

TERESA ŚWIĘCKOWSKA  
Faculty of Journalism, Information and Book Studies  
University of Warsaw  
e-mail: t.swieckowska@uw.edu.pl  
ORCID 0000-0002-3979-5600

## CONTROLLED DIGITAL LENDING: LEGAL CONDITIONS, SOCIAL CONTEXTS, PRACTICES AND CHALLENGES FOR LIBRARIES



Teresa Świąćkowska is an Assistant Professor at the Department of Journalism, Information and Book Studies, University of Warsaw. She teaches copyright and ethics in library practice. Her research interests include the history of copyright, libraries, and reading culture, among others.

**KEYWORDS:** Controlled Digital Lending. Libraries. USA. EU. Poland.

**ABSTRACT:** **Thesis/Purpose of the article** – The article examines the concept of Controlled Digital Lending (CDL) which applies the principles of traditional physical book lending to the online lending of digitized works. It also discusses the practices of Polish libraries engaging with this model. **Method** – The study is based on a critical review of international literature on CDL and an examination of digital lending practices in Poland. Digital lending is discussed in the broader context of mass digitization and the challenges of providing access to the heritage of twentieth-century publishing. **Conclusions** – The article outlines the legal frameworks relevant to digital lending in the United States where the concept of CDL originated as well as in the European Union. Regarding the latter, particular attention is given to the 2016 CJEU ruling in the VOB case and its interpretation. The study demonstrates that in both the US and the EU—including Poland—the absence of clear legal regulations concerning digital lending poses a barrier for libraries striving to ensure digital access to the publishing output of the twentieth and twenty-first centuries.

## INTRODUCTION

In the process of digitization that has been ongoing for over three decades, works in the public domain are already or can be made available online. In the case of European collections, these are mainly 19th-century collections, while in the USA the public domain includes works published before 1923. However, the vast majority of 20th-century publishing output is not digitally available, and in the case of works not available commercially, traditional forms of access through libraries are also limited. Libraries also encounter many difficulties in providing access to current publishing output in the form of e-books. To date, the dominant form of providing access to 21st-century books in digital form in libraries is the licensing model, which, where it already functions, is criticized for its limited offer and high prices. In some countries, including Poland, there is still a lack of both adequate infrastructure and offerings for this form of access, which means that libraries cannot provide their readers with remote access to books, while they are already digitally available through commercial channels. The main difficulty associated with the problem described above is the lack or ambiguity of copyright regulations regarding digital access by libraries in a model other than licensing. This problem has been highlighted by libraries for many years, who, with the progress of digitization and the development of the e-book market, are seeking ways to adapt their offerings to the new technical possibilities of providing access to knowledge and cultural resources on the one hand, while meeting the expectations of their users on the other. The concept of controlled digital lending is one of the results of these searches. However, it faces many challenges, both legal, technical, and organizational.

## DEVELOPMENT OF THE CONTROLLED DIGITAL LENDING CONCEPT IN THE USA

The concept of Controlled Digital Lending (CDL) was introduced by Michelle Wu in 2011 in an article dedicated to a collaborative project of law libraries in creating a shared digital collection (Wu, 2011). Wu's premise was that it is possible to create a digital library that, on the one hand, respects the rights of copyright holders and, on the other, meets the growing need for online access to collections of printed materials. According to Wu, the assumptions adopted in the USA regarding limitations on copyright allow for the distribution of the exact number of copies of purchased items, regardless of the format, as long as the number of copies in circulation does not exceed the number of purchased copies. Justifying this statement, Wu referred to the First Sale Doctrine, according to which, under Section 109 of the U.S. Copyright Act, the owner of a legally acquired copy of a work

has the right to sell or otherwise dispose of it (Wu, 2011). Further premises of CDL, according to Wu, are the principle of fair use and exceptions to copyright for libraries and archives (Section 108 of the U.S. Copyright Act), which allow libraries to reproduce and distribute works in specific situations, e.g., for archiving or replacing damaged copies (Wu, 2011). At the time Wu presented her concept, controlled digital lending was already being tested in practice. Since 2010, a pilot program of such lending has been conducted by the Open Library (OL) operating under the Internet Archive (IA).

The concept of Controlled Digital Lending (CDL) gained wider dispersion in the USA at the turn of the second and third decades of the 21st century. Two factors significantly contributed to this. On the one hand, there was the introduction in 2017 by the Internet Archive of the Open Libraries program, inviting libraries to cooperate in developing controlled digital lending, and on the other hand, the publication in 2018 of two documents concerning CDL (Pang, 2022, 157). The first of these documents was the *Position Statement on Controlled Digital Lending*, prepared by Wu and five other specialists.<sup>1</sup> This document aimed to help librarians understand the general concept of Controlled Digital Lending (CDL) and support the creation of a space for the collaborative development of digital lending practices. The document concisely described how to correctly apply the principles of CDL. These principles, summarized in six points, are as follows: libraries should: (1) ensure that original works are acquired legally; (2) apply CDL only to works owned by the library; (3) limit the total number of copies in circulation to the number of copies the library legally owns, maintaining a one-to-one ratio of owned copies to borrowed copies; (4) lend each digital version to only one user at a time, just as a physical copy would be lent; (5) limit the loan period to a period analogous to physical loans; (6) use secure digital rights management (DRM) tools to prevent copying and redistribution (Position Statement, 2018). The statement was signed by a number of leading libraries and copyright experts. A second document, *A White Paper on Controlled Digital Lending of Library Books*, is related to and expands upon the position statement described above (Hansen & Courtney, 2018).<sup>2</sup> It presents in detail the legal framework and arguments supporting the possibility of libraries using Controlled Digital Lending (CDL). This text sparked a lively discussion in US library circles and became a key point of reference for subsequent work

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<sup>1</sup> These were: Lila Bailey, policy advisor at the Internet Archive; Kyle K. Courtney, copyright counsel at Harvard University Library; David Hansen, librarian and copyright advisor at Duke University; Mary Minow, affiliated with the Berkman Klein Center for Internet and Society and Harvard University; and Jason Schultz, professor at NYU School of Law.

