Court of Justice EU, 29 November 2017, VCAST v RTI

COPYRIGHT

National legislation which permits, without the copyright holders' consent, an online recording service for television programmes which are freely accessible in the territory of the Member State, where it is the provider of the service, and not its users, that receives and records the broadcasting signal, is in breach of Article 5(2) under b of the Copyright Directive

- **that Directive 2001/29, in particular Article 5(2)(b) thereof, precludes:**

national legislation which permits a commercial undertaking to particular Article 5(2)(b) thereof, precludes 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.

- **sum of by recording service targeted persons constitutes a 'public'**

47. In the first place, it is evident that the sum of the persons targeted by that provider constitutes a 'public' within the meaning of the case-law cited in paragraph 45 of the present judgment.

- **original transmissions are made under specific technical conditions and using a different means of transmission**

48. In the second place, the original transmission made by the broadcasting organisation, on the one hand, and that made by the service provider at issue in the main proceedings, on the other, are made under specific technical conditions, using a different means of transmission for the protected works, and each is intended for its public (see, to that effect, judgment of 7 March 2013, ITV Broadcasting and Others, C‑607/11, EU:C:2013:147, paragraph 39).

- **transmissions referred to thus constitute communications to different publics, and each of them must therefore receive consent**

49. The transmissions referred to thus constitute communications to different publics, and each of them must therefore receive the consent of the rightholders concerned.

Vindplaatsen: **curia.europa.eu**

Court of Justice EU, 29 November 2017

(L. Bay Larsen, President of the Chamber, J. Malenovský (Rapporteur), M. Safjan, D. Šváby and M. Vilaras)
JUDGMENT OF THE COURT (Third Chamber)
29 November 2017 (*)
(Reference for a preliminary ruling — Approximation of laws — Copyright and related rights — Directive 2001/29/EC — Article 5(2)(b) — Private copying exception — Article 3(1) — Communication to the public — Specific technical means — Provision of a cloud computing service for the remote video recording of copies of works protected by copyright, without the consent of the author concerned — Active involvement of the service provider in the recording)
In Case C‑265/16,
REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunale di Torino (District Court, Turin, Italy), made by decision of 4 May 2016, received at the Court on 12 May 2016, in the proceedings
VCAST Limited
v
RTI SpA,
THE COURT (Third Chamber),
composed of L. Bay Larsen, President of the Chamber, J. Malenovský (Rapporteur), M. Safjan, D. Šváby and M. Vilaras, Judges,
Advocate General: M. Szpunar,
Registrar: R. Schiano, Administrator,
having regard to the written procedure and further to the hearing on 29 March 2017,
after considering the observations submitted on behalf of:
– VCAST Limited, by E. Belisario, F.G. Tita, M. Ciurcina and G. Scorza, avvocati,
– RTI SpA, by S. Previti, G. Rossi, V. Colarocco, F. Lepri, and A. La Rosa, avvocati,
– the Italian Government, by G. Palmieri, acting as Agent, and by G. Galluzzo and R. Guizzi, avvocati dello Stato,
– the French Government, by D. Colas and D. Segoin, acting as Agents,
– the Portuguese Government, by L. Inez Fernandes, M. Figueiredo and T. Rendas, acting as Agents,
– the European Commission, by L. Malferrari and J. Samnadda, acting as Agents,
after hearing the **Opinion of the Advocate General** at the sitting on 7 September 2017,
gives the following
Judgment
1. This request for a preliminary ruling concerns the interpretation 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), in particular of Article 5(2)(b) thereof, of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (OJ 2000 L 178, p. 1) and of the FEU Treaty.

2. The request has been made in proceedings between VCAST Limited and RTI SpA concerning the lawfulness of the making available to VCAST's customers of a cloud video recording system for television programmes broadcast, inter alia, by RTI.

Legal context

EU law

Directive 2000/31

3. Article 3(2) of Directive 2000/31 reads as follows:

'Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide information society services from another Member State.'

4. Article 3(3) of Directive 2000/31 provides that, inter alia, Article 3(2) of that directive does not apply to the fields referred to the annex to that directive, that annex concerning, inter alia, copyright and related rights.

Directive 2001/29

5. According to recital 1 of Directive 2001/29:

'The Treaty provides for the establishment of an internal market and the institution of a system ensuring that competition in the internal market is not distorted. Harmonisation of the laws of the Member States on copyright and related rights contributes to the achievement of these objectives.'

6. Recital 23 of that directive states:

'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.'

7. Article 2 of that directive 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;

(b) for performers, of fixations of their performances;

(c) for phonogram producers, of their phonograms;

(d) for the producers of the first fixations of films, in respect of the original and copies of their films;

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

8. Article 3(1) of Directive 2001/29 reads as follows:

'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.'

9. Article 5(2)(b) of that directive provides:

'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'.

10. According to Article 5(5) of that directive:

'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.'

Italian law

11. Article 5(2)(b) of Directive 2001/29 was transposed into Italian law in Article 71 sexies of Legge n. 633 — Protezione del diritto d'autore e di altri diritti connessi al suo esercizio (Law No 633 on the protection of copyright and other rights relating to its exercise) of 22 April 1941 in the version in force on the date of the facts at issue in the main proceedings ('the Law on copyright'). That Article 71 sexies, which is contained in Section II of that law, entitled 'Private reproduction for personal use', provides:

'1. The private reproduction of phonograms and videograms on any media made by natural persons for personal use only shall be permitted, provided that it is not for profit or ends that are directly or indirectly commercial, in compliance with the technical measures referred to in Article 102 quater.

2. The reproduction referred to in paragraph 1 may not be carried out by a third party. The provision of services for the reproduction of phonograms and videograms by a natural person for personal use shall constitute a reproduction activity covered by the provisions in Articles 13, 72, 78 bis, 79 and 80.

...'

12. Article 71 septies of the Law on copyright provides:

'1. The authors and producers of phonograms, and the original producers of audiovisual works, the performers and producers of videograms, and their successors in title, shall be entitled to compensation for the private copying of phonograms and videograms referred to in Article 71 sexies. In respect of devices designed solely for the analogue or digital recording of phonograms or videograms, that compensation shall consist of a percentage of the price paid by the final purchaser to the retailer which, in respect of multipurpose devices, shall be calculated on the basis of the price of a device with characteristics equivalent to those of the internal component designed to record or, where that is not possible, of a fixed amount for each device. In respect of audio and video recording media, such as analogue media, digital media and internal or removable memory designed for recording phonograms or videograms, the compensation shall consist of a sum corresponding to the recording capacity provided by those media. In respect of remote video recording systems, the compensation referred to

in this paragraph shall be due from the person who provides the service and correspond to the remuneration obtained for providing that service.
2. The compensation referred to in paragraph 1 shall be set, in accordance with Community law and having regard, in any event, to the reproduction rights, by a decree of the Minister for Cultural Heritage and Activities to be adopted by 31 December 2009, after consultation with the trade associations which represent the majority of the manufacturers of the devices and media and media referred to in paragraph 1. In setting the compensation, account shall be taken of the application or non-application of the technological measures referred to in Article 102 quater and the different effect of digital copying in comparison with analogue copying. The decree shall be updated every three years.
...'.
13. Article 102 quater of the Law on copyright on provides:
'1. Rightholders of any copyright or of any related right as well as of the right under paragraph 3 of Article 102 bis may apply to protected works or objects effective technological protection measures, including any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts which are not authorised by the rightholders.
2. Technological protection measures shall be deemed effective where the use of the protected work or object is controlled by the rightholders through the application of an access control or protection process, such as encryption, scrambling or other transformation of the work or the protected work, or if that use is limited by a copy control mechanism which achieves the objective of protection.
3. The present article shall not affect the application of the provisions concerning computer programs referred to in Title 1, Chapter IV, Part VI.'

