

## **E-books in German and European copyright law:**

### **Backgrounds, contrasts and effects**

#### A. Introduction

Books have become the authoritative medium for the storage and transmission of information since the invention of modern printing in the 15th century. The particular cultural meaning of books is recognised at various points in law. For example, in support of a broad participation in cultural life, books are subject to a reduced tax rate of merely 7% in accordance with the German VAT Act based on Art. 98 (2) and Annex III No. 6 of Directive 2006/112/EC. Moreover, in contrast to other goods, books are subject to a fixed pricing in accordance with German law governing the resale prices of books, which should promote an extensive range of books. Finally, books also receive special attention in the German copyright law, as explained below.

Regarding the technical production aspect, a book is commonly defined as a non-periodical printed matter. However, more than 500 years after the invention of printing with movable types, books also appear in electronic form. Electronic books (e-books) have become a firmly established communication medium to date. Indeed, the use of e-books statistically remains at a disadvantage compared to printed books. In 2015, e-books in Germany generated sales of only €957 million, compared to sales of €8.231 billion in print products<sup>1</sup>. Accordingly, approximately 2% of all 'book readers' read only e-books, whereas 32% read only printed books. Meanwhile, 24% of readers use both printed and electronic books<sup>2</sup>. According to forecasts, sales of electronic books are expected to increase to roughly €1.755 billion by 2020, whereas falling sales figures are projected for print products<sup>3</sup>. Overall, an increase in the use of electronic books is expected. Against this background, a clarification of whether the copyright regulations also include e-books in favour of a modern book culture is necessary.

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\* This essay is based on the doctoral thesis "E-Books im Urheberrecht. Kollision von Buchkultur und digitaler Wissensgesellschaft", which was adopted in 2018 by the Faculty of Economics and Law, Martin-Luther-University Halle-Wittenberg.

<sup>1</sup> PwC, 'Umsätze im Buchmarkt in Deutschland in den Jahren 2011 bis 2020\* (in Millionen Euro)', in Statista, available at: <<https://de.statista.com/statistik/daten/studie/12554/umfrage/umsatzentwicklung-im-buchmarkt-seit-2003/>> (last visited on 22 January 2019).

<sup>2</sup> Statista. 'Lesen Sie eher E-Books oder eher gedruckte Bücher?', available at: <<https://de.statista.com/statistik/daten/studie/254618/umfrage/praeferenz-fuer-normale-buecher-oder-e-books-in-deutschland/>> (last visited on 22 January 2019).

<sup>3</sup> PwC, supra, note 1.

This viewpoint raises the question of the scope that the copyright law provides for the use of e-books and whether the copyright law thus also indirectly certifies public interest in the usage of e-books. For authors and other rights holders, this issue goes along with the question of how far they can, if appropriate, participate economically in the permitted use of e-books within the collective rights management system.

## B. Books as a driving force for the German copyright law

With regard to the immaterial protected object, the question of the copyright treatment of certain media seems to be dissonant. In principle, both printed and electronic books must be distinguished from the work protected by copyright, which is represented in the media. Nevertheless, due to the genesis of copyright protection in Germany, the fact that the medium 'book' has found its way directly into the German copyright law is not surprising.

In particular, book authors' sensitisation to intellectual property at an early stage is evident in the use of a written curse against the unauthorised use of their works by an inscription of the respective books<sup>4</sup>. Later, the subsequent invention of modern printing was the major driving force for the creation of certain privileges and thus a significant landmark for the development of copyright<sup>5</sup>. In the 15th century, privileges were indeed only granted to printers that obtained an exclusive right to print a literary work<sup>6</sup>. In addition to these monopolies, authors' privileges later emerged, which now granted the author an exclusive exploitation right<sup>7</sup>. The book trade subsequent allowed the abolition of privileges and thus the development of modern copyright<sup>8</sup>. Also the first German copyright law from 1871 was primarily devoted to the protection of written works and the regulation of their reprint; moreover, it is largely based on the efforts of authors, publishers and booksellers, and thus central players in the book culture<sup>9</sup>. Due to their nationwide unitary structure in the German Publishers & Booksellers

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<sup>4</sup> S. Hrubesch-Millauer, 'Das schweizerische Urheberrecht: Heutige Rechtslage und künftig Entwicklungen', in W. Schmitz (ed.), *Probleme des neuen Urheberrechts für die Wissenschaft, den Buchhandel und die Bibliotheken* (2008), 49.

<sup>5</sup> Detailed W. Bappert, *Wege zum Urheberrecht. Die geschichtliche Entwicklung des Urheberrechtsgedankens* (1962), 126; E. Wadle, *Geistiges Eigentum. Bausteine zur Rechtsgeschichte I* (1996), 66; see also H. Schack, *Urheber- und Verlagsrecht* (8th ed., 2017), para. 105.

