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Too early, too fast? The regulation of the eBook market in France and its possible effects on EU libraries

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Abstract

Until now, legislative interventions on eBooks and libraries have been applied to mass digitization programmes. France has taken further steps, with general regulation of the eBook market. Over and above the French "cultural exception", the eBook price-maintenance law of May 26, 2011, and the decrease in the eBook VAT rate decided in 2012 will have profound effects on this sector and, perhaps, could prevent the strains between publishers and libraries seen in the USA.

Moreover there is a problem with regulation, namely: what is an eBook? The French Parliament laid the foundations for the debate, but the answers depend on the EU authorities, who have to define a clear policy. The ongoing discussions could have a major consequence: is the eBook, becoming a juridical object, subjected to the "digital renting and lending right", in line with the 2006 Council directive? This may be the first step towards regulation of the European library market.

Key Words: eBook legal scheme, digital library, eBook market regulation, fixed prices for eBooks

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Introduction

With effect from November 2011, France is the only country to have adopted regulation of eBooks. This was done in two steps. First, the Parliament voted for a law on eBook pricing on May 26. It then adopted an amending finance law (in effect since January 1, 2012), which brought the eBooks' VAT rate to the level of the printed books' reduced rate. However, it is not over: France should have waited a little longer. The Commission accepted the eBook pricing-law, but rejected the decrease in the VAT rate. It sued France for dumping, despite general agreement to apply the same VAT on eBooks as on printed books.

This firm action of the French authorities is partly due to the difficulty of growth for the eBook market in France, which represents only 0.6% of the whole book market (20% in the United States) and, until now only a very poor catalogue is available. Besides, regulation has been a traditional attitude in France for 30 years. Since 1981, the Act concerning book price maintenance (known as "*loi Lang*", named after the former Culture Secretary) has forbidden publishers and retailers to discount prices. Its main goals are:

- to promote competition, through the quality of services;
- to maintain a local and diverse network of bookstores across the territory;
- to preserve the diversity of the supply side: without the freedom to sell at a lower price, big publishers have fewer opportunities to acquire a monopoly position in the market.

This type of scheme and pricing control is widespread across the European Union, through legislation or sector agreements. However, this has recently shown some limitations, especially in relation to online trading.

The 2011 Act is inspired by the principles of the 1981 law and the wish to maintain a balance in the sector. But the new law is not a mere extension of the 1981 Act: its mechanism is different, planned in regard to the very particular market situation in France and heading for a supply-side policy.

The contrast between the ambition of the 2011 law and the silence that surrounded its promulgation in other European countries is odd. Is it due to the fact that they consider it just as a "transition law", not adjusted to the flexibility of the digital era, or as a new and pointless manifestation of the

claimed "*exception culturelle*"? Maybe both. This should not hide the fact that this framework is at this stage the only attempt to regulate the digital marketplace and recognize the existence of cultural objects in it. The question of the relevance of the national eBooks' regulation rule has been posed. It could be assessed by other countries thanks to the results of the French experience – even if it results in keeping a totally free market.

Nevertheless, a reflection on eBooks' regulation cannot be complete without introducing a copyright policy. It has often been said that the digital economy marks the declining role of traditional publishers, and the rise of large retailers, who are the native players on the web. But, it is at the same time fundamental to keep in mind that the eBook market is not a juridical void, a kind of lawless jungle. On the contrary, it is saturated by intellectual property rights legislation and the management thereof. The norm of reference is the Berne Convention, in particular the compatibility with the "three-step test". On the other hand, the digital market creates a publisher's licensing line of contracts from the authors with the distributors, chaining data and licensing rights in a renewed industrial environment and new practices (O'Brien, Gasser, & Palfrey, 2012). Accordingly, "*the rise of digital books may require a re-examination of our legal policies that regulate the book market, primarily copyright law and anti-trust*" (Elkin-Koren, 2011).

Indeed, at first glance, the legal framework seems very complex. The terms used are hazy and, sometimes, conflicting. These new rules will apply to libraries by changing the purchasing process. Maintenance of prices could also prevent negotiations and lead to the end of consortia. On the other hand, the leeway granted by the law on price maintenance could be very helpful. Academic use is partially subject to its requirements, and the notion of "collective use" is now legally admitted.

The need of a juridical approach for eBooks is highlighted by the specific problem of the eBook market in developing a library offer, even as the public market matures. This is a major concern for all, and as a recent report ordered by the French Culture Ministry explained: "*The digital book offers for public libraries have different models depending on the country, at the direct instigation of the publishers or, more often, third party providers. Nevertheless, it can be observed that at the European level offers are poorly developed (in terms of depth of catalogue and/or number of libraries providing services), so that the question of a possible 'French delay' should be strongly nuanced*"[1] (IDATE, 2013, p. 4).

How do we manage collective use? Beyond the analysis of the achievements and future of the French law for libraries, this article aims also to broaden the reflection about juridical tools for unlocking the eBook market for collective use. Europe is no longer a juxtaposition of national legislations: decisions taken in one country can have implications for the others through European treaties. In this case, we will see that the French government asked several questions:

- What is the legal definition of the eBook, and is it possible to conceive a uniform scheme for it?
- Are fixed prices synonymous with fixed rights?
- Is it possible to separate the print world from the digital one, and is the contract the only juridical tool to do so?
- Could the European Union be set out of this reflection ?

The 2011 eBook price maintenance law

The use of legal proceedings: a European obligation

The publishers' wish to control the price is due to the policy of huge retailers like Amazon, who at one time forced producers to sell eBooks at a single tariff of $9.99. In this weak and vulnerable position, the only way out was to develop juridical means to control the switch to digital. Without this protection, the alternative was to limit the digital offer and keep publishing in paper format.

