Kluwer Copyright Blog

Internet TV services under the scrutiny of EU copyright law: CJEU ruling in Ocilion

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With the Court of Justice of the EU (CJEU) restarting its activities after the vacation break, we look back to one of the late-summer judgement, standing out for its technical, yet impactful character. In Case C-426/21, the CJEU looked into the complicated relationship between copyright law and online television services. The focus of the case is twofold: the scope of application of the private copy exception, on the one hand, and that of the right of communication to the public, on the other.

The Court took the opportunity to shed new light on the role and interpretation of legal elements, such as the commercial purpose and the scalability of some uses of copyright protected materials. On the one side, it ruled out the inclusion of a specific type of copying systems in the scope of the private copy exception. On the other side, it reaffirmed that the sole knowledge by an intermediary about end-users' access to protected content does not amount to an act of communication to the public. In both its takeaways, the ruling represents an interesting addition to the EU regulatory landscape on the boundaries and obligations of online platforms and their users.

The applicant, the media company Seven.One Entertainment, asserts that the defendant, Ocilion, violated its broadcasting rights on some TV programs. Ocilion is an Austrian company that offers hardware and software equipment to business clients – such as network operators, hotels, stadiums – to enable them to offer Internet TV services. The services include an online video recording mechanism that allows time-shifting and replay of TV programs. Such mechanism is based on a process that, upon initiative of one end-user, generates, stores, and de-duplicates a copy of a TV program that can be accessed by other users who wish to rewatch the same content.

The CJEU faced, first, the question of whether such de-duplication system is covered by the private copy exception. Then, the question if Ocilion could be considered as engaging in acts of communication to the public. Regarding the first point, the Court posits a restrictive interpretation of the private copy exception. It clarifies that such an exception can only apply to reproductions made by natural persons for non-commercial purposes, even when facilitated by third-party

equipment. In the present case, despite the Opinion by AG Szpunar suggesting that end-users merely accept time-shifted TV content rather than proactively intend to copy it, the CJEU's reasoning does not pivot on this subjective element of intent. Rather, the decision rules out the possibility of the de-duplication system set up by Ocilion falling within the scope of the private copy exception due to the inherent commercial and scalable nature of the copies it generates. This leaves some legal uncertainty over the possibility of a de-duplication system capable of generating copies and making them available for a specific number of users.

The decision in *Ocilion* takes some distance from prior rulings by the CJEU. The Austro-Mechana ruling, for example,allowed lawfully acquired private copies to be stored in cloud services, regardless of any connotations. In *Ocilion*, the Court gives less weight to the copies themselves and looks more into the technological tool used to produce them, requiring it to serve a non-commercial and non-scalable purpose. The profit-oriented focus of the technology becomes central in the analysis of the legality of private copies. This opens up the possibility of pushing national judges towards overly restrictive interpretations of copyright exceptions and causing confusion with legal principles safeguarding consumers' reasonable expectations in the market of online TV services.

Regarding the second focus of the case, the CJEU reiterated that facilitating access to online TV broadcasts does not itself constitute an act of communication to the public. As AG Szpunar highlighted, the potential infringement of this exclusive right is based on the relationship established between the author and the user accessing the work. The mere awareness of potential access to protected content via its services, even when they are indispensable, is not sufficient to constitute a communication to the public by an intermediary.

In line with AG Szpunar's view, the Court ruled that Ocilion does not actively enable end-users' access to protected works, its clients do. Ocilion merely equips network operators for this purpose. As construed by Tito Rendas, the Court's reasoning, despite very linear, results somewhat challenging to fully align with its prior case law regarding the meaning and scope of "facilitating" activities carried out by intermediaries.

By and large, the Ocilion case teaches us that online TV services need to carefully consider the possibilities and boundaries drawn by a complex (and not fully harmonized) copyright legal system in the EU. They must adjust their processing systems to guarantee lawful copying and dissemination of contents, while grappling with liability rules that, despite ongoing attempts to finetune the EU regulation for digital platforms, still remain obscure.

For a full case comment, see Giulia Priora and Amanda Costa Novaes, "CJEU grapples with the intertwined nature of private copies and retransmission of online television broadcasts" (2023) JIPLP Current Intelligence.

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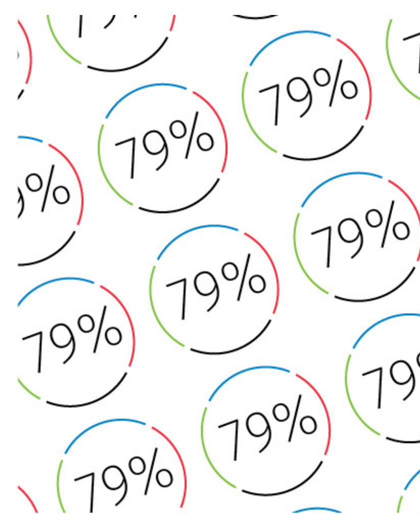

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