



Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

13 July 2023*

(Reference for a preliminary ruling – Intellectual property – Copyright in the information society – Directive 2001/29/EC – Article 3 – Right of communication to the public – Article 5(2)(b) – ‘Private copying’ exception – Provider of an Internet Protocol television (IPTV) service – Access to protected content without the rightholders’ consent – Online video recorder – Replay function – De-duplication technique)

In Case C-426/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Oberster Gerichtshof (Supreme Court, Austria), made by decision of 27 May 2021, received at the Court on 13 July 2021, in the proceedings

Ocilion IPTV Technologies GmbH

v

Seven.One Entertainment Group GmbH,

Puls 4 TV GmbH & Co. KG,

THE COURT (First Chamber),

composed of A. Arabadjiev, President of the Chamber, L. Bay Larsen, Vice-President of the Court, acting as Judge of the First Chamber, M. Ilešič, A. Kumin and I. Ziemele (Rapporteur), Judges,

Advocate General: M. Szpunar,

Registrar: D. Dittert, Head of Unit,

having regard to the written procedure and further to the hearing on 21 June 2022,

after considering the observations submitted on behalf of:

- Ocilion IPTV Technologies GmbH, by P. Burgstaller, Rechtsanwalt,
- Seven.One Entertainment Group GmbH and Puls 4 TV GmbH & Co. KG, by M. Boesch, Rechtsanwalt,

* Language of the case: German.

– the European Commission, by J. Samnadda and G. von Rintelen, acting as Agents,
after hearing the Opinion of the Advocate General at the sitting on 15 December 2022,
gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 3(1) and Article 5(2)(b) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10).
- 2 The request has been made in proceedings between Ocilion IPTV Technologies GmbH ('Ocilion'), on the one hand, and Seven.One Entertainment Group GmbH and Puls 4 TV GmbH & Co. KG (together, 'Seven.One and Other'), on the other hand, concerning the making available by Ocilion to its commercial customers of an Internet Protocol television (IPTV) service by which the content of television programmes in respect of which Seven.One and Other are the rightholders is broadcast for the benefit of end users.

Legal context

European Union law

- 3 Recitals 4, 9, 10, 21, 23, 27, 31 and 44 of Directive 2001/29 state:
 - '(4) A harmonised legal framework on copyright and related rights, through increased legal certainty and while providing for a high level of protection of intellectual property, will foster substantial investment in creativity and innovation, including network infrastructure, and lead in turn to growth and increased competitiveness of European industry, both in the area of content provision and information technology and more generally across a wide range of industrial and cultural sectors. This will safeguard employment and encourage new job creation.
- ...
- (9) Any harmonisation of copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation. Their protection helps to ensure the maintenance and development of creativity in the interests of authors, performers, producers, consumers, culture, industry and the public at large. Intellectual property has therefore been recognised as an integral part of property.
- (10) If authors or performers are to continue their creative and artistic work, they have to receive an appropriate reward for the use of their work, as must producers in order to be able to finance this work. The investment required to produce products such as phonograms, films or multimedia products, and services such as "on-demand" services, is

considerable. Adequate legal protection of intellectual property rights is necessary in order to guarantee the availability of such a reward and provide the opportunity for satisfactory returns on this investment.

...

- (21) This Directive should define the scope of the acts covered by the reproduction right with regard to the different beneficiaries. This should be done in conformity with the acquis communautaire. A broad definition of these acts is needed to ensure legal certainty within the internal market.

...

- (23) This Directive should harmonise further the author's right of communication to the public. This right should be understood in a broad sense covering all communication to the public not present at the place where the communication originates. This right should cover any such transmission or retransmission of a work to the public by wire or wireless means, including broadcasting. This right should not cover any other acts.

...

- (27) The mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Directive.

...

- (31) A fair balance of rights and interests between the different categories of rightholders, as well as between the different categories of rightholders and users of protected subject-matter, must be safeguarded. The existing exceptions and limitations to the rights as set out by the Member States have to be reassessed in the light of the new electronic environment. Existing differences in the exceptions and limitations to certain restricted acts have direct negative effects on the functioning of the internal market of copyright and related rights. Such differences could well become more pronounced in view of the further development of transborder exploitation of works and cross-border activities. In order to ensure the proper functioning of the internal market, such exceptions and limitations should be defined more harmoniously. The degree of their harmonisation should be based on their impact on the smooth functioning of the internal market.