<sup>6</sup> U. Jochum, *Bücher. Vom Papyrus zum E-Book* (2015), 103.

<sup>7</sup> Detailed H. Pohlmann, 'Privilegienwesen und Urheber-Recht', 33 *Archiv für Medienrecht und Medienwissenschaft (UFITA)* (1961), 169; see also E. Ulmer, *Urheber- und Verlagsrecht* (3rd ed., 1980), 51.

<sup>8</sup> P. Beisler, 'Die angemessene Vergütung literarischer Urheber', in W. Schmitz (ed.), *Probleme des neuen Urheberrechts für die Wissenschaft, den Buchhandel und die Bibliotheken* (2008), 23, at 25.

<sup>9</sup> O. W. R. Dambach, *Die Gesetzgebung des Norddeutschen Bundes betreffend das Urheberrecht an Schriftwerken, Abbildungen, musikalischen Kompositionen und dramatischen Werken* (1871), 1.

Association, these actors suffered to a particular extent from the hitherto prevailing fragmentation in the field of author and publishing law within the German Confederation. Altogether, the growth of book culture and the development of copyright protection in Germany are closely intertwined<sup>10</sup>.

European copyright law has other historical roots even at the starting point. From the outset, European copyright law was primarily designed to create a single European market for knowledge and information through the harmonisation of various national regimes<sup>11</sup>. Since 1991, the European Union (EU) has therefore adopted an entire series of harmonisation directives in the field of copyright and related rights. However, a complete standardisation of copyright laws in the member states was not achieved. Also against this background of the (comparatively short) history of the European copyright law, an imprint in particular by the book culture cannot be identified.

### C. Traditional concept of books under the German copyright law

In different ways, Sec. 53 (4) lit. b and Sec. 61 (2) No. 1 of the German Copyright Act such as Sec. 51 of the German Collecting Societies Act still expressly demonstrate public interest in books by directly targeting the regulations to the medium ‘book’. However, a question arises about whether the regulations also certify a special public interest in the use of books in electronic form.

#### I. Absolute copy ban

According to Sec. 53 (1), (2) of the Copyright Act, reproductions for private and other own uses are generally permitted by law. Among other things, this should protect the interest in broad participation in cultural life<sup>12</sup>. Exceptions are provided in paragraph 4. Accordingly, the reproduction of graphic recordings of musical works (lit. a) and an essentially complete reproduction of a book or a periodical (lit. b) shall, insofar as this does not occur by means of manual transcription, always be permissible only with the consent of the rights holder. The rationale for this case lies in a special cost situation in the production of books where high start-up costs arise. A sufficient initial print run is necessary to achieve the contribution

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<sup>10</sup> Descriptive F. Seifert, ‘Über Bücher, Verleger und Autoren – Episoden aus der Geschichte des Urheberrechts’, 45 *Neue Juristische Wochenschrift (NJW)* (1992), 1270.

<sup>11</sup> See, for example, recitals 4, 5 of Directive 91/250/EEC or recitals 1-7 of Directive 2001/29/EC.

<sup>12</sup> R. Reh binder and A. Peukert, *Urheberrecht* (18th ed., 2018), para. 573; Schack, *supra*, note 5, at para. 553.

margin<sup>13</sup>. By contrast, the economic success of these investments cannot be estimated accurately. If the copy of the entire book were to be expected within such an economic starting situation, the willingness to take risks in producing it would be reduced. This risk is covered by Sec. 53 (4) lit. b of the Copyright Act. In this manner, the result is to promote the willingness to publish books as well as cultural diversity as a whole<sup>14</sup>. Consequently, the reason for the absolute copy ban for books is the cost of producing the single copies by the copyright holder<sup>15</sup>. Hence, the prescription cannot be applied to e-books as no costs are involved in producing a single copy. Rather, e-books and other digital goods can be duplicated rapidly and cost effectively through mouse clicks.

A contrary indication to the inclusion of electronic books within the scope of the prohibition of copying entire books is also an interpretation in accordance with Directive 2001/29/EC. Specifically, the regulations of private copying are based on Art. 5 (2) lit. a, b of Directive 2001/29/EC<sup>16</sup>. An exception to the permissibility of the private copy is indeed merely intended for sheet music (Art. 5 (2) lit. a of Directive 2001/29/EC). A comparable regulation for books does not exist. Nevertheless, Art. 5 (2) lit. a of Directive 2001/29/EC provides further information for the relevant question. The rules governing sheet music are also based on the specific cost situation, while taking into account the public interest in their provision<sup>17</sup>. The exception of the private copy is once again based precisely on the production cost of the single copy, which does not apply to e-books. The purpose of the prohibition on copying both sheet music and books under the German copyright law indicates that the absolute copy ban for printed books in accordance with Sec. 53 (4) lit. b of the Copyright Act is not based on extrinsic criteria with regard to the scheme and objectives of Directive 2001/29/EC. Although Sec. 53 (4) lit. b of the Copyright Act has no direct basis in EU law, the absolute prohibition of copying entire books does not contradict the requirements of Directive 2001/29/EC.

