



Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR

delivered on 15 December 2022¹

Case C-426/21

Ocilion IPTV Technologies GmbH

v

**Seven.One Entertainment Group GmbH,
Puls 4 TV GmbH & Co. KG**

(Request for a preliminary ruling from the Oberster Gerichtshof (Supreme Court, Austria))

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

Introduction

1. In its case-law concerning the exclusive right of communication to the public under EU copyright law, the Court of Justice has at times recognised liability for an infringement of that right on the part of players whose acts appeared at first to contribute only indirectly to those infringements.² That approach has met with some criticism, in particular from Advocate General Saugmandsgaard Øe in his Opinion in the joined cases *YouTube v Cyando* (C-682/18 and C-683/18, EU:C:2020:586),³ to which the referring court refers in the present case.

2. I do not entirely agree with this criticism.⁴ However, one thing is certain: despite being misinterpreted, the case-law of the Court of Justice may serve as a basis for seeking a declaration of liability for infringement of the right of communication to the public in situations where either no communication takes place, or the role played by the alleged infringer is limited to acts unrelated to the communication of a specific protected work, such as the mere provision of technical facilities enabling such communication. The misinterpretation consists of taking out of context the concepts of the ‘indispensable role’ of the player in question and his or her ‘full knowledge of the consequences of his or her action’, used by the Court of Justice in its case-law.

¹ Original language: French.

² See, in particular, judgments of 8 September 2016, *GS Media* (C-160/15, EU:C:2016:644); of 26 April 2017, *Stichting Brein* (C-527/15, EU:C:2017:300); of 14 June 2017, *Stichting Brein* (C-610/15, EU:C:2017:456); and of 22 June 2021, *YouTube v Cyando* (C-682/18 and C-683/18, EU:C:2021:503).

³ See points 94 to 106 of this Opinion.

⁴ I myself have contributed to the development of this line of case-law (see my Opinion in *Stichting Brein* (C-610/15, EU:C:2017:99)).

3. A series of preliminary rulings were made in those cases.⁵ Although in my view the present case is included in this, it is in fact much more complicated, not only on account of the complexity of the mechanism in place for communication to the public, which is the subject matter of the main proceedings, but because – apart from the right of communication to the public – it concerns the exclusive reproduction right and a ‘novel’ attempt to apply an exception to that right, known as the ‘private copy’ exception.

4. Nevertheless, the key to a correct solution, which would also be useful in the dispute pending before the referring court, seems to me to lie in a proper assessment of the respective roles of the various players involved.

Legal framework

European Union law

5. Article 2(a) and (e) 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 society⁶ 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.’

6. Pursuant to Article 3(1) and (2)(d) of that directive:

‘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.’

⁵ See the case giving rise to the judgment of 2 April 2020, *Stim and SAMI* (C-753/18, EU:C:2020:268), and joined cases *Blue Air Aviation* (C-775/21 and C-826/21), pending before the Court of Justice.

⁶ OJ 2001 L 167, p. 10.

7. Under Article 5(2)(b) and (5) of that directive:

‘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.’

8. Article 7(2) of Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property⁷ provides:

‘Member States shall provide for broadcasting organisations the exclusive right to authorise or prohibit the fixation of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite.’

9. Under Article 10 of that directive:

‘1. Member States may provide for limitations to the rights referred to in this Chapter in respect of:

(a) private use;

...

2. Irrespective of paragraph 1, any Member State may provide for the same kinds of limitations with regard to the protection of ... broadcasting organisations ..., as it provides for in connection with the protection of copyright in literary and artistic works.

...

3. The limitations referred to in paragraphs 1 and 2 shall be applied only in certain special cases which do not conflict with a normal exploitation of the subject matter and do not unreasonably prejudice the legitimate interests of the rightholder.’

⁷ OJ 2006 L 376, p. 28.

Austrian law

10. In Austrian law, the reproduction right and the right of communication to the public, in respect of authors, are provided for, respectively, in Article 15 and Articles 17 to 18a of the Urheberrechtsgesetz (Law on Copyright) of 9 April 1936,⁸ in the version applicable to the dispute in the main proceedings ('UrhG'). The exception to the reproduction right for private use is laid down in Article 42(4) and (5) of the UrhG. Finally, Article 76a(1) of the UrhG prescribes the exclusive right of broadcasting organisations to fix, reproduce, broadcast and use their broadcasts for the purpose of making them available to the public.

