Towards e-Lending by Libraries

Judgment of the Court of Justice of the European Union of 10 November 2016, C-174/15[1]

1. **Article 1(1), Article 2(1)(b) and Article 6(1) of Directive 2006/115/EC […] on rental right and lending right and on certain rights related to copyright in the field of intellectual property must be interpreted as meaning that the concept of 'lending', within the meaning of those provisions, 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.**
2. **EU law, and in particular Article 6 of Directive 2006/115, must be interpreted as not precluding a Member State from making the application of Article 6(1) of Directive 2006/115 subject to the condition 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 of that copy in the European Union by the holder of the right of distribution to the public or with his consent […].**
3. **Article 6(1) of Directive 2006/115 must be interpreted as meaning that it precludes the public lending exception laid down therein from applying to the making available by a public library of a digital copy of a book in the case where that copy was obtained from an illegal source.**

Konrad Gliściński
Jagiellonian University, Poland
konrad.gliscinski@uj.edu.pl
ORCID: 0000-0002-2532-3856

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[1] Judgment of the Court (Third Chamber) of 10 November 2016, Case C-174/15 (Vereniging Openbare Bibliotheken v. Stichting Leenrecht), EU:C:2016:856.

Commentary

1. The facts of the case

The judgment was issued in a dispute between *Vereniging Openbare Bibliotheken* (Netherlands Association of Public Libraries [VOB]) and *Stichting Leenrecht*, the foundation designated to collect public lending right (PLR) payments. The dispute concerned whether, under the applicable provisions of Dutch law, the derogation from the exclusive right to lend books also covers the lending of electronic copies. In connection with ongoing legislative work, the Netherlands Ministry of Education, Culture, and Science commissioned a report on this matter. The report adopted a traditional approach, stating that the exclusive lending right, as defined in the Rental and Lending Directive,[2] and the derogation provided for in Article 6(1) of that directive, apply only to physical copies of books. As a result, it was determined that it is not possible to introduce a national law exception allowing libraries to lend books in digital form (e-lending). Based on this traditional position, the government prepared a draft law.

VOB did not share this view, arguing that the relevant provisions of Dutch law also apply to digital lending. This association brought court proceedings in which it sought a declaration that, essentially, Dutch copyright law already covers digital lending, especially in the "one copy, one user" model. The district court in The Hague found that answering the questions raised by VOB requires the interpretation of EU law provisions.

2. Judgment of the Court

The Court found that the fundamental question in the present case was "whether Article 1(1), Article 2(1)(b) and Article 6(1) of Directive 2006/115 must be interpreted as meaning that the concept of 'lending', within the meaning of those provisions, 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 the user concerned 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."[3]

CJEU noted that Article 1(1) of Directive 2006/115, "does not specify whether the concept of 'copies of copyright works', within the meaning of that provision, also covers

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[2] Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, OJ L 376, 27.12.2006, pp. 28–35.

[3] Judgment of the Court (Third Chamber) of 10 November 2016, Case C-174/15 (Vereniging Openbare Bibliotheken v. Stichting Leenrecht).

copies which are not fixed in a physical medium, such as digital copies."[4] Additionally, the court highlighted that the definition of lending, as found in Article 2(1)(b) of that directive, does not specify whether the scope of lending should exclusively encompass physical copies of works or if it could also include intangible items like digital copies. This opened the way for the court "to examine whether that are grounds to justify the exclusion, in all cases, of the lending of digital copies and intangible objects from the scope of Directive 2006/115."[5]

The court noted that the WIPO Copyright Treaty and Agreed Statements clarify that the terms "original" and "copies," in Article 7 of that treaty, in relation to the right of rental, refer "exclusively to fixed copies that can be put into circulation as tangible objects."[6] Consequently, this means the need to interpret "rental" in Article 2(1)(a) of Directive 2006/115 as referring exclusively to tangible objects and "copies" in Article 1(1) of the directive as referring to physical copies for rental purposes[7] However, this treaty does not address lending rights nor does any other international copyright law. Therefore, Directive 2006/115 serves as the only source of lending rights. Also, according to the Court, there is no need to consider that "EU Legislation necessarily intended to give the same meaning to the concepts of 'objects' and 'copies', whether with regard to the rental system or to the lending system."[8] This is because "the EU legislature sought to define the concepts of 'rental' and 'lending' separately. Thus the subject matter of 'rental' is not necessarily identical to that of 'lending'."[9] Therefore, there are no reasons from international law or the history of Directive 2006/115 that would require excluding digital copies and intangible objects from this Directive in all cases.

