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EU Copyright Law and the Cloud: *VCAST* and the intersection of private copying and communication to the public

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Abstract

This article examines the applicability of the private copying exception to cloud services against the backdrop of the judgment of the Court of Justice of the European Union (CJEU) and the Opinion of Advocate General (AG) Szpunar in Case C-265/16, *VCAST*.

The case raises the question of whether the exception protects services of an online platform allowing users to store copies of free-to-air TV programmes in private cloud storage spaces. The AG's proposed answer was to consider that cloud copying could generally be covered by the exception, but the specific service of *VCAST* could not. The CJEU focused on *VCAST*'s service only, largely following AG Szpunar's conclusion.

The article explains and discusses both the Opinion and the Judgment, further addressing the possible implications of the case for the "leviability" of cloud-based services and the interface between the private copying exception and the right of communication to the public.

Case C-265/16, *VCAST* concerned the question of whether the private copying exception covered the services of an online platform that allowed users to store copies of free-to-air TV programmes in private cloud storage spaces. On 7 September 2017, Advocate General (AG) Szpunar delivered his opinion on the case.² AG Szpunar's proposed answer was a mixed one: while cloud copying, in general, should be considered covered by the exception, the specific

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² Opinion of Advocate General Szpunar, 7 September 2017, Case C-265/16, *VCAST Limited v RTI SpA*, ECLI:EU:C:2017:649.

service offered by VCAST should not. Less than three months later, the Court of Justice of the European Union (CJEU or Court) handed out its judgment, which focused on VCAST's service only.³

This article critically examines the AG Opinion and the CJEU Judgment, as well as some of their implications for EU copyright law. Following this introduction, section 1 provides a legal and factual background to the case. Section 2 examines the two main dimensions of the AG Opinion, namely the applicability of the exception to cloud-based services (2.1) and the lawfulness of VCAST's service (2.2). Section 3 analyses the CJEU Judgment. Section 4 then discusses the main implications of this case. Section 5 concludes.

1. Legal and Factual Background

Article 5(2)(b) Directive 2001/29/EC (InfoSoc Directive) contains the so-called private copying exception to the exclusive reproduction right laid down in Article 2. The exception covers reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightholders receive fair compensation. The exception applies to reproductions made on all technologies and media (whether analogue or digital) and regarding all subject matter, with the exclusion of software and databases.⁴ The payment and calculation of fair compensation must take into account "the application or non-application of technological measures referred to in Article 6 to the work or subject-matter concerned".⁵

The provision is subject to a number of cumulative requirements, which have been the object of a rich body of CJEU case law in *Padawan* (C-467/08), *Stichting de ThuisKopie* (C-462/09), *Luksan* (C-277/10), *VG Wort* (C-457/11), *Amazon.com* (C-521/11), *ACI Adam* (C-435/12), *Copydan* (C-463/12), *Reprobel* (C-572/13), *Austro-Mechana* (C-572/14), *EGEDA II* (C-470/14), *Microsoft* (C-110/15), and *SAWP* (C-37/16).⁶ *VCAST* is the latest instalment in this saga. It is a relevant case because it addresses the application of the exception to cloud services and its interface with the right of communication to public in Article 3 InfoSoc Directive.

VCAST's platform⁷ enabled users to record TV 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 could choose the programme or time frame she wished to record. VCAST then captured the signal through its own antennae and recorded the broadcast in a private cloud storage space provided by a third party, like Google Drive or Microsoft OneDrive.⁸

VCAST brought an action against RTI before the Court of Turin, asking for a declaratory judgment attesting that its service is lawful. In the course of the proceedings and following an

³ CJEU, 29 November 2017, C-265/16, *VCAST Limited v RTI SpA*, ECLI:EU:C:2017:913.

⁴ The reproduction of computer programs and databases had been previously dealt with by Directive 91/250/EEC (later repealed and replaced by Directive 2009/24/EC) and Directive 96/9/EC, which are left intact by the InfoSoc Directive pursuant to Articles 1(2)(a) and (e).

⁵ Article 5(2)(b) InfoSoc Directive. On the scope of the provision, see J. P. Quintais, *Copyright in the Age of Online Access: Alternative Compensation Systems in EU Law* (Kluwer Law International) 2017, pp. 212–225.

⁶ For an overview of the case law, see A.L. Dias Pereira, 'Levies in EU copyright law: an overview of the CJEU's judgments on the fair compensation of private copying and reprography' [2017] *JIPLP* 591.

