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COVID-19 and the Libraries: What is left for Private Copying Exception? - A Greek Copyright Law approach

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Abstract:

The present paper deals with copying, which is a tool that renders users' access in library's physical material more efficient as it allows users to repeatedly access, i.e., study the copied material portably, without the need of repeated physical presence within opening hours of libraries' premises and without reserving the physical medium during their presence. However, during the COVID-19 pandemic, what is left for private copying except for the library's physical material, when the only available alternative for users is distant or no access to the library's collection? This paper questions whether Greek Copyright Law in force would accommodate the realization of "distant private copying" of library's physical material by users, especially in view of the fact that in situ access of users has been prohibited or suspended by law.

Index Terms — COVID-19, Libraries, Private Copying Exception, Copyright Law.

INTRODUCTION

1. The main mission of libraries is to provide their users with access to library's material. In the offline environment, access to library's material requires access to physical mediums (typically: printed books, printed journals, maps, photographs and the like), that incorporate intangible works (such as literary, scientific photographic works and so on), i.e., access to tangible (material) copies of works (hereinafter: "physical material"). Access to physical material allows users to perceive (i.e. intellectually access) incorporated works via contemplating, reading or studying them. This, in turn, requires direct physical contact between

physical material and the user. *In situ* access to library's physical material (and, subsequently, access to incorporated works thereto) is subject to unavoidable (pragmatic) restrictions: from library's side, it requires availability of material and adequate premises, capable to accommodate simultaneously all interested users; from user's side, it presupposes commute and physical presence on given location, days and hours.

2. The possibility for users to copy library's physical material, especially¹ by means of reprographic equipment constitutes the principal way for overcoming some of the above limits in accessing the (physical) material of library's (offline) collection². In fact, the procurement of a copy of a work, via *photocopying*, *scanning* or *photographing*, enhances user's access to the copied library's material, to the extent that the copy (photocopy, scanned file, photography) allows the user to repeatedly access, i.e. contemplate, read and study the copied material portably, without the need of (repeated) physical presence within opening hours of libraries' premises and without reserving the physical medium during his presence. As a consequence, copying is a tool that renders users' access in library's physical material more efficient. Besides, even if this is a case-dependant question, usually only some of library's resources are available in digital form. Thus, accessing and copying of library's physical material remain essential means both for the satisfaction of users' informative needs and for the fulfillment of library's mission.

3. From a copyright law perspective, copying of libraries' physical material by means of reprographic equipment (photocopying, scanning, photographing etc) constitutes a form of reproduction which is subject to copyright law restrictions, in case that copied material is copyrighted³. In fact, the reproduction right confers upon the authors and secondary rightholders (e.g. publishers, research organizations, Universities) the exclusive right to authorize or prohibit the fixation and direct or indirect, temporary or permanent reproduction of their works by any means and in

¹ Hand-copying, although still conceivable, is nowadays a marginal copying method, given the development and widespread availability of technical/mechanical means of copying.

² An alternative to this would be public lending services.

³ And this, notwithstanding the fact that reproduction may lead to the creation of a derivative work, authored by the copyist, such as an original photograph of library's material. It shall also be noted

that material may be additionally or alternatively protected by related rights (such as the publisher's right over printed editions of art. 51 Law No 2121/1993). For simplicity reasons, the present paper focuses only on physical material protected by copyright law. The analysis extends also to physical material protected by related rights, to the extent that, according to art. 52(b) Law no 2121/1993, copyright limitations and exceptions apply accordingly.

any form, in whole or in part (art. 3§1(a) of Greek Copyright Act- Law No. 2121/1993, fully aligned with art. 2 of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society – hereinafter: “Directive 2001/29”). Under this broad definition, any copy of copyrighted material made by use of any means other than “brain copying” in “carbon memory”, made during intellectual accessing of works⁴, would be subject to prior authorisation, unless if the conditions of an exception/limitation to that right were met, according to applicable law. As a consequence, copying of libraries’ physical material by users could be lawfully made, without prior authorisation by authors/rightholders, under application of an exception or limitation.

4. In the context of satisfaction of user’s personal informative needs, the most suitable exception is the exception of “Reproduction for Private Use” or *private copying* exception, introduced by art. 18§1 of the Law No. 2121/1993. As it will be explained below, from a legal perspective, private copying exception allows reproductions of library’s protected physical material in the benefit of library’s users, insofar its requirements are met. Moreover, any private copy, shall not conflict with normal exploitation of the work and shall not unreasonably prejudice the legitimate interests of the rightholder, according to art. 27C Law No 2121/1993 (“three-step test”, transposing art. 5§5 of Directive 2001/29⁵) and its specific application by art. 18§2 of the Law No. 2121/1993.