...

- (44) When applying the exceptions and limitations provided for in this Directive, they should be exercised in accordance with international obligations. Such exceptions and limitations may not be applied in a way which prejudices the legitimate interests of the rightholder or which conflicts with the normal exploitation of his work or other subject-matter. The provision of such exceptions or limitations by Member States should, in particular, duly reflect the increased economic impact that such exceptions or limitations may have in the context of the new electronic environment. Therefore, the scope of certain exceptions or limitations may have to be even more limited when it comes to certain new uses of copyright works and other subject-matter.'

4 Article 2 of Directive 2001/29, entitled ‘Reproduction right’, provides:

‘Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part:

(a) for authors, of their works;

...

(e) for broadcasting organisations, of fixations of their broadcasts, whether those broadcasts are transmitted by wire or over the air, including by cable or satellite.’

5 Article 3 of that directive, entitled ‘Right of communication to the public of works and right of making available to the public other subject-matter’, provides:

‘1. Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.

2. Member States shall provide for the exclusive right to authorise or prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them:

...

(d) for broadcasting organisations, of fixations of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite.

...’

6 Under Article 5 of the directive, entitled ‘Exceptions and limitations’:

‘1. Temporary acts of reproduction referred to in Article 2, which are transient or incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable:

(a) a transmission in a network between third parties by an intermediary, or

(b) a lawful use

of a work or other subject-matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2.

2. Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 in the following cases:

...

(b) in respect of 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 which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject-matter concerned;

...

5. The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.'

Austrian law

7 Paragraph 15 of the Urheberrechtsgesetz (Law on Copyright) of 9 April 1936 (BGBl. 111/1936), in the version applicable to the dispute in the main proceedings ('the UrhG'), provides:

'The author shall have the exclusive right to reproduce the work, irrespective of the process used and the quantity reproduced, temporarily or permanently.'

8 Paragraph 17(1) of the UrhG is worded as follows:

'The author shall have the exclusive right to transmit the work via broadcast or similar means.'

9 Under Paragraph 18a(1) of the UrhG:

'The author shall have the exclusive right to make the work available to the public, by wire or wireless means, in such a way that allows members of the public to access it from a place and at a time chosen by them.'

10 Paragraph 42 of the UrhG provides:

'...

(4) Any natural person may make reproductions of a work on media other than those mentioned in subparagraph 1 for private use and for ends that are neither directly nor indirectly commercial.

(5) Subject to subparagraphs 6 and 7, a reproduction shall not be made for personal or private use where it is made to make the work accessible to the public by means of the reproduced copy or where the model used for that purpose has been made or made available to the public in a manifestly unlawful manner. Copies produced for personal or private use may not be used to make the work accessible to the public.

...'

11 Paragraph 76a of the UrhG provides:

'(1) Any person who transmits, via broadcast or similar means, sounds or images (a broadcasting organisation within the meaning of Paragraph 17) shall, within the limits laid down by law, have the exclusive right to transmit the broadcast simultaneously via another broadcaster and to use the broadcast for communication to the public within the meaning of Paragraph 18(3) in places accessible to the public against payment of an entrance fee; the broadcasting organisation shall

also have the exclusive right to fix the broadcast on a visual or audio medium (in particular also in the form of a photograph), to reproduce it, to transmit it and to use it to make it available to the public. Reproduction also covers the use of a communication made by means of a visual- or audio-recording medium to transmit it to another medium.

(2) Visual or audio recordings reproduced or transmitted in disregard of subparagraph 1 may not be used for broadcasting or communication to the public.

(3) Any natural person may, for private use and for ends that are neither directly nor indirectly commercial, fix a broadcast as a visual or audio recording and make multiple copies of it ...'