The absolute prohibition of copying according to Sec. 53 (4) lit. b of the Copyright Act consequently only deals with printed books. E-books are comprehensively covered by the scope of the private copy according to Sec. 53 (1), (2) of the Copyright Act, signifying that the reproductions of e-books for private and other own uses are generally permitted by

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<sup>13</sup> V. Kitz, 'Anwendbarkeit urheberrechtlicher Schranken auf das eBook', in 4 *MultiMedia und Recht (MMR)* (2001), 727, at 729; C. Kuß, 'Gutenberg 2.0 – der Rechtsrahmen für E-Books in Deutschland', in *Kommunikation & Recht (K&R)* (2012), 76, at 80.

<sup>14</sup> Kitz, supra, note 13, at 729.

<sup>15</sup> Detailed H. Henke, *E-Books im Urheberrecht* (2018), 81.

<sup>16</sup> U. Grübler, in H. Ahlberg and H.-P. Götting, *Beck'scher Online-Kommentar Urheberrecht* (22. Ed., 2018), to § 53 para. 4.

<sup>17</sup> Grübler, supra, note 16, to § 53 para. 36.

copyright. Certainly, cultural diversity in the form of e-books, in contrast to printed books, is not subject to any specific protection of production.

## II. Orphan works

With the law on the use of orphan and out-of-commerce works issued in 2013, the German legislator transposed Directive 2012/28/EU on certain permissible forms of use of orphan works. Contrary to the regulations regarding out-of-commerce works in Sec. 51 et seq. of the Collecting Societies Act, the regulations on orphan works are directly related to Directive 2012/28/EU. The Directive aims to establish online libraries that will create new sources of evidence (recital 1 of Directive 2012/28/EU). To this end, libraries require a legal framework that also allows the online dissemination of works and other subject matter the rights holders of which are unknown or cannot be located (recital 3 of Directive 2012/28/EU). Against this backdrop of EU law, Sec. 61 of the Copyright Act permits the reproduction and the making available to the public of orphan works. Within the purview of Sec. 61 (2) of the Copyright Act, orphan works include works and other protected subject matter in books, trade journals, newspapers, magazines or writings (No. 1); cinematographic works, as well as video media and audio and video media on which cinematographic works have been recorded (No. 2) and audio media (No. 3) in the collections of publicly accessible libraries, educational institutions, museums, archives and institutions in the field of cinematic and audio heritage. The question of whether this Act also covers e-books, the rights holders of which cannot be established, arises once again.

The systematics of the German copyright law already contradicts this point. Elsewhere, copyright law explicitly distinguishes between writings and other data carriers<sup>18</sup> whereby digital content is only covered by other data carriers<sup>19</sup>. This distinction suggests that also in the sense of Sec. 61 (2) No. 1 of the Copyright Act, 'writings' only mean printed works. Accordingly, in the sense of Sec. 61 (2) No. 1 of the Copyright Act, a book as a special form of writing presupposes a collection of several printed sheets - an element that is missing in an e-book.

However, teleological considerations oppose such a narrow interpretation. The purpose of the regulations is the utilisation of works the rights holders of which cannot be identified or traced

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<sup>18</sup> See Sec. 48 (1) No. 1 of the Copyright Act.

<sup>19</sup> S. Lüft, in A.-A. Wandtke and W. Bullinger (eds.), *Praxiskommentar zum Urheberrecht* (4th ed., 2014), to 48, para. 4.

what excludes the granting of rights.<sup>20</sup> Given the aim of overcoming unclear legal situations, the reason to treat digitally available works in e-books differently from printed works is eliminated. Digitalisation in particular allows for the publication of content easily and cost effectively through the internet. In terms of the book industry, the electronic market simplifies self-publishing activities<sup>21</sup>, thus facilitating the quantitative increase in published titles<sup>22</sup>. As a result, the quantity of works the authors of which cannot be identified or located potentially increases. The disintermediation simultaneously causes the disappearance of institutions, which potentially could provide the necessary information. In this regard, digitalisation and online sales even encourage the orphaning of works.