<sup>2</sup> Its authors were also co-authors of the *Position Statement On Controlled Digital Lending By Libraries*, see footnote above.

on controlled digital lending (Pang, 2022, 157). It was cited, among others, in the *IFLA Statement on Controlled Digital Lending* from 2021. Discussions concerning CDL intensified during the pandemic, and these discussions were accompanied by the emergence of various projects for implementing CDL.

## MASS DIGITALIZATION AS THE HISTORICAL CONTEXT OF CDL

When Wu (2011) presented her concept of CDL, an intense discussion was underway in the USA and beyond regarding digitalization and its compatibility with copyright law, triggered by the ongoing lawsuit between publishers and Google concerning the Google Books project (Marcum & Schonfeld, 2021). The Google Books project, officially announced at the end of 2004, was based on cooperation with the largest academic libraries in the USA, to which Google offered the digitalization of their collections. The libraries of the universities of Michigan, Stanford, Harvard, Oxford, and the New York Public Library were among the first to join the collaboration with Google.

The libraries of the universities of Michigan and Stanford decided to submit for digitalization both collections in the public domain and books still protected by copyright. When Google made the Books Search service available online, publishers and authors who owned the rights to the digitized books accused the company of infringement. They argued that creating digital copies and making excerpts of the text available without their consent constituted a violation of copyright law. Google defended itself by claiming that it had introduced an opt-out option, allowing copyright holders to exclude their books from the project upon request, and that copying for search purposes was permitted under fair use (Manuel, 2010). In 2005, authors and publishers filed a lawsuit. The lawsuit was a class action, meaning it was filed on behalf of a broad group of authors and publishers. Such a process involves negotiating a settlement between the parties. The draft settlement agreement, negotiated between Google's lawyers and representatives of publishers and authors, was presented at the end of 2008. The settlement applied exclusively to books published before January 5, 2009, and protected by copyright in the USA. Under the agreement, Google was to obtain a non-exclusive license to use the books covered by the settlement in the following areas of exploitation: creating and storing digital copies of books; selling subscriptions to institutions for access to an electronic database of books; providing online access to books for a fee; displaying excerpts of books; displaying bibliographic information from books. Full use, in the form of display or distribution, could only apply to books unavailable commercially to customers in the

USA. If a book was available, Google would have to obtain the explicit consent of the rights holder for the uses described above. The company guaranteed rights holders 63% of the profits from the use of the books, including from advertising. The rights holders themselves were to decide whether and to what extent Google could use their works.

The proposed settlement sparked a wave of criticism and protests from publishers, authors, and lawyers alike. In 2011, when the settlement was rejected by the court, Google continued digitizing public domain books while simultaneously introducing the Google Partners program, which involved agreements with individual publishers and authors. The rejection of the agreement meant that the issue of digital access to copyrighted books remained unresolved in the USA. On the other hand, the draft settlement demonstrated the enormous potential for making valuable resources available online. The discussion surrounding the settlement also revealed important issues related to the digitization and dissemination of library collections. It highlighted, among other things, the problem of access to out-of-print and orphan works. Supporters of the settlement emphasized the benefits of introducing the possibility of digital access to the resources of the largest academic libraries. They pointed to the democratization of access and the fact that the most important scientific collections would be available to all libraries, even those on small campuses, as well as to individual users. Other arguments included new search capabilities; a new life for out-of-print books and those forgotten on dusty library shelves; and financial benefits for partners (Marcum & Schonfeld, 2021, 143-156). Opponents of the settlement primarily pointed to the dangers of a Google monopoly, arguing that a commercial entity would gain broad rights to digitize and utilize publishing output.

In response to the Google Books project, alternative projects emerged both in the USA and worldwide, including the Open Content Alliance (OCA), the Digital Public Library of America (DPLA), and EUROPEANA. Discussions surrounding Google's settlement with publishers, as well as the issue of fair use in relation to copying for full-text searching purposes, consolidated the library community in the USA, which became involved in various initiatives to enable libraries to provide online access to their collections. An important outcome of the Google lawsuit with publishers was the 2012 ruling, which rejected the Authors Guild's complaint and recognized the creation of digital copies for full-text searching purposes as fair use, a decision confirmed by the US Supreme Court in 2016.

