Private Copying Forum
(Web meeting, 29 June 2022)

Participants :

Paul Fischer	AUME
Christine Mergoupi	AUTODIA
David Kitzinger	ARTISJUS
Istvan Sponga	ARTISJUS
Verena Wintergerst	GEMA/ZPUE
Annemie Maes	SABAM/AUVIBEL
Kurt Van Damme	SABAM/ AUVIBEL
Karla Lievens	SABAM/AUVIBEL
David El Sayegh	SACEM/SDRM – Chairman
Charles-Henri Lonjon	SACEM/CopieFrance
Martin Lavallee	SOCAN
Kit Wheeler	SOCAN
Carlos Casado	SGAE
Coleman Gota	SGAE
Alessandra Amendola	SIAE
Hester Wijminga	STEMRA/Stichting de Thuiskopie
Anke Link	SUISA
Ignacio Chico	VUD
Juan Antonio Orgaz Espuela	VUD
Veronique Desbrosses	GESAC

From *BIEM & CISAC*
Laure Margerard
Cristina Perpiña-Robert
Constance Herreman
Leonardo de Terlizzi
Eleonora de sa Barros

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The meeting was chaired by David El Sayegh (SACEM).

1. Impact of the ECJ decision on Cloud Lockers (case 433/20)

Presentation of the decision of the ECJ dated 24 March 2022 (Paul Fischer—Austro-Mechana)

The ECJ decision clearly states that cloud copies should be encompassed within the levy system in line with the InfoSoc Directive.

The ECJ leaves it to member states to determine how the levy should be implemented. This is an outcome of discussions during the oral hearing and written opinions from different governments, which made it very apparent that there are different methods to assess and collect the levy, for example:

- In the NL, a surplus is added to the levy to be paid on devices that usually give access to cloud services (smartphones, tablets and computers).
- In Austria, due to the historic development of the law, the levy can only be collected from storage and not on the device. Therefore, AUME will go to the service provider, as the entity making money from private copies. In addition, the service provider has all the information at hand regarding how the service is used, the number of users by country, and the number of copies made by each user.
- A third method can be to levy the servers used by the cloud services, etc.

Finally, the ECJ indicates that the implementation of the cloud levy need not lead to double compensation—if there is a system in place that already includes cloud services, additional claims cannot be made.

To a question about the industry argument against a cloud levy, Paul outlined that the industry raised the argument of double payment in the context of Austrian domestic law. It was stated that the cloud has already been covered by the levy, and any new levy would lead to a double payment. Actually, in 2015 a major amendment to the law was introduced to include so-called "new media" in the Austrian levy system (smartphones, hard disks and so on). At that time the industry only wanted to have physical carriers covered, expressly excluding any levy on the cloud.

According to David El Sayegh, this ECJ ruling is very positive, because of the following elements:

- **The principle of technological neutrality**: The ECJ decision does not restrict private copying to physical carriers but includes cloud services. It means that the concept of private copy can evolve according to new technology, and national legislation should take into consideration such evolution.
- **Private copying services can be provided by** a **third party**. Here the decision contradicts an old French ruling of 1984 stating the need to have the custody of a tool of the devices to claim for private copying exception, which excludes third-party services that could provide private copying.
- The decision gives a very good insight about the evolution of private copying exceptions in the future and leaves room for interpretation. Thus, it does not jeopardize our local system.
  In short, when copies are to be taken into consideration in the scope of the private copy exception, compensation should be paid (no double compensation) and different entities can be charged. For instance, In France, it will be easier to charge the manufacturer or the importer of devices.

In Germany, the decision of the ECJ has been intensively discussed. ZPÜ considers filing a lawsuit and in parallel appealing to the legislator to adapt the German copyright law to cloud activities. ZPÜ will go both ways and see which institution will act faster. We are not in the position to wait any longer against the background of the ECJ's ruling in this case and the Strato decision.

Calculation of the harm of cloud locker services

To a question from David Kitzinger, Paul reminded that in the national proceeding AUME claimed that the service providers have all the necessary data at hand, so they can report on every Austrian private user with the capacity rented by each user.

They only need to aggregate the list of users per capacity category. Usually, they have some rather low storage space for free, and some renumerated higher storage space. This will give an accurate picture, and private copy compensation will be calculated according to the capacity. The higher the capacity, the more the service provider should pay for this client. Of course, this is only restricted to private clients.

According to David Kitzinger, the compensation system described sounds easy, but when it comes to applying an additional amount to the levy of the device, it will be much more difficult to calculate the harm.