Even an interpretation in conformity with Directive 2012/28/EU suggests the broad range of the book concept in Sec. 61 (2) No. 1 of the Copyright Act. First, the directive applies to works published in the form of books, journals, newspapers, magazines or other writings contained in the collections of publicly accessible libraries, educational establishments or museums as well as in the collections of archives or film or audio heritage institutions (Art. 1 (2) lit. a Directive 2012/28/EU). In fact, a similar question about the meaning of ‘books’ or ‘writings’ emerges. In addition to German implementation, Art. 1 (2) lit. b, c of Directive 2012/28/EU stipulates that even audio-visual works may be orphan works regardless of their concrete representation. In any case, multimedia works in digital form are consequently within the scope of Directive 2012/28/EU. Therefore, multimedia e-books can also be orphan works within the purview of Directive 2012/28/EU<sup>23</sup>. Given the purpose of the regulations, a different treatment of multimedia e-books and those that consist only of text cannot be convincing. E-books thus fall comprehensively within the scope of the Directive. Therefore, an interpretation of Sec. 61 (2) No. 1 of the Copyright Act in conformity with Directive 2012/28/EU requires that e-books generally may also be orphan works<sup>24</sup>. In any case, the wording of Sec. 61 (2) No. 1 of the Copyright Act allows the inclusion of e-books as a ‘book’ within the meaning of the regulation.

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<sup>20</sup> S. Engels and S. Hagemeyer, in H. Ahlberg and H.-P. Götting (eds.), *Beck'scher Online-Kommentar Urheberrecht* (18th ed., 2018), to § 61 para. 1; G. Spindler, in G. Schricker and U. Loewenheim et al. (eds.), *Urheberrecht. Kommentar* (5th ed., 2017), to 61 para. 1; K.-N. Peifer, ‘Die gesetzliche Regelung über verwaiste und vergriffene Werke’, 67 *Neue Juristische Wochenschrift (NJW)* (2014), 6.

<sup>21</sup> M. Clement, E. Blömeke and F. Sambeth, ‘Herausforderungen in der Buchbranche’, in M. Clement, E. Blömeke and F. Sambeth (eds.), *Ökonomie der Buchindustrie* (2009), 11, at 19; S. Hiller, *Buchhandelsstrategien im digitalen Markt* (2016), 67.

<sup>22</sup> J.-M. Grages, *Verwaiste Werke* (2013), 21; C. Janello, *Wertschöpfung im digitalisierten Buchmarkt* (2010), 154.

<sup>23</sup> Also G. Spindler, ‘Ein Durchbruch für die Retrodigitalisierung?’, 57 *Zeitschrift für Urheber- und Medienrecht (ZUM)* (2013), 349, at 351.

<sup>24</sup> Detailed Henke, *supra*, note 15, 107.

### III. Out-of-commerce works

With the law on the use of orphan and out-of-commerce works, the German legislator used the option that was left open in accordance with recital 4 of Directive 2012/28/EU to make independent rules on the handling of out-of-commerce works. According to Sec. 51 (1) No. 1 of the Collecting Societies Act, it shall be presumed that a collecting society which manages the rights of reproduction (Sec. 16 of the Copyright Act) and of making works available to the public (Sec. 19a of the Copyright Act) in out-of-commerce works and which is authorised to do so (Sec. 77) is authorised, within its scope of activity, to also grant users these rights in works of those rights holders who have not mandated the collecting society with the management of their rights in the case of out-of-commerce works published before 1 January 1966 in books, journals, newspapers, magazines or in other writings. Similar to limitations and exceptions to copyright, this mechanism essentially balances the author's interest in the exploitation of his work with the public interest in cultural participation. Analogous to Sec. 61 (2) No. 1 of the Copyright Act, public interest is limited to the use of works in books, journals, newspapers, magazines or in other writings according to Sec. 51 (1) No. 1 of the Collecting Societies Act. As with the absolute ban on copying, only printed books are covered by the regulation. This aspect is already evident in the fact that the regulation only covers works published before 1 January 1966. This requirement has excluded e-books since the publication of the first commercially available e-book was in 1988<sup>25</sup>.

In addition, teleological considerations are against the equal treatment of printed and electronic books. As previously mentioned, the production of books represents a special cost situation. To achieve the contribution margin, a high initial print run is necessary, which causes high fixed costs. Consequently, even in cases where the copies originally produced are out of commerce, the renewed production only makes economic sense if a sufficient demand exists. Against this backdrop, the economic interest in a further exploitation of the work can be missing. The regulations for out-of-commerce works are precisely linked to this economic starting point. By contrast, in the typical diffusion of e-books in the form of making available to the public, the manufacture of an unlimited number of copies in a cost effective manner is probable. Due to these differences, the possibility of any access to the digital asset 'e-book' excludes copies that are out of commerce in the sense of the Collecting Societies Act. The concept of being out of commerce requires the distribution of a physical copy. Regardless of the cut-off date specified in Sec. 51 (1) No. 1 of the Collecting Societies Act, e-books that are

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<sup>25</sup> J.-F. Schrape, *Der Wandel des Buchhandels durch Internet und Digitalisierung*, SOI-Discussion Paper 2011-01, 31.

sold by making them available to the public are therefore not covered by Sec. 51 of the Collecting Societies Act. In other words, if an e-book is no longer available online, collecting societies cannot grant libraries the rights of reproduction and making available to the public. The libraries directly have to apply to the rights holders, which complicates the legitimate use of e-books that are no longer available compared to the usage of out-of-print books.