## THE INTERNET ARCHIVE AND CDL IN PRACTICE

The Internet Archive (IA) was founded in 1996 by Brewster Kahle as a non-profit organization with the primary goal of archiving online digital resources. Although preserving humanity's digital heritage and providing access to historical versions of websites through the Wayback Machine remains one of IA's most important services, the organization has implemented many other projects related to its overarching mission defined as providing universal and open access to knowledge (Kahle & Parejo Vadillo, 2015). Many of IA's projects are related to the digitization of 20th-century cultural heritage, books, music, and television broadcasts. Among the most important projects, besides the Wayback Machine, is the Open Library, established in 2006. One of the main goals of this project was to create a catalog of all published books by creating a website for each book. This cataloging and information function was then combined with the function of providing full texts for books in the public domain, and for those protected by copyright, the practice of controlled digital lending was introduced over time. According to information on the IA website as of March 2025, OL contains over 20 million pages with information about books and 2 million books whose full texts are available in the IA browser or for download (Internet Archive, n.d.-a).

Even before the announcement of Open Library, in 2005 the Internet Archive initiated the Open Content Alliance, a digitization project alternative to Google Books. Several large companies and dozens of libraries joined the OCA.<sup>3</sup> This project, like Google Books, aimed to digitize and make books available, but was intended to be more open and transparent. Book scanning in the Open Content Alliance (OCA) was managed by the Internet Archive (IA), which also provided permanent storage and access to digital copies through the Open Library (OL) website. Although the OCA was disbanded after a few years, around 2010, the Digital Public Library of America (DPLA) initiative, independent of IA, grew out of it (Jones, 2014, 274). From the beginning, DPLA has shown greater caution in its approach to copyright than IA and assumes the online availability of books in the public domain or on the basis of obtaining permissions. On the other hand, DPLA is actively involved in lobbying for the introduction of solutions that would allow for the digital availability of copyrighted books as well, especially those that are commercially unavailable. Robert Darnton, director of the Harvard University Library and one of the main

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<sup>3</sup> Initially, the project collaborated with Yahoo!, Adobe Systems, European Archive, HP Labs, UK National Archives, O'Reilly Media, Prelinger Archives, the University of California, and the University of Toronto, and over the next two years the Open Content Alliance gained dozens of partners, including large companies such as Microsoft, and libraries such as the Smithsonian Institution Libraries and numerous university libraries (Jones, 2014, 268).

founders of DPLA, wrote in an article published in 2011 that “DPLA must respect copyright,” but also signaled the need for legal solutions for the digital availability of commercially unavailable books and orphan works (Darnton, 2011). OL, on the other hand, starting in 2010, developed a project in cooperation with libraries to make 20th-century books not yet in the public domain available while maintaining the same principles that apply to lending printed books. Brewster Kahle described this process as follows: “Our digital ebook lending program mirrors traditional library practices: only one reader at a time can borrow a book, and others must wait for its manual return. Alternatively, after two weeks the book is automatically returned and made available to other waiting users. The technical protection mechanisms that ensure access to only one reader at a time use the same technologies that publishers use to protect ebooks available for sale. In this way, the Open Library website respects copyright issues” (Kahle, 2016). In 2016, the IA held 500,000 post-1923 digital volumes, as Kahle described them (Kahle, 2016).<sup>4</sup>

In 2017, the Internet Archive (IA) launched the Open Libraries initiative, aimed at expanding cooperation with libraries and developing both digitization and controlled digital lending. As stated on the IA website, by joining Open Libraries, libraries can identify overlaps between their physical collections and IA’s digital resources and provide readers with free access to these digital books in cases of overlapping titles. Additionally, libraries can add titles from their collections to Open Libraries to increase the number of available loans. IA reports that some public, academic, and specialized libraries have already joined the project (Open Libraries, n.d.). Project leader Chris Freeland emphasized in 2020 that while most public domain works in the USA are already digitized and available online, 20th-century publications still remain in print and are not digitally available. Open Libraries aimed to digitize these 20th-century collections that are not available in digital form but are on library shelves, and to make them available in cooperation with libraries through controlled digital lending. According to Freeland’s statement from 2020, the Open Libraries project demonstrated that libraries can successfully implement controlled digital lending in practice (Vieira, 2020).

## CDL DURING THE PANDEMIC

When libraries were closed and unable to lend their collections due to the Covid-19 pandemic, interest in controlled digital lending (CDL) increased. As Xuan Pang writes, CDL became a hot topic among librarians

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<sup>4</sup> In the USA, due to a different copyright system, books published before 1923 are in the public domain.

in 2020, as they understood that this new initiative was the only way to continue providing access to books when libraries remained physically inaccessible (Pang, 2020). Webinars on CDL were organized by, among others, the Internet Archive (IA), which, as shown above, already had experience in this area. According to Pang, a webinar on CDL and the future of libraries, *The Right to Reserves: CDL and the Future of Libraries*, organized by the copyright librarian at Harvard University, proved exceptionally helpful for academic librarians. It presented the legal framework of CDL and argued that libraries could digitize their printed textbooks and make digital copies available to students (Pang, 2022, 158).

For libraries that decided to implement Controlled Digital Lending (CDL), a major challenge proved to be the lack of technological infrastructure, i.e., suitable platforms that would allow them to provide access to digital copies of books while maintaining the necessary conditions for controlled lending. Faced with the urgent need to solve this problem, libraries sought temporary solutions. One such solution, which also became a model for others, was developed by the library of the Shanghai branch of New York University. This model utilized Google Drive and Google Apps scripts (Xu, Lin & Wu, 2021; Pang, 2022, 159). Digitized materials were made available via Google Drive or Team Drive. Before sharing the file, download, printing, and copying options were disabled in the settings for viewers, ensuring that the user could not permanently save or distribute the digital copy. Google Sheets was used to manage the lending process. Google Apps Script was used to design functions for automatically revoking access, setting a time limit for access, and removing access after a specified period. The script automatically removed the user's access rights to the shared file. After access expired, the script sent an email notification to the library staff. The main advantage of this model was the possibility of quick implementation and low costs, as it utilized existing infrastructure. However, this temporary solution had serious drawbacks. From the user's perspective, these were primarily related to the inconvenience of reading via a PDF viewer, and from the staff's perspective, the labor-intensive manual handling of setting restrictions (Xu, Lin & Wu, 2021).

