support, libraries continue to face substantial legal and practical obstacles that hinder their ability to provide effective and equitable e-lending services to their communities.

Independent SDL Based on Books Digitized by Libraries

An alternative approach for libraries is to digitize the paper copies they already hold in their collections. However, this practice raises a distinct legal question: to what extent is digitization for the purpose of e-lending permissible under EU law? The VOB ruling did not provide a definitive answer, leaving a degree of legal uncertainty regarding this approach.

In the Report, we advance an argument supporting the permissibility of libraries digitizing books to facilitate what we term independent Secure Digital Lending. Our analysis draws on the reasoning of Advocate General Szpunar in his Opinion on Case C-174/15, *Vereniging Openbare Bibliotheken*, who suggested that the exception under Article 5(2)(c) of the same directive ought to come into play to enable libraries to benefit from the derogation from the lending right provided for in Article 6(1) of Directive 2006/115.²⁰

This position is consistent with the Court's earlier decision in the *Technische Universität Darmstadt* case²¹, where the Court held that the exception under Article 5(2)(c) may be employed to allow libraries to make works accessible to the public in accordance with Article 5(3)(n). Building on this precedent, the report examines how applying similar reasoning to e-lending could provide a robust legal basis for libraries to digitize books.

In the Report, we indicated that it is possible to interpret EU law in a way that allows libraries to provide access to selected items in the form of e-lending. The independent Secure Digital Lending (iSDL) model, grounded in the Darmstadt case, is not intended to justify mass digitization of entire library collections. Rather, it permits the digitization of specific works within a collection.²² This is because, in this context, the right to digitize is based on Article 5(2)(c) of the InfoSoc Directive, which allows libraries to carry out *specific acts of reproduction*. Within this framework, libraries retain the discretion to determine which works should be digitized for e-lending, guided by e.g. the need to "maintain the content of the collection in an unimpaired state".²³

The (i)SDL Model and the Three-Step Test

General Assumptions

The above considerations should be complemented by an assessment of the possibility of implementing e-lending under the (i)SDL model in light of the three-step test. The primary addressees of this test are legislators. This follows from its inclusion in international legal instruments such as the TRIPS Agreement and the WIPO Copyright Treaty (WCT). In this context, the test serves as a benchmark for determining the scope of discretion national lawmakers have when introducing copyright exceptions and limitations. Secondarily, the test may also apply to courts adjudicating individual cases concerning the application of such exceptions and limitations. This occurs when national copyright law incorporates the test into its domestic legal framework—such as Article 35 of the Polish Copyright Act. Against this background, it remains unclear to which of these two categories the three-step test provided in the InfoSoc Directive should be assigned.²⁴

What is important is that the three-step test – in itself – does not provide grounds for the assertion that the provisions must be interpreted strictly.²⁵ As pointed out by Janusz Barta and Ryszard Markiewicz,

within the limits set by the directives of the European Union and the case law of the Court of Justice, “an extensive interpretation of the provisions on permitted use, and even the application of analogy, is possible.”²⁶ In this context, the case law of the CJEU emphasizes that the interpretation of provisions on exceptions and limitations must be such that, “whilst consistent with their wording and safeguarding their effectiveness, fully adheres to the fundamental rights enshrined in the Charter of Fundamental Rights of the European Union.”²⁷ This approach to interpretation was adopted in the Report due to the need to consider the role of exceptions and limitations in the realization of human rights other than copyright.²⁸

Compliance of E-Lending in the (I)SDL Model with the Three-Step Test

In the VOB judgment, the CJEU did not directly address the issue of the three-step test set out in Article 5(5) of the InfoSoc Directive. At the same time, the Court held that the lending of digital copies – in the factual circumstances under analysis – is permissible under European copyright law. In contrast, in the Darmstadt judgment, the CJEU explicitly held that digitisation carried out for the purpose of making books available via reading terminals is compatible with the three-step test.²⁹

