

**THE LEGAL CHALLENGES OF THE PUBLISHING  
INDUSTRY IN THE E-BOOK ERA  
(LEGAL OPINION)**

## **Abstract**

Following the technological revolution in the consumption of literature occurred over the past years, the e-book sector has been subject to a fast-paced growth. The publishing industry has initially strained to adapt to the transformations of the market for digital books, but it has ultimately accepted the innovation brought forward by e-book technology.

This legal opinion is aimed at analysing the current legal framework for the protection of e-books, while also critically discussing some of the market challenges the publishing industry is still facing. After explaining the substantive differences in the copyright protection of books and e-books, it is reviewed a recent development in the case law of the Court of Justice of the European Union for the protection of copyright holders against the re-sale of lawfully purchased e-books. Consequently, the issues involved in the digitisation of physical books are discussed, from the Google Books Project and the recognition of the application of the fair use doctrine, to the latest developments due to the current COVID-19 pandemic. Subsequently, anti-competitive behaviours characterising the e-book market are outlined, analysing how they have been addressed by competition authorities in different jurisdictions. Moreover, the main difficulties faced by libraries in the e-book industry are described, given that literary institutions are struggling to protect and safeguard their interests and those of their patrons. A brief overview of the changes brought forward by self-publishing explores how such phenomenon is transforming the publishing industry, while raising peculiar issues that will need to be addressed in copyright laws. Lastly, it is addressed e-book piracy, a major threat to publishers and authors, and how rightsholders are trying to respond to the increase of online infringing acts.

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## **I. INTRODUCTION**

New technologies have significantly impacted the publication, dissemination, and consumption of literature, aiding new reading habits. In particular, the development of digital alternatives to paper books has brought forward a new age for the publishing sector. Even if authors and publishers initially struggled to adapt to the changes advanced by such digital revolution, they have slowly embraced the innovation promoted by the introduction of e-books. This legal opinion offers an outline of some of the legal issues and market challenges currently affecting the publishing industry in relation to copyright protection and commercialisation of e-books.

In the first part, it is analysed the definition of e-books, the legal and technical frameworks that govern their use and how it differs from the one of printed books, which contain the same intellectual creation. Then, a recent development in the protection of rightsholders under European Union ('EU') case law against the re-sale of e-books is discussed to emphasise how guarantees for the adequate remuneration of e-books' copyright holders have been progressively recognised. The matter of digitisation of paper books is also addressed by discussing how the copyright implications of such projects are impacting rightsholders and outlining recent developments in the debate following the COVID-19 pandemic.

The second part of this legal opinion focuses on the market challenges still troubling the publishing industry. Firstly, it is explored how national and supranational competition authorities have policed the e-book retail market against anti-competitive behaviours of publishers and online retailers in the commercialisation of digital books. Then, it is described how libraries are fighting against the e-book licensing practices to obtain broader access to digital works for their patrons and how publishers are taking advantage of their strong position to the detriment of academic institutions. It is also analysed how the increase in digital self-publishing is markedly changing the e-book market by raising novel perspectives on traditional copyright issues and reframing the status of publishers and authors. Lastly, the widespread problem of e-book piracy is examined, focusing on how rightsholders are attempting to protect their interests against online copyright infringement.

## II. E-BOOKS: A NEW CHAPTER IN COPYRIGHT LAW?

### 1) Books and e-books: an expansion of the printed page or a new creative asset?

The legal classification of e-books has been challenging ever since they entered the retail market, as they do not fit within the traditional categories of copyright-protected works<sup>1</sup>. As e-books can be both electronic books, which exclusively have a digital form, and digitised printed books, which are scanned and distributed electronically, their characterisation is focused on the incorporation of the work, the medium of its communication to the public, rather than on the intellectual creation. Such approach is criticisable under the fundamental principle of copyright law of the separation of the protected intellectual work from the physical carrier that incorporates it<sup>2</sup>. However, it is unquestionable that readers can perform special functions on e-books, impossible on paper books: they can read in the dark with backlight, change font and increase its size, search for words inside the work and look up their definition in downloadable dictionaries<sup>3</sup>. Such additional features have determined a differentiation between the legal protection and commercial exploitation of books and their digital counterparts.

The ‘physical’ distinction between e-books and books is reflected in the legal status of their ownership and use. A paper book’s owner enjoys a free right of disposal over it: the book can be lent or re-sold as a second-hand book without requiring the consent of the copyright holder. This is possible because the rule of exhaustion of the right of distribution under EU law<sup>4</sup> and the US first sale doctrine<sup>5</sup> reconcile the physical ownership of the tangible product incorporating the intellectual work with the intangible asset of intellectual property<sup>6</sup>. These principles are also beneficial for the affordability and availability of books: out-of-print works, which are no longer published by rightsholders, can be commercialised and circulated in the used books’ market. Conversely, the dissemination of e-books is a manifestation of the rights of reproduction and making available, rather than the right of distribution, so the user’s acts are not covered by the principle of exhaustion<sup>7</sup>. The user is not a purchaser in the ‘analogue’ sense, but a licensee, who is usually granted restricted use: the exclusive control over the e-

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<sup>1</sup> Tatiana-Eleni Synodinou, ‘E-books, a new page in the history of copyright law?’ (2013) 35(4) E.I.P.R. 220, 220

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*, 225

<sup>4</sup> Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L 167/10, Art.4(2)

<sup>5</sup> 17 U.S.C. §109(a) (2018)

<sup>6</sup> Synodinou (n 1), 226

<sup>7</sup> *Ibid.*

book is bestowed on rightsholders, entitling them to unilaterally end or modify the permitted uses under contractual terms.

Recent technologies have allowed to impose significantly stringent limitations on e-books' uses. A purchaser can be prevented from sharing, reproducing completely or in part, or printing the digital book. Rightsholders can decide how many times an e-book can be downloaded, read, or accessed on different computers, how long it can be retained, whether and how it can be modified, and in which format it can be disseminated, limiting its compatibility with only specific devices. These limitations are ensured by applying technical protection mechanisms, such as Digital Rights Management ('DRM'). While digitally protecting a file and permitting its use only on certain devices encourages brand loyalty and gives rightsholders more control over the use of the copyright-protected work<sup>8</sup>, such practice is particularly controversial for e-books. Users are hindered in their access and enjoyment of the intellectual work in the form of the digital book, as they are bound to the mediums and formats imposed by rightsholders. To read an e-book, the e-reader<sup>9</sup> must be compatible with the file format and DRM measures in place. Such limitations are not replicable in any way on physical books containing the same intellectual work, which can be transferred, read, and disposed of at the reader's discretion.

The use of DRM measures has remained "relatively hidden from consumers"<sup>10</sup>. While some e-book stores, such as Amazon, offer non-DRM titles, the distinction between these and protected e-books is not specified, so consumers believe that by clicking 'Buy Now' they will be entitled to the same ownership-related privileges on e-books as for paper books<sup>11</sup>, whereas they are merely paying a licensing fee to access the digital content<sup>12</sup>. DRM measures are impairing lawful uses of legitimately purchased e-books<sup>13</sup> and users can find their digital libraries altered without their permission by e-books' providers. In 2009 Amazon decided without warning to remotely delete from Kindle e-book libraries certain versions of George Orwell's *1984* and *Animal Farm*<sup>14</sup>. In April 2019 Microsoft announced the closure of its Microsoft Store's e-book

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<sup>8</sup> Synodinou (n 1), 225

<sup>9</sup> E-book distributors provide e-books formats compatible with their chosen e-readers: Nook for Barnes & Noble, Kindle for Amazon and Kobo for Rakuten.

