ALAI-Congress 2012 – KYOTO Questionnaire - GERMANY[1]

Session 1 - Developments of New Platforms

1) How would you define “The Cloud” in your country?

Out of the many different definitions of Cloud Computing in the German literature the following core content can be extracted:
Cloud Computing describes data processing on several, interconnected servers which are accessed over a network and from which the usage of software and hardware is offered. The services offered in the Cloud cannot necessarily be located geographically, since their individual components may be distributed on all servers of the Cloud. The Cloud Services are at least partially performed at a location distant from the user.

The essential characteristic which differentiates Cloud Services from conventional web sites and conventional methods of outsourcing is the employment of several interconnected servers: web sites can also be stored on only one single server; IT-outsourcing can involve only one big mainframe computer.

2) Is exploitation of works, performances, sound recordings and so on generally considered to relate to the Cloud?

Not yet. In Germany many people have no idea what Cloud Computing is at all - naturally those people do not relate exploitation of any works to the Cloud. Those who have a vague understanding of Cloud Computing associate it primarily with the services offered to companies (Storage as a Service, Software as a Services or Business Process as a Service). But since the press reported on the iCloud this has become one major association to the Cloud.

The limited cognition of exploitation of works etc. in Clouds is astonishing since the press has reported constantly on the diverse Cloud functions[2] concerning the direct

1 Answered by Anna Giedke, doctoral fellow of the Max Planck Institute for Intellectual Property and Competition Law, Munich. For further questions please contact me by e-mail (Anna.Giedke@ip.mpg.de).
2 E.g., the Frankfurter Allgemeine Zeitung edited a whole enclosure concerning Cloud Computing, 26.05.2011, V2.

exploitation of works (downloading videos, games and music from a Cloud) or the indirect exploitation of works ("Cloud Learning", which offers digitized libraries, social media, learning platforms, up-to-date information, lectures of professors by video conferences instead of presence seminars and online questionnaires, or: "Cloud Workplaces", communicating the idea that the whole working process – and of course: outcome – shall be shifted into the Cloud creating new workplace-models). Besides, the main slogan of the CeBIT 2011 (the world's biggest exposition of information technology, held annually in Hannover, Germany) was "Work and Life with the Cloud" which includes private and professional uses of any kind of works in the Cloud.

3) Are there already commercial platforms established specifically designated for the Cloud or to some extent related to Cloud uses? Can you foresee such new platforms to be established in the near future?

Yes. There are many commercial Cloud Services offered in Germany. On www.clouds.de, which considers itself as Germany's Cloud Service Register, around 270 providers of Cloud Services are listed. The German Magazine Computerwoche presented around 40 "useful" German Cloud Services[3] (whose target audience are mainly companies).

As concerns the future: there will be probably an ongoing growth of Cloud Services since Cloud Business Models are supported by politics and economic associations: The German State Ministry of Economic Affairs and Technology initiated an action programme "Cloud Computing 2010" in cooperation with the science.[4] Part of this program is the technological program "Trusted Clouds", which comprises 14 Cloud-based projects for which innovative, secure and legally compliant Cloud Computing solutions are developed and tested. One of the projects develops a Cloud-based marketplace for information and analysis and its target group is among others the media. Generally, the aim is to find secure and practical business models in the Cloud complying to technical standards and the law. The usage of Cloud Computing in small and medium-sized businesses as well as in the administration shall be supported. A purely commercial approach to build and support Cloud-based platforms is "EuroCloud-

3 www.computerwoche.de/management/Cloud-computing/2359614/.
4 Find more information under: www.bmwi.de/DE/Mediathek/publikationen,did=477800.html.

Germany”,[5] an association of the German Cloud Computing Industry. They are part of a pan-European network of the Cloud Industry. They aim to establish a market-place for Cloud Computing, build the necessary infrastructure to support the providers with the marketing, communicate Cloud Computing competence, create seals of quality and contribute to legal clarity.

4) How would you evaluate the Cloud’s importance to copyright for the next few years to come?

Cloud Computing will be very important to copyright simply because it facilitates to offer and to use works that can be digitized. Users from all over the world can be addressed by the originator (biggest possible circle of addressees) and it enables a very simple way of using works (from every place in the world as long as you have internet access). This is in line with the latest figures of the (German) music industry, that in 2011 the business volume for digital business areas had grown 21,5 % over 2010, to 0,25 billion Euros (to one sixth of overall revenue).[6] There are even indications that digital distribution of works (even by file sharing) enhances the sale of (physical) albums.[7]

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5 www.eurocloud.de.

6 Bundesverband Musikindustrie, press release 2012, www.musikindustrie.de/fileadmin/news/presse/Pressemitteilungen_2012/120419-JPK-BVMI-Factsheet-FINAL.pdf.

7 Prof. Robert Hammons, Department of Economics, North Carolina State University, “Profit Leak? Pre-Release File Sharing and the Music Industry”, May 7 2012, http://www4.ncsu.edu/~rghammon/Hammond_File_Sharing_Leak.pdf, S.1 “The results strongly suggest that an album benefits from increased file sharing (…)” even though “file sharing benefits more established and popular artists but not newer and smaller artists.”