First, the lending of books in this model is possible only by entities that meet the conditions set out in Article 2(1)(b) of the Rental and Lending Rights Directive, i.e. “establishments which are accessible to the public”, provided that the activity is carried out “not for direct or indirect economic or commercial advantage.” Libraries, which fulfil an important public mission and generate indirect socio-economic value³⁰, are a prime example of such entities. These are institutions through which states fulfil their obligations in the area of human rights protection, in particular the right to culture.³¹ While human rights are granted exclusively to individuals, legal literature points out that such rights may indirectly influence the freedom of action of legal persons and other organisational entities.³² This applies in particular to institutions such as universities, museums, theatres, film studios, or libraries—whose purpose is to ensure unrestricted access to cultural goods. “From the perspective of libraries, pursuing their mission of promoting ‘education, research and access to information’ requires them to offer eLending as a service complementary to the lending of printed books.”³³ As a result, such entities may invoke the freedom to access cultural goods not as a direct

entitlement of their own, but as the foundation of their activities and as “an instrument enabling this freedom for every individual who wishes to access the objects held by the institution.”³⁴

Moreover, this form of use does not permit libraries to make works freely available but allows only very specific acts of use. Both of these aspects were noted by the Advocate General in his opinion in the context of analysing the first condition of the three-step test.³⁵

Secondly, the e-lending model accepted in the VOB judgment does not interfere with the normal exploitation of the work. It is widely acknowledged that “normal exploitation” must necessarily mean something less than the full commercial use of a work. A different interpretation would imply that any form of permitted use would be incompatible with the test.³⁶ One such use is the lending of physical books, which constitutes one of the core functions of libraries. However, the introduction of an exception for this type of use is broadly accepted. This is partly because lending by libraries does not serve to generate direct or indirect economic or commercial advantage. Moreover, books intended for lending must first be purchased. In addition, libraries have only a limited number of copies of each title, which makes it impossible for them to meet the full demand for a given book at the same time.

In this context, the Court of Justice of the European Union held that the model of electronic book lending discussed in the VOB judgment constitutes a functional equivalent to the lending of physical books.³⁷ This equivalence between both types of lending is crucial for satisfying the second element of the three-step test. According to the Court, this results from two key aspects: the reliance of the model on the principle of “one copy – one user” and the limitation on the duration for which books can be borrowed. As a result, despite the digital nature of the model, libraries operate within the constraints of the traditional lending system. On the one hand, readers must wait in a queue to access a given book; on the other, they do not obtain permanent access to it. Furthermore, as noted by the Advocate General:

The mere fact that certain electronic book sellers have developed business models similar to digital renting cannot by itself constitute an obstacle to the application of the public lending derogation to electronic books. Indeed, that derogation pursues a legitimate objective in the public interest that cannot be restricted to areas that are not touched by economic

activity. Otherwise any lending activity could be displaced by commercial renting, of either tangible or intangible goods, and thus render the derogation entirely redundant.³⁸

Equally important, lending books under the (i)SDL model is not the most convenient solution for either libraries or readers. Libraries must carry out digitisation and bear its costs, as well as implement electronic controls over the use of the works. Readers, meanwhile, must wait in artificially created queues to access selected titles. This means that rights holders still retain room to develop a market for specialised licenses dedicated to libraries. For example, in the Netherlands, there is a licensing model for libraries that “allows the lending of one digital copy of a book to multiple library users simultaneously, in accordance with the so-called ‘one copy – many users’ model.”³⁹ From this perspective, we can observe that (i)SDL — as a minimal or fallback model — provides incentives for copyright holders to develop new licensing models or offer additional features for e-books. This way, they can always create new products that will be more attractive both to libraries and their users.

Thirdly, e-lending under the model specified in the VOB judgment does not unjustifiably prejudice the legitimate interests of authors. This requirement does not prohibit interference with exclusive rights, but only such interference that unjustifiably harms the interests of the author. Both the literature and WTO reports indicate that the third element of the three-step test is fulfilled if the exception is linked to some form of remuneration.⁴⁰ However, this does not mean that exceptions or limitations unrelated to remuneration are automatically considered impermissible under this criterion.⁴¹

As a rule, the possibility of lending books under the library privilege in EU law is based on the right to remuneration (PLR). The Rental and Lending Directive does not differentiate the principles for determining such remuneration between physical and electronic books. Member States, pursuant to Article 6(1) of this Directive, have the discretion to set such remuneration “taking account of their cultural promotion objectives.” Furthermore, Member States may exempt certain categories of entities (e.g., university libraries) from the obligation to pay this remuneration (Article 6(3) of the Rental and Lending Directive). Consequently, it is also possible to introduce an exception that is partially based on the right to remuneration and partially not.