⁷ <https://www2.vcast.it/home/>.

⁸ On the examples provided see <https://www.google.com/drive/> and <https://onedrive.live.com/about/en-us/>.

application by RTI, the Court of Turin adopted an interim order prohibiting VCAST from pursuing its activity. However, since the final decision turned on the interpretation of EU law provisions, namely Article 5(2)(b) InfoSoc Directive, the Court of Turin found it necessary to refer two questions to the CJEU.

The referred questions essentially boiled down to one: should EU law be interpreted as allowing the provision of a cloud-based video recording service, where the service provider plays an active role in the recording, without the rightholder's authorisation?

2. The Szpunar Opinion

The referred questions were rephrased and somewhat narrowed down by AG Szpunar⁹, allowing him to focus the opinion on the specific service provided by VCAST, which enabled the recording of terrestrial TV programmes that were freely accessible in the Member State's territory. In addressing this issue, the AG essentially dealt with two issues. The first was whether the private copying exception was susceptible of application to cloud recording services (2.1). The second concerned the lawfulness of the particular service provided by VCAST, which also entailed a discussion on the intersection between the exception and the right of communication to the public (2.2).

2.1 Cloud recording and the private copying exception (in general)

AG Szpunar began by addressing the broader issue of whether the private copying exception should be read as covering the storage of copies of protected works in the cloud. The answer is not clear-cut. On the one hand, Article 5(2)(b) only exempts reproductions made *by* a natural person, as opposed to a legal person. On the other, acts of reproduction in the cloud require the intervention of third parties (*e.g.*, the providers of cloud computing services), and not just of users themselves. The lawfulness of the unauthorized recording thus depends on who is considered to be the maker of the copies: the end-user (a natural person) or the service provider (a legal person).

It is enlightening to reflect about this question by contrasting acts of copying made through tangible equipment and those made through remote cloud services. Given the case's factual background, let us take video recording as an example.

The platform provided by VCAST allowed users to record TV programs for time-shifting purposes. As such, it served purposes similar to those of preceding technologies, like the Video Cassette Recorder (VCR) and the Digital Video Recorder (DVR). Unlike its predecessors, however, VCAST's platform stored the recordings in the user's private cloud storage space, dispensing with tangible media, such as cassettes, CD-Rs or hard disks.¹⁰

In the case of VCRs, it is indisputable that it is the user who makes the relevant copies. Even though the making of the copies depends on the operation of the VCR, the link between the act of copying the programs and the manufacturer of the equipment is not sufficient to consider the latter to be the copy-maker. It is the user of the VCR who makes the copy, for it is her who

⁹ *Opinion VCAST*, para 17.

¹⁰ See T. Rendas, 'Cloud computing and copyright law: cloud-based video recording reaches the CJEU', *JIPLP* 11(11) (2016), p. 809.

deliberately programs the equipment to make a recording at a certain time and for a predetermined period.

For AG Szpunar, there is no substantial difference between this VCR scenario and the situation in which the copy is made, upon the user's request, through a remote cloud-based platform. What is essential, in his words, is that the user "takes the initiative in respect of the reproduction and defines its object and modalities".¹¹

Moreover, as he noted, the CJEU's case law on the compensation for acts of private copying clarifies that these acts may be carried out with the aid of third party equipment.¹² In *Copydan*, after acknowledging that Article 5(2)(b) is silent on the possibility of using third party devices to make private copies, the Court concluded that such use is outside the scope of that provision.¹³ This means that Member State legislators have discretion to include copies made through these devices within their national versions of the exception.¹⁴ If they choose to do so, the use of such devices is not copyright infringing and the copies at stake must be subject to the payment of fair compensation.¹⁵ By citing *Copydan*, the AG extended its rationale (or applied it by analogy) to cloud-based services used by individuals to make private copies.

The fact that the cloud-based service must be actively maintained by the service provider is not per se dispositive. That is to say, it does not necessarily entail that the service provider plays a more active role regarding the act of copying than, to use our previous example, the manufacturer and distributor of VCRs. Rather, the role of the cloud-based provider is necessarily shaped by the remote character of his services, reflecting the adaptation of video recording platforms to technological developments.