Sessions 2 and 3 - Can the Internet Treaties of 1996 play an important role in legal issues raised by “Cloud” Business? (WCT and WPPT)

1) Is there any case law to be found in your country and/or examples of (good) practices concerning:

1.1) the right of making available to the public with reference to “Cloud” storage, retrieval and dissemination?

Yes. There are several decisions concerning the question whether a Cloud Provider is the one making a work available to the public (pursuant to § 19a UrhG[8]) even though only one decision points out (and uses it in its reasoning) that the service provided was a “Cloud” service.[9] In all other cases the provider of Cloud Services are treated as any other content provider in the internet. Besides: after the above given definition of Cloud Computing all providers of content in the internet using more than one server for their services are Cloud Providers.

RapidShare:

Facts in short. RapidShare offers storage place “in the internet” - more precisely in its Cloud[10]. Clients can upload data in the Cloud, whereupon RapidShare sends them a link with which they can access their data any time. Without knowing this link there is no realistically feasible way to access the data. RapidShare provides no register which lists the uploaded data by their clients. But it is possible for the clients to send their links to third parties and enable them to access the data they have uploaded (in the case: copyright protected videos).

OLG[11] Düsseldorf decided[12] that RapidShare did not make copyrighted material

8 German Copyright Law. The English translation of the German Copyright law bases in general on the suggestions of Beier/Schricker/Fikentscher, German Industrial Property, Copyright and Antitrust Laws, 1996.

9 OLG Hamburg, 14.03.2012, file number 5 U 87/09, MMR 2012, 393 ff. (RapidShare II) not yet legally binding. Notable: The OLG Hamburg explicitly changed its former jurisprudence (it had held that business models like the one of RapidShare would not deserve legal protection) due to the change of habits on how the internet is used. It pointed out that in the “age of Cloud Computing” it was strongly solicited to store data on servers of third parties in the internet. Since there are users who use service providers like RapidShare exclusively in accordance with the law and since magazines like “Computerbild” rank RapidShare as the second best Cloud-Storage-Provider and name it in a row with widely used providers like web.de or GMX, the court held that it “could not ignore this perception” of RapidShare (as a legitimate service).

10 Cf. Schröder, in: MMR 2010, 483, 486.

available to the public itself (but maybe its clients). The reason for this finding was, that only RapidShare's clients decided to whom they would send the link; RapidShare had no influence on that. The court pointed out, that out of RapidShare's view there was only an internal, contractual relationship to the specific user – not to the whole “internet community”. Finally RapidShare did not even “let” its clients make the data available to the public, since this was exclusively the client's area of responsibility. However, the pure provision of storage can lead to a so-called “Störerhaftung” (liability as disturber – see question 1.2).

OLG Hamburg decided[13] (RapidShare II) that works (of music) were made available to the public as soon as links which lead to the works (and to a possibility to download them) were made available to third parties over the internet. The pure upload of pirate copies was not considered as a “making available to the public”; the relevant action rather was the making available of whole collections of links to the internet community without any restrictions. Since RapidShare did not place the links itself, it was neither held to make the works available to the public itself nor that it would participate in it but was prosecuted as a “Störer” (disturber).

GEMA[14] vs. **YouTube:**

LG[15] Hamburg[16] decided that YouTube (which offers the possibility to upload videos which users can stream but not download) does not make videos available to the public itself (but its users). The court argued that YouTube neither uploaded the videos itself nor did it adopt them as it's own (“sich zu eigen machen”). Decisive for the latter was whether an objective user of the Internet would think that the provider of the web page assumes the responsibility with regard to the content. To disprove this, it was not sufficient to simply state that the content did not originate from the provider; moreover, an objectively taken view based on a general survey of all relevant circmstances[17] had to show that the provider did not

11 I.e. regional appeal court.
12 27.04.2010, File Number I-20 U 166/09, MMR 2010, 483ff.
13 14.03.2012, File Number 5 U 87/09 – not yet legally binding, MMR 2012, 393 ff.
14 A German collecting society.
15 I.e., County Court.
16 20.04.2012, File Number 310 O 461/10, ITRB 2012, 128 f; MMR 2012, 404 ff.

assume an editorial control over the uploaded contents.
Nevertheless, a “Störerhaftung” is possible if there was sufficient contribution to the infringement of copyright. (Question 1.2)

Kino.to:

Facts in short. Until June 2011, Kino.to was the biggest German-speaking internet platform for pirate copies or adaptations of cinematographic works. The pirate copies itself were stored on servers of third parties (professional providers of online storage and streaming solutions, so called “filehoster”) the performance of which was controlled by employees of Kino.to. Clients who stored their data at the filehoster's storage received a link which they uploaded via their personal access to the database of the Kino.to web page. Kino.to stored those links on its servers and offered them to its users via internet. Everybody having access to the internet could also access those links and hence either stream the connected movies or download them on user-owned storage devices.