#### IV. Interim results

At the starting point, several provisions of the German copyright law are based on the classical book concept, according to which a book is a physical object characterised by a collection of several sheets. The motives for a distinction between printed and electronic books are mainly the different methods of production and diffusion. The European Union law provides only indirect requirements for this aspect. Only the interpretation of the regulations on the use of orphan works that complies with the EU law leads to a broad interpretation of the book concept of national copyright law.

#### D. E-books in education and science

German copyright regulations grant privileges at various points for educational and research purposes. In each case, these provisions are constitutionally based on the freedom of information, the freedom of science, the cultural state principle and the recognised purpose of the general public interest of school education<sup>26</sup>. In this connection, the communication and generation of knowledge relies on modern technologies as up-to-date sources of information. On the one hand, electronic media enable time- and location-independent learning. On the other hand, because of their interactivity, networking opportunities and multimedia skills, electronic media offer further potential for knowledge transfer than, for example, print media. Thus, access to and use of digital media has a decisive effect on educational opportunities<sup>27</sup>. Schools in particular are expected to make modern technologies themselves the subject of modern media pedagogy teaching<sup>28</sup>. Accordingly, different perspectives are essential for the utilisation of e-books for educational and scientific purposes permitted under copyright law.

In this context, Sec. 60a and Sec. 60c of the German Copyright Act are of particular importance. With the so called *Urheberrechts-Wissensgesellschafts-Gesetz* (UrhWissG), the

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<sup>26</sup> K. de la Durantaye, *Allgemeine Bildungs- und Wissenschaftsschranke* (2014), 67.

<sup>27</sup> BT-printed matter 17/12029, 14.

<sup>28</sup> BT-printed matter 17/12029, 88.



German legislator has recently redrafted these regulations. The regulations summarise the legal uses for educational and teaching purposes as well as for scientific research purposes. This redrafting was intended to respond to the allegations that the previously applicable rules on education and research were unsuitable for the use of new media and provided only legally inaccurate and incomprehensible standards for practice<sup>29</sup>. Despite the recent adjustment, the usage of e-books remains subject to numerous restrictions compared to printed books. The reason is that both Sec. 60a and Sec. 60c of the Copyright Act allow the use of parts of works (15% in general, 75% for own research) and small-scale works for the specified use for research and educational purposes.

The restriction, which is not imposed by the European rules such as Art. 5 (2), (3) of Directive 2001/29/EC, commonly affects e-books. The reason lies in their respective file structures. If only a part of the e-book content is to be extracted, a restructuring of the file is required. However, access to the file is excluded in any case with common proprietary file formats such as Kindle and iBooks. But also with the open file format EPUB an extraction of parts of a book is not provided. The technical design of e-books thus largely prevents access to the e-book file and makes the user dependent on the given functions of the interface. Nevertheless, the manual reproduction of the respective parts of the work is always possible, such that the work usage has no unconditional dependence on the specific technical design of the copy to be used. However, due to the burden of manual copying, this limited scope of application does not do justice to the purpose of the legislative amendment introduced by UrhWissG to facilitate the use of modern media for research and educational purposes. With regard to the restriction to parts of a work, Sec. 60a and Sec. 60c of the Copyright Act are therefore technology-dependent. This aspect can be because even modern work is not technologically neutral; multimedia and interactive works are based on a digital environment.

Thus, within the framework of Sec. 60a and Sec. 60c of the Copyright Act, the only question remaining is whether e-books can be used as small-scale works. Here, a normative overall view is to be made, which, however, creates difficulty in practice in terms of determining when an e-book is a work on a small scale. The utilisation remains risky in individual situations, but it is not reserved for the case of e-book usage. However, for e-books without fixed paging, there are also no indications in the general agreements of the collecting societies. This legal uncertainty constitutes another obstacle to the use of modern learning media.

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<sup>29</sup> De la Durantaye, supra, note 26, 191.

The technical implementation of a book content once again remains a decisive factor for the copyright-permissible exchange of information. In this regard, the technology dependence of modern creative processes has a direct effect on the statutory balance of interests between authors and users, which must also be considered in legal terms given the demand for the increased application of digital media in education and research. Even if the postulate of technological neutrality itself makes no substantive statements about the balancing of interests, technical developments must not unthinkingly affect copyright.