The facts, the procedure and the questions referred for a preliminary ruling

11. The companies Seven.One Entertainment Group GmbH and Puls 4 TV GmbH & Co. KG, applicants at first instance and respondents in the appeal on a point of law, are broadcasting organisations established in Germany and Austria, respectively.

12. Ocilion IPTV Technologies GmbH ('Ocilion') is a company formed under Austrian law. It offers an internet television service in a closed network⁹ (IPTV¹⁰) to commercial customers. These may be network operators such as telephone or electricity companies, or establishments such as hotels or stadiums ('the network operators'). The service is provided either as an on-premises solution, in which Ocilion makes the necessary hardware and software available to the customer (to be managed by the customer), or as a cloud hosting solution (managed by Ocilion).

13. The network operators use the service provided by Ocilion to offer their customers (end users) access to television via the internet. The television channels owned by the defendants are part of that offering.

14. Ocilion's IPTV solution includes a function for recording particular broadcasts using an online video recorder, as well as a replay function that allows the entire broadcasting content of any given television channel to be viewed for up to seven days after it has aired (broadcasts are recorded continuously so that they can be watched later). In principle, each recording is initiated by the end user, who activates these functions himself or herself by selecting the content to be reproduced. For the replay function, the programming only needs to be done once, for example when accessing the service for the first time.

15. In practice, however, a 'de-duplication' process is used, which avoids several copies being made for customers who programme the same recordings. All end users who programmed the same recording have access to the first (and only) copy, made when the 'first' end user programmed the recording. This is accessed using a reference which is sent to users. The copy may be deleted only once the last user has cancelled the programming of the recording in question (or after seven days, in the case of the replay function).

⁸ BGBl. 111/1936.

⁹ That is, accessible to subscribers only.

¹⁰ Internet Protocol Television.

16. The framework agreements between Ocilion and the network operators state that the latter are responsible for acquiring the rights of use to the broadcasts they retransmit using Ocilion's IPTV solution. Furthermore, according to Ocilion, the replay and online video recording function is covered by the private copying exception provided for in Article 5(2)(b) of Directive 2001/29.

17. The defendants in the main proceedings contend that they did not consent to Ocilion's customers retransmitting their broadcasts. They also question the applicability of the private copying exception to a process such as the one implemented by Ocilion for its IPTV solution. They brought actions for a prohibitory injunction before the Austrian courts, together with applications for the adoption of interim measures to prohibit Ocilion from communicating to the public or making available to the public, or from reproducing or allowing third parties to reproduce and make available to the public, copies of their broadcasts or from providing its customers with services or products enabling them to do so.

18. Since the applications were granted at first instance, and upheld on appeal, Ocilion brought an appeal on a point of law (*'Revision'*) before the referring court seeking the dismissal of all the applications for interim measures.

19. In those circumstances, the Oberster Gerichtshof (Supreme Court, Austria) 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 provided by a commercial provider and which
- (a) by virtue of the deduplication 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 [commercial] 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?’

20. The request for a preliminary ruling was received at the Court of Justice on 13 July 2021. Written observations have been submitted by the parties to the main proceedings and the European Commission. The parties presented their arguments at the hearing on 21 June 2022.

Analysis

21. The referring court has referred two questions to the Court of Justice for a preliminary ruling. The first concerns the interpretation of Article 2 of Directive 2001/29, which lays down, in particular, the exclusive right of authors to authorise or prohibit the reproduction of their works, read in conjunction with Article 5(2)(b) of that directive, which lays down an exception to that right for reproductions made by individuals for their own private use. The second question concerns the interpretation of Article 3(1) of the directive, which provides for the exclusive right of communication to the public.

22. I shall analyse these questions in the order in which they were asked, bearing in mind that the outcome of the dispute in the main proceedings, which involves ascertaining the liability of the applicant in the main proceedings, requires that the answers given to those two questions be considered together.

The first question referred for a preliminary ruling

The wording of the question

23. Although the wording of the first question referred for a preliminary ruling might suggest that the referring court is questioning whether the Austrian legislation transposing Article 5(2)(b) of Directive 2001/29 complies with that article, it seems to me that that question is rather intended to establish the correct interpretation of that legislation. This amounts to asking the Court of Justice to give an interpretation of that provision, read in conjunction with Article 2 of the

directive. Furthermore, the question must be understood as referring to a situation such as the one at issue in the main proceedings – that is to say, a service for the online retransmission (via the internet) of television broadcasts.

