

## **Private Copying Levies Do Not Apply in the Case of Streaming (31 March 2020)**

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*Executive summary.* This paper considers whether the licit streaming of music or films, in particular the offline and online modes, involve some form of reproduction that can qualify as private copying and therefore be subject to levies under Article 5(2)(b) of the 2001/29 InfoSoc Directive.

The response is negative for the offline tethered downloads because they do not respect the restrictive conditions for private copies:

- Private copies must be made by a natural person for her/his permanent enjoyment;
- Private copies must be stored on a device or medium on which the natural person has full control and must be made from a copy that the natural person owns;
- Private copies are not subject to contracting terms, but are inseparable from the tangible property that the user enjoys.

In addition, the application of copyright levies is not justifiable when the exclusive right can safely be deployed, and this is the case with tethered downloads.

At last, the 2001/29 Directive sets some limitations to the remuneration of the rightholders:

- Remuneration from levies should not be excessive, therefore to add levies to the remuneration for the tethered downloads provided in the fees of the rightholders and in the tariffs of the collective societies, and passed on to the consumers, is disproportionate;
- Remuneration from levies should take into account the use of digital rights management systems (DRMs), and, in the case of the tethered downloads, their extensive use excludes the application of levies.

Regarding the temporary copies made during the streaming process, they are exempted and justified under the provision for transient copies (Article 5(1)) and therefore do not fall under the scope of Article 5(2)(b) of the InfoSoc Directive.

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Streaming services started to flourish about a decade ago and have since generated a major shift for the online distribution of content, in particular for the music industry. This shift benefits not only the content industry, including the creative contributors but also consumers and the new distributors of content.

Streaming services have made it possible for the music business to return to prosperity – and to reach more than USD 30 billion of revenues in 2018, an all-time high in nominal terms<sup>1</sup>. In 2019, streaming services like Spotify, Apple Music and Pandora generated 79% of all U.S. music industry revenues (while in 2009, streaming only represented 5% of those revenues)<sup>2</sup>. Streaming services not only benefit producers but authors and performers as well.

Streaming has been widely applauded by the consumers as it offers new ways of accessing music and videos. Services such Spotify, Deezer Netflix or Amazon Prime provide consumers with an unprecedented music and movie catalogue to choose from. With a reliable internet

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<sup>1</sup> W. Page, *Is the music copyright business worth more than ever?*, Billboard, 29 Febr. 2020, p. 18-19.

<sup>2</sup> See the data made available by the Recording Industry Association of America on Febr. 25, 2020: <https://medium.com/@RIAA/charting-a-path-to-musics-sustainable-success-12a5625bbc7d>.

connection, consumers simply need to open a subscription without requiring huge storage capacity on their devices (laptop, phone, tablet, TV set). Enhanced consumer empowerment means more choice for them as to the time, place and way they enjoy content. And streaming removes the need for the users to copy and maintain numerous, and sometimes huge, files on each of their devices and still to enjoy the content.

Streaming has also allowed new online distributor and providers of (streaming) services to emerge and grow. In turn, copyright piracy has significantly decreased. All these features and advantages for various operators explain why streaming services have been growing exponentially over the last decade and continue to expand.

This paper considers how copyright fits in the streaming context.

The 2001/29 Directive on copyright and related rights in the Information Society (the “InfoSoc Directive”) was adopted about twenty years ago. It still defines the copyright framework for the EU. The exclusive rights listed in Articles 2 to 4 of the InfoSoc Directive are fit for the new digital distribution models, although the application of the broad reproduction right (Art. 2) in the digital context still raises some issues.

The question is whether the licit streaming of music or films, in particular the offline and online modes<sup>3</sup>, involve some form of copying that can qualify as private copying and therefore be subject to levies in the sense of Article 5(2)(b) of the InfoSoc Directive. The response, as argued below, is negative.

While the exclusive rights within copyright are flexible enough to adjust to the new distribution model, some copyright rules, such as private copying levies, do not fit with the streaming model. This paper argues that the private copying levies do not apply when copyrighted works are made available through streaming, and that the traditional negotiation between the providers of streaming services and the rightholders on the basis of the exclusive right is sufficient to achieve the objective of copyright, in particular to adequately compensate for the use of the copyrighted content.

In a first part (under I), we show how the exclusive rights deployed in the digital and streaming context. The main part (under II) demonstrates, first, that the private copying exception (Article 5(2)(b) InfoSoc Directive) and the associated levies do not apply to the tethered downloads made available in the offline mode and, second, that the temporary copies made for the online access to the streamed content fall under the mandatory exception of Article 5(1) InfoSoc Directive.

## **I. The exclusive rights in the digital and streaming context**

The **making available right**, which was first incorporated in the 1996 WIPO Copyright Treaty (Art. 8) and then in the InfoSoc Directive (Art. 3), adequately addresses the new ways to deliver content: this exclusive right covers the making available to the public, by the authors and by the related rights holders, of their works and other subject-matter “in such a way that members of the public may access them from a place and at a time individually chosen by them”. While there were some previous discussions as to whether a communication to a public takes place when a single consumer chooses to listen to a particular song or to watch a particular film, the new right made clear that a point to point mode of distributing content falls under this right of

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<sup>3</sup> See below for a presentation.

communication to the public, despite the absence of a true public. For the service providers, the possibility to control the access to the streamed content and to receive payment in exchange has incentivized many businesses to turn to offering streaming services. Together with technology and market developments, the making available right and other copyright rules<sup>4</sup> have therefore allowed a virtuous cycle for the creative economy – and coincidentally withdrawing the incentive and necessity for illicit peer-to-peer exchanges and other unauthorized sharing of content that had led to reduced returns and investment during the 2000s.