For its part, copyright law has constantly evolved to respond to technological change and adapt its concepts to novel uses of works. The historical adoption and development of private copying is illustrative of this.¹⁶ To secure its adaptability to technological developments, the law must be interpreted dynamically. Indeed, this need to engage in a dynamic interpretation has been repeatedly recognised by the CJEU in the context of the exception for acts temporary reproduction¹⁷ and, quite emphatically, by AG Szpunar himself in a case about e-lending¹⁸:

it is imperative to give legal acts an interpretation which takes into account developments in technology, markets and behaviour and not to fix such acts in the past by adopting too rigid an interpretation. (...) An interpretation of this kind, which might be described as 'dynamic' or 'evolving', is, in my opinion, necessary, particularly in fields where technological progress has a profound effect, such as copyright. Indeed, technological progress today is so rapid that it easily outstrips the legislative process, such that attempts to adapt legal provisions by that means are often defeated, with legal acts becoming obsolete the moment they are adopted or shortly thereafter.

¹¹ *Opinion VCAST*, para 25.

¹² CJEU, 5 March 2015, C-463/12, *Copydan Båndkopi*, ECLI:EU:C:2015:144, para 91.

¹³ *Ibid*, paras 87–88.

¹⁴ *Ibid*, paras 90–91.

¹⁵ Quintais 2017, pp. 224–225.

¹⁶ P.B. Hugenholtz, *The Story of the Tape Recorder and the History of Copyright Levies*, in: B. Sherman and L. Wiseman (eds), *Copyright and the Challenge of the New*, pp. 176–196, Kluwer Law International 2012.

¹⁷ See, e.g., CJEU, 4 October 2011, C-403/08 and C-429/08, *Football Association Premier League*, ECLI:EU:C:2011:631, para 163; and CJEU, 5 June 2014, C-360/13, *PRCA*, ECLI:EU:C:2014:1195, para. 24.

¹⁸ *Opinion of Advocate General Szpunar*, 16 June 2016, C-174/15, *VOB*, ECLI:EU:C:2016:459, paras 27–28.

Following this hermeneutical stance, AG Szpunar refused to engage in an “excessively strict” interpretation of Article 5(2)(b) in *VCAST*. He concluded, rightly in our view, that acts of cloud copying should, in general, be protected by the private copying exception laid down in Article 5(2)(b) of the InfoSoc Directive.¹⁹ Regrettably, as shall be seen, the CJEU failed to provide explicit clarification on this issue.

2.2 The lawfulness of VCAST’s service (or when private copying meets communication to the public)

AG Szpunar then turned to an examination of the copies made by users through the specific service provided by VCAST. The AG identified two relevant acts in the context of VCAST’s service. First, the service made works available to the public within the meaning of Article 3 InfoSoc Directive. Second, it allowed users to order a copy of the programme, which was then made accessible in their cloud storage space. In principle, these copies qualify for the exception in Article 5(2)(b).²⁰

However, in VCAST’s case, the copies failed to meet the requirement of the lawfulness of their source. VCAST’s service allowed some users to record programmes to which they did not have prior authorised access, either due to 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 provided the sole means of access to the reproduced works.²¹

Following this logic, the copying acts could only be lawful if the preceding making available by VCAST (i.e. the *source* of the reproductions) was also lawful. The AG concluded that it was not. In essence, the conclusion rested on the assessment that VCAST made available free-to-air TV programmes to a ‘new public’ (i.e. a public ‘not considered by the copyright holders in authorising those broadcasts’), following established (if controversial) case law of the Court since *SGAE* (C-306/05).²²

The AG argued that VCAST was an organisation other than the original communicator (here: the broadcasters) authorised by the rightholders, which furthermore provided 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”.²³

The AG continued by stating that, in any event, VCAST would still be carrying out a restricted communication to the public. This is because, like in *ITV Broadcasting*²⁴, it was making available the programmes through a *specific technical means* different from that of the original communication. The AG was careful to rule out the applicability to VCAST of what it called

¹⁹ *Opinion VCAST*, paras 23–28.

²⁰ *Ibid*, paras 39–40.

²¹ *Ibid*, paras 36–37, 43.

²² *Ibid*, paras 45–47. For a critical analysis of the new public criterion, see P.B. Hugenholtz & S. van Velze, ‘Communication to a New Public? Three Reasons Why EU Copyright Law Can Do Without a “New Public”’, IIC 47(7) (2016).