According to CJEU case law, Member States may not exclude all or nearly all categories of libraries from this obligation.⁴² Therefore, it can be concluded that exempting a specific category of libraries from the obligation to pay remuneration—provided the criteria set out in the CJEU case law are met—should not be considered a violation of the assumptions of the three-step test. This means that if, in a given national system, a certain category of libraries (most commonly school or academic libraries) is exempt from the obligation to pay remuneration, but such an obligation exists in general, it appears that the VOB ruling should also apply to those libraries.

Such an interpretation in relation to school and academic libraries is supported by their key role in fulfilling fundamental rights to education and scientific research, as well as the limited user base of these libraries. From this perspective, the author’s legitimate interest cannot be considered to justify preventing the use of their works—including through e-lending—in such libraries, as this would undermine the rights to education and scientific research. This position is justified in light of a human rights-based interpretation and may find further support in other exceptions and limitations. Denying access to e-books for pupils, students, or researchers should be regarded as a violation of the principle of proportionality.⁴³ From this viewpoint, excessive restriction of access to such resources by copyright law in the 21st century leads to an unjustified limitation of fundamental rights to education and freedom to conduct scientific research. Moreover, it should be emphasised that the absence of remuneration in this case does not amount to a complete deprivation of the rightsholders’ material benefits connected to the implementation of e-lending by libraries under the (i)SDL model. This is because, in order to use this model, libraries must first possess physical books that have been legally acquired on the market. In other words, this situation involves rights holders being deprived of certain aspects of material benefits related to the exploitation of their works by libraries (i.e., offering licences), but it is not an exception that entirely excludes their remuneration.

If it is accepted that the assessment of this element of the three-step test also requires consideration of the moral interests of authors,⁴⁴ then it should likewise be concluded that e-lending does not infringe upon these interests. First, these moral rights pertain to works that have already been made available to the public,

so the right of first publication cannot be violated. Second, if lending physical copies of works does not infringe upon the right of authorship, the right to have the work attributed in the manner chosen by the creator, the right to the integrity of the work, or the right to its proper use, then, as a general rule, the same assessment should apply to the lending of those works in digitized form. Third, provided that the digitization is carried out properly, it should likewise not lead to a violation of the right to supervise the manner in which the work is used.

Fourthly, the CJEU, in the Darmstadt judgment, indicated that the provisions of German law permitting the digitisation of works for the purpose of making them available via terminals complied with the requirements of the three-step test. According to the CJEU, this was primarily because such digitisation, carried out by publicly accessible libraries, did not exceed the number of physical copies legally acquired by the library. This limitation is also present in the (i)SDL model, which is based on the principle of “one copy – one user”. Secondly, the CJEU noted that while the act of digitising a work is not, in itself, linked to an obligation to pay remuneration, the subsequent making available of that work in digital format via appropriately equipped terminals is subject to the payment of appropriate remuneration. Such a mechanism is likewise found in the (i)SDL model.

Can European Libraries Lend Digitised Books? Comparative Legal Analysis

The potential legality of independent Secure Digital Lending (iSDL) under European Union law does not automatically translate into permission under the domestic laws of Member States. EU legislation merely allows for this model—it does not require countries to adopt it. Generally, the Rental and Lending Directive indicates that Member States may replace the exclusive lending right with a right to remuneration. At the same time, they can base the traditional lending mechanism on the exclusive right, for example, through licensing schemes administered by collective management organizations (CMOs). The same principle applies to e-lending.

For this reason, our study sought to answer a crucial question: To what extent do national legal systems across Europe currently allow—or could allow through dynamic interpretation—the implementation of iSDL by libraries? To assess this question, the study analysed the

legislative frameworks of 22 countries — including 20 EU Member States — against three essential legal preconditions. These conditions reflect the requirements that must be satisfied for iSDL to function lawfully within national systems, particularly in light of EU directives and CJEU jurisprudence.