By contrast, the **reproduction right**, because it is very broadly interpreted, is not fully adjusted to the digital environment. The functioning of the internet requires the making of numerous intermediate copies which in principle fall under the reproduction right. Most of those copies should not require the right owner's authorization. However, they are not always clearly exempted by the existing legal framework. For instance, this is the case of the copies made for indexing images and searching the internet or for checking mistakes and plagiarism. The ubiquity of reproductions in the digital environment automatically expands the scope of copyright and requires a constant adjustment of the exceptions to the copyright holders' exclusive rights. In some cases, it has proved necessary to add new exceptions, such as those recently adopted for text and data mining<sup>5</sup>. Adding such exceptions is needed to keep a just balance, but this is problematic as changes in the exceptions often lag behind market and technology developments. Restructuring the reproduction right is probably necessary as technical or intermediate copies form an integral part of the digital ecosystem and of any dissemination process<sup>6</sup>.

The present contribution aims at reviewing another example where the ubiquitous notion of reproduction and the possible "levitation"<sup>7</sup> i.e endless expansion of copyright levies raises problems, in particular in relation to streaming services.

## II. Streaming: the private copying exception and levies

Technically, "streaming can be defined as '*a method of transmitting data packets so that the earlier packets can be reassembled and processed before the entire file is downloaded, allowing for immediate display or playback*'"<sup>8</sup>. In essence, streaming is a mode of content exploitation that involves the making available of a file divided into smaller packets, and an immediate access and enjoyment of the content, while ensuring the data made available becomes quickly inaccessible.

One can distinguish non-interactive/linear streaming and interactive streaming. The first type is similar to a broadcast and only accessible at a specific time (it can include simulcasting, i.e.

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<sup>4</sup> On top of the "making available right", the protection of technological measures of protection (Art. 13 WIPO Treaty and Art. 6 InfoSoc Directive) and the possibility to get "an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right" (Art. 8(3) InfoSoc Directive) have permitted to combat illicit providers of streamed content and to comfort the position of the licit streaming services.

<sup>5</sup> Articles 3 and 4 of the Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.

<sup>6</sup> The inadequacy of the exclusive reproduction right has been discussed elsewhere. See B. Hugenholtz (ed.), *Copyright Reconstructed, Rethinking Copyright's Economic Rights in a Time of Highly Dynamic Technological and Economic Change*, Wolters Kluwer, 2018, and in this book: A. Strowel, *Reconstructing the Reproduction and the Communication to the Public Rights: How to Align Copyright with Its Fundamentals*, p. 203-240.

<sup>7</sup> The term was first coined by B. Hugenholtz to refer to the unstoppable extension of levies in the digital era, a consequence of the massive multiplication of digital copies over the networks and in various devices.

<sup>8</sup> J. Pedro Quintais, *Copyright in the Age of Online Access: Alternative Compensation Systems in EU law*, Information Law Series, Volume 40, Kluwer Law International, 2017, p. 154 quoting J. Anderson, « Stream capture : Returning control of digital music to the users », *Harvard Journal of Law & Technology Volume 25*, Number 1, Fall 2011, p. 166.

the diffusion of the simultaneous online retransmission of a stream). Interactive streams are available on demand. This paper only examines those services that offer interactive streams, such as Spotify or Netflix.

Two main types of interactive streaming services need to be distinguished from a copyright point of view; those offering the offline streaming mode (under A) and those offering pure subscription services (under B). When an additional offline streaming mode is included in the service, some copies can be accessed when no internet connection is available by leaving some copies on the device for a longer time. In the case under B, only temporary, or even transient, copies are made when the protected content is made available on demand. Whether these copies qualify under the private copying exception (Art. 5(2)(b)) or under the exception for temporary copies (Article 5(1)) will be analyzed below under A and B respectively. The analysis concludes that the offline streaming mode does not involve any private copy in the sense of Article 5(2)(b) and that the exception for temporary copies applies to the pure streaming subscription services.

### A. Services offering the possibility to make offline copies

**Technical description of the offline streaming mode.** As part of their offer, some streaming providers allow users to consume the content without an internet connection. This is referred to as the offline mode of accessing content<sup>9</sup>. Here the user downloads the content to the respective device within the app beforehand (so-called “tethered download”). The content is then stored in the app on the user's device for a limited period of time and can be used without an internet connection. The content is protected by a digital rights management (DRM) system and cannot be copied or transferred by the user. The offline mode is useful when no connection is available (as when travelling); it also reduces the network lag-time (linked to buffering); in addition, listening to music or watching films offline permits the saving of battery power of the portable device.<sup>10</sup>

If the user does not connect to the internet from time to time (for example, 30 days in the case of Apple Music) or if the subscription with the streaming service provider ends, the ability to play the downloaded content is disabled. In other cases, the content is automatically deleted from the device. In any case, access to the content is prevented.

**Private copying and levies in the InfoSoc Directive.** Article 5(2) of the InfoSoc Directive allows for exceptions or limitation to the reproduction right in a limited number of cases, including:

“(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”.

### Tethered downloads cannot be assimilated to private copies.

(1) First, Article 5(2)(b) InfoSoc Directive must be interpreted narrowly as an exception to the broad reproduction right under Article 2.

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<sup>9</sup> Among the most popular providers of an offline streaming mode, a June 2019 survey lists Spotify, Pandora, SoundCloud, Google Play Music, Apple Music, Slacker Radio, Amazon Music Unlimited and Deezer (see M. Harris, 8 Best Streaming Music Services With an Offline Mode, 24 June 2019, available on <https://www.lifewire.com/streaming-music-services-for-downloading-songs-2438407> ).

<sup>10</sup> See M. Harris, *What Is Offline Mode in a Streaming Music Service?*, 6 May 2019, available on <https://www.lifewire.com/what-is-caching-mode-in-music-services-2438241>.

- (2) Second, the justification for imposing private copying levies does not apply to tethered downloads as it is possible to negotiate a remuneration for those downloads on the basis of the exclusive right.
- (3) Third, Article 5(2)(b) InfoSoc Directive subjects private copies to several conditions that must be strictly interpreted, and none of these conditions are met in the case of the tethered downloads:
- (i) Copies must be made by a natural person for her/his permanent enjoyment;
  - (ii) Private copies must be stored on a device or medium on which the natural person has full control and must be made from a copy that the natural person owns;
  - (iii) Private copies are not subject to contracting terms, but are inseparable from the tangible property that the user enjoys;
  - (iv) Remuneration from levies should not be excessive, therefore to add levies to the remuneration for the tethered downloads provided in the fees of the rightholders and in the tariffs of the collective societies, and passed on to the consumers, is disproportionate;
  - (v) Remuneration from levies should take into account the use of digital rights management systems (DRMs), and, in the case of the tethered downloads, their extensive use excludes the application of levies.

