Kluwer Copyright Blog

Cloud Services and private copying levy: further developments in the AG Opinion on the Austro-Mechana case

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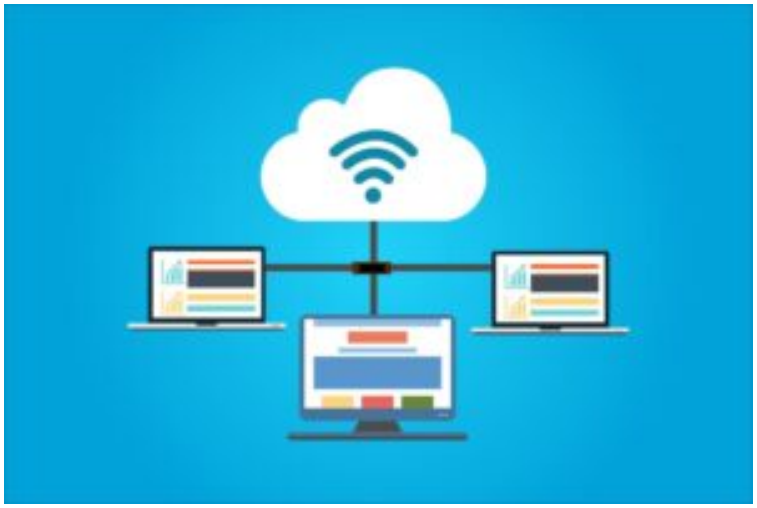
Introduction

In a previous post on this Blog, we analysed the EU case law relating to the emerging services of Cloud Service Providers (C-265/16, V-CAST), as well as the impact of the new EU Directive on copyright in the Digital Single Market (CDSM). More specifically, in the case between V-Cast and RTI, the CJEU ruled that the Infosoc Directive, in particular Article 5(2)(b) thereof, must be interpreted as precluding national legislation which permits a commercial undertaking to provide private individuals with a Cloud service for the remote recording of private copies of works protected by copyright, by means of a computer system, by actively involving itself in the recording without the rightsholder's consent.



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Even though that Court's judgment was very specific to the V-Cast service, it left room, arguing *a contrario* and subject to certain conditions, to consider the mere provision of Cloud storage services of audio-visual content, with reproductions made on individual requests of end-users, to be covered by the private copying exception. This is since: *(i)* it is not a necessary requisite that the users possess the reproduction means or equipment, given that such reproduction can be made also via means or equipment made available by third-party operators (§ 35 of the V-Cast judgment); *(ii)* the provider which merely organizes the reproduction on behalf of the users could be considered within the limits of the private copying exception, where the provider does not play an active role

and does not interfere with other exclusive rights, such as the communication to the public (§ 37-38 of the V-Cast judgment).

The recent AG Opinion on the Austro-Mechana case (C-433-20) discusses some interesting developments on how to treat Cloud Services from the perspective of the private copying levy.

The Austro-Mechana case and the right to claim private copying levy

"Austro-Mechana" is a copyright collecting society which collects, among others, the remuneration for the exploitation of the right of reproduction on storage media. Austro-Mechana sued a German company named "Strato", which provides the 'HiDrive' service (a '*virtual cloud storage solution which is as quick and simple to use as an (external) hard disk'* and that '*offers enough space to store photos, music and films in one central location'*). Austro-Mechana's claim was based on the assumption that the remuneration for exploitation of the right of reproduction on storage media is payable where storage media of any kind are, in the course of a commercial activity, 'placed on the market' – by whatever means and in whatever form – within national territory, including in situations involving the provision of Cloud-based storage space.

Strato argued that the current local copyright law (Paragraph 42b(1) of the Austrian Urheberrechtsgesetz) does not provide for remuneration in relation to Cloud services and that the legislature, aware of the technical possibilities available, made a deliberate choice not to charge Cloud services. Strato also stated that it has already indirectly paid the copyright fee for its servers in Germany (as a component of the price charged by the manufacturer/importer). In addition, Austrian users had already paid a copyright fee for the devices, without which content cannot even be uploaded to the Cloud. The imposition of an additional charge for Cloud storage by way of remuneration for exploitation of the right of reproduction on storage media would, according to Strato, have the effect of doubling or even tripling the obligation to pay a fee.

According to the Austrian Court of First Instance (Handelsgericht Wien) the defense proposed by Strato was well founded, since the local copyright law expressly refers to '*storage media of any kind'*, which includes internal and external computer hard disks, while Strato does not provide its customers with storage media but makes storage capacity available – as a service – online. Austro-Mechana appealed before the referring court, which proposed a referral to the CJEU on the question of whether Article 5(2)(b) of the Infosoc Directive covers the storage of copyright-protected content in the Cloud.

Cloud Services and the exception to the reproduction right

AG Hogan's Opinion moves towards considering the exceptions or limitations contained in Article 5(2) of the Infosoc Directive in respect of the reproduction right to be optional on the part of the

Member States. The optional nature of the exceptions or limitations gives Member States a certain freedom of action (AG Opinion in Joined Cases VG Wort C-457/11 to C-460/11) even if the Member States cannot lay down detailed fair compensation rules which would discriminate, without any justification, between the different categories of economic operators marketing comparable goods/services covered by the private copying exception or between the different categories of users of protected subject matter (Copydan Båndkopi C-463/12). Even though Member States do enjoy broad discretion in respect of the way they avail themselves of the Article 5(2)(b) exception, they nonetheless cannot legislate in a manner which could be considered not technologically neutral.