LG[18] Leipzig[19] decided that the defendant had communicated works to the public in the sense of § 106 UrhG, which implies “making available to the public” pursuant to §§ 15 II 2, 19a UrhG. The relevant action of exploitation was to place the works on the internet. Of no importance was whether the work was accessed at all, how often this happened and in which technical way access was granted. The court differentiated between “deep links” and “other links”. Deep links, which only linked to contents that were saved somewhere else should (in general) not be enough for § 19a UrhG but in this case the links of Kino.to were the only way to find and access the movies. This scenario was therefore held to be comparable with integrating the links in one's own web presentation especially since employees of Kino.to had controlled all links as to whether the named movies were complete and if they included a reference to Kino.to in the beginning and the end.

17 Eine objektive Sicht auf der Grundlage einer Gesamtbetrachtung aller relevanten Umstände, MMR 2012, 404, 405.
18 I.e., County Court.
19 11.04.2012, File Number 11 Kls 390 Js 183/11. The court decided on criminal liability of the chief programmer and main member of the technical staff of the provider of Kino.to pursuant to §§ 106 I, 108a I UrhG.

Marions Kochbuch

Facts in short. In this case, the provider of the web page www.Chefkoch.de was held to have infringed the right of making photographs available to the public. The provider enabled third parties to upload recipes and photographs of dishes. Before unlocking this content to the internet community it controlled the content as to its completeness and correctness and whether the photographs seemed to be professionally made. The recipes formed the core content of the platform. On printed versions of the recipes the text and the pictures appeared under a big badge/emblem of Chefkoch. In its General Terms and Conditions the provider demanded the consent of the user to agree to duplications and transfer of their content. Chefkoch offered the recipes to third parties for commercial use.

Due to these facts, the BGH[20] held that the provider of Chefkoch himself had made the recipes and photographs available to the public. This was not excluded by the fact that the photographs in question had been made available to the public by the plaintiff beforehand on his own web page. The overall view of all mentioned circumstances lead to the conclusion that the provider had adopted the content as its own. It did not only provide a platform for auctions in the internet or an electronic market-place but it had assumed the responsibility for the content factually and visibly to the public. Since the provider had not only ceded storage place to its users but adopted the contents as its own, it was the one using the works (in terms of making them available to the public).

Shift.tv

Facts in short. Shift.tv is a German online-video-recorder.[21] After having logged in, users can record German TV-programmes on a monthly rented personal video recorder and either download or stream them to their devices.[22] What is recorded by the video recorder is in fact saved on a storage cell of the provider, which is exclusively reserved for the individual client and which lies somewhere on the interconnected servers of Shift.tv. The client can access his private video recorder (including the stored data) from any place of the world at any time as often as he pleases.[23] The question arose whether Shift.tv, which receives the signals of the

20 Federal court of justice, 12 November 2009, File Number I ZR 166/07, GRUR 2010, 616 – Marions Kochbuch.de.
21 Unterföhring, Bavaria, http://www.Shift.tv/stv/cms/public/contact_impressum.html.
22 General Terms and Conditions, http://www.Shift.tv/stv/cms/public/gtac.jsp.

TV shows over satellite antennas and enables their storage with the personal video recorders[24] made the shows “available to the public”.

The BGH held[25] that even if Shift.tv was the one saving the shows on the video recorders (instead of their clients) it would not make them available to the public. The requirement “public” was not fulfilled since each single recording was only accessible to one single client. It did not matter that the entity of all the clients who had received the TV shows constituted a public in the sense of the German Copyright Act.[26] Shift.tv only offered to record the show. At the time of this offer (to the public) the specific work was not within the sphere of access of Shift.tv. Once stored by the private video recorder, the work was only accessible to the individual client.

The **BGH** stated the same **in Save.tv**[27] and referred the case back to the **OLG Dresden,**[28] which explored the facts more precisely and argued in more detail why Save.tv had not infringed the claimant's right to make (the recorded) TV-shows available to the public (§§ 87 I No. 1 Alt. 2, 15 II No. 2, 19a UrhG). As soon as the show was in the sphere of access of Save.tv, it had already been demanded by an individual client. There was no storage ahead of time. At the time the shows were ready to be streamed or downloaded they were not available to the public. They had been copied in the individual roster of clients from where only the individual clients could call them.[29]

However, it was held that Save.tv had infringed the right to broadcast the TV shows (§§ 87 I No. 1 Alt. 1 , 20 UrhG), since Save.tv had rendered the contents of the shows “accessible to the public” by radio-technical means.[30]

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23 See BGH, BeckRS 2009, 17250 Rn.2.

24 See BGH, BeckRS 2009, 17250 Rn.2.

25 See BGH, BeckRS 2009, 17250 Rn.25.

26 See BGH, BeckRS 2009, 17250 Rn.26.

27 Judgement of 22.04.2009, file number I ZR 175/07, BeckRS 2009, 17249.

28 OLG Dresden, 12.07.2011, File Number 14 U 801/07, MMR 2011, 610 ff.

29 OLG Dresden, 12.07.2011, File Number 14 U 801/07, MMR 2011, 610, 612.

30 § 20 UrhG requires that the content of a show is made available to several members of the public by radio-technical means. This was considered to be the case since Save.tv did not only communicate the signals to its clients but also provided the possibility to store them (by the online video recorders). The communicated signal of the show can be recorded by several users simultaneously. Those clients were considered to be “public” in the sense of § 20 UrhG thus the shows were made accessible to the public. See OLG Dresden, 12.07.2011, File Number 14 U 801/07, MMR 2011, 610, 613.

