Preliminary ruling by the CJEU in Case C-426/21

IRIS 2023-8:1/3

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By judgment dated 13 July 2023, the Court of Justice of the European Union (hereafter referred to as “the Court”) gave a preliminary ruling, at the request of the Austrian Oberster Gerichtshof, in Case C-426/21 opposing Ocilion IPTV Technologies GmbH to Seven.One Entertainment Group GmbH and Puls 4 TV GmbH & CO. KG.

Ocilion, a company incorporated under Austrian law offers an IPTV service to its commercial costumer. The service concerns, among other programmes, programmes for which Seven.one and Puls 4 TV hold retransmission rights and takes the form of either an on-premises solution where Ocilion provides both hardware and software for the network operators to manage themselves but with Ocilion also providing technical assistance, or a cloud-hosting solution managed directly by Ocilion.

Both of Ocilion solutions allow end users to replay programmes via an online video recorder. In order to avoid multiple duplications of the same content, once a user has recorded it, it becomes available to all users who requested access to it, through the provision of a corresponding reference number communicated to users by Ocilion.

Seven.One and Puls 4 TV argue that they did not consent to the communication by Ocilion of their television programmes, which amounts according to them to an unauthorised retransmission of content over which they hold exclusive rights. They also argue that the means by which the online recorder operates does not allow the resulting “de-duplications” to be “regarded to be falling within the ‘private copying’ exception”, for the purposes of Paragraph 42(4) and Paragraph 76a(3) of the UrhG. They brought an application for “interim measures seeking to prohibit Ocilion from making the content of their programmes available to its customers or to reproduce or have third parties reproduce such programmes, without their consent.” The application was granted at first instance and upheld on appeal, leading to Ocilion bringing an appeal before the referring court, the Oberster Gerichtshof (the Austrian Supreme Court).

The referring court stated that it is required to determine whether the recordings are covered by the ‘private copying’ exception. A decisive element would be to determine if Ocilion has the power to organise how the recording function of the

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online video recorder works or if it merely stores copies made by natural persons without offering a service that makes content available. If the latter is true, the reproductions will be regarded as falling within the concept of 'private copying'. To answer this question, the Oberster Gerichtshof estimates necessary to obtain clarifications on how to interpret Article 5(2)(b) of Directive 2001/29.

It also asked whether the on-premises service offered by Ocilion constitutes "a communication to the public of protected broadcasting content, within the meaning of Article 3(1) of Directive 2011/29, for which that undertaking should be held responsible." It considers unclear from the case-law of the Court that "acts which are not in themselves to be regarded as transmission but which merely facilitate transmission by a third party fall within the scope of that provision" and that "the case-law arising from the judgment of 14 June 2017, Stichting Brein (C 610/15, EU:C:2017:456), needs to be clarified as regards the concept of the 'indispensable role' that the provider must play in the present case in order to consider that it carries out a 'communication to the public', within the meaning of that provision."

The referring court subsequently stayed the proceedings and referred the questions above to the Court for a preliminary ruling.

The Court ruled that Articles 2 and 5(2)(b) of Directive 2001/29 "must be interpreted as meaning that the exception to the exclusive right of authors and broadcasting organisations to authorise or prohibit the reproduction of protected works does not cover a service offered by an operator of retransmission of online television broadcasts to commercial customers allowing, on the basis of a cloud-hosting solution or based on the necessary hardware and software made available on premises, a continuous or one-off recording of those broadcasts, on the initiative of the end users of that service, where the copy made by the first of those users to have selected a broadcast is made available, by the operator, to an indeterminate number of users who wish to view the same content."

Regarding the Oberster Gerichtshof's second question, the Court rules that Article 3(1) of Directive 2001/29 "must be interpreted as meaning that the supply by an operator of retransmission of online television broadcasts to its commercial customer of the necessary hardware and software, including technical assistance, which enables that customer to allow its own customers to replay online television broadcasts, does not constitute a 'communication to the public' within the meaning of that provision, even if that operator is aware that its service may be used to access protected broadcasting content without the consent of the authors."

Judgment of the Court in case C-426/21

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