Case C-433/20

Request for a preliminary ruling

Date lodged:

15 September 2020

Referring court:

Oberlandesgericht Wien (Austria)

Date of the decision to refer:

7 September 2020

Appellant:

Austro-Mechana Gesellschaft zur Wahrnehmung mechanisch-musikalischer Urheberrechte Gesellschaft mbH

Respondent:

Strato AG

…

The Oberlandesgericht Wien (Higher Regional Court, Vienna), acting in its appellate jurisdiction … in the case of **AUSTRO- MECHANA Gesellschaft zur Wahrnehmung mechanisch-musikalischer Urheberrechte Gesellschaft m.b.H.,** 1030 Vienna, appellant, … against **Strato AG**, D-10587 Berlin, respondent, …, concerning invoicing (EUR 43 200) and payment (EUR 5 000), following the appeal brought by the appellant against the judgment of the Handelsgericht Wien (Commercial Court, Vienna) of 25 February 2020, … has made the following

O r d e r:

I. The following questions are referred to the Court of Justice of the European Union for a preliminary ruling pursuant to Article 267 TFEU:

Question 1: Is the expression ‘on any medium’ in 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 (‘Directive 2001/29’) to be interpreted as meaning that it also includes

servers owned by third parties which make available to natural persons (customers) for private use (and for ends that are neither directly nor indirectly commercial) storage space on **[Or. 2]** those servers which those customers use for reproduction by storage (‘cloud computing’)?

Question 2: If so: is the provision cited in Question 1 to be interpreted as meaning that it is applicable to national legislation under which the author is entitled to equitable remuneration (remuneration for exploitation of the right of reproduction on storage media), in the case:

- where a work (which has been broadcast, made available to the public or recorded on a storage medium produced for commercial purposes) is by its nature likely to be reproduced for personal or private use by being stored ‘on a storage medium of any kind which is suitable for such reproduction and, in the course of a commercial activity, is placed on the market in national territory’,

- and where the storage method used in that context is that described in Question 1?

II … [Stay of proceedings]

G r o u n d s

1. The appellant is a collecting society which

protects, in a fiduciary capacity, rights of use and rights to remuneration attendant upon works of music with and without lyrics in its own name but in the interests and for the account of the beneficiaries of those rights.

The following collecting societies:

- Literar-Mechana Wahrnehmungsgesellschaft für Urheberrechte, Gesellschaft m.b.H.;
- VAM Verwertungsgesellschaft für audiovisuelle Medien GmbH;
- VdFS – Verwertungsgesellschaft der Filmschaffenden registrierte Genossenschaft mit beschränkter Haftung; and
- Verwertungsgesellschaft Rundfunk GmbH

perform comparable tasks in their respective spheres of activity. **[Or. 3]**

The interests protected by all collecting societies include in particular the statutory rights to remuneration provided for in Paragraph 42b(1) of the Austrian Urheberrechtsgesetz (Law on Copyright) (UrhG) (‘remuneration for exploitation of the right of reproduction on storage media’).

The appellant brought an action seeking an order allowing it to invoice for, and subsequently take payment in settlement of, the remuneration owed for exploitation of the right of reproduction on storage media and claimed … that the aforementioned collecting societies had entrusted it with the task of pursuing the remuneration claims accruing to them too under Paragraph 42b(1) of the UrhG, and that they had assigned those claims to it.

In the Urheberrechtsgesetznovelle (Amendment to the Law on Copyright) (UrhGNov) 1980, BGBl 1980/321, the legislature provided for a right to equitable remuneration enforceable against all those who, in the course of a commercial activity, place on the market within the national territory certain media intended for reproduction and storage. That legislation has since been adapted on several occasions in order to bring it into line it with changes of circumstances and with the requirements of EU law, most recently in the form of the Urheberrechts-Novelle (Amendment to the Law on Copyright) (Urh-Nov) 2015, BGBl I 2015/99, which, in particular, brought computer hard disks within the scope of that legislation inasmuch as they constitute ‘storage media of any kind’.

Introduced more recently to the market has been the use, for the purposes of reproduction for (personal and) private use, of powerful (cloud-based) hard disks operated by third parties for business and private customers.

The respondent too provides such a service, under the name ‘HiDrive’. According to the supplier’s description, HiDrive is a ‘virtual cloud storage solution which is as quick and simple to use as an (external) hard disk’. The respondent claims that its storage solution ‘offers enough space to store photos, music and films in one central location’. **[Or. 4]**

Since the form of words used in Paragraph 42b(1) of the UrhG is itself deliberately framed in general terms, remuneration for exploitation of the right of reproduction on storage media is payable even in the case where storage media of any kind are, in the course of a commercial activity, ‘placed on the market’ – by whatever means and in whatever form – within national territory, including in situations involving the provision of cloud-based storage space.

The descriptor ‘place on the market’ does not refer to physical distribution but deliberately leaves scope for the inclusion of all processes that have the effect of making storage space available to users in national territory for the purposes of reproduction for (personal or) private use. In addition, Paragraph 42b(3) of the UrhG makes it clear that it is immaterial whether the storage media placed on the market originate in national territory or in other countries.

