Court of Justice of the EU: Case Austro-Mechana v Strato AG

IRIS 2022-4:1/3

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On 24 March 2022, the Court of Justice of the EU (CJEU) delivered a judgment in Case C-433/20, in which it ruled that the 'private copying' exception included in Article 5(2)(b) of Directive 2001/29/EC applies to copies of works on a server in storage space made available to a user by the provider of a cloud computing service. However, Member States are not obliged to make the providers of cloud storage services subject to the payment of fair compensation under that exception, in so far as the payment of fair compensation to rightsholders is provided for in some other way.

Austro-Mechana, an Austria copyright collecting society, had brought a claim for payment of remuneration for private copying before the *Handelsgericht Wien* (Vienna Commercial Court) against Strato AG, a provider of cloud storage services. The claim was dismissed on the grounds that Strato does not supply storage media to its customers, but provides them with an online storage service. On appeal, the *Oberlandesgericht Wien* (Vienna Higher Regional Court) requested a preliminary ruling from the CJEU concerning the question whether the storage of content in the context of cloud computing comes within the scope of the private copying exception laid down by Article 5(2)(b) of Directive 2001/29/EC.

The CJEU held that Directive 2001/29/EC provides that the private copying exception applies to reproductions on any medium. Regarding the concept of 'reproduction', the Court stated that saving a copy of a work in storage space in the cloud constitutes a reproduction of that work, and that uploading a work to the cloud consists in storing a copy of it. With regard to the words 'any medium', the Court observed that these refer to all of the media on which a protected work may be reproduced, including the servers used in cloud computing. In that regard, the fact that the server belongs to a third party is not decisive. In addition, as one of the objectives of Directive 2001/29/EC is to prevent copyright protection in the European Union from becoming outdated or obsolete as a result of technological developments, that objective would be undermined if the exceptions and limitations to copyright protection were interpreted in such a way as to exclude digital media and cloud computing services. The Court ruled that the subjection of providers of cloud storage services to the payment of fair compensation is within the discretion conferred on the national legislature to determine the various elements of the system of fair compensation. Member States may introduce a private copying levy chargeable to the producer or importer of the servers by

means of which the cloud computing services are offered to natural persons. When setting the private copying levy, Member States may take account of the fact that certain devices and media may be used for private copying in connection with cloud computing. However, they must ensure that the levy thus paid, in so far as it affects several devices and media in the single process of private copying, does not exceed the possible harm to the rightsholders.

Judgment of the Court of Justice of the European Union (Second Chamber) of 24 March 2022, Case C-433/20, Austro-Mechana Gesellschaft zur Wahrnehmung mechanisch-musikalischer Urheberrechte Gesellschaft mbH v Strato AG

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