<sup>10</sup> Brian Barrett, 'Microsoft's E-book Apocalypse Shows the Dark Side of DRM' (*Wired*, 30 June 2019) <<https://www.wired.com/story/microsoft-ebook-apocalypse-drm/>> accessed 23 August 2020

<sup>11</sup> *Ibid.*

<sup>12</sup> Bobbie Johnson, 'Why did Big Brother remove paid-for content from Amazon's Kindles?' (*The Guardian*, 22 July 2009) <<https://www.theguardian.com/technology/2009/jul/22/kindle-amazon-digital-rights>> accessed 23 August 2020

<sup>13</sup> Dana B. Robinson, 'Digital Rights Management Lite: Freeing E-books from Reader Devices and Software' (2012) 17 *Va.J.L. & Tech* 152, 155

<sup>14</sup> Johnson (n 12)

section and interrupted all sales. As all purchased e-books were removed from digital libraries, Microsoft offered full refund for what users had paid, plus an additional \$25 if annotations and mark-ups had been made<sup>15</sup>. Such policy was criticised as not “sufficient to cover the harm done to consumers”<sup>16</sup>, as they would have had to buy the same titles on other platforms, potentially having to purchase a new device compatible with the new files. Moreover, for academics, lawyers and students, annotations on e-books would have been more valuable than the reimbursed £25.

Although it can be accepted that digital restrictions on e-books are necessary to prevent piracy, it is submitted that it would be desirable to devise alternatives to avoid limiting legal uses by lawful purchasers under such “restrictive techno-legal regime”<sup>17</sup>, while also adequately balancing the rightsholders’ interests in the protection and marketing of e-books. Recently, many publishers have decided to facilitate their customers’ legitimate uses by refraining from applying DRM measures on their digital titles, given that they were easily and frequently circumvented<sup>18</sup>. As copyright-protected content is valuable, rightsholders should explore how innovative technologies, such as blockchain encryption, could aid regulating ownership and use of digital works, while contrasting piracy and copyright infringement.

## **2) E-books’ aftermarkets: more protection for rightsholders under EU law**

Digital books containing copyright-protected works can be easily copied and circulated over the internet and, unlike paper books, they do not deteriorate over time. One of the main threats to publishers is e-books’ aftermarkets, where lawfully purchased e-books are sold by the first retail customers<sup>19</sup>. While the re-sale of used books is accepted by publishers, rightsholders have made every effort to prevent the re-sale of e-books as it “erodes the ability of the publisher to sell its e-books”<sup>20</sup> and it threatens the remuneration of copyright holders<sup>21</sup>. Various methods have been employed to keep e-books out of secondary markets, such as the application of DRM measures and the provision of e-books in specific formats that cannot be read or transferred on

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<sup>15</sup> Barrett (n 10)

<sup>16</sup> *Ibid.*

<sup>17</sup> Synodinou (n 1), 227

<sup>18</sup> Robinson (n 13), 156

<sup>19</sup> *Ibid.*, 158

<sup>20</sup> *Ibid.*

<sup>21</sup> Francesco Rizzuto, ‘The European Court of Justice rules in *Tom Kabinet* that the exhaustion of rights in copyright has little space in the age of online digital formats’ (2020) 26(4) C.T.L.R. 108, 109

different devices other than the ones chosen by the publisher<sup>22</sup>. A recent decision of the Court of Justice of the European Union ('CJEU') has ruled on the lawfulness of re-sale of 'used' e-books under EU law, defining the scope of digital exhaustion rights<sup>23</sup>.

In *Kabinet*<sup>24</sup> the CJEU had to clarify whether the *UsedSoft*<sup>25</sup> decision that the right of distribution of a computer program is exhausted after the software's first sale under Directive 2009/24/EC<sup>26</sup> could be applied to other copyrighted works in digital format, protected under Directive 2001/29/EC ('InfoSoc Directive'). The CJEU ruled that the supply by downloading, for permanent use of an e-book is not an act of distribution (Art.4(1) InfoSoc Directive)<sup>27</sup>, but it is instead covered by the right of communication to the public (Art.3 InfoSoc Directive), which cannot be exhausted. Interpreting the provisions in the context of the international commitments of the WIPO Copyright Treaty and the objectives pursued by the Directive, the Court reasoned that communication to the public covers all communications to a public not present at the place where the communication originates and that rightsholders have an exclusive right to decide to make available to the public their works through interactive on-demand transmissions at the discretion of the members of the public<sup>28</sup>. The CJEU observed that the rule of exhaustion was intended by the European legislator to be applied only to the distribution of tangible objects incorporating intellectual creations<sup>29</sup>, such as books, whose initial marketing can be controlled by their authors<sup>30</sup>. Despite having been accepted for digital copies of computer programs in *UsedSoft*<sup>31</sup>, the exhaustion of rights for e-books was not recognised by the Court. Agreeing with Advocate General Szpunar<sup>32</sup> that an e-book cannot be

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<sup>22</sup> *Robinson* (n 13), 159

<sup>23</sup> *Rizzuto* (n 21), 110

<sup>24</sup> C-263/18 *Nederlands Uitgeversverbond v Tom Kabinet Internet BV* EU:C:2019:1111 [2020] Bus.L.R. 983

<sup>25</sup> C-128/11 *UsedSoft GmbH v Oracle International Corp* EU:C:2012:407 [2012] 3 C.M.L.R. 44

<sup>26</sup> Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs [2009] OJ 111/16

<sup>27</sup> Two associations engaged in the protection of Dutch publishers requested an injunction for copyright infringement and unauthorised communication to the public to the District Court of The Hague against Tom Kabinet, who was making available e-books on his 'reading club' website. The defendant claimed that his actions were covered by the distribution right subject to the rule of exhaustion. The District Court asked the CJEU to clarify whether making available remotely by allowing the download of an e-book to be used for an unlimited period was an act of distribution under Art.4(1) InfoSoc Directive and whether such right could be exhausted if the circulation was made with the author's consent.

<sup>28</sup> InfoSoc Directive, Recitals 23 and 25

<sup>29</sup> C-263/18 *Kabinet* EU:C:2019:1111, para 52

<sup>30</sup> InfoSoc Directive, Recital 28

<sup>31</sup> C-263/18 *Kabinet* EU:C:2019:1111, para 56

<sup>32</sup> C-263/18 *Nederlands Uitgeversverbond v Tom Kabinet Internet BV* EU:C:2019:697 [2019] E.C.D.R. 27



considered a computer program<sup>33</sup>, the CJEU reasoned that, as *lex specialis* to the InfoSoc Directive<sup>34</sup>, Directive 2009/24/EC cannot be applied to other copyright-protected works<sup>35</sup>.

The Court reaffirmed that, under Art.3(1) InfoSoc Directive, the concept of communication to the public involves two cumulative elements: an act of communication of the work and the communication of the work to a public<sup>36</sup>. An act of communication is characterised by making available the work to the public, such as the offering of a work on a public website prior to its on-demand transmission. Since in *Kabinet* e-books were made available to anyone registered in the reading club's website, there was communication to the public of the works, regardless of whether the subscribers actually retrieved the e-books uploaded. To determine whether there is a 'public', the Court reasoned that it should be taken account not only of the number of persons able to access the work simultaneously, but also of how many had access to it in succession<sup>37</sup>. The CJEU observed that in *Kabinet* the number of people who could have access to the works via the website was substantial, as anyone could subscribe to the reading group. Moreover, the website was not equipped with measures to ensure that only one copy could be downloaded in the period in which access to the work was allowed and that after such period had expired the work could no longer be used by the subscriber. Therefore, the works had to be considered as having been communicated to a public<sup>38</sup>, rather than having been distributed. Finally, to have communication to the public, a protected work has to be communicated using different means from the ones previously used or to a new public that had not been taken into account by the copyright holders in authorising their work's initial communication to the public<sup>39</sup>. Since e-books are made available with a user licence allowing their download only by legitimate users<sup>40</sup>, the Court concluded that the communication by Tom Kabinet was made to a new public not initially considered by the rightsholders.