The first condition for implementing independent Secure Digital Lending (iSDL) is the existence of a legal framework that permits libraries to digitise physical books held in their collections. Such permission may take several forms: it can be an explicit statutory provision authorising digitisation, a technology-neutral reproduction right that encompasses digital copying, or an ancillary right inferred from CJEU case law, particularly the Technische Universität Darmstadt ruling (C-117/13). The second condition concerns whether libraries are legally entitled to lend digital versions of works. While the lending of physical books is universally recognised, e-lending remains a legally uncertain or restricted area in many jurisdictions. National legal systems were assessed on the basis of whether they expressly permit e-lending in legislation, or whether, in light of the VOB ruling, existing lending rights can be interpreted to include digital formats. The final condition relates to the presence of a Public Lending Right (PLR) scheme that applies to e-books. Under EU law, lending by public institutions must be accompanied by appropriate remuneration for authors and rightsholders. The existence of such a scheme ensures that digital lending respects the economic rights of creators while enabling libraries to provide access to their collections in digital form.

Results

For a general assessment of implementing e-lending by libraries under the (i)SDL model, we grouped countries into four categories based on national law. None of the analysed countries explicitly allows (i)SDL e-lending; therefore, no country was placed in the first group. Only three—Finland, Ukraine, and the United Kingdom—explicitly provide for library e-lending, but in these cases it relies on licensing agreements rather than library-digitised books, which limits libraries’ ability to fully fulfil their public functions, including access to specific titles, practical legal obligations, and user privacy and research freedom.

We assigned 4 countries (Germany, Croatia, Poland, UK) to the second group, where national law

can be interpreted to allow (i)SDL e-lending, particularly following the *VOB* and *TU Darmstadt* judgments. Twelve countries (Czech Republic, Estonia, Finland, France, Hungary, Ireland, Italy, Latvia, Lithuania, Netherlands, Slovenia, Spain) fall into the third group, where additional interpretative challenges exist, such as restrictions on the purposes for which works can be reproduced. Six countries (Bulgaria, Greece, Portugal, Romania, Slovakia, Ukraine) are in the fourth group, where national law fails to meet at least one of the three conditions for (i)SDL legality.

The differences between these groups reflect the extent of interpretative effort required. For example, group two includes countries where lending is not tied to physical copies, allowing digitised copies under the *VOB* logic. Group three ties lending to physical copies, but we argue national law can still be interpreted to allow the (i)SDL model. Naturally, differences in interpretative approaches and legal doctrines across countries mean that the classification we propose should not be seen as definitive. Nevertheless, it is worth noting that, with the exception of Slovakia, national laws in most countries could likely be interpreted to allow the implementation of e-lending under the iSDL model. However, in most cases, this requires a dynamic interpretation of copyright law to effectively uphold the human rights of library users (see below). In Slovakia, however, book lending is not grounded in the exception provided by Article 6 of the Rental and Lending Directive but is instead governed by agreements with collective management organizations. This framework effectively precludes the adoption of any lending model based on a copyright exception.

Human Rights as a Foundation for Interpretation of Copyright

One of the most important dimensions of the report is its emphasis on the need to interpret copyright law through the lens of users' fundamental rights. Traditionally, copyright exceptions are interpreted narrowly, reflecting the principle of *exceptio strictissimae interpretationis*, which limits courts to the exact wording of the law.⁴⁵ However, our approach relies on balancing rights, considering fundamental rights in interpretation. The increasing incorporation of human rights into EU law—especially through the Charter of Fundamental Rights—supports a broader interpretation of copyright exceptions. The CJEU has shifted from strict

interpretation toward balancing authors' rights with users' rights, ensuring a fair equilibrium in cases such as *Premier League*, *Pelham*, and *Funke Medien*. Fundamental rights, including freedom of expression, privacy, education, and scientific research — all recognised under European and international human rights frameworks — must guide the evolution of copyright exceptions and limitations⁴⁶ and the CJEU recognises their horizontal effect in private relations.⁴⁷ Implementing the iSDL model in European libraries requires a dynamic interpretation of copyright law—one that takes into account users' fundamental rights. The Court of Justice of the European Union (CJEU), in the *Funke Medien* case, clearly emphasized:

In striking the balance which is incumbent on a national court between the exclusive rights of the author... on the one hand, and, on the other, the rights of the users of protected subject matter referred to in Article 5... the latter of which derogate from the former, a national court must, having regard to all the circumstances of the case before it, rely on an interpretation of those provisions which, whilst consistent with their wording and safeguarding their effectiveness, fully adheres to the fundamental rights enshrined in the Charter of Fundamental Rights of the European Union.⁴⁸

Moreover, the principle of proportionality in copyright exceptions and limitations operates in two directions. On one hand, together with the three-step test, it restricts the ability to shape exceptions in an arbitrary manner. On the other hand, it also limits the extent to which exclusive rights can be defined by law or judicial decisions at the expense of the fundamental rights of users.