The use of the law raises a question: the risk of interfering with inadequate legislative development on an embryonic market is real and has already been criticized. The French Competition Authority issued a statement considering the choice of a legislative solution as premature (Lienafa & Perrot, 2009). The establishment of a sustainable system of fixed prices for the digital book must respect the law of competition. This task was very difficult due to the hybrid nature of the eBook, which is both a digital artefact and a creative work.

Thus, before any examination of the specificity of eBooks, the issue of the articulation between book trading and competition has to be treated.[2] The European Treaties and the Court of Justice of the European Union (ECJ) certainly recognize the specificity of cultural goods and services, which favours

a derogation from the principle of free circulation of goods and services, mainly in the name of patrimonial protection, defence of regional identities or supporting creatives. "*The general interest in the proper appreciation of places and things of historical interest and the widest possible dissemination of knowledge of the artistic and cultural heritage of a country can constitute an overriding reason justifying a restriction on the freedom to provide services."*(European Court, 1991, Art. 17)

However, the provisions of the Treaty of Rome are sufficiently blurred to allow national authorities to brush aside the rules of the competition policy, although this always depends on the varying framework set by the European Union (Gavalda & Parléani, 1999). In other words, the right to cultural exception is recognized in each country but is under surveillance.

As for the book trade, the European Court of Justice (ECJ) confirmed the principle of legislative action in 1985. States can only be prosecuted for the obstruction of free movement."*It follows that, as community law stands, member states' obligations under article 5 of the EEC treaty, in conjunction with articles 3 (F) and 85, are not specific enough to preclude them from enacting legislation of the type at issue on competition in the retail prices of books, provided that such legislation is consonant with the other specific treaty provisions, in particular those concerning the free movement of goods."*(European Court, 1985, Art. 20). The Council, meanwhile, in its resolution of February 12 2001, expressly invited the Commission "*when applying competition rules and rules on the free movement of goods, to take account of the specific value of the book as a cultural object and the importance of books in promoting cultural diversity, and of the cross-border dimension of the book market."* (European Council, 2001). The European authorities thus give some latitude to states for cultural goods. The same is not true for the private sector, which can be prosecuted for collusion, tacit agreement, or abuse of a dominant position, with little consideration for the cultural character of the activity.

This analysis was confirmed in 2009 by the ECJ in the case "*Fachverband der Buch und Medienwirtschaft v/ Libro Handelsgesellschaft".* The Court held that the rules for determining a single price by Austria for books from Germany were contrary to Treaties and stated its doctrine:*"the protection of books as cultural objects can be considered as an overriding requirement in the public interest capable of justifying measures restricting the free movement of goods, on condition that those measures are appropriate for achieving the objective fixed and do not go beyond*

what is necessary to achieve it."(European Court, 2009). Non-competition rules applied to the book market are therefore an exception. Like any exception, their impact has to be limited. In the case of eBooks, the digital access to data or reading devices is a new factor that blurs the traditional assessment by the court of the relevant book market grid. Finally, the hybrid nature of the eBook is a source of discrepancy between the French and the European cultural policies.

Under these conditions, the solution of private contracts was abandoned. The only way to control prices by contract was the "agency agreement". The relationship between an agent (or intermediary) and its principal can escape antitrust laws on condition that those legal persons are not independent companies, but actually form a single economic entity. The agency model therefore involves vertical agreements between publishers and distributors, giving the publisher control over retail prices. But, in the agency model, the risk of accusation of collusion is very high. Actually, agency models tend to favour tacit collusion: this is why US anti-trust Authorities and the European Commission took the decision, each for its own market, to open antitrust proceedings against major publishers and Apple (Linklater, 2012).[3] Publishers eventually preferred to give up and accepted settlements with the authorities.

This also means that the only way to control tariffs is legislative action, in the whole European Union.

The "homothetic" book and... beyond

Following the decision to take legal action to unlock the digital offer, the norm has also to explain "what" an eBook is... The term "electronic book" is a simplification of language that refers to various realities. There are two alternatives:

- The first one refers to print, and involves a mere digital copy. "*It is not clear from their purely digital attributes that an eBook is distinguishable from a print book. The fact that this content is the same for both print and digital books could signify that a reader would be willing to purchase a print book were the eBook unavailable, particularly where the author or series is well established*."(Linklater, 2012, p. 6)

- The other solution is to consider the book as a database, a text linked to digital services like a search engine offering links to multimedia items ... "*An e-book is a digital object with textual and/or other content, which arises as a result of integrating the familiar concept of a book with features that can be provided in an electronic environment. E-books, typically have in-use features such [as] search and cross reference functions, hypertext links, bookmarks....*" (Vasileiou & Rowley, 2008, p. 363).

The creators and the supporters of the law have engaged in fierce debates. For some people, the state intervention could curb creativity and innovation in this sector. In fairness, the aim of the legislature has to be seen in context: the law was intended to apply only to a segment of the market, foremost fiction, general publishing and humanities (mainstream publishing), excluding academic works, comics and encyclopaedias. The law does not seek to produce an "exclusive" definition of cultural property, but to distinguish one type of media. By exempting the eBook from competition rules, the law created a legally intangible cultural property.[4]

The gradual evolution of the definition of the electronic book reflects the need to cover a large range of the publishing market. The first analysis of this topic, the "*Zelnik Report*", narrowed the legal definition of an eBook to the reproduction of the printed version. By doing so it introduced the concept of the "homothetic book" as opposed to the "enriched book", which would be limited to "*electronic facsimile paper book [...] that is to say, reproducing the same information contained in the printed book, while acknowledging some enhancements as internal search engine*". The law of May 26, 2011, remained relatively vague about it. Article 1 states: "*This Act applies to a digital book when it is a work of the mind created by one or more authors and is marketed both in digital form and published in printed form, or when it – due to its content and design – may potentially be printed, with the exception of some related components specific for digital publications*"[5] (Legifrance, 2011a, Art. 1). The notion of "related components" is a vague and frail thing.

