Kluwer Copyright Blog

Private Copying Levies for Cloud Storages? An ongoing dispute…

Philipp Homar (Johannes Kepler University Linz / University for Continuing Education Krems) · Tuesday, April 4th, 2023

Image by C Dustin via Unsplash

Despite the increasing use of streaming services, where media content is not stored on local devices, but merely accessed online, the private copying exception (Art 5(2)(b) InfoSoc Directive) remains at the center of European jurisprudence. In the *Austro-Mechana v. Strato* case, the Austrian courts have to decide whether the remuneration for private copying must also be collected from providers of cloud storage services (e.g., Dropbox, iCloud). The question was referred to the CJEU (C-433/20) and demonstrates the challenges that copyright law faces due to the virtualization of use practices and remuneration models.

Private Copying Remuneration: The European framework

In the EU copyright framework, Art 5(2)(b) InfoSoc Directive allows member states to provide exceptions or limitations from the reproduction right "*in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial*". If member states decide to transpose this private copying exception or limitation into their national law, they must ("*on condition*") provide rightholders with a claim for "*fair compensation*". The CJEU has already clarified several key aspects concerning this fair compensation (see C-263/21;C-265/16; C-110/15; C-572/14; C-470/14; C-572/13; C-463/12; C?435/12; C-521/11; C-457/11 to C-460/11; C-277/10;C-462/09; C?467/08).

Private Copying Remuneration: The Austrian system

In Austria, the fair compensation for the private copying exception is collected in the form of a '**storage media levy**'. This levy is paid by persons who (from a place located in Austria or abroad)

first put storage media of any kind suitable for private copies on the Austrian market (Sec 42b(3)1. Austrian Copyright Act, "UrhG"). In practice, these are the producers, importers or dealers of physical storage media such as external or internal (built-in) hard drives, servers, storage sticks, DVDs, CDs etc. Currently, however, no levies are charged when a server is not put on the Austrian market physically (i.e., sold in Austria), but virtually, i.e., when users are granted access to the storage space. This means that when a cloud storage service is available to users in Austria, but its server is located abroad, remuneration may have been paid in the country where the server is located (as the physical server was sold there). However, the provider of the cloud storage service is not subject to pay the Austrian storage media levy.

Against this background, the Austrian collecting society that collects the storage media levy (Austro Mechana) sued Strato, a provider of a cloud storage service the servers of which are located in Germany, for payment of the Austrian storage media levy. The court of first instance (Commercial Court Vienna) dismissed Austro-Mechana's claim because Strato does not place *physical* storage media on the Austrian market as required by Sec 42b(3)1. UrhG, but only provides online storage space. Austro-Mechana appealed against that judgment to the Higher Regional Court of Vienna, which referred the case to the CJEU for a preliminary ruling.

The CJEU decision C?433/20

Private copies? Within the first question referred for a preliminary ruling, the CJEU had to clarify whether the private copying exception (Art 5(2)(b) InfoSoc Directive) also applies when users store copies of protected works on a remote server to which they are granted access. In that regard, the CJEU held that the term "*reproductions on any medium*" in Art 5(2)(b) InfoSoc Directive covers the saving, for private purposes, of copies of protected works on a server on which storage space is made available to a user by the provider of a cloud computing service (para 33). This is not changed by the fact that the server is owned not by the users, but by a third party, i.e., the provider of the cloud storage service (para 23).

Fair Compensation? Regarding the second question, the CJEU had to clarify whether member states must also collect fair compensation from providers of cloud storages. The court answered that Art 5(2)(b) InfoSoc Directive *does not preclude* national legislation that *does not make* the providers of storage services in the context of cloud computing *subject to the payment* of fair compensation in so far as that legislation provides for the payment of fair compensation to the rightholders (para 54). Put differently, member states have the discretion to collect the fair compensation only when *physical* servers and *physical* storage media in devices used for cloud computing (e.g., mobile telephones, computers and tablets) are marketed within their territory, as long as such a system also guarantees a fair compensation for private copies that are stored not on local storage media, but in the cloud.

Implications of the decision C?433/20

The CJEU's answer to the first question highlights that users benefit from the **private copying exception** not only when they store copies on local storage media (hard disks, storage sticks etc.), but also when they store copies in **cloud storages** (e.g., Dropbox, iCloud), i.e., on a remote server

to which they are granted access. Interestingly, this result is also justified with the principle of technological neutrality, which requires that exceptions and limitations are interpreted in such a way as to not exclude technological developments and the emergence of digital media and cloud computing services (para 27 et seq; this of course competes with the principle of narrow interpretation of copyright exceptions which the CJEU has highlighted on several other occasions, e.g., C-265/16 para 32).

What the court did not explicitly decide is **which country's private copying exception** is actually applicable when users store private copies in cloud storages, the server of which is located abroad. Although the prevailing opinion has so far considered the server location to be decisive, it is more convincing to apply the private copying exception of the country of residence of the users. Otherwise, users could often not determine which private copying exception applies to their copies, as they have no knowledge about the server location (there may even be multiple servers in several countries). And furthermore, the CJEU also states that the harm from private copying arises in the territory of the state in which the end users reside (para 38).

The applicability of the private copying exception demonstrates that **fair compensation** must also be paid for private copies that are stored in cloud storages. However, regarding the collection, the decision demonstrates that member states are **not obliged** to collect the compensation directly from the providers of these services. It is permissible for member states to only charge levies for devices or media which form a necessary part of the cloud computing process, provided that this reasonably reflects the harm (para 52). This means that member states enjoy the discretion to collect a remuneration (like the Austria storage media levy) only when *physical* storage media (servers, laptops, smartphones etc.) are imported to or sold in their territory. In this case, however, the fair compensation due for the private copies in the cloud must be **priced in** (indirect collection). Whether this requires an adjustment of the currently applicable levies in Austria will have to be clarified in the ongoing proceedings before the Austrian courts.

However, the CJEU's decision does **not** mean that it is **prohibited** for member states to make providers of cloud storage services subject to payment of fair compensation. After all, the court states that "*several devices and media*" in the single process of cloud computing may be affected by a levy in so far as it does not exceed the possible harm to the rightholders (para 53). In other words, when member states charge levies both for local storage media (laptops, tablets, smartphones etc.) and, subsequently, also for providing access to the server, the cumulative amount of the levies must not exceed what is considered a *fair* compensation for the entire process (see previously, joined cases C?457/11 to C?460/11).

There may even be good reasons for member states to collect the fair compensation for private copies in cloud storages directly from the providers of the services. Admittedly this will cause certain challenges regarding calculation and handling; however, it may still be best suited to provide the most accurate reflection of the harm caused by private copying in the cloud. This holds especially true when levies (such as the Austrian storage media levy) are not applied to reproduction devices as such, but to storage media in those devices. After all, users require less storage space on their smartphones and laptops if they store private copies not locally, but in cloud storages. Thus, in a system of pricing-in, the levies for private copies in the cloud would be linked to a potentially decreasing calculation factor (local storage space), although the intensity of private copying may remain the same or even increase. Of course, if cloud storage providers are indeed charged levies in a member state in which they provide users access to their service, it means that they may request repayment of any levies that they have paid in a different member state in which

their server is located (see C-521/11, para 65).

To make sure you do not miss out on regular updates from the Kluwer Copyright Blog, please subscribe here.

This entry was posted on Tuesday, April 4th, 2023 at 11:53 am and is filed under Austria, inter alia, for ensuring that EU law is interpreted and applied in a consistent way in all EU countries. If a national court is in doubt about the interpretation or validity of an EU law, it can ask the Court for clarification. The same mechanism can be used to determine whether a national law or practice is compatible with EU law. The CJEU also resolves legal disputes between national governments and EU institutions, and can take action against EU institutions on behalf of individuals, companies or organisations.">CJEU, European Union, Infringement, Private copying, Remuneration (equitable)
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.