The dispute in the main proceedings and the questions referred for a preliminary ruling

- 12 Ocilion, a company incorporated under Austrian law, offers to commercial customers, who may be network operators, for example telephone or electricity companies, or even establishments such as hotels or stadiums ('the network operators'), an IPTV service, access to which is restricted to network end users who are natural persons and customers of the network operators. That service, which concerns, inter alia, television programmes for which Seven.One and Other hold retransmission rights, takes the form of either (i) an on-premises solution, in which Ocilion makes the necessary hardware and software available to those network operators, which are to be managed by those operators, but for which Ocilion provides technical assistance, or (ii) a cloud-hosting solution, which is directly managed by Ocilion.
- 13 Ocilion's service not only allows the simultaneous retransmission of Seven.One and Other's television programmes, but also offers the possibility of replaying those programmes via an online video recorder. This makes it possible for a particular broadcast to be recorded on an ad hoc basis, but also for all the programmes selected by the end user – who is a customer of the network operator – to be recorded, allowing them to be replayed, up to seven days after the initial broadcast of the programmes concerned.
- 14 Whether it is the on-premises solution or the cloud-hosting solution, each recording is initiated, in practice, by the end user who himself or herself activates the online recording function and selects the content to be recorded. Once a programme has been selected by a first user, the recorded material is made available to any other user who wishes to view the recorded content. In order to do so, a de-duplication process is used, which avoids several copies being made for customers who programme the same recordings, and access to the recorded content is provided through the allocation of a reference number communicated to each user by Ocilion.
- 15 As regards the on-premises solution, the framework agreements concluded between Ocilion and the network operators state that the latter must ensure, by their own means, that they and their clients have sufficient rights for all the content that they make available.
- 16 Since they did not consent to the communication of their television programmes by means of the service offered by Ocilion, Seven.One and Other maintain that that service amounts to an unauthorised retransmission of content over which they hold exclusive rights. They also submit that the means in which the online recorder operates does not allow the resulting de-duplications to be regarded as falling within the 'private copying' exception, for the purposes of Paragraph 42(4) and Paragraph 76a(3) of the UrhG.

- 17 In those circumstances, Seven.One and Other 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.
- 18 Since that application was, in essence, granted at first instance and upheld on appeal, Ocilion brought an appeal before the Oberster Gerichtshof (Supreme Court, Austria), the referring court.
- 19 That court states, in the first place, that it is required to determine whether the reproductions of broadcasting content made using an online video recorder are covered by the exceptional ‘private copying’ arrangement, both as regards the on-premises solution and in the context of cloud hosting.
- 20 In that regard, it considers that a finding as to whom the copy of content made in the de-duplication process provided by Ocilion is attributable will be decisive. Thus, if Ocilion has the power to organise how the recording function of the online video recorder works, the de-duplication of the content would be attributable to it and the application of the exceptional ‘private copying’ arrangement would be excluded. By contrast, if Ocilion merely stores copies made by natural persons, without offering a service that makes content available, there is nothing to prevent the reproductions made from being regarded as falling within the concept of ‘private copying’.
- 21 The referring court refers, in that regard, to the judgment of 29 November 2017, *VCAST* (C-256/16, EU:C:2017:913), in that it states that the fact that the person concerned himself or herself possesses reproduction equipment, devices or media for making a private copy has no bearing on the unlawful nature of that copy. However, that court doubts the relevance of such a solution in the main proceedings, in the light of the particular features of the service offered by Ocilion and, in particular, because that service goes well beyond that of a storage-space provider. Therefore, in order to avoid circumvention of Directive 2001/29, that court considers that, in order to determine whether private copying is involved, importance should not be attached to the formal question of who initiates the copying.
- 22 In the second place, the referring court asks 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 2001/29, for which that undertaking should be held responsible.
- 23 In that regard, it states, first, that it is not clear 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. Secondly, it states 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.