24. By its first question, the referring court thus seeks to ascertain whether Article 2 and Article 5(2)(b) of Directive 2001/29 are to be interpreted as meaning that the provision by an operator of a service for the retransmission of online television broadcasts, of an additional service for recording those broadcasts, in which

- separate copies of the broadcasting content programmed for each recording initiated by a user are not made, but – provided the content in question has already been recorded by another user who recorded it for the first time – a reference is generated which allows the next user to access the recorded content, and
- a replay function via which the entire television programme of all selected channels is recorded around the clock and is available for 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,

comes under the exception to the exclusive right to authorise or prohibit the reproduction of protected works referred to in that latter provision.

25. I have omitted the last point made by the referring court in the first question because, in my view, it is merely intended to establish that the process referred to in that question is carried out without the copyright holders' permission. However, as an exception to the exclusive right, that aspect is implied: in the event that the act of exploitation has been authorised, the exception to the exclusive right does not apply.

26. I shall now turn to the analysis of that question, following a brief reminder of how the service at issue works.

How the service works and the arguments of the applicant in the main proceedings

27. The applicant in the main proceedings provides its customers, the network operators, with an IT solution consisting of technical hardware and software enabling them to provide end users with an Internet Protocol Television (IPTV) service. As part of that service, the network operators, using the hardware and software made available to them by the applicant in the main proceedings, but without its active involvement, receive the broadcasts of broadcasting organisations, convert them and make them available, simultaneously and unchanged, to end users on the internet.¹¹ The service is provided within a closed network, that is to say it is only accessible to users who are customers of the network operators.

28. The service also includes an online recording function. With this function, end users can record specific programmes and programme the continuous recording of broadcasts of particular television channels, which will then be available for seven days after the broadcast has aired.

¹¹ This information comes from the written observations of the applicant in the main proceedings. It was confirmed, in respect of the on-premises solution, at the hearing by the defendants in the main proceedings. However, this aspect is not decisive as regards the answer to be given to the first question referred for a preliminary ruling.

29. The recording is made using the hardware (storage space) supplied by the applicant in the main proceedings to the network operators as part of its IPTV solution. It is organised in such a way that, after being programmed by a ‘first’ end user, a specific broadcast or the entire programme of a television channel is recorded (in other words, a copy is created). When another end user subsequently wishes to programme the recording of the same broadcast or the same television channel, no new copy is created, but that user gets access to the first, and only, copy, as do all subsequent users. This process is called ‘de-duplication’.

30. The first question relates to whether such a process falls within the private copying exception. I must begin by observing that, were that the case, the exception would have to be regarded as covering the entire process – that is to say, both the reproduction itself and the making available to end users of the copies resulting from that reproduction. The reproduction made under this exception must be intended for ‘private use’ by the user. In the case of a reproduction made for the user by a third party, the user must be able to make use of the copy and must have access to it. The reproduction itself, separate from the access to the copy thus made, cannot fall under the private copying exception. However, although the process in question does not fall within that exception, it must in my view be seen as the exploitation of two distinct exclusive rights: the reproduction right (when a copy of a broadcast is made) and the right of communication to the public (when access to that copy is given to end users).

31. The applicant in the main proceedings submits that, according to the case-law of the Court of Justice, it is not necessary, in order to benefit from the private copying exception, for the individual to own the equipment and the reproduction media. He or she may even use reproduction services provided by a third party.¹² However, the principle of technological neutrality requires that that rule be applied to modern reproduction techniques, such as the de-duplication technique used in the context of the IPTV solution of the applicant in the main proceedings. It is irrelevant, from the users’ point of view, whether a separate copy is made for each of them or whether they have access to one and the same copy, provided that such access was granted to each individual user on his or her own initiative. Any other solution would lead to the ‘petrification’ of copyright and the erosion of technological progress. Therefore, according to the applicant in the main proceedings, the recording service provided as part of its IPTV solution, both for the actual broadcasts themselves and for the continuous recording of the broadcasts of television channels selected by the end user, should benefit from the private copying exception and be exempt from the monopoly of the copyright holders.

32. These arguments do not convince me.

The replay function

33. Regarding the service for the continuous recording of the broadcasts of television channels selected by the end user so that he or she can access those broadcasts for seven days after they have aired, I doubt whether the private copying exception applies to such recording, regardless of whether there is a copy for each user or whether they share access to the same copy.

¹² See judgment of 24 March 2022, *Austro-Mechana* (C-433/20, EU:C:2022:217, paragraph 1 of the operative part).