1.2) Cloud Providers that may be relevant to determine liability for the making available of unauthorized content in the Cloud environment?

Yes. The same decisions as above (1.1)[31] and some more.

RapidShare (concerning civil liability)
In the five decisions considered[32] it was unanimously held that RapidShare was not liable as an offender or aider and abettor since its users uploaded the works without RapidShare knowing about it in advance. Liability as a disturber (Störerhaftung) was held to be possible. Mostly Störerhaftung was denied since the claimed injunctive relief was held to be unreasonable. Only the OLG Hamburg decided that RapidShare had not taken all necessary reasonable steps to effectively prevent copyright infringements on its servers.

YouTube[33] (concerning civil liability)
The video platform YouTube was held to be liable as a disturber (Störer) but not as an offender or aider and abettor. It was liable for infringements of copyrights by its users since it had not attended its auditing duties and its duty to behave despite knowing about the infringement.

Kino.to[34] (concerning criminal liability)
The defendant was sentenced for commercial illegal usage of copyright protected works pursuant to §§ 106, 108a UrhG, § 25 II StGB.

Marions Kochbuch[35] (concerning civil liability)
The claim for injunctive relief (concerning pictures of the plaintiff having been made available to the public and being reproduced on other servers or storage devices of the defendant) and damages was successful.

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31 For the facts of the cases see above.
32 OLG Düsseldorf (RapidShare I, 27.04.2010, file number I-20 U 166/09; RapidShare II, 06.07.2010, file number I-20 U 8/10; RapidShare III, 21.12.2010, file number I-20 U 59/10), BGH 12.07.2012, file number I ZR 18/11, not yet published in full but see press release no. 114/2012, OLG Hamburg, 14.03.2012, file number 5 U 87/09, RapidShare II.
33 LG Hamburg, 20.04.2012, File number 310 O 461/10.
34 LG Leipzig, 11.04.2012, File number 11 KLs 390 Js 183/11.
35 BGH (Federal court of justice), 12 November 2009, File Number I ZR 166/07, GRUR 2010, 616ff.

Further decisions concerning the liability of provider in the internet and considered to be groundbreaking[36] are:
BGH[37] concerning **media which imperil the youth at eBay** and competition law (§§ 3, 8 UWG[38]) but also § 7 II TMG[39] and Art. 14 III, 15 E-Commerce-Directive.
BGH[40] **Kinderhochstühle im Internet**, concerning the duties of a provider of an online market-place who enables third parties to place offers for sale without his knowledge by using a fully automated procedure. In the case infringements of trademarks and unfair competition were at stake. BGH[41] **Stiftparfüm** concerning the liability of the provider of an online marketplace in cases of infringements of trademarks by products offered on his marketplace by his users (§§ 14 II, 19 MarkenG[42], §§ 7 II, 10 TMG).

2) Is there case law on the technological protection measures and electronic rights management information in the "Cloud" environment?

No. No specific judgements concerning the "Cloud" environment could be identified. There is, however, general case law concerning technological protection measures and electronic rights management, which might be applicable to Cloud environments as well. For example, there is jurisprudence concerning the creation of a hyperlink to avoid technological protection measures which intend to ensure that access to a work is only granted over the home page of the author's/beneficiary's web site.[43]

36 Podszun, Habilitationsvortrag (postdoctoral lecture), 19.07.2012, S. 4.
37 Federal court of justice, 12.07.2007, File number I ZR 18/04, GRUR 2007, 890 (jugendgefährdende Medien bei eBay).
38 German Act against Unfair Practices.
39 German Act on Tele-Media.
40 22.07.2010, File Number I ZR 139/08, GRUR 2011, 152.
41 17.08.2011, File Number I ZR 57/09, GRUR 2011, 1038, "Stiftparfum".
42 German Trade Mark Act.
43 See BGH, 29.04.2010, - Session-ID - file number I ZR 39/08, GRUR 2011, 56 ff.

3) How can we re-examine or re-evaluate the role of the WIPO Treaties with reference to “Cloud” developments?

At present, Art. 8 WCT (concerning the right of communication to the public) and the Agreed Statement to Art. 1 IV WCT in conjunction with Art. 9 of the Berne Convention (concerning the right of electronic reproduction) play a major role for Cloud Computing. But the two main legal problems which arise out of this usage of works, namely the determination of the applicable law and of Cloud-Provider's liability[44] are not regulated in the WIPO treaties. For legal relations a world wide consensus on both questions would be desirable. As to the applicable law this is frequently said to be unrealistic, but maybe a minimal consensus on the duties of a Cloud Provider could be found.[45]

Session 4 – New Business Models for effective Protection of Copyright and Related rights in the “Cloud”: Role of electronic rights management in new business models