### **(1) The notion of private copy must be interpreted narrowly**

Article 2 InfoSoc Directive defines the reproduction right as ‘the *exclusive* right to authorize or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part’ of the authors’ works. The application of the exclusive reproduction right is triggered by an operation of ‘copying’ on a tangible medium (new copy on paper, disc, PC or server) in either analogue or digital form. Reproductions falling under this provision cover the copies of all subject matter, whether textual, audio, visual or audiovisual.

As further developed below, the CJEU has developed ‘a consistently broad interpretation of the reproduction right’<sup>11</sup>. For instance, in the *Infopaq* case, the Court considered that several reproductions occur during a data capture process, such as the creation of a TIFF file by scanning, the conversion into a searchable text file (by an OCR or Optical Character Recognition process), the storing of an extract, and the printing of that extract on a paper medium<sup>12</sup>.

Such a broad interpretation of the reproduction right has the effect that all the exceptions to the reproduction right, including for private copies, must be narrowly constructed. This has been confirmed several times by the Court of Justice<sup>13</sup>.

Also, the private copying exception must respect the three-step test set out in Article 5 (5) of the InfoSoc Directive and in Article 13 TRIPs.

The limitations of private copies as further discussed below (under (3)) must therefore be strictly interpreted.

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<sup>11</sup> M. Leistner, *Europe’s Copyright Law Decade: Recent Case Law of the European Court of Justice and Policy Perspectives*, *Common Market Law Review*, 2014, 51, p. 569.

<sup>12</sup> CJEU, 16 July 2009, C-5/08, ECLI:EU:C:2009:465 (*Infopaq I*), § 51.

<sup>13</sup> CJEU, 10 April 2014, C-435/12, EU:C:2010:620 (*ACI Adam and Others*), § 22 and the case-law cited; CJEU, 29 Nov. 2017, C-265/16, ECLI:EU:C:2017:913 (*VCAST Limited v. RTI SpA*), § 32.

## **(2) The justifications for private copying levies (privacy at home and full control of the private copies) do not exist in the case of tethered downloads**

The national systems of copyright levies were designed before the advent of digital copies. Back in the 1960s, the common forms of distributing music involved tangible copies, in the form of the vinyl discs. Soon the tape recorders became available, allowing consumers to make copies at home. In the German *Personalausweise* case<sup>14</sup>, the Federal Court of Justice considered that wholesalers or retailers of recording equipment could not be forced to communicate the identity of their individual purchasers. The protection of privacy was a legal argument to oppose the extension of copyright's exclusive control to the analogue copies made at home. Privacy protection reinforces the full property right that the user has on the home copies.

In the streaming environment, whilst offline copies are made on a personal device (e.g. a smartphone), the user remains into a contractual relation with the streaming provider. By contrast, in the analogue context, once the discs or other media incorporating the works are bought, no contractual relation remains between the user and the distributor. Further, in the streaming context, copies are not made by the recording equipment owned by the user, but within the service (and often within the app) of the distributor of the streamed content. That means also that there is a chain of contracts from the rightholders to the final users, with the possibility for the distributor to pass on the obligations regarding the content to the end users. When the levies were first designed in Germany in the analogue age, there was another, more practical, argument for excluding the application of the exclusive right: the reliance on copyright for prohibiting private copies at home would not have worked in practice in the absence of any system to control the uses at home.

The protection of privacy and the impossibility to enforce the exclusive reproduction right prompted the legislator to incorporate in the 1965 German Copyright Act that levies were to be paid by the producers of the recording equipment. This was justified by the possibility to pass-on the remuneration within the final price of the recorders. In 1985, a levy on blank tapes was introduced<sup>15</sup>. Since then, most continental European countries, following the German example, have adopted private copying levies that are applied to devices and blank media.

In the case of the tethered downloads permitted by most streaming services, the protection of privacy is no longer a valid argument for excluding the application of the exclusive right. On the contrary, the end user who uses a streaming service at home or elsewhere typically consents to the use of his/her personal data for the delivery of the service and for the payment. In addition, the subsistence of the subscription agreement between the streaming service and the end user, combined with the technological means used (see below on the DRMs), makes it possible for the distributor to maintain control of the tethered downloads. For instance, when the subscription ends, or when rightholders revoke their rights, the access to the offline files is deactivated by the streaming provider within a certain period of time. This is in clear contrast to copies done on an analogue media (or on the digital files downloaded in the case of a pay-per-download service), where the user retains full access of the content.

The application of copyright levies is not justifiable when the exclusive right can safely be deployed, and this is the case with tethered downloads which (i) remain under the control of the service provider (and indirectly of the rightholders), (ii) are specifically compensated (see below) and (iii) are well protected by DRMs (see below).

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<sup>14</sup> BGH, decision of 29 May 1964 I ZR 4/63.

<sup>15</sup> See B. Hugenholtz, L. Guibault and S. van Geffen, *The Future of Levies in a Digital Environment*, IVIR, Amsterdam, 2003, p. 10 ff (available at <https://www.ivir.nl/publicaties/download/DRM&levies-report.pdf>).

**(3) The conditions for private copies, narrowly interpreted, cannot apply to the tethered downloads.**

**(i) The tethered downloads are not copies made by an individual for an unlimited period of time. Rather those downloads are to be considered as rented copies.**

Under Article 5(2)(b) InfoSoc Directive, private copies must be “made by a natural person”. The tethered downloads are, strictly speaking, not *made by* the individual user. Instead, the streaming service, at the request of the user, allows the offline enjoyment of the tethered downloads during a limited period of time. A strict reading of Article 5(2)(b) also implies that, because the conditional downloads are made by the service providers, the copies are not made for private use and for ends that are neither directly nor indirectly commercial.

