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Court of Justice of the European Union

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Advocate General's Opinion in Case C-117/13
Technische Universität Darmstadt v Eugen Ulmer KG

According to Advocate General Jääskinen, a Member State may authorise libraries to digitise, without the consent of the rightholders, books they hold in their collection so as to make them available at electronic reading points

While the Copyright Directive does not allow Member States to authorise users to save a book digitised by a library onto a USB stick, it does not prevent, in principle, the book from being printed as a private copy.

Pursuant to the Copyright Directive,¹ Member States must grant authors the exclusive right to authorise or to prohibit the reproduction and the communication to the public of their works. However, the directive allows Member States to provide for specific exceptions or limitations to that right. This option exists notably for publically accessible libraries² which, for the purpose of research or private study, make works from their collections available to users by dedicated terminals.³ In the present case, the Bundesgerichtshof (Federal Court of Justice of Germany) asks the Court of Justice to clarify the scope of the option, of which Germany has made use.

The Bundesgerichtshof is required to rule on a dispute between the Technical University of Darmstadt (Technische Universität Darmstadt) and a German publishing house, Eugen Ulmer KG⁴. The publishing house is seeking to prevent (i) the university from digitising a book it holds in its library collection published by Eugen Ulmer⁵ and (ii) users of the library from being able, via electronic reading points provided therein, to print the book or save it on a USB stick and/or take those reproductions out of the library. The university has digitised the book in question and made it available on its electronic reading posts.⁶ It has refused the offer of the publishing house to purchase and use as electronic books ('E-books') the textbooks it publishes.

In today's opinion, Advocate General Niilo Jääskinen considers, first of all, that, even if the rightholder offers to a library the possibility of concluding licencing agreements for the use of his works on appropriate terms, the library may avail itself of the exception provided for in favour of dedicated terminals.⁷ In Mr Jääskinen's view, it is only when such a contract has already been concluded that the library may no longer avail itself of the exception.

¹ 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 (OJ 2001 L 167, p. 10).

² Such libraries are not for economic or commercial advantage. The option applies, under the same terms, to educational establishments, museums and archives.

³ '[U]se by communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises of establishments referred to in paragraph 2(c) of works and other subject-matter not subject to purchase or licensing terms which are contained in their collections' (Article 5(3)(n) of the directive).

⁴ The dispute is a test case. The university is supported by the Deutscher Bibliotheksverband e.V. (German Library Association) and by the European Bureau of Library, Information and Documentation Associations (EBLIDA). The publishing house is supported by the Börsenverein des deutschen Buchhandels (German Publishers & Booksellers Association). This indicates, according to the Advocate-General, the importance of the present case for libraries, authors, and publishing houses (in particular scientific publishers).

⁵ The book in question is a textbook by Winfried Schulze entitled *Einführung in die neuere Geschichte* (Introduction to Modern History).

⁶ Those points did not allow more copies to be consulted at any one time than those available in the library collection.

⁷ That is, that such an offer does not mean that the work in question must be regarded as being subject to purchase or licencing terms within the meaning of the provision of the directive cited in footnote 3.

Next, the Advocate General considers that **the directive does not prevent Member States from granting libraries the right to digitise the books from their collections, if their being made available to the public by dedicated terminals requires it.** That may be the case where it is necessary to protect original **works** which, although still covered by copyright, are **old, fragile or rare.** That may also be the case where the work in question is **consulted by a large number of students and its photocopying might result in disproportionate wear.**

However, Mr Jääskinen makes clear that **the directive permits not the digitisation of a collection in its entirety, but only the digitisation of individual works.** It is particularly important not to opt to use dedicated terminals where the sole purpose of doing so is to avoid the purchase of a sufficient number of physical copies of the work.

Lastly, Mr Jääskinen takes the view that **the directive does not allow the users of dedicated terminals to save the works made available to them on a USB stick.** He notes in particular that the exception provided for in favour of dedicated terminals previously constitutes an exception to the rightholder's exclusive right of communication. In the view of the Advocate General, the concept of communication excludes from the exception's scope the option of saving the work onto a USB stick, since that constitutes not communication by the library, but the creation of a private digital copy by the user. Furthermore, such a reproduction is not necessary for preserving the effectiveness of the exception, even though it would be useful to the user. In addition, the exception in question does not cover an act by which the library makes a digital copy accessible to the user so that the user may later make a copy and keep it on a USB stick.

While the Advocate General is of the view that the exception provided for in favour of dedicated terminals no longer covers the printing of a paper copy, he nevertheless notes that **the printing of a work available on dedicated terminals may be covered by other exceptions provided for by the directive, including, in particular, the exception of private copying.** In that regard, the Advocate General sees no difference between a photocopy of pages of a work physically present in the library collection and the printing of pages of a digital copy. The risk of unlawful distribution on a large scale, present in the case of digital copies, does not exist in the case of the printing of a paper copy.

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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The [full text](#) of the Opinion is published on the CURIA website on the day of delivery.

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