5. COVID-19 pandemic and the lockdown measures that have been implemented in order to cope with spreading of the corona-virus, have seriously affected the regular operation of libraries and, most crucially, the accessibility of their premises (and, subsequently, of their physical material) by users. In fact, since the outburst of the COVID-19 pandemic in Greece (March 2020) until today (July 2021), i.e. a period of about sixteen (16) months, the *in situ* access of users to library’s physical material has been prohibited or suspended for more than the half of that period (*circa* nine (9) months), as a preventive administrative measure for safeguarding public health (I). Under these circumstances, private copying of libraries’ physical material was practically not feasible, for reasons that fall outside user’s sphere and control.

6. Therefore, during COVID-19 pandemic, what is left for private copying exception with regards library’s physical material, when the only available alternative for users is distant or no access to library’s collection? This paper questions whether Greek Copyright Law in force would accommodate the realization of “distant private copying” of

library’s physical material by users, especially in view of the fact that *in situ* access of users has been prohibited or suspended by law (II) and draws some concluding remarks and recommendations on how to caution (library) users’ benefits related with private copying, when *in situ* access in library’s premises and material is jeopardized for public health reasons (III).

I. USER ACCESS IN LIBRARIES DURING COVID-19 PANDEMIC IN GREECE

7. The operation of libraries, including the access of users to premises and physical material has been severely affected by administrative measures aiming at facing COVID-19 pandemic in Greek territory. In particular, operation of libraries has been (temporarily) *prohibited [sic]* in its entirety throughout the country, for preventive reasons of public health, initially by means of Joint Ministerial Decision No. **18149/13.3.2020** effective from 14/3/2020⁶. The above prohibition covered all libraries’ functions and has been extended until 1/6/2020 (i.e. almost three months). In fact, according to Joint Ministerial Decision No. **33465/31.5.2020**⁷ libraries’ premises have become accessible again for in-person visits of the public, with the reserve of implementation of precaution measures such as wearing of face-mask, limitation of simultaneously present persons in library’s premises according to their surface and other. By means of Joint Ministerial Decision No. **69543/31.10.2020**⁸ (art. 22) “The public and municipal libraries, National Library of Greece (N.L.G.) and reading rooms of General State Archives are operating normally with obligatory use of face-mask by everyone and by maintaining distance of one meter and a half (1,5) between users [...]”⁹. However, few days later, the operation of Libraries’ (including academic libraries’ and N.L.G.’s) reading rooms and premises and access of their users thereto have been suspended in the entire Greek territory on 7 November 2020, according to the Joint Ministerial Decision No. **7134/2020**¹⁰, for fear of the relapsing corona-virus spreading. The suspension was initially planned until 30 November 2020. Nonetheless, the above restrictions have been maintained until 23 May 2021 (more than six (6) months).

8. On 24 May 2021, according to Joint Ministerial Decision No **31950/21.5.2021**¹¹, libraries falling under the surveillance of Ministry of Education and Religious Matters (i.e. school and academic libraries), have initiated again their operation, with the exception of reading rooms, which remained inaccessible for users until 13 June 2021. In addition, since 14 June 2021, by means of Joint Ministerial Decision No 36587/2021¹², all categories of libraries have become accessible for the public (including their reading

14.3.2020 until 27.3.2020 [...] 3. Of public, municipal and private libraries, of National Library of Greece (N.L.G.), of reading rooms of General State Archives and of archives. [...]”.

⁷ O.J. B 2087/31-05-2020.

⁸ OJ B 4810/31.10.2020.

⁹ Unofficial translation of the author.

¹⁰ O.J. B 4899/6.11.2020.

¹¹ O.J. B 2141/22.05.2021.

¹² O.J. B 2476/10.06.2021.

⁴ On that issue and its relation with copyright law, see Th. Chiou, “Copyright Law and Algorithmic Creativity: Monopolizing Inspiration?” in Ph. Jougoux, C. Markou, T. Prastitou-Merdi, (Eds.), EU Internet Law in the Digital Single Market, Springer, 2021, p. 265 ff. and in particular 270 ff.

⁵ Originating from Article 9§1 of the Berne Convention (1886).

