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TV on demand and private copying ... both are back before the Court of Justice of the European Union

C-426/21 *Ocilion IPTV Technologies GmbH v Seven.One Entertainment Group GmbH & Co. KG*, EU:C:2023:564 (Court), EU:C:2022:999 (AG)

Introduction

The scope of the communication to the public right under the Information Society Directive¹ is something that has come before the Court of Justice of the European Union many times² as has the scope of the private copying exception also found in that Directive.³ The recent decision in *C-426 Ocilion IPTV Technologies GmbH v Seven.One Entertainment Group GmbH & Co. KG* (“*Ocilion*”)⁴ takes the law further in relation to both and while it relates to a very specific technical product, there are certain important issues it raises and resolves. To understand the decision, however, it is first necessary to explain the product.

The product

The technology behind *Ocilion* is a little esoteric. It provided an internet television service in a closed network to commercial customers. These customers or network operators⁵ represented a wide range of businesses from stadiums to electricity companies.⁶ The product offered was an on-premise product whereby *Ocilion* made the necessary hardware and software available to its customers (the network providers), but once it was made available it was for the network providers to manage.⁷ These providers in turn offered their own (end user) customers access to television over the internet.⁸ *Ocilion*’s services were such that once its product was installed, the original broadcast programmes were received simultaneously and unchanged without it being involved.⁹ The Court of Justice was asked to consider whether the provision of this product would constitute communicating to the public the television channels which were received using the product.

The other question the Court was asked related to an additional “add-on”¹⁰ service provided by *Ocilion*.¹¹ This involved the recording of a particular programme using an online video recorder so that it could be watched at any time by an end user up to seven days later.¹² This is what is commonly called a “catch-up” service.¹³ A significant feature of this “delayed” viewing was that one copy was made and all the end users who wished to record the particular programme would be given access to this single recording.¹⁴ It was argued by *Ocilion* that this process was little more than private copying and so was permitted under the Directive.¹⁵

When is the provision of a service a communication to the public?

The question that will be examined first is whether the product *Ocilion* was providing was communicating the works to the public.¹⁶ The decision of the Court does not include much detail, it reiterates its standard position on what amounts to a communication to the public and summarised it as follows: a “service provider makes an action of communication when it intervenes, in full knowledge of the consequences of its action, to give its customers access to

a protected work, particularly where, in the absence of that intervention those customers would not, in principle, be able to enjoy the ... work".¹⁷ It then largely agreed with the Advocate General's view that Ocilion was not liable because it was providing physical facilities.¹⁸ It is therefore his reasoning which must be examined.

It is clear that the provision of any physical facilities which enable a communication to the public does not in itself amount to such a communication.¹⁹ The key issue is whether the supplier of the facilities played an *active* role in the communication or not. It was opinion by the Advocate General, and accepted without much demur from the Court, that Ocilion had no active role and so was merely providing physical facilities.²⁰

Critically, the Advocate General took the view that "physical facilities" includes both *software* and hardware²¹ even though the software itself was not "physical". This was because, he said, it would be anachronistic to treat software otherwise as almost all technical equipment intended to make or receive a communication now has a processor and requires software to function.²² The Court accepted this and fitted it with the language of earlier case law. So it held that the software and hardware necessary to access the broadcast did not play an "indispensable role" as Ocilion had not "take[n] action" to give end users access.²³ This is an important distinction. While Ocilion's product was *necessary* to give access to the works, the company itself did not take action to provide access to those works. The access was given by the network providers. Indeed, as the Court emphasised once more, knowledge that a product may be used for communicating a work to the public is not the same as actually communicating that work.²⁴ This makes sense if one takes a very simple example. A computer might be necessary to upload works to the internet, but it would be very strange to suggest that the computer manufacturer is actually responsible for communicating the works uploaded.

The second significant aspect of the judgment (and the Advocate General's opinion) is that the provision of physical facilities can extend to technical support.²⁵ The Advocate General took this view because technical support – including software updates and other technical improvements – are a "standard ancillary service" and they are necessary for the end user to take full advantage of the facilities in question.²⁶ To the extent that there was no evidence before the Court that these updates and improvements affected what programmes would be watched by the end user, the Court was content to agree with the Advocate General.²⁷ This once more highlights the need for passivity. So, for instance, if the software creates a system recommending programmes based on an end user's earlier choices, it may be that the software is no longer passive. Its provision is therefore not merely providing physical facilities. While the extent of the permitted passivity in this context is unclear, the starting point must be right.

