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# Recent CJEU rulings on online copyright law

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# Presentation overview

1. Introduction
2. Presentation of four cases
3. Comments



## The legal bases:

- InfoSoc Directive 2001/29 (implementing in part the WCT and the WPPT from 1996)
- SatCab Directive 93/83

Disputes focus on **the scope** of

1. Exclusive rights

- Reproduction right, art. 2 InfoSocD
- Communication to the public, art. 3 InfoSocD

2. And of statutory remuneration rights

- Private copying levy, art. 5(2)(b) InfoSocD

## Judgment of 24 March 2022, Austro-Mechana (C-433/20)



Hilfe & Kontakt Warenkorb Login

Domain & E-Mail Website & Shop Hosting & WordPress Online-Marketing Server Cloud-Speicher ⋮

### Cloud-Speicher HiDrive Der Cloud-Speicher für Ihre Daten

- ✓ TÜV Zertifikat
- ✓ Serverstandort Deutschland
- ✓ Zwei-Faktor-Authentifizierung



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Questions concern art. 5(2)(b) InfoSocD:

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;

Application to copies on a cloud storage server?

Preliminary point: Does the case fall under art. 3(1) (communication to the public)?

- Consequence if it did
- The court distinguishes
  - VCAST and Nederlands Uitgeversverbond (second-hand e-books): “dual functionality services” where reproduction and access/comm to the public go hand in hand
- Strict distinction between
  - the act of reproduction (art. 2)
  - and any communication that would result from the sharing of a work by the user of a cloud storage service (art. 3(1)).

## First Q: Reproduction on any medium?

Yes:

- The concept of ‘reproduction’ in art. 2 and 5(2) must be construed broadly
  - Broad concept (wording) and high level of protection
- ‘by any means’
  - Also by digital storage
    - Cf. 5(2)(a): “reproductions on paper or any similar medium”
  - Also by third parties making the storage space available to the user



Second Q: Does art. 5(2)(b) require that MS subject cloud computing providers to the payment of fair compensation?

- Arguments pro
  - Cloud computing is similar to the distribution of recording equipment or the provision of reproduction services.
  - The servers used for cloud computing may not be put into circulation in Austria and thus not covered by the Austrian levy system.
  - Each reproduction on any device used has to be covered.
  - Strato may be able to seek reimbursement of (part of) the levies paid in Germany if it is ordered to pay levies for Austrian users (CJEU Amazon International 2013).

Second Q: Does art. 5(2)(b) require that MS subject cloud computing providers to the payment of fair compensation?

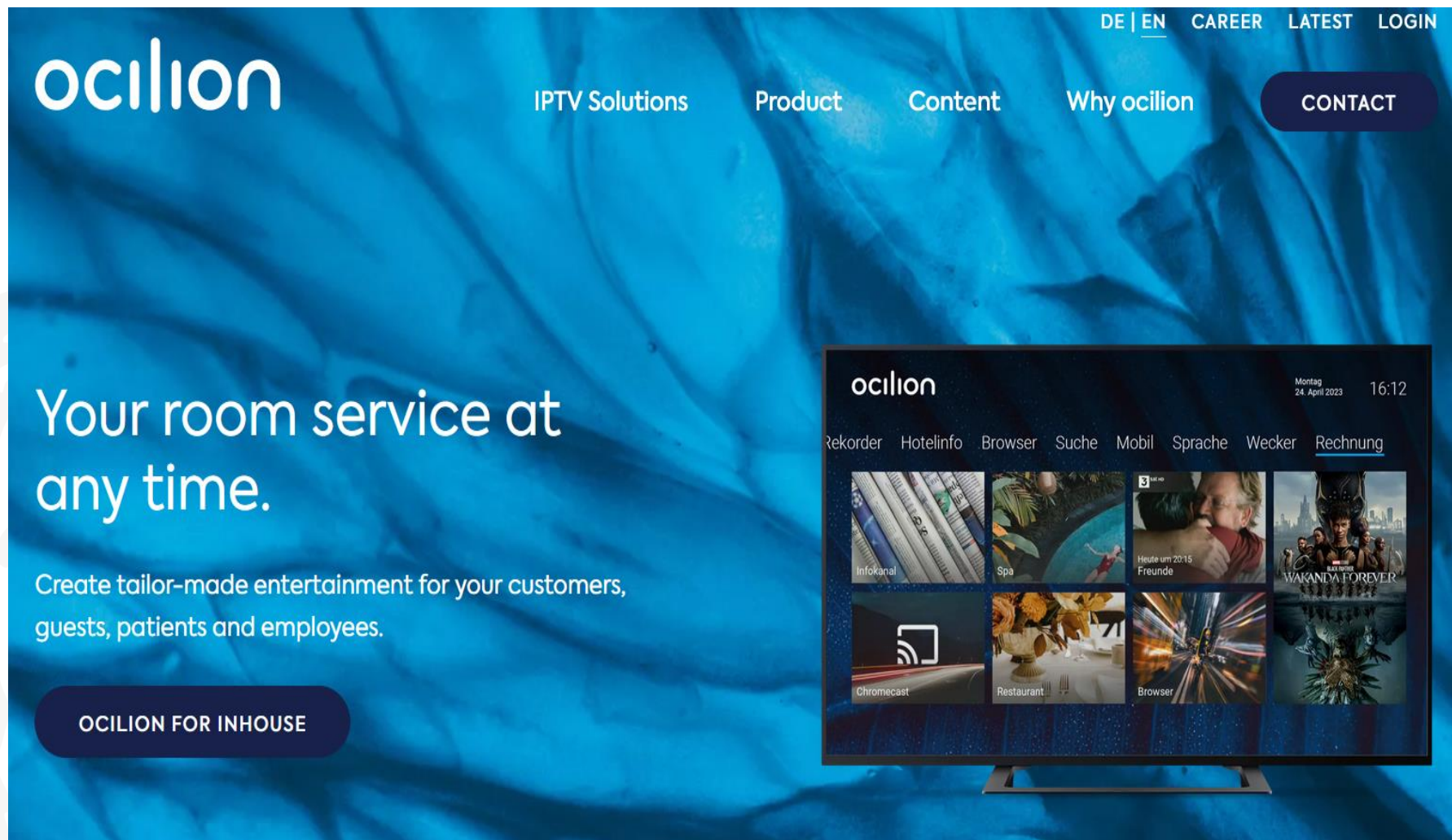
- Arguments contra
  - Strato does not sell or lease physical storage media to Austria but merely offers online storage space on its servers hosted in Germany.
  - Strato has already indirectly paid the copyright fee for its servers in Germany (as a component of the price charged by the manufacturer/importer).
  - Austrian users have paid a fee for the devices used for uploads and downloads.