The Enforcement Decree of the Act, published on November 10, 2011, has been a surprise. Instead of reducing the electronic book, the decree sought to emancipate the "homothetic" book (which from now on we will use in the legal sense of an eBook) from the paper. Article 1 of the decree thus clarifies the meaning: the components include "*the associated search engine, modalities*

for scrolling or browsing of content elements, as well as additions of text or data belonging to different genres, including sounds, music, pictures or movies, limited in number and importance, complementary to the book and designed to facilitate its understanding"[6] (Legifrance, 2011b, Art. 1). The reference to multimedia content opens the way to include to a certain extent enriched books in the legal framework.

We have to emphasize one point. This text inserts a legal definition of "eBook" in the "French juridical order". The existence of a legal definition of eBook is not "neutral". From now on, in France, any legal action (taken by legislation, by courts ...) could rely on this definition and in the future it could be used to define the legal inclusion of eBooks in the French National Library.

A fixed and dynamic price

The law will create two dissimilar legal regimes for creators. The book in the legal sense is subject to publishing contract requirements, defined by the code of intellectual property (as modified by the law). The 6th article of the act stipulates that "*remuneration resulting from the exploitation of this book is fair and equitable*",[7] while enriched works depend on other contractual provisions stemming from database law. Nevertheless, the terms of the law link print and digital versions, introducing the idea of "*substitutability*" between both supports. For customers, the content remains identical; the costs of production are essentially the same. The homothetic definition of an eBook defines therefore the book market as a single market, in which the total revenue of the publishing industry is preserved: a rise of digital sales will counterbalance a decline of physical sales.

According to the 2nd Article of the law: "*any person established in France who publishes an eBook in order to release it commercially in France is required to establish a public selling price for any type of offer: unit or group. This price is disclosed to the public. This price may differ in function of the content of the offer and its terms of access or use*".[8]

The territoriality of the law is guaranteed by the application of this price to all purchasers situated in France, even if the retailers are outside the French borders.

"*Once book content is in digital form an almost infinite number of new business models become available both for online and for offline consumption. Such models range from the outright perpetual purchase of a digital eBook version to time-delimited rental or subscription and pay-per-view. Within those models there can be an almost infinite range of usage rights conferred or denied to the users*" (Weissberg, 2008).

The text is in line with the following practice: the 2011 law explicitly says that "*price may differ in function of the content of the offer and its terms of access or use*". The decree specifies: "*Within the meaning of the second paragraph of 2nd article of the Law of 26 May 2011 referred to above:*

- *The content of an offer can consist of all or part of one or more digital books and of the associated functionalities;*
- *The access modalities to the digital book refer to the conditions under which a digital book is made available on a removable storage medium or in a public online network of communication, including downloading or streaming;*
- *The usage modalities of the digital book are related to the private or group character of such use, to the duration of the availability of the digital book, to the possibilities for printing, copying and transferring the digital book in various reading formats*".[9]

The law and the decree show flexibility and are appropriate for the digital economy: the content and the list of rights covered determine the price. Mentioning the duration of access proves that loans will certainly form part of a major business model.

The freedom to create several offers enables the design of different offers for the same eBook: integration in eBook packages, pick-and-choose or patron-driven acquisition... To our mind, the terms of the act do not preclude any commercial practice. The best way to characterize this flexibility of the law is as "dynamic pricing". The only limitations are the marketing innovation of the producers and the number of distribution models they can manage.

All retailers have to apply the producers' prices. Advertising of prices provides knowledge to the consumer. By ensuring uniform application within the national territory, the law also provides clarity of pricing models. The 4th Article of the decree states: "*the selling price of the offer of*

a digital book to the public, [...] must be brought to the attention of the persons to whom the offer is intended, in an unambiguous, visible and readable. [....]. In the case of a collective use of the offer, the price is set according to the scale set by the publisher.."[10] These elements appear in a database (managed by the publisher himself) that *"describes each offer and mentions the prices or rates associated with it*."

This measure could have a strong effect, even if it is not the most salient aspect of the text. To control the effectiveness of the scheme, publishers and retailers must disclose their prices. From now on, when purchasing an eBook, the commercial site warns the customer that the price is fixed by the publisher. This transparency produces direct effects on the distribution of the book, favouring comparisons. For instance, between vendors' pricing models: how much are 500 undergraduate students in science worth? What is the value of a loan?

This measure helps to disclose business models in an industry where the costs are unknown and commercial secret is the rule. Furthermore, any retailer can know the commercial policy of the publisher.

For the public, the law has two majors flaws:

- without the pressure of booksellers, the price will probably remain at a high level, close to the print version;
- the risk of inertia of prices is real, decreasing the capacity for innovation.

As far as libraries are concerned, the fixed price is a major advantage for publishers as the development of an offer is now in their hands.

In contrast to the Lang Act, there are no rules for organizing the distribution. We have to keep in mind that the collective bookstores' catalogue shows the whole print production in France. Each retailer is thus able to order any book. In the 2011 Act, no article commits publishers to develop and broadcast their offers. They control the price and the distribution (they can choose to keep exclusivity). This opens up possibilities for unexpected distribution models in the digital world, beyond the traditional "vertical marketing system", in which some producers and some retailers work as a unified group.