Modern electronic devices routinely need to update the software to fix bugs and to avoid security risks. As the ongoing updating and improvement of the software is something which must be encouraged, it would have been very unfortunate if this was undermined because a rule was introduced that providing updates would lead to copyright infringement.

In the end, what the decision made clear is that it is the network operators who gave the end users access to the copyright works, whether live or in delayed replay mode, and not the provider of the hardware and software.²⁸ This made sense as the end user is unlikely to even be aware of Ocilion's role in the provision of the service.²⁹ Accordingly, the private copying question was not relevant to Ocilion's liability. But the Court addressed it in any event.

Private copying

The second part of the reference considered whether the catch-up service was covered by the private copying exception. Once more, the key feature of this service was that the end user requests a programme to be recorded. But it is recorded by the network operator on hardware provided by Ocilion as part of its product;³⁰ and it is recorded only once, and all users who ask to record the programme get access to the same copy.

It was once more reiterated that the private copying exception is part of ensuring the fair balance between right holders and users.³¹ It was immediately clear that delayed access service did not provide the necessary balance between these interests.³² An immediate problem was the copy of the work was not made by the end user, but by the network operator.³³ The private copying exception applies to individuals and not to legal persons;³⁴ and so a copy made by a company automatically falls outside the exception. To avoid this problem, Ocilion claimed it was merely providing a *tool* to make the copy.

The difficulty with this argument was that, as the Advocate General noted, the copying was not even initiated by the end user.³⁵ This was because the catch-up service was not to enable the end user to make additional use of a work to which they have been given access, but to provide an alternative means of access to the transmission of the original television programme.³⁶ In simple terms, the catch-up service was adding value to the original broadcast.³⁷ It therefore can be contrasted with services where copies are made by the user themselves using online services.³⁸

Critically, the Advocate General noted that the single copy made as part of the catch-up service is not made in the *private* sphere of the end user at all, rather it is made as part of the public exploitation of the work so as to make it available to an indeterminate number of end users.³⁹ Indeed, as the Court noted, the main interest of the catch-up service was to provide content at a different time to that when it was transmitted live.⁴⁰ Thus, even if multiple copies had been made of the same programme it would still not have been a private copy.

As already explained, this was not how the software worked. Instead, it created one recording and gave anyone requesting it access to the same recording. Clearly, this technical approach could not improve the case for it being private copying. In fact, it made it worse. It was said that making only one copy for use by multiple end users was making a copy for a “collective (public) use”.⁴¹ Furthermore, the service provided did not actually involve making a copy, but giving access to an existing copy.⁴² In other words, the network operators were not making a reproduction of a work, but communicating an existing work to the public.⁴³ While neither the Advocate General nor the Court cited it, this had been established a decade ago in *C-607/11 TV Broadcasting Ltd v TVCatchup*.⁴⁴ Nevertheless, what was emphasised again in *Ocilion* is that there is a difference between simultaneously making a television programme available online in accordance with the broadcaster’s own schedule and making it available at other times.⁴⁵

Unsurprisingly, therefore, the Court dismissed any claim that allowing the single copy to be used many times was a matter of technical neutrality. It held that the system was nothing to do with a new technology being introduced, but rather it was nothing more than giving an indeterminate number of people access to a single copy for commercial purposes.⁴⁶ In short,

the Court was objecting to the service provided and not the technology used to provide it. Accordingly, the private copying exception did not apply.