Having clarified the range of copyright-protected work within the scope of the rule of digital exhaustion of rights and determining that selling second-hand e-books is a communication to

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<sup>33</sup> The Advocate General and the Court agreed that an e-book is protected because of its content and the fact that a computer program is part of an e-book to allow it to be read is not sufficient to apply Directive 2009/24/EC. – C-263/18 *Kabinet* EU:C:2019:1111, paras 55, 59

<sup>34</sup> *Ibid.*, para 55

<sup>35</sup> In *Nintendo* the CJEU held that in the case of 'complex' works, such as computer games, containing different copyrighted works, the protection of these should take precedence over that afforded to the computer software. - C-355/12 *Nintendo Co Ltd v PC Box Srl* EU:C:2014:25 [2014] E.C.D.R. 6, para 23

<sup>36</sup> C-610/15 *Stichting Brein v Ziggo BV* EU:C:2017:456 [2017] E.C.D.R. 19

<sup>37</sup> C-263/18 *Kabinet* EU:C:2019:1111, para 68

<sup>38</sup> Alexander Ross, 'CJEU puts UsedSoft back in the Kabinet with e-book ruling' (2020) 31(3) Ent.L.R. 115, 116

<sup>39</sup> C-610/15 *Stichting Brein* EU:C:2017:456, para 28

<sup>40</sup> C-263/18 *Kabinet* EU:C:2019:1111, paras 70-71

the public<sup>41</sup>, *Kabinet* effectively limits the re-sale of lawfully purchased e-books<sup>42</sup>. Such approach conforms with the InfoSoc Directive's purpose of guaranteeing a high standard of protection to authors, ensuring that they are appropriately remunerated for their works. It is submitted that recognising as lawful the re-sale of e-books without the authorisation of the rightsholders would have lowered such high protection by denying them the income from these sales and the possibility to object to such form of dissemination of their works<sup>43</sup>. Moreover, as the rule of exhaustion was introduced only to cover tangible objects rather than digital ones, its application on e-books would have taken away from authors their rightful economic gains more than in the case of printed books, as copies of digital books are not subject to deterioration with use, remaining perfectly adequate substitutes for new copies<sup>44</sup>. It can be concluded that copyright holders do not lose their right to control subsequent exploitations of their e-books over the internet after their initial making available: they can intervene against anyone who sells lawfully purchased e-books without their consent. In any case, the development of second-hand markets of e-books is not completely excluded: they will require explicit authorisation from the rightsholders to operate, ensuring that they respect appropriate licensing agreements and that copyright owners are adequately remunerated every time e-books are re-sold<sup>45</sup>.

### **3) The matter of mass digitisation: from Google Books to digitising in a pandemic**

In recent years, mass digitisation projects to scan and convert printed works into computer readable formats have become extremely popular. The cultural benefits of these projects are undisputable as it is permitted access to a "tremendous amount of knowledge"<sup>46</sup>, to works not in physical collections and to patrons unable to attend libraries' premises<sup>47</sup>. However, the digitisation of books owned by third parties poses great challenges under copyright laws, especially when paper works are scanned on a large scale and enriched with additional features to be transformed into e-books<sup>48</sup>. It is generally accepted that converting printed books into

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<sup>41</sup> The CJEU did not address the act of reproduction that downloading entails, despite the Advocate General pointing out that, regardless of whether there was communication to the public, the rule of exhaustion should not apply to the right of reproduction (Art.2 InfoSoc Directive), always engaged in a re-sale. - C-263/18 *Kabinet* EU:C:2019:697, paras 45-49

<sup>42</sup> Rizzuto (n 21), 108

<sup>43</sup> *Ibid.*, 114

<sup>44</sup> C-263/18 *Kabinet* EU:C:2019:111, para 58

<sup>45</sup> Rizzuto (n 21), 115

<sup>46</sup> Timothy J. Busse, 'Crossing the Digital Rubicon: Google Books and the Dawn of an Electronic Literature Revolution' (2018) 18 Hous.Bus & Tax L.J. 119, 132

<sup>47</sup> Emily Hudson, 'Copyright and Mass Digitisation' (2014) 36(1) E.I.P.R. 72, 72

<sup>48</sup> Synodinou (n 1), 220

digital copies is an act of reproduction, requiring the consent of the rightsholders. However, compliance with copyright law is often difficult, given that in many instances rightsholders are impossible to identify, as in the case of orphan works, or it is unclear whether the right to consent to digitisation has been retained by authors or has been transferred to their publishers. Digital exploitation is usually part of modern publishing contracts, but in older ones it is not addressed, as e-books did not exist, so the transfer of the right of reproduction to publishers does not encompass the books' digital reproduction<sup>49</sup>. Consequently, authors may be in the position to renegotiate the terms for their works' digitisation with the publishing houses already commercialising their printed titles. Therefore, digitised copies are not simply an "extension"<sup>50</sup> of paper books, but they are entirely new commercial products.

Despite the authors' right to authorise the production of digital copies of their works, in *Google Books*<sup>51</sup> it was recognised that Google's mass digitisation project<sup>52</sup> was covered by the fair use doctrine. In September 2005 Authors Guild claimed wilful copyright infringement by Google, arguing that books were being scanned without authorisation and that the recompilation of snippets available on the search results on Google Books posed serious risks of piracy<sup>53</sup>. They also opposed the making available of scanned books as market function by Google, which would have resulted in the creation of an alternative permission-free e-book market in a Google-only online marketplace<sup>54</sup>. After failing to reach a satisfactory settlement<sup>55</sup>, the Southern District of New York found that, under 17 U.S.C. §107, Google Books was within the fair use exception, as the purpose and character of use was highly transformative, since the software converted the scanned pages into a "comprehensive word index that helps readers, scholars, researchers and others find books"<sup>56</sup>. Google's potential commercialisation of copyright-protected works was deemed irrelevant, as Google had not yet directly marketed

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<sup>49</sup> Such approach has been confirmed in US copyright law by *Random House, Inc. v. Rosetta Books LLC* 150 F. Supp. 2d 613 (S.D.N.Y. 2001): despite granting to publishers the exclusive right to market their works in paper form, authors retain the right to publish their works in electronic form. - Synodinou (n 1), 221

<sup>50</sup> *Ibid.*, 222

<sup>51</sup> *Authors Guild v. Google Inc.* 954 F. Supp. 2d 282, 284 (S.D.N.Y. 2013)

<sup>52</sup> In 2004 several academic and public libraries, including Harvard and Oxford, agreed to select books for Google to digitise in exchange for digital images and machine-readable versions for their collections.

<sup>53</sup> Busse (n 46), 145

<sup>54</sup> Mark Seeley, 'Books Digitisation and Demand' (*Scipubl*aw, 26 February 2019) <<https://scipubl.com/books-digitization-demand/>> accessed 23 August 2020

<sup>55</sup> The settlement would have allowed Google to continue its digitisation project, sell subscriptions to its database and individual books, place advertisements on online book pages and make other commercial uses of the scanned works. In exchange, Google had to pay \$125 million to authors whose works had been digitised and fund the Books Rights Registry to improve the management of future licensing and distribution of revenue.

<sup>56</sup> *Authors Guild v. Google Inc.* 954 F. Supp. 2d 282, 291

them, either by selling digital copies or introducing advertisements in webpages showing snippets<sup>57</sup>. The Second Circuit endorsed this decision: relying on *HathiTrust*<sup>58</sup>, it found that Google’s search feature and display of snippets was transformative as it placed searched terms in context, while not “making available the expression of the original work”<sup>59</sup>. It reasoned that Google Books provided no “significant substitutive competition with the original works”<sup>60</sup>, as the expressive core of the digitised work was adequately safeguarded<sup>61</sup>.