#### THE NATIONAL EMERGENCY LIBRARY AND THE HACHETTE V. INTERNET ARCHIVE LAWSUIT

In 2020, during the lockdown, the Internet Archive (IA) decided to deviate from the strict rules of controlled digital lending and established a temporary emergency library, the National Emergency Library (NEL), which lifted the one-copy-one-user restriction previously applied in Open Library, allowing an unlimited number of users to borrow the same

book simultaneously. IA argued that in the exceptional circumstances of the pandemic, lending books in this way constituted fair use. NEL was intended as a temporary solution, and at the time of its announcement on March 24, it was stated that the project would last until June 30. The main goal of NEL was to support distance learning at a time when libraries and educational institutions were inaccessible (Rimmer, 2022). Supporters of NEL emphasized the public benefits of the program, arguing that copyright holders would gain nothing if the public were deprived of access to IA resources, especially since the organization's digitization policy included 20th-century books unavailable commercially, and these were precisely the books that were lacking in commercial offerings for libraries (Mercanti, 2023). However, alongside positive and even enthusiastic opinions, the NEL project also met with criticism, especially from publishers' and authors' associations, such as the Association of American Publishers and the Authors Guild (Vieira, 2020).

In early June 2020, Hachette Book Group, HarperCollins, John Wiley & Sons, and Penguin Random House sued the Internet Archive (IA) for copyright infringement. The lawsuit concerned both the National Emergency Library (NEL) and the Open Library (OL). Following the filing of the lawsuit, on June 10, 2020, IA announced the early closure of the NEL, which occurred on June 16, 2020. The OL then reverted to a one-copy, one-user lending model and waiting lists for loans, but the publishers did not withdraw the lawsuit. In 2022, both sides filed motions for summary judgment, i.e., a ruling without a full trial. In the US, a judge may agree to such a procedure if there is no significant dispute as to the essential facts. The case concerned 127 books to which the aforementioned four publishers held the rights, and copies of which IA had acquired through purchase or donation. All these books were also available as e-books through licensing agreements for libraries. After digitizing the acquired titles, IA stored the physical copies in a warehouse and allowed users to borrow digital copies through the OL. Anyone could register as an OL user and borrow up to 10 titles simultaneously. After borrowing a book, it could be read online, downloaded, or listened to using an automated text-to-speech reader. After borrowing a book, a link to the book on Better World Books (a commercial used bookstore run by Brewster Kahle) appeared on the title page. If a user clicked on the link and bought the title, IA received some form of referral fee (Wu, 2024).

The publishers sued, alleging copyright infringement by IA. They argued that IA was committing mass copyright infringement for commercial purposes by digitizing and distributing full versions of copyrighted books without licenses. They emphasized that IA's actions did not constitute fair use, violated their rights, and undermined the book market (Rimmer, 2022). IA requested a ruling that its activities under

CDL and NEL were non-commercial and transformative in nature and constituted fair use (Rimmer, 2022).<sup>5</sup> In March 2023, Judge John Koeltl of the New York District Court sided with the publishers and ruled that the Internet Archive's activities did not fall under fair use. The court found that IA's activities were commercial, non-transformative, and caused market harm (Wu, 2024). The judge determined the commercial nature of the activity based on the collection of donations on the IA website and commissions from book sales through Better World Books. Regarding the transformative nature, the court found that IA provided digital copies of books in a manner identical to commercial entities, which did not add new value, purpose, or character to the distribution. The court also found that IA's activities caused market harm because the free access to digital copies of books offered by IA competes with the market for digital licenses offered by publishers to libraries and consumers. In its September 2024 ruling, the Court of Appeals upheld the lower court's judgment finding copyright infringement by IA, but disagreed with the lower court on the commercial nature of IA's activities. Based on arguments about the non-transformative nature of the use of the works and the potential market harm, it confirmed that IA's actions did not constitute fair use and infringed the publishers' copyrights. As a result of the *Hachette v. Internet Archive* ruling, IA removed over half a million copyrighted books from its Open Library lending service (Internet Archive, n.d.-b).

## THE LEGAL SITUATION OF DIGITAL LENDING IN THE EUROPEAN UNION

The legal framework for digital lending under European Union (EU) legislation is very complex and in some aspects unclear, or even internally contradictory. These conditions were extensively presented by Matteo Frigeri, Martin Kretschmer, and Péter Mezei in their 2024 article "Copyright and eLending in public libraries: an incomplete revolution" (Frigeri, Kretschmer & Mezei, 2024). These authors demonstrate that current EU copyright law creates significant barriers to the implementation of controlled digital lending in EU member states. According to their findings, none of the member states has yet introduced legal solutions concerning this issue in their national legislation. As the authors cited above explain, the legal situation of digital lending is influenced by several EU directives and rulings of the Court of Justice of the European Union (CJEU). Among the most important legal acts harmonizing copyright law

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<sup>5</sup> Non-commercial and transformative use are among the most important criteria in determining whether the use of a work falls within the scope of fair use. More on fair use and transformative use can be found in Świąćkowska, 2019.

in the EU is *Directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society* (InfoSoc), also known as the Internet Directive, as its aim was to adapt copyright law to the challenges associated with digital technologies. This directive harmonizes, among other things, the right to publicly share works. According to its principles and provisions, making e-books available online, including through downloading, is considered an act of public sharing protected by copyright.