Libraries play a central role in safeguarding and enabling fundamental rights. By providing access to culture, education, scientific knowledge, and information, they support rights such as participation in cultural life, freedom of expression, and the right to education. Access to books—particularly in digital form—is increasingly essential for full participation in modern cultural, educational, and scientific life. Without digital access, fundamental rights risk being confined to the analog sphere, contributing to digital exclusion.

In this context, e-lending emerges as a key tool for realizing these rights. It ensures equal opportunities, combats digital exclusion, and allows citizens to acquire knowledge, develop skills, and engage with culture. Using human rights as a basis for interpreting

copyright law provides a balanced approach that protects copyright holders while addressing societal needs, enabling libraries to fulfill their public mission in the digital age. Considering e-lending in the interpretation of national copyright laws in line with CJEU case law is therefore not merely optional but a legal necessity. To comply with EU law, it may be necessary to move beyond a literal reading of provisions and reconsider established doctrines that have traditionally overlooked the human rights dimension.

User Privacy in the Age of Digital Publishing

A central element underpinning the legality of e-lending under the iSDL model is the protection of user privacy. Today, many libraries provide access to e-books via platforms operated by publishers or commercial aggregators. While such arrangements can offer rapid and extensive access to digital content, they also raise significant concerns regarding the privacy of library users and the alignment of these practices with the core mission and values of public libraries. Accessing e-books through these platforms typically involves the collection, processing, and transfer of user data. Challenges emerge when license agreements require libraries to share this information or grant third-party access—often including copyright holders. Even when such practices comply with data protection legislation, the data involved extends beyond personal identifiers protected by the GDPR to include behavioral information and usage patterns related to digital reading.

Many publishers, including those in the academic sector, are increasingly adopting data-driven business models, where user data is considered as valuable as the content itself. Digital reading applications and online platforms frequently collect detailed information, such as reading duration, highlighted passages, search queries, navigation habits, and individual preferences. This approach conflicts with the fundamental ethical principles of librarianship, which stress the importance of protecting user privacy and ensuring that patrons can access information freely, without being monitored. The term “surveillance publishing” has been used to describe this emerging model, which systematically tracks user behavior. Its expansion threatens a core value of library practice: intellectual freedom, encompassing the right to read, research, and explore information anonymously and without interference.⁴⁹

Consequently, library users should have the right to access digital resources without surveillance and to determine whether their data remains confined within the library’s system or is shared externally. Libraries, in turn, should not be forced to serve as conduits for commercial data collection schemes. The iSDL model offers a practical solution by ensuring that all e-lending interactions and data flows remain strictly between the library and its patrons, without involving third-party platforms or rights holders. This framework empowers libraries to protect user privacy, maintain full control over access, and uphold their professional responsibility to safeguard intellectual freedom in the digital environment. This approach serves as a clear example of using library users’ human rights as a guiding principle for interpreting copyright law.

Policy Recommendations: Towards a Sustainable E-Lending

The e-lending model presented in this Report should be understood as the result of an interpretative approach, developed through an analysis of international law, EU law, and the legal frameworks of the countries examined. Like any such approach, it represents a proposal which, in the authors’ view, is feasible in practice. It is important to emphasize, however, that this model has not yet been tested in widespread library practice, nor has it been subject to judicial review. For this reason, we have prepared a set of policy recommendations addressed to three groups of stakeholders.⁵⁰

For EU Legislators

To ensure uniform access across Europe to e-lending by libraries, the EU legislator should introduce a mandatory copyright exception that clearly permits libraries to offer e-lending under the iSDL model or other frameworks consistent with the VOB ruling. This exception must be technology-neutral and not overridable by contracts or TPMs. It should also allow libraries to digitize and use existing e-books even when current agreements or technologies impose restrictions. Additionally, authors should be ensured fair remuneration through the PLR scheme. Ideally, such exception should be adopted as part of a broader regulatory framework focused on access to knowledge, such as a Digital Knowledge Act⁵¹ or a European Research Area Act.⁵² To guarantee effectiveness, the exception should also enable cross-border e-lending in the EU, reflecting the

principle of country of origin and supporting mobility of students, researchers, and citizens.

