Kluwer Copyright Blog

AG Szpunar on VCAST: Copyright and the Cloud

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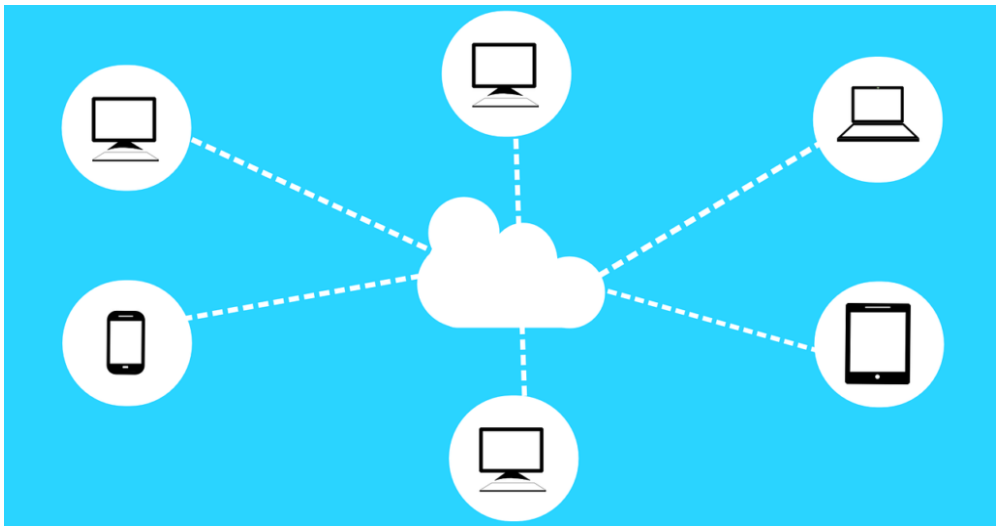

On 7 September 2017, AG Szpunar delivered his opinion on Case C-265/16, *VCAST*. The case concerns the question of whether the private copying exception covers the services of an online platform that allows users to store copies of free-to-air TV programmes in private cloud storage spaces. AG Szpunar's proposed answer was a mixed one: while cloud copying, in general, should be considered covered by the exception, the specific service offered by VCAST should not.

Background and referred questions

VCAST's platform enables users to record TV programmes broadcast by the main digital terrestrial television channels in Italy (such as RTI) and store them in the cloud. After signing in to VCAST's website, the user chooses the programme or time frame she wishes to record. VCAST then captures the signal through its own antennae and records the broadcast in a private cloud storage space provided by a third party, *e.g.* Google Drive or Microsoft OneDrive.

VCAST brought an action against RTI before the Court of Turin, asking for a declaratory judgment attesting that its service is lawful. Since the decision turns on the interpretation of EU law provisions, namely Article 5(2)(b) of the InfoSoc Directive, the Court of Turin found it necessary to refer two questions to the CJEU.

The referred questions, as noted by AG Szpunar (para. 17), essentially boil down to one: should EU law be interpreted as allowing the provision, without the rightholder's authorisation, of a cloud-based video recording service such as VCAST's?

The lawfulness of cloud copying, in general

AG Szpunar began by addressing the issue of whether the InfoSoc Directive's private copying exception should be read as covering the storage of copies of protected works in the cloud. The answer is not clear-cut, since, on the one hand, Article 5(2)(b) only exempts reproductions made *by* a natural person and, on the other, acts of reproduction in the cloud require the intervention of third parties (*e.g.*, the providers of cloud computing services), and not just of users themselves.

The AG answered the question in the affirmative, marshalling two arguments in support of his view. First, he noted that the CJEU's case law on the compensation for acts of private copying clarifies that these acts may be carried out with the aid of third party equipment (*Copydan Båndkopi*, para. 91, discussed here). Second, AG Szpunar saw no substantial difference between a copy made by a cloud-based platform upon the user's request and a copy made through a tangible device that the user is able to control directly, such as a printer. What is essential is that the user "takes the initiative in respect of the reproduction and defines its object and modalities" (para. 25). The AG thus refused to engage in an "excessively strict" interpretation of Article 5(2)(b).

The lawfulness of VCAST's service (or when private copying meets communication to the public)

The AG then turned to the question of access to the copied works, identifying two relevant acts in the context of VCAST's service. First, the service makes works available to the public within the meaning of Article 3 InfoSoc Directive. Second, it allows users to order a copy of the programme, which is then accessible in their cloud storage space. In theory, these copies may qualify for the exception in Article 5(2)(b). However, in VCAST's case, the copies fail to meet the requirement of the lawfulness of their source (as developed in *ACI Adam*, discussed here).

VCAST's service allows some users to record programmes to which they do not have prior authorised access, either due to lack of the necessary equipment (e.g., an antenna or a television set) or because users may access the service from abroad, outside the Italian terrestrial TV catchment area. Thus, at least for these users, the service provides the sole means of access to the reproduced works.

Following this logic, the copying acts are only lawful if the preceding making available by VCAST (i.e. the *source* of the reproductions) is also lawful. The AG concludes that it is not. In essence, the conclusion rests on the assessment that VCAST makes available free-to-air TV programmes to a 'new public', following established (if controversial) case law of the Court since *SGAE*. The AG argues that VCAST is an organisation other than the original communicator (here: the broadcasters) authorised by the rightholders, which furthermore provides its service for-profit. Without its intervention, users would in principle not be able to enjoy the works in this manner, "whether physically within the catchment area of the original broadcasts or not" (paras 44–47).

