

# Cloud Computing & Copyright Levies & Bird & Bird

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# Cloud Computing & Copyright Levies

## 1. Context

- Copyright levy systems in national legislations since the 1980-90's (e.g.: in France since 3 July 1985 ("loi Lang"); in Germany since the law of 16 July 1998)
- Community levy system introduced by Directive 2001/29/EC (22 May 2011) – but no harmonisation of model for fair compensation
- Original aim:
  - To charge single-function devices designed and intended to be used for private copying and reprography of works belonging to the "family circle" (« copie privée »)
- Traditional justification:
  - Recognition that it would be impossible to prevent private copying
  - Right holders had to be awarded a compensation for the copyright revenues lost due to the unlicensed copies made of their works for private uses

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## *2. Outline of the issue*

- The rapid pace of technological change is putting the traditional justification under pressure
- Necessity to re-think the current copyright levy system(s)
- Main concerns:
  - Remunerate/compensate right holders
  - Allow cross border trade (and consumer satisfaction)
  - Take into account technological changes
- Two debates/questions:
  - The legitimacy and legality of the current system
  - The adequacy and pertinence of the current system

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## *3. Issues of the current system*

### **a. The legitimacy and legality of the current system**

- Growing number of legal disputes at national and EU levels challenging the legitimacy and legal certainty of the existing system(s)
  - CJEU Padawan of 21 October 2010 (C-467/08)
  - CJEU Stichting de Thuiskopie of 16 June 2011 (C-462/09)
  - CJEU Austromechna v. Amazon – pending - (C-521/11)

E.g. highly challenged in Belgium and Austria (applying high levies)
- Adverse consequences for authors (since Padawan) as national Courts and institutions:
  - Enjoined collecting societies to massive refunds
  - Annulled existing levy tariffs

E.g.: Spain abolished its copyright levy system in 2011 (now levies calculated in the State budget)

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## *3. Issues of the current system*

### **b. The adequacy and pertinence of the current system (1)**

- Digitalization of copyrighted content has changed the way contents are used
- The rationale underlying the levy system is no longer pertinent (new substituting channels to compensate)
- Consumers change the way they access to entertainment due to the omnipresence of Internet
- Increasing:
  - Number of mass market multifunction and multipurpose digital devices
  - Fit-for purpose applications
  - Versatility

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## *3. Issues of the current system*

### **b. The adequacy and pertinence of the current system (2)**

- Consumers want to access contents of their choice at anytime and on a range of devices – switching to whichever device is best suitable at each moment of the day
- Consumers' contents are stored and centralised in a single database on which are synchronised the various devices
- Technology enabling private copying increases the value of the legitimately purchased content (use goods in new ways)
- Streaming and cloud computing change moreover the way we use content
  - Streaming: releases from downloading and storage constraints
  - Cloud computing: allows delocalisation of storage operations, and virtual uploads (cloud providers often store once each work for all subscribers)

# Cloud Computing & Copyright Levies

A need for change

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## *4. A need for change*

- The current system
  - Acts as a barrier to cross border trade
  - Prevents consumers from benefiting from the single market
  - Does not take into account the growth of e-commerce
  - Does not take into account "pure player" online retailers

### *Possible consequence*

- Online players may increasingly be confronted with double payment issues in cases of exports
  - Due to the lack of harmonisation in the EU regarding the person liable for paying the levy (manufacturer or retailer)
  - ↳ Complex and unpredictable environment for businesses – reluctance to sell cross-border
  - ↳ Induces manufacturers to avoid/minimize levy payments (withdraw or downgrade devices)



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## *4. A need for change*

- The current device-based levy is not compatible with:
  - The fast developing digital market
  - The emergence of streaming and cloud services
  - The increased presence of multifunction devices (also used to store UGC and licensed content)
- The system does not take into account the actual making of private copies or professional use
- Streaming and cloud services result in the reduction of private copying (thus also the compensation due) because:
  - Cloud computing is not a device
  - Streaming does not constitute an act of private copy

# Cloud Computing & Copyright Levies

## *4. A need for change*

- With the increase of online distribution, copying of content is often authorised and paid for by consumers ⇒ license
  - Dual system: levy + license
- E.g. Consumer buys music and is granted a limited license to use + benefits from the legal license on private copy/reprography for which they pay a levy on recording devices
  - Consequently applying levies allowing access to licensed content would result in a double (or triple) compensation

Thank you **& Bird & Bird**

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