From the perspective of library operations, another important regulation is *Directive 2006/115/EC on rental and lending rights and certain related rights to copyright in the field of intellectual property*. This directive harmonizes the right to public lending in the EU. It defines lending as “a temporary transfer for use not serving directly or indirectly economic or commercial purposes, when this is done by institutions accessible to the public.” The Rental and Lending Rights Directive grants authors the exclusive right to authorize the lending of their works, but also introduces the possibility for Member States to derogate from this exclusive right, provided that authors receive remuneration for such lending. This principle is also known as the Public Lending Right exception. Frigeri, Kretschmer, and Mezei believe that the Rental and Lending Rights Directive, at the time of its introduction, did not contain explicit provisions regarding digital lending, and its definition of lending was interpreted as referring to physical copies. Only the 2016 CJEU ruling in the case *C-174/15 Vereniging Openbare Bibliotheken - VOB* (Association of Public Libraries in the Netherlands) opened up the possibility of applying this directive to e-lending. This ruling specifically addressed the question of whether the definition of “lending” contained in the Rental and Lending Rights Directive also includes digital lending. The CJEU ruled that the concept of lending included in this directive also covers the lending of a digital copy of a book, under certain conditions (Szczepańska, 2016; Gliściński, 2024). The conditions for digital lending specified by the CJEU correspond to the concept of controlled digital lending described above and are as follows: Only one digital copy may be downloaded by the user during the lending period. The downloaded digital copy becomes inaccessible and cannot be further used by the user after the agreed lending period has expired. The digital copy of the book must be obtained by the library from a legal source. According to Frigeri, Kretschmer, and Mezei, this last condition may pose a serious problem for libraries, among other things, due to the lack of an effective secondary market for e-books. According to them, the condition of a legal source in the current legal system automatically translates into the need to license access to digital copies from publishers. In this context, they refer to the CJEU ruling in the *Tom Kabinet* case (C-263/18) from 2019, which excluded the possibility of exhaustion of the right to further resale with regard to

e-books, as is the case with physical books. In the case of physical copies of books, after the first sale within the EU, the right to dispose of them expires. However, in the case of e-books, making them available electronically is treated as a service. The CJEU ruling in the *Tom Kabinet* case indicates that in the case of e-book distribution, we are not dealing with their sale, but only with public access, consisting of downloading for permanent use. According to Frigeri, Kretschmer, and Mezei, the ruling in the *Tom Kabinet* case significantly impacts the possibility of owning an e-book, practically excluding the concept of permanent “ownership” of a digital copy in the same way that we understand ownership of a physical book after purchase. This means that the buyer of an e-book does not become its owner in the same sense as the owner of a printed book, who can freely resell it. The buyer of an e-book purchases the right to use the e-book under specific conditions (permanently or for a specified period), but does not become its full owner with the ability to freely dispose of the copy, which consequently reduces the e-book market to a service market. This legal situation is crucial for the functioning of e-lending in libraries, which depends on the publishing offer.

The question also arises whether libraries can lend digital copies of their printed collections, maintaining the principle that instead of a printed book, a digital copy is provided under the conditions specified by the CJEU ruling in the *VOB* case. According to Frigeri, Kretschmer, and Mezei, the legality of digital copies of printed books created by scanning library collections is complex and ambiguous, and the possibility of using them for e-lending is limited. These authors, citing recital 40 of the *InfoSoc* Directive, point out that the exception for libraries regarding reproduction was not introduced with digitization in mind, carried out for the purpose of providing digital access. They therefore conclude that, under the current European legal framework, the legality of creating digital copies from printed books held by libraries for e-lending is questionable, and achieving an effective e-lending system requires further legal decisions at the EU level, for example, by expanding the exceptions for libraries.

A different opinion on this matter is held by a team of Polish researchers from the Future Law Lab, who have recently developed the concept of Secure Digital Lending within the context of EU legal frameworks (Gliściński, 2025). It refers to the lending of digital copies of printed books and is similar to the American CDL in that it assumes a one-copy, one-user model, corresponding to the conditions for lending printed books.<sup>6</sup> This concept is based on the aforementioned CJEU ruling in the *VOB* case and

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<sup>6</sup> An accessible description of the Secure Digital Lending model and its legal conditions can be found on the website of the Digital Center at <https://centrumcyfrowe.pl/projekty/raport-e-books-and-secure-digital-lending-in-european-libraries-comperative-analysis-under-national-and-international-law/> [accessed: August 8, 2025]

the exceptions for libraries provided for in EU legislation. It also assumes a dynamic approach to copyright law, which allows for a departure from the literal wording of the provisions and interpreting them in a way that makes it possible to achieve the objectives foreseen by the exceptions and limitations. Researchers from the Future Law Lab team argue that although there is no direct legal basis in EU law allowing for the digitization of books solely for the purpose of e-lending, libraries can invoke an ancillary right to digitize paper books for the purpose of e-lending.<sup>7</sup> They argue that in some European countries, including Poland, there is already a legal basis for lending digital versions of printed books, i.e., the possibility of applying the concept of Secure Digital Lending they have proposed. According to them, this basis, in addition to the CJEU rulings in the VOB case and the *Technische Universität Darmstadt v. Eugen Ulmer KG* case, is provided by the fulfillment of three conditions. They believe that national laws are needed that grant libraries the right to digitize books, and additionally, that national law provides for an exception/permitted use for lending books and the right to remuneration for such lending (Gliściński, 2025, 13).