Moreover, VCAST would still be carrying out a restricted communication to the public because, like in *ITV Broadcasting*, it is making available the programmes through a *specific technical means* different from that of the original communication. The AG was careful to rule out the applicability to VCAST of the "AKM exception": not only does the recent *AKM* ruling (further analysis here) apply only when copyright holders take into account the retransmission in question in the authorisation of the initial broadcast, but also the service in question here is not a *retransmission* (paras 52–56).

In sum, VCAST makes available works without the permission of rightholders, in contravention of

Article 3 InfoSoc Directive. As such, the source of the works reproduced by users through its service is unlawful, and this unauthorised use cannot therefore qualify as a private copy under Article 5(2)(b).

Finally, the AG assesses whether a service like that of VCAST could be covered by a domestic private copying exception, read in light of the three-step test in Article 5(5). The AG concludes in the negative. He argues that allowing such a service would encroach upon the exploitation of the right of communication to the public, force copyright holders to "tolerate acts of piracy in addition to private use", affect potential revenues for similar authorised services, and enable unfair competition by VCAST in the advertising market that primarily finances free-to-air broadcasting (paras 60–69).

Concluding Remarks

This opinion is interesting for different reasons, which can only be briefly addressed here.

First, the AG opened the door for the application of the private copying exception to cloud services, an issue previously raised in a 2014 EU Parliament Resolution and the Recommendations of Mediator Vitorino. Should the judges follow AG Szpunar's opinion, *VCAST* may end up being read as yet another example of the Court's move away from the canon of strict interpretation of exceptions, initiated in *Premier League* (paras 162-163) and endorsed in cases like *Painer* (para. 133) and *Deckmyn* (paras 22-23).

Second, this case illustrates the complex intersection between the private copying exception and the right of communication to the public in the online environment. By adding the requirement of "lawfulness of source" in *ACI Adam* and creatively developing a set of factors (e.g., "specific technical means" and "new public") to assess when a work is communicated to the public, the Court has intertwined the scope of this exclusive right with that of an exception to a different right (reproduction). Although this flexibility has advantages for the interpreter, it also brings with it legal uncertainty, amplified by the significant grey area surrounding the status of many works made available online. Be that as it may, it appears that the expansion in scope of the communication right results in a contraction of the private copying exception.

Third, by proposing the delimitation of the 'AKM-exception', the AG provides the CJEU with an opportunity to reconcile *AKM* with *ITV Broadcasting*, allowing for a more consistent interpretation of the 'specific technical means' criterion.

In closing, the *VCAST* opinion is but the opening chapter in what promises to be an interesting story of copyright and the cloud in EU law. Let us await the judgment to see what plot twist the CJEU has in mind.

One of the authors of this post acted as agent for the Portuguese Government in VCAST. Nonetheless, the views expressed herein are those of the authors and do not necessarily reflect the official position of the Portuguese Government.

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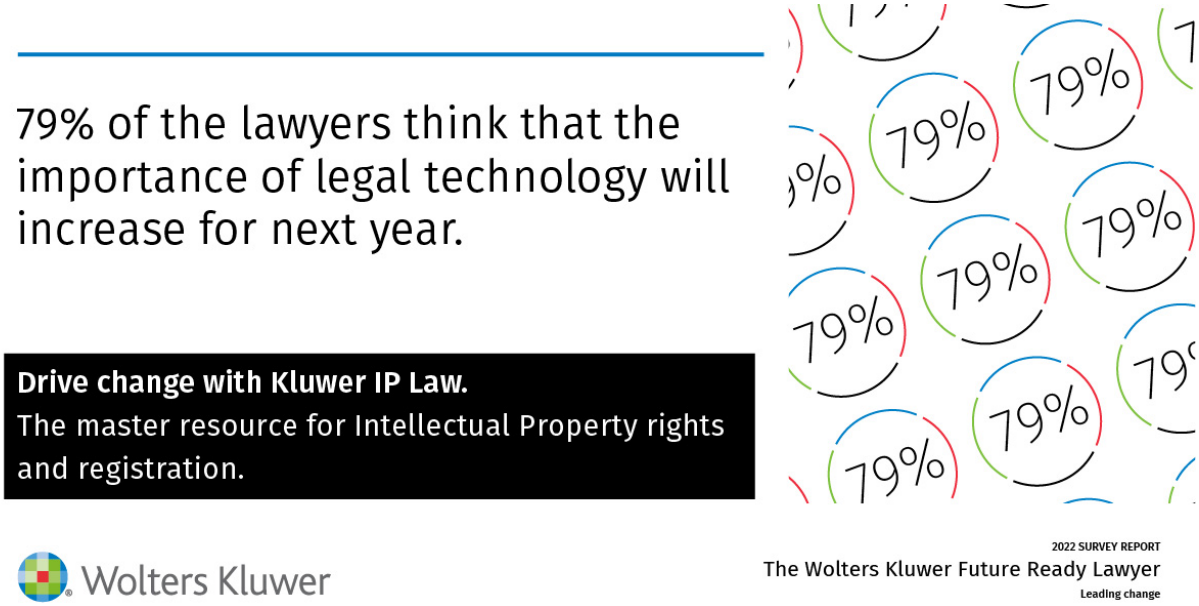

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