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

14. VCAST is a company incorporated under UK law which makes available to its customers via the Internet a video recording system, in storage space within the cloud, for terrestrial programmes of Italian television organisations, among which are those of RTI.
15 It is apparent from the order for reference that, in practice, the user selects a programme on the VCAST website, which includes all the programming from the television channels covered by the service provided by that company. The user can specify either a certain programme or a time slot. The system operated by VCAST then picks up the television signal using its own antennas and records the time slot for the selected programme in the cloud data storage space indicated by the user. That storage space is purchased by the user from another provider.
16. VCAST brought proceedings against RTI before the specialised chamber for company law of the Tribunale di Torino (District Court, Turin, Italy), seeking a declaration of the lawfulness of its activity.
17. In the course of proceedings, by an order for reference of 30 October 2015, that court upheld in part the application for interim measures submitted by RTI and prohibited VCAST, in essence, from pursuing its activity.
18. Taking the view that the resolution of the case in the main proceedings depended in part on the interpretation of EU law, in particular on Article 5(2)(b) of Directive 2001/29, the Tribunale di Torino (District Court, Turin) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:
'(1) Are national rules prohibiting a commercial undertaking from providing private individuals with socalled cloud computing services for the remote video recording of private copies of works protected by copyright, by means of that commercial undertaking's active involvement in the recording, without the rightholder's consent, compatible with EU law, in particular with Article 5(2)(b) of Directive 2001/29 (as well as Directive 2000/31 and the founding Treaty)?
(2) Are national rules which allow a commercial undertaking to provide private individuals with so-called cloud computing services for the remote video recording of private copies of works protected by copyright, even where the active involvement of that commercial undertaking in the recording is entailed, and even without the rightholder's consent, against a flat-rate compensation in favour of the rightholder, in essence subjecting the services to a compulsory licensing system, compatible with EU law, in particular with Article 5(2)(b) of Directive 2001/29 (as well as Directive 2000/31 and the founding Treaty)?'

Consideration of the questions referred

Preliminary observations

19. It is apparent from the request for a preliminary ruling that the referring court has adopted an interim order containing provisional measures prohibiting VCAST's activity.
20. Nevertheless, that court has referred two questions to the Court in relation to that activity, with two opposing premisses, on the one hand, that national legislation prohibits that activity, and on the other that the activity is authorised.
21. It may thus be inferred from those considerations that it is not established that the legislation at issue in the main proceedings does in fact prohibit such an activity.
22. In those circumstances, and in order to provide the referring court with a useful answer, the Court will answer the two questions together, operating on the assumption that national legislation authorises the carrying out of an activity such as that at issue in the main proceedings.
23. It should be pointed out, moreover, that the referring court is asking the Court about the conformity with EU law of the national provision at issue in the main proceedings by referring, not only to Directive 2001/29, in particular Article 5(2)(b) thereof, but also to Directive 2000/31 and the 'founding Treaty'.

24. In that regard, as the Advocate General observed in point 19 of his Opinion, the provision of Directive 2000/31 which could possibly be applicable in this case is Article 3(2) thereof, which prohibits Member States from restricting the freedom to provide information society services from another Member State. However, according to Article 3(3) of that directive, restrictions stemming from the protection of copyright and neighbouring rights are in particular excluded from the scope of that prohibition.
25. It follows that the provisions of Directive 2000/31 are not applicable in a case such as that at issue in the main proceedings, which concerns copyright and its exceptions.
26. With regard to the questions asked in so far as they concern the 'Treaty', it must be recalled that, according to the settled case-law of the Court, where a matter is regulated in a harmonised manner at EU level, any national measure relating thereto must be assessed in the light of the provisions of that harmonising measure (see, inter alia, judgments of 13 December 2001, DaimlerChrysler, C‑324/99, EU:C:2001:682, paragraph 32; of 24 January 2008, Roby Profumi, C‑257/06, EU:C:2008:35, paragraph 14, and of 1 October 2009, HSBC Holdings and Vidacos Nominees, C‑569/07, EU:C:2009:594, paragraph 26).
27. It should be noted that one of the objectives pursued by Directive 2001/29 consists, as is apparent from the recital 1 thereof, in harmonising the laws of the Member States on copyright and related rights, so as to contribute to the achievement of the objective of establishing an internal market.
28. Thus, it is not necessary to rule on the questions asked with regard to the FEU Treaty.
29. In those circumstances, it must be considered that, by its questions, the referring court asks, in essence, whether Directive 2001/29, in particular Article 5(2)(b) thereof, precludes 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.

The Court's reply

30. Under Article 5(2)(b) of Directive 2001/29, Member States may provide for exceptions or limitations to the reproduction right 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.
31. Moreover, Article 5(5) of that directive states that the exceptions and limitations provided for, inter alia, in Article 5(2) of that directive will 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.
32. Concerning Article 5(2)(b) of Directive 2001/29, it must be pointed out that, according to the settled caselaw of the Court, the provisions of a directive which derogate from a general principle established by that directive must be interpreted strictly (**judgment of 10 April 2014, ACI Adam and Others, C‑435/12, EU:C:2014:254**, paragraph 22 and the case-law cited). It follows that Article 5(2)(b) must be given such an interpretation.
33. The Court has also held that copying by natural persons acting in a private capacity must be regarded as an act likely to cause harm to the rightholder concerned, where it is done without seeking prior authorisation from that rightholder (see, to that effect, **judgment of 21 October 2010, Padawan, C‑467/08, EU:C:2010:620**, paragraphs 44 to 46).
34. In addition, the Court has held that, while Article 5(2)(b) of Directive 2001/29 must be understood as meaning that the private copying exception prohibits the rightholder from relying on his exclusive right to authorise or prohibit reproductions with regard to persons who make private copies of his works, that provision must not be understood as requiring, beyond that express limitation, the copyright holder to tolerate infringements of his rights which may accompany the making of private copies (see, to that effect, **judgment of 10 April 2014, ACI Adam and Others, C‑435/12, EU:C:2014:254**, paragraph 31).
35. Last, it follows from the case-law that, in order to rely on Article 5(2)(b), 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 (see, to that effect, **judgment of 21 October 2010, Padawan, C‑467/08, EU:C:2010:620, paragraph 48**).
36. The question whether a service such as that at issue in the main proceedings, the relevant elements of which are set out in paragraphs 14 and 15 of the present judgment, is covered by Article 5(2)(b) of Directive 2001/29 should be considered in the light of the case-law cited above.
37. In that regard, it should be pointed out that the provider of that service does not merely organise the reproduction, but also provides access to the programmes of certain television channels that can be recorded remotely, with a view to reproducing them. Thus, it is the individual customers who choose which programmes are to be recorded.
38. In that regard, the service at issue in the main proceedings has a dual functionality, consisting in ensuring both the reproduction and the making available of the works and subject matter concerned.
39. However, although the private copy exception means that the rightholder must abstain from exercising his exclusive right to authorise or prohibit private copies made by natural persons under the conditions provided for in Article 5(2)(b) of Directive 2001/29, the requirement for a strict interpretation of that exception implies that that rightholder is not deprived of his right to prohibit or authorise access to the works or the subject matter of which those same natural persons wish to make private copies.