## LEGAL FRAMEWORK FOR DIGITAL LENDING IN POLAND

As a member state, Poland had to implement the provisions of EU directives into national legislation. The legal framework for digital lending, as defined in the European directives described above, has been implemented in the Polish *Act on Copyright and Related Rights of 1994* (Act on Copyright). The Polish law grants creators a very broad monopoly on the use of their works. As a rule, authors and copyright holders have the exclusive right to use their works in all fields of exploitation, i.e., in all currently known ways of using works (Article 17 of Act on Copyright). On the other hand, the law defines a closed list of exceptions that define situations in which authorized entities may use works without the consent of the copyright holders (Articles 23-35 of Act on Copyright). The most important exceptions include the so-called permitted personal use, which defines the legal framework for private use of works, and permitted public use, which includes, among others, exceptions for libraries. In Polish law, exceptions for libraries are primarily defined in Article 28 of the Act on Copyright. It states that libraries may “lend, within the scope of their statutory tasks, copies of disseminated works.” Libraries and other authorized institutions listed in Article 28 of the Act on Copyright may lend

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<sup>7</sup> This case referred to the ruling of the Court of Justice of the European Union in the case of *Technische Universität Darmstadt v. Eugen Ulmer KG* (Gliściński, 2025, 13). However, it should be noted that although this ruling granted the academic library the right to digitize a paper book for the purpose of making it available electronically, it referred to making it available on terminals within the library premises.

copies of works, i.e., printed books and periodicals, as well as films and audiobooks on CDs. Libraries and other authorized institutions may also “reproduce works permanently held in their own collections, regardless of format or medium, in order to supplement, preserve or protect these collections.” The wording of this last exception was changed in the latest amendment to the law, which came into force in September 2024. The previous version did not include the condition that the works must be “permanently” in the library’s collections. The new form of this exception therefore excludes the possibility of libraries copying works that they do not permanently hold in their collections, i.e., works borrowed from other libraries through interlibrary loan. Article 28 of the Act on Copyright also allows for the provision of works in digital form, but this is only permitted on terminals located on the library premises. Additionally, Article 28 of the Act on Copyright includes a limitation on the use of copies of works, stating that reproduction cannot lead to an increase in the number of copies of works and an expansion of the collections, respectively lent and made available. Thus, a library possessing one copy of a given title can only lend or make available on a terminal on the library premises one copy of that work.

The European legal framework for library lending described above assumes the possibility of an exception for lending, provided that the creators of the borrowed works receive remuneration. This principle is reflected in Article 28, paragraph 4 of the Polish Act on Copyright, which states that remuneration is due for the lending of copies of works expressed in words, created or published in Polish in printed form by public libraries. In the context of controlled digital lending, it should be noted that the legislators only included works “in printed form.” On the one hand, it can be argued that they interpreted the provisions of the European directives in a similar spirit to how Frigeri, Kretschmer, and Mezei (2024) understand them, i.e., excluding digital copies or e-books from the lending exception. On the other hand, these provisions were introduced before 2016, i.e., before the CJEU ruling in the VOB case, which also allows for a different interpretation adopted by researchers from the Future Law Lab in their concept of Secure Digital Lending, based on a dynamic approach to legal regulations. It is also worth noting that the payment of remuneration for library loans in Poland applies only to public libraries and is based on a sample of loans in a selected group of libraries, so the question arises whether the sample will be representative of all digital loans.

In conclusion, it should be stated that in Poland, as in other EU countries, there are no unambiguous legal provisions that allow for the practice of digital lending in an unquestionable manner. There is also a lack of a clear position regarding the interpretation of the CJEU ruling in the VOB case. For example, Ryszard Markewicz, while considering this

ruling to be a correct solution, also acknowledges that its application, given the current provisions in Polish copyright law, raises doubts (Markewicz, 2018, 419). Unfortunately, these doubts were not dispelled in the latest amendment to the law in 2024. The new concept of Secure Digital Lending presented above is an important theoretical position from the point of view of libraries, but its application, due to interpretive discrepancies among lawyers, is not without legal risk and requires confirmation in unambiguous, unequivocal provisions in national law.