Hester Wijminga advised looking at the Reprobel decision that considers when actual damage is not established; the amount of the levy, therefore, does not have to correspond to the actual damage. A link or a relation with the actual damage is sufficient.

Next steps
The next decision of the competent Austrian Court should be published in September. In any case, the next step will be the appeal procedure initiated by the failing party. The final verdict in the Austrian case is not expected before summer 2023.

2. nPVR & Private Copy—Austrian case before the ECJ

A current pending Austrian case before the ECJ should clarify if nPVR is to be included in the private copying exception, following the decision of the Austrian Supreme Court to put it outside the scope of the private copy.

Paul Fischer asked what impact the confirmation of the Austrian Court position could have on the French system.

According to David El Sayegh, the ECJ will first have to state if a third party can provide a service that is included in the scope of a private copying exception. According to the VCast, Strato, and even CopyDan rulings, the answer should be yes.

The other issue is about shared copies. nPVR does not provide a looker to each individual, but personal access to a copy that is shared by different individuals. The French law only includes nPVR under the private copying exception without any further details on how the copy is made—if it is one copy for one individual consumer or one copy shared among different end-consumers desiring the same protected work.

From a technical standpoint, nPVR services do not provide a different copy of the same protected work to each consumer. It is the same work that is shared. As such the ECJ's answer will be of interest to us. If the answer is yes, a copy can be shared, the nPVR services will not change anything. If the answer is no, they should change their functionalities to offer everyone a copy and its locker.

David El Sayegh reminded that providers of setup boxes have all shifted to nPVR. Regardless of the technology used by the service provider, the aim remains the same: to provide a copy of protected content. The principle of neutral technology, mentioned in the Strato ruling, should also apply here.

This decision will have an impact on the audio-visual sector relying on the PC levy.

In the Netherlands, Hester Wijminga mentioned that the industry made it clear that technically it is just one master copy that is stored and accessible to people. Thuiskopie did request that the nPVR be covered by the PC system but it did not succeed because of arguments made by the industry.

In Austria, Paul assumed that the position of the government, if it steps in, would be to go along with the Supreme Court, which has already said that it is more an issue of exclusive rights than a private copying exception. This is AUME's position, which is already in negotiation about licensing such exclusive rights with one major cable operator in Austria.

In Hungary, nPVRs are licensed as exclusive rights. Tariffs have been in place for more than 12 years and proved to be quite easy to collect from cable operators because there are three big players and a dozen mid-size players.

3. ECJ case concerning Broadcaster Private copying rights

The question put before the ECJ is whether broadcasting companies may claim private copying levies on copies made by users of broadcasted TV content in Germany.

The German law provides for an exception on the basis that these broadcasters do not have a right to compensation. The assessment of the German legislator is very elaborate with precise argumentation. However, one collecting society in Germany does not accept this decision of the legislator. After several attempts, it finally

convinced a small German court to address a preliminary ruling to the European Court of Justice. ZPÜ is not a party to the case.

Paul faces the same situation in Austria.

David El Sayegh reminded participants that from a theoretical standpoint, broadcasters are on the list of rightsholders who benefit from a reproduction right, according to Article 2 of the 2001 Directive.

However, in France, they do not receive a share as broadcasters but as audio-visual producers.

Because of this preliminary question addressed to the ECJ, the pre-existing shares defined in the system may be questioned.

For its part, the German government has not issued any opinion yet, but it will certainly defend its law. This also goes for Austria.

4. Cloud & Tethered Downloads – Decision of the Dutch Court and update

Hester Wijminga' presentation is attached.

Hester indicated that the Appeals Court verdict of 22 March 2022 cancels the judgment of the District Court of The Hague of 18 September 2019. According to her, the decision was purely based on the Dutch Copyright Act.
On the one hand, the decision states that tethered downloads are not included in the private copying exception because these are copies made in commission and are not made by the natural person him/herself.
On the other hand, the Court confirmed that Cloud copies are included in the private copying exception.

Thuiskopie has decided to lodge an appeal in cassation to the Supreme Court against the judgment of March 2022, for more clarity on the issue in the highest instance, because of the differences between nPVR and licences given by f.i. to Netflix, which includes a private copy.

Thuiskopie considers that rightsholders are not sufficiently remunerated for copies that are made now which were not done before or which were done before but with another technology that allows private copy compensation.

In parallel, based on the verdict, the industry is fighting to have the tariffs lowered and HP, Dell, Apple, Samsung and many others are claiming a refund. Thuiskopie is in the midst of negotiations to obtain a temporary tariff decision while awaiting the final verdict from the Supreme Court.
Thuiskopie expects a verdict from the Supreme Court in September/October 2023 at the earliest. The Supreme Court may also ask questions before ECJ.

