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Making Private Copies in the Cloud: Yes, No, Maybe?

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May 19, 2015

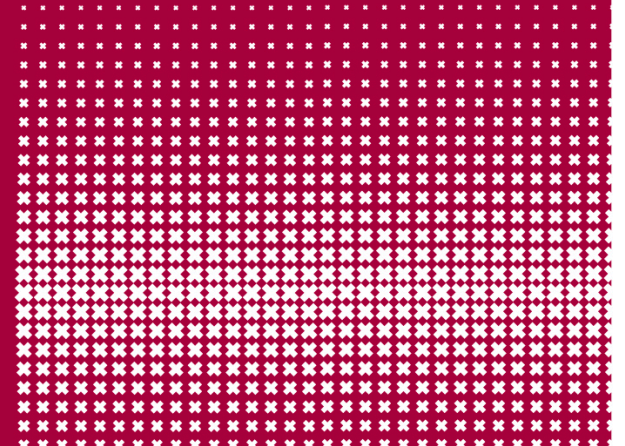
Making Private Copies in the Cloud: Yes, No, Maybe?

Lucie Guibault, *Universiteit van Amsterdam*

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Making Private Copies in the Cloud: Yes, No, Maybe?

Dr. Lucie Guibault, Adam Mickiewicz Univ., 19.05.2015



Private copying and technological development

1970-1990



2000-20xx



2010-20xx

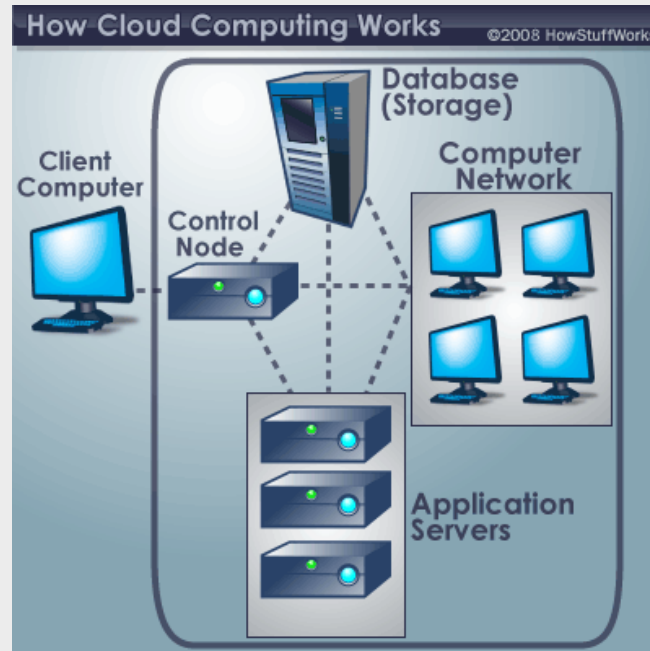


1990-2000

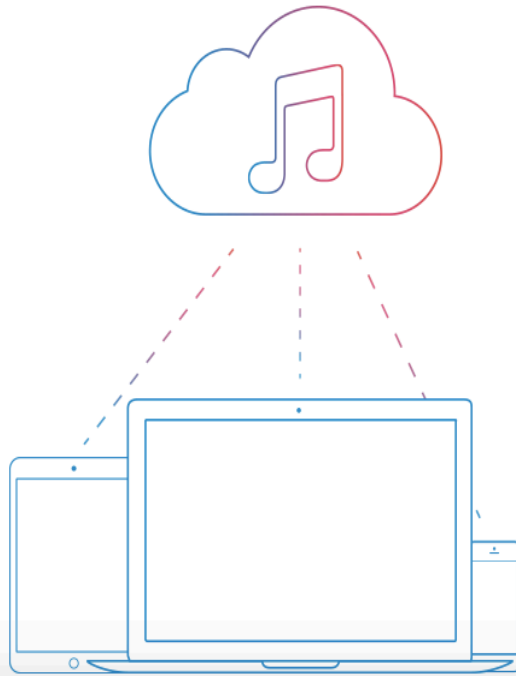


2010-20xx

Computational phenomenon: the Cloud



Cloud services... One example



How iTunes Match works.

iTunes determines which songs in your collection are available in the iTunes Store. Any music with a match is automatically added to iCloud for you to listen to anytime, on any device. Since there are more than 43 million songs in the iTunes Store, chances are your music is already in iCloud.³ And for the few songs that aren't, iTunes uploads what it can't match (which is much faster than uploading your entire music library). Even better, all the music iTunes matches plays back from iCloud at 256-Kbps AAC DRM-free quality — even if your original copy was of lower quality.

Once your music is in iCloud, you can play it from any of your devices. Just browse the complete list of all your music stored in the cloud and tap to play to it. You can store up to 25,000 songs in iCloud (more if songs are purchased from the iTunes Store), but only what you play or download is stored on your device. Tap the iCloud download button to download music from an artist, album, or playlist. So you have immediate access to a

Directive 2001/29/EC, art. 5(2)(b)

Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 in the following cases:

- 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;

Key issues in cloud

- What is the scope of the exception?
 - (Legal or illegal sources – ACI Adam)
 - Who makes the copies?
- What is fair compensation?
 - On what product/ service?
 - Who pays?