40. It follows from Article 3 of Directive 2001/29 that any communication to the public, including the making available of a protected work or subject matter, requires the rightholder's consent, given that, as is apparent from recital 23 of that directive, the right of communication of works to the public should be understood in a broad sense covering any transmission or retransmission of a work to the public by wire or wireless means, including broadcasting.
41. In that respect, the Court has already held that the concept of 'communication to the public' includes two cumulative criteria, namely an 'act of communication' of a work and the communication of that work to a 'public' (**judgment of 31 May 2016, Reha Training, C‑117/15, EU:C:2016:379**, paragraph 37).
42. That said, it must be stated, first, that the concept of an 'act of communication' refers to any transmission of the protected works, irrespective of the technical means or process used (**judgment of 31 May 2016, Reha Training, C‑117/15, EU:C:2016:379**, paragraph 38).
43. Moreover, every transmission or retransmission of a work which uses a specific technical means must, as a rule, be individually authorised by the author of the work in question (**judgment of 31 May 2016, Reha Training, C‑117/15, EU:C:2016:379**, paragraph 39).
44. Second, in order to fall within the concept of 'communication to the public', within the meaning of Article 3(1) of Directive 2001/29, it is also necessary, as noted in paragraph 41 of the present judgment, that the protected works actually be communicated to a 'public' (**judgment of 31 May 2016, Reha Training, C‑117/15, EU:C:2016:379**, paragraph 40).
45. In that connection, it follows from the Court's case-law that the term 'public' refers to an indeterminate number of potential recipients and implies, moreover, a fairly large number of persons (**judgment of 31 May 2016, Reha Training, C‑117/15, EU:C:2016:379**, paragraph 41).
46. In the present case, the service provider at issue in the main proceedings records programmes broadcast and makes them available to its customers via the Internet.
47. In the first place, it is evident that the sum of the persons targeted by that provider constitutes a 'public' within the meaning of the case-law cited in paragraph 45 of the present judgment.
48. In the second place, the original transmission made by the broadcasting organisation, on the one hand, and that made by the service provider at issue in the main proceedings, on the other, are made under specific technical conditions, using a different means of transmission for the protected works, and each is intended for its public (see, to that effect, **judgment of 7 March 2013, ITV Broadcasting and Others, C‑607/11, EU:C:2013:147**, paragraph 39).
49. The transmissions referred to thus constitute communications to different publics, and each of them must therefore receive the consent of the rightholders concerned.
50. In those circumstances, it is no longer necessary to examine whether the publics targeted by those communications are identical or whether the public targeted by the service provider at issue in the main proceedings constitutes a new public (see, to that effect, **judgment of 7 March 2013, ITV Broadcasting and Others, C‑607/11, EU:C:2013:147**, paragraph 39).
51. It follows that, without the rightholder's consent, the making of copies of works by means of a service such as that at issue in the main proceedings could undermine the rights of that rightholder.
52. Accordingly, such a remote recording service cannot fall within the scope of Article 5(2)(b) of Directive 2001/29.
53. In those circumstances, there is no longer any need to verify whether the conditions imposed by Article 5(5) of that directive have been complied with.
54. In view of all the foregoing considerations, the answer to the questions asked is that Directive 2001/29, in particular Article 5(2)(b) thereof, precludes national legislation which permits a commercial undertaking to particular Article 5(2)(b) thereof, precludes 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.

Costs

55. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national 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 (Third Chamber) hereby rules:

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, in particular Article 5(2)(b) thereof, 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.

[Signatures]

OPINION OF ADVOCATE GENERAL SZPUNAR

delivered on 7 September 2017 (1)

Case C‑265/16

VCAST Limited

v

RTI SpA

(Request for a preliminary ruling from the Tribunale di Torino (District Court, Turin, Italy))

(Reference for a preliminary ruling — Intellectual and industrial property — Copyright and related rights — Reproduction right — Exception — Reproduction for private use — Provision of a remote video recording (cloud computing) service for reproductions of television programmes for private use without the copyright holders' consent — Intervention of the service provider in the recording — Making available of those programmes)

Introduction

1. Cloud computing is defined as access via a telecommunication network (internet), on demand and on a self-service basis, to configurable shared computing resources. It is thus a delocalisation of computing infrastructure. (2) A distinctive feature of cloud computing is that, unlike conventional ways of using computing infrastructure, the user does not purchase or lease physical computer equipment, but uses, in the form of services, infrastructure capacities belonging to a third party, the location of which is not known to the user and which may vary. From the point of view of that user, those capacities are thus 'somewhere in the cloud' (not in an atmospheric sense, but in a computing sense of course). This arrangement allows resources to be used more effectively and to be adapted automatically to fluctuations in demand.

2. The services provided in the form of cloud computing are very varied, ranging from the simple provision of computing infrastructure, software and communication tools (email) to the most sophisticated services. Of the cloud services provided to consumers, one of the most common is data storage. Many providers offer storage capacities in different sizes, free of charge or as a paid service, using various business models. Those storage capacities are normally intended for the private use of the beneficiary, but they can also include sharing functions. The storage services are often accompanied by related services, such as indexing of stored data or data processing, for example image-processing tools.

3. Data stored in the cloud can contain, among other things, reproductions of works protected by copyright made by users of those storage services under the private copying exception. However, unlike the use of reproduction equipment directly available to the copyist, in the case of reproduction in the cloud, intervention by the provider of the storage service or another person is normally necessary. It is therefore reasonable to ask the question whether, in that case, the reproduction is still made 'by' the beneficiary of the private copying exception, as required by the legislation. It is on this point that the arguments made in the present case have focused.

4. I nevertheless think that, in the light of the facts of the dispute in the main proceedings, this raises a more fundamental question: the limits of the private copying exception with regard to the origin of the work which is the subject matter of the reproduction. The Court has already addressed this question in a number of cases concerning the fee due in respect of the private copying exception. I think that the case-law on this subject warrants some clarification.

Legislative framework

EU law

5. Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') (3) provides, in Article 3(2) and (3):

'2. Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide information society services from another Member State.

3. Paragraphs 1 and 2 shall not apply to the fields referred to in the Annex.'

6. The Annex to Directive 2000/31, entitled 'Derogations from Article 3', provides in its first indent:

'As provided for in Article 3(3), Article 3(1) and (2) do not apply to:

– copyright, neighbouring rights …'

7. Under Article 2 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: (4)

'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;

(b) for performers, of fixations of their performances;

(c) for phonogram producers, of their phonograms;

(d) for the producers of the first fixations of films, of the original and copies of their films;

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

8. Article 5(2)(b) and (5) of Directive 2001/29 provides:

'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.'

