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Quintais, J.P.; Rendas, T.

**Publication date**
2017
**Document Version**
Final published version

Kluwer Copyright Blog

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CASE LAW, CJEU, COMMUNICATION (RIGHT OF), COPYRIGHT, EUROPEAN UNION, INFRINGEMENT, ITALY, LIABILITY

# Up in the Cloud: Some reflections on the CJEU judgment in VCAST

**Joao Pedro Quintais** (**Institute for Information Law (IViR)**) and **Tito Rendas** (**Universidade Católica Portuguesa**) / **December 12, 2017** / **Leave a comment**

### Introduction and background

Case C-265/16, *VCAST,* 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. In his **opinion of 7 September 2017** (discussed **here**), Advocate General (AG) Szpunar proposed a mixed answer to the questions referred: to consider cloud copying as generally covered by the exception, but to exclude the specific service offered by VCAST from its scope of application. Less than three months later, on 29 November 2017, the Court of Justice of the European Union (CJEU or Court) handed down its **judgment**, focusing exclusively on services like the one provided by VCAST.

To remind readers, VCAST allows its customers to record TV programmes broadcast by the digital terrestrial television channels in Italy and store them in the cloud. The customer can sign in to the website and select a programme or time slot. VCAST then captures the signal through its own antennae and records the broadcast in a private cloud storage space indicated by the customer but provided by a third party.

VCAST sought a declaratory judgment attesting to the lawfulness of its service. However, following an application by RTI, the Court of Turin adopted an interim order prohibiting VCAST

from pursuing its activity. Because the final decision turns on the interpretation of EU law provisions, namely Article 5(2)(b) InfoSoc Directive, the Court of Turin referred two questions to the CJEU, which recast it as 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?

**The Judgment**

The Court started by recalling three important aspects of its case law on copyright exceptions and limitations, both in general, and on the private copying provision in particular. First, Article 5(2)(b) – as a derogation to the exclusive right of reproduction – is to be strictly interpreted (para. 32). 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" (para. 34). Finally, the fact that the copying services are provided by a third party does not preclude the application of the exception (para. 35).

The Court noted, however, that VCAST's service does more than merely providing copying services: it has a "dual functionality, consisting in ensuring both the reproduction and the making available of the works and subject matter concerned" (paras 37–38). Strictly interpreted, the exception cannot be read as depriving the rightholder of her right to prohibit or authorise access to the protected subject matter (para. 39).

Following in 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. The Court answered in the affirmative, essentially relying on the "specific technical means" criterion and ***ITV Broadcasting***: the original communication of the TV programmes and that made by VCAST resort to "different means of transmission" (para. 48).

Because this is so, the Court added, these two acts amount to "communications *to different publics*" (para. 49, emphasis added). 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 alternatives. In this case, the conflation is starker because the Court immediately states that under such circumstances it becomes unnecessary to examine whether the communications at issue reach a "new public" (para. 50).

The upshot is that VCAST's communication needs a separate authorisation from the rightholder. Without such authorisation, the service will have to be deemed copyright-infringing, for it fails to come within the scope of the private copying exception (paras 51-52). In the Court's view, this conclusion pre-empts the need to assess the three-step test (para 53).

**Comments**

Unlike AG Szpunar, the Court failed to clarify whether acts of cloud copying in general are covered by the private copying exception. 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 to the public.

The Court's focus on the access functionality 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 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.

In our view, the judgment does not completely foreclose the application of the exception to cloud services. To be sure, where a service has a clear double functionality, it will likely require permission by rightholders to operate in the EU, as it will otherwise infringe the right of communication to the public. In turn, this will cause its customers to infringe the right of reproduction.

However, in recognising the "dual functionality" of VCAST's service, the Court implies that each functionality of the service is subject to a different regime: the part of the service that organises 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.

Cloud services come in different shapes and forms. For instance, personalised locker services (e.g. **Dropbox**) are different from file synchronisation 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. 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. The *VCAST* judgment opens the door for the private copying exception to 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 characterised by the reproduction functionality.

If this reasoning is accepted, it will be necessary to address additional issues on the legal status of cloud services. These include, to name but a few, how to define the relevant copier, how to differentiate between types of cloud-based services for the purpose of the private copying exception, and how to articulate the scope of the right of communication to the public with that of the exception. As readers of this blog are aware, the latter are fertile fields for preliminary references to the CJEU. In other words, the odds are good that further questions on the legal status of cloud copies in EU copyright law will reach the CJEU.

*One of the authors of this article acted as agent for the Portuguese Government in C-265/16, VCAST. Nonetheless, the views expressed herein are those of the authors and do not necessarily reflect the official position of the Portuguese Government*