24 In those circumstances, the Oberster Gerichtshof (Supreme Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

- ‘(1) Is a national provision compatible with EU law if it permits, on the basis of Article 5(2)(b) of Directive [2001/29], the operation of an online video recorder which is [made available] by a commercial provider and which
- (a) by virtue of the de-duplication process implemented as a technical means, does not create an independent copy of the programmed broadcasting content for each recording initiated by a user, but, in so far as the content in question has already been stored on the initiative of another user who was the first user to record that content, merely makes a referencing – in order to avoid redundant data – which allows the subsequent user to access the content already stored;
 - (b) has a replay function via which the entire television programme of all selected channels is recorded around the clock and made available for retrieval over a period of seven days, provided that the user makes a one-off selection to that effect in respect of the channels concerned by ticking a box in the menu of the online video recorder; and
 - (c) also provides the user with access (either embedded in a cloud service of the provider or as part of the complete on-premises IPTV solution provided by the provider) to protected broadcasting content without the consent of the rightholders?
- (2) Is the term “communication to the public” in Article 3(1) of Directive 2001/29 to be interpreted as meaning that such communication is carried out by a commercial provider of a complete (on-premises) IPTV solution, in the context of which it provides, in addition to software and hardware for receiving TV programmes via the internet, technical support and makes adjustments to the service on an ongoing basis, but that service is operated entirely on the customer’s infrastructure, if the service provides the user with access not only to broadcasting content whose online use has been authorised by the respective rightholders, but also to protected content for which rights clearance has not been obtained, and the provider
- (a) can influence which TV programmes can be received by the end user via the service,
 - (b) is aware that its service also enables the reception of protected broadcasting content without the consent of the rightholders, but
 - (c) does not advertise that possibility of unauthorised use of its service, thereby creating a major incentive to purchase the product, but rather advises its customers at the time of conclusion of the contract that they must take care of the granting of rights on their own responsibility, and
 - (d) does not provide, through its activity, special access to broadcasting content which, in the absence of its intervention, could not be received or could be received only with difficulty?’

Consideration of the questions referred

The first question

25 By its first question, the referring court asks, in essence, whether Article 2 and Article 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 may 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 a server made available on premises, and on the initiative of the end users of that service, a continuous or one-off recording of those broadcasts, 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.

- 26 As a preliminary point, it should be recalled that, according to the Court's settled case-law, in interpreting a provision of EU law, it is necessary to consider not only its wording, by reference to its usual meaning in everyday language, but also the context in which it occurs and the objectives pursued by the rules of which it is part (judgment of 4 May 2023, *Österreichische Datenschutzbehörde and CRIF*, C-487/21, EU:C:2023:369, paragraph 19 and the case-law cited).
- 27 In the first place, it should be noted at the outset that, under Article 5(2)(b) of Directive 2001/29, Member States may provide for exceptions or limitations to the exclusive reproduction right provided for in Article 2 of that directive 'in respect of 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'.
- 28 As regards, first of all, the question whether a service such as that at issue in the main proceedings constitutes a 'reproduction' for the purposes of Article 5(2)(b) of that directive, the Court has held that that concept must be construed broadly, in the light both of the requirement expressed in recital 21 of that directive, according to which the acts covered by the reproduction right are to benefit from a broad definition in order to ensure legal certainty within the internal market, and of the wording of Article 2 of that directive, which uses expressions such as 'direct or indirect', 'temporary or permanent', 'by any means' and 'in any form'. In addition, the scope of that protection of the acts covered by the reproduction right also follows from the main objective of that directive, which is to introduce a high level of protection, in particular for authors (judgment of 24 March 2022, *Austro-Mechana*, C-433/20, EU:C:2022:217, paragraph 16).
- 29 Next, as regards, more specifically, the expression 'reproductions on any medium', referred to in Article 5(2)(b) of that directive, the Court has held that it covers the saving, for private purposes, of copies of works protected by copyright on a server on which storage space is made available to a user by the provider of a cloud-computing service (judgment of 24 March 2022, *Austro-Mechana*, C-433/20, EU:C:2022:217, paragraph 33).
- 30 In order to rely on the derogation provided for in Article 5(2)(b) of that directive, it is not necessary that the natural persons concerned possess reproduction equipment, devices or media. They may also have copying services provided by a third party, which is the factual precondition for those natural persons to obtain private copies (judgment of 29 November 2017, *VCAST*, C-265/16, EU:C:2017:913, paragraph 35 and the case-law cited).
- 31 Last, it should be noted that, as is apparent from the wording of Article 5(2)(b) of Directive 2001/29, as set out in paragraph 27 of this judgment, that provision is applicable only where the reproductions are made by a natural person not only for private use, but also for ends that are neither directly nor indirectly commercial.
- 32 In the second place, it should be remembered that, as regards the exceptions and limitations provided for in Article 5(2) of Directive 2001/29, Article 5(5), read in conjunction with recital 44 of that directive, provides that they are applicable only in certain special cases which do not conflict with a normal exploitation of the work or other subject matter and do not unreasonably prejudice the legitimate interests of the rightholder.