Importantly, it is worth noting that the Advocate General highlighted various things as important for private copying. The overarching point is the copy made should be for the user's exclusive use⁴⁷ but, more interestingly, he suggested that there must be some *cost* to the user making the copy. This might be the cost of the hardware, the reproduction material (e.g. the CD) or the storage service or simply the effort to make the reproduction.⁴⁸ Thus, where something makes a single copy available to many it does so with minimal fixed cost and so is clearly outside the exception.⁴⁹ This "cost" requirement appears to be in addition to the requirement to provide "fair compensation" for any copy made.⁵⁰ This idea a user must incur some form of "cost" is strange. Copyright exceptions are not usually based on cost and, indeed, surely the requirement to pay the fair compensation *is* the cost. The Court neither endorsed nor distanced itself from this cost requirement, but it is suggested that a requirement for user costs should not be a precondition for any exception.⁵¹

Conclusion

It is not the decision in *Ocilion* itself which is likely to be of significant interest. The decision is but another case in an increasingly long line of new technologies being assessed in terms of the scope of rights and exceptions. But what the case highlights is that the passive provision of facilities can evolve as technology evolves and can go beyond the physical and so extend beyond apparatus. The inclusion of software (and indeed technical support) as physical facilities may have significant ramifications for developers of software for third party devices. The case also makes it clear that private copying will be viewed narrowly. It must actually involve a copy and – critically – that copy cannot be made available to people other than the copier and those in the copier's private sphere. Whether other suggestions, such as copying must involve a cost to fall within exception, will stand the test of time is less clear. Nevertheless, statements such as these indicate a very restrictive view of the exception's scope. **i.**

¹ Directive 2002/29/EC on copyright in the information society, Art 3.

² Indeed, it was the subject of an earlier case comment in this journal: Phillip Johnson, 'User Generated Content and Intermediary liability' (2021) 126 *Intellectual Property Forum* 101.

³ The subject of another case comment: Phillip Johnson, 'A copy of a cloud: private copying levies ... again' (2022) 128 *Intellectual Property Forum* 86.

⁴ EU:C:2023:564 (Court), EU:C:2022:999 (AG).

⁵ As they were called: AG, [12].

⁶ AG, [12]; Court, [12].

⁷ *Ocilion* also offered a cloud-based system, and while this technology was discussed it was not relevant to the questions asked: see AG, [16]; Court, [15].

⁸ AG, [13].

⁹ AG, [27].

¹⁰ AG, [36].

¹¹ The questions were actually answered the other way around.

¹² AG, [14] and [29]; Court, [13].

¹³ However, it was not called this by the Court of the Advocate General.

¹⁴ AG, [15]; Court, [14].

¹⁵ Directive 2001/29/EC, Art 5(2)(b).

¹⁶ The Court was not asked about the second product.

¹⁷ Court, [59] also see AG, [68].

¹⁸ Court, [62] adopting AG, [68] to [70].

¹⁹ AG, [61] referring to Directive 2001/29/EC, recital (27) and C-527/15 *Stichting Brein*, EU:C:2017:300.

²⁰ AG, [65] and Court, [64].

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- ²¹ AG, [65].
- ²² AG, [65].
- ²³ Court, [64].
- ²⁴ Court, [64].
- ²⁵ Court, [66] and AG, [66].
- ²⁶ AG, [66] (the Commission took the contrary view in its submissions).
- ²⁷ Court, [66].
- ²⁸ AG, [69].
- ²⁹ AG, [70].
- ³⁰ AG, [29].
- ³¹ AG, [34]; Court, [33] and [34].
- ³² AG, [35].
- ³³ AG, [37].
- ³⁴ Court, [39].
- ³⁵ AG, [37].
- ³⁶ AG, [37].
- ³⁷ Court, [43].
- ³⁸ See C-433/20 *Austro-Mechana*, EU:C:2022:2017; and Phillip Johnson, ‘A copy of a cloud: private copying levies ... again’ (2022) 128 *Intellectual Property Forum* 86; also see C-265/16 *VCAST*, EU:C:2017:913, [35].
- ³⁹ Court, [45].
- ⁴⁰ Court, [44].
- ⁴¹ AG, [41].
- ⁴² AG, [42].
- ⁴³ AG, [45].
- ⁴⁴ EU:C:2013:147, [40].
- ⁴⁵ AG, [47].
- ⁴⁶ Court, [49].
- ⁴⁷ AG, [43].
- ⁴⁸ AG, [50].
- ⁴⁹ AG, [50] and its application to the three-step test: AG, [54].
- ⁵⁰ AG, [51].
- ⁵¹ Indeed, *removing* transaction costs has been suggested as a reason to *create* copyright exceptions: see for instance, Wendy Gordon, ‘Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors’ (1992) 82 *Columbia Law Review* 1600.