The operators for music authors also consider the tethered downloads as rented copies, and not as bought or fully acquired copies. For example, Tunecore, a company offering various services to artists, clearly distinguishes between the permanent/unlimited downloads and the temporary/limited downloads. Referring to the second type, Tunecore explains to the music artists that:

“this type of limited downloading is typically referred to as a conditional or tethered download. In many ways, it's like your fans joined a *service that lets them rent your music*. As soon as they stop paying their monthly subscription fee, they will not have access to listen to your music.”<sup>16</sup>

Some legal commentators also consider that streaming services offering the offline mode operate under a hybrid model:

“When online service providers allow their subscribers to make downstream reproduction, it takes the form of a “mixed form”, between streaming and downloading. This “mixed” model is characterized by the potential to access works offline during the period of subscription (e.g., as happens with Spotify premium playlists) for longer than a short period of time, typically subject to access and use restrictions through TPMs [Technological Protection Measures]. Such a hybrid model – *sometimes presented as an offer of ‘lending’ services* – is more akin to (temporary) downloading than streaming, even where the user does not, strictly speaking, make a ‘permanent’ copy”<sup>17</sup>.

If such hybrid services can effectively be viewed as a whole, then the transaction and operation involving the protected files, from a copyright point of view, appear as an act of rental/lending, subject to the terms of conditions of the streaming services. In this case, the exclusive (rental) right can ensure some remuneration, and there is no need to rely on private copying levies.

This reading is confirmed by the terms of use. The contracts between the streaming services and their subscribers allow for access and use of the tethered downloads *for a limited period of time*. For example, in the Apple Music Terms of Use, the access (and enjoyment) of the songs is clearly only guaranteed for as long as the subscription lasts:

“When your Apple Music membership ends, you will lose access to any feature of Apple Music that requires a membership, including but not limited to access to Apple Music songs *stored on your device*, and iCloud Music Library”<sup>18</sup>

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<sup>16</sup> See <https://support.tunecore.com/hc/en-us/articles/115006688388-What-are-downloads-and-streams-> .

<sup>17</sup> J. Pedro Quintais, *Copyright in the Age of Online Access: Alternative Compensation Systems in EU law*, Information Law Series, Volume 40, Kluwer Law International, 2017, p. 154.

<sup>18</sup> See <https://www.apple.com/legal/internet-services/itunes/us/terms.html> .

Regarding audiovisual content, the Netflix terms of use indicate that the viewing of the offline titles is limited in time:

“Some Netflix content is available for *temporary download and offline viewing* on certain supported devices ("Offline Titles"). Limitations apply, including restrictions on the number of Offline Titles per account, the maximum number of devices that can contain Offline Titles, the time period within which you will need to begin viewing Offline Titles and *how long the Offline Titles will remain accessible*.”<sup>19</sup>

The terms of use thus confirm that when an offline mode is allowed, it is for a limited time and subject to payment conditions. Therefore, the tethered downloads are to be considered as rented copies, not as permanent copies which can trigger the application of levies.

**(ii) The tethered downloads are not (output) copies over which the user has full control, and are not made from a (source) copy that the user owns.**

The replacement of the exclusive right by a right to remuneration through levies is premised on the principle that individual users are, and should remain, free to use their property as they wish, in particular at home. Copyright law cannot reduce the autonomy and sovereignty enjoyed by the users on their lawfully acquired properties. Levies kick in as an alternative way to ensure remuneration for certain use that is permitted by law. Levies compensate for the impossibility to implement the exclusive right to prohibit the reproductions. But, on the tethered downloads, the streaming providers (and by contract therefore also the rightsholders) retain the possibility to negotiate a remuneration and to terminate the enjoyment of the downloads when the subscription ends. Therefore, levies are neither justified, nor necessary to ensure a form of remuneration.

In addition, tethered downloads are only allowed by the service. They are not derived from a source copy owned by the user, but from the files controlled by the service. In the case of the conditional downloads, there is therefore no (source) copy fully owned by the user and no possibility for the user to make further copies. This significantly differs with the (analogue and digital) copies commonly subject to levies.

**(iii) The tethered copies are subject to contractual terms and are thus licensed and paid for.**<sup>20</sup>

The private copies that led to the first legal recognition of the necessity and legitimacy of a right to compensation (see above) were not licensed. For the Court of Justice, the InfoSoc Directive relies on the obligation to obtain an authorization or consent for each and any reproduction: already in *Infopaq I*, the Court identified “the general principle established by that directive, namely the requirement of authorisation from the rightholder for *any* reproduction of a protected work”<sup>21</sup>. The Court of Justice considers that when an act or process falls under an exception (Article 5(1) for example), “that process may be carried out *without the consent* of the relevant rightholders”<sup>22</sup>. The applicability of an exception thus removes the obligation to seek and obtain consent.

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<sup>19</sup> See <https://help.netflix.com/legal/termsofuse>. The Netflix terms are not very precise about how long the offline content will remain accessible.

<sup>20</sup> This additional argument only applies if one considers that tethered downloads are to be considered as private copies, which is not correct for the reasons developed above.

<sup>21</sup> CJEU, 16 July 2009, C-5/08, ECLI:EU:C:2009:465 (*Infopaq I*), §57 (see also judgments of 4 October 2011, *Football Association Premier League and Others*, C-403/08 and C-429/08, EU:C:2011:631, § 162; order of 17 January 2012, *Infopaq International*, C-302/10, EU:C:2012:16, § 27, and judgment of 5 June 2014, *Public Relations Consultants Association*, C-360/13, EU:C:2014:1195, § 23).

<sup>22</sup> CJEU, 16 July 2009, C-5/08, ECLI:EU:C:2009:465 (*Infopaq I*), § 53.



But the question in relation to the offline tethered downloads is whether a *prior* authorization granted by the rightholder makes it possible to apply the private copying exception. The prior authorization for the offline mode is granted through the license between the rightholder and the distributors of streamed content and, subsequently, through the end user license agreement between the streaming service and its subscribers.