Italian law

9. Copyright is governed in Italian law by Legge n. 633/1941 — Protezione del diritto d'autore e di altri diritti connessi al suo esercizio (Law No 633/1941 on the protection of copyright and other rights relating to its exercise) of 22 April 1941 ('the Law on copyright'). The private copying exception is laid down in Article 71 sexies of the Law on copyright, which reads as follows:

'1. The private reproduction of phonograms and videograms on any medium made by a natural person for personal use only shall be permitted, provided it is not for profit or it is for ends that are neither directly nor indirectly commercial, in compliance with the technological measures referred to in Article 102 quater.

2. The reproduction referred to in paragraph 1 may not be carried out by a third party. The provision of services for the reproduction of phonograms and videograms by a natural person for personal use shall constitute a reproduction activity covered by the provisions in Articles 13, 72, 78 bis, 79 and 80.

…

4. Without prejudice to the provisions in paragraph 3, rightholders shall be required, notwithstanding the application of the technological measures provided for in Article 102 quater, to permit a natural person who has acquired legitimate possession of copies of the protected work or subject matter or has accessed them legitimately to be able to make a private copy of them, even merely an analogue copy, for personal use, provided that possibility does not conflict with a normal exploitation of the work or other subject matter and does not constitute unjust enrichment to the detriment of rightholders.'

10. Article 71 septies of the Law introduces compensation for copyright holders in respect of the private copying exception. That compensation is financed by a fee levied on the selling price of equipment and media which allows copies of works protected by copyright to be made. The last sentence of paragraph 1 of that article reads as follows:

'In respect of remote video recording systems, the compensation referred to in this paragraph shall be due from the person who provides the service and correspond to the remuneration obtained for providing that service.'

11. This last sentence was inserted by a legislative amendment of 31 December 2007. According to information provided by the Italian Government, its introduction gave rise to infringement proceedings brought by the European Commission for the alleged infringement of Article 2, entitled 'Reproduction right', and Article 3, entitled 'Right of communication to the public', of Directive 2001/29. On account of the allegations made by the Commission, the Italian authorities decided not to set a fee for remote recording services. This choice was considered to be lawful by the Italian courts. In particular, the Consiglio di Stato (Council of State, Italy) ruled that the authorities decided 'lawfully to suspend the application of the last sentence of paragraph 1 temporarily'.

Facts, procedure and questions referred for a preliminary ruling

12. VCAST Limited is a company incorporated under UK law which provides its users with a cloud recording system for free-to-air terrestrial programmes broadcast by Italian television organisations, including RTI SpA (RTI). In practice, the user selects a programme on the VCAST website, which includes all the programming from the television channels covered by the service. The user can specify either a certain programme or a time slot, knowing that in the former case it is the time slot in which the selected programme is scheduled that will be recorded. The system operated by VCAST then picks up the television signal using its own antennas and records the time slot for the selected programme in the cloud data storage space indicated by the user. That storage space is not provided by VCAST but by third-party providers. (5) The audiovisual data thus recorded are then made available to the user on the conditions specified by the storage service provider. The VCAST service has three options: one option which is free to the user and financed by advertising and two paid options.

13. VCAST brought proceedings against RTI before the Tribunale di Torino (District Court, Turin, Italy), the referring court, seeking a declaration of the lawfulness of its activities, if necessary after either raising a question regarding the constitutionality of Article 71 sexies(2) of the Law on copyright or referring a question to the Court of Justice for a preliminary ruling on the interpretation of EU law. VCAST claims, in essence, that its activity comes under the private copying exception, as it is the user who actually makes the recording, VCAST only providing the necessary equipment, namely the remote video recording system. According to VCAST, the lawfulness of its service is confirmed in particular by the last sentence of Article 71 septies(1) of the Law on copyright which, by making remote recording services subject to a fee, treats those services in the same way as the exercise of the private copying exception.

14. RTI, the defendant in the main proceedings, challenges the lawfulness of VCAST's activity. It has made a counterclaim seeking to prohibit VCAST from pursuing the activity in question and compensation for damage suffered as a result of that activity. By order for reference of 30 October 2015, the referring court adopted interim measures, in particular prohibiting VCAST from pursuing its activity with regard to programmes broadcast by the RTI television channels.

15. After it considered that the resolution of the dispute required an interpretation of provisions of EU law, in particular Article 5(2)(b) of Directive 2001/29, the Tribunale di Torino (District Court, Turin) stayed the proceedings and referred the following questions to the Court for a preliminary ruling:

'(1) Are national rules prohibiting a commercial undertaking from providing private individuals with socalled cloud computing services for the remote video recording of private copies of works protected by copyright, by means of that commercial undertaking's

active involvement in the recording, without the rightholder's consent, compatible with EU law, in particular with Article 5(2)(b) of Directive 2001/29 … (as well as Directive 2000/31 … and the founding Treaty)?

(2) Are national rules which allow a commercial undertaking to provide private individuals with so-called cloud computing services for the remote video recording of private copies of works protected by copyright, even where the active involvement of that commercial undertaking in the recording is entailed, and even without the rightholder's consent, against a flat-rate compensation in favour of the rightholder, in essence subjecting the services to a compulsory licensing system, compatible with EU law, in particular with Article 5(2)(b) of Directive 2001/29 … (as well as Directive 2000/31 … and the founding Treaty)?'

16. The request for a preliminary ruling was received at the Court on 12 May 2016. Written observations were submitted by the parties in the main proceedings, the Italian, French and Portuguese Governments and the Commission. The parties in the main proceedings, the Italian Government and the Commission were represented at the hearing held on 29 March 2017.

Analysis

Preliminary remarks

17. The two questions actually concern the same legal problem seen from two different perspectives. In essence, it must be determined whether the provisions of EU law mentioned in the questions require Member States which have transposed the private copying exception into their domestic law to permit, or, on the contrary, prohibit them from permitting, the activity of providing, without the copyright holders' consent, an online (cloud) recording service for terrestrial television programmes which are freely accessible in the territory of the Member State concerned.

18. As regards identification of the provisions of EU law whose interpretation is being sought, only Article 5(2)(b) of Directive 2001/29 has been clearly indicated.

19. As far as Directive 2000/31 is concerned, the provision which could possibly be applicable in this case is Article 3(2), which prohibits Member States from restricting the freedom to provide information society services from another Member State. The service provided by VCAST would appear to fulfil the criteria for the definition of information society service. However, under Article 3(3) in conjunction with the Annex to Directive 2000/31, restrictions stemming from the protection of copyright and neighbouring rights are excluded from the scope of that prohibition. It is precisely on this basis that VCAST's activity could be considered unlawful in Italian law. Article 3(2) of Directive 2000/31 does not therefore seem to be applicable in this case.

20. In addition, as far as the 'founding Treaty' is concerned, neither the wording of the questions referred nor the reasoning contained in the request for a preliminary ruling provides any clear guidance for identifying the provision of primary law to which the national court refers. As RTI asserts in its observations, moreover, this casts doubt on the admissibility of the questions referred in so far as they relate to 'the founding Treaty'. In a spirit of goodwill and following the logic employed in the preceding point with regard to Directive 2000/31, I can only assume that the provision which the referring court has in view is the one concerning the freedom to provide services in Article 56 TFEU. As VCAST is a company established in the United Kingdom, it provides a cross-border service, which allows it to benefit from that freedom.

