Court of Justice of the European Union: Advocate General Opinion on cloud-based recording of television programmes

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On 7 September 2017, Advocate General (AG) Szpunar delivered his opinion on the case of VCAST v. RTI SpA. 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.

VCAST's platform enables users to record television 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 timeframe he 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. 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 Court of Justice of the European Union (CJEU).

Those questions, as noted by AG Szpunar, 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? 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, and not just of users.

The AG answered the question in the affirmative. Firstly, he noted that the CJEU's case law on compensation for acts of private copying clarifies that these acts may be carried out with the aid of third-party equipment. Secondly, 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".

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The AG then turned to the question of access to the copied works, identifying two relevant acts in the context of VCAST's service. Firstly, the service makes works available to the public within the meaning of Article 3 InfoSoc Directive. Secondly, 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. VCAST's service allows some users to record programmes to which they do not have prior authorised access, either due to a 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 act of VCAST making them available (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 television programmes to a "new public", following the established case-law of the Court. 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". In sum, VCAST makes available works without the permission of rightholders, in contravention of the 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).

Lastly, the AG assesses whether a service like that of VCAST could be covered by a domestic private copying exception, read in the 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 on the part of VCAST in the advertising market that primarily finances free-to-air broadcasting.

Opinion of Advocate General Szpunar, Case C-265/16 VCAST Limited v RTI SpA, 7 September 2017

http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d2dc30d602d794c08901441e9d20fa8a8261a679.e34KaxiLc3qMb40Rch0SaxyMbxv0?text=&docid=194115&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=357318

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