The arrangements and tariffs between rightholders (or their management organization) and distributors (the streaming providers) show that a prior authorization is given and that a counterpart is negotiated. Indeed, collecting societies propose tariffs for streaming services that expressly include the tethered downloads. For instance, in its Tariff VR-OD8 for “Music and Music Video Streaming Subscription”, the German GEMA expressly factors in the offline playing of the streamed files:

“This tariff also covers such services, in which the end user can in addition to playing the musical works also produce a copy with restricted scope of use (so-called tethered download), thus enabling the end user to play the musical work without having constant access to the internet. The copy is restricted in that playing is tied to the subscription period”<sup>23</sup>.

The French SACEM tariffs distinguish between the streaming subscription modes allowing an access “only when the user is connected to a network” and those including “offline listening or viewing”<sup>24</sup>. And there is a substantial difference in the tariff for those streaming modes: “13,5% of income by subscription, plus a minimum of: €0.56 (exc VAT)\* per subscriber and per month for a service accessible only when the user is connected to a network; €1.12 (exc VAT)\* per subscriber and per month for a service which includes portability and offline listening or viewing.”

Similarly, the Belgian collecting society, SABAM, has a higher fee per subscriber per month in the case of streaming services allowing tethered downloads of musical works. For on-demand streaming with subscription, the percentage of 12% on the net revenues distinguishes between the minimum remuneration of “0,7898€ per subscriber per month for subscription services that *do not allow* tethered downloads of musical works” and “1,0531 € per subscriber per month for subscription services that *allow* tethered downloads of musical works”<sup>25</sup>. There is therefore a huge difference (of about 33%) between the two tariffs. This difference clearly shows that the offline mode is considered and that an adequate compensation for this additional authorized use of the streamed music is taken into account.

There are also significant differences between tethered downloads (i.e. their express inclusion within the negotiation with right holders organizations and the specific tariffs that they are officially subject to) and copies, technologies and circumstances involved in the *VG Wort* case. In this last case, the CJEU had to respond to the question “*whether the fact that rightholders have expressly or implicitly authorised reproduction of their protected work or other subject-matter affects the fair compensation which is provided for, on a compulsory or optional basis, under the relevant provisions of Directive 2001/29, and, where appropriate, whether such authorisation may mean that no compensation is due*”<sup>26</sup>. The Court’s response to the question was negative, but the situation is not comparable to circumstances surrounding tethered downloads for the following reasons: (i) *VG Wort* involved reprography (typically photocopying) where a user makes copies and has full control of both the source copies and

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<sup>23</sup> The “GEMA Royalty Rates Schedule for the use of works from GEMA’s repertoire within the scope of streaming offers subject to a fee (so-called “unlimited subscriptions”)” is available at:

[https://www.gema.de/fileadmin/user\\_upload/Musiknutzer/Tarife/Tarife\\_VRA/tarif\\_vr\\_od8\\_e.pdf](https://www.gema.de/fileadmin/user_upload/Musiknutzer/Tarife/Tarife_VRA/tarif_vr_od8_e.pdf) .

<sup>24</sup> See <https://clients.sacem.fr/en/licences/subscription-music-streaming-service> (accessed on Febr. 10, 2020).

<sup>25</sup> See p. 3 of the tariff available at: [https://www.sabam.be/sites/default/files/streaming\\_en.pdf](https://www.sabam.be/sites/default/files/streaming_en.pdf).

<sup>26</sup> CJEU, 27 June 2013, C-457/11 to C-460/11, ECLI:EU:C:2013:426 (*VG Wort*), § 30.

output copies; (ii) the copies involved in *VG Wort* are permanent copies which remain indefinitely within the reach of the user; (iii) in *VG Wort*, the copies were made outside any on-demand service, while the tethered downloads are delivered as part of the streaming service and even within the app provided by the service provider; (iv) in contrast to the *WG Wort* situation, the rightholders and their management organizations specifically negotiate for the use of the tethered downloads, conclude an agreement, and impose a substantial increase in the tariffs when this use is allowed; (v) reprography does not correspond to the situation of interactive on-demand streaming services where, according to Art. 6(4)(4) InfoSoc Directive (see below), it is possible for a legislator to completely exclude the enjoyment of a private copying privilege.

The fact that the remuneration for the tethered downloads is negotiated and (substantially) remunerated by the right holders' organizations is sufficient evidence to demonstrate that the exclusive right, and the room for negotiation it creates, is the right system for determining the compensation, and that levies, which were always seen as a second best solution in case of market failure, are neither needed, nor adequate. In line with the reasoning of the Court of Justice, the express reliance on the exclusive right for remunerating the right holders excludes the application of the private copy exception and the related levies.

- (iv) An additional remuneration for the tethered downloads is excessive, as payment is already provided for under the terms of the agreements between rightholders and streaming services. Additional remuneration would contradict the harm principle on which fair compensation systems rely.<sup>27</sup>**

According to the InfoSoc Directive, compensation must be “fair” (Art. 5 (2) (b)), not only in relation to rightholders but also in relation to other stakeholders, such as consumers and equipment and media manufacturers<sup>28</sup>. To assess the compensation, “harm to the rightholders” is a “valuable criterion” according to the Directive (rec. 35 and 38). For the Court of Justice, the harm caused is even the *raison d'être* of the levies, as well as the sole measure for assessing their level: “fair compensation is intended to provide compensation for the harm caused to rightholders” and “fair compensation must necessarily be calculated on the basis of the criterion of the harm caused to authors of protected works”<sup>29</sup>. The InfoSoc Directive considers there is a need to take into account “other form of payment” (rec. 35). If the compensation is provided through a payment under the licensing terms, then no extra payment is mandated under the form of levies.

In its *Premier League* decision, the Grand Chamber of the Court of Justice of the EU underlined that: “the specific subject-matter of the intellectual property does not guarantee the right holders concerned the opportunity to demand the highest possible remuneration”<sup>30</sup>. The rightholders are ensured – as recital 10 in the preamble to the InfoSoc Directive envisages – to only

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<sup>27</sup> This additional argument only applies if one considers that tethered downloads are to be considered as private copies, which is not correct for the reasons developed above.