In the court's opinion, a different conclusion is justified because of the directive's purpose. "Recital 4 of that directive states, inter alia, that copyright must adapt to new economic developments such as new forms of exploitation. Lending carried out digitally indisputably forms part of those new forms of exploitation and, accordingly, makes necessary an adaptation of copyright to new economic developments."[10] Moreover, "the general principle of requiring a high level of protection for authors"[11] supports the idea that lending rights cover both physical and digital copies. This is because implementing an exception to exclusive lending rights by a Member State requires compensating authors for lending (Article 6(1) of Directive 2006/115).

According to the Court, the lending of digital copies of books by public libraries may fall within the scope of a derogation from the exclusive right of lending if it

4 *Ibid.*, point 28.
5 *Ibid.*, point 30.
6 *Ibid.*, point 34.
7 *Ibid.*, point 35.
8 *Ibid.*, point 36.
9 *Ibid.*, point 38.
10 *Ibid.*, point 45.
11 *Ibid.*, point 46.

"has essentially similar characteristics to the lending of printed works."[12] This is the characteristic of the model that is the subject of the proceedings, according to which the lending of a digital copy of a book takes place by "placing it on the server of the public library and allowing the user concerned 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."[13] This assessment results from the fact that, first, "the limitation of simultaneous downloads to a single copy implies that the lending capacity of the library concerned does not exceed that which it would have as regards a printed work and, secondly, that lending is made for only a limited period."[14]

The court found that e-lending in the "one copy, one user" model aligns with Directive 2006/115. At the same time, the CJEU allowed the possibility of introducing additional requirements at the national level. In particular, Member States can add to their national laws a requirement 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 of that copy in the European Union by the holder of the right of distribution to the public or with his consent."[15] Moreover, the CJEU pointed out that the possibility of e-lending depends on libraries using digital copies of books from a legal source.[16]

3. Dynamic interpretation of UE law

There is no doubt that the interpretation adopted by the Court significantly departs from the previously prevalent interpretation of EU law.[17] According to the traditional approach, which was also acknowledged by the Dutch government, it was presumed that lending rights exclusively pertained to the lending of tangible copies of works. Under this interpretation, e-lending, which involves providing access for a limited duration, without direct or indirect economic or commercial gain, through facilities accessible to the public, of digital copies of works, did not fall within the concept of lending. These activities were deemed a form of the right to communicate works to the public as defined in Article 3 of the InfoSoc Directive.[18] Consequently, this interpretation established that libraries could not engage in e-lending without the consent of rights holders. This is because none of the exceptions to the exclusive right outlined in Article 5 of the InfoSoc Directive could serve as the basis for such activities.

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12 *Ibid.*, point 51.
13 *Ibid.*, point 52.
14 *Ibid.*, point 53.
15 *Ibid.*, point 65.
16 *Ibid.*, point 72.
17 Cf. S. Dusollier, *A manifesto for an e-lending limitation in copyright*, "JIPITEC" 2014, vol. 5, 213 para 1.
18 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 socjety, OJ L 167, 22.6.2001, pp. 10–19.