The discreet, but partial, success of the 2011 law

Growth of the public offer

It is certainly too early to give a definitive assessment of the law's consequences. From now on, purchasing an eBook in France is often accompanied by a note: "*recommended price from the publisher*". There are positive indicators, showing that the goal to develop the offer has been reached (Baromètre, 2013):

- 100 000 digital books are available to date;
- in France, 90% of the print novel production is also available in digital format, according to publishers;
- the total sales of eBooks exceeded €21M in 2012, an increase of 80% in a year.

The market was supported during the last two years by technological innovation, resulting in a real flourishing of mobile single or multi-purpose media. The market of reading devices has enjoyed very strong growth since 2011: 27 000 e-readers sold in 2010, 150 000 in 2011, 300 000 expected in 2012. For tablets, it will rise from 1.5 million in 2011 to 3 million in 2012.

Also distribution channels are multiplying: traditional bookstores (Fnac, Decitre...) – and of course Amazon, Apple, and lately Google who has also launched a reader. This multiplication entails problems of interoperability, norms and standards in ensuring fluidity and continuity of purchases and also strains between the players in the market. The difference in content of these offers is furthermore not clear for most customers with the result that transparency of the distribution channel is now a major concern.

On the production side, the homothetic production of publishers is increasing, as is self-publishing. However, the production possibilities of this new media are still in their infancy.

According to these statistics, the supply-side policy followed by French authorities in relation to publishers has been successful. But it still represents only 0.6% of the total book market, with forecasts aiming at 3% of the market by 2015. The development of digital books faces many impediments

specific to the French model, both on the demand side and on the supply side.

The first obstacle is demand. A recent study by Opinion Way shows that nearly 80% of the French population is still resistant to the digital format. In addition, France is characterized by the highest average price for a book in digital format: €15, against €9.30 in the United States, only 30% cheaper than its paper equivalent. This is too expensive, given that 42% of digital readers download free books (copyright free) and 37% spend less than €8 per purchase. This problem is a direct result of the law's book pricing policy (Bianqui, 2013). Massive use of digital rights management (DRM) and the problem of compatibility are also sensitive points. In conclusion, the market suffers from a global lack of transparency.

Concerning the offer, there is a contradiction within the French legal framework. The density of the network of French booksellers is an obstacle to electronic growth: customers enjoy an easy access to physical books. So "*publishers do not want [...] to cannibalize their print sales. They have no interest [...] in an explosion of the digital book sales*"[11] (Dahan, 2012). Unlike the United States and the UK, the action of the whole book industry in France aims to keep a dense distribution network (approximately 15 000 outlets including traditional bookstores). Therefore, the convenience of getting a book online is much less crucial to French readers. Does the 1981 law compete with the 2011 framework?

The specific case of the French market underlines the importance of national customs for the development of eBooks – and in the French case, the bookstore situation is crucial. It also emphasizes the need to find actors to guide people on the digital offer, like libraries. In conclusion, the law had real effects, but mainly to the advantage of producers, while much remains to be done to strengthen the position of customers.

The blurring terms of the Act could lead to important distortions in competition, with risk of conflict. As we have seen, there is a lack of coherency in the legal rules. The French Ministry of Culture has therefore announced during the Paris Book Fairs, that a new High Authority will be created to guarantee correct application of the 1981 and 2011 Acts, *Le Mediateur du livre* (a kind of "*Books' Ombudsman*") (Oury, 2013). We hope that it will take the libraries into consideration.

The exception for libraries: misunderstanding and disappointment

In order to protect collective use, especially for libraries, an exception was introduced in the 2011 law. The 3rd Article of the law grants an exception for this use, under two constraints:

- the licence is limited to research, higher education or professional activities. The absence of a specific framework for all libraries has led to fears of insidious market segmentation. Librarians have denounced the separate treatment of public and academic libraries;
- this exemption is furthermore only applicable under the condition that they associate "*books with digital content of a different nature and different functionalities*" (this concerns, e.g., reviews). Obviously, this article has been designed for international producers, in a big deal perspective.

Purchases of eBooks by a university library are therefore subject to this law. Far from facilitating the selection process, a strict application entails a separation of the publishing offer in two parts: on the one hand eBooks with reviews and on the other hand eBooks only...

A third part could even be composed of eBooks whose definition does not match with the 1st Article: e.g., the juridical nature of an encyclopaedia makes it difficult to characterize it as an eBook or a database with regard to the law's definition. The legal terms involve very fine distinctions.

Furthermore, some practices hardly comply with the terms of the decree. For instance, the decree does not specify the status of commercial offers for eBooks hosted on the same platform as magazines, but sold separately from the latter. In this case, does the offer fall within the scope of the law or is it covered by the exception? If a library purchases the eBooks' offer without reviews, are the prices fixed? And if another library purchases both packages, are they free at that time? In practice much depends of the publishers' policy.

Lastly, what is the value of the distinction between academic use and public libraries? Isn't the nature of the product more fitting to characterize a purchase?

Strictly applied, the law could delay the development of the offer of eBooks for French libraries whenever the offer of eBooks for the general public is growing.

Finally, these legal complexities will be expensive for libraries: just consider the time uselessly spent by librarians examining offers and wondering whether an eBook is homothetic or not.

On the other hand, the law did give benefits to libraries, recognizing collective use or rights that determine the price (as, e.g., remote access, or the right to copy), which could lead to a simplification of business models.

One major concern is the fate of consortia. On the one hand, some publishers have an interest in continuing to discuss their offer with them if libraries are their main market as applies for instance to technical books. On the other hand, for fiction, there will be no incentive to negotiate.

In the last analysis, the law's requirement to publish the price of an offer is contradictory to normal commercial and negotiating practices.