²³ *Opinion VCAST*, paras 44–47. NB in this portion of the Opinion the AG appears to conflate two criteria – “new organisation” and “new public” – with different meanings. It is this same confusion that underlies the Court’s misguided adoption of the new public criterion in *SGAE* on the basis of an historical interpretation of the Berne Convention. See Hugenholtz & van Velze 2016, pp. 808-809.

²⁴ CJEU, 7 March 2013, C-607/11, *ITV Broadcasting*, ECLI:EU:C:2013:147, paras 24–26.

the “AKM exception”. For AG Szpunar, not only did the recent *AKM* judgment (C-138/16) apply only when copyright holders took into account the retransmission in question in the authorisation of the initial broadcast, but also the service in question here was not a *retransmission*.²⁵

In sum, VCAST made available works without the permission of rightholders, in contravention of Article 3 InfoSoc Directive. As such, the source of the works reproduced by users through its service is unlawful. This unauthorised use cannot therefore qualify as a private copy under Article 5(2)(b).

Finally, the AG assessed VCAST’s service in light of the three-step test in Article 5(5). The test is a set of three cumulative conditions that regulate the application and permissible scope of exceptions. According to it, exceptions to the exclusive rights in the directive shall only be applied (1) in certain special cases (2) which do not conflict with a normal exploitation of the work or other subject-matter and (3) do not unreasonably prejudice the legitimate interests of the rightholder.

The AG concluded that VCAST’s service did not meet the conditions of the test. He argued 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 by VCAST in the advertising market that primarily finances free-to-air broadcasting.²⁶

3. The CJEU Judgment

The unusually short span of time between the opinion and the judgment – less than three months – hinted that the judges would be following AG Szpunar’s conclusions. They largely did so, though providing a much less nuanced analysis.

The Court started by recalling three important aspects of its case law on copyright exceptions and limitations, in general, and on the private copying provision, in particular. First, Article 5(2)(b) – as a derogation from the general rule according to which the authorisation of the rightholder is needed for any reproduction of a protected work – should be given a strict interpretation.²⁷ Second, beyond the scope of permitted copying, this exception should not be understood as requiring the rightholder “to tolerate infringements of his rights which may accompany the making of private copies”.²⁸ Finally, in order to benefit from the private copying exception, users may have the copying services provided by a third party.²⁹

The Court noted, however, that VCAST’s service did more than merely providing copying services: it had a “dual functionality, consisting in ensuring both the reproduction and the making available of the works and subject matter concerned”.³⁰ Strictly interpreted, said the Court, the private copying exception cannot be read as depriving the rightholder from her right of prohibiting or authorising access to the protected subject matter.³¹ In other words, whereas

²⁵ *Opinion VCAST*, paras 52–56.

²⁶ *Opinion VCAST*, paras 60–69.

²⁷ CJEU, *VCAST*, para. 32.

²⁸ *Ibid.*, para. 34.

²⁹ *Ibid.*, para. 35.

³⁰ *Ibid.*, paras 37–38.

³¹ *Ibid.*, para. 39.

the reproduction function of VCAST's service may be covered by the exception (a statement the Court never explicitly makes), the making available function would still be subject to the exclusive right.

Following on AG Szpunar's footsteps, the Court moved on to examine whether VCAST's service constituted a communication to the public under Article 3 of the InfoSoc Directive.³² After reminding that the concept of "communication to the public" is composed of two cumulative criteria – the existence of an "act of communication" of a work and the communication of that work to a "public"³³ –, the Court concluded that VCAST's service fell within such concept. However, for that purpose, the Court essentially relied on the "specific technical means" criterion and *ITV Broadcasting*: the original communication of the TV programmes and that made by VCAST resorted to "different means of transmission"³⁴.

Because this was so, the Court added, these two acts amounted to "communications to different publics"³⁵. As with the AG opinion, this statement conflates the "specific technical means" and "new public" criteria, which in much of the preceding case law are presented as alternative.³⁶ In this case, the conflation is starker because the Court immediately stated that under such circumstances it becomes unnecessary to examine whether the communications at issue reach a "new public".³⁷

The upshot is that VCAST's communication needed a separate authorisation from the rightholder. Without such authorisation, the service will have to be deemed copyright-infringing, for it failed to come within the scope of the private copying exception³⁸. In the Court's view, this conclusion pre-empts the need to assess the three-step test.³⁹ Strikingly, unlike AG Szpunar, the Court did not clarify whether acts of cloud copying in general are protected by the private copying exception.