## DIGITAL LENDING IN POLAND

In Poland, there are two approaches to digital lending due to the interpretation of copyright law. The first strictly adheres to the provisions of the Polish *Copyright and Related Rights Act* and cautiously interprets the CJEU ruling in the VOB case. The second approach treats the ruling as authorizing the lending of digital copies. The first approach includes the online provision by libraries of books and materials that have already entered the public domain. Examples include primarily regional digital libraries and Polona (the National Library). Another example is *Academica*, a project of the National Library, which enables the provision of digital copies of protected works from the National Library's collections in libraries throughout Poland on terminals located on the premises of these libraries, applying the one copy, one user principle. The solution used in *Academica* is based on the exception described above, specified in Article 28 of the Copyright Act, allowing the provision of digital copies on-site in the library and on the principle of interlibrary lending. Other forms of digital access in this approach are commercial licenses, the offer of which in Poland is very limited and primarily concerns academic books, and is practically absent in the case of fiction broadly defined (Święćkowska, 2022). Launched in 2014, *Academica* is based on the enormous digital resources of the National Library, also including digital copies of protected works. According to the National Library's 2023 Report, *Academica* provided access to 1,781,607 copyright-protected publications (books or articles). In 2023, the *Academica* network had 3882 libraries and 4823 terminals registered. In the same year, 164,365 users utilized the *Academica* project's services, reading 224,059 publications (National Library, 2024). These statistics mean that, on average, each user read approximately 1.4 publications per year, and each library averaged approximately 58 publications read annually, resulting in an average monthly figure of about five publications per library. This can hardly be considered a high figure, given the number of collections available in *Academica*. The reason for this result is most likely the inconvenience for

the user, who only has access to the desired title on a terminal screen in their local library.<sup>8</sup>

Academica fulfills its function in cases where readers do not have access to specific titles in libraries in their own region and/or they are not available commercially. In such situations, instead of traveling to Warsaw to the National Library, or waiting for copies to be sent by mail through interlibrary loan (at the cost of shipping), users have access on-site at the library, provided that the item is not being used by another reader. In the latter case, a queue applies. On the other hand, it must be stated that the potential of the National Library's digital collections remains underutilized. It can be assumed that users would use it more often if they had online access from their homes. This applies in particular to collections that are not available commercially, and access to which is limited or even impossible by other means.<sup>9</sup>

Following the CJEU ruling in the VOB case, some public libraries in Poland offer e-book lending. These libraries acquire e-books available for sale and lend them using a one-copy-one-user model. E-book lending services are provided by the Mateusz Library System (SBM). E-book lending in this system is integrated with the catalog, which displays information on the availability of each book. If an e-book is borrowed, the user can reserve it. The catalog also shows the number of reservations. The e-book lending system works in such a way that books in e-pub or mobi formats are available for download, and users agree, by accepting the terms and conditions, to delete the files from their device after the lending period. The terms and conditions for e-book lending in libraries using SBM include the following provisions to ensure compliance with the conditions of the 2016 CJEU ruling in the VOB case: The user has the right to use borrowed e-books exclusively for their own use, in accordance with applicable law, in particular the Act of February 4, 1994, on copyright and related rights, excluding personal use. The following are prohibited: distributing and marketing borrowed e-books; modifying or duplicating the content of e-books; using e-books for commercial purposes, in particular distributing their content or uploading them to the internet. Transferring the downloaded file between devices is permitted, but this cannot be done by duplicating it. This means that after copying the file, it must be deleted from the device where it was previously stored. A library user can borrow up to three e-books at a time, and the loan period is 30 days, with no possibility of shortening it. The user is obligated to delete the borrowed

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<sup>8</sup> I have heard this interpretation many times from librarians, part-time students, and postgraduate students of library science, whom I have been teaching for years.

<sup>9</sup> The rules and exceptions for making books unavailable commercially accessible, which have been in place since 2015 and amended in 2024, require implementation in the form of establishing appropriate institutions, which has not yet been done.

file before the 30-day period expires. Additionally, the regulations state that the e-books available for loan are marked in a way that allows for the identification of the source of the files and the borrower.<sup>10</sup>

For several years the National Library Deposit Foundation (FDB) in Poland has been implementing the concept of controlled digital lending. This initiative, similar to Open Library, focuses on digitizing printed collections and lending controlled digital copies of them. According to information available in the National Court Register, the Library Deposit Foundation was established in 2021. The Foundation's statutes state that it operates for the benefit of the general public, and its goal is educational and cultural activity, consisting of the development, promotion, and dissemination of reading. The Foundation was established by Booklikes sp. z o.o., in which Legimi holds 100% of the shares.<sup>11</sup> Legimi is the largest provider of subscription-based digital services in Poland and has been developing technology for remotely accessing e-books for over a decade. It also offers its services to public libraries, selling monthly access codes that are then distributed among readers (Swięćkowska, 2022). According to a 2024 report, nearly 1000 libraries throughout Poland have so far used Legimi's services (Legimi, 2024).

FDB is the organizer of a library that provides free, publicly accessible lending of digital copies of its own collections, while adhering to the conditions specified in the CJEU ruling in the VOB case. In addition, FDB collaborates with other libraries, providing them with free digitization services, hosting of digital copies, and intermediation in digital lending. To provide lending services for its own collections and those from partner libraries, it uses the technical infrastructure of Legimi, which ensures secure and controlled digital lending. The goal of FDB is to digitize and digitally lend primarily books that are unavailable commercially. This definition of the goal is dictated, as FDB representatives state, by a concern for maintaining a balance between the interests of readers and publishers.<sup>12</sup> How does this work in practice? The selection of works that are digitized and made available through FDB is based on the criterion of the availability of a given title in commercial circulation. The second criterion is the interests and needs of users. The initial selection is made by FDB employees, who review the catalogs of partner libraries and compare lists of titles unavailable commercially with lists of user reservations for specific titles. They send information about user interests and needs to

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<sup>10</sup> Such provisions can be found in the Regulations of the Public Library in the Bemowo District of the City of Warsaw, the Public Library in the Białołęka District of the City of Warsaw, and the Public Library in the Żoliborz District of the City of Warsaw.

