

Kluwer Copyright Blog

Switzerland: The library's document delivery service (scanning and sending journal articles by email to users) complies with copyright law

Yaniv Benhamou (Lenz & Staehelin, Geneva) · Wednesday, January 7th, 2015



In a battle between the Zurich Eidgenössischen Technischen Hochschule (ETH) and three publishers (Elsevier, Springer, Thieme), the Zurich Commercial Court, in its **decision of 7 April 2014**, prohibited the library from providing a document delivery service (scanning and sending journal articles by email to the users). The Supreme Court reversed this ruling, in its **decision of 28 November 2014**, and agreed with the ETH that such a service complies with copyright protection and may continue to be provided.

According to the Supreme Court, the library may rely on the exception for private use (Art. 19 CopA): users, who are entitled to **make copies** of journal articles **for private use** (Art. 19 (1) CopA), **may use the library's devices** to copy journal articles, as well as have such copies made by the library (Art. 19 (2) CopA). Sending such copies to the users (by registered mail or email) does not infringe the Copyright Act, as such copies are permitted under the exception for private use.

The **document delivery service of the library is not equivalent to the publishers' service** (publishers' pay-platform) and is thus not in direct competition with them, as the library may merely scan individual journal articles upon request but shall not provide an online database with all the articles. In this respect, one should also bear in mind that the document delivery service is a paying service and leads to the **payment of royalties to publishers and authors**.

This decision clarifies various aspects of the Copyright Act, and provides welcome relief for Swiss libraries that they may retain their document delivery services.

– the decision clarifies the scope of the exception for private use: a private user (Art. 19 (1) CopA) may not only use the libraries' devices to copy journal articles but also have such copies made by libraries (Art. 19 (2) CopA). This point was previously controversial, as certain Swiss authors considered the making of a copy of an entire work using libraries' devices to be forbidden based on the limitation to the exception for private use (Art. 19 (3) CopA: copying entire works is not allowed outside the private sphere). Now the decision makes clear that this limitation to the exception does not apply in this context and that **libraries' devices can be used to copy entire**

works.

– the decision clarifies that the method of sending copies to users (by registered mail or email) is irrelevant, as such copies are permitted for private use. This point was also controversial, as the Zurich Commercial Court considered the sending of copies by registered mail to be permitted but sending of copies by email to be forbidden (in accordance with the limitation of the exception in Art. 19 (3) CopA). Now the decision makes clear that **the exception for private use applies irrespective of the sending method.**

– the decision confirms that the document delivery service is not in competition with publishers, as it works on individual request without providing an online database with all the articles, and because such service leads to the payment of royalties. This reflects a **balanced approach** between private interests (protection of publishers and authors) and the public interests (dissemination of information and promotion of academic research by allowing such service). This balanced approach brings to mind the [decision of the ECJ \(Technische Universität Darmstadt v. Eugen Ulmer KG\)](#) that considered that Darmstadt University's service digitizing works for the purposes of on-site research and private study was permitted as an exception pursuant to the EU Directive 2001/29/EC. However, depending on national legislation, public end users may or may not be permitted to print or save such works to USB sticks.

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