However, due to the "importance of the public lending of digital books, and in order to safeguard both the effectiveness of the derogation for public lending referred to in Article 6(1) of Directive 2006/115 ('the public lending exception') and the contribution of that exception to cultural promotion,"[19] the CJEU found that the possibility of e-lending cannot be excluded in all cases. The Court concurred with the view of Attorney General Maciej Szpunar, who highlighted that "books are not regarded as an ordinary commodity and that literary creation is not a simple economic activity. The importance of books for the preservation of, and access to culture and scientific knowledge has always taken precedence over considerations of a purely economic nature."[20]

The role of the public lending exception is to enable the library to conduct its activities. "Today, in the digital age, libraries must be able to continue to fulfill the task of cultural preservation and dissemination that they performed when books existed only in paper format."[21] According to the Attorney General, "in fields where technological progress has a profound effect, such as copyright"[22] justifies referring to the dynamic interpretation of law. "The anachronistic character of obsolete legal rules is a common source of interpretative problems, uncertainty and juridical lacunae. In such cases, only an adjusted judicial interpretation will be able to ensure the effectiveness of the legislation in question in a sector experiencing such rapid technological and economic development."[23]

The court emphasized that when interpreting exceptions to copyright law must be interpreted strictly.[24] At the same time, the CJEU reiterated that "the interpretation given must also enable the effectiveness of the exception thereby established to be safeguarded and its purpose to be observed."[25] This approach is consistently reaffirmed in subsequent Court judgments. This is primarily because there is an increasing emphasis on the necessity of considering the dimension of fundamental rights in the interpretation of copyright provisions. "[T]he recourse to fundamental rights-based reasoning in CJEU case law has sharply increased since the Treaty of Lisbon came into force, through which the Charter of Fundamental Rights of the EU3 (Charter) acquired legally binding character."[26]

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19 Judgment of the Court (Third Chamber) of 10 November 2016, Case C-174/15 (Vereniging Openbare Bibliotheken v. Stichting Leenrecht), point 51.

20 Advocate General Szpunar, 16 June 2016 (opinion), Case C-174/15 (Vereniging Openbare Bibliotheken v. Stichting Leenrecht), point 37.

21 *Ibid.*, point 38.

22 *Ibid.*, point 28.

23 *Ibid.*

24 Judgment of the Court (Third Chamber) of 10 November 2016, Case C-174/15 (Vereniging Openbare Bibliotheken v. Stichting Leenrecht), point 50.

25 *Ibid.*

26 T. Rendas, *Fundamental rights in EU copyright law* [in:] *The Routledge handbook of EU copyright law*, ed. E. Rosati, New York 2021, p. 19.

4. Functional equivalence

The means of achieving compliance between these requirements (strict interpretation vs the effectiveness of the exception) is an approach grounded in the concept of functional equivalence. This concept is manifested in various interpretations in the Court's case law. In the case under analysis, it pertains to entities that are functionally equivalent from an economic standpoint.[27] The adoption of such an interpretation was possible thanks to the recognition that e-lending digital copies of books "has essentially similar characteristics to the lending of printed works."[28] Acknowledging the existence of functional equivalence between both types of lending enabled the development of a flexible interpretation of the derogation from the exclusive right. While the Court did not explicitly state it, embracing such equivalence must imply that e-lending does not infringe upon the three-step test of either European law or international treaties. Nevertheless, for a specific model of e-lending digital copies to be deemed the functional equivalent of lending physical copies of works, it must satisfy particular conditions.

The form of e-lending considered in these proceedings and recognized by the Court as having essentially similar characteristics to the lending of printed works was the "one copy, one user" model. First, this model created "the limitation of simultaneous downloads to a single copy implies that the lending capacity of the library concerned does not exceed that which it would have as regards a printed work."[29] Secondly, lending is made for a limited period.[30] In practice, this requires a library interested in such e-lending employs some form of digital rights management. The question that remains is whether there are other e-lending system models with similar characteristics to lending printed works.

It appears that, in the Court's view, this approach effectively strikes a balance within the copyright system. On one hand, libraries can fulfill their public mission in the digital realm, authors should receive remuneration (PLR), and the interests of rights holders, especially publishers, are safeguarded by restricting e-lending to the "one copy, one user" model.

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27 Cf. V. Breemen, *E-lending according to the ECJ: Focus on functions and similar characteristics in VOB v. Stichting Leenrecht*, "EIPR" 2017, vol. 39, no. 4, pp. 251–253.