- 33 In that regard, in the third place, the Court has stated that since the exceptions and limitations provided for in Article 5(2) of Directive 2001/29 themselves confer rights on the users of works or of other subject matter, that provision contributes to ensuring a fair balance between, on the one hand, the rights and interests of rightholders, which must themselves be given a broad interpretation, and, on the other hand, the rights and interests of those users (see, to that effect, judgment of 29 July 2019, *Spiegel Online*, C-516/17, EU:C:2019:625, paragraph 54).
- 34 As is apparent from recital 31 of Directive 2001/29, maintaining such a fair balance is precisely the objective of the harmonisation effected by that directive (see, to that effect, judgment of 22 June 2021, *YouTube and Cyando*, C-682/18 and C-683/18, EU:C:2021:503, paragraph 64).
- 35 It is in the light of the foregoing that it must be determined whether a service, such as that offered by Ocilion, is capable of falling within the ‘private copying’ exception provided for in Article 5(2)(b) of Directive 2001/29.
- 36 At the outset, it is apparent from the national legal framework set out in the order for reference that the Republic of Austria has exercised the option conferred on it by Article 5(2)(b) of Directive 2001/29 by providing in Paragraph 42(4) and in Paragraph 76a(3) of the UrhG that any natural person may make reproductions of a work or fixations of a broadcast on media for private use and for ends that are neither directly nor indirectly commercial.
- 37 In that regard, it follows from the judgment of 29 November 2017, *VCAST* (C-265/16, EU:C:2017:913), that Article 5(2)(b) of Directive 2001/29 must be interpreted as precluding national legislation which permits a commercial undertaking to provide private individuals with a cloud service for the remote recording of private copies of works protected by copyright, by means of a computer system, by actively involving itself in the recording, without the rightholder’s consent.
- 38 The referring court is uncertain, however, whether that case-law can be applied to a service such as that offered by Ocilion.
- 39 In the case in the main proceedings, it is common ground that Ocilion is a company that provides its services in the course of its commercial activity. Consequently, since legal persons are in any event excluded from benefiting from the exception provided for in Article 5(2)(b) (judgment of 9 June 2016, *EGEDA and Others*, C-470/14, EU:C:2016:418, paragraph 30), that company cannot be regarded as making a copy falling within that exception.
- 40 Ocilion submits, however, that the service it offers is limited to providing a tool that enables each end user, on his or her own initiative and on the basis of that user’s own programming, to replay television programmes, bearing in mind that, where content has been selected by a first end user, the resulting recording is made available to other end users who wish to view that same content by means of a reference number. That undertaking concludes that the resulting reproduction of television programmes is made by each end user for private purposes and that, in the light of the de-duplication technique that it uses, it does not unreasonably prejudice the legitimate interests of the holders of exclusive rights.
- 41 Therefore, it must be determined whether Article 5(2)(b) of Directive 2001/29 must be interpreted as meaning that the de-duplication of television broadcasts generated by a service, such as that offered by Ocilion, is capable of being covered by the ‘private copying’ exception.