On the optimistic side, the clauses will not cause a revolution, but only a gradual evolution of practices. Consortia are expected to play a more technical support role, perhaps at the expense of their role in the ongoing negotiation of tariffs. For instance, they could assess an eBook offer and confirm or deny legal constraints on its pricing. They could also coordinate libraries' purchases, encouraging new business models. They could play a huge role in testing innovative business models, since it is very important that providers understand the libraries' market, budgets and administrative processes, much more political role in other words.

In our opinion, the law falls between two stools: an exemption already exists but fails to be effective. The current terms are not fair. For our part, we strongly recommend a temporary exemption of the 2011 law for all libraries.

The 2011 law could promote a completely new distribution channel, designed both for the public and for libraries

If libraries seem to be forgotten by the law, this is not the case for the booksellers. Currently, the first effect of the law is to reinstate in the digital world the balances of the print world. If the flexibility of the Act's terms allows almost every market structuring, the publishers' policy tends to sustain the frailest traditional actors of the sector, the bookstores, haunted by the failure of Borders in the USA, which led the publishers to Amazon.

French publishers, authorities and retailers engaged in a firm policy in favour of a broad opening of the market, avoiding vertical distribution. Subsidies have been allocated to producers in order to speed up digitisation, on the mere condition of respecting some kind of technical formats.

In this way, traditional booksellers are called upon to keep playing a role they have lost in other countries. The solution consists in an inter-professional distribution channel. For this design, two conditions are required:

- Solving the balance of power between publishers and retailers. If retailers keep the possibility of lowering prices and of promoting one publisher for commercial reasons, most of the producers will continue delivering their eBook production with caution. This is what happened in the US with Amazon.
- Protecting the retailer market and smoothing competition. Actually, sharing a single distribution channel put them to the risk of losing customers.

Therefore, actors of the industry need a "trusted third party". One solution is to give all retailers the opportunity to sell eBooks under the obligation to sell at the publisher's price. As a first step, this has been achieved by the 2011 law.

The second step was to organize the distribution. After several attempts, professionals have come to agree on a model. The technical solution consists in a hub led by the company Dilicom, which is already in charge of all relations and transactions between bookstores and publishers for printed book delivery. Dilicom can now take charge of the transfer of an eBook file following its order.

Currently, the local bookstores' inability to launch an online sale-site means a new structure for distribution:

- The files are hosted on the sites of the publishers. Those advertise the prices and the rights, according to the law.
- All retailers will have access to the files thanks to Dilicom. Dilicom will manage all fees related to the transaction.
- The booksellers are then responsible for returning the order and providing to the final customer the eBook file through Dilicom's hub: from this point of view, the sales process is transparent.

The circuit followed is very close to the print circuit. Of course, this model is only possible thanks to the absence of competition between distributors. Otherwise, the possibility to offer rebates would give advantages to major booksellers and lead to a battle inside this global distribution channel. Dilicom is therefore the "trusted third party", who does not favour any producer or retailer.

There remains the question of how digital distributors, like Ebsco or Proquest, will enter the process. The lack of direct and personal links between them and publishers is a major change, breaking with the formal organisation of the sector.

For libraries, this scheme has been trialled through the project "Prêt numérique en Bibliothèque" (PNB, *Digital loan in the Library*). It has been presented to the *European and International Booksellers Federation* (EIBF). As a unifying project, PNB claims to "*respect the role of each actor*" and aims to include public and academic libraries in France and Belgium, if the pilot is successful.

Of course, PNB includes all possible scenarios for publishers to feel confident: online reading (in or out of a library), downloading, limitation to one or two year licences, remote access or not, number of loans. Technical protection will be ensured by Adobe DRM.

At first glance, this framework seems enticing: the book market is unified, price models are standardized, the acquisition process is easier, relationships of trust allow the development of an eBook offer for libraries. It is even possible to combine print and digital purchases: the provider can be the same. Purchasers consulting the booksellers' catalogue will immediately see if a digital version of the book is available. With the hub, they are sure – in theory – that no other offer yet exists.

The "dark side" of the project is the impossibility to negotiate a relevant offer for libraries because of legal price maintenance, the limitation of the market to one actor, high tariffs and a uniform business model. Relationships between libraries and publishers will be definitely broken.

At the same time, publishers will have to design a broad offering, without being able to tailor their offer accurately. The danger for the customer lies in the choice of the easiest and safest trading models. For instance, on a factsheet

presenting the project, a privileged business model consists of a licence that expires when a number of digital loans is reached.[12]

What is at stake is that libraries remain unprotected unless publishers allow the opening of a distribution channel in which the price and special offers could be discussed. The further developments of this project have therefore to be watched closely.

A "butterfly effect"? Legal consequences for the regulation of the eBook market in the European Union

Two legal definitions of the eBook in a single country: the VAT definition

The purpose of the government was to encourage the eBook sector. The choice of giving publishers the opportunity to control prices was obviously synonymous with high prices, which is known as a major brake on the development of a digital market. In consequence, the government influenced the price by lowering the VAT on eBooks. The reduced VAT rate is now applied to eBooks and print books since January 1, 2012: 5.5% instead of 19.6%. This change was particularly problematic, because although the 2011 law prevents companies from being attacked for barriers to competition, and was at first glance in accordance with European requirements, fiscal changes are strictly controlled by the European Commission. Today, VAT on electronic services is subject to the standard rates.[13] France is risking an accusation of fiscal dumping. According to a report issued by the French Ministry of Economy, the only legal solution acceptable by the European Union would be to emphasize the substitutability between paper and electronic: "*The eBook and the physical book are two products that differ only in their method of manufacturing and distribution. Applying to them different tax rates violates the principle of neutrality of VAT rates*"[14] (Barry, Formagne, & Martel, 2011, p. 3). This argument, supported by France, is based on the principle of "tax neutrality", created by the European Court of Justice by which a tax measure should not distort competition for the same product in the same market regardless of the medium or form of distribution.