Note: In general, services offered on the basis of Cloud computing technologies are classified as “Software as a Service“ (SaaS), “Platform as a Service” (PaaS) and “Infrastructure as a Service” (IaaS). Under the heading of “New Business Models for effective Protection of Copyright and Related rights in the ‘Cloud’”, the ***main focus is on PaaS****, whereas both IaaS and SaaS are of minor importance, since they generally do not involve the* ***use of copyrighted works of literature and the arts (issues of copyright in software are not discussed at this congress).***

Note: This subsection focuses on successful ***business models of authors and rightholders who market their copyrighted subject matter in the Cloud*** *either themselves or via a service provider (such as, e.g., Apple’s “iTunes in the Cloud“), presumably by employing digital rights management (****DRM****) and perhaps also technical protection measures (****TPM****).*

44 More precisely: the scope of the (auditing) duties the Cloud Providers have to comply with.

45 Those duties could probably be formulated for all providers who enable the communication of works to the public (not only Cloud Providers), if the specialty of Clouds (i.e., that several interconnected servers are involved) would not justify a higher level of care than for e.g., providers of Web sites which are hosted on a single server.

1) In your country, what types of Cloud Services are offered and/or made available by authors and rightholders offering their copyrighted content?

This question may target exclusively at German Cloud Services or all Cloud Services which can be accessed from Germany. Of both categories there are much more services than could be presented here. Beforehand: there are services free of charge and for-fee services; services which require registration and such which do not. All spotted services, which enable its users to upload their works, require a previous registration of the uploading user.

German Cloud Services:

SoundCloud: A German start-up,[46] founded by two musicians, which describes itself as “an audio platform that enables anyone to upload, record, promote and share their originally-created sounds across the internet, in a simple, accessible and feature-rich way.”[47] In its General Terms and Conditions, it calls itself a “hosting service” which stores the uploaded data “at the direction” of the registered users. It allows **registered sound creators** anywhere instantly to record their own audio productions[48] on the site or via mobile applications and share them publicly or privately, to embed sound across web sites, social networks and blogs and receive feedback from the community. SoundCloud's open platform also supports a wide range of applications built on the SoundCloud API, enabling everything from mobile voice recording, online mastering, digital distribution to FaceBook artist profiles and iPad music making. SoundCloud offers **free accounts** to amateur creators and for-fee **premium accounts** for more advanced users (with advanced features like statistics, controlled distribution and custom branding)[49] with which SoundCloud wants to earn money. SoundCloud has not published any business figures yet.[50] The platform can be **used by anyone –**

46 Even though its registered office is in London, GB. Süddeutsche Zeitung, 04.01.2012, http://www.sueddeutsche.de/digital/start-up-unternehmer-alexander-ljung-der-tueftler-hinter-SoundCloud-1.1250270.
47 Press information, http://SoundCloud.com/press.
48 Heise online 03.01.2012, http://www.heise.de/newsticker/meldung/Grosse-Kapitalspritze-fuer-deutsches-Startup-SoundCloud-1402907.html.
49 Press information, http://SoundCloud.com/press.
50 Heise online 03.01.2012, http://www.heise.de/newsticker/meldung/Grosse-Kapitalspritze-fuer-deutsches-Startup-SoundCloud-1402907.html.

registered or not – to view, listen to and share content uploaded and made available by registered users.[51]

Clipfish[52] is a German video platform, initiated by the private TV station RTL, which contains user generated videos but also recordings by RTL[53] and additionally enables to upload pictures and texts.[54] Clipfish provides the storage on which the authors can upload their content.
The service can only be used after **registration,**[55] which is **free of charge**.[56]

Bookrix[57] calls itself the biggest German "book-community" and offers "a place for readers, authors, publishers and everyone else who likes books". Tens of thousands of eBooks can be found there, which are **offered** by other users **free of charge** either for online-reading or downloading. Everyone can write and publish his own books free of charge at Bookrix. A **registration** is required to upload data but not to read and download books. The platform wants to support exchange between readers and authors. Books can be evaluated, writing contests are offered. It also **supports authors to offer their works for sale** worldwide, either only on Bookrix.de or additionally in the top eBook stores like Amazon or Apple's iBookstore. For a professional selling of the book some costs incur.[58]

Cloud Services which can be accessed in Germany:

YouTube[59] enables to upload videos and consuming them via streaming – download is prohibited in the General Terms and Conditions[60] (but can be realized using special services or software). It can be used by consumers free of charge with or without application. To upload contents, a registration is required.

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51 The interaction with one another and the contribution to discussions is however reserved to registered users, see General Terms and Conditions – Description of the Platform.
52 www.Clipfish.de.
53 http://de.wikipedia.org/wiki/Clipfish.
54 See II), General Terms and Conditions of Clipfish, www.Clipfish.de.
55 See III), General Terms and Conditions of Clipfish, www.Clipfish.de.
56 www.Clipfish.de.
57 www.Bookrix.de.
58 Bookrix, http://www.Bookrix.de/support/?topicID=20.
59 www.YouTube.de.
60 LG Hamburg, MMR 2012, 404.

MyVideo Deutschland[61] offers TV productions (movies and soap operas) but also user generated clips. MyVideo Germany is said to be the biggest video community in Germany.[62] Registration is required to upload videos but not for watching them – and both are free of charge.