21. However, in any event, according to settled case-law, the protection of copyright constitutes an overriding reason in the public interest which can justify a restriction on the freedom to provide services. (6) Furthermore, it is a harmonised field in which a finding that the activity in question is unlawful having regard to a provision of EU law is sufficient to justify the corresponding restriction on the freedom to provide services. Thus, in the light of the answer to the questions which I intend to propose to the Court, any restriction on the freedom to provide services supplied by VCAST would in any case be largely justified by the objective of the effective protection of copyright.

22. In the light of the foregoing, I therefore propose to examine the questions only from the perspective of Article 5(2)(b) of Directive 2001/29. So that the examination is useful for the resolution of the dispute in the main proceedings, which concerns the lawfulness of the service provided by VCAST, it will also take account of the particular way in which that service operates.

The question of cloud recording under the private copying exception

23. It should be recalled that Article 5(2)(b) of Directive 2001/29 defines private copying as 'reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial'. (7) It is not disputed that making reproductions and storing them in the cloud requires the intervention of third persons: first and foremost, the provider of the storage capacities and possibly other persons. It is therefore reasonable to ask if and to what extent the abovementioned provision permits such intervention.

24. First, the Court's case-law concerning compensation in connection with the private copying exception seems to offer fairly clear guidance with regard to the possession and the making available of storage capacities. According to that case-law, even though the persons liable to pay compensation are, in principle, users who make reproductions under that exception, for practical reasons the Member States are entitled to collect that compensation from the persons who make recording media or equipment available to the public. (8) Although in most cases such making available occurs through the sale of media or equipment, compensation being levied on the price of sale, in my view there is nothing in principle to prevent it from taking the form of the making available of cloud storage capacities. This position is corroborated by the Court's caselaw, according to which compensation in

respect of the private copying exception may relate to reproductions made by a private individual with the aid of a device which belongs to a third party. (9)

25. Second, with regard to the intervention of third parties in the act of reproduction itself, I consider that an excessively strict interpretation of Article 5(2)(b) of Directive 2001/29 would not be justified. It is clear that the reproduction of a work under the private copying exception and its recording in the cloud, that is, in a data storage space not directly accessible to the user who makes that reproduction, requires the intervention of a third party, whether the provider of that storage space or another person. The initialisation of the reproduction by the user triggers a number of processes, which are more or less automated, resulting in the creation of a copy of the work in question. I do not think that this form of reproduction should be excluded from the scope of the private copying exception simply by reason of the intervention of a third party which goes beyond simply making available media or equipment. As long as it is the user who takes the initiative in respect of the reproduction and defines its object and modalities, I cannot see a decisive difference between such an act and a reproduction made by the same user with the aid of equipment which he controls directly. (10) Furthermore, the case-law cited in the preceding point explicitly recognises that compensation in respect of the private copying exception concerns reproductions made in the context of the provision of copying services. (11)

26. The fact that the intervention of a third party in the making of the reproduction may be for remuneration does not invalidate this conclusion, as the requirement of non-commercial ends in Article 5(2)(b) of Directive 2001/29 does not relate to any intervention by a third party, but to the use of the copy by the beneficiary of the exception in question.

27. Lastly, I would add that the fact, raised by RTI at the hearing, that the user is able to share content recorded in the cloud with other internet users, thereby going beyond the scope of private use of the copy, does not seem relevant. Cloud data storage services often include data-sharing features. Thus, once a private copy of protected subject matter is recorded as part of such a service, it is technically possible for the user to share that copy with an indefinite, potentially sizeable number of third persons. Such sharing could go beyond the scope of the permitted use for private copying and, as a result, be classified as unauthorised making available. This possibility is not unique to cloud recording, however, as at present any copies, in particular digital copies, can be easily shared using the internet, thereby infringing copyright. It is the responsibility of users to refrain from committing such infringements. On the other hand, I am not convinced that the mere existence of this theoretical possibility should lead to cloud recording being excluded from eligibility for the private copying exception.

28. Accordingly, there appears to be nothing to suggest that Article 5(2)(b) of Directive 2001/29 prevents the reproduction under the exception provided for in that article being made in storage space in the cloud. The question of access to the subject matter of the reproduction

29. The situation seems more complicated as regards the origin of works reproduced under the private copying exception. Although the Court's case-law acknowledges, on the one hand, that private copies are made with the aid of devices which belong to third parties, it requires, on the other, that the user lawfully accesses the subject matter of the reproduction. I have doubts that a service like that offered by VCAST fulfils this latter requirement.

Access to the subject matter of the reproduction according to the Court's case-law

30. The Court has already had the opportunity to answer the question whether Article 5(2)(b) of Directive 2001/29 precluded national legislation providing for compensation in respect of copies of protected works made not only with the aid of a device which belonged to a third party, but also by such a device. (12) The Court replied in the negative, holding that that provision did not regulate at all the legal connection between the person making the reproduction under the private copying exception and the device used for that purpose (13) and that the device used could therefore certainly belong to a third party. (14)

31. This finding made by the Court might suggest that any copy made for the private use of a natural person comes under the exception laid down in Article 5(2)(b) of Directive 2001/29. This conclusion needs to be qualified, however.

32. The Court also ruled that eligibility for the private copying exception is subject to the lawfulness of the source of the reproduction. (15) In other words, Article 5(2)(b) of Directive 2001/29 'necessarily presupposes that the subject matter of the reproduction covered by that provision is a protected work, not a counterfeited or pirated work'. (16)

33. Thus, before being entitled to make a reproduction for his private use, the user must have lawfully accessed the work in question. As has been explained, such access does not necessarily have to involve the purchase of a physical medium containing the work. It can take the form of a communication of the work to the public with the copyright holders' consent. I assume that such access can also take place in the context of one of the exceptions to copyright or related rights laid down in EU legislation. In contrast, access with a view to eligibility for the private copying exception may not be in the context of distribution or communication of the work to the public without the copyright holders' consent.

34. It is therefore necessary, in the light of these considerations, to examine the conditions in which users access television programmes in the recording service provided by VCAST.

Access to the subject matter of the reproduction in the service provided by VCAST

35. It should be recalled that, according to the description of the service provided by VCAST

contained in the request for a preliminary ruling, which is not disputed by the parties, in that service the user selects the television channel and time slot to record on the VCAST website. VCAST then picks up the television signal distributed terrestrially (over the air), with the aid of its own reception systems, and records the time slot selected by the user on the cloud storage service specified by him.

36. In my view, it is therefore clear from this description that the possibility of enjoying the reproduction made by VCAST is certainly not subject to prior access by the user to terrestrial television programmes in Italy. It is thus possible that the user does not have any access to them, possessing neither an antenna nor a television set, and VCAST provides him with access by making the selected programmes available to him. In doing this, it is clear that VCAST does not carry out a full retransmission of programming from Italian television channels. However, this has no bearing on the matter at issue, which does not concern the possibility of watching television in general, but access to programmes reproduced in the service provided by VCAST.