After the vote on the reduced rate in the Finance Act, some publishers asked the fiscal Authorities: what is a digital book? The confirmatory ruling ("rescript" in

fiscal terms) (Rescrit 2011/38, 2011) clearly reduced the scope of the eBook in comparison with the 2011 law's definition: "*the eBook [...] is intended for reproduction and representation of intellectual work created by one or more authors, consisting of graphical elements (texts, drawings ...) published under a title. EBook differs from the printed book only by a few necessary elements inherent to the book format. Specific components for the digital book are […] as well as the access modalities to the text and illustrations (associated search engine, methods for browsing or scrolling of the content). The digital book is available on an online public communication network, including downloading or streaming, or on a removable storage device.*"[15]

The fiscal eBook is thus only homothetic. This position is absolutely coherent: it results from the application of the tax neutrality principle. But it is in conflict with the definition in the law, which admits "*additions of text or data belonging to different genres*". Moreover, this tax definition avoids the notion of "*collective uses*". In this sense, one can imagine that within each package, publishers must distinguish between "*law 2011 eBooks*" and "*fiscal eBooks*", whereas in practice the fiscal definition prevails.

After the first negotiations led by the French Couperin consortium, we were able to draw up this report on the implementation of VAT by publishers:

- The consortium asked all eBook providers to respect the law and to apply a 5.5% rate (which means a serious reduction of prices – more than 14%);
- Some publishers refused, some from fear of fiscal prosecutions and some from fear of disturbing their relationship with the authors. At present, the 2011 law and the interprofessional agreements require that the publishing contract has to be fair with authors. Especially, authors' income must be proportionnal to the revenue of the exploitation. Therefore, as soon as a "digital item" is recognized as an eBook, all the legal clauses of the publishing contract would have to be applied, including discussions about the computation of the profit and its sharing, and the duration of the transfer of copyright.
- Others accepted. In some cases, the tariff has been separated in two tiers: one part is subjected to the standard rate ("*technical fees*"), the other is subjected to the reduced rate ("*intellectual property fees*").

It is almost impossible to compel reluctant providers. The terms of the definition can be interpreted in a very narrow manner, and the simple presence of

a *hyperlink is enough* to give arguments for characterizing the book *as part of a database. Of* course, the case of package purchases is much more difficult: if a library takes a subscription for a bundle of eBooks, the reduced rate would (normally) not apply.

For libraries, the pick and choose system could paradoxically be cheaper, according to some forecasts, due to the lower VAT. Once again, we see how difficult the practice of the legal scheme will be.

There is also a danger that the rate of VAT on purchases from communities and universities will rise to 19.6%, due to the presence of enriched services by providers, while the purchase of books by individual persons would be taxed at 5.5%!

A first step towards a harmonization of the eBook VAT in the EU, despite apparent conflict?

The European Commission has decided to refer France and Luxembourg to the European Court of Justice (ECJ) for applying reduced rates of VAT to eBooks on the grounds that eBooks are an electronically provided service and as such cannot benefit from a reduced rate. The Commission considered that failure to comply with this legislation by France and Luxembourg could result in serious distortions of competition to the detriment of retailers in the single market. According to the Commission's statement explaining this decision, "*the effects of such unfair competition are felt in Member States that apply the VAT directive correctly. Several Ministers of Finance and representatives of both the paper and e-publishing industries have voiced their concern on this subject and have pointed out to the European Commission the negative effect on sales of books on their domestic markets*"(European Commission, 2013).

Paradoxically, the French and the Commission's policies agree on this point. The disagreement concerns the schedule of the reform, more than the terms themselves. Actually, one of the guiding principles of the ongoing revision of VAT rules in EU led by Commission says: "*Similar goods and services should be subject to the same VAT rate and progress in technology should be taken into account in this respect, so that the challenge of convergence between the on-line and the physical environment is addressed.*"(European Commission, 2011, p. 11). This is exactly the French argument about tax neutrality: in our mind, the mistake

has been to have applied a lower rate too early, without consulting others countries.

With a little more patience, this trouble could have been avoided. The Commission is going to make proposals on reducing the rates by the end of 2013 under the new VAT strategy. Meanwhile, the European Commission is taking its role of guardian of the Treaties seriously by enforcing the rules of the Union. Nevertheless, either thanks to a decision in favour of France or when the VAT directive will be released, sooner or later, the eBook will become a legal reality in the EU.

However, there are two questions that show how frail the actual schemes are:

- First: what will happen if the ECJ agrees with the Commission? What will happen to the 2011 law if the Court denies the specificity of the eBook in fiscal terms?
- Second, the reference to tax neutrality means that the European eBook will be a homothetic one. From this point of view, the French experiences will be very useful. The French market is an illustration of the rigidity of the publishing sector. In our opinion, eBooks cannot simply be reduced to a homothetic definition; this will not be sustainable for the industry in the long term. From this point of view, the definition given by the law opens up room for manoeuvre towards a more flexible application of the principle of tax neutrality.

France has stressed the need to regulate the eBook sector and its issues. We have now to await the further development and outcomes. One very important thing is that acceptance by the European authorities of the price control would open the way for similar action in other countries, with all the accompanying difficulties and opportunities we have described.