⁶ O.J. B 855/13.03.2020. According to art. 1 (3) of said decision: “[We decide] [t]he temporary prohibition of operation, in the entire Greek territory, for preventive reasons of public health, for the time period starting from

rooms). In both cases, users' access in libraries is subject to the terms of art. 22 of joint ministerial decision 69543/31.10.2020 (see above), whose duration has been retroactively extended until 31 July 2021. The process of libraries' re-operation is gradual¹³ and any visit to libraries' premises is made upon prior arrangement (usually via email or telephone) of appointment and (reduced number of) users are served on a priority basis. This means that, even after the (definite or temporary-this remains to be confirmed by future developments), re-operation of libraries' premises for the public, access of users remains subject to qualitative and quantitative restrictions which are, again, implemented preventively, for public health reasons, as long as the COVID-19 pandemic is still at stake.

II. IS "DISTANT PRIVATE COPYING" OF A LIBRARY'S PHYSICAL MATERIAL COVERED BY PRIVATE COPYING EXCEPTION?

9. The formulation of an answer to the main question of this paper could be given on the basis of an assessment of "distant private copying" under art. 18 Law No 2121/1993 **(B)**, which requires a prior analysis of current private copying regime **(A)**, that applies in case of copying of a library's physical material by their users.

A. Analysis of private copying exception regime under Law No 2121/1993

10. Greece is listed among the jurisdictions that provide for a private copying exception¹⁴. According to the text of art. 18§§1 and 2 of Law No 2121/1993, private copying of protected works (and use of this copy), including private copying of a library's physical copyrighted material, is freely permissible by law, insofar some requirements are fulfilled **(1)** and some limits in benefitting the exception are not exceeded **(2)**. Some controversies related with the interpretation of some requirements need also to be taken into account, in order to offer a complete image of current private copying exception regime **(3)**, also applicable in case of copying of a library's physical material by library's users.

¹³ See for instance the two-phase re-operation of National Library of Greece, <https://www.nlg.gr/news/stadiaki-epanaleitoyrgia-ethnikis-vivliothikis-tis-ellados-v-fasi-jun21/>.

¹⁴ Private copying exception of art. 5 § 2 (b) of the Directive 2001/29 is not mandatory for Member-States. For a European perspective of private copying exception see, among others, S. Karapapa, *Private Copying*, Routledge, 2012.

¹⁵ Although private copying is not subject to remuneration payable by the beneficiary (copyist/user), paragraphs 3 ff. of articles 18 of the Law No 2121/1993 establish a fair compensation system in favor of several categories of rightholders, in case that private copying is made with the use of technical means ("handmade" copy is not subject to fair remuneration), such as audio or video recorders or audio and video recorders, magnetic tapes or other material suitable for the reproduction of sound or images or sound and images, including digital reproduction devices and

I. Requirements for lawful private copying of library's material

11. According to art. 18§1 first sentence of the Law No 2121/1993:

"[...] the reproduction of a lawfully published work shall be permissible without the author's consent and without remuneration¹⁵, insofar the reproduction [of the work] is intended for the private use of the person who makes this reproduction.¹⁶"

12. The following positive conditions derive from this provision:

1) Reproduction of a (protected) work. First, private copying exception is relevant only with regards to the reproduction right of protected works (art. 3§1 (a) of Law No 2121/1993; art. 2 of Directive 2001/29). On the contrary, private copying exception does not touch, in principle, other economic rights, such as distribution right, communication to the public, lending right etc.¹⁷. As the Law does not distinguish, private copying exception covers, in principle, *any type of reproduction* of a copyrighted work included in library's physical collection, i.e. direct or indirect, temporary or permanent, by any means (e.g. via the use of a technical device, such as photocopying or photography, but also hand-copy, hand-design¹⁸ etc.) and in any form (meaning with or without fixation in a tangible medium, e.g. analogue or digital), in whole or in part. Moreover, the Law does not introduce any restrictions related with the location or context of realization of the reproduction of the work. As a consequence, there is no particular regime regarding private copying of library's physical material within library's premises; the general regime of private copying exception shall apply.