In France, there is no consensus among rightsholders about the inclusion of tethered downloads in the calculation of the harm. Authors would like them to be included, but label representatives disagree. They consider it to be already covered by the licence and do not want to put the licensing scheme at risk.

Regarding the position of the Court of Appeal on the commercial purpose of tethered download (vs not private copying), David El Sayegh outlined that the commercial purposes need to be assessed according to the use made by the end user: If it is a tethered download, it is for personal use and not for commercial use.
Hester agrees, but according to the Court, the provider makes the copy, and therefore the commercial purpose becomes relevant. Thuiskopie argued against that.

The argument that FTP restricts certain access of the copies made in the scope of a private copying exception, cannot be relevant, because PVR and nPVR and even subsequent downloads are restricted by FTP. Based on the VG Wort ruling, there is no contradiction between FTP and private copying exception. FTP may only impact the level of harm.

5. Latest developments on the pending ECJ AMETIC case (263/21)

Proceeding initiated by AMETIC against Spanish one-stop shop (VU – Ventanilla Unica Digital)[1]
Juan Antonio Orgaz Espuela (VUD) gave a quick summary of the case. He indicated that finally no public hearing will be organised and the ECJ did not also ask for the opinion of the general attorney. He considers both as positive elements.

The ECJ decision is expected on 8 September 2022.

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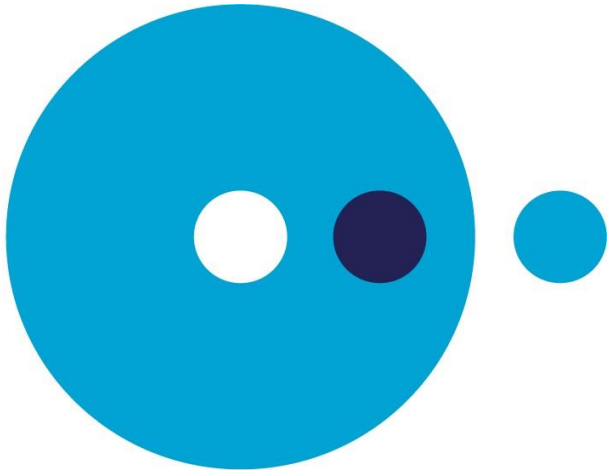
BIEM Doc. 22-0199

Tethered downloads & private copying

Recent developments

de Thuiskopie



Requirements private copy – LAW and ECJ

- A private copy must be made by a natural person for non-commercial use
- A private Copy must be made from a legal source (ACI Adam)
- The private copying exception prohibits the rightholder from relying on his exclusive right to authorize or prohibit reproductions with regard to persons who make private copies of his works (statutory license)
- Any authorising act (to make a private copy) a rightholder may adopt will be devoid of legal effects (Copydan,VGWort,Vcast) → copy made from a licensed source can be a private copy
- 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 → copies stored in the cloud or made through a cloud service are private copies

The Netherlands
Tariff decisions 2018-2020 and 2021-2023 include cloud & tethered downloads

- Cloud storage of private copies is mainly done in combination with the PC/laptop, tablet and smartphone, especially for backup and automatic synchronization. The remuneration for this category of private copies **is included via a surcharge of 5% in 2018 and 10% in 2021** in the tariffs for the devices most used for this purpose.
- Any authorising act (to make a private copy) a rightholder may adopt will be devoid of legal effects (Copydan no. 65,66, VGWort, Vcast) → copy made from a licensed source can be a private copy -> Tethered downloads are included in the exception

The Dutch court cases on cloud & tethered downloads

HP, Dell, Stobi vs. SONT & Stichting de Thuiskopie (tariffs 2018-2020)

HP, Dell and Stobi argue that the SONT Decision 2018 is based on legally incorrect starting points, since:

- (i) offline streaming copies, namely copies that consumers can make as part of their streaming subscription (where the option of offline storage is marketed to the consumer as a facility of the subscription) are wrongly included in determining the level of the private copying levy;
- (ii) the alleged loss when making copies in the cloud is wrongly included in determining the level of the private copying levy on computers and smartphones.

Other cases regarding 2021 tariffs – Tethered downloads:

- Belsimpel, Mobiel.nl vs. SONT & Stichting de Thuiskopie
- Apple vs. SONT & Stichting de Thuiskopie

Oral hearings: October 14, 2022

District court The Hague- on offline streaming

On September 18, 2019, the court dismissed the claims of HP, Dell and Stobi. Substantively, the court ruled that offline streaming copies, copies made with a legal streaming service as the source, are private copies within the meaning of art. 16c Aw. A private copying fee is therefore due for those copies. The fact that this would mean paying twice (license fee and private copying fee) does not stand in the way of this. Any permission granted to make the copy has no impact, as making a private copy is not subject to permission.