28 Judgment of the Court (Third Chamber) of 10 November 2016, Case C-174/15 (Vereniging Openbare Bibliotheken v. Stichting Leenrecht), point 51.

29 *Ibid.*, point 53.

30 *Ibid.*

5. Where to get a legal digital copy – practical problems and theoretical solutions

The judgment was seen as a favorable ruling in support of libraries. Regrettably, in practice, it did not lead to an increase in the availability of digital copies of books offered through e-lending in public libraries.[31] The judgment established that the exception from the exclusive lending right, under Directive 2006/115, includes not only the lending of physical books but also digital copies of books.

First, this judgment did not alter the fundamental nature of the public lending exception itself. It continues to be an optional provision, allowing Member States the freedom to implement it or not.

They can choose to forgo its implementation and maintain book lending regulations based entirely on the licensing model (e.g., with Collective Management Organizations).[32] Theoretically, they could also opt to exclude digital copies from its scope. To the best of my knowledge, no country has explicitly excluded e-lending from its regulations. Nonetheless, many of them are still influenced by a traditional interpretation, sometimes rooted in dogmatic construction of lending rights,[33] while in other cases, they adhere to the conventional interpretation of the concept of a "copy" of a work, understood solely as a physical copy. Particularly in the latter instances, it appears feasible to overcome such an interpretation and similarly adopt the dynamic interpretation upheld by the Court. This approach can be found in the literature on Polish law. As Aurelia Nowicka points out "the position of the CJEU may also be used in the interpretation of lending within the meaning of Article 28 sec. 1 point 1 pr. aut."[34]

Second, the judgment highlights that the possibility of e-lending depends on digital copies of books used for this purpose being sourced legally. It is undisputed that such copies can come from rights holders, such as publishers or aggregators. The challenge lies in the fact that, while for physical books, libraries can simply purchase a book on the market, digital copies involve a licensing agreement rather than a straightforward sales contract. In practice, many rights holders are either uninterested in providing such licenses to libraries or offer them at significantly higher prices compared to those available to individual consumers.[35]

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31 Cf. *First European Overview on E-lending in Public Libraries. An interim report prepared by EBLIDA EGIL (Expert Group on Information Law). Country profiles and Summary Tables*, June 2022.

32 E.g. the lending system in Slovak law is not based on an exception but on a collective licensing system.

33 With regard to German law, cf. K. de la Durantaye, *Große Hafenrundfahrt – Optionen für eine (Neu-) Regelung des e-Lending in Deutschland*, "Zeitschrift für Urheber- und Medienrecht" 2022, vol. 66(8–9), p. 587.

34 A. Nowicka, *Komentarz do ustawy o prawie autorskim i prawach pokrewnych* [in:] *Ustawy autorskie. Komentarze. Tom I*, ed. R. Markiewicz, Warszawa 2021, p. 765. See also: J. Marcinkowska, *Wyrok TSUE z 10.11.2016 r. w sprawie Vereniging Openbare Bibliotheken przeciwko Stichting Leenrecht* [in:] *Prawo autorskie. Komentarz do wybranego orzecznictwa Trybunału Sprawiedliwości UE*, eds. E. Laskowska-Litak, R. Markiewicz, Warszawa 2019.

35 R. Matulionyte, *Lending e-books in libraries: Is a technology-neutral approach the solution? Get access*

The second option is to digitize the paper books that libraries have acquired. Nevertheless, for this digitization to be legal, the library must possess the appropriate rights to reproduce books for e-lending purposes. The exceptions available under EU law do not explicitly address this scenario. However, there seems to be room for interpreting provision 5(2)(c) of the InfoSoc Directive, which could serve as the foundation for such digitization. The Advocate General pointed out this potential in his opinion: "reproductions made by libraries, […] are […] covered by the exception to the reproduction right provided for in Article 5(2)(c) of Directive 2001/29, read in the light of the Court's judgment in '*Technische Universität Darmstadt*.' […] That provision provides for an exception to the reproduction right for 'specific acts of reproduction made by publicly accessible libraries […] which are not for […] economic […] advantage'. In the abovementioned judgment, the Court held that that exception could apply so as to enable libraries to complete acts of communication to the public under another exception […] By analogy, 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."[36]