2) The reproduction shall concern "lawfully published works". This condition has been subject of controversial interpretation as to the meaning of lawful publication of the source (in our case, the physical material of the library) of the private copy (see below §15). *De minimis* and under any possible interpretation adopted (*pro auctoris* or *pro usoris*), reproductions based on private copying exception would not be allowed in case of unpublished works or works published without the consent of the author/rightholder, as an expression of exercise of the moral right of publication (art.

media, in particular, CD-RW, CD-R, DVD and other storage media, computers, portable electronic devices (tablets), smartphones and others (so called "blank-tape levy"). The amount of the remuneration is calculated upon a percentage of the market value of each mean, which varies according to the type of technical mean at stake. This compensation is paid by producers or importers of technical means and is mandatorily collected and distributed to its beneficiaries (authors, publishers, producers, performing artists) by collective management organizations.

¹⁶ Unofficial translation of the author.

¹⁷ However, some acts that go beyond reproduction of the work may be covered by private copying exception, to the extent that they are part of private use of the copy made under private copying exception regime, such as "distribution" or lending of the copy by the copyist to persons that are connected with family links (see below).

¹⁸ See also in that regard, G. Koumantos, *Copyright Law*, 8th ed., Sakkoulas, 2002, p. 308 and 309.

4§1 (a) of the Law No 2121/1993¹⁹). This *de minimis* condition would usually be fulfilled in case of libraries' physical material.

3) The reproduction of the work shall be "intended for the private use of the person who makes this reproduction".

This condition determines various aspects of the scope of private copying exception. To begin with, from a *ratione personae* point of view, since the law does not specify, the exception must be regarded as benefiting all categories of "persons who make reproductions intended for private use", i.e. all categories of users/copyists, including library's users. Thus, the benefit of private copying is reserved for all users of protected works. However, the beneficiary of the private copying exception/copyist, and, accordingly, the beneficiary of the work/user (via the copy produced) shall always correspond to a *natural person*²⁰.

Moreover, reproduction of works would be lawful, according to the text of art. 18§1 Law No 2121/1993, insofar it is made for purposes of *private use*. First of all, even if the title of art. 18 and wording of the provision in question are not explicit in that regard, the intended private use mentioned in art. 18§1 refers to the use of *the reproduced work, via the vehicle produced copy*²¹. As a consequence, the reproduction allowed under private copy exception shall be considered as functional, i.e. connected with the private use of the reproduced work.

The notions of "use" and "private" are not defined in the Law, even though their definition is apparently crucial for implementing the exception, including in library context. The qualification of "private" should be interpreted as the opposite of "public use", in the sense of art. 3§2 Law No 2121/1993. According to the latter:

*"As public is considered any use or performance or communication of the work that renders the work accessible to a circle of person that exceeds the narrow circle of family and the immediate social environment [...]"*²².

Therefore, the notion "private use" would cover both the use of reproduced works made by the library's user

him/herself (i.e. personal use of the work/ personal benefit taken from the work via the produced copy) and the use made by persons connected with friendly of family links with the copyist/user of the library²³. As to the latter type of use, private copying exception would accommodate also acts that lay beyond the mere reproduction of the work and that are necessary for rendering the work accessible to intimate persons²⁴, via the copy produced, such as private "distribution"²⁵, communication or lending of the (private) copy of the work²⁶.

Given the above definition of the notion "private" and pursuant a textual and teleological interpretation of the provision in question, the intended use of the reproduced work in the framework of private copying exception would primarily correspond to *intellectual access or benefit abstracting* from the work by the library's user, i.e. *passive enjoyment of the work*, such as contemplation, reading, studying, generation of inspiration or deduction of input for the creation of other works, via the (use of) copy produced²⁷. This type of use of works fall outside the scope of copyright monopoly²⁸. Thus, private copying exception refers to the reproduction of the work that leads to the creation of a copy that will serve as vehicle for using (in the above sense) the reproduced work. In sum, private use would correspond to the use of the reproduced work via the produced copy by library's user, for purposes of passive enjoyment of the user or of persons pertaining to the narrow circle of family and the immediate social environment (private purposes).

By contrast to the above, private copying exception would not accommodate acts of public use (in reality: acts of exploitation) of the work, i.e. acts that render the work (via the copy produced) accessible by persons laying beyond the narrow circle of the family and the immediate social environment of the library's user (such as distribution, rent, or public lending of the copy intended for private use)²⁹. From the above it may also be derived that private use is naturally not compatible with commercial use of the work via distribution of the copy³⁰. Similarly, the Law explicitly

¹⁹ Art. 4§1: "The moral rights shall confer upon the author notably the following rights: a) the right to decide on the time, place and manner in which the work shall be made accessible to the public (publication) [...]"

²⁰ This is, besides, explicitly provided in art. 5§2(b) of the Directive 2001/29.