The iSDL model, however, is far from optimal. It is built on the digitization of print works, thereby excluding born-digital materials, and it adheres to the “one copy, one user” paradigm, which imposes disproportionate constraints on the efficient utilization of intangible goods.⁵³ Accordingly, it should be regarded as a fallback mechanism rather than a definitive or desirable model. To fully safeguard the fundamental rights of library patrons, consideration should be given to implementing a more ambitious framework that enables libraries to provide e-lending in its full scope.

For National Legislators

Regardless of EU legislation, national lawmakers should, within the limits currently allowed by EU law, introduce provisions into their national legal systems to permit iSDL. Implementing such national regulations is essential to protecting users’ fundamental rights, which are currently undermined by legal uncertainty and exclusive reliance on commercial licenses. In practice, for libraries to engage in e-lending systematically, they require legal certainty—best achieved through the establishment of clear and appropriate legal frameworks. National provisions should explicitly safeguard user privacy, prevent contractual override of exceptions, and guarantee access to works on fair and reasonable terms. Moreover, legislators should introduce *safe harbour* mechanisms protecting libraries from liability when they act in good faith to fulfil their public mission.⁵⁴

For Libraries and their Associations

Nothing will progress without the active involvement of libraries themselves. Therefore, they should, whenever possible, strive to implement e-lending within the framework of their existing national legal systems. To create practical opportunities for such activities, it is essential for local library associations to establish common guidelines that address the legal and technical aspects of e-lending. In many national legal systems, there appears to be sufficient scope to interpret existing laws in line with the iSDL model. However, to ensure clarity and legal certainty, adopting such codes of practice could prove invaluable. Moreover, libraries must actively engage in dialogue with policymakers, providing concrete evidence of how current market

conditions undermine their mission and the rights of users. They should also strengthen their negotiating position vis-à-vis publishers by promoting initiatives such as the *e-Book pledge*, which can help secure sustainable licensing terms, long-term access, and respect for copyright exceptions and limitations.

Conclusion

Libraries play an essential public role by providing autonomous access to reliable knowledge for society. States, through copyright law, should enable them to fulfill this mission[55]. The Independent Secure Digital Lending (iSDL) model is proposed as a viable solution for European libraries seeking to enable digital lending in the face of complex and often restrictive copyright frameworks. Unlike the dominant licensing-based model, which limits library autonomy and raises significant concerns over user privacy, iSDL relies on the digitisation of lawfully acquired physical books and their temporary lending in digital form under the principle of “one copy – one user.” Its legal foundations lie in the case law of the Court of Justice of the European Union (CJEU), particularly the *Vereniging Openbare Bibliotheken* and *Technische Universität Darmstadt* rulings, as well as key EU directives such as the Rental and Lending Directive and the Information Society Directive. By preserving institutional independence, safeguarding user data, and ensuring long-term access to cultural and scientific resources, iSDL strengthens the public mission of libraries in the digital era.

The study demonstrates that, although most European jurisdictions lack explicit provisions regulating e-lending, there is a sufficient legal basis to implement iSDL through a dynamic interpretation of copyright law, particularly when read in light of fundamental rights of library users. Unlike the American Controlled Digital Lending (CDL) model, iSDL explicitly integrates author remuneration through the Public Lending Right (PLR), thereby balancing the interests of creators and the public. To facilitate its systematic adoption, the Report recommends that both EU and national legislators introduce mandatory, technology-neutral copyright exceptions that cannot be overridden by licensing contracts or technical protection measures (TPMs). Equally important is the active involvement of libraries and their professional associations in developing common guidelines and engaging in structured dialogue with policymakers.

The central conclusion is that e-lending under the iSDL framework should not be regarded as a supplementary or optional service, but as an essential extension of the traditional functions of libraries. It is directly connected to the protection of fundamental rights such as access to culture, education, scientific research, and freedom of expression. Establishing clear and enforceable rules would reduce legal uncertainty, strengthen the resilience of library services—particularly in times of crisis, as seen during the COVID-19 pandemic—and contribute to building a more inclusive, democratic, and knowledge-based digital society.

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