- 42 First, as the Advocate General observed in points 36 to 38 of his Opinion, a service such as that offered by Ocilion is characterised by its dual functionality. It is based on an IPTV solution for the simultaneous retransmission of television broadcasts, supplemented by an online recording tool for those broadcasts. Since the online recording concerns broadcasts retransmitted in the context of the IPTV solution, that service is not autonomous, but necessarily depends on the simultaneous retransmission service provided by that solution.
- 43 Moreover, the possibility of recording retransmitted television broadcasts represents added value to a service such as that at issue in the main proceedings, since it offers access to the content concerned under conditions that are different from those of its simultaneous retransmission.
- 44 Secondly, it is apparent from the order for reference that the service offered by Ocilion is based on a technique that makes the copy made by the first user, using the means provided by that service provider, available to end users who wish to view the content. In those circumstances, although it is true that the end user himself or herself programmes the recordings, the service of recording and making available the copy thus made is not only based on the means provided by the service provider, but also constitutes, as is apparent from the preceding paragraph, the main interest of the offer provided.
- 45 In that regard, the de-duplication technique at issue in the main proceedings leads to the making of a copy that, far from being available exclusively to the first user, is intended to be accessible, through the system offered by the service provider, to an indeterminate number of end users, themselves customers of the network operators to which that service provider makes that technique available.
- 46 In those circumstances, it must be held, subject to the verifications to be carried out by the referring court, that a service such as that offered by Ocilion, which allows access to a reproduction of a protected work to an indeterminate number of recipients for commercial purposes, is not covered by the ‘private copying’ exception provided for in Article 5(2)(b) of Directive 2001/29.
- 47 Thirdly, and as the Advocate General emphasised in point 42 of his Opinion, that finding cannot be invalidated by the need to comply with the principle of technological neutrality, according to which the law must specify the rights and obligations of persons in a generic manner, so as not to favour the use of one technology to the detriment of another (see, to that effect, judgment of 24 March 2022, *Austro-Mechana*, C-433/20, EU:C:2022:217, paragraph 27).
- 48 In that regard, the Court has already emphasised that the exception provided for in Article 5(2)(b) of Directive 2001/29 must allow and ensure the development and operation of new technologies, and must safeguard a fair balance between the rights and interests of rightholders and of users of protected works who wish to avail themselves of those technologies (judgment of 24 March 2022, *Austro-Mechana*, C-433/20, EU:C:2022:217, paragraphs 26 and 27).
- 49 However, whilst it is thus accepted that the principle of technological neutrality requires that the interpretation of provisions of EU law does not hold back innovation and technological progress (see, by analogy, judgment of 15 April 2021, *Eutelsat*, C-515/19, EU:C:2021:273, paragraph 48), the fact remains that the finding made in paragraph 46 of this judgment does not depend on the reproduction technology used in the context of a service such as that at issue in the main proceedings, but results from the fact that the system used by the network operators gives access to recorded broadcasts to an indeterminate number of persons for commercial purposes, and that

access is liable unreasonably to prejudice the legitimate interests of the rightholders, with the result that the application of the ‘private copying’ exception in respect of such a service would be liable to undermine the objective of maintaining a fair balance between the interests of rightholders and those of users.

- 50 In the light of the foregoing considerations, the answer to the first question is that Article 2 and Article 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.

The second question

- 51 By its second question, the referring court asks, in essence, whether Article 3(1) of Directive 2001/29 must be interpreted as meaning that the making available and maintenance of an on-premises process of online video recording, giving access to protected content, constitutes a ‘communication to the public’ within the meaning of that provision, where the provider has a certain influence over the selection of content to which the user has access, the user has access to that content without the involvement of the provider and that provider, while aware that its service may be used to access protected broadcasting content without the consent of the authors, does not promote that aspect of its service.
- 52 Under Article 3(1) of Directive 2001/29, Member States are to provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.
- 53 As the Court has repeatedly held, under that provision, authors thus have a right which is preventive in nature and which enables them to prohibit any communication to the public which possible end users or commercial customers might contemplate making (see, to that effect, judgment of 20 April 2023, *Blue Air Aviation*, C-775/21 and C-826/21, EU:C:2023:307, paragraph 44 and the case-law cited).
- 54 As Article 3(1) of Directive 2001/29 does not define the concept of ‘communication to the public’, the meaning and scope of that concept must be determined in the light of the objectives pursued by that directive and the context in which the provision being interpreted is set (judgment of 20 April 2023, *Blue Air Aviation*, C-775/21 and C-826/21, EU:C:2023:307, paragraph 45 and the case-law cited).
- 55 In that regard, the Court has recalled that that concept must, as stated in recital 23 of Directive 2001/29, be understood in a broad sense, covering all communication to the public not present at the place where the communication originates and, thus, any such transmission or retransmission of a work to the public by wire or wireless means, including broadcasting. It is, indeed, clear from recitals 4, 9 and 10 of that directive that the principal objective of the directive is to establish a high

level of protection of authors, allowing them to obtain an appropriate reward for the use of their work, including when a communication to the public takes place (judgment of 20 April 2023, *Blue Air Aviation*, C-775/21 and C-826/21, EU:C:2023:307, paragraph 46 and the case-law cited).