37. The fact, confirmed at the hearing, that the service provided by VCAST is not limited to Italian territory (or, at least, was not at the material time in the main proceedings) corroborates that VCAST is the source of access for its users to the programmes which are the subject matter of the reproduction. Thus, in order to access programmes, users of the service do not even need to be in the Italian terrestrial television catchment area. (17) In other words, VCAST's service is not limited to persons who actually have access to programmes broadcast on Italian terrestrial television or even to persons who could theoretically access them.

38. It is true that at the hearing the representative of VCAST stated that the service could be limited geographically if necessary. However, the issue is not whether that service is geographically limited or not. Moreover, such limitation could be contrary to, if not the letter, at least the spirit of the internal market rules. (18) Indeed, the mere fact that the service in question can operate outside the catchment area of Italian terrestrial television shows that it is not based on the logic of the private copying exception, as that exception presupposes that the user has prior lawful access to the work which is the subject matter of the reproduction. In the case of this service, it is the reproduction itself that constitutes the only means of access for the user to the work reproduced.

39. So what is the role played by VCAST? The answer is not clear, as its role combines an act of making available and an act of reproduction. I have adopted an interpretation which is favourable to VCAST, allowing room for a private copy made by the user. My assessment is thus as follows.

40. VCAST makes programmes broadcast by Italian television organisations available to its users, which is a form of communication to the public coming under Article 3 of Directive 2001/29. The user accesses the programme by ordering a reproduction of the programme, which will be made in the user's cloud storage space. While the act of reproduction itself may, in principle, be eligible for the private copying exception, that is not the case for the prior act of making available, which is the source of that reproduction. Accordingly, for any operation to be lawful, the making available must be lawful, as its unlawfulness would exclude the application of the exception. (19)

41. VCAST makes programmes available to its users without the copyright holders' consent. If the works were normally available on the market for a payment made to the rightholders, like phonograms or videograms, there would be no doubt, in my view, that such making available constitutes an infringement. The present case is distinctive in that it concerns terrestrial television programmes freely accessible to all users in the broadcast catchment area. (20) It is therefore necessary to examine whether this distinctive feature has a significant influence on the approach to the problem.

Protection of rights of free-to-air television organisations

42. I must begin by stating that in my view this question must, for a number of reasons, be answered in the negative.

– The geographical scope of the service

43. As I stated above, the service provided by VCAST, at least at the material time in the main proceedings, was not limited to Italian territory, which is also the catchment area for Italian terrestrial television.

Thus, any internet user in the world could request and receive in his cloud storage space a reproduction of a television programme to which he would not have access without the VCAST service. This is in itself sufficient, in my view, to exclude such a service from the scope of the private copying exception. The fact that the programmes are accessible freely and without charge does not affect this conclusion, as that accessibility, and thus any limitation of the copyright holders' exclusive rights, is restricted to the terrestrial television catchment area and cannot have effects outside that area.

– Protection of broadcasting organisations against infringement of their copyright

44. Irrespective of the geographical scope of the service provided by VCAST, in my view the interpretation of the provisions of Directive 2001/29 which follows from the Court's case-law precludes a conclusion that the television organisations would be deprived of protection of their copyright by reason of the free accessibility of their programmes.

45. With regard to the right of communication of works to the public (protected by Article 3 of Directive 2001/29), the Court has ruled, relying primarily on the Berne Convention (21) and its explanatory guide, that a communication made by a broadcasting organisation other than the original one must be seen as being made to a public different from the public at which the original act of communication of the work is directed, that is, to a new public. (22) According to the Court,

this is because when the author authorises the broadcast of his work, he considers only direct users, that is, the owners of reception equipment who, either personally or within their own private or family circles, receive the programme. However, if reception is for a larger audience, possibly for profit, a new section of the receiving public hears or sees the work. (23)

46. The Court concluded that the retransmission of the television signal to hotel rooms by a hotel manager constitutes a communication to the public requiring the copyright holders' consent. The Court also held that the hotel's customers form a new public which, in the absence of the intervention of the manager, although physically within the catchment area of the original broadcast, would not, in principle, be able to enjoy the broadcast work. (24) This position taken by the Court has subsequently been confirmed for other kinds of establishments. (25)

47. I consider that the same holds for a service like that provided by VCAST. That company is undoubtedly an organisation other than the television organisations which make the original broadcasts. The users of the service, whether physically within the catchment area of the original broadcasts or not, therefore form a new public which was not considered by the copyright holders in authorising those broadcasts. Furthermore, the service is provided for profit. (26) It follows that where VCAST makes available television programmes as part of its recording service, this constitutes an infringement of the copyright of television organisations, and possibly of other rightholders, if it is done without their consent.

48. Such making available is also unlawful in the light of the Court's findings in ITV Broadcasting and Others. (27) In that case, which concerned the retransmission of television programmes over the internet and was therefore similar to the case in the main proceedings, the Court ruled that, by regulating the situations in which a given work is put to multiple use, the European Union legislature intended that each transmission or retransmission of a work which uses a specific technical means must, as a rule, be individually authorised by the author of the work in question. However, given that the making available of works through the retransmission of a terrestrial television broadcast over the internet uses a specific technical means different from that of the original communication, that retransmission must be considered to be a communication within the meaning of Article 3(1) of Directive 2001/29. (28)

49. The Court reached this conclusion even though the provider of the service at issue in that case ensured that those using its service could obtain access only to content which they were already legally entitled to view in the Member State concerned (the United Kingdom) by virtue of their television licence (29) and that, according to the arguments made by that provider, those users could not therefore be regarded as a new public in relation to the public already targeted by the original broadcasts. The Court held that, in the case of the transmission of works included in a terrestrial broadcast and the making available of those works over the internet, each of those two transmissions must be authorised individually and separately by the authors concerned given that each is made under specific technical conditions, using a different means of transmission for the protected works, and each is intended for a different public. In those circumstances, it was no longer necessary to examine the requirement that there must be a new public, which is relevant only in situations where the technical means of communication is the same. (30)

50. In conclusion, the Court ruled that the concept of communication to the public within the meaning of Article 3(1) of Directive 2001/29 must be interpreted as meaning that it covers a retransmission of the works included in a terrestrial television broadcast:

– where the retransmission is made by an organisation other than the original broadcaster;

– by means of an internet stream made available to the subscribers of that other organisation who may receive that retransmission by logging on to its server;

– even though those subscribers are within the area of reception of that terrestrial television broadcast and may lawfully receive the broadcast on a television receiver. (31)

51. The second indent of the preceding point need only be replaced with 'by means of reproductions made available to the subscribers of that other organisation who may receive that retransmission by logging on to their storage service' for that case-law to be fully applicable to the present case. It should also be stated that VCAST does not even check that its users are entitled and have the technical means to receive Italian terrestrial television broadcasts.

– The inapplicability of the 'AKM exception'

52. It is true that the Court's position seems to have been slightly moderated by the recent judgment in AKM. (32) In that judgment the Court ruled that a simultaneous, full and unaltered transmission of programmes broadcast by the national broadcaster, by means of cables in the national territory, that is to say, by a technical means different from that used for the initial broadcast transmission, does not constitute a communication to the public within the meaning of Article 3(1) of Directive 2001/29, as the public to which that transmission is made cannot be regarded as a new public. (33) However, it would seem that this approach is based on the condition, which must be reviewed by the referring court, that the copyright holders had taken into account the retransmission in question in connection with their authorisation of the initial broadcast. (34)

53. The judgment in question is not entirely clear in this regard. However, any other interpretation would mean that it represents a clear reversal of the rule established in ITV Broadcasting and Others, (35) according to which, where there is a different technical means, the question of the existence of a new public is not relevant. (36) There is nothing in the judgment in question to indicate that the Court intended to make such a reversal.