4. Implications

The AG Opinion and the CJEU Judgment are interesting for different reasons, of which we highlight but a few: the application of the private copying exception to cloud services and payment of the respective fair compensation (4.1); the intersection between private copying and the right of communication to the public (4.2); the reconciliation of the 'AKM-exception' with the specific technical means criterion (4.3).

4.1 "Leviability" of Cloud Services: Does One Size Fit All?

The first major implication of the AG opinion is its recognition that cloud-based services can be subject to the private copying exception. Had the CJEU unambiguously followed AG Szpunar's opinion and *VCAST* could be read as yet another example of the Court's move away from the

³² Ibid, paras 40 et seq.

³³ Ibid, para. 41, citing CJEU, 31 May 2016, C-117/15, *Reha Training*, ECLI:EU:C:2016:379, para. 37.

³⁴ Ibid, para. 48.

³⁵ Ibid, para. 49 (emphasis added).

³⁶ See supra n. 23. But see, e.g., T. Synodinou, 'Communication to the public in the Zurs.net case: more explanations, less clarity', Kluwer Copyright Blog (23 August 2017), who sees the "specific technical means" criterion as establishing the presumption of the existence of a "new public".

³⁷ CJEU, *VCAST*, para. 50.

³⁸ Ibid, paras 51-52.

³⁹ Ibid, para 53.

canon of strict interpretation of exceptions, initiated in *Premier League* and endorsed in cases like *Painer* and *Deckmyn*.⁴⁰ From the perspective of consumers, this would have promoted legal certainty. Consumers would find it difficult to understand why cloud copying infringes copyright, while (functionally similar) acts of copying in cassettes and MP3 players do not.

The judgment is ambiguous in this respect, to the detriment of such certainty. On the one hand, the Court restated the canon of strict interpretation and failed to explicitly discuss the applicability of the exception to these services. On the other hand, the judgment did not foreclose the application of the exception thereto. In recognizing the “dual functionality” of VCAST’s service, the Court implied that each functionality of the service is subject to a different regime: the part of the service that organizes the reproduction can fall within the private copying exception, whereas the part that offers access to content with a view to customers reproducing that content is regulated by the right of communication to the public.

The crux of the issue is that the legal regimes interact. The applicability of the exception is conditional upon the status of the source of the reproduction. This determination turns on an analysis of how the work was made available under Article 3 InfoSoc Directive. (The intersection between the exception and the exclusive right is explored below at 4.2.) However, if a work is lawfully made available or the cloud service is predominantly characterized by the reproduction functionality, copies made by individual customers of the service are arguably subject to the private copying exception.

If this reading of the judgment is accepted, Member States will be obliged to identify *which* services are covered by the exception. For those that are, an assessment must be made of whether they cause harm to rightholders’ reproduction right under Article 2 InfoSoc Directive. At least where that harm goes above a *de minimis* threshold, there will be an obligation to ensure the payment of fair compensation.

As noted above at 2.1, from the Court’s previous judgments, the application of the exception to cloud services could only be derived from an ample reading of references to third-party devices in *Padawan* and *Copydan*. In institutional documents, the matter had only been previously raised in the 2013 Recommendations of Mediator Vitorino and in an inconsequential 2014 EU Parliament Resolution.⁴¹

The Vitorino recommendations discuss the application of the exception to new cloud-based business models and licensed services. The main recommendation in this respect is to clarify that copies made by end-users for private purposes in the context of online services licensed by rightholders should not be considered to cause harm that requires compensation in the form of private copying levies. If the service is licensed, he argues, any additional levy-based compensation would lead to double payments by end-users.⁴²

⁴⁰ CJEU, 1 December 2011, C-145/10, *Painer*, EU:C:2011:798, para. 133; CJEU, 3 September 2014, C-201/13, *Deckmyn*, EU:C:2014:2132, para. 23;

⁴¹ See A. Vitorino, ‘Recommendations Resulting from the Mediation on Private Copying and Reprography Levies’ (Brussels, 31 January 2013). The EU parliament resolution merely “[s]tresses that private copying exception arrangements should apply to certain online services, including certain cloud computing services”, and calls on the Commission to assess the impact of these services on the private copying system as well as if an how to take such services into account for compensation purposes. See European Parliament Resolution of 27 February 2014 on private copying levies (2013/2114(INI)), paras 29 (on “Licenses”) and 30 (on “New business models in the digital environment”).

⁴² Vitorino 2013, pp. 4–8.