*Google Books* has been considered an attempt at making the fair use doctrine more “muscular”<sup>62</sup>, encouraging institutions in their educational and non-commercial digitisation projects. However, the application of the fair use defence in mass digitisation projects has been criticised as improperly “shelter[ing] fundamental shifts in the use of copyrighted works”<sup>63</sup>. While the fair use doctrine can be adequate in the context of restricted digitisation projects, where books in the public domain<sup>64</sup> are scanned or rightsholders’ authorisation is obtained, a clear statutory framework should be introduced to guide commercial entities in their mass digitisation projects, protecting authors and publishers, while ensuring a public widespread access to digitised literature<sup>65</sup>. Many commentators have advocated for the introduction of extended collective licences (‘ECL’), overseen by collective management organisations. ECLs would allow to manage rights of a specific class of works, while enabling rightsholders to retain control over their rights and be appropriately remunerated by a reliable royalty stream<sup>66</sup>. Others have suggested introducing a legal privilege to allow scanning of books for conservation purposes<sup>67</sup>, arguing that the digitisation’s social benefit of ensuring the preservation of cultural heritage should be more relevant than the economic risks for rightsholders. Coordination at

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<sup>57</sup> Busse (n 46), 137

<sup>58</sup> In 2011 Authors Guild claimed copyright infringement against HathiTrust for digitising works without authorisation to create an online collection for the preservation of its members’ catalogues. Before reaching a settlement in HathiTrust’s favour, the district and appeals court accepted the defence’s claim of fair use, as the copies served the entirely different purpose of increasing search capabilities rather than accessing the copyright-protected material. – *Authors Guild v. HathiTrust* 755 F.3d 87 (2d Cir. 2014)

<sup>59</sup> Busse (n 46), 136

<sup>60</sup> *Authors Guild v. Google Inc.* 804 F.3d 202 (2d Cir. 2015), 218-219

<sup>61</sup> *Ibid.*, 229-230

<sup>62</sup> Dan Cohen, ‘What the Google Books Victory Means for Readers’ (*The Atlantic*, 22 October 2015) <<https://www.theatlantic.com/technology/archive/2015/10/what-the-google-books-victory-means-for-readers-and-libraries/411910/>> accessed 23 August 2020

<sup>63</sup> Busse (n 46), 142

<sup>64</sup> It is estimated that up to 75% of US titles published between 1923 and 1964 may be out of copyright and in the public domain, so they could be freely scanned. In 2019 when US copyright expired for the first time in 20 years and works published in 1923 entered the public domain, many institutions, such as Penn Libraries, decided to digitise them.

<sup>65</sup> Busse (n 46), 145

<sup>66</sup> *Ibid.*, 148

<sup>67</sup> Pamela Samuelson, ‘Legal Alternatives to the Google Book Settlement’ (2011) 34 Colum.J.L. & Arts 697, 716

international level is advised, as European copyright law is lacking “enough flexibility [...] to cover the activities”<sup>68</sup> of commercial digitisation projects<sup>69</sup>, especially in continental author’s rights jurisdictions, where the alteration of the work through digitisation techniques could infringe the author’s moral right of integrity.

The debate on digitisation has become once again relevant as libraries and archives around the world were forced to close and to switch to online services by the COVID-19 pandemic. Even though many academic publishers decided to loosen their restrictions on digital publications contained in their databases, the fair use doctrine has been invoked by many research libraries and experts to cover such extreme circumstances, as it provides “the flexibility necessary for the vast majority of remote learning needed”<sup>70</sup>. Relying on the fair use defence, the University of Georgia Libraries offered emergency scanning of print materials from their collection to faculty and students, while Cornell University Library advised on how to assess whether it was permitted under fair use to scan physical materials for online teaching<sup>71</sup>.

As more comprehensive alternatives to selective scanning became necessary, in April 2020 HathiTrust implemented the Emergency Temporary Access Service for US libraries, allowing one-to-one digital borrowing as for physical holdings, while Internet Archive decided to create the National Emergency Library (‘NEL’)<sup>72</sup>, extending worldwide access to its 1.4 million digital books<sup>73</sup>. Through the suspension the waiting lists for already lent digital copies<sup>74</sup>, readers could access digitalised books simultaneously, but they were prevented from disseminating or keeping them overtime by DRM measures<sup>75</sup>. Internet Archive defended the lawfulness of such unprecedented initiative relying on controlled digital lending (‘CDL’), already used to lend digital books as physical ones: controlled digital access to works is allowed

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<sup>68</sup> Hudson (n 47), 73

<sup>69</sup> Under EU law exceptions for digitisation projects of orphan works are provided for organisations with a public interest mission. In 2008 Europeana was launched to offer access to digitalised museum collections and preserve European heritage.

<sup>70</sup> Ryan Clough, ‘Digitisation in an Emergency: Fair Use/Fair Dealing and How Libraries Are Adapting to the Pandemic’ (*ARL*, 1 April 2020) <<https://www.arl.org/blog/digitization-in-an-emergency-fair-use-fair-dealing-and-how-libraries-are-adapting-to-the-pandemic/>> accessed 23 August 2020

<sup>71</sup> *Ibid.*

<sup>72</sup> Timothy B. Lee, ‘Internet Archive offers 1.4 million copyrighted books for free online’ (*ArsTechnica*, 23 March 2020) <<https://arstechnica.com/tech-policy/2020/03/internet-archive-offers-thousands-of-copyrighted-books-for-free-online/>> accessed 23 August 2020

<sup>73</sup> *Ibid.*

<sup>74</sup> Internet Archive allows to check out its digital scans of books, by either consulting them online or downloading them to an e-reader. Through Open Library, users can borrow a limited number of books and they must return them within a fixed period. Internet Archive lends only the copies that the library owns, limiting the number of people being able to check them out, instituting waiting lists for when copies are not available.

<sup>75</sup> After an increase of subscriptions, it was estimated that 15,000 to 20,000 books were being lent per day.

to one patron at a time by employing technical protections that publishers use to prevent further redistribution of their e-books. In any case, for in-copyright books in its catalogue, such as J.K. Rowling's titles, Internet Archive allowed authors to opt out of NEL.

In June 2020, Hachette, Penguin Random House, Wiley, and HarperCollins sued Internet Archive for copyright violations in relation to Open Library<sup>76</sup> and NEL, claiming that in-copyright books were being illegally scanned and distributed to users<sup>77</sup>. They argued that Internet Archive was circumventing the typical licensing restrictions imposed on conventional libraries for e-books, as its stored works, being scans of physical copies, had not been purchased under licensing agreements with the titles' publishers<sup>78</sup>. In April 2020, Authors Guild had released an open letter raising similar complaints, arguing that Internet Archive was damaging rightsholders with the excuse of allowing people access to literature. On 14 June 2020, Internet Archive suspended NEL and switched back to its usual CDL. While it cannot be accepted that a pandemic could suspend the application of copyright and contract law, rightsholders should consider the current difficulties of libraries and academics. Publishers and libraries should join forces to find practical solutions, so that remote teaching and learning can be sustained during these challenging times. The acceptance by publishers of the application of the fair use exception to the digitisation of books would significantly aid libraries in satisfying their patrons' requests, while entities storing digitised books should reach contractual arrangements with copyright owners to adequately safeguard their exclusive rights, while also ensuring wider digital access to literature.

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<sup>76</sup> Already in November 2019 the Society of Authors had demanded Internet Archive to cease scanning books and making them available to the UK public, threatening legal action against Open Library for copyright infringement.

<sup>77</sup> Russell Brandom, 'Publishers sue Internet Archive over Open Library e-book lending' (*The Verge*, 1 June 2020) <<https://www.theverge.com/2020/6/1/21277036/internet-archive-publishers-lawsuit-open-library-ebook-lending>> accessed 23 August 2020

<sup>78</sup> *Ibid.*

### III. ONGOING E-BOOK MARKET CHALLENGES

#### 1) Anti-competitive behaviours in the e-book industry: Apple, Amazon, and others

Following the boom of digital publishing, the e-book market has been the object of watchful observation by competition authorities, which have screened agreements between publishers and retail platforms to prevent anti-competitive behaviours. The focus of most of the investigations has been on e-books' pricing. It has been estimated that the costs of production and distribution of an e-book may be about 50% of those for the same title in physical form, as marginal costs linked to e-books' sales are substantially lower, since expenses associated to printing, storing, and shipping of paper copies are reduced<sup>79</sup>. The first concerns about ensuring a level playing field in the e-book retail market were raised in 2007, when Amazon quickly became the largest e-book retailer, covering approximately 90% of e-book sales, by setting on its platform prices for digital new releases significantly lower than those for physical copies of the same titles<sup>80</sup>. Publishers accused Amazon of strengthening its "dominant position in e-book retailing"<sup>81</sup> by inducing readers to adopt its Kindle e-reader and platform, while causing a reduction in the price of physical books. In an attempt to pressure Amazon to raise its retail prices, many publishing companies adopted the practice of 'windowing': their new releases were not made available in e-book formats on Amazon until the hardcover had been on the market for several months<sup>82</sup>.