34. As the Court has repeatedly pointed out, under recital 31 of Directive 2001/29, EU copyright is based, *inter alia*, on a ‘fair balance’ between the interests of copyright holders (and related rights) and those of users of protected subject matter.¹³ The private copying exception is one of the main provisions of the directive that ensures this fair balance. On the one hand, it takes into account the user’s interest in having full enjoyment, in his or her private sphere, of lawfully acquired protected subject matter,¹⁴ without fear of interference from the copyright holders. On the other hand, any prejudice suffered by those rightholders as a result of the private copying is deemed to be remedied by fair compensation, which, under Article 5(2)(b) of Directive 2001/29, must accompany the transposition of that exception into national law. However, since the use permitted under the private copying exception is limited to the user’s private sphere, the prejudice suffered by the copyright holders is not such as to affect the normal exploitation of the work.

35. In my view, applying the private copying exception to a service for the continuous recording of all broadcasts of television channels, such as that included in the IPTV solution of the applicant in the main proceedings, would be inconsistent with the requirement for a fair balance between the interests of copyright holders and those of users.

36. In the first place, it is not a stand-alone reproduction or storage service. The service at issue is an integral part of the IPTV solution, which consists mainly of the simultaneous retransmission of television broadcasts on the internet, to which the recording service is an add-on. Moreover, the recording service is dependent on the retransmission, which for the end user is the source of access to the subject matter to be reproduced. Thus, it cannot operate on a stand-alone basis and is necessarily attached to a service that provides access to television broadcasts. This is similar to a service with dual functionality, such as the one at issue in the case that gave rise to the *VCAST* judgment.¹⁵

37. In the second place, owing to its scale and its automatic nature, the service in question is, in my view, clearly outside the scope of the private copying exception as conceived by the EU legislature. Not only is the reproduction not made *by* the end user, as is literally required by Article 5(2)(b) of Directive 2001/29, but it is difficult to see how it is even *initiated* by that user. All that the end user does in the context of that service is to accept the offer made to him or her, together with the retransmission offer, to make a block recording of future broadcasts, without knowing the content of that reproduction and without knowing whether or not he or she will want to use it. The actual purpose of such a service is therefore not to enable the end user to make additional use of the works to which he or she has already been granted access, but to provide him or her with an alternative means of access to the simultaneous retransmission of television broadcasts.

38. All of that demonstrates, in my view, that in this case it is not a question of use of the protected subject matter in the end user’s *private* sphere, but of a *public* exploitation of such subject matter by the provider of the retransmission and recording service. The service provider, apart from the communication to the public of the works contained in television broadcasts by their retransmission on the internet, makes a reproduction and subsequently makes those works available to the public from the reproductions thus made. This means that copyright holders can

¹³ See, *inter alia*, judgment of 22 June 2021, *YouTube v Cyando* (C-682/18 and C-683/18, EU:C:2021:503, paragraph 64 and the case-law cited).

¹⁴ The principle that, in order to benefit from the private copying exception, the copy must come from a lawful source was laid down by the Court of Justice in its judgment of 10 April 2014, *ACI Adam and Others* (C-435/12, EU:C:2014:254, paragraph 1 of the operative part).

¹⁵ Judgment of 29 November 2017 (C-265/16, EU:C:2017:913).

fully exercise their right to authorise or prohibit such exploitation, without this constituting any interference in the private sphere of those users.¹⁶ Accordingly, there is no justification for applying the private copying exception.

The de-duplication technique

39. The de-duplication process, as used in the context of the IPTV solution of the applicant in the main proceedings,¹⁷ reinforces and confirms the foregoing conclusions. Indeed, that process alone excludes the application of the private copying exception.

40. In the context of that process, a single copy is made when an end user programmes the recording of a broadcast or the entire programme of a television channel. That copy is then made accessible to all end users who have programmed the recording of the same broadcast or the same channel.

41. In essence, as the defendants in the main proceedings and the Commission submit, that reproduction cannot be regarded as being made by the end user for private and non-commercial use, which would make it possible to apply the private copying exception. On the contrary, since it is to be made available to all end users who have programmed the same recording, that copy must be considered as being made by the service provider, for collective (public) use and for commercial purposes.

42. The arguments of the applicant in the main proceedings, which stem from the need to take into account technological progress when applying the private copying exception, cannot call that finding into question. EU copyright, as harmonised, inter alia, by Directive 2001/29, is based entirely on the technical characteristics of the different forms of exploitation of works. The various exclusive rights enshrined therein and the various exceptions to those rights reflect this. The Court also takes into account progress in that area. It has thus recognised the existence of online reproduction and storage services and the applicability of the private copying exception where an individual uses those services.¹⁸ However, this does not change the nature of the acts carried out. Making a copy of content on any medium is an act of reproduction; giving access to a pre-existing copy is not. These are objective facts that no intellectual stratagem, such as the concept of a ‘logical copy’ relied on by the applicant in the main proceedings, can alter.