At this stage, a return to basics is necessary. Cloud computing is a means of storing content on remote servers made available by third parties. A cloud service provider offers external storage capacity together with the possibility of remote access to content. Copyright comes into play from the moment works are reproduced in the context of these services. If a copyright-relevant reproduction occurs, the question becomes whether the same qualifies under the private copying exception.⁴³

To make this assessment, we must look at the specific cloud service. For instance, personalised locker services (e.g. Dropbox) are different from file synchronization or “syncing” services (e.g. iTunes), which in turn are distinct from “scan and match” services (e.g. Amazon Cloud Player) and Network Personal Video Recorders.⁴⁴ Certain services allow users to permanently download content, whereas others subject the subscriber to temporal or quantitative restrictions (e.g. Spotify Premium), often based on the applicable terms and conditions of use.⁴⁵ A differentiated treatment of cloud-based services on the basis of their design, functionality and susceptibility of use for private copying is in line with CJEU case law and appears to be justified in light of the principle of equal treatment in Article 20 of the Charter of Fundamental Rights of the EU.⁴⁶

Moreover, only by examining the service can we ascertain who is making the copy: the user or the service provider. As noted, AG Szpunar argued that the individual is the copier whenever she “takes the initiative in respect of the reproduction and defines its object and modalities”. This quasi *volitional* approach to the definition of copier is in line with a technology-neutral and dynamic view of the law, which accounts for the specificities of the technological process of reproduction but does not give them centre stage in defining the legal status of the act.⁴⁷ The CJEU, beyond the reference to the “dual functionality” of VCAST’s service, was silent on this.

Applying the definition to the above examples of cloud services we may conclude that in certain cases only the user makes a copy, whereas in others both the user and service provider are making copies. In the latter case, not only is the provider’s copy (on its database or servers) not covered by the exception but it is also likely that the provider is communicating the copies to the public by making them available to end-users.⁴⁸

The volitional reading of the concept and role of the copier has strong parallels with the current approach under US law. The decision of the US Court of Appeals for the Second Circuit in

⁴³ See CSPLA, Report Summary - Cloud computing (2012), <http://www.culturecommunication.gouv.fr/Thematiques/Propriete-litteraire-et-artistique/Conseil-superieur-de-la-propriete-litteraire-et-artistique/Travaux/Commissions-specialisees/Commission-du-CSPLA-relative-au-cloud-computing-informatique-en-nuage>

⁴⁴ For a description of the first three services, see CLSPA 2012. For examples of each type of service, see: <https://www.dropbox.com/help/sign-in/how-security-works> (Dropbox), <https://support.apple.com/en-us/HT201253> (iTunes), <https://www.amazon.com/gp/help/customer/display.html?nodeId=201380010> (Amazon Music Terms of Use, Last updated November 15, 2016, Clause 1.5) NB that in France, since July 2016, Network Personal Video Recorder services “offering cloud storage now fall within the scope of remuneration for private copying”. See WIPO and Stichting de ThuisKopie, *International Survey on Private Copying: Law and Practice 2016*, WIPO Publication No. 1037E/17 (2017), pp. 7, 74–75.

⁴⁵ See B.J. Jütte, ‘Coexisting digital exploitation for creative content and the private use exception’, *International Journal of Law and Information Technology* 2016, Vol. 24(1), pp.1-21.

⁴⁶ See, by analogy, *Copydan*, paras 30–41.

⁴⁷ CLSPA 2012, grounding what we call a *volitional* approach on *Padawan*, para 48.

⁴⁸ See e.g. the case of a licensed music service like Spotify Premium that allows subscribers to download a number of songs to listen to “offline”. Cf. Jütte 2016, pp. 8–9.

*Cablevision*⁴⁹, a case with some similarities to *VCAST*, may provide an appropriate comparison between the EU and US approaches. Cablevision operated a Remote Storage DVR System (RS-DVR) that enabled users without access to a DVR device to make recordings of TV programmes, storing them in hard disks remotely housed and managed by Cablevision. The user could then watch the recordings using a cable TV set equipped with the RS-DVR software. The Second Circuit concluded that the copies made through the RS-DVR system are effectively made by the user; Cablevision's role in providing the system did not therefore constitute primary copyright infringement.⁵⁰

Assuming the end-user is the copier, the subsequent question is whether her copy originates from a lawful source. For that assessment, the Court will need to clarify the aforementioned intersection between the exception and the right of communication to the public (see *infra* 4.2.)