#### E. Special case of e-lending

Libraries as reservoirs of knowledge are important intermediaries in disseminating information through the collection, preservation and indexing of media. In particular, books have always been read and written off in libraries. New technologies such as photocopying and microfilming have subsequently replaced manual copying. Copyright issues specifically arise in libraries due to the use of copyrighted works for the dissemination of knowledge in book form. The regulation of the use of printed and electronic books is a highly topical issue in the field of lending by public libraries. The consensus in German law is that the time-limited transfer for use of digital content through electronic data transmission is not an act of lending within the purview of Sec. 27 (2) of the Copyright Act<sup>30</sup>. By contrast, based on Directive 2006/115/EC, the European Court of Justice (ECJ) ruled in 2016 that the term ‘lending’ can, in principle, also cover the time-limited transfer for use of a digital copy of a book through electronic transmission<sup>31</sup>. Hence, the national and European perspectives seem diametrically opposed.

#### I. European Court of Justice as a pioneer

The respective dogmatic embodiments of the European and German lending right are the starting point for this apparent divergence. In accordance with Art. 1 (1) of Directive 2006/115/EC, member states shall provide a right to authorise or prohibit the rental and lending of originals and copies of copyright works. The lending right is thus designed as an independent exclusive right<sup>32</sup>. However, Art. 6 (1) of Directive 2006/115/EC stipulates that

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<sup>30</sup> U. Loewenheim, in G. Schricker and U. Loewenheim et al. (eds.), *Urheberrecht. Kommentar* (5th ed., 2017), to 27 para. 16; G. Schulze, in H. Dreier and G. Schulze (eds.), *Urheberrechtsgesetz. Kommentar* (6th ed., 2018), to 27 para. 22.

<sup>31</sup> ECJ, C-174/15, *Vereniging Openbare Bibliotheken* (ECLI:EU:C:2016:856), para. 59.

<sup>32</sup> S. v. Lewinski, in M. Walter and S. v. Lewinski (eds.), *European Copyright Law* (2010), para. 6.1.1, 6.1.6.

this exclusive right may be reduced to a claim for remuneration by the authors. Nevertheless, according to the wording of Art. 1 (1) of Directive 2006/115/EC, the lending right covers only the act of making ‘originals and copies of copyright works’ available for use. Therefore, lending in the sense of Directive 2006/115/EC essentially indicates a tangible exploitation act. Nevertheless, from the ECJ perspective, the rules are also applicable to electronic distribution, even though the e-lending is an intangible act of exploitation. In the case of *Vereniging Openbare Bibliotheken*, the ECJ underlines that electronic lending must fall within the scope of Directive 2006/115/EC to ensure the highest possible level of protection for the author<sup>33</sup>. However, the exploitation that occurs during the electronic lending process could also be covered by Directive 2001/29/EC. In this manner, the act of making available for use could also be subject to the right of making works available to the public pursuant to Art. 3 (1) of Directive 2001/29/EC and the right of reproduction pursuant to Art. 2 of Directive 2001/29/EC. From the standpoint of libraries, this matter is a particular problem because Directive 2001/29/EC does not provide a limitation or exception for the time-limited transfer for use in electronic form, which limits the electronic lending by libraries despite the increasing importance of electronic media works. On the contrary, the member states can provide exceptions to the lending right in accordance with Art. 6 of Directive 2006/115/EC. In this respect, Directive 2006/115/EC also serves to balance the interests of authors with the interests of public libraries that open up access to works for the public and thus contribute to scientific and cultural education<sup>34</sup>. The focus of the question on the applicability of Directive 2006/115/EC to the electronic lending is thus the applicability of the exception rule according to Art. 6 (1) of Directive 2006/115/EC. Only an analogous application of Art. 6 (1) is methodologically possible due to the requirement of a physical transfer of originals or copies according to Directive 2006/115/EC<sup>35</sup>. Such an analogous application to electronic lending may be justified by the purpose of Art. 6 (1) of Directive 2006/115/EC, which is intended to balance the interests of the rights holders with the general interest in scientific and cultural participation. However, this point contradicts the principle postulated by the ECJ to ensure the highest possible level of protection for the author. According to the ECJ, this option is only justified if the public lending of a digital copy of a book is verified to have ‘essentially similar characteristics to the lending of printed works’<sup>36</sup>. The crucial aspect in this case is that ‘the lending capacity of the library concerned does not exceed that which it would have as regards

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<sup>33</sup> ECJ, C-174/15, *Vereniging Openbare Bibliotheken* (ECLI:EU:C:2016:856), para. 46.

<sup>34</sup> S. Nérison, in I. Stamatoudi and P. Torremans (eds), *EU copyright law* (2014), para. 6.66.

<sup>35</sup> M. Stieper, comment on ECJ, C-174/15, 118 *Gewerblichen Rechtsschutz und Urheberrecht (GRUR)* (2016), 1270.