Spotify[63] offers music to its users and is accessible from Germany since March 2012.[64] Every user has to register either for free (limited access) or against payment (offering unlimited access, better quality, online radio, offline access). The offered music is licensed.[65] The right holders get paid according to the frequency with which their works are played. Spotify generates money through advertisements and through the accounts for fees.

Project Gutenberg[66] offers mainly copyright-free eBooks and others with consent of the right holders. Users can read and download them. No fee or registration is required but donations are requested. So-called volunteers decide which books are published by Project Gutenberg.[67]

2) What kinds of works are being offered in this way (e.g., musical works, literary works, photographic works, audiovisual works, performances etc.)?

Musical works ("from sample to symphony and soundbite to soliloquy")[68], literary works (eBooks or mere comments on works of other people), audiovisual works (any kind of videos, recordings of TV transmitters[69]..), photographic works, pictures, graphics.[70]

61 www.MyVideo.de.
62 According to AGOF Internet Facts 2010-IV, http://is2.MyVideo.de/bilder/presse/110323_MyVideo_Daten&Fakten.pdf.
63 www.Spotify.com.
64 http://bestboyz.de/musikbibliothek-Spotify-geht-in-deutschland-online/.
65 Find more details: http://www.Spotify.com/de/work-with-us/labels-and-artists/.
66 http://www.gutenberg.org/.
67 http://www.gutenberg.org/wiki/Gutenberg:General_FAQ#G.11._What_books_does_Project_Gutenberg_publish.3F.
68 Press information, http://SoundCloud.com/press.
69 General Terms and Conditions of Clipfish, www.Clipfish.de.
70 Detailed enumeration in SoundClouds General Terms and Conditions.

3) What rights do rightholders usually transfer to the providers of Cloud Services?

One common clause seems to be that “all necessary rights” to provide the respective Cloud Service are granted. The specification of this clause varies:

SoundCloud[71] is entitled to transcode any audio content and to store it on its servers. However, the right holders maintain the right to control and authorise the use, reproduction, transmission, distribution, public display, public performance, making available and other communication to the public of the uploaded content. “To the extent it is necessary” for SoundCloud to provide its clients with any of the aforementioned hosting services, to undertake any of the tasks set forth in the General Terms and Conditions and/or to enable the right holder's use of the Platform, SoundCloud is granted such licences “on a limited, worldwide, non-exclusive, royalty-free and fully paid basis.” The licences concerning the uploaded works terminate – in general – automatically when the client removes the content from the account. Such removal results automatically in the deletion of the relevant files from SoundCloud’s systems and servers. However, right holders must agree that once the content is distributed to a linked service, SoundCloud is not obligated to ensure the deletion of the content from any servers or systems operated by the operators of any linked service, or to require that any user of the platform or any linked service deletes any item of the content.

Clipfish[72] is entitled to use the uploaded contents for the services offered under Clipfish.de and is therefore granted “all necessary rights” for free. This includes among others the right to make the works available to the public worldwide (over Clipfish.de or other media), to reproduce, distribute and transfer it to third parties. Clipfish is also entitled to place ads and undertake other measures of publicity next to the contents, further to grant sublicences and to transfer the granted rights of use (but Clipfish claims no possessorship), to edit the contents, in particular to adopt them to the necessary format requirements or to improve the quality of presentation. The rights granted to Clipfish by the user expire with termination of the membership or deletion of the content. Lastly, the user indemnifies Clipfish (and several connected companies and

71 See its Terms of Use: http://SoundCloud.com/terms-of-use#license.
72 See its General Terms and Conditions, Section VI: http://www.Clipfish.de/agb/.

persons) of claims of third parties, which allege that the uploaded contents infringe their rights.

Bookrix:[73] By uploading their works, the right holders grant Bookrix a worldwide, non-exclusive right of use "as far as it is necessary" to publish and distribute the contents in the envisioned form on the Bookrix platform. This is specified in 5.6. of the General Terms and Conditions using almost no legal terms but describing literally the envisioned actions (downloading, copying, printing, the viewing of the works on- and offline, reproduction and storage on one or several devices, change of format, converting and coding of eBooks, to advertise, merchandise, transfer, and make works/ part of works available for others in other digital ways; further the right to use, reproduce, adapt and modify to an extent which Bookrix considers reasonable, etc.). In case the users exercise the possibility to publish their works within an offered partner programme at third party providers (like Google Books) Bookrix is entitled to grant the necessary sublicences.[74]

4) What uses of copyrighted material are the users of such Cloud Services permitted?