For copies made from lawful sources, it will be necessary to determine the type of source at stake. This will either be a *licensed service* (i.e. a service authorized by rightholders to offer protected content) or a *use otherwise permitted by law*. Furthermore, it must be established whether the harm to rightholders warrants payment of fair compensation. If we follow Mr. Vitorino's argument, there is no case for compensation for copies made from licensed services, including services of "scan and match", "synching" and even authorised Network Personal Video Recorders. On the other hand, following *VG Wort* and *Copydan*, it is arguable that the authorisation of rightholders is "devoid of legal effects" and thus irrelevant for the application or calculation of fair compensation. If so, fair compensation is due unless we consider that private copying only causes minimal harm because it is already priced into licensed services (and is eventually subject to technological and contractual restrictions).⁵¹

4.2 The intersection between private copying and communication to the public

A second implication of *VCAST* is that it should contribute to clarify the complex intersection between the private copying exception and the right of communication to the public in the online environment.

On the one hand, the CJEU developed in *ACI Adam* and later confirmed in *Copydan* and *Reprobel* a requirement of "lawfulness of source". This entails that the exception, when interpreted in light of the three-step test, only privileges copies made from lawful sources. That means, at the very least, copies made from works or subject matter made available to the public with the consent of copyright owners.⁵²

On the other hand, in its vast body of case law on the right of communication to the public, the Court has developed a set of criteria and factors to determine whether a work is communicated to the public. Among the criteria with application to online use are those of "specific technical means" (e.g. in *ITV Broadcasting*) and "new public" (e.g. case C-466/12, *Svensson* and its progeny). The new public criterion, in particular, is of difficult application to dissemination of content over the internet. To name a few points of contention, it is unclear whether a link to a freely accessible work is outside copyright or subject to implicit consent, what is meant by

⁴⁹ *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008).

⁵⁰ *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008).

⁵¹ Quintais 2017, pp. 216-219.

⁵² CJEU, 10 April 2014, C-435/12, *ACI Adam*, ECLI:EU:C:2014:254, paras 20–58; *Copydan*, paras 74–79; CJEU, 12 November 2015, C-572/13, *Reprobel*, ECLI:EU:C:2015:750, paras 57-64. See Quintais 2017, pp. 221–223.

“freely accessible” (i.e. regarding technological vs contractual restrictions), and how to apply the for-profit condition attached to the knowledge presumption developed in *GS Media* (C-160/15).⁵³

The joint operation of these requirements and criteria has intertwined the scope of the right of communication and making available to the public with that of an exception to a different right (reproduction). To determine whether an act qualifies as a private copy, we must assess whether the source of the reproduction is lawful. In the online environment, that will require a determination of the legal status of a work communicated or made available to public, which will in many cases be challenging.

To be sure, these developments add flexibility to judicial interpretation, with obvious advantages for the interpreter. However, they also bring along legal uncertainty, amplified by the significant grey area surrounding the status of many works made available online.

4.3 The ‘AKM-exception’ and the specific technical means criterion

A final aspect to point out in the *VCAST* Opinion is that the AG offered an alternative interpretation of *AKM* that may allow its coherent reading with *ITV Broadcasting*. This discussion is omitted in the judgment, which does not make any mention to *AKM*. However, the matter is relevant for the debate on cloud levies, as the AG Opinion provided clarity on the status of broadcast works later made available over the internet through online personal video recorders.

ITV Broadcasting concerned the online retransmission by TV Catchup of free-to-air television broadcasts (including those transmitted by ITV) to users that were legally entitled to receive the broadcasts under a UK television license. The CJEU considered the online retransmission to be a separate act that required an independent authorisation of the rightholder, due to specific technical conditions, means and intended audience.⁵⁴

In *AKM*, however, the Court appeared to walk back its position when it stated that a cable retransmission of a broadcast in the same territory, despite being carried out through a different technical means, is not a restricted act of communication to the public. To reconcile both judgments, AG Szpunar argued that the “AKM exception” applies only where an additional condition is met: the copyright owners must have “taken into account the retransmission in question in connection with their authorisation of the initial broadcast”.⁵⁵

In sum, by proposing the delimitation of the ‘AKM-exception’, the AG provided the CJEU with an opportunity to reconcile *AKM* with *ITV Broadcasting*, allowing for a more consistent interpretation of the ‘specific technical means’ criterion. In turn, this would clarify the legal status of secondary online retransmissions of broadcasts, some of which will be the source of copies made through certain cloud-based services.