Second Q: Does art. 5(2)(b) require that MS subject cloud computing providers to the payment of fair compensation?

- Court defers the q to the member states
  - MSs that implement the exception are obliged to provide for a system of fair compensation.
  - The compensation must be linked to the harm resulting from private copies.
  - Fair compensation must not over or under compensate.
  - MSs enjoy broad discretion, including for an indirect lump sum levy system where providers of digital reproduction equipment have to pay and pass on the levy to end users.
  - Could also be applied to cloud computing providers.

Second Q: Does art. 5(2)(b) require that MS subject cloud computing providers to the payment of fair compensation?

- MSs are free to put a levy
  - only on the devices used for the upload and download, taking into account the possibility to use these devices in connection with cloud computing services;
  - or both on those devices and on the servers used for cloud computing.



The image displays the Ocilion website and a mockup of its IPTV interface. The website background is a blue, crumpled fabric texture. The Ocilion logo is in the top left. Navigation links include DE | EN, CAREER, LATEST, LOGIN, IPTV Solutions, Product, Content, Why ocilion, and a CONTACT button. The main text reads "Your room service at any time." followed by "Create tailor-made entertainment for your customers, guests, patients and employees." and an "OCILION FOR INHOUSE" button.

**ocilion**

DE | EN CAREER LATEST LOGIN

IPTV Solutions Product Content Why ocilion CONTACT

**Your room service at any time.**

Create tailor-made entertainment for your customers, guests, patients and employees.

OCILION FOR INHOUSE

**ocilion** Montag 24. April 2023 16:12

Rekorder Hotelinfo Browser Suche Mobil Sprache Wecker Rechnung

Infokanal Spa Heute um 20:15 Freunde WAKANDA FOREVER

Chromecast Restaurant Browser

First Q: Is the “de-duplication” recording function covered by the private copy exception of art. 5(2)(b)?

- No:
  - Dual functionality of the offer: online recording necessarily depends on the simultaneous retransmission.
  - Difference to cloud storage
  - Recording function adds value to the simultaneous retransmission, part and parcel of the commercial Ocilion offer
  - The “de-duplication technique” makes the master copy accessible to an indeterminate number of end users.

Second Q: Is the provision of hardware and software a “communication” of a protected content under art. 3(1)?

- Principles regarding the interpretation of art. 3(1)
  - A right which is preventive in nature.
  - Broad concept.
  - Two criteria:
    - an *act of communication* of a work
    - and the communication of that work *to a public*
    - individual assessment
- Problematic here: ‘act of communication’?
  - Any transmission of the protected works, irrespective of the technical means or process used
  - But: ‘the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication’ (recital 27)



Second Q: Is the provision of hardware and software a “communication” of a protected content under art. 3(1)?