Who makes the copies?

.../1

■ BGH 22.4.2009 (Videorecorder) - accepted

- If the provider of a Private Video Recorder (PVR) service saves the programs himself on the server, he violates the exclusive rights of the plaintiff; but
- If the procedure is fully automated, the respective client can be considered as the user of the service. In this case the copy would normally be legal since it is intended for the client's private use.

Who makes the copies?

.../2

- Court of Appeal of Paris, 1st ch. 14 December 2011 (*Wizzgo/Metropole Television and others*) - rejected
 - The click made by the user has the effect of generating the automatic recording of the selected program, which is encrypted and stored on the platform until the user takes the initiative to download the copy on the hard drive of his computer, which will effectively decrypt it using the software Wizz attached to the user's personal account

Who makes the copies?

- Current state of the law in some Member States:
 - If copy made by service: exception does not apply
 - If copy made by user: exception applies
- **What about the cloud?**
 - **Who makes the copies on combined/ global storage space?**

Copydan case (5 March 2015)

Para. 91 “Directive 2001/29 does not preclude national legislation which provides for fair compensation in respect of reproductions of protected works made by a natural person by or with the aid of a device which belongs to a third party”

Basis for fair compensation?

- Directive 2001/29/EC is silent on the issue of the device or media subject to the levy
- Big differences between Member States
- So far levies raised only on tangible device/media:
 - CD, DVD, hard-drive, mp3, PC, laptop, smartphones, Settopbox, tablet
- **What about the cloud?**
 - **Levy on the subscription? Storage space?**

Who pays?

- Directive 2001/29/EC is silent on the issue of who must pay the levy
- Generally: Manufacturers, importers, sellers of storage media and recording devices are responsible for payment
- **What about the cloud?**
 - **Who is responsible for payment: the user or the provider?**



Territorial issues

Cross-border application

- Art. 5(2)b) of Directive 2001/29/EC is optional
- Varying implementation of private copying exception
- National application of exception
- **What about the cloud?**
 - **Which law (e.g. levy) is applicable to global cloud space?**

Opus Supplies (16 June 2011)

- If a MS has introduced an exception into its national law and if the final users who, on a private basis, reproduce a work reside on its territory, that MS must ensure, in accordance with its territorial competence, the effective recovery of the fair compensation for the harm suffered by the authors on the territory of that State.
- The mere fact that the commercial seller of reproduction equipment, devices and media is established in a Member State other than that in which the purchasers reside has no bearing on that obligation to achieve a certain result.

Opus Supplies

... /2

- It is for the national court, where it is impossible to ensure recovery of the fair compensation from the purchasers, to interpret national law in order to allow recovery of that compensation from the person responsible for payment who is acting on a commercial basis.



Licensing issues

VG Wort (27 June 2013)

... /3

- In the context of an exception or limitation provided for by Article 5(2) or (3) of Directive 2001/29, an act by which a rightholder may have authorised the reproduction of his protected work or other subject-matter has no bearing on the fair compensation owed, whether it is provided for on a compulsory or an optional basis under the relevant provision of that directive.
- The possibility of applying technological measures under Article 6 of Directive 2001/29 cannot render inapplicable the condition relating to fair compensation provided for by Article 5(2)(b) of that directive.

Copydan (5 March 2015)

- Para. 66: ‘such authorisation is devoid of legal effects, it cannot, of itself, give rise to an obligation to pay remuneration of any kind in respect of the reproduction, for private use, by the user of the files concerned to the rightholder who authorised such use’.

Relation Exception/ Licence

- Unresolved issue of relation between exception and contracts: comes back with a vengeance!
- Reasoning applied not clear;
- Could be as follows:
 - If private copy is excepted from the exclusive right, then right holder has no power to license; no right to obtain compensation

Complication?

- Avoiding double payment is good!
- How to reconcile this line of reasoning with art. 6(4) para. 2 and para. 4 of Directive 2001/29/EC?
 - Right holders may fix conditions for private use;
 - Provision does not apply to works made available to the public on agreed contractual terms

Looking forward

- The Cloud is the future
- How to deal with its specificities in terms of licensing and compensation?
- Do the recommendations of the Vitorino report still make sense?
- How else should the private copying system be articulated to be future proof?

Vitorino report (January 2013) ... /1

Recommendation # 1:

Clarifying that copies that are made by end users for private purposes in the context of a service that has been licensed by rightholders do not cause any harm that would require additional remuneration in the form of private copying levies.

Vitorino report (January 2013) ... /2

Recommendation # 2:

Levies should be collected in cross - border transactions in the Member State in which the final customer resides;

Vitorino report (January 2013) ... /3

Recommendation # 3

The liability for paying levies should be shifted from the manufacturer's or importer's level to the retailer's level while simplifying the levy tariff system and obliging manufacturers and importers to inform collecting societies about their transactions concerning goods subject to a levy

Or alternatively, clear and predictable ex ante exemption schemes should be established