<sup>36</sup> ECJ, C-174/15, *Vereniging Openbare Bibliotheken* (ECLI:EU:C:2016:856), para. 51.

a printed work and, secondly, that lending is made for only a limited period<sup>37</sup>. As a result, the ECJ has opened up the possibility for member states to grant public libraries the same legal power with regard to e-books as they have with printed books.

## II. German doctrine as an obstacle

The scope allowed for a derogation of the lending right pursuant to Art. 6 (1) of Directive 2006/115/EC is completed in German law by Sec. 27 (2) of the Copyright Act. Hence, the author shall be paid an equitable remuneration for the lending of those originals or copies of a work the dissemination of which is permissible according to section 17 (2) if the originals or copies are lent through a publicly accessible institution. The direct linkage of the lending right to the distribution right according to Sec. 17 of the Copyright Act is expressly stated. The lending right is thus limited to the physical utilisation, which is missing in the electronic data transmission as in the case of electronic lending. In this respect, under the German copyright law, libraries still require the permission of the copyright holders for electronic lending.

Nevertheless, with reference to the electronic lending of e-books, German law does not fall behind the legal status required by Directive 2006/115/EC, even after the ECJ judgment in the case of *Vereniging Openbare Bibliotheken*. The mandatory consequence of the judgment is that the member states must provide an exclusive right concerning electronic lending according to Art. 1 and Art. 2 (1) lit. b of Directive 2006/115/EC. These requirements are fulfilled by the German copyright law. The offer of electronic lending by libraries is covered by the right to make the work available to the public according to Sec. 19a of the Copyright Act. In addition, the usage of e-books by the user is regularly covered by the right of reproduction according to Sec. 16 of the Copyright Act. The fact that the German copyright law does not provide any deregulation from the exclusive lending right regarding e-books in accordance with Art. 6 (1) of Directive 2006/115/EC is harmless because this is merely an optional exception. The ECJ has thereby paved the way for the copyright permissibility of the lending of e-books. Under national law, however, libraries still require the license of the copyright holder for the electronic lending of e-books<sup>38</sup>. The German copyright law once again differentiates permissibility between the use of books according to their format.

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<sup>37</sup> ECJ, C-174/15, *Vereniging Openbare Bibliotheken* (ECLI:EU:C:2016:856), para. 52.

<sup>38</sup> On options of the German legislator with regard to the electronic lending, see H. Henke, 'Bestandsaufnahme und Perspektiven des Verleihrechts', in M. Hennemann and A. Sattler (eds.), *Immaterialgüter und Digitalisierung* (2017), 183, at 192.

## F. Practice of the collecting societies regarding e-books

Independent of the specific legal basis, the collective rights management of e-books is similarly subject to special restrictions nowadays. In Germany, the VG Wort is responsible for word authors and their publishers<sup>39</sup>. According to Sec. 3 (1) of the statutes of the VG Wort, its scope of activity includes primarily literary works in the sense of Sec. 2 (1) No. 1 of the Copyright Act. Authors of e-books granted copyright protection as a literary work are thus entitled to exercise their rights through the VG Wort<sup>40</sup>. However, texts must be written as ‘standing text’; texts in a multimedia context cannot be registered at the VG Wort<sup>41</sup>. In this respect, economic participation in the exploitation of the affected works of the respective authors is excluded. This aspect primarily affects the authors of e-books in which multimedia is regularly highlighted as a particular advantage.

Indeed, collecting societies may establish fixed rules for the allocation of revenue through a distribution plan. However, an arbitrary procedure is prohibited in accordance with Sec. 27 (1) of the Collecting Societies Act. Consequently, the possibility to register a work, which does not necessarily result from the distribution plan itself, must not be ruled out arbitrarily. According to the VG Wort, the exclusion of the registration capacity of texts in multimedia contexts is based on the generally unclarified responsibility of collecting societies for multimedia products. It follows that a justifiable reason seems to be given.

In any case regarding the limits according to Art. 5 (2) lit. b of Directive 2001/29/EC and thus also in the case of the private copy of (multimedia) e-books, a fair compensation for the rights holders must be guaranteed. This principle also applies despite the presence of comprehensible reasons against the VG Wort’s participation in the revenue. In accordance with this EU law, due diligence in collecting, managing and distributing the rights revenue required by Sec. 23 sentence 1 of the Collecting Societies Act compels the authors’ financial participation. Ambiguities about the responsibility between collecting societies must not come at the cost of authors. The same stance applies beyond the scope of Art. 5 (2) lit. b of Directive 2001/29/EC. In fact, authors of literary works that are generally within the scope of activity of the VG Wort must also be involved in its revenues, even if their texts are embedded in a multimedia context<sup>42</sup>. This case is true even as the VG Wort’s revenues are

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<sup>39</sup> See the preamble to the statutes of the VG Wort, last amended on 9 June 2018, approved on 7 November 2018, available at: <[https://www.vgwort.de/fileadmin/pdf/satzung/Satzung\\_VG\\_WORT.pdf](https://www.vgwort.de/fileadmin/pdf/satzung/Satzung_VG_WORT.pdf)> (last visited on 22 January 2019).