- No:
  - Access to content is not provided by Ocilion but by the network operators; rightholders have to go after them!
  - Ocilion only provides the hardware and software necessary for the retransmission
    - Cf. Stim and SAMI (cars with radio equipment, “direct link” required between intervention and transmission)
  - Ocilion does not play an “indispensable role” in the communication
    - Stichting Brein “filmspeler” and YouTube/Cyando v. Ocilion IPTV
  - Any knowledge of such a provider is irrelevant/insufficient



## AG Szpunar opinion case C-423/21, Grand Production

### The facts of the case

- Grand Production produces audiovisual content for the Serbian television broadcaster (Prva Srpska Televizija, PST)
- GO4YU operates an online streaming platform on which it is authorized, by PST, to retransmit PSTs programs, in the territory of Serbia and Montenegro, but not beyond. It is obliged to block internet users located outside those two countries from accessing the programmes concerned. However, those users can bypass the blockade by using a so-called virtual private network (VPN) service.
- From 30 April 2020 to 15 June 2020, the applicant's shows could be accessed in Austria via the streaming platform owned by GO4YU Beograd without any geoblocking.
- Moreover, GO4YU is aware of the fact that its geoblocking can be bypassed using a VPN service.
- AG Szpunar opinion of 20.10.2022
- Case was removed from the register on 13.2.2023

Q1: Is the retransmission of content via the Internet into a territory for which no authorization was granted a communication to the public?

- AG Szpunar: yes
  - See ITV Broadcasting
  - To the extent that the retransmission is available in the territory of a Member State.
  - German case law on this issue.

## Q2: Is GO4YU liable for communications to users who bypass geoblocking using a VPN?

- AG Szpunar: no!
  - If GO4YU applies geoblocking, it does not communicate to the public in the respective territory.
  - Holding GO4YU liable would make managing © on the internet impossible.
  - Circumventing geoblocking is a risk inherent in internet commercialization of works.
  - Liability only if GO4YU intentionally applied ineffective geoblocking measures.
  - Cf. Stichting Brein (Filmspeler)

## Q3: Liability of an associated ad and distribution company?

- AG Szpunar: no!
  - No “direct link” between this activity and the transmission of works.
  - Liability for facilitating or collaborating in copyright infringement is not harmonised in EU law and is regulated solely by the national laws of the Member States.
  - ... well ...

AKM is a collecting society entitled to exercise broadcasting rights in Austria on a fiduciary basis.

Canal+, established in Luxembourg, offers in Austria, by satellite, in return for payment, packages of encrypted programmes of various broadcasting organisations located in other Member States, both in high-definition and in standard definition. The introduction of each of the programme-carrying satellite signals into the chain of communication (uplinking) is carried out in those other Member States. After being 're-sent' by the satellite, that stream is received by satellite-receiving equipment within the coverage area. That stream is then split up and the user may access each of the programmes on a terminal by means of a decoder.

AKM has brought an action seeking an injunction against the broadcasting by Canal+ of satellite signals in Austria.

## Background: The business model of encrypted satellite packages

- The use value of satellite packages for consumers:
  - Access to certain pay-tv programmes (HD) plus free-to-the-air (SD) programmes
- Profit interest of the package provider (Canal+)
- Profit interest of the participating broadcasting organizations
- Fair participation of the authors of the works being broadcasted (e.g. composers of music)?

## Preliminary point:

- The package provider needs an authorization from the broadcasting organisations (Airfield and Canal Digitaal 2011).
  - Reaches a new public with a new product (critical Szpunar)

Q: Is a satellite package provider required to obtain an authorisation only in the Member State of uplink or also in the reception countries?

- Only in the MS of uplink (Art. 1(2)(b) SatCabD)
  - Fosters the pan-European availability of satellite programs
  - Copyright holders (such as composers) are entitled to receive appropriate and proportionate remuneration in the uplink MS from broadcasting organisations for this monetization of their works (art. 18 CDSMD).
  - Does an adequate proportion of this remuneration end up in the pockets of Austrian composers?



# The new copyright rapporteur at the CJEU!?



Ineta Ziemele, rapporteur in all judgments presented

## Relevant principles

- High level of protection, in particular for authors
- Safeguard a fair balance between rightholder and user interests
- Preserve technological neutrality
  - Do not favour the use of one technology to the detriment of another
  - Limited relevance (cf Ocilion)
- EU © law must not become outdated or obsolete

### Cross-border issues

- Fragmentation of the internal market through 27 copyright territories
- Geoblocking and its legality
  - Cf. General Court Case T-172/21 - Valve
- The 'broadcasting Member State' principle in the case of satellite broadcasting
- Levies/collective licenses
  - Payments in the country where the use occurs
  - One single payment in the case of satellite broadcasting
  - Possibly several payments in the case of cloud storage providers (Amazon International)

### Defining the scope of exclusive rights

- The difficulty to distinguish between reproduction and making available (“dual functionality” services)
  - E.g. Strato cloud storage vs. Ocilion IPTV
- Which actors play an “indispensable role” in the communication of content?
  - Ocilion vs. YouTube

### General trends in digital © law

- “The old guys sue ...”
  - Collecting societies, broadcasting organisations and film producers
  - The decline of traditional revenue streams, in particular from linear TV.
- “... the new guys in town.”
  - Service providers high up the communication stream
- How to preserve fair remuneration of authors and performers in the online environment?