Media & Entertainment - France

The cloud and private copying

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Author

Eric Lauvaux

The development of cloud computing poses a number of questions for lawyers, especially with regard to the categorisation of the rights at stake (reproduction and/or performance) and the application of the private copying exception.

Cloud features developed by online music services effectively permit users to keep one copy of a work hosted with the service provider, which they can then access on demand – whether to listen to via, or download to, a device, computer, tablet, mobile phone or games console.

The Superior Council of Literary and Artistic Property, an advisory body to the minister of culture, has brought together professionals from the arts and industry to participate in a debate on the issues. Considering the number of perspectives involved, it is unsurprising that the consultation took a long time to reach its conclusion.

While music industry stakeholders favour an evolved approach that reflects and responds to technological advancements, film producers and broadcasters remain attached to a system of individual authorisation. Meanwhile, telecommunications professionals are careful to maintain a position as 'neutral' hosts in cases where they have not themselves mastered the content.

In its report, the council suggested that a uniform analysis cannot be applied to services that require different technical and legal measures in order to implement:

- so-called 'personal locker' ('cyberlocker') services, which allow for the storage and access of content determined by the user;
- legal download services that offer additional copies for private use; and
- 'scan-and-match' services that allow users to identify the data that they already have to determine whether they may have access to a copy - often of higher quality - in relation to which they will be offered the services typically linked to downloading a digital work.

The council examined these services in terms of copyright and related rights, as well as the relevant case law. It found that each gives rise to the application of an exclusive right, since each involves the reproduction of works and recordings to make them available or to communicate them.

However, opinion differed as to the categorisation of synchronisation facilities and the provision of additional copies.

Under French law, the private copying exception traditionally assumes not only that the source is legitimate, but also that the copy is made by the copier for his or her private use. The first criterion derives from the law, following a decision of the Council of State. The requirement of identity between the copier and the recipient of the copy is old and settled law, which was recently applied and affirmed in the context of television on-demand services.

The Superior Council of Literary and Artistic Property report unanimously affirms that scan-and-match services cannot benefit from the private copying exception, since there is no guarantee that the copy is legitimate.

Locker services appear to present no difficulties where the content is not scanned by the provider and remains intended for the user. However, questions remain as to whether the providers of such services should qualify as hosting providers where content is made available not to the public, but rather to the user and his or her 'friends'.

Opinion was most divided on the qualification of additional copies to which cloud services provide access. Most participants held that the requirement of identity between

the copier and user no longer corresponds to reality, and therefore that permanent or temporary copies provided by a cloud service can be treated as private copies and must be taken into account when calculating payment.

From the music industry's perspective, such copies are technically and legally no different from copies that the user can create at home, and should therefore benefit from the private copying exception.

For the film and television industry, on the other hand, a provider should be required to obtain permission from the copyright holder before offering additional copies.

This difference of opinion does not seem irreconcilable. Under the EU Copyright Directive, the private copying exception and the obligation to implement a compensatory mechanism arise from the impossibility of controlling the duplication of content.

Thus, the music industry continues to diverge from the film and television industry, as it has for many years. By opting for the CD at the start of the digital age, the music industry selected an open standard; video content, on the other hand, was always protected. This distinction is again reflected today in online exploitation, where music formats are often open, while the different video business models (eg, streaming, renting, sale) involve technical protection measures.

The council's opinion does not devote much space to the analysis of such services in other countries.

One may also wonder about the relevance of a purely national analysis. Recent judgments of the European Court of Justice (ECJ) (*Padawan* and *UsedSoft*) point out that EU law aims to find an "autonomous and uniform interpretation". The possibility for member states to adopt their own definition of the notion of a 'copier' or to tie the benefit of the exception to the legality of the source remains uncertain.

Imminent and anticipated decisions of the ECJ and, more generally, the position of the European Commission on the subject of private copying are awaited with interest.

For further information on this topic please contact Eric Lauvaux at Nomos by telephone (+33 01 43 18 55 00), fax (+33 01 43 18 55 55) or email (elauvaux@nomosparis.com).