43. The fact that the programming of the recording by the first end user activates the reproduction does not change this. As I have already observed, the reproduction of defined content¹⁹ is an integral part of the overall internet television service. That reproduction is initiated by the end user, but the copy made is not then at that user’s exclusive disposal:²⁰ instead it remains under the service provider’s control and is the source of the communication, by the

¹⁶ The situation here is quite different from the case of a stand-alone reproduction service, where the user reproduces potentially protected subject matter which he or she has obtained access to elsewhere. The exercise of the exclusive reproduction right would then require the rightholders to have knowledge of the reproduced subject matter, which falls within the private sphere of the user.

¹⁷ See point 29 of this Opinion.

¹⁸ See, inter alia, judgment of 24 March 2022, *Austro-Mechana* (C-433/20, EU:C:2022:217).

¹⁹ That is to say, television broadcasts that are re-transmitted on the internet.

²⁰ The user cannot, for example, decide to delete it if other users have programmed the recording of the same content.

latter, of the reproduced work to all users.²¹ The defendants in the main proceedings quite rightly observe in this regard that it is not the recording service that serves as a reproduction tool for end users, but it is the users who serve as a tool for the service provider to make a reproduction.

44. Online video recording, such as that included in the IPTV solution of the applicant in the main proceedings, thus consists of two separate acts of exploitation: an act of reproduction (the fixation of television broadcasts) and an act of communication to the public (the making available to end users who have programmed the recording of a broadcast access to the copy of that broadcast made by the service provider).²² These two acts are ascribable to the service provider and cannot benefit from the private copying exception.

45. Admittedly, a communication such as the one referred to in the preceding point is directed at the same public as the initial communication in the form of the simultaneous re-transmission of television broadcasts over the internet – that is to say, to the network operators' customers. Moreover, these two acts of communication are made by the same technical means, namely the internet. In essence, it could be argued therefore, as the applicant in the main proceedings does, that the subsequent communication benefits from the authorisation given for the initial communication,²³ in accordance with the case-law of the Court on the right of communication to the public.²⁴

46. Yet I do not believe that to be the case here, since the two acts of communication to the public are different forms of exploitation of protected subject matter.

47. Re-transmission on the internet is a 'linear' communication, to borrow a term from audiovisual services, in which content is broadcast according to the schedule established by the broadcaster and users can watch their chosen broadcast when it airs. This is how radio and television normally work, regardless of the broadcasting mode (terrestrial, satellite, cable or internet). In contrast, when the broadcast is recorded and the user has access to that recording, this is a 'non-linear' communication: in other words, it is the user who decides when he or she wants to watch the broadcast; he or she can also pause it and watch it several times. The user is thus able to enjoy the broadcast much more 'intensely' than with linear communication.

48. While Article 3(1) of Directive 2001/29 groups the two forms of communication together under the term 'any communication to the public of their works ... 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', they are in fact two separate acts of exploitation, both subject to exclusive rights and requiring separate authorisation from the copyright holders, despite the fact that both forms of communication may be directed at the same public and use the same technical means.²⁵

²¹ Including the 'first' end user who activated the recording, whose access to the copy is based on a 'reference', as is the case for all other end users. This concept of 'first end user' is, moreover, purely fictitious: in so far as several users can programme the recording of the same broadcast in advance, so that, at the time that broadcast starts, it is hard to say which of them initiated the recording.

²² See point 30 of this Opinion.

²³ Assuming this is done with the copyright holders' permission.

²⁴ See, recently, judgment of 22 June 2021, *YouTube v Cyando* (C-682/18 and C-683/18, EU:C:2021:503, paragraph 70).

²⁵ It is also important to note that holders of rights related to copyright only have the right, under Article 3(2) of Directive 2001/29, to authorise or prohibit the making available to the public of their protected subject matter in a non-linear manner, which supports the view that these are two distinct and independent rights.

Final observations and answer to the question referred

49. In general, there is nothing to support the application of the private copying exception to a service using the de-duplication technique, as is the case with the IPTV solution at issue in the present case.