²¹ Under this approach, art. 18§1 should read: "[...] *the reproduction of a lawfully published work shall be permissible without the author's consent and without remuneration, insofar the reproduction [of the work] is intended for the private use [of the work] by the person who makes this reproduction.*" and its title: "Reproduction for private use of the reproduced work".

²² Unofficial translation of the author.

²³ K. Christodoulou, *Copyright Law*, Nomiki Vivliothiki, 2018, no 382, p. 155. Following that distinction, personal use would correspond to a subsystem of private use.

²⁴ In that case, however, there is a question raised, related with the type of use that those persons would be allowed to make: private in the above sense (i.e. covering also their intimate persons) or strictly personal?

²⁵ The notion of distribution, according to art. 3 § 1 (d) of the Law No 2121/1993, is connected with the existence of public, i.e. persons that exceed the narrow circle of family

and the immediate social environment. This is why the term "distribution" is not used in the legal sense in this context.

²⁶ In that regard, the use would be considered as private but not personal. Cf. Koumantos, *op.cit.*, p. 306, where it is argued that "the private use may correspond either to the passive use of the work, for enjoyment or for the personal benefit of the user or the active use, with modes of use similar to those connected with exercise of copyright [economic] rights".

²⁷ In that regard, use of the work and use of the (private) copy would practically coincide, to the extent that the use of the work presupposes the use of the copy that embodies it, with the nuance that use of the work is based on intellectual access and use of the copy on physical access.

²⁸ See, among others, Koumantos, *op.cit.*, p. 306: "The freedom in passive use of the work does not constitute, literally, a limitation of copyright law but, rather, its natural limit [...]" and *ibid.* p. 307, where the author mentions that "passive use [of a work] is not a mode of exploitation [...]"

²⁹ Christodoulou, *op.cit.*, no 382, p. 155.

³⁰ Cf. Christodoulou, *op.cit.*, no 379, p. 154 and no 382, p. 155. The marginal case of onerous private distribution or private renting (such as the case of a copyist that renders the copy accessible to the narrow circle of family or immediate social environment against the payment of a fee),

clarifies in art. 18§1, second sentence, that no private use may be established in case that reproduced works are intended for use within the framework of a business, a service or an organization. Indeed, in these cases, the personnel could not be characterized as belonging into a narrow circle of family or immediate social environment. In addition, the benefit from the use of the work will be related with the purposes of a legal person's operation and not with the personal benefit of the copyist (i.e. the employee or executive of the business/organization)³¹.

2. Limits in the benefit of private copying exception

13. Even if the above conditions deriving from art. 18§1 Law 2121/1993 are cumulatively met, the benefit of private copying exception, also in case of copying of a library's physical material, is permissible "with the reserve of following paragraphs" of the same article. In particular, art. 18§2 of the Law No 2121/1993 introduces restrictions in realization of private copying, basically on the grounds of a specialized application of three-step test clause (art. 28C [28Γ] Law No 2121/1993). As a consequence, private copying would not be permissible in case that it would conflict with the normal exploitation of the work and/or it would (unreasonably) prejudice author's interests. In addition to that, article 18 § 2 of the Law No 2121/1993 mentions three indicative cases, as illustrations of not acceptable private copying cases on the basis of three-step test application. All of them are related with private copying of a specific type of work (architectural work, graphical representation of musical work, works of visual art):

"2. The freedom to make a reproduction for private use is not valid in cases where such an act conflicts with the normal exploitation of the work, or where the authors' legitimate interests are prejudiced, and notably:

- a) in the case where an architectural work in the form of a building or any similar construction is reproduced,
- and,
- b) when technical means are used for the reproduction of a work of visual arts which circulates in a restricted number of copies, or when the reproduction is a graphical representation of a musical work."

In these cases, the realization of copies, even if they are intended for private use as explained above, they would require prior authorisation of the author/rightholder. From library's perspective, the exclusion of private copying exception in case of reproduction of graphical representation of musical works presents greater interest (e.g. in case of music libraries).