<sup>28</sup> The judgments of the European Court of Justice in the *SENA* case C-192/04 (Feb 6, 2003) and the *Lagardère Active Broadcast* case C-192/04 (July 14, 2005) dealing with the concept of “equitable remuneration” in the context of Directive 92/100, provided that it is critical that the remuneration is “equitable”, so “that enable a proper balance to be achieved between the interests of performers and producers in obtaining remuneration for the broadcast of a particular phonogram and the interests of third parties in being able to broadcast the phonogram on terms that are reasonable” (*SENA*, paragraph 36). Further in accordance with such judgments and the opinions issued by the Advocate General on such cases, the principles contained in the recitals of the respective Directive should be necessarily kept into consideration – while not exclusively – in order to determine the criteria to calculate such remuneration. The same principles should apply *mutatis mutandis* to the “fair compensation” requirement and the criteria outlined in the recitals of InfoSoc Directive.

<sup>29</sup> CJEU, 12 Nov. 2015, C-572/13, ECLI:EU:C:2015:750, (*HP v. Reprobol*), § 79 and 36. See also CJEU, 21 Oct. 2010, C-467/08, EU:C:2010:620 (*Padawan*), § 40 and 42.

<sup>30</sup> CJEU, 4 Oct. 2011, C-403/08 and C-429/08, ECLI:EU:C:2011:631 (*Premier League*), § 108.

*appropriate* remuneration for each use of the protected subject-matter. To be appropriate, the remuneration must be “reasonable in relation to the economic value of the service provided”<sup>31</sup>. The InfoSoc Directive adds that if a “payment” is “already received [...] in some other form” (“license fee”), no “separate payment [is] due” (rec. 35). Recital 35 underlines that the “particular circumstances of each case” should be taken into account as those circumstances impact the “form, detailed arrangement and possible level” of compensation.

In particular, the Court of Justice in *Reprobel* underlined the risk of “overcompensation” if a lump-sum is paid in advance in addition to a remuneration “fixed after the fact”. For the Court, “the introduction of a levy fixed prior to the making of copies cannot, in principle, be authorised except in the alternative, in the event that it is impossible to identify the users and, consequently, to assess the actual harm suffered by the rightholders”<sup>32</sup>. For the tethered downloads, it is possible to identify the users having a subscription allowing an offline access and some payment is made accordingly.

The compensation in the form of levies is only a second best solution that remains *subsidiary* to the payments by the persons having made the private copies: “in principle, it is for the persons who have made the reproductions to make good the harm related to those reproductions by financing the compensation which will be paid to the rightholder”<sup>33</sup>. In the case of the tethered downloads, the payment is directly ensured by the streaming service.

For all these reasons, levies are not justified here.

- (v) **Effective technological measures are used to control the tethered files and in particular to prevent the possibility to copy them at any time and to play them once the subscription ends. This precludes the imposition of levies.**<sup>34</sup>

**Role of the technological measures used by streaming services.** In 2003, the authors of a report on the future of levies stressed that “copyright levy systems have been premised on the assumption that private copying of protected works cannot be controlled and exploited individually”<sup>35</sup>. To justify a fundamental re-examination of the levy systems, they pointed at that time to the advent of DRM systems. For various reasons, the implementation of DRMs on the protected files, at least on the audio CDs, was not successful, and many files remained unprotected or the DRM systems were quite easily circumvented. Today, streaming service providers use DRMs that protect a service rather than single files. Those DRMs not only preclude the possibility to make additional copies (as some traditional DRMs), but they can also prevent the consumer to play the files after the subscription is terminated. The companies want to ensure that the users do not “sign up, enjoy the music, and then stop paying”. Under the system adopted by Spotify or Apple Music, the files are crippled and unplayable if the user cancels the subscription. Apple FairPlay Streaming (FPS) allows the encryption of content and secures the delivery of streaming media to devices through the HTTP Live Streaming protocol<sup>36</sup>. A similar technology is used by Spotify<sup>37</sup>.

Therefore, the DRMs in the case of tethered downloads cannot be compared with those used in other circumstances, such as those concerned in the *Copydan case*<sup>38</sup>. In this case, the Court of Justice made clear that “the implementation of technological measures under Article 6 of

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<sup>31</sup> *Idem*, § 109.

<sup>32</sup> CJEU, 12 Nov. 2015, C-572/13, ECLI:EU:C:2015:750, (*HP v. Reprobel*), § 82 and 86.

<sup>33</sup> CJEU, 12 Nov. 2015, C-572/13, ECLI:EU:C:2015:750, (*HP v. Reprobel*), § 69.

<sup>34</sup> This additional argument only applies if one considers that tethered downloads are to be considered as private copies, which is not correct for the reasons developed above.

<sup>35</sup> See B. Hugenholtz, L. Guibault and S. van Geffen, *The Future of Levies in a Digital Environment*, IVIR, Amsterdam, 2003, p. ii and p. 1 (available at <https://www.ivir.nl/publicaties/download/DRM&levies-report.pdf>).

<sup>36</sup> See <https://developer.apple.com/streaming/fps/>.

<sup>37</sup> See <https://blogs.commons.georgetown.edu/cctp-797-fall2013/archives/557>.

<sup>38</sup> CJEU, 5 March 2015, C-463/12, ECLI:EU:C:2015:144 (*Copydan*), § 12 ff.

Directive 2001/29 for devices used to reproduce protected works, such as *DVDs, CDs, MP3 players and computers*, can have no effect on the fair compensation payable in respect of reproductions made for private use by means of *such devices*. However, the implementation of such measures may have an effect on the actual level of such compensation”<sup>39</sup>. Thus, according to the Court, the principle that levies are payable is not affected by the use of TPMs, while the level of the compensation can be affected by their use. But *Copydan* examined whether levies could be applied on memory cards (other than SIM cards) for mobile phones on which files containing musical works or films can be stored. The source of the copies was the internet (in case of downloading) or DVDs, CDs, MP3 players or the user’s computer. In such circumstances, the implementation of technological measures is not relevant. *Copydan* deals with a very different context and technology than in the case of tethered downloads obtained during the duration of the streaming service. The ruling of *Copydan* cannot be applied where downloads are made by the streaming service and are only available during the subscription period and within the app of the provider: in this context, the use of TPMs does not only affect the level of the compensation, but the principle that levies are due.