"The Dutch legislator has chosen to apply the limitation of Article 5(2)(b) of the Information Society Directive within the scope of Article 2 of that Directive. The right of the rightholders to give consent to reproductions of their works for private use is therefore entirely excluded. Under Dutch copyright law, therefore, any consent from the rightholder does not form part of his exclusive exploitation rights, and therefore remains without any legal effect. In a system such as that in the Netherlands, with full exclusion of the right of the rightholders to give consent for reproductions of their works for private use, any consent by the rightholder does not affect the loss to the rightholder and cannot have any effect on the fair compensation."

Appeal

- At the hearing on 10 May 2021, HP argued that there is interference by the provider with a commercial objective and that therefore the reproduction falls outside the scope of Section 16c Aw. In response to a question from the Appeals Court, they added to this that a provider such as Spotify makes the copy on behalf of the user.
- Thuiskopie and SONT argued the Dutch legislator had in mind the situation where a third party copies a DVD/CD for a natural person for payment, but not the situation that arises with tethered downloads. In the tethered download situation, the user initiates the copying process, and he does not in the DVD/CD copy situation.
    - Art. 16c of the Dutch Copyright Act himself. Copies made on commission by a professional supplier are not within scope. states a private copy must be made by the natural person
    - Section 16c Aw must therefore be interpreted as meaning that there is no question of a private copy if the copy is made on instructions of a natural person by a third party acting professionally/with commercial intent. Whether Article 5(2)(b) Arl also sets this requirement for private copying can be disregarded. After all, the Member States are free to apply the restrictions of Article 5(2) and (3) Arl only partially.

Appeals Court verdict March 22nd 2022

- Annuls the judgment of the District Court of The Hague of 18 September 2019
- Tethered downloads are NOT included in the private copying exception because it are copies made in commission and not made by the natural person himself. Gave specific definition of concept “tethered download”
- dismisses all other claims which means:
  - Cloud copies are included in the private copying exception
  - The SONT tariff decree is NOT annulled
  - The verdict is NOT provisionally enforceable

Thuiskopie lodged an appeal in cassation against the judgement of 22 March 2022, the SONT considers it appropriate to follow and lodged an appeal in cassation as well.

Courts Definition tethered download

The Court ruled that tethered downloads do not fall under the exception, insofar as the copy was made on behalf of a natural person by a third party acting professionally/with commercial intent.

According to the Court, this applies to paid streaming services that offer the option of offline storage, insofar as (in summary, see no. 4.2 of the judgment):

- There is a commercial purpose of the service provider (paid service)
- The provider determines the storage location and the user himself has no freedom of choice or room to move
- The encryption method has been determined by the provider and the content can only be “decrypted” by the provider
- The content remains within the streaming facility due to the technical protection measures and cannot be transferred to another medium
- The storage of the content on the user's device is temporary and is automatically deleted after (among other things) termination of the subscription

Market survey (Kantar)

- Ongoing market surveys examine which sources consumers copy from.
- It is established that the source is “download from a paid streaming service within a subscription model”
  - 2021: 38% of copies on a smartphone, 41% on a tablet. Average 33% on all devices last 3 years
- Discussion on other downloads like free You Tube – allowed: not within the “walled garden” and not paid for subscription model

https://www.onderhandelingthuiskopie.nl/Gebruikersonderzoek

Dutch Levies 2018-2020 and 2021-2023

Devices	**2018 - 2020**	**2021-2023**
Desktop/PC/notebook/server/mediacenter	€ 2.60	€ 2.70
Tablet	€ 2.60	€ 2.20
Smartphone/Phone with MP3 function	€ 4.70	€ 7.30
Portable audio/video player	€ 1.20	€ 2.10
Settopbox wit hard disk / HDD Recorder	€ 3.80	€ 3.80
E-reader	€ 0.80	€ 1.10
External HDD/SSD, USB > 256 GB	€ 0.60	€ 1.00
USB-stick < 256 GB	€ 0.60	€ 0.50
Wearables with storage capacity	€ 1.20	€ 0.60

Consequences in the Netherlands

- Tariff discussions ongoing
- HP/Dell, Apple, Samsung & others claim refunds as of 2018
- Demand that Thuiskopie will not distribute towards rightsholders
- Cassation Supreme Court – verdict

- HP cs. Have to submit a statement of defence September
- Verdict: September/October 2023 earliest

Thank you

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