SoundCloud: Generally speaking, users of SoundCloud can subscribe to regularly receive the works of other users, listen to them via online streaming or even download them – if permitted by the setting of the author.[75]
In legal terms: The right holders grant the users of the platform (by uploading their content) a "limited, worldwide, non-exclusive, royalty-free, fully paid up," licence "to use, copy, transmit or otherwise distribute, publicly display, publicly perform, prepare derivative works of, make available, and otherwise communicate to the public" the content within the parameters set by the right holder using the services. The right holder can limit and restrict the availability of certain of the content to other users of the platform at any time (..).[76]
SoundCloud grants its users a "limited, personal, non-exclusive, revocable, non-assignable, and non-transferable right and licence" to use the platform in order to view

73 See 5.6 of the General Terms and Conditions, http://www.Bookrix.de/agb_terms.html.
74 See 5.9. of the General Terms and Conditions.
75 Heise online 03.01.2012, http://www.heise.de/newsticker/meldung/Grosse-Kapitalspritze-fuer-deutsches-Startup-SoundCloud-1402907.html.
76 See its Terms of Use: http://SoundCloud.com/terms-of-use#license.

content uploaded and posted to the web site, to listen to audio content streamed from the platform and to share and download audio content where the appropriate functionality has been enabled by the user who uploaded the relevant content – under the condition that the users strictly comply with its Terms of Use and Community Guidelines.[77]

Clipfish: Users can watch the videos with a Flash player. They may only use the contents privately – no commercial use is permitted.
The right holders agree that third parties are entitled to link and otherwise hint to the contents of Clipfish. The purpose of the Community requires that all content is freely available for third parties which includes in particular usage for one's own purposes.[78]
Clipfish allows its users during their membership to utilise the offered services and therefore grants its users a non-exclusive, non-transferable licence to use.[79]

Bookrix: The users can read eBooks online or download them. There is no specification in the General Terms and Conditions.

5) Can you give any figures regarding both royalty rates and total revenue authors and rightholders receive when their works are being offered in the Cloud?

Clipfish: the author grants the licence for free.
SoundCloud: the author grants the licence for free. It is not clear whether authors benefit from costs paid for premium accounts to SoundCloud.
Bookrix: the user has no right to payment from Bookrix neither for making available of his content nor for commercial usage of the content through Bookrix (e.g., placing adverts next to the content). Something different is regulated in the contract of authorship if the work is placed at Bookrix for distribution for a fee (kostenpflichtiger Vertrieb).[80]

Spotify: the author earns per streamed file to a client 0,00164€ at most, for a whole

77 http://soundcloud.com/terms-of-use#use.
78 General Terms and Conditions VI 3.
79 General Terms and Conditions VI 7.
80 See General Terms and Conditions No. 5.8.

album 0.02132€.[81]

iTunes: as calculated in the press: the author probably earns 2,4237€ per downloaded album.[82]

No more facts could be identified.

6) What kind of TPM and DRM is used by these services?

Almost no information could be found about TPM and DRM of the above cited services. On enquiry there were no responses or excuses for not being willing to disclose them.

SoundCloud mentions that its users can impose content protection measures.[83]

MyVideo declares that it would use a "clever-clever, software based system of security" to counter infringements of copyrights.[84] According to German Wikipedia, MyVideo uses a digital fingerprint of the uploaded data, i.e., it saves striking features of the data when it is uploaded. If a rejected video is removed from the platform due to a notice-and-take-down-procedure, this content is locked in the future for the platform and cannot be uploaded a second time – not even by a different user.[85]

Ciando, a provider of German-language eBooks offers in its contracts two variants of technical protection measures to prevent dissemination of works through the consumers to unauthorised third parties. The first option is the so called "hard" copy protection, i.e., a DRM-system, like Adobe Content Server: by obtaining the work, it is encrypted and is thus bound to a user account (apparently only the user can decrypt it again). The second option is the so called "soft" copy protection (water mark, like Fraunhofer Cosee): by obtaining the data, an attribute is added to the file which will remain attached to the work in further transfers and which can be used to identify the client.[86]

Almost all examined Cloud Providers try to protect copyrights by an appropriate contract design.[87]

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81 Hr online, Ramschware Musik, http://www.hr-online.de/Web site/rubriken/kultur/index.jsp?rubrik=73271&key=standard_document_44272043&seite=2.

82 Hr online, Ramschware Musik, http://www.hr-online.de/Web site/rubriken/kultur/index.jsp?rubrik=73271&key=standard_document_44272043&seite=2.

83 http://developers.SoundCloud.com/docs/api/terms-of-use#changes under "user content".

84 "ausgeklügelte(s), softwarebasierte(s) Sicherheitssystem", http://www.MyVideo.de/Hilfe?topic=2&question=3.

85 http://de.wikipedia.org/wiki/MyVideo.

86 See the contract for authors of ciando: http://www.ciando.com/doc/autorenvertrag.pdf.

As to DRM: Next year Sony wants to open its digital library “Ultraviolet” in Germany. It is a Cloud based licensing system, which enables consumers to use their digital contents (like movies) on up to twelve platforms (computer, mobile phone or tablet, etc.). The service does not save the contents but only the gained rights for the purchase of, e.g., a movie.[88]

7) Under the legislation of your country, to what extent are TPM protected against their unauthorized circumvention?

§95 a UrhG[89] determines that effective TPM may not be circumvented insofar as the acting person is aware of or should be aware of, according to the circumstances, that circumvention takes place to enable access to a protected work etc. or its use. (§ 95a UrhG is mostly a literal translation of Art. 6 Section 1 to 3 Directive 2001/29/EC and accords with Art. 11 WCT and Art. 18 WPPT).