In conclusion, the French experiment has resulted in an increase of the digital market and has restored the dialogue within the publishing sector. However, it must be corrected by taking into account the specificity of the library market, and, on a broader scale, by adapting digital rights to public's use – which because of DRM and format issues remains the main impediment to eBook market increase. It gives great power to producers and it is now time to restore the balance in favour of the customers. For a global regulation, an additional action on intellectual property rights should be a priority.

Challenging an adaptation of copyright framework for a new juridical object?

Whether we like it or not, the ongoing legal action on VAT will probably change the legal framework of the whole industry. The eBook's fiscality and copyright are closely linked. The creation of an eBook as a legal object, which is mentioned in a Directive, could require a global revision of the framework and a better protection of libraries, in accordance with European Policy. The French example shows the need to comply with this policy, and to assist the publishing sector through legislation.

For the moment, the European rules do not seem able to help the libraries. The main norms are the Directive on rental and lending right of 1992 (revised in 2006) and the Copyright Directive of 2001.

In the digital economy, intellectual property rights are a main component of pricing: each right is monetized (remote access for instance). Now the problem focuses on the notion of digital lending, which is the main business model in the licence. In other European countries, the action of public authorities aims at adapting the regulation to public e-lending, and not to the whole industry.

- The United Kingdom intended to extend the exemption to eBooks through the *Public Lending Right Act* (National Archives, 1979) by the *Digital Economy Act* (National Archives, 2010). However, the implementation of the new rules has been delayed.
- The *Dutch Minister of Education, Culture and Science* commissioned a study on the legal possibilities for e-lending under the present public lending right provisions at both Dutch and European levels. On February 26, 2013, the Minister released the report ("*E-lending by public libraries: exploring legal possibilities and economic effects")*.

The central question of this last study concerns the possibility for a library to benefit from the same exception for e-lending as *the renting and lending Directive*, which entitles members of the European Union to set aside the exclusivity belonging to right holders if covered by remuneration. The report concludes that the 2006 Directive will not allow e-lending: "*Similarly, the European Directive on rental and lending right that has harmonized the public lending right in the European Union, is limited in scope to the lending of material copies"*(van der Noll et al., 2012, p. iii).

Besides, the Copyright Directive of 2001 provides an exhaustive list of permitted limitations and exceptions to copyright. According to the report: "*article 53 of the Directive, which provides for consultation of library collection by way of onsite terminals might offer some space: this provision might arguably permit onsite lending*". Obviously, the consultation of eBooks in the frame of this exemption does not concern e-lending, as a way of consulting eBooks out of the library. At the moment, business models are so ill-defined, that lending and consultation tend to become the same thing. It is therefore impossible for libraries to digitize books and lend them, which would be a rough but effective way to overcome publishers' reluctance.

The report finally concludes: "*the existing European copyright framework does not leave room for the introduction at the national level of a (compensated or non-compensated) copyright exception permitting on-line lending of eBooks by public libraries*". All those legal questions indicate the need of a regulation. The 2006 Directive represented an improvement compared to the protection afforded to public lending activities prior to the Directive: should not the same be done for eBooks? But for the moment digital book trading still requires agreements with authors and other rights holders through contracts. The current stalemate leads to this conclusion for libraries: "*to the extent that contractual approach is doomed to failure and the current legal framework is too narrow, it appears necessary to expand the catalogue of exceptions to Copyright law granted provisionally by the directive Information Society*" (Dreier, 2012).[16]

Conclusion

In conclusion, even if the French framework is frail and could collapse due to procedural action, its main goal has been reached, namely drawing the attention of EU authorities to eBooks and preserving the continuity between the print and digital eras in the book policy. For countries wishing to implement price maintenance on eBooks, France is a laboratory with the emergence of new commercial models.

The tax neutrality principle, taken to its logical conclusion, results in a similar treatment for books and for eBooks. Or, more accurately, the schemes and rules applying to digital books are the same as for print books. From this point of view, the plausible recognition of the eBook by the EU text, after completion of the new VAT Directive, can change the scope of the 2006 Directive. It

could open leeway for offering eBooks in libraries with an adjustment of the rights holders' exclusivity.

It complies with the spirit of the 2006 Directive: "*Copyright and related rights protection must adapt to new economic developments such as new forms of exploitation*" (European Parliament, 2006). Furthermore, the assessment of the Directive application made by the Commission points out: "*it is difficult to assess if and if so to what extent, traditional public lending by libraries will be replaced by new forms of on-line distribution, which would not be covered by the present scope of this Directive. In this respect, the Commission will ensure the proper functioning of PLR rules enshrined in the Directive. In the same spirit, it will continue to examine the functioning of public lending and observe the new technological developments in lending institutions, with a view to assessing the possible need for further actions in this field*" (European Commission, 2002).

Anyway, if there is no modification of the texts, the 2006 Directive will lead to a deadlock: would copyright holders be eligible for remuneration for print books and not for digital books? With the rise of the market, this discrimination is clearly nonsense and could not be sustained in the long term. The success of the 2011 law and the expected market growth in Europe will entail harmonization between the legal environment of the digital and the print book. This is the logical consequence of the convergence created by the regulation of the eBooks.

This reasoning has to be extended to the whole digital world. In our opinion, accordingly, it will entail changes to the 2001 Directive. The libraries need to expand their public mission into a diverse digital offering. A lot has been done for the producers but, if no agreement with the industry can be obtained, the adaptation of the Intellectual Property Law would be a weapon to support public use and promote culture.

If no legal solution is found, other tools could be proposed. An important role could be given to collective rights management, even with regard to contractual solutions. A statutory instrument for extended collective licensing (ECL) is put forward as a model by the Dutch report. It has inspired the draft British Act. These suggestions could meet the concerns of a new reading public mentioned in the French report on *Cultural policies in the digital Era* (Lescure, 2013), which is upset by the lack of the eBook offer in libraries.