14. Beyond these cases, and the probably straightforward case of realization of an integral copy of a work for private purposes (e.g. photocopying of all pages of a book would abort the purchase of a copy)³², there is no uniform or predetermined standard related with the confirmation of conflict of private copying exception with normal exploitation of the work or with legitimate interests of the author/rightholder³³. This is why, in addition to the above, copying of libraries' material (either copyrighted or not) is usually framed under the (contractual) terms of Library's Regulations and Policies. In most cases³⁴, the terms contain quantitative and/or qualitative restrictions related with the entitlement of library's users to realize (private) copies of Library's material (such as the provision for lawful photocopying up to a maximum number of pages or up to a fixed percentage of pages of a book, the exclusion of certain type of private copying equipment and others). In the absence of a concrete rule or standard in this matter, these terms reflect in reality Library's adopted "safety net" towards private copying of their material by users, as they predetermine the cases where private copying would not conflict with normal exploitation of the work and would not unreasonably prejudice the legitimate interests of the rightholders of copied material, according to art. 27C Law No. 2121/1993.

3. Controversial aspects

15. Last, there are at least two aspects of applicable regime provided in art. 18§1 first sentence of Law No 2121/1993 that remain controversial. On the one hand, it remains discussable³⁵ whether the meaning of "lawful publication" refers to the publication of a work *per se* (i.e. willful rendering of a work as public) or it goes beyond that and it refers to the lawful character of the *source of the copy*, which, in case of physical material of libraries, would require that the physical carrier accessed by the library's user and used as source for making a copy, has initially been disseminated in the market with the consent of the author/rightholder.

16. On the other hand, it is disputed whether the user of the copy and the copyist shall always coincide. This controversy touches significantly libraries and especially, photocopying of their physical material by users. The question here is whether a private copy (intended for the private use of the library's user, as described above) could be produced by a proxy (third person) upon user's command. According to the dominant position in theory, supported also by wording of the provision ("*reproduction [...] for the private use of the person who makes this reproduction.*") and the Explanatory

even if it would be covered by the notion of private use, it would probably not surpass the three-step test.

³¹ This is why business or professionals may be exempted from the fair remuneration of art. 18§3 (see above footnote No 15), following the procedure introduced in art. 18§11 Law no 2121/1993, if it is proven that the technical means that are adequate for copying have been used only or mainly for professional (i.e. not private) purposes. A marginal scenario remains in case of reproductions of a library's physical material made by natural persons that are self-employed sole traders, such as a lawyer- user of the library of its Bar

Association, for their business purposes. Favorable in coverage of this case by private copying exception, Christodoulou, *op.cit.*, p. 159, footnote No 70.

³² Koumantos, *op.cit.*, p. 307.

³³ Koumantos, *op.cit.*, p. 307.

³⁴ Of course, in some other cases, (private) copying may be partially or totally prohibited, especially for reasons related with the conservation of the tangible medium.

³⁵ For an overview see, among others, Christodoulou, *op.cit.*, Nos 383 ff., pp. 156-158.

Report of the Law No 2121/1993³⁶, the private use of the copy of the work shall be made by the copyist himself³⁷ (e.g. by use of self-service photocopying / scanning devices in library's premises). As a consequence, the reproduction of a work intended for the private use of a different person (the user) than the copyist (e.g. a library's agent), would not be covered by private copying exception.

17. According a different, more pragmatic approach towards the text of art. 18§1 first sentence of Law No 2121/1993, it is indifferent whether the library user proceeds in the reproduction himself or via a proxy, who, however, acts as mere executor of orders and directions of the user³⁸. This approach seems also supported by CJEU case-law, according to which *"in order to rely on Article 5(2)(b) [private copying exception of Directive 2001/29], it is not necessary that the natural persons concerned possess reproduction equipment, devices or media. They may also have copying services provided by a third party, which is the factual precondition for those natural persons to obtain private copies"*³⁹. Under this approach, the realization of copies of library's physical material by a library's agent or service, using reproduction equipment of the library (such as photocopying or scanning devices), under the initiative and orders of a library's user and intended for his private use, would also be qualified as private copying.

18. In sum, according to the applicable law, private copying of library's physical material would be permissible without prior authorisation and without remuneration, insofar: a) all positive conditions are cumulatively met, something which is also subject to different interpretations, as far as it concerns the above controversial aspects and b) the limits of the exception are not fulfilled. Under these circumstances, distant copying of libraries' physical material, made under the order of users, would it be covered by private copying exception?

B. Assessment of "distant private copying" under art. 18 Law No 2121/1993

19. "Distant private copying" of libraries' physical material would correspond to a function or service of the library offered to library's users, by means of which the library's user could benefit of the exception of private copying (ie. copy intended for private use, made without authorisation and without remuneration), without the need of physical presence and access to the physical material. This could be possible in case that the library would act as a proxy/intermediary in accessing and realizing (partial) reproduction of works upon user's initiative and orders and the user would receive the copy for his/her own private use also in distance (e.g. via email, fax or via a platform on library's website).