<sup>40</sup> Also R. O. Graef, *Recht der E-Books und des Elektronische Publishing* (2016), para. 328.

<sup>41</sup> VG Wort, *METIS für Urheber* (version 2.0, 2018), 5.

<sup>42</sup> Detailed Henke, *supra*, note 15, 194.

based on the management of rights to linguistic works that are embedded in multimedia products. This illustrates the model collection agreement between the VG Wort and the authors<sup>43</sup>. According to Sec. 2 of this agreement, the respective granting of rights applies to all the linguistic works of the authorised party, insofar as they were created, co-created or their relevant rights are acquired at the signing of the contract, and those linguistic works created during the term of validity of this contract, or their respective rights are acquired. Linguistic works are therefore subject to the management of rights of the VG Wort, which is not limited in any case. The various general agreements of the VG Wort therefore do not differentiate between pure written works and written works in multimedia products. Even if general agreements are jointly concluded with other collecting societies, there is no exclusion of multimedia works or linguistic works in multimedia contexts under the respective agreements. Consequently, the users also remunerate the usage of linguistic works in multimedia contexts, which is legally required. Therefore, the question of the responsibility for multimedia works or works in a multimedia context may not be charged to the authors or the users. Rather, a stricter standard must be applied to the legality of the distribution of revenue so that the participation of authors of texts in multimedia e-books must be guaranteed in principle. In this respect, the VG Wort's current distribution practice is illegal.

With regard to multimedia e-books, collective rights management could indeed fall into the scope of the VG Bild-Kunst. According to the preamble to its statutes, the VG Bild-Kunst exercises rights in the categories of works of fine art and photography and cinematographic works including similar works<sup>44</sup>. However, especially for works that are included in e-books, distributions are again categorically excluded<sup>45</sup>. The mere publication of a work in an e-book cannot justify the exclusion of the reporting capacity. In this respect, VG Bild-Kunst is acting arbitrarily in relation to the distribution of revenue. Therefore, the VG Bild-Kunst's practice is likewise illegal in terms of e-books.

The collective management of rights generally raises significant barriers to balancing the economic interests of rights holders with the public interest in using e-books. For the authors concerned, this issue increases the incentive for the use of technical protection measures,

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<sup>43</sup> Version of 9 June 2018, available at: <<http://www.vgwort.de/publikationen-dokumente/wahrnehmungsvertrag.html>> (last visited on 22 January 2019).

<sup>44</sup> See the preamble to the statutes of the VG Bild-Kunst last amended on 28 July 2018, available at: <[http://www.bildkunst.de/uploads/media/Satzung\\_2018\\_07\\_28.pdf](http://www.bildkunst.de/uploads/media/Satzung_2018_07_28.pdf)> (last visited on 22 January 2019).

<sup>45</sup> *VG Bild-Kunst*, Merkblatt Buchmeldung, 1, available at: <<http://www.bildkunst.de/service/formulare-und-merkblaetter.html>> (last visited on 22 January 2019).

which completely leaves the balance of interests to the practice of the rights holders and thus regularly to the publishers.

## G. Conclusion

In terms of book culture, in the starting point both the practice of collecting societies and the German copyright law itself are attached to classical printed products. In contrast to its analogue predecessors, the electronic book is thus not lifted out of the circle of other media goods. The e-book as a digital product is treated like other digital goods by copyright law. Under the German copyright law, literature in electronic form is viewed as a private asset rather than a cultural asset, which is contrary to literature in printed form. In the European copyright law, this depiction is already different in the starting point where rules are more neutral to the media. Under the German copyright law, however, this depiction only leads to a selective adjustment in such a way that the book concept of the regulations on orphan works must be based on a broad understanding.

A parallel situation occurs with regard to the lending right: In the opinion of the ECJ, the electronic lending of e-books may be comparable to the lending of printed books. Therefore, a derogation from the exclusive lending right of rights holders is justified based on European law. However, according to national law, the authorisation of the rights holder is still a legal requirement for the electronic lending of digital goods, which is dissimilar to the lending of print works. In the future, the European copyright law could particularly reduce the German copyright law's focus on classical printed matter. This approach would be welcome in view of the demand for a technology neutrality of copyright law. In the meantime, for the possibilities of use by copyright, the issue of whether a book is put on the market in printed or electronic form is a crucial one. Nonetheless, the German collecting societies should at least adapt the collective rights management as soon as possible and where necessary in the realm of multimedia e-books. Altogether, the technological development of book culture can once again sharpen the view for a contemporary adaptation of the copyright.