The Austrian Oberster Gerichtshof (Supreme Court) (OGH) has held, in relation to remuneration for exploitation of the right of reproduction on storage media, that even the wording of a statutory provision does not necessarily preclude an interpretation in conformity with the Directive. The Court of Justice of the

European Union (the Court of Justice) also calls for an interpretation in conformity with the Directive.

2. The respondent contests the application and raised the objection … that the applicable version of the Urheberrechtsgesetz (Law on Copyright) does not provide for remuneration for cloud services. Rather, it submits, the legislature, being cognisant of the technical possibilities available, made a deliberate choice not to take up that option.

Cloud services and physical storage media are, it argues, not comparable. An interpretation that includes cloud services too is not possible: no storage media are placed on the market; storage space is simply made available. The respondent does not sell or lease physical storage media to Austria. It simply offers online storage space on its servers hosted in Germany. **[Or. 5]**

The respondent states that it has already indirectly paid the copyright fee for its servers in Germany (as a component of the price charged by the manufacturer/importer), and (Austrian) users too have already paid a copyright fee for the devices without which content cannot even be uploaded to the cloud in the first place. The imposition of an additional charge by way of remuneration for exploitation of the right of reproduction on storage media, for cloud storage, would have the effect of doubling or even tripling the obligation to pay a fee.

3. The Handelsgericht Wien (Commercial Court, Vienna) dismissed the action and found in law, essentially, that holders of copyright and related rights ('rightholders') are entitled to equitable remuneration in the case where storage media (from a location in national territory or another country) are, in the course of a commercial activity, placed on the market in national territory, if an object requiring protection is by its nature likely to be reproduced for personal or private use by being recorded on a storage medium (in a manner permitted in accordance with Paragraph 42(2) to (7) of the UrhG), that is to say, in relation to storage media of any kind that are suitable for making such reproductions.

Since Decision 4 Ob 138/13t, the OGH has proceeded on the basis of the premiss that remuneration is also payable in regard to computer hard disks. The same finding was also reached by the Court of Justice in Case C-463/12, *Copydan*, in relation to memory chips and memory cards for mobile phones. Following the Urh-Nov 2015 (2015 Amendment to the Law on Copyright), that position has, finally, been reflected in the text of Paragraph 42(1) of the UrhG too, which now expressly refers to 'storage media of any kind', which also includes – internal and external – computer hard disks.

Cloud services exist in the most diverse forms. The core of any such service is the assurance that the user has a certain storage capacity, but this does not include the right for the user to have his content stored on a particular server or on particular servers, his entitlement being **[Or. 6]** limited to being able to access his storage capacity 'somewhere in the [supplier's] cloud'.

The respondent does not therefore, in the view of the Handelsgericht, provide its customers with storage media but makes storage capacity available – as a service – online.

In the course of the procedure for peer review of the draft of the Urh-Nov 2015 (2015 Amendment to the Law on Copyright) [before it was presented to the Austrian Parliament as a draft law], an express call was, admittedly, made for account to be taken of cloud storage and proposed forms of words were put forward for that purpose. However, the legislature made clear its position in this regard by deliberately choosing not to include such a provision. There is therefore no unintended legislative loophole; an interpretation *contra legem* is not permissible.

4. It is against that judgment that the appellant has lodged its appeal, in which it claims that the legal assessment [in that judgment] is incorrect and seeks an order varying that decision and upholding its application.

The respondent contends that the appeal should be dismissed.

5. In this connection, the appeal court has taken the following into account:

5.1 The appeal court does not share the view of the court of first instance that the interpretation of a rule of law depends on what dialectical process took place in the peer-review procedure that was conducted before the legislature made its decision. In accordance with Paragraph 6 of the ABGB (Austrian Civil Code), regard is to be had [in the context of the construction of a statute] first and foremost to the specific meaning of the words [of the statute] in the context in which they are used and to the 'clear intention' of the legislature; the context in question, however, calls for an interpretation in conformity with the Directive and thus with EU law, which the Court of Justice alone may provide.

5.2 Paragraph 42b(1) of the UrhG reads, in extract, as follows:

'(1) If a work … is by its nature likely to be reproduced for personal or private use by being recorded **on a storage medium** […], the author shall be entitled to equitable remuneration **[Or. 7]** (remuneration for exploitation of the right of reproduction on storage media) in the case where **storage media of any kind** which are suitable for making such reproductions are, in the course of a commercial activity, placed on the market in national territory.'

That provision transposes Directive 2001/29, Article 5(2)(b) of which reads:

'(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 …, on condition that the rightholders receive fair compensation …;

…’

(Emphasis added by the appeal court)

The question as to whether this means that those provisions also cover the storage of content in the cloud is to be assessed not exclusively on the basis of the text of the Austrian legislation but in conjunction with the Directive cited above. Since it is a directive, that is to say, an act of the EU institutions, that falls to be interpreted (Article 267 TFEU), a preliminary ruling must be sought from the Court of Justice.

5.3 No *acte clair* is present, as the Court of Justice has already held, in the judgment of 29 November 2017, C-265/16, *VCAST* (EU:C:2017:913), that the storage of protected content in a cloud is to be treated as an exploitation of rights in which the author alone may engage; see, on the subject of the cloud generally, the Opinion of Advocate General Maciej Szpunar in this case (EU:C:2017:649).

…