As noted, the judgment was silent on *AKM*. Silence sometimes speaks volumes. Here, in our interpretation, the Court appeared to essentially agree with the AG without going so far as to

⁵³ For a discussion of these issues, see Quintais 2017, pp. 164-183 and P. Savola, *EU Copyright Liability for Internet Linking*, 8 (2017) JIPITEC, pp. 139-150.

⁵⁴ *ITV Broadcasting*, paras 9-13, 32-35, 39, 43-46.

⁵⁵ *Opinion VCAST*, para 52, citing *AKM*, paras 28-29, and first point of the operative part.

contradict its previous ruling in *AKM*. To this effect, it is noteworthy that the Court first cited *Reha Training* (C-117/15) to state that ‘every transmission or retransmission of a work which uses a specific technical means must, as a rule, be individually authorised by the author of the work in question’.⁵⁶ It then cited *ITV Broadcasting* to state that the transmissions of the broadcaster and VCAST are intended to different publics.⁵⁷ The joint operation of these statements leads to the conclusion that transmissions through different technical means (even in the same territory) are restricted communications to the public unless the intended publics are the same. In essence, this interpretation leads to the same results as AG Szpunar’s delimitation of the “AKM exception”, albeit in an opaque fashion.

5. Concluding Remarks

This article examined the applicability of the private copying exception to cloud services against the backdrop of the AG Opinion and CJEU judgment in *VCAST*, a case concerning an online platform that allows users to store copies of free-to-air TV programmes in private cloud storage spaces. AG Szpunar recommended that the CJEU consider cloud copying to be generally covered by the exception, but not the specific service of VCAST. The Court failed to address the applicability of the exception to cloud services in general. Instead, it focused on the “dual functionality” of the VCAST service and the fact that its provision of access to works triggers the application of the right of communication and making available to the public.

The conclusion by the AG that the exception can apply to cloud copies was based on a dynamic interpretation of the law and a *volitional* concept of copier. His disqualification of VCAST’s service relied on a joint reading of the exception’s lawfulness of source requirement and the criteria for assessing the right of communication to the public. Regarding the latter, the AG offered crucial guidance to the Court on reconciling the apparently diverging judgments in *ITV Broadcasting* and *AKM*, thus clarifying the status of secondary online retransmissions of a primary “offline” broadcast.

For its part, the Court’s focus on the access functionality of the VCAST service allowed it to elude explicit analysis of the applicability of the exception to cloud services. The judgment confirms the growing importance of the right of communication and making available to the public in determining the legal status of online use of copyright-protected content. In this case, that determination will influence whether the private copying exception (to the reproduction right) applies to the services of cloud-based providers.

As noted, we do not believe that VCAST forecloses the application of the exception to such services. Indeed, the exception should arguably apply to copies made by individual customers of the service in cases where the work is lawfully made available or the cloud service is predominantly characterized by the reproduction functionality. Where a service has a clear double functionality, it will likely require permission by rightholders to operate in the EU, as it will otherwise be infringing on the right of communication to the public. In turn, this will cause its customers to infringe on the right of reproduction.

Still, by opting for a shallow analysis of the private copying issue, *VCAST* was a missed opportunity for the CJEU to clarify some complex aspects regarding the status of cloud services vis-à-vis copyright law. These include, to name but a few, how to define the relevant copier,

⁵⁶ CJEU, *VCAST*, para. 43.

⁵⁷ *Ibid*, paras 48–49.

how to differentiate between types of cloud-based services for purposes of the private copying exception, and how to articulate the scope of the right of communication to the public with that of the exception.

Assuming the exception applies to certain cloud services, many thorny issues remain. For instance, do private copies made in the context of licensed services justify the payment of fair compensation? How to define levy targets and the best system to collect compensation? If levies are imposed on cloud service providers, where is the copy made and the levy due? Or should levies instead be imposed as a surcharge on connected devices that make copies when accessing the cloud? And what is the margin of discretion of Member States in this respect?

In closing, *VCAST* was but the opening chapter in what promises to be an interesting story of copyright and the cloud in EU law. Further preliminary references should follow, as they always seem to do when it comes to private copying and communication to the public. We may not agree with what's to come, but the plot twists and cliff-hangers will surely be gripping.