54. Furthermore, a general rule that the transmission of a work which has already been broadcast by an organisation other than the original broadcaster does not constitute a communication to the public would seem to be contrary to Article 11 bis(1)(ii) of the Berne Convention, which grants authors the exclusive right of authorising 'any communication to the public … of the broadcast of the work, when this communication is made by an organisation other than the original one'. According to the Court's settled case-law, the concept of 'communication to the public' within the meaning of Article 3 of Directive 2001/29 must be interpreted in conformity with that convention provision. (37)
55. It must be also noted that the judgment in AKM (38) concerns the simultaneous, full and unaltered transmission of programmes broadcast. (39) In the case of such transmission, users may enjoy the programmes in the same conditions as the initial broadcast. However, in the case of a service like that provided by VCAST, they have a digital copy of the programme which they can watch when and as many times as they wish, make reproductions of it and transfer it onto any kind of equipment. This situation is not therefore comparable with AKM. In any event, in the case in the main proceedings, VCAST does not claim to have been given any consent by the copyright holders to make the works broadcast by Italian television organisations available to its users. It cannot therefore rely on AKM. (40)
56. To conclude this section, it is clear in my view, in the light of the Court's case-law, that the making available of television programmes to users of the service provided by VCAST without the copyright holders' consent constitutes an infringement of that copyright, even though the programmes are freely accessible and regardless of whether or not such making available is limited to the catchment area for the broadcast of those programmes. The reproduction of the programmes from an unlawful source as part of the same service cannot therefore be eligible for the private copying exception.

The three-stage test

– Preliminary remarks

57. Article 5(5) of Directive 2001/29 introduces a limitation on the Member States' right to provide in their domestic legislation for the exceptions mentioned in that article, stipulating that such exceptions must be only 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'. That provision has its origin in Article 9(2) of the Berne Convention, which similarly limits the possibility of providing for exceptions to the right of reproduction. (41) This triple condition governing the applicability of the exceptions is commonly known as the 'three-stage test' or 'triple test'.
58. It is true that, according to the Court, Article 5(5) of Directive 2001/29 does not modify the content of the exceptions laid down in that article. (42) However, at the same time the Court ruled that that provision takes effect at the time when the exceptions are applied by the Member States. (43) It can therefore be used as guidance for the interpretation of the exceptions when they are applied in the Member States' domestic law, but also for the purposes of the interpretation of the provisions of Directive 2001/29 by the Court. Thus, as regards the private copying exception, the Court has ruled that the exception applies only to reproductions made from a lawful source on the basis of Article 5(5) of Directive 2001/29 in particular. (44)
59. Accordingly, account must also be taken of Article 5(5) of Directive 2001/29 in answering the question whether a service like that provided by VCAST may, in the Member States' domestic law, come under the exception to the right of reproduction based on Article 5(2)(b) of that directive.

– Application in special cases and prohibition of unreasonable prejudice

60. The first and third 'stages' of the triple test consist in reviewing whether the exception is applied in special cases which do not unreasonably prejudice copyright holders. Since any exception to the author's exclusive rights, as a limitation of his rights, unreasonably prejudices him to some degree, this rule requires that the application of a certain exception is limited to situations in which such application is justified by the raison d'être of the exception. That raison d'être alone can justify the prejudice caused by the application of the exception.
61. Although the foundations for the private copying exception stem from various factors, it is quite commonly accepted that its main raison d'être is that it is impossible, or at least very difficult, for copyright holders to control use of their protected works by persons who lawfully access them. Such control could, moreover, constitute an unacceptable interference with the private life of users. (45)
62. That justification does not apply in the case of a service like that provided by VCAST. That service is not limited to the users' private circles, as the stage prior to the creation of the reproduction, namely the provision of access to television programmes by VCAST, takes place publicly as part of the company's economic activity and can be easily controlled by copyright holders. There is nothing to prevent those rightholders requiring their consent to be requested for the service or VCAST requiring such consent. The raison d'être for the private copying exception does not therefore justify the prejudice which would be caused to copyright holders by the application of that exception to services like that provided by VCAST.
63. I wish to make clear that VCAST's situation is different from that of operators that make recording equipment or media available to users or that provide reproduction services. Such equipment, media and services can be used to reproduce protected works, but can also be used for other purposes. In addition, the identity of any reproduced works, and therefore of the rightholders, is not known in advance. It would thus be absurd to require those operators to require the copyright holders' consent for the sale or leasing of

such equipment or the provision of such services. On the other hand, the sole purpose of a service like that provided by VCAST is the making available and reproduction of protected works which are specifically designated in advance (as they are scheduled in the television channels' programming) and whose copyright holders are known.

64. With regard to copies of works from unlawful sources, the Court has ruled that the application of the private copying exception would unreasonably prejudice copyright holders, as they would have to tolerate acts of piracy in addition to private use of the works by users. (46) Similarly, the application of the private copying exception to services which readily fall within the scope of the normal exclusive rights of rightholders would also unreasonably prejudice them.

– Normal exploitation of the work

65. The assessment of the second stage of the test, which requires that there is no conflict with a normal exploitation of the work, answers the question what prejudice is actually caused to the rightholders.

66. The mere fact that copyright holders are unable to control the exploitation of their works by third parties, on account of the excessively broad definition of the scope of the private copying exception, conflicts with a normal exploitation of the work, as such control, outside the scope rightfully reserved for the user's private circles, is part of that normal exploitation.

67. Furthermore, recording a television programme makes it possible, first, to watch that programme outside the time slot in which it has been scheduled and, second, to keep a copy in order to watch it again or to transfer it to equipment other than the television set, such as a mobile device. This therefore constitutes an additional service in relation to the initial broadcasting. Television organisations might wish to provide a service of this kind themselves, thereby exploiting works in which they hold the rights and generating additional revenue from them. The fact that this service is provided by VCAST without the consent of those television organisations therefore conflicts with this form of exploitation of the works.

68. In addition, television organisations which broadcast free-to-air programmes are financed mainly by advertising revenue, with the exception of public organisations, which may levy a fee. That revenue is the consideration for the exploitation of the works in which those organisations hold copyright. The broadcast of the works attracts viewers, as a result of which advertisers are willing to purchase broadcast time. As RTI pointed out in its observations, VCAST is in direct competition with those organisations on the advertising market. Because VCAST is exploiting, without consent, works in which those television organisations hold copyright, that competition becomes unfair. To authorise such competition through the private copying exception would necessarily conflict with a normal exploitation of those works.

69. Consequently, the application of the exception laid down in Article 5(2)(b) of Directive 2001/29 to services like those provided by VCAST would not, in my view, comply with the requirements laid down in paragraph 5 of that article.