This solution would mean numerous advantages:

- Collective rights management enables a mandatory organisation to represent all the rights holders of the sectors: it favours discussions about best practices and meets the need for an "Ombudsman" on eBooks in libraries.
- Additional costs due to monetisation of e-lending could partly be absorbed by governments. This system could be fairer and less expensive for the communities. A distinction between the different kinds of use could be made (public, research, scholar...). The collecting societies would ensure from their side better governance and greater transparency.

Finally, this kind of initiative matches the purpose aimed at by the Commission and Parliament report "*Unlocking the potential of cultural and creative industries*" (European Parliament, 2011). The condition of success is a coordinated action of European libraries to make their voice heard by the European authorities. The first step could be exchange of information about their own national legislation.

For better or worse, France has created a new object, the digital book, whose juridical contours and properties are still to be discovered.

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Notes

[1] Original text: "*Les offres de livres numériques en bibliothèque de lecture publique se sont développées selon différents modèles selon les pays considérés, sous l'impulsion directe des éditeurs ou, plus souvent, de prestataires tiers. Un constat peut néanmoins être fait au niveau européen: les offres sont peu développées (en termes de profondeur de catalogue et/ou de nombre de bibliothèques proposant un service de livres numériques) si bien qu'il convient de nuancer fortement la question d'un éventuel 'retard français'.*"

[2] See Respingue-Perrin (2012) for an overall description of the actual legal framework on books and eBooks.

[3] See Pouchard (2001) about the notion of relevant market and the doctrine of the European judge in regard to EU competition policy.

[4] On the bitter disputes about the cross-border law's enforcement, see Respingue-Perrin (2011) and Assemblée Nationale (2011).

[5] Original text: *"La présente loi s'applique au livre numérique lorsqu'il est une œuvre de l'esprit créée par un ou plusieurs auteurs et qu'il est à la fois commercialisé sous sa forme numérique et publié sous forme imprimée ou qu'il est, par son contenu et sa composition, susceptible d'être imprimé, à l'exception des éléments accessoires propres à l'édition numérique."*

[6] Original text: *"le moteur de recherche associé, les modalités de défilement ou de feuilletage des éléments contenus, ainsi que des ajouts de textes ou de données relevant de genres différents, notamment sons, musiques, images animées ou fixes, limités en nombre et en importance, complémentaires du livre et destinés à en faciliter la compréhension".*

[7] Original text: "*la rémunération résultant de l'exploitation de ce livre est juste et équitable*".

[8] Original text: *"Toute personne établie en France qui édite un livre numérique dans le but de sa diffusion commerciale en France est tenue de fixer un prix de vente au public pour tout type d'offre à l'unité ou groupée. Ce prix est porté à la connaissance du public. Ce prix peut différer en fonction du contenu de l'offre et de ses modalités d'accès ou d'usage".*

[9] See Legifrance (2011b), Article 2. Original text:

- *le contenu d'une offre peut être composé de tout ou partie d'un ou plusieurs livres numériques ainsi que de fonctionnalités associées;*
- *les modalités d'accès au livre numérique s'entendent des conditions dans lesquelles un livre numérique est mis à disposition sur un support d'enregistrement amovible ou sur un réseau de communication au public en ligne, notamment par téléchargement ou diffusion en flux («streaming»);*
- *les modalités d'usage du livre numérique se rapportent notamment au caractère privé ou collectif de cet usage, à la durée de mise à disposition du livre numérique, à la faculté d'impression, de copie et de transfert du livre numérique sur divers supports de lecture.*

[10] See Legifrance (2011b), Article 4. Original text: *"Le prix de vente au public d'une offre de livre numérique [...]doit être porté à la connaissance des personnes auxquelles cette offre est destinée de manière non équivoque, visible et lisible. [...] Dans le cas d'un usage collectif de l'offre, le prix est fixé en application du barème établi par l'éditeur."*

[11] Original text: *"les éditeurs ne veulent pas voir le prix descendre trop bas, pour ne pas trop cannibaliser leurs ventes papier. Ils n'ont pas d'intérêt vital pour l'instant à faire exploser les ventes de livres numériques."*

[12] For further information about this project, please report to Dilicom's statement: https://dilicom-prod.centprod.com/documents/307-PNB_Presentation_V0201.pdf.

[13] http://ec.europa.eu/taxation_customs/taxation/vat/traders/e-commerce/.

[14] Original text: *"le livre numérique et le livre physique sont deux produits qui ne diffèrent que par leur mode de fabrication et de diffusion. Leur appliquer des taux de TVA différents contrevient au principe de l'unicité de taux de TVA."*

[15] Original text: *"Le livre numérique [...] a pour objet la reproduction et la representation d'une oeuvre de l'esprit créée par un ou plusieurs auteurs, constituée d'éléments graphiques (textes, illustrations, dessins…) publiée sous un titre. Le livre numérique ne diffère du livre imprimé que par quelques éléments nécessaires inhérents à son format. Sont considérés comme des éléments accessoires propres au livre numérique [...] ainsi que les modalités d'accès au texte et aux illustrations (moteur de recherche associé, modalités de défilement ou de feuilletage du contenu). Le livre numérique est disponible sur un réseau de communication au public en ligne, notamment par téléchargement ou diffusion en flux, ou sur un support d'enregistrement amovible."*

[16] Original text: *"Dans la mesure où la voie contractuelle est vouée à l'échec et le cadre légal actuel trop étroit, il apparaît indispensable d'élargir le catalogue des exceptions au droit d'auteur consacré provisoirement par la directive Société de l'information."*