Court of Justice of the European Union: Judgment on cloud-based recording of television programmes

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On 29 November 2017, the Court of Justice of the European Union (CJEU) delivered its judgement in the case of VCAST Limited v. RTI SpA (Case C-265/16). The Court held that the "private copying exception", under Article 5(2)(b) of Directive 2001/29/EC (the EU Copyright Directive), does not apply to a company providing a cloud video recording system enabling Internet users to make remote private copies of television programme broadcasts. This was based on the grounds that, prior to the reproduction act in question, an unauthorised act of communication to the public had taken place.

The dispute arose before the District Court of Turin, in Italy, when VCAST asked the Court to issue a declaration of lawfulness regarding its activities, carried out over the internet, in relation to RTI, the other party to the dispute. The latter party is an Italian television organisation whose broadcast programmes are, among other programmes, offered by VCAST for remote recording, via the internet, through a cloud video recording system. The system works as follows: the VCAST website lists the different television channels covered by its system and the corresponding programming; VCAST's customers can specify whether to record a specific programme or a specific time slot; through VCAST's own antenna, the television signal is picked up and the time slot for the selected programme is recorded in an indicated cloud data storage space, provided by a third party but purchased by VCAST's customers. In the light of an application for interim measures, submitted by RTI and upheld by the Court, VCAST was prohibited from pursuing its activities. However, in order to decide on the lawfulness of VCAST's activity, the Italian Court decided to stay the proceedings and to refer two questions to the CJEU for a preliminary ruling. What was asked, in essence, was whether the private copying exception, laid down in Article 5(2)(b) of the Copyright Directive, applies to the service offered by VCAST where no prior consent of the copyright holder has been obtained. On 7 September 2017, Advocate General Szpunar delivered his opinion on the case (see IRIS 2017-10/6).

In its answer, the CJEU noted that, in the case at issue, the act of reproduction cannot be seen in isolation from the preceding act, which consists of making different programmes, from which the customer can choose, available on the VCAST website. In light of this, the Court reiterated that the making available of protected works falls within the meaning of the exclusive right of "communication

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to the public", which is protected under Article 3 of the Copyright Directive and which, in order to be lawful, requires prior authorisation from the rightsholder. Having regard to the different means of transmission used by the initial broadcasting organisation, through television, and by VCAST, through the internet, different publics are reached and, consequently, VCAST needs to secure the prior consent of the rightsholders. The Court therefore considers that the act of communication to the public on VCAST website was unlawful.

With regard to the private copying exception, the CJEU emphasises the importance of the lawfulness of the source, which is a precondition for the exception to apply. However, taking into account the unlawful access to those works (evaluated under Article 3 of the Copyright Directive), through which reproduction is made and which must thus be regarded as an unlawful source of reproduction, the private copying exception cannot apply.

Judgment of the Court (Third Chamber), Vcast Limited v. RTI SpA, Case C-265/16, 29 November 2017

http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d2dc30d6fd0da67d140247cc8593da32dda07729.e34KaxiLc3qMb40Rch0SaxyMchb0?text=&docid=197264&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1485818

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