Final remarks

70. To summarise my remarks concerning the interpretation of the private copying exception in respect of a service like that provided by VCAST, that exception presupposes that the user lawfully accesses the work which is the subject matter of the reproduction. In the service at issue, it is the reproduction itself that gives the user access to the reproduced work. That service therefore constitutes a form of making available of works by its provider. Such making available is unlawful as it is done without the copyright holders' consent, which excludes the application of the private copying exception. Furthermore, the application of that exception to such a service would be contrary to the requirements laid down in Article 5(5) of Directive 2001/29.

Conclusion

71. In the light of these considerations, I propose that the Court answer the questions referred for a preliminary ruling by the Tribunale di Torino (District Court, Turin, Italy) as follows:

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 precluding national legislation which permits the activity of providing, without the copyright holders' consent, an online recording service for terrestrial television programmes which are freely accessible in the territory of that Member State, where it is the provider of the service, and not its user, that receives the terrestrial broadcasting signal from which the recording is made.

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1 Original language: French.

2 Wikipedia, French version, article for 'cloud computing'.

3 OJ 2000 L 178, p. 1.

4 OJ 2001 L 167, p. 10.

5 General cloud storage services such as Google Drive.

6 See, inter alia, judgment of 4 October 2011, Football Association Premier League and Others (C‑403/08 and C‑429/08, EU:C:2011:631, paragraph 94 and the case-law cited).

7 Emphasis added.

8 See, inter alia, judgment of 21 October 2010, Padawan (C‑467/08, EU:C:2010:620, paragraphs 45 and 46).

9 Judgment of 5 March 2015, Copydan Båndkopi (C‑463/12, EU:C:2015:144, paragraph 91).

10 I would add that, even though this is not the subject of the present case, an interpretation of the private copying exception excluding any third-party intervention would also raise other problems at present. Increasingly, it is not only storage space that is being offered in the form of services, but also the software necessary for making reproductions. Thus, the

reproduction of a work from a physical medium (such as a CD) belonging to a certain user on his computer's hard drive, an act which unquestionably falls within the scope of the private copying exception, can be done with the aid of data recording software which is not installed on the user's computer, but is made available to him remotely as a service by a provider. The intervention of the provider would therefore be essential for the reproduction to be able to take place. It would not be logical to exclude such reproduction from eligibility for the private copying exception when a reproduction made with the aid of software installed on the user's computer would be eligible for it.

11 Judgment of 21 October 2010, Padawan (C‑467/08, EU:C:2010:620, paragraph 46).

12 See judgment of 5 March 2015, Copydan Båndkopi (C‑463/12, EU:C:2015:144, paragraph 80).

13 See judgment of 5 March 2015, Copydan Båndkopi (C‑463/12, EU:C:2015:144, paragraph 86).

14 See judgment of 5 March 2015, Copydan Båndkopi (C‑463/12, EU:C:2015:144, paragraph 89).

15 See judgment of 10 April 2014, ACI Adam and Others (C‑435/12, EU:C:2014:254, paragraph 41).

16 Judgment of 5 March 2015, Copydan Båndkopi (C‑463/12, EU:C:2015:144, paragraph 82).

17 The catchment area is normally limited, broadly speaking, to the territory of each State. Programmes may of course be retransmitted under licence in other States, including by cable or satellite. In that case, however, access is granted to programmes through the service of the operator effecting the retransmission, usually for payment.

18 See judgment of 4 October 2011, Football Association Premier League and Others (C‑403/08 and C‑429/08, EU:C:2011:631, paragraphs 87 to 89). I will not expand on this subject in detail any further, as it does not relate to the legal questions raised in the present case.

19 A different assessment is also possible, to the effect that VCAST does not carry out the prior act of making available, but an act of reproduction of the programme from the television signal which it receives itself and, by the same act, makes that reproduction available to the user for profit (as the reproduction is recorded directly on the storage service available to the user). However, in that case, it is clearly VCAST, and not the user of its service, that is the real author of the reproduction, which would rule out any recourse to the private copying exception.

20 The payment of a possible compulsory fee does not constitute consideration for the public broadcasting service and is not a condition for enjoying it (see judgment of 22 June 2016, Český rozhlas, C‑11/15, EU:C:2016:470, paragraphs 23 to 27).

21 Berne Convention for the Protection of Literary and Artistic Works (Paris Act of 24 July 1971), as amended on 28 September 1979.

22 Judgment of 7 December 2006, SGAE (C‑306/05, EU:C:2006:764, paragraph 40).

23 Judgment of 7 December 2006, SGAE (C‑306/05, EU:C:2006:764, paragraph 41).

24 Judgment of 7 December 2006, SGAE (C‑306/05, EU:C:2006:764, paragraph 42).

25 See, inter alia, judgment of 31 May 2016, Reha Training (C‑117/15, EU:C:2016:379, paragraph 46 and the case-law cited, and paragraph 62).

26 Depending on the option chosen by the user, that service is either a paid service or financed by advertising.

27 Judgment of 7 March 2013 (C‑607/11, EU:C:2013:147).

28 Judgment of 7 March 2013, ITV Broadcasting and Others (C‑607/11, EU:C:2013:147, paragraphs 24 and 26).

29 Judgment of 7 March 2013, ITV Broadcasting and Others (C‑607/11, EU:C:2013:147, paragraph 10).

30 Judgment of 7 March 2013, ITV Broadcasting and Others (C‑607/11, EU:C:2013:147, paragraph 39).

31 Judgment of 7 March 2013, ITV Broadcasting and Others (C‑607/11, EU:C:2013:147, paragraph 40 and point 1 of the operative part).

32 Judgment of 16 March 2017 (C‑138/16, EU:C:2017:218).

33 Judgment of 16 March 2017, AKM (C‑138/16, EU:C:2017:218, paragraphs 18, 26, 29 and 30).

34 See judgment of 16 March 2017, AKM (C‑138/16, EU:C:2017:218, paragraphs 28 and 29, and first point of the operative part).

35 Judgment of 7 March 2013 (C‑607/11, EU:C:2013:147).

36 That rule has subsequently been confirmed; see, inter alia, judgment of 8 September 2016, GS Media (C‑160/15, EU:C:2016:644, paragraph 37 and the case-law cited).

37 See, most recently, the same judgment of 16 March 2017, AKM (C‑138/16, EU:C:2017:218, paragraph 21).

38 Judgment of 16 March 2017 (C‑138/16, EU:C:2017:218).

39 Judgment of 16 March 2017, AKM (C‑138/16, EU:C:2017:218, paragraph 18).

40 Judgment of 16 March 2017 (C‑138/16, EU:C:2017:218).

41 Under that provision, '[i]t shall be a matter for legislation in the countries of the Union [constituted by the Berne Convention] to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author'.

42 Judgment of 10 April 2014, ACI Adam and Others (C‑435/12, EU:C:2014:254, paragraphs 25 and 26).

43 Judgment of 10 April 2014, ACI Adam and Others (C‑435/12, EU:C:2014:254, end of paragraph 25).

44 Judgment of 10 April 2014, ACI Adam and Others (C‑435/12, EU:C:2014:254, paragraphs 38 to 41).

45 For further explanation and various views put forward in legal literature, see my Opinion in EGEDA and Others (C‑470/14, EU:C:2016:24, point 15).
46 Judgment of 10 April 2014, ACI Adam and Others (C‑435/12, EU:C:2014:254, paragraphs 31 and 40).