6. Independent Secure Digital Lending – (i)SDL

Both the VOB and Technische Universität Darmstadt/Eugen Ulmer[37] (C-117/13) judgments should be placed in a broader context of libraries' implementation of e-lending. The digitization of paper books for e-lending in the USA is often referred to as Controlled Digital Lending (CDL). However, due to differences in legal systems, e-lending based on paper books digitized by European libraries is referred to as Independent Secure Digital Lending (iSDL).[38] CDL is grounded in the first-sale doctrine (17 US Code § 109) and fair use (17 US Code § 107). Conversely, (i)SDL derives its legal justification from Article 6 of the Rental and Lending Directive and Article 5(2)(c) of the InfoSoc Directive. The use of the letter "i" was intended to indicate that this type of e-lending is based on books that are digitized or otherwise created by a library; it is not based on license agreements related to the use of e-books. Both models enable libraries to offer noncommercial e-lending with the following rules:

Arrow, "International Journal of Law and Information Technology" Winter 2017, vol. 25, iss. 4, p. 261; Case C-174/15, AG Opinion, para 38.

[36] Advocate General Szpunar, 16 June 2016 (opinion), Case C-174/15 (Vereniging Openbare Bibliotheken v. Stichting Leenrecht), point 57.

[37] Judgment of the Court (Fourth Chamber) of 11 September 2014, Case C-117/13 (Technische Universität Darmstadt v. Eugen Ulmer), ECLI:EU:C:2014:2196.

[38] This name was adopted as part of a study "Secure Digital Lending in European libraries" conducted by the Digital Center and the Future Law Lab of the Jagiellonian University, which concerned a comparative analysis of the current state of copyright law regarding the possibility for libraries to digitize and lend books under national and European law, https://centrumcyfrowe.pl/en/projekty/secure-digital-lending-in-european-libraries/ [accessed: 2024.04.03].

1. The library must have a legal, physical copy of a book, whether purchased or donated.
2. The library must maintain an owned-to-loan ratio, which means lending no more copies than it legally owns (owned to loaned ratio/"one copy, one user").
3. The library must take technical measures to prevent digital files from being copied or redistributed.

Both CDL and (i)SDL are conceptually based on an important limitation, according to which a library can e-lend as many electronic versions of books as it has paper copies. In other words, it must use the "one copy, one user" model. This model was accepted in the VOB ruling. However, as indicated above, the practical possibility of libraries implementing e-lending in the (i)SDL model depends, among others, on national provisions. None of the EU countries have legal regulations directly enabling e-lending. Consequently, the possibility of implementing this system will be contingent on the interpretation of existing regulations. It seems that, at least in certain EU countries, it will be feasible to employ a dynamic interpretation to uphold the fundamental rights of library users.[39] Interpretational difficulties at the national level pertain to both the understanding of "lending" and "copies of works" in line with the VOB CJEU ruling, as well as finding legal grounds for book digitization by libraries, similar to what occurred in the Technische Universität Darmstadt/Eugen Ulmer judgment (C-117/13).

Conclusions

The judgment discussed above represents a significant step towards adapting exceptions and limitations to copyright law to meet the needs of technological development. In principle, one must agree that interpreting the concept of lending as encompassing both the lending of physical books and electronic books is the proper solution. At the same time, this judgment leaves a certain sense of dissatisfaction. It does not directly determine whether libraries have the right to digitize books for the purpose of e-lending, nor whether they can lend books for this purpose in contravention of licensing agreements and by circumventing technological protection measures. However, it seems that reading this judgment in conjunction with the principles established in the Darmstadt ruling permits justifying, at least to some extent, the existence of the right for libraries to digitize physical books for the purpose of e-lending. Such an interpretation means that, at the level of EU law, it is permissible for libraries to conduct e-lending within the iSDL model. However, whether this is feasible in practice depends on how exceptions for libraries are implemented in national laws.