20. From a technical point of view, distant access and private copying of library's material requires respective technical infrastructure available on both user's and library's sphere (e.g. internet connection and terminals, in case that distant private copying is made via email). Beyond technical (the need of certain equipment) or pragmatic (a minimum of awareness of the structure and content of the material, such as pages, chapters etc.) restrictions, "distant private copying" could function as substitute for *in situ* access-dependent private copying of library's material by users. In fact, "distant private copying" would allow library's users to make use of the benefit deriving from private copying exception with regards library's physical material and would enable the satisfaction of user's informative needs when library's physical material is practically inaccessible, like in case of lockdown due to COVID-19 pandemic. Within that context, distant access models of physical material have been adopted by some Greek Libraries during lockdown⁴⁰.

21. However, "distant private copying" would not be admissible under Greek copyright law, even if the conditions of lawfully published work and of intention of private use are fulfilled. First, the "distant private copying" requires the intervention of a distant proxy, who will physically access the selected material and proceed to the realization of the copy in library's premises, under the orders of the user. In that

³⁶ P. 4, where it is mentioned that "[...] it is required that the reproduction is made by the user himself".

³⁷ In that regard, D. Kallinikou, *Copyright Law and the Libraries*, 2007, Ed. P.N. Sakkoulas, p. 70; G.- A. Zannos, "Article 18" in L. Kotsiris & E. Stamatoudi, *Copyright Act. Article-by-Article Commentary*, Sakkoulas Ed., Athens-Thessaloniki, 2009, p. 478; A. Manthos, *Copyright Law*, Nomiki Vivliothiki, 2015, p. 221.

³⁸ In that regard, M.-Th. Marinos, *Copyright Law*, Sakkoulas Editions, 2004, p. 223; *Idem*, "Some remarks regarding the role of conventional public libraries and of public digital libraries within the system of Law No. 2121/1993", *Elliniki Dikaosyni*, 1998, p. 1483 ff. and in particular p. 1487; Christodoulou, *op.cit.*, p. 156; more reserved, A. Papadopoulou, "Reproduction via photocopying in libraries and copyright law issues", *DEE*, 2006, p. 345.

³⁹ CJEU, judgment 29 November 2017, VCAST Limited v RTI SpA, C-265/16, para. 35, referring to judgment of 21 October 2010, Padawan, C-467/08, para. 48.

⁴⁰ See for instance the notice from the Athens Law School Library, dated 03.04.2020, available at: <http://law.lib.uoa.gr/nea->

case, such copying would be qualified as private, only in case that the flexible, not dominant, approach *vis-à-vis* the need for identification between copyst and user is adopted (see above § 17).

22. But most importantly, distant private copying entails the realization of acts that are not covered by reproduction right, in a context which exceeds the narrow circle of the family or of the immediate social environment. In particular, the provision of distant access⁴¹ to the copy would amount in an act of distribution (if the copy, e.g. a photocopy, is sent with analogue means by the library to the user) or act of communication (in case of digital distribution of the ordered copies, e.g. in digital files) made by the library, far beyond its reproduction for private purposes⁴². In fact, “distant private copying” entails public use of the work (distribution or communication to the public), given that the library’s agent and library’s user do not belong in the same narrow circle of family or immediate social environment. The fact that the use of the work by the user, via the recuperated copy, would be private does not disqualify the above public use. As a consequence, “distant private copying” of library’s physical material would be a library’s function that requires prior authorisation of the author/rightholder⁴³.

III. CONCLUDING REMARKS & RECOMMENDATIONS

23. The pandemic of COVID-19 and the subsequent restriction of *in situ* access in libraries’ premises have diminished the possibility for library’s users to benefit from private copying exception with regards library’s physical material. In fact, the exception of private copying in the framework of libraries, according to art. 18 of the Law No 2121/1993, implies the direct contact of the user with the physical material, and, consequently, presupposes the ability of physical presence of the user in library’s premises, even in case that the realization of the reproduction via a proxy would be admitted. “Distant private copying” is not covered by private copying exception as the distant procurement of the user with the copy would entail public use of the reproduced work (made by the library). As a consequence, private copying exception is not the appropriate nor sufficient mechanism in order to accommodate distant copying of library’s material for private use of the copyst/library’s user, during the time of COVID-19 pandemic (and beyond).

24. Given the above, benefit of copying library’s physical material for private use, and, subsequently, the enhanced access to copied works deriving therefrom would be excluded for library’s users, as long as access of the user/copyst to the material is not possible, due to exceptional circumstances produced by COVID-19 pandemic and libraries are not licensed by rightholders to perform “distance private copying” for their users. The fact that these are extraordinary situations or parameters that lay outside user’s sphere of control does not affect the outcome from the application of current private copying exception regime. Within this framework, it seems that the balance between users’ and rightholders’ interests, as reflected in private copying exception applied in the framework of libraries, is impaired⁴⁴.

25. Inability of library’s users to benefit private copying exception, due to the impossibility of *in situ* access in library’s premises and material, should be remediated before the eventual adoption of additional precautionary measures in order to face the so-called 4th wave of COVID-19 pandemic which is apparently arriving in the weeks or months to come. In that regard, the following recommendations could be made:

- 1) Libraries shall be considered as a first-need service for the public⁴⁵. Therefore, access of users to library’s premises, even during lockdown, should be maintained. In that event, suspension or prohibition of their operation shall be considered as an *ultimum refugium* solution, in favor of other measures referring, among others, to use of face-mask, limited number and duration of simultaneous presence of users, appropriate handling of physical material.
- 2) Licensing solutions should be offered by rightholders (eventually via a representative Collective Management Organisation), in order to authorize “distant private copying” of library’s material, undertaken by libraries for the benefit of their users. This licence would function as an “extension” of private copying exception and would cover both reproduction and distribution or communication to the public of copied works intended for the private use of the user. Such licence should provide equal terms of use with those imposed by current legislation and library’s regulations with regards *in situ* private copying of library’s physical material made by users, and would be activated in case that access to library’s premises (and physical material) is suspended or prohibited, such as in case of lockdowns

⁴¹ The answer would probably be different in case of a “take away” system, where user would recuperate the copies by accessing library’s premises (e.g. by accessing a personal locker), of course insofar the realization of the copy via a proxy is considered as being covered by the scope of the exception (see above §17).

⁴² In that regard, Th. Chiou, “Copyright Law, COVID-19 and Libraries: Is the satisfaction of informative needs quarantined?”, 12 May 2020, IPrightsGR, available at: <https://www.iprights.gr/gnomes/311-pneumatiki-idiokthsia-covid-19-kai-vivliothikes-i-ikanopoiisi-pliroforiakon-anagkon-se-karantina-dikigoros-pneumatikon-dikaionaton-theodoros-chiou>; V. Strakantouna & Th. Chiou, “Copyright Law, distance research and teaching and the role of Academic Libraries in

times of pandemic”, 2020, available at: <https://lekythos.library.ucy.ac.cy/bitstream/handle/10797/26917/26psab011a.pdf?sequence=18&isAllowed=y>, §11.

⁴³ Cf. Chiou, *op. cit.*

⁴⁴ See also in that regard, Strakantouna & Chiou, *op. cit.*, §20.

⁴⁵ Cf. in that regard, the French Decree No 2021-217 of 25 February 2021 « modifiant les décrets n° 2020-1262 du 16 octobre 2020 et n° 2020-1310 du 29 octobre 2020 prescrivants les mesures générales nécessaires pour faire face à l’épidémie de covid-19 dans le cadre de l’état d’urgence sanitaire », Official Journal No 0049, 26 February 2021, according to which bookstores would remain open even during lockdown as part of necessary stores.

due to public health reasons. Under this licence, libraries would be in charge of monitoring the respect of private copying exception modalities (such as quantitative limitations in copying), according to the Law and library's regulations and they should permanently erase any copy created and eventually stored or saved in their premises or systems, within the framework of "distant private copying".

- 3) Transition towards equivalent ability of private copying of library's material both *in situ* and in distance could be complemented by enhancement of digital public lending of library's material, on the basis of CJUE's case-law *Vereniging Openbare Bibliotheken κατά Stichting Leenrecht* (judgment of 10 November 2016, C-174/15).

26. In an era where several activities and services, including work, education and research, were (and probably will be) forced to run and be conducted remotely, access to libraries' physical material and respective legal framework and practice shall also be adapted accordingly and transit towards a distance-led environment. The established balance of interests and user's benefits, according to copyright exceptions, including private copying exception, should remain unaffected, even if *in situ* access to library's protected physical material is suspended or prohibited.

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