50. The balance that underpins that exception²⁶ takes into account, *inter alia*, the cost of the reproduction for the user. This can be the cost of the hardware and the reproduction medium, the storage service or simply the effort required to make a reproduction.²⁷ Those costs are a limiting factor on the number of reproductions made, thereby protecting the interests of copyright holders. The de-duplication technique – which saves on that storage space, as the applicant in the main proceedings has repeatedly stated – undermines that balance by allowing an unlimited number of ‘reproductions’ to be made for a minimal fixed cost.

51. Moreover, in practice the fair compensation required under Article 5(2)(b) of Directive 2001/29 is often financed by a contribution included in the price of the reproduction hardware and storage media.²⁸ The removal of the link between storage space and the number of copies made under the exception in question, caused by the de-duplication technique and the creation of virtual²⁹ copies, upsets the balance on which this system of financing fair compensation is based.

52. Thus, contrary to the assertion of the applicant in the main proceedings, the recording service using the de-duplication technique is not functionally equivalent to a simple video recorder, at least as regards the important aspects from the point of view of the private copying exception. Therefore, this exception cannot be applied here by analogy, as the Court did with the public lending of electronic books.³⁰

53. The aspects analysed above also lead me to conclude that the application of the private copying exception to a recording service, such as the one included in the IPTV solution of the applicant in the main proceedings, would be contrary to the requirements of Article 5(5) of Directive 2001/29. According to that article, the exceptions to the exclusive rights protected by that directive are applied only in certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rightholders.

54. Now, an exception that allows a provider of access to television broadcasts by retransmitting them on the internet to reproduce all such broadcasts at minimal cost given the scale of the reproduction, and then to give its customers access to those broadcasts on a deferred basis, would inevitably affect the normal exploitation of the broadcasts made by broadcasting organisations, since those organisations could provide a comparable service themselves or authorise the provision of such services in return for the payment of licence fees. Furthermore, since the application of that exception is not justified by the protection of the private sphere of end users, the prejudice caused would be unjustified.

²⁶ See point 33 of this Opinion.

²⁷ Not all storage services are paid for; in some cases, the cost is borne by the service provider, who recovers it from users. After all, nothing in life is free.

²⁸ With an incentive derived from the case-law of the Court. See, in particular, judgment of 9 June 2016, *EGEDA and Others* (C-470/14, EU:C:2016:418).

²⁹ Or ‘logical’, in the words of the applicant in the main proceedings.

³⁰ See judgment of 10 November 2016, *Vereniging Openbare Bibliotheken* (C-174/15, EU:C:2016:856, paragraph 53).

55. On the basis of those considerations, I propose that the answer to the first question referred for a preliminary ruling be that Article 2 and Article 5(2)(b) of Directive 2001/29 are to be interpreted as meaning that the provision by an operator of a service for the re-transmission of online television broadcasts, of an additional service for recording those broadcasts, in which

- separate copies of the broadcasting content programmed for each recording initiated by a user are not made, but – provided the content in question has already been recorded by another user who recorded it for the first time – a reference is generated which allows the next user to access the recorded content, and
- a replay function via which the entire television programme of all selected channels is recorded around the clock and is available for 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,

does not fall within the exception to the exclusive right to authorise or prohibit the reproduction of protected works referred to in that second provision.

The second question referred for a preliminary ruling

56. The second question referred for a preliminary ruling asks whether the provider of an IPTV solution such as the one offered by the applicant in the main proceedings is making a communication to the public of television broadcasts which are re-transmitted to end users using that IPTV solution. The wording of this question creates a certain amount of ambiguity.

The wording of the question

57. In the first place, the referring court confines its question to the ‘on-premises’ service, when the IPTV solution is used on hardware that belongs to customers of the applicant in the main proceedings (the network operators) or that the applicant in the main proceedings makes available to them but they manage. That court does not specify the reasons why it excludes the cloud service from the scope of that question, even though this also seems to be the subject of the dispute in the main proceedings. I assume the referring court must consider it obvious that the applicant in the main proceedings is making a communication to the public in those circumstances.

58. Although that view is possibly correct, it does not seem self-evident to me. As part of its cloud solution, the applicant in the main proceedings owns the servers that its software runs on, as well as the storage media to which broadcasts are copied as part of the recording and replay service. As a result, it is also in direct contact, technically speaking, with end users. It seems conceivable therefore that the applicant in the main proceedings should be held responsible for the communication to the public of such broadcasts, at least as regards the communication made in the context of the replay service, according to my analysis of the first question referred for a preliminary ruling. However, a final ruling on this question would require more detailed knowledge of the respective roles of the applicant in the main proceedings and the network operators – information that is not available to the Court of Justice in the present proceedings. I propose therefore that the answer to the second question be limited to the context defined by the referring court, namely the on-premises service.