**Restrictions imposed by Article 5(2)(b) InfoSoc Directive.** The framework defined by the InfoSoc Directive contains clear restrictions for levies when technological measures are available or deployed. First, according to Article 5(2)(b), a private copying levy “takes account of the application or non-application of technological measures” (or “Technological Protection Measures or TPMs” which also cover DRM systems). Second, the “level of fair compensation” should take “full account of the degree of use of technological protection measures” (rec. 35). Third, “availability” of “effective TPMs” must be taken into account (rec. 39). Fourth, exceptions (such as private copying) shall not “inhibit the use of TPMs or their enforcement against circumvention” (rec. 39). In the analogue world where the uses of works could not be monitored, the levy system made sense as a form of second best solution in favor of the right owners; in the digital world and in particular for streaming services, the DRM/TPM solutions allow to modulate the payment of the tariffs by the streaming services according to the type of use (see (iii) above about the higher fee per subscriber in the case of streaming services allowing tethered downloads).

**Exclusion of private copying in the case of licensed interactive on-demand services.** Article 6(4)(4) of the InfoSoc Directive indicates that the possibility of consumers to enjoy the private copying exception might be curtailed when licensed interactive on-demand services protected by DRM/TPMs are involved. The use of DRM/TPMs can limit private copying when the works are “made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them”. As further explained by recital 53, this provision applies to the category of “interactive on-demand services” to which streaming services belong (as they are on-demand, interactive and based on subscription contracts). This shows that the European legislator considered that in the presence of “agreed contractual terms”, private copying by the users can be excluded. The joint application of contractual terms and of DRM/TPMs ensure that rightholders retain the control and are able to be adequately remunerated, thus eliminating the need to rely on the second best solution of private copying levies. The subscription contracts (between the end users and the streaming services) can rule out any private copying by the subscribers, and this can be enforced through the DRM/TPMs, thus eliminating any harm for the rightholders. For the Court of Justice, the harm that justifies the fair compensation results from the introduction of the exception by the legislator (not only from the individual acts of reproduction) and Member

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<sup>39</sup> *Idem*, § 73.

States are free to choose how to ensure that copyright holders receive that fair compensation. When the legislator permits to exclude the enjoyment of the private copying exception, such as with Article 6(4)(4), this ground for harm disappears likewise. Thus in the case of interactive on-demand, the reasoning of the Court in the *VG Wort* case (see above) is not applicable. For interactive on-demand services, Article 6(4)(4) allows for the contractual overridability of the private copying exception.

In addition, for streaming services, the subsequent digital uses, such as those made for the offline streaming mode, are expressly permitted and priced in the license. The terms of use of the existing streaming services such as Apple Music or Spotify must be read as excluding the possibility of private copies.

**Conclusions on the tethered downloads allowed by the streaming services.** The analysis of the specificities of those downloads, compared to the private copies envisaged under Article 5(2)(b), as well as the interpretation of this framework by the Court of Justice, lead to the conclusion that no levies should apply in the case of the tethered downloads proposed by the streaming services to their subscribers.

## **B. Pure streaming subscription services**

**Technical description of the streaming process.** From a technical point of view, streaming content is stored temporarily in the cache (or “buffer”) of the user’s terminal device. The data is overwritten while the user is listening or watching. When consumption is complete, the data is no longer available on the terminal device and the user cannot store the content permanently. Further, the terms of use forbid any other use of the temporary copies; for instance, Spotify indicates that “transferring copies of cached Content from an authorized Device to any other Device via any means” (art 9 – User Guideline) is not allowed.

**The copies made during the streaming process qualify as temporary copies.** While the exploitation of the streamed content is subject to an authorization from the rightholders under the communication to the public right (see above I), the question arises whether the temporary copies made in the course of the transmission must be authorized as well. This in turn requires an examination as to whether (1) they fall under the exclusive reproduction right and whether (2) a legal exception (such as for some temporary copies under Article 5(1) InfoSoc Directive) applies.

### **(1) Broad notion of reproduction**

As already underlined, the right has been broadly interpreted by the Court of Justice. In *Premier League*, the Grand Chamber of the Court held that ‘the reproduction right extends to transient fragments of the works within a satellite decoder and on a television screen, provided that those fragments contain elements which are the expression of the author’s own intellectual creation’.<sup>40</sup> That ‘transient fragments’ of works are possibly covered by the right of reproduction shows how encompassing this right is. Therefore, the transient copies of the streamed packets extracted from the streamed files could arguably qualify as reproductions under copyright law.

In a 29 July 2019 decision of the Grand Chamber of the CJEU dealing with sampling (approximately 2 seconds electronically sampled/copied from a Kraftwerk song), the Court

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<sup>40</sup> CJEU, 4 Oct. 2011, C-403/08 & C-429/08, ECLI:EU:C:2011:631 (*Premier League*) § 159.

emphasized that “the reproduction by a user of a sound sample, *even if very short*, of a phonogram must, in principle, be regarded as a reproduction ‘in part’ of that phonogram”<sup>41</sup>. This broad reading of what constitutes a reproduction not only derives from the literal interpretation of Article 2 InfoSoc directive, but also from “the general objective of that directive which is, as follows from recitals 4, 9 and 10, to establish a high level of protection of copyright”<sup>42</sup>. However, according to Grand Chamber of the Court of Justice, when a user “takes a sound sample from a phonogram in order to use it, *in a modified form unrecognisable to the ear*, in a new work, it must be held that such use does not constitute ‘reproduction’ “ (emphasis added)<sup>43</sup> in the sense of Article 2 InfoSoc Directive. For a short sequence, the criterion for a reproduction therefore includes the condition that the sample/copy is “recognizable” (to the ear in the case of music, to the eye in the case of literary or visual works). This condition of “human recognition”, if it is embedded in the notion of reproduction, could imply that some purely technical and intermediate copies needed for transmission or for other actions fall outside the scope of the reproduction right.