- 56 In particular, as the Court has repeatedly held, the concept of ‘communication to the public’, within the meaning of Article 3(1), includes two cumulative criteria, namely an act of communication of a work and the communication of that work to a public, and requires an individual assessment (judgment of 20 April 2023, *Blue Air Aviation*, C-775/21 and C-826/21, EU:C:2023:307, paragraph 47 and the case-law cited).
- 57 As regards the concept of an ‘act of communication’, it must be stated that such an act refers to any transmission of the protected works, irrespective of the technical means or process used (judgment of 29 November 2017, *VCAST*, C-265/16, EU:C:2017:913, paragraph 42 and the case-law cited).
- 58 Furthermore, for the purposes of the individual assessment referred to in paragraph 56 of this judgment, account has to be taken of several complementary criteria, which are not autonomous and are interdependent. Since those criteria may, in different situations, be present to widely varying degrees, they must be applied both individually and in their interaction with one another (judgment of 20 April 2023, *Blue Air Aviation*, C-775/21 and C-826/21, EU:C:2023:307, paragraph 48 and the case-law cited).
- 59 Among those criteria, the Court has emphasised the indispensable role played by the service provider and the deliberate nature of its intervention. That service provider makes an act 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 broadcast work (see, to that effect, judgment of 20 April 2023, *Blue Air Aviation*, C-775/21 and C-826/21, EU:C:2023:307, paragraph 49 and the case-law cited).
- 60 By contrast, recital 27 of Directive 2001/29 states that ‘the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of [that] Directive’.
- 61 In the present case, as mentioned in paragraph 12 of this judgment, it is apparent from the order for reference that Ocilion provides network operators, as part of its on-premises solution, with the necessary hardware and software, and technical assistance for maintenance.
- 62 As the Advocate General observed in points 68 to 70 of his Opinion, in the absence of any link between the provider of the necessary hardware and software and the end users, a service such as that at issue in the main proceedings cannot be regarded as an act of communication, within the meaning of Article 3(1) of Directive 2001/29, carried out by Ocilion.
- 63 First, a service provider such as Ocilion does not give end users access to a protected work. It is true that it provides network operators with the necessary hardware and software in that regard, but those network operators are the only ones who grant the end users access to protected works.
- 64 Secondly, since it is the network operators who give end users access to protected works, in accordance with the detailed rules laid down between them in advance, the service provider that supplies the necessary hardware and software to the network operators in order to give access to

those works does not play an ‘indispensable role’ within the meaning of the case-law arising from the judgment cited in paragraph 59 of this judgment, with the result that it cannot be regarded as having carried out an act of communication within the meaning of Directive 2001/29. Although the use of that hardware and software, as part of the on-premises solution, appears necessary in order for end users to be able to replay television broadcasts, it is not apparent from the information in the file submitted to the Court that the provider supplying that hardware and that software takes action to give end users access to those protected works.

- 65 In that context, any knowledge that such a service provider may have of the fact that its service may be used to access protected broadcasting content without the consent of the authors is not in itself sufficient for it to be regarded as making an act of communication within the meaning of Article 3 of Directive 2001/29.
- 66 Moreover, it is not apparent from the order for reference that the technical assistance offered by Ocilion goes beyond the maintenance and adaptation of the necessary hardware and software provided and allows that provider to influence the selection of television programmes that the end user can watch on replay.
- 67 In the light of the foregoing considerations, the answer to the second question is 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.

Costs

- 68 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

1. Article 2 and Article 5(2)(b) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society

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.

2. 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.

[Signatures]