59. In the second place, the referring court does not explain the basis of the assertion contained in Question 2(a), according to which the provider of the IPTV solution ‘can influence which TV programmes can be received by the end user via the service’. According to the observations of the applicant in the main proceedings – which were not contested on this point by the defendants in the main proceedings – the choice of television programmes, their reception and their re-transmission on the internet are handled by the network operators, with no influence or contribution from the applicant in the main proceedings. There is nothing in the case file that casts doubt on that assertion. The premise contained in Question 2(a) thus does not appear to be established.

60. By its second question referred for a preliminary ruling, the referring court thus asks, in essence, whether Article 3(1) of Directive 2001/29 must be interpreted as meaning that a supplier who provides hardware and software, as well as technical support, enabling television broadcasts to be re-transmitted on the internet to end users and a service for recording and replaying those broadcasts (IPTV solution), who makes that hardware and software available to customers for their own use, is making a communication to the public within the meaning of that article.

Analysis of the question

61. According to a fundamental principle of EU copyright law, enshrined in recital 27 of Directive 2001/29³¹ and recognised in the case-law of the Court,³² 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. The difference between the mere provision of physical facilities and the communication to the public lies in the role played by the service provider in the transmission to the public of specific copyrighted works. It is only when the supplier plays an active role in that transmission that it can be considered as making a communication.

62. Two decisions of the Court clearly illustrate this difference. In the first place, in *Stichting Brein*,³³ the Court recognised the existence of a communication to the public in the case of the supply of multimedia players on which hyperlinks had been installed to websites on which copyright-protected works had been made available to the public. It held that the installation of such hyperlinks made it possible to establish a direct link between the works made available on the websites that those links led to and the buyers of multimedia players. Therefore, this was not a mere provision of physical facilities, in the form of multimedia players, but an act of communication made through pre-installed hyperlinks.³⁴

63. In the second place, with regard to the hiring of motor vehicles equipped with radio receivers, with no link whatsoever to the transmission of specific protected works, the Court had no difficulty in rejecting the existence of a communication to the public and finding that it was a case of a mere provision of physical facilities.³⁵

³¹ Which in turn reflects the joint declaration concerning Article 8 of the World Intellectual Property Organisation (WIPO) Copyright Treaty, which was approved by Council Decision 2000/278/EC of 16 March 2000 on the approval, on behalf of the European Community, of the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty (OJ 2000 L 89, p. 6).

³² See, inter alia, judgment of 2 April 2020, *Stim and SAMI* (C-753/18, EU:C:2020:268, paragraph 33).

³³ Judgment of 26 April 2017 (C-527/15, EU:C:2017:300).

³⁴ Judgment of 26 April 2017, *Stichting Brein* (C-527/15, EU:C:2017:300, paragraph 41).

³⁵ Judgment of 2 April 2020, *Stim and SAMI* (C-753/18, EU:C:2020:268, paragraphs 33 to 36).

64. I recognise that the services provided by the applicant in the main proceedings are much more complex than the hiring of vehicles equipped with radio receivers. That being the case, I take the view that such services, at least as regards the on-premises service, must be considered a mere provision of physical facilities, as referred to in recital 27 of Directive 2001/29, and do not amount to communication to the public within the meaning of Article 3 of that directive.

65. First, although the term ‘facilities’ is defined neither in the text of Directive 2001/29 nor in the case-law of the Court of Justice, it seems obvious to me that it is broad enough to encompass not only the technical equipment itself (or hardware, to use the term often used in IT), but the software necessary for that equipment to function. Indeed, to exclude software from the definition of ‘facilities’ would, in my view, be completely anachronistic, since all technical equipment, or almost all, intended to make or receive a communication within the meaning of Directive 2001/29 now has a processor and requires software in order to function. Moreover, from the point of view of the abovementioned difference between communication to the public and the mere provision of physical facilities, the software cannot be distinguished from the hardware in so far as it does not, on its own, transmit specific copyright-protected works.