In March 2011, the European Commission launched an investigation into agency agreements between Apple and some major publishing houses, including HarperCollins, Hachette, Penguin, Macmillan Publishers, and Simon & Schuster. It was alleged that through a parallel behaviour the publishers had managed to abandon the traditional reseller model and create an agency model aimed at controlling and raising e-book pricing. The EU Commission claimed that in 2010, in conjunction with the release of the iPad, Apple had contacted several publishers about its entrance into the digital book market, becoming a 'hub', a conduit that facilitated the exchange of information among the competitors. In a short period of time the publishers signed agency agreements with same key terms and conditions with Apple for both the US and EU

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<sup>79</sup> Benjamin Klein, 'The Apple E-books Case: When is a Vertical Contract a Hub in a Hub-and-spoke Conspiracy?' (2017) 13(3) J.C.L. & E. 423, 439

<sup>80</sup> E-book prices were set at \$9.99 by Amazon, while publishers usually charged about \$10.39 for e-books and \$25.99 for paper books. – Klein (n 79), 438

<sup>81</sup> *Ibid.*, 439

<sup>82</sup> *Ibid.*, 442

markets. These agreements included most-favoured nation (MFN) clauses, which provided that the publishers were not to set prices in the iBookstore higher than the ones offered for the same e-books by other retailers. These terms resulted in the publishers demanding the conversion of Amazon to agency arrangements, preventing it from setting lower prices than the ones offered on the Apple platform<sup>83</sup>. The EU Commission regarded such behaviour as only plausibly explained by a concerted action, aimed at controlling prices and hindering price reductions, leading to a restriction of competition by object. The investigation was suspended in December 2012 when the publishers offered commitments that safeguarded the competition principles in the EU e-book market<sup>84</sup>. They agreed not to restrict an e-book retailer from altering final e-books' prices or offering discounts and accepted not to enter into agency agreements with EU retailers for five years.

Simultaneously, in April 2011 an antitrust suit was brought by the US Department of Justice against Apple and the same publishing houses. In September 2012 a settlement was reached with the publishers, which accepted to terminate their agreements with Amazon, Apple and other e-book distributors and not to enter into contracts containing MFN clauses or constraining e-book retailers from offering promotions or discounts to consumers<sup>85</sup>. Concurrently, the Second Circuit found that Apple had operated in a horizontal price-fixing scheme<sup>86</sup>, as the publishers were being updated on what their competitors were doing to ensure that most of them signed the agency agreements<sup>87</sup>. It was inevitable that such contractual terms would have forced Amazon to implement agency arrangements as well<sup>88</sup>. Ultimately, Apple had “consciously orchestrated a conspiracy”<sup>89</sup> among the publishers, aimed at eliminating competition in retail pricing and raising e-book prices<sup>90</sup>, challenging Amazon’s pricing before it became “cemented in consumer expectations”<sup>91</sup>.

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<sup>83</sup> Klein (n 79), 451

<sup>84</sup> European Commission Press Release IP/12/1367, ‘Antitrust: Commission accepts legally binding commitments from Simon & Schuster, HarperCollins, Hachette, Holtzbrinck and Apple for sale of e-books’ (2012) <[https://ec.europa.eu/commission/presscorner/detail/en/IP\\_12\\_1367](https://ec.europa.eu/commission/presscorner/detail/en/IP_12_1367)> accessed 23 August 2020

<sup>85</sup> Klein (n 79), 452

<sup>86</sup> Stephen J. Marietta, ‘An Apple a day doesn’t keep doctor miles away: The Second Circuit’s misuse of the per se rule in the *United States v Apple*’ (2016) 69 Rutgers U.L.Rev. 325, 360-363

<sup>87</sup> *United States v. Apple, Inc.*, 791 F. 3d 290, 297 (2d Cir. 2015)

<sup>88</sup> Marietta (n 86), 349

<sup>89</sup> *United States v. Apple, Inc.*, 791 F. 3d 290, 316

<sup>90</sup> Vara Vauhini, ‘Did Apple fix e-book prices for the greater good?’ (*TheNewYorker*, 16 December 2014) <<https://www.newyorker.com/business/currency/apple-claiming-virtue-e-book-price-fixing-case>> accessed 23 August 2020

<sup>91</sup> Klein (n 79), 466



In 2015 it was Amazon's turn to be investigated by the EU Commission its e-book distribution agreements containing MFN clauses, under which publishers were to inform Amazon about more favourable terms negotiated with its competitors and offer Amazon similar conditions<sup>92</sup>. The Commission reasoned that these arrangements prevented other e-books retailers from accessing the market and competing with Amazon, while precluding competitors and publishers from developing innovative and alternative e-books distribution services<sup>93</sup>. The investigation halted when Amazon offered commitments, which included the non-enforcement of MFN clauses and the undertaking not to include similar terms in any new agreement with e-books publishers. Publishing houses would be allowed to terminate the contracts containing clauses linking offers and discounts for e-books to the retail price imposed on a competing platform. In 2017 an investigation was launched by the Canadian Competition Bureau for suspected anti-competitive arrangements in distribution agreements between Apple and some publishers, including Hachette, Macmillan Publishers, Simon & Schuster<sup>94</sup>, which had resulted in higher prices for Canadian readers, while allowing retailers, such as Amazon and Kobo to offer discounts on e-books<sup>95</sup>. In 2018, the Canadian Competition Bureau reached the final agreement with HarperCollins which effectively restored retail price competition for e-books.

Overall, competition authorities have played a significant role in safeguarding the freedom of actors in the e-book retail market and it is to be expected that such role will be upheld until sufficiently good market practices will be established. A stringent competition surveillance will be needed in the future as many independent publishers and self-publishing authors are approaching the e-book industry to ensure that they will not be affected by prejudicial acts of their major corporate competitors.

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<sup>92</sup> These clauses concerned prices, alternative distribution models, innovative e-book formats and promotional techniques.

<sup>93</sup> European Commission Press Release IP/17/137, 'Antitrust: Commission seeks feedback on commitments offered by Amazon in e-book investigation' (2017) <[https://ec.europa.eu/commission/presscorner/detail/en/IP\\_17\\_137](https://ec.europa.eu/commission/presscorner/detail/en/IP_17_137)> accessed 23 August 2020

<sup>94</sup> Competition Bureau Canada News Release, 'Competition Bureau reaches settlement with HarperCollins in e-books case' (2018) <[https://www.canada.ca/en/competition-bureau/news/2018/01/competition\\_bureareachessettlementwithharpercollinsinebookscase.html](https://www.canada.ca/en/competition-bureau/news/2018/01/competition_bureareachessettlementwithharpercollinsinebookscase.html)> accessed 23 August 2020

<sup>95</sup> CPI, 'Canada: Competition watchdog settles e-book case' (CPI, 23 January 2017) <<https://www.competitionpolicyinternational.com/canada-competition-watchdog-settles-ebook-case/>> accessed 23 August 2020

## 2) Libraries' struggles in the e-book era: licensing access to culture

In October 2019, during a series of Congress hearings about competition issues in digital marketplaces, the American Library Association ('ALA') denounced that dominant companies of the publishing sector<sup>96</sup> are engaging in "unfair behaviours"<sup>97</sup> to the detriment of libraries and their patrons. In advocating for the implementation of public policies that could redress such acts, ALA highlighted how major US publishers are exploiting "abusive pricing"<sup>98</sup> against libraries, which are often asked to pay excessively higher prices than consumers, while also being significantly limited in the lending terms of their e-books' licences<sup>99</sup>. Specifically, ALA's complaints focused on the embargo to be imposed by Macmillan Publishers against libraries in the sales of e-books: under such measure libraries will be able to obtain only one digital copy of a new title for a period of 8 weeks after the book's release, after which period they would be allowed purchase additional licences for more copies.