[39] The assessment of this possibility in some EU countries is the subject of the report prepared as part of the project mentioned above.

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Summary

Konrad Gliściński

Towards e-Lending by Libraries

The commentary discusses a judgment of the CJEU on the interpretation of EU law in relation to e-lending by libraries. E-lending conducted by libraries using digitized paper books is known as Independent Secure Digital Lending (iSDL), which is the European equivalent of the Control Digital Lending (CDL) system used in the USA. The Court clarified that lending digital copies of books by public libraries can be covered by the exception from the exclusive lending right provided it has similar characteristics to lending printed works. The "one copy, one user" model, where a digital copy is placed on the library's server, and only one user can download it during the lending period, aligns with Directive 2006/115. However, the practical implementation of e-lending in public libraries still faces challenges. The judgment does not change the optional nature of the public lending exception, allowing Member States the freedom to implement it or not. Many countries are influenced by traditional interpretations that limit lending only to physical copies. Moreover, for e-lending to be considered legal under EU law, libraries must possess a digital copy from a legal source. This raises the question of whether libraries can, under the existing exceptions outlined in the InfoSoc Directive, digitize their physical book copies for subsequent e-lending. This issue was not definitively addressed in this judgment, but it found support in the Advocate General's opinion. Simultaneously, due to the prevailing traditional approach to lending at the Member State level, e-lending is still not widespread in practice.

Keywords: e-lending, Independent Secure Digital Lending (iSDL), Control Digital Lending (CDL), definition of a copy, lending right.

Streszczenie

Konrad Gliściński

W kierunku e-użyczeń przez biblioteki

Glosa omawia orzeczenie TSUE dotyczące interpretacji prawa UE w kontekście e-użyczeń realizowanych przez biblioteki. E-użyczenia przeprowadzane przez biblioteki z wykorzystaniem zdigitalizowanych książek papierowych znane są jako Independent Secure Digital Lending (iSDL), co stanowi europejski odpowiednik systemu Control Digital Lending (CDL) stosowanego w USA. Trybunał wyjaśnił, że użyczanie cyfrowych kopii książek przez publiczne biblioteki może być objęte wyjątkiem od wyłącznego prawa do użyczenia, pod warunkiem że charakteryzuje się podobnymi cechami do wypożyczania dzieł drukowanych. Model „jedna kopia, jeden użytkownik", w którym cyfrowa kopia jest umieszczana na serwerze biblioteki, a tylko jeden użytkownik może ją pobrać w czasie trwania okresu użyczenia, jest zgodny z dyrektywą 2006/115. Niemniej jednak praktyczna realizacja e-użyczania w publicznych bibliotekach wciąż napotyka wyzwania. Orzeczenie nie zmienia dobrowolnego charakteru wyjątku dotyczącego wypożyczania publicznego, co daje państwom członkowskim swobodę w jego wdrażaniu lub rezygnacji z niego. Wiele krajów kieruje się tradycyjnymi interpretacjami, które ograniczają użyczenia jedynie do kopii fizycznych. Ponadto, aby e-użyczenia mogły być uznane za legalne w świetle prawa UE, biblioteki muszą posiadać cyfrową kopię pochodzącą z legalnego źródła. Rodzi to pytanie, czy biblioteki mogą, w ramach istniejących wyjątków określonych w dyrektywie InfoSoc, zdigitalizować swoje fizyczne egzemplarze książek w celu późniejszego e-użyczania. Ta kwestia nie została jednoznacznie rozstrzygnięta w tym orzeczeniu, ale znalazła wsparcie w opinii rzecznika generalnego. Równocześnie, ze względu na panujące tradycyjne podejście do wypożyczania na poziomie państw członkowskich, e-użyczenia wciąż nie są powszechnie stosowane w praktyce.

Słowa kluczowe: e-użyczanie, Independent Secure Digital Lending (iSDL), Control Digital Lending (CDL), definicja kopii, prawo do użyczania.