In case of streaming, it is unclear whether the parts of the streamed files temporarily copied are or not recognizable by humans (as originating in some musical or visual work). But the reassembly of those fragments in the streamed file clearly aims to make the file and content recognizable to the end user.

## (2) Exemption of transient copies

Article 5(1) InfoSoc Directive provides for a mandatory exception for certain temporary copies. It exempts reproductions if the following five conditions are met: (1) the reproductions are temporary, (2) transient or incidental, (3) an integral and essential part of a technological process, (4) their sole purpose is to enable a transmission in a network between third parties, and (5) they have no independent economic significance. In *Infopaq I*, which involved several copies made during a data capture process, the Court of Justice emphasized that, to respect those conditions, “the storage and deletion of the reproduction [should] not be dependent on discretionary human intervention, particularly by the user of protected works”; if “there is no guarantee” that the user “will actually delete the reproduction created or, in any event, that he will delete it once its existence is no longer justified by its function of enabling the completion of a technological process”<sup>44</sup>. Examples of such exempted acts, recital 33 of the InfoSoc directive lists “acts which enable browsing as well as acts of caching [...] Such acts are, by definition, created and deleted automatically and without human intervention”<sup>45</sup>.

Those conditions are met in the case of transient copies of data or packets needed for the purpose of making the content available under the streaming mode: their duration is limited to what is necessary for the proper completion of the technological process (streaming), the deletion is automatic at the end of the process and it happens without human intervention. Not only does a literal reading of Article 5(1) lead to this conclusion: a teleological interpretation also supported by the Court of Justice dictates to “allow and ensure the development and operation of new technologies”, such as streaming, because of the need to reach “a fair balance between the rights and interests of rights holders and of users of protected works who wish to avail themselves of those technologies”<sup>46</sup>. Asked whether browsing and caching fall under Article 5(1), the Court found that the “copies on the user’s computer screen and the copies in the

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<sup>41</sup> CJEU, 29 July 2019, C-476/17, ECLI:EU:C:2019:624 (*Pelham v. Hütter*), § 29.

<sup>42</sup> *Idem*, § 30.

<sup>43</sup> *Idem*, § 31.

<sup>44</sup> CJEU, 16 July 2009, C-5/08, ECLI:EU:C:2009:465 (*Infopaq I*), § 62.

<sup>45</sup> *Idem*, § 63.

<sup>46</sup> CJEU, 5 June 2014, C-360/13, ECLI:EU:C:2014:1195 (*Public Relations Consultants Association Ltd v Newspaper Licensing Agency Ltd*), § 24 (referring to CJEU, *Premier League*, § 164).

internet ‘cache’ of that computer’s hard disk, made by an end-user in the course of viewing a website, satisfy the conditions that those copies must be temporary, that they must be transient or incidental in nature and that they must constitute an integral and essential part of a technological process<sup>47</sup>, i. e. the first three conditions of Article 5(1).

In the case of the streaming of protected content, the temporary reproductions made at the demand of the user of the streaming service also meet the conditions of Article 5(1), in particular they constitute an integral and essential part of a technological process.

In *Filmspeler*<sup>48</sup>, which involved the sale of a multimedia player used to stream (unlicensed) audio or visual content, the Court of Justice had to ascertain whether the acts of temporary reproduction on the multimedia player of a protected work obtained by streaming from a website belonging to a third party (offering that work *without* the consent of the copyright holder<sup>49</sup>) satisfy the five conditions of Article 5(1). To respond to the question, the Court relied mainly on the additional condition of Article 5(5) InfoSoc directive, according to which the exemptions of Article 5 (including Article 5(1)) are “to be applied only 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 right holder”. For the CJEU, the temporary reproductions “are such as to adversely affect the normal exploitation of those works and cause unreasonable prejudice to the legitimate interests of the right holder, because [...] that practice would usually result in a diminution of lawful transactions relating to the protected works, which would cause unreasonable prejudice to copyright holders”, and, as a consequences, those reproductions “do not satisfy the conditions set out in Article 5(1) and (5)”<sup>50</sup>.

In the case of licit streaming services, the communication to the public and making available are done with the consent of the copyright holder (see above under I), there is thus no justification for rejecting the application of Article 5(1) based on the limitations set by Article 5(5) InfoSoc Directive. Besides, the temporary reproductions do not adversely affect the normal exploitation of the works, on the contrary, they are a necessary condition for this exploitation.

**Conclusions on the pure streaming services.** Although those services require that some temporary copies be made, such copies are exempted and justified under Article 5(1) (and 5(5)) and therefore do not fall under the scope of Article 5(2)(b) InfoSoc Directive.

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From our review of the issues under II A and B, it appears that the communication to the public right and other exclusive rights are apt to cover the streaming services and to ensure an adequate remuneration for the rightholders. The extension of the remuneration right linked to private copying is not applicable to the new ways of accessing and enjoying copyrighted content and there is no necessity to further compensate the rightholders.



Alain Strowel (Brussels, 31/3/2020)

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<sup>47</sup> *Public Relations Consultants*, §63 and operative part.

<sup>48</sup> CJEU, 26 April 2017, C-527/15, ECLI:EU:C:2017:300 (*Stichting Brein v Jack Frederik Wullems*).

<sup>49</sup> The seller of the multimedia device promoted it by using the following slogan which was explicit: “Never again pay for films, series, sport, directly available without advertisements and waning time. (no subscription fees, plug and play) Netflix is now past tense!” (Opinion of Advocate General Sanchez-Bordona, *Stichting Brein v. Wullems*, [2016], Dec. 8, 2016, §19).

<sup>50</sup> *Stichting Brein v Jack Frederik Wullems*, § 63, 70 and 71.