According to the AG, there is no indication that the EU legislature intended to limit the scope of Article 5(2)(b) of the Infosoc Directive exclusively to physical media or substrate. The exception thus should cover, inter alia, reproductions in both analogue and digital form and reproductions on a physical substrate or in a more intangible media/substrate such as storage space or capacity made available in the Cloud by an Internet service provider. Such a conclusion is, moreover, supported by one of the principal objectives pursued by Directive 2001/29, namely to ensure that copyright protection in the EU did not become outdated and obsolete by virtue of the march of technological development and the emergence of new forms of exploitation of copyright-protected content.

The Opinion also distinguishes the conclusion of the Austro-Mechana case from the conclusion of the Court ruling on the V-Cast case, namely highlighting that Article 5(2)(b) of the Infosoc Directive: *(i)* must be interpreted as not covering the case of private copies made from an unlawful source (the V-Cast case took the form of an illegal broadcast which had not been authorised by the rightsholder); *(ii)* relates exclusively to the reproduction right and does not extend to the right of communication to the public of works and right of making available to the public (in the V-Cast case the Internet service provider had provided two services which consisted of the reproduction and the making available of the works which were then saved in a Cloud data storage).

Private copying levy and digital copies in the Cloud: a fair balance to be identified

The second question under analysis by the AG was whether Article 5(2)(b) of the Infosoc Directive requires national legislation on private copying to provide for the payment of fair compensation to rightsholders in respect of storage capacity in the Cloud made available by third parties to natural persons for private use. In this regard it must be considered that, in the case at stake, in order to use Cloud services, the protected material must be on a storage medium before it can be loaded into the Cloud and that a copyright levy must be paid for the storage medium – mobile phone, computer, tablet – by means of which the private copy is made. In addition, the user pays a royalty in order to access the original and cannot do much with the simple recording of the private copy in the Cloud; the user uses the Cloud to consult the downloaded content onto other terminal equipment or to save it onto it. Such equipment has its own storage media which is subject to a levy. Thus, on the user side, rightsholders have up to three sources of revenue: first, the initial acquisition of the work; secondly, storage on the terminal equipment used for loading, which is subject to a levy; and thirdly, storage on the terminal equipment used for downloading, which is also subject to a levy.

According to the CJEU, where a chain of devices is used to create a private copy, the requirement of fair compensation may be imposed on one device in the chain (VG Wort and Others – C-457/11 to C-460/11).

In the Padawan case (C-467/08) the Court observed that copying '*by natural persons acting in a private capacity must be regarded as an act likely to cause harm to the author of the work concerned*', but it also drew attention to the considerable practical difficulties in identifying the infringements of private users, together with the fact that the harm caused by such individual infringements might simply be *de minimis* and thus not give rise to a payment obligation. The Court then stated that it is open to the Member States to establish a 'private copying levy' for the purposes of financing fair compensation chargeable not to the private persons concerned, but to those who have the digital reproduction equipment, devices and media and who, on that basis, in law or in fact, make that equipment available to private users or who provide copying services for them.

According to AG Hogan, given that Article 5(2)(b) of the Infosoc Directive is optional and does not provide any further details concerning the various parameters of the fair compensation scheme that it requires be established, it is clear that the Member States necessarily enjoy broad discretion in regard to the parameters of their national law and Member States may accordingly determine the persons who have to pay that fair compensation and the form, detailed arrangements and level thereof, in compliance with Directive 2001/29 and, more generally, with EU law. Fair compensation is compensation which does not over or under compensate the rightsholders for the harm caused by private copying; the requirement of fair compensation in respect of such copying laid down in Article 5(2)(b) of the Infosoc Directive is by its very nature a proxy for or an approximation of the harm caused to rightsholders.

Each step in the process of uploading and downloading copyright-protected content to the Cloud from devices or media such as smartphones constitutes a reproduction of that content which is, in principle, in breach of Article 2 of the Infosoc Directive unless such reproduction is justified by virtue of an exception or limitation pursuant to Article 5 of that directive. Given that Article 5(2)(b) and Article 5(5) of the Infosoc Directive equally strive to avoid both under and over compensation of the rightsholder and thus to achieve a fair balance between the private users and the rightsholder, the question which arises is whether a separate levy must be paid in respect of each step in this sequence of copies, including the reproduction/storage in the Cloud, given that an adequate levy may have already been paid by the user on devices and media used by it in the sequence.

If reproduction/storage in the Cloud is not taken into account, there may be a risk of undercompensating the rightsholder for harm. Nonetheless, as the uploading and downloading of copyright-protected content to the Cloud using devices or media could be classified as a single process for the purposes of private copying, it is open to Member States – in light of the broad discretion which they enjoy – to put in place, where appropriate, a system in which fair

compensation is paid solely in respect of devices or media which form a necessary part of that process, provided that this reflects the harm caused to the rightsholder from the process in question.

Conclusion

The AG's Opinion in Austro-Mechana builds on the conclusions of the V-Cast case and offers further developments in the interpretation of the copyright regime applicable to Cloud services. However, it must be noted that, unlike the V-Cast case whereby the CJEU analyzed a tailor-made and very specific case involving both the communication to the public and reproduction rights, AG Hogan's Opinion seems to offer a broad interpretation on the applicability of the copyright exception for private copies to Cloud services, which extends beyond the specific nature of the service offered by Strato and which does not go into detail on the level of involvement of the Cloud service provider in allowing the reproduction or the nature of the "service" offered by the Cloud service provider (as opposed to the supply of storage support). Nonetheless, to find a fair balance of interests, the AG proposes to enter into the merits of the private copying levy to ascertain whether, in the light of the overall analysis of the technical chain involving the Cloud service provider, a single process can be identified and so doubling or even tripling the obligation to pay the fair compensation has to be avoided.

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