Libraries have struggled to adapt to the innovative forms of e-books' distribution. While a paper book or an academic journal purchased by a library can be freely lent to the patrons under the US first sale doctrine and the EU rule of exhaustion of distribution rights, e-books are licensed. Therefore, libraries can be severely limited in their ability of lending and providing access to purchased digital works by the licensing conditions unilaterally imposed by e-book distributors, which can prescribe rigid user restrictions and time limitations. Despite libraries having actively put in place digital protection arrangements to ensure respecting e-books' licensing terms, they are still facing difficulties in being able to acquire digital content. ALA has reported that Amazon Publishing is consistently refusing libraries to obtain licences to make Amazon e-books available to their users. Such approach is denounced as a strategy to ensure that consumers purchase e-books directly on Amazon, rather than borrowing them from libraries, therefore limiting access to e-books to only those who can afford them<sup>100</sup>. ALA asserts that denying and obstructing new works from reaching libraries is preventing their "democratising mission of providing equal access to information to citizens"<sup>101</sup>.

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<sup>96</sup> Hachette, HarperCollins, Macmillan Publishers, Penguin Random House, and Simon & Schuster are identified as the "Big 5 Publishers": together they control over 80% of the US publishing business and book trade.

<sup>97</sup> American Library Association, 'Competition in Digital Markets' Report (2019), 1

<sup>98</sup> ALA Report (n 97), 2

<sup>99</sup> Following Penguin Random House, in 2019 Hachette and Simon & Schuster terminated their perpetual licensing models to libraries and introduced a two-year e-book lending period.

<sup>100</sup> ALA Report (n 97), 2

<sup>101</sup> *Ibid.*, 3

ALA has also harshly criticised how the so called ‘Big Deals’ for the sale of journal bundles can easily monopolise the budget of libraries<sup>102</sup>, preventing their purchase of other materials. Initially, Big Deals had been perceived as beneficial for academic institutions, as they allowed access to more digital journals for several years at a lower price. However, libraries have found themselves bound by multi-year agreements with “built-in price increases”<sup>103</sup>, often accompanied by non-disclosure agreements, which prevent gathering reliable data on how much libraries effectively spend on such content. These deals often restrict access to the journals to a limited userbase and preclude the “financial and strategic flexibility”<sup>104</sup> of libraries. Many institutions have tried to cancel their multi-journals subscriptions, but, as ALA’s Report points out, there is a high concentration of power<sup>105</sup> in scholarly publishing among few companies and competition is further restricted as academic texts and journals are non-substitutable goods<sup>106</sup>.

In response to ALA’s concerns, publishers have argued that they should be entitled to a stable revenue stream to continue their publishing activities and to keep innovating distribution channels. Macmillan Publishers replied to academic institutions objecting to the announced embargo stating that their decision had been necessary to “balance the needs of the system in new and complex world”<sup>107</sup>. They upheld that the increase of reads of e-books lent by libraries had decreased the “perceived economic value of a book”<sup>108</sup>: despite libraries paying for them, readers consider them free. Consequently, a significant change in the revenue obtained from lending and sales had been registered: Macmillan Publishers claim that libraries make up for the 45% of “digital reads”<sup>109</sup>, but they account only for 15% of sales revenue. ALA has pointed out that libraries have to be considered equally involved in supporting authors and innovation

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<sup>102</sup> George H. Pike, ‘ALA’s Report to Congress on Libraries and the E-book Industry: A Primer’ (*InformationToday, Inc.*, 19 November 2019) <<http://newsbreaks.infotoday.com/NewsBreaks/ALAs-Report-to-Congress-on-Libraries-and-the-Ebook-Industry-A-Primer-135287.asp>> accessed 23 August 2020

<sup>103</sup> ALA Report (n 97), 5

<sup>104</sup> *Ibid.*, 5

<sup>105</sup> *Ibid.*

<sup>106</sup> After increasing textbook prices, academic publishers have initiated a rather aggressive process of digitisation of their works, phasing out printed books and implementing an all-access subscription to digitalised content. For ALA, such conducts can potentially further limit libraries from offering access to academic material to their patrons. – ALA Report (n 97), 7

<sup>107</sup> Macmillan Publishers, ‘Letter to Librarians’ (2019) <<https://d1x9nywezkh0w2.cloudfront.net/wp-content/uploads/2019/10/29160131/A-Letter-from-John-Sargent-.pdf>> accessed 23 August 2020

<sup>108</sup> *Ibid.*

<sup>109</sup> Matt Enis, ‘Publishers Change E-book and Audiobook Models; Libraries look for Answers’ (*LibraryJournal*, 17 July 2019) <<https://www.libraryjournal.com/?detailStory=publishers-change-ebook-and-audiobook-models-libraries-look-for-answers>> accessed 23 August 2020

in the sector<sup>110</sup>: restricting their accessibility to digital content only damages their patrons' "discovery, reading choice, literacy, and the simple love of reading"<sup>111</sup> and their "local marketing efforts"<sup>112</sup> conducted on authors' behalf. In any case, in November 2019 Macmillan Publishers decided to proceed with the eight-week window of limited lending<sup>113</sup>, together with a reduced price for the first copy, to which libraries are granted perpetual access. However, the publisher has declared to be ready to collaborate with libraries to understand the implications of these new policies, while supporting libraries' role in "discover, in literacy and in building readers"<sup>114</sup>.

While it is unquestionable that publishers should be entitled to profit from e-books' exploitation, it can be argued that licensing digital content to libraries is effectively limiting "open access to culture"<sup>115</sup>. Rather than increasing the purchase price of e-books or restricting their availability, it is advised that fair, sustainable alternatives should be explored for digitally delivering content in libraries, balancing their role as culture's safekeepers with the need to adequately remunerate rightsholders. Arrangements allowing libraries broader access to publishers' databases could be considered. The potential benefits of such solution were confirmed during the COVID-19 pandemic, when academic publishers were persuaded to review and widen the terms of access to their databases containing digital versions of their publications. However, as each institution had to negotiate customised conditions, in a time-consuming, expensive, and often unfavourable process<sup>116</sup>, it is submitted that it would be recommendable for libraries to coordinate as a group when dealing with publishers<sup>117</sup>: by wielding stronger negotiating power they could reach more generous and less expensive licensing agreements, while channelling their efforts in defending their interests in the dissemination of culture and safeguarding their users' scholarly needs.

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<sup>110</sup> ALA reports that over \$40 billion have been spent by libraries on digital content in the past decade. – ALA Report (n 97), 1

<sup>111</sup> ALA, 'ALA responds to Macmillan letter' (ALA, 30 October 2019) <<http://www.ala.org/news/member-news/2019/10/ala-responds-macmillan-letter>> accessed 23 August 2020

<sup>112</sup> Enis (n 109)

<sup>113</sup> The Macmillan Publishers' embargo has been heavily criticised, as the introduction of windows has often contributed to an increase in piracy, as seen in the movie industry. – Mike Masnick, 'Giant Publisher Macmillan Goes to War Against Libraries' (*TechDirt*, 15 November 2019) <<https://www.techdirt.com/articles/20191108/23524343352/giant-publisher-macmillan-goes-to-war-against-libraries.shtml>> accessed 23 August 2020

<sup>114</sup> Macmillan Publishers Letter (n 107)

<sup>115</sup> Synodinou (n 1), 227

<sup>116</sup> Clough (n 70)

<sup>117</sup> ALA, 'E-books and Copyright Issues' (ALA, 2014) <<http://www.ala.org/news/state-americas-libraries-report-2014/e-books>> accessed 23 August 2020

### 3) Self-publishing: a revolution in the digital publishing sector

E-book technology has boosted the phenomenon of self-publishing<sup>118</sup>, which is substantially reshaping the market for digital books: Amazon has declared that self-published authors represent the “fastest growing catalogue of e-books sales”<sup>119</sup>, and many of them are scaling best-sellers lists. Most of the self-published works can be produced in e-book formats at fairly low costs, as self-published authors carry out all the functions that usually are undertaken by a traditional publisher, namely editing, formatting, and marketing, either personally or outsourcing to third-party services providers. Self-publishing is advantageous for authors unable to gain support and financing from publishing houses, which usually operate a quality-control check to select works presenting more commercial potential. Moreover, testing the appeal of their material directly on readers in the market has given authors more leverage when negotiating with traditional publishers. Publishing houses as well have realised the potential of self-publishing: they increasingly expect new writers to be engaged in the online publishing and marketing of their early works, before deciding to sign them for their future works.

