Kluwer Copyright Blog

Copyright Levy on Storage Media goes Cloud?

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The story of Austria's copyright levy on storage media (storage media levy, briefly "SML") is not over: In its latest chapter, the Austrian courts – and now also the Court of Justice of the European Union ("CJEU") – have to deal with the Austrian legislation once more and this time with a view to cloud server space located abroad but offered to Austrian private individuals. According to § 42b of the Austrian Copyright Act ("ACA"), creators are entitled to specific tariffs where one of their works that is transmitted via broadcast, made available online or offered on a commercially made storage medium is expected to be copied onto a storage medium for an individual's own or private use. Under § 42b ACA, companies that commercially put storage media onto the Austrian market (be it from Austria or from abroad) for the first time are the principal debtors owing the SML to the competent Austrian collection society; retailers are liable for the SML as guarantors.

In the present case, pending at the Vienna Appellate Court ("VAC") under docket no 33 R 50/20w of 7 September 2020, the crucial question is whether storage media built into cloud servers located abroad are also subject to the Austrian SML when they make their offers towards Austrian customers. More specifically and from a legal language point of view: does the term "putting on the market" include not only selling physical storage media such as hard disks, but also the offering of cloud storage space in Austria?

After the Vienna Commercial Court ("VCC") denied the competent collecting society's (i.e. AUSTRO MECHANA's) claim in first instance, the following arguments were on the table before the VAC, bearing in mind that the defending cloud provider advertised its "HiDrive" offer inter alia as follows: "[our cloud storage] *offers enough space for saving your photos, music and films centralized at one location*".

The collecting society's principal arguments were as follows:

- The term "putting on the market" is not exclusively aimed at physical distribution but deliberately leaves room to also include all processes which result in the provision to users of storage space for their own or private use. Furthermore, § 42b ACA also clarifies that it is irrelevant whether the "putting on the market" originates from Austria or from abroad.
- The wording of § 42b ACA was deliberately phrased in a general way. Hence, the

SML is applicable to storage media that are commercially put on the Austrian market in whatever form and manner. Consequently, the provision of cloud storage space is subject to § 42b ACA.
- With regard to the SML, the Austrian Supreme Court has previously held that the specific wording of an Austrian legal provision is still open to an interpretation in compliance with the underlying EU Directive, even where such an interpretation may go somewhat beyond the specific Austrian language. Also, the CJEU requires such a compliant interpretation.

The key arguments raised by the defending cloud provider were as follows:

- The SML's applicability to cloud storage space cannot be derived from the ACA's current language. Rather, the Austrian legislator has deliberately not implemented such an SML in full awareness of the relevant technical possibilities.
- Cloud services and physical storage media cannot be compared. Interpreting § 42b ACA in such a way that it also applies to cloud services is impossible: No storage media are put on the market, only storage space is offered. The Defendant does not sell or rent out physical storage media in Austria. The Defendant only offers storage space hosted on their servers in Germany.
- The Defendant has already paid a storage media levy indirectly because the corresponding German levy was already priced into the hard disks obtained from German retailers/importers. Furthermore, the Austrian users have also already paid the SML in Austria because in order to be able to upload anything into the cloud they require a local storage device. A further levy would lead to double or even triple taxation.

The VAC held that the Austrian rules must be interpreted in line with the underlying EU Information Society Directive 2001/29/EC (see this link, only available in the German language). Therefore, and in contrast to the VCC's earlier judgment, neither the language of Austria's transposition nor the Austrian legislator's intentions are exclusively relevant. In this context, the meaning of the term "on any [storage] medium" as laid down in Article 5 para 2 lit b) of that Directive is crucial. This is further supported by the CJEU's case C-265/16, VCAST, where the CJEU ruled that storing copyright-protected content in the cloud is an act of exploitation that is reserved for the creator.

Consequently, the VAC stayed the proceedings and asked the CJEU to respond to the following questions:

Question 1: Is the term "on any medium" as laid down in Article 5 para 2 lit b) of Directive 2001/29/EC to be construed in such a way that it also covers servers on which third parties offer storage space to individuals for their private use, which the customers use for copying via storing ("cloud computing")?

Question 2: If question one is affirmed: Is Article 5 para 2 lit b) of Directive 2001/29/EC to be construed in such a way that its provisions are also applicable to the levy regulations of § 42b ACA to the extent the above-mentioned "cloud computing" storing method is used?

If the CJEU answers both questions with “yes”, cloud providers will potentially face significant consequences as their cloud storage spaces offered to Austrian private individuals could (also) be subject to the Austrian SML.

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