66. Second, the fact that the applicant in the main proceedings provides network operators not only with hardware and software, but with technical support and functional adjustments to that hardware and software does not, in my view, fundamentally change its role in the operation of its IPTV solution. Contrary to the opinion expressed, *inter alia*, by the Commission, I do not believe that the provision of technical support is sufficient proof of the existence of a communication to the public by the applicant in the main proceedings. In the provision of complex technical facilities, functional modifications and support are standard ancillary services. In some cases, they are even necessary for the user to take full advantage of the facilities in question, because often only the supplier has a sufficient understanding of them to ensure that they function properly. This is particularly true in the case of software that, to function properly, requires ongoing maintenance in the form of patches or updates.³⁶

67. To take the view that the simple fact of providing technical support for the facilities turns the mere provision of those facilities into an act of communication to the public of the copyright-protected subject matter, because they facilitate that communication, would negate the reservation contained in recital 27 of Directive 2001/29 and the balance that that recital seeks to achieve. I am of the opinion, therefore, that the concept of ‘provision of physical facilities’ referred to in that recital must be interpreted as including the technical support needed to ensure that the facilities provided function properly.

68. Finally, and third, according to the now standard wording of the case-law of the Court of Justice, an operator makes an act of communication, within the meaning of Article 3(1) of Directive 2001/29, 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.³⁷ That wording is based on three key elements: access to the work, the author of the communication³⁸ and its customers who make up the public that the communication is directed at. It is this relationship

³⁶ On this subject, as regards software, I recall that under Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (OJ 2009 L 111, p. 16), the corrective maintenance of software may be contractually reserved for the holder of the copyright to that software (judgment of 6 October 2021, *Top System* (C-13/20, EU:C:2021:811, paragraph 67)). Besides, the user simply might not have the technical skills to perform such maintenance.

³⁷ See, recently, judgment of 22 June 2021, *YouTube v Cyando* (C-682/18 and C-683/18, EU:C:2021:503, paragraph 68).

³⁸ Not to be confused with the author of the work.

between the author of the communication, access to the work and the customers (public) that defines an act of communication. The other two elements – namely the knowledge of the author of the communication and his indispensable role – although essential, are not in themselves sufficient to amount to a communication.

69. In a set-up such as the one in the main proceedings, the end users who make up the public are not the customers of the provider of the IPTV solution (in this case, the applicant in the main proceedings), but those of the users of that solution, namely the network operators. It is the network operators who give their customers access to the protected works, whether in the form of live re-transmission of television broadcasts on the internet or the replay of those broadcasts after they have been recorded.

70. Conversely, the applicant in the main proceedings's knowledge – as the defendants in the main proceedings allege – that its IPTV solution can be used to give the public access to television broadcasts without the consent of the holders of the copyright in those programmes is not sufficient for the communication of those broadcasts to be attributed to it, in the absence of any link between the applicant in the main proceedings and the end users. Similarly, the applicant in the main proceedings does not play an indispensable role in the communication from the point of view of the end users, who may be completely unaware of its existence. Once again, that role is performed by the network operators, who, by signing contracts with their customers for the provision of internet television services, determine the relevant public of the communication at issue. In other words, the end users gain access to the relevant broadcasts through contracts with the network operators. The IPTV solution provided by the applicant in the main proceedings is simply a tool that enables that access, with no link to the individuals who make up the public.

71. I therefore propose that the answer to the second question referred for a preliminary ruling be that Article 3(1) of Directive 2001/29 must be interpreted as meaning that a supplier who provides hardware and software, as well as technical support, enabling television broadcasts to be re-transmitted on the internet to end users and a service for recording and replaying those broadcasts (IPTV solution), who makes that hardware and software available to customers for their own use, is making a communication to the public within the meaning of that article.

Conclusion

72. In the light of the foregoing considerations, I propose that the Court answer the questions for a preliminary ruling referred by the Oberster Gerichtshof (Supreme Court, Austria) as follows:

- (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 provision by an operator of a service for the retransmission of television broadcasts online, of an additional service for recording those broadcasts, in which

- separate copies of the broadcasting content programmed for each recording initiated by a user are not made, but – provided the content in question has already been recorded by another user who recorded it for the first time – a reference is generated which allows the next user to access the recorded content, and

- a replay function via which the entire television programme of all selected channels is recorded around the clock and is available for 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,

does not fall within the exception to the exclusive right to authorise or prohibit the reproduction of protected works referred to in that second provision.

(2) Article 3(1) of Directive 2001/29

must be interpreted as meaning that a supplier who offers hardware and software, as well as technical support, enabling television broadcasts to be re-transmitted on the internet to end users and a service for recording and replaying those broadcasts (IPTV solution), who makes that hardware and software available to customers for their own use, is making a communication to the public within the meaning of that article.