Self-publishing poses several challenges for copyright law, as the traditional roles of readers, authors, publishers, and distributors have become increasingly blurred. Firstly, readers are more invested in the production of the written works: they contribute to authors’ writings either on dedicated platforms or blogs, not only with suggestions and grammar checks, but also with inputs on character development and storylines. Such involvement and collaborative writing could be regarded under certain national copyright systems as satisfying the traditional requirements of authorship, therefore making the readers co-authors of the final product. This approach could potentially cause legal uncertainty, especially for the economic exploitation and distribution of the work, which could require the authorisation of all the authors<sup>120</sup>. Secondly, self-published authors, who often are readers and fans of successful books, are engaging in the “unauthorised borrowing”<sup>121</sup> of characters, storylines, and elements from popular works. This trend has intensified the discussion on the extent such borrowing should be tolerated in self-publishing, which can only be determined on a case-by-case, depending on

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<sup>118</sup> Broadly self-publishing can include any work made available to the public, such as texts of blogs and online forums, while narrowly it can cover only works published in print or e-book formats offered to the readers through online and offline methods of distribution. – Rita Matulionyte, ‘A boom in self-publishing and its legal challenges (2017), 39(12) E.I.P.R 754, 754

<sup>119</sup> Enis (n 109)

<sup>120</sup> Matulionyte (n 118), 756

<sup>121</sup> *Ibid.*, 757

the different approaches to copyright infringement under national legislations. However, the self-publishing world has elaborated its own responses: content producers have independently developed industry guidelines for the legitimate use of other works, while online literary communities have autonomously set ‘boundaries’ on what is permitted in borrowing from other authors, introducing ways to deal with infringing content<sup>122</sup>.

As authors embark in the process of becoming their own publishers, they face new obligations<sup>123</sup> and challenges, so they often choose to rely on third-party service providers for certain tasks, including editing, cover designing and formatting. Many online e-book distributors are undertaking these traditional publishing functions, while asking authors to pay a registration fee or demanding in exchange a share from the sales of the e-books<sup>124</sup>. Under national copyright legislations, these platforms have been increasingly scrutinised as to whether they could be classified as publishers, which have specific obligations and liabilities. Unlike publishing houses, self-publishing platforms do not select and check the quality of the literary product, they do not impose prices unilaterally and they do not decide on the format or the design. They have non-exclusive rights to publish and disseminate works in specific formats, whereas publishers usually hold exclusive rights. Authors are not paid in advance and the publication process involves remarkably low financial risks for platforms, which collect revenues only when e-books are sold. Therefore, it could be argued that these distribution platforms resemble more passive host providers. However, there are examples of providers with controversial status. Amazon’s self-publishing platform Kindle Worlds had an irrevocable licence in terms of copyright on works created on it by fans, who drew inspiration from well-known works, while earning a percentage on the sale of such creations. The program actively checked the content published, ensuring compliance with the guidelines established by rightsholders, who had conceded licences to Amazon for their original works’ use. In this respect, the platform resembled more a traditional publisher as it held control over the content,

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<sup>122</sup> Matulionyte (n 118), 757

<sup>123</sup> It is unclear whether self-published authors must respect the requirement of legal deposit in force in several countries. Under UK law they could be excluded, since they are mostly publishing digital content and they could be considered micro-business, exempted from complying with such obligation. However, it has been observed that failing to collect and preserve their works could cause the loss of a significant part of contemporary culture for future generations.

<sup>124</sup> Matulionyte (n 118), 761

while gaining exclusive rights in the works. Despite its success, in 2018 Amazon decided to shut down Kindle Worlds, cutting off a relevant source of income for many authors<sup>125</sup>.

While the issues involved with self-publishing are regarded as acceptable risks by authors when considering the potential success and exposure to be gained, a change in copyright laws is inevitable for national and international systems to remain in touch with the concrete reality of the changing self-publishing market. Updating the requirements for the classification of contributors as authors will be necessary to guarantee legal clarity in the commercialisation of works produced online. Concurrently, the parameters for copyright infringement will have to be redefined, establishing a clearer demarcation as to what is permitted to be borrowed from other authors' work, without unduly stifling creative productivity. Moreover, as online publishing platforms are updating the services they provide, a clarification will be necessary as to their status and their obligations towards self-publishing authors to protect them against the detrimental exploitation of their intellectual creations.

#### **4) E-book piracy: a doomed industry?**

Despite the fact that the publishing industry is not characterised by a lack of easy access to legitimate content that lead to widespread piracy in the music and video industry<sup>126</sup>, the e-book market is profoundly affected by piracy: the International Publishers Association has calculated that over one billion dollars is lost worldwide because of e-book piracy, while the UK Intellectual Property Office discovered that 17% of the 4 million e-books consumed in 2017 had been obtained illegally<sup>127</sup>. E-book piracy is quite straightforward: pirate sites allowing to download infringing content for free without authors' authorisation are constantly taken down, only to be re-instated under a different domain name<sup>128</sup>. A recent trend has been to offer through online ads to send via e-mail pirated e-books in exchange for a small sum of money. Anti-piracy bots cannot easily detect such ads and, since infringing transactions are private and there are no links to illegal content, most of the times the entire process does not fall within the

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<sup>125</sup> Travis Clark, 'Authors describe losing thousands of dollars in monthly income when Amazon quietly shut down its fan-fiction service – and how they bounced back' (*MarketsInsider*, 14 January 2020) <<https://markets.businessinsider.com/amp/news/inside-kindle-worlds-amazons-defunct-fan-fiction-service-authors-2019-12-1028816670>> accessed 23 August 2020

<sup>126</sup> Matulionyte (n 118), 760

<sup>127</sup> Michael Kozlowski, 'E-book Piracy is on the rise in 2019' (*Goodereader*, 13 August 2019) <<https://goodereader.com/blog/e-book-news/ebook-piracy-is-on-the-rise-in-2019>> accessed 23 August 2020

<sup>128</sup> *Ibid.*

application of anti-piracy laws<sup>129</sup>. In November 2019, the Educational Publishers Enforcement Group filed a federal lawsuit against several sites offering the sale of pirated e-books through Google ads<sup>130</sup>, claiming that operators of the websites had paid Google to have prominent ads showing up when users searched for legitimate content<sup>131</sup>. They requested a temporary restraining order for the immediate shut down of the sites and their supporting services, which most of the time were legitimate domain hosts, payment processors and internet service providers.

While it has been estimated that \$300 million in publishers' income is lost annually due to piracy<sup>132</sup>, authors are the most affected by online infringing acts, often losing their publishing contracts once piracy drives down their sales to an unsustainable level<sup>133</sup>. Despite their critical position, authors are unfortunately lacking robust instruments to defend their works against illegal conducts. Usually, they must request their publishers to act on their behalf, as they generally hold the rights to act for copyright violations. Authors can also file a report via dedicated copyright infringement portals managed by various publishers' associations or attempt to email a 'takedown request' themselves to the offending site or platform, indicating the link and full details of the pirated material along with an explanation of why the content is infringing. For self-published authors, these takedown notices are the only remedies available against piracy. However, such actions are often ineffective, mostly because authors, especially self-published ones, do not have the same influence and resources as publishing houses to request infringing websites or distributors to remove pirated works<sup>134</sup>. Recently, authors have started to demand to their publishers to be more "muscular"<sup>135</sup>, soliciting actions similar to

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<sup>129</sup> Kozlowski (n 127)

<sup>130</sup> McGraw-Hill, 'Educational Publishers Take Legal Action Against Dozens of E-book Sites that use Google Ads to Sell Pirated Content' (*Prnewswire*, 25 November 2019) <<https://www.prnewswire.com/news-releases/educational-publishers-take-legal-action-against-dozens-of-ebook-sites-that-use-google-ads-to-sell-pirated-content-300964628.html>> accessed 23 August 2020

<sup>131</sup> *Ibid.*

<sup>132</sup> Adam Rowe, 'U.S. Publishers Are Still Losing \$300 Million Annually to E-book Piracy' (*Forbes*, 28 July 2019) <<https://www.forbes.com/sites/adamrowe1/2019/07/28/us-publishers-are-still-losing-300-million-annually-to-ebook-piracy>> accessed 23 August 2020

<sup>133</sup> Over one-quarter of authors have had their works pirated. Some of the most affected are those who publish series: while the first book could be successful, the second one could be heavily pirated, resulting in the third one failing completely. – Kathy Guest, "I can get any novel I want in 30 seconds": can book piracy be stopped?' (*The Guardian*, 6 March 2019) <<https://www.theguardian.com/books/2019/mar/06/i-can-get-any-novel-i-want-in-30-seconds-can-book-piracy-be-stopped>> accessed 23 August 2020

<sup>134</sup> Matulionyte (n 118), 758

<sup>135</sup> Mark Chandler, 'Joanne Harris calls on publishers to take online pirates to court' (*The Bookseller*, 5 March 2019) <<https://www.thebookseller.com/news/harris-hits-out-pirate-site-and-calls-legal-precedent-965311>> accessed 23 August 2020



those taken by the music and film industry against file-sharing services<sup>136</sup>. Instead of issuing takedown notices for individual titles, they should strive to set legal precedents by taking big piracy websites to court to shut them down. In addition, imposing certain “filtering obligations”<sup>137</sup> on online intermediaries could enhance the taxing struggle against piracy of self-published authors. Some e-books distributors have already started implementing measures to filter out illegal content<sup>138</sup>, aiming at making their platforms more attractive to rightsholders by offering a viable alternative to DRM measures.

Notwithstanding publishers funding anti-piracy agencies and getting more involved in the constant battle to get pirated titles taken down, the number of people accessing pirate websites has increased over the last years<sup>139</sup>. Overall, rightsholders seem to have resigned to the “inevitability of copyright infringement on the internet”<sup>140</sup> and rather than pursuing time-consuming and expensive infringement procedures<sup>141</sup>, they are turning to new online business models, such as the so-called ‘honesty box’, which allows free download of e-books in exchange for payment at the reader’s discretion<sup>142</sup>. Similarly, Amazon has launched Kindle Unlimited, a subscription package where millions of titles can be accessed by users in the Kindle Store for a monthly subscription fee and authors’ compensation is calculated on pages read<sup>143</sup>. Although it is still unclear whether these alternative distribution systems will effectively help in the uphill battle against piracy, unlawful acts will not be curbed without comprehensive legal frameworks that ensure proper online enforcement of copyright law. The Directive on Copyright in the Digital Single Market 2019/790<sup>144</sup> is to be considered a step in the right direction, given that it established new rules for the accountability of internet platforms for the files shared and uploaded by their users. Ultimately, any long-term solution against piracy will only be effectual if the public becomes aware that such practices are

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<sup>136</sup> Chandler (n 135)

<sup>137</sup> Matulionyte (n 118), 759

<sup>138</sup> Amazon has declared it has introduced a filtering software in its Kindle platform without clarifying how it works.

<sup>139</sup> Guest (n 133)

<sup>140</sup> Matulionyte (n 118), 759

<sup>141</sup> Another solution that would benefit self-publishing authors is the development of alternative dispute resolutions mechanisms for small claims for online copyright infringement, as the ones already used for domain names disputes.

<sup>142</sup> Matulionyte (n 118), 760

<sup>143</sup> *Ibid.*

<sup>144</sup> Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market [2019] OJ L 130/92

“dishonest, wrong and killing publishing [and] stealing the product of someone else’s work”<sup>145</sup>. Fortunately, many online literary communities have started to actively police copyright infringements, flagging them to authors and intermediaries and asking for refunds for pirated content they inadvertently purchase<sup>146</sup>.

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<sup>145</sup> It was estimated that in 2018 41% of adult e-book pirates were 18-29 years old, 47% were 40-44 years old and the remaining 13% was older than 45. Many justified piracy not because of costs, but because of how easily titles could be found or because they wanted to “pre-read” books before purchasing them. – Guest (n 133)

<sup>146</sup> *Ibid.*

#### IV. CONCLUSION

Despite the early boom of the e-book market, recent estimates show that print publications continue to outsell their digital counterparts, as consumers prefer to own paper books. However, it can be expected this trend to be reversed, especially given the drastic changes in the consumption of literature prompted by the COVID-19 pandemic. Undeniably, copyright systems will need to be updated to cater to the digital needs of the publishing industry. In particular, the legal and technical protection of e-books' ownership and use should be reviewed to establish a more favourable regime for legitimate purchasers of e-books. Authorship and infringement rules should also be reconsidered to provide a legal framework more suitable to safeguard self-published authors, ensuring the sustainability of their presence in the e-book market. Legislators could draw inspiration from the guidelines already set by the self-publishing industry and online literary communities. In any case, the position of authors and publishers in their e-books' commercial exploitation has been strengthened by *Kabinet*. By confirming that the re-sale of e-books must be authorised by copyright owners, e-books' aftermarkets will operate only after obtaining the consent of rightsholders, which under appropriate licensing agreements will be adequately remunerated for their works' further exploitations.

Following the unexpected shift to remote services experienced in the past few months, the publishing sector will have to quickly adapt to such new demands. Concerted solutions will need to be found both for the copyright issues involved in the digitisation of paper books and for the e-books' licensing terms offered to academic and research libraries, too restrictive to satisfy their patrons' needs during such complex circumstances. While licensing arrangements for accessing publishers' databases could be reviewed to include fair prices and more permissive conditions, exceptions to copyright could be introduced in law or accepted by rightsholders to allow their works' digitisation, so that readers around the world will be able to access the content they need to study and research. Concomitantly, the e-book retail market will have to be thoroughly overseen by competition authorities against anti-competitive behaviours by big publishers and distributors to guarantee that smaller organisations, embarking in digital retailing, enjoy market freedom in their e-books' commercialisation and that consumers are safeguarded in their purchase of digital titles at reasonable prices.

To further ensure a profitable market environment for rightsholders, e-book piracy will need to be firmly contrasted. While broader lawful access to digital books for libraries' patrons could significantly reduce the consumption of pirated e-books, transparency among publishers should

be enhanced. Presently, the exact figures of income and revenue lost due to online infringing acts are not known, as publishing houses are reluctant to offer updated information. By improving disclosure and strengthening publishers' cooperation in infringements actions, lawmakers could be further prompted to intervene against piracy by enacting more stringent laws against websites and platforms containing pirated content. Ultimately, substantial efforts should be dedicated to raise public awareness on the damages caused to authors, especially self-published ones, by piracy.

Overall, while the survival of e-books has been repeatedly doubted, in my opinion digital and paper books will continue to co-exist: given the recent push toward digital substitutes to paper, the e-book technology will continue to reshape the legal framework of the traditional publishing sector, while redefining the literature retail market.

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