<sup>11</sup> *Individual and Consolidated Annual Report for the year 2024*, Legimi, March 21, 2025, <https://www.legimi.pl/relacje-inwestorskie/raporty-legimi/> [accessed April 2, 2025]

<sup>12</sup> Interview with representatives of FDB.

the libraries, which can then take this into account when deciding which books to digitize and make available for digital lending. How does the lending of digital copies through FDB work? FDB displays titles available for digital lending from partner libraries in its catalog, and thanks to the connection with their OPAC catalogs, it can see whether a physical copy is currently on loan. If the title is available, it lends a digital copy, recording this loan in the partner library's OPAC and also informing the library by email to block the lending of the physical copy. Ultimately, FDB is working on automating this process. The book is automatically unlocked after the loan period expires, i.e., after 30 days.

Users who want to borrow a book digitally must register with FDB and obtain a digital library card, which is permanently linked to the reader's account and serves as a token authorizing the reader to access the resources of the FDB library and partner libraries. The reader must also log in to the Legimi application, where they enter their library card number. As FDB representatives emphasize, the Legimi account is something like a key to the infrastructure that Legimi leases to the Foundation, and the latter is responsible for processing user data.<sup>13</sup>

FDB states on its website (April 2025) that it collaborates with 150 public libraries at all levels (Library Deposit, n.d.). The number of registered FDB readers as of March 31, 2025, is 30,762, and the number of titles available for borrowing is 15,166.<sup>14</sup>

## CONCLUSIONS

The analysis of digital lending concepts and practices presented above demonstrates the need for clear regulations regarding libraries' rights to digital lending. The concept of controlled digital lending developed in the USA has been challenged by the ruling in the *Hachette v. Internet Archive* case. Although this ruling refers to the CDL practices used by IA, it may still have a chilling effect on the activities of libraries in the USA and beyond. This ruling has been criticized, especially by lawyers who advocate the CDL concept. They point out errors in the court's reasoning and its misunderstanding of the essence of fair use in the context of libraries (Hansen, Taylor, & Lewis, 2024; Wu, 2024). Critics of the ruling also fear its negative consequences for the further development of CDL practices and, in general, its negative impact on access to knowledge, indicating that the court's decision favors the interests of copyright holders at the expense of the public interest (Hansen, Taylor, & Lewis, 2024; Wu, 2024).

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<sup>13</sup> Interview with representatives of FDB.

<sup>14</sup> Correspondence with an FDB representative.

The legal situation regarding digital lending in the EU remains unclear despite the CJEU ruling in the VOB case, which is reflected in the uncertainty among librarians themselves regarding this issue (De Angelis, 2025). As mentioned above, lawyers addressing this topic do not entirely agree on the conditions for the legality of digital lending, although they concur that solutions are needed to dispel existing doubts (Frigeri, Kretschmer & Mezei, 2024; Gliściński, 2025). A number of arguments for introducing clearly defined exceptions for libraries are provided by the researchers from the Future Law Lab cited above, who also recommended specific legal solutions relating to the concept of Secure Digital Lending (Gliściński, 2025, 88). Global and European library associations, such as IFLA and EBLIDA, have been advocating for years for the introduction of clear legal frameworks enabling libraries to lend digital content. The need to introduce exceptions regarding digital lending for libraries in the EU is convincingly justified by Séverine Dusollier in her still relevant article from 2014 (Dusollier, 2014). She emphasizes that an e-lending exception is essential for libraries to continue their public mission in the digital age. The mission of providing access to knowledge and culture to a wide audience is too important for its fulfillment in relation to digital distribution to rely solely on commercial transactions with publishers. Many other authors draw attention to this issue, arguing that the licensing offers from publishers to libraries are limited, and some books are not available at all through these offers. Limited availability or lack of certain items in publishers' offerings, such as bestsellers; high prices; limited or difficult options for libraries to select titles; and the inability to ensure continuous access to books due to constant changes in offerings and access models are among the most frequently mentioned problems in the literature (Świątkowska, 2022; Giblin & Weatherall, 2022).

In Poland, public libraries have limited opportunities to provide online access to digital books under a licensing model due to the restricted offerings from publishers. The most common form of providing access to e-books and audiobooks for a wide range of users is the purchase of packages of individual codes for monthly access to commercial subscription services such as Legimi or EmpikGo, which involves using the technical infrastructure of these companies (Świątkowska, 2022). Similarly, in the case of lending digital versions of print books based on the CJEU ruling in the VOB case, those libraries that have adopted these practices, as shown above, utilize the infrastructure of the Legimi company. Therefore, when considering the problem of digital lending in Poland, it is necessary to take into account, in addition to legal constraints, the real capabilities of Polish public libraries in meeting the technical requirements of controlled digital lending (see De Angelis, 2025). Creating a system that technically meets all the requirements of controlled or secure digital lending is technically

complex and expensive (Kalb, 2023). In other countries, such systems are provided to libraries by external vendors, e.g., Onleihe in Germany for e-book licensing services. They are also created under the patronage and with the support of large public institutions, such as national libraries or library consortia (Święćkowska, 2022; EBLIDA, 2023). In Poland, so far, there is a lack of this kind of institutional support for libraries in the area of digital lending. In this situation, some libraries resort to solutions that may not be optimal, but are those that are currently available to them.

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