Breaches of this rule can lead to consequences in criminal and civil law:[90]

Criminal Law:
The breaches of § 95a UrhG that are considered to be criminal are regulated in § 108 b I No. 1, II, III UrhG (requires intent/ knowledge; no act exclusively for private use of the offender/a person closely connected to him; monetary penalty or up to one year custodial sentence; in case of commercial commitment up to three years custodial sentence).
It can also be sanctioned as a mere administrative offence, § 111a I No.1 UrhG (up to 50.000€).

Civil Law:
A claim for damages can arise from § 823 II BGB[91] in conjunction with § 95a UrhG (very

87 By notifying their users of copyright issues, demanding declarations of not infringing copyrights with their uploaded data, requesting them to notify the provider if they happen to notice infringements of copyright (notice-and-take-down-procedure), see, e.g., the General Terms and Conditions of SoundCloud, MyVideo and Bookrix.
88 See Handelsblatt, 24.05.2012, http://www.handelsblatt.com/technologie/it-tk/it-internet/filme-online-sony-startet-digitale-bibliothek-in-deutschland-seite-all/6669392-all.html.
89 German Copyright Act.
90 See Dreier/Schulze, Urheberrecht, § 95a Rn. 1 and 5 ff.
91 German Civil Code.

difficult to prove the suffered damage) and an injunctive relief from § 1004 BGB mutatis mutandis.

If somebody links to illegal measures for circumvention he can be liable as a disturber (Störer) pursuant to § 97 UrhG.[92]

8) Is unauthorized circumvention of TPM a practical problem for those offering their content in the Cloud?

Cloud specific problems could not be identified.

Session 5 - Copyright-avoiding business models

Note: This subsection focuses on business models of persons other than authors and rightholders, who build upon someone else's copyrighted material and who – successfully or not – ***try not to be subject to copyright liability****. Examples are services that make use of the* ***private copying exception*** *(such as, e.g., personalized internet video-recorders) or which strive to benefit from an* ***exception to legal liability as an Internet Service Provider*** *(such as, e.g., under the EU e-Commerce Directive). In addition, strategies of authors* ***who market their copyrighted works outside of copyright*** *(such as, e.g., under an* ***open content*** *or Creative Commons (CC) licence) can also be regarded as "copyright-avoiding" business models (although technically, they are based on copyright).*

5.1 – Private copying in the Cloud

1) **In your country, are there services – and if so, what kind of services are there - that offer its users to store private copies in the Cloud?**
   Examples are storage services with limited access (such as Google's "Picasa"), platforms with general public access (such as, e.g., FlickR) and mixed-forms (such as, e.g. FaceBook) but also so-called internet-video recorders and possible other forms of private storage services.

92 Again: Dreier/Schulze, Urheberrecht, § 97 Rn. 34.

There are many of such services: starting with conventional “web mail services”, over “hard disks” in the Cloud, over “file hosting services” to “internet radio recorders” and “online-video-recorders”.

Every **web mail service** (yahoo.de, googlemail.com, web.de, etc.) can be used to store private copies on the servers of the service (on its “Cloud”).

Several companies promote **“hard disks” in the Cloud**:[93]
Dropbox offers its clients to save their pictures, videos and documents online, access their storage from anywhere and share it with whomever they want.[94] The clients remain the owner of their data.[95] **Google** offers the service Google Drive, which allows to save up to 5 GB data for free on Google's servers.[96] Third parties can be granted access to the data and it can be jointly edited. **Microsoft** offers the service Skydrive, which is similar to the above mentioned ones.[97] The web page Clouds.de, which describes itself as Germany's Cloud Computing Catalogue, lists ten more providers of **Cloud storage:** Apple iCloud, CloudMe, CloudSafe, DIG:ED, Host Europe, Livedrive, Loomes, Mesh, Netapp, Netfiles, storsimple, Strato, Verizon, ZumoDrive.[98]

Also **“file hosting services”** offer their users to store private copies in the Cloud like the already mentioned **RapidShare**.[99] Its latest service (for paying clients) is RapidDrive, which offers an online hard disk which is embedded in the operating system (Windows 7, Vista and XP). All uploaded data of Rapidhare accounts are included. **BayFiles**[100] provides an infrastructure which enables the user to save electronic files on internet servers. After saving the files, the user receives a download link (enabling the user to download it over the internet from anywhere in the world) as well as a "remove" link, with which the uploaded file can be removed from the server again.[101]

93 See Computer Bild, 26.04.2012, Ihr Speicherplatz im Internet – Cloud-Festplatten: Das bieten Google Drive, Dropbox, Skydrive & Co.
94 https://www.dropbox.com/about.
95 See General Terms and Conditions, https://www.dropbox.com/terms.
96 http://support.google.com/drive/bin/answer.py?hl=de&answer=2424384&ctx=cb&src=cb&cbid=-33qvlpw6y2w9.
97 http://www.windowslive.de/Skydrive/.
98 http://www.clouds.de/alle-anbieter/cloud-storage-and-hosting/storage/.
99 See Session 2 and 3; RapidShare is one of the first German file hosting services, Computerbild, 09.07.2012, Online Speicher - RapidDrive: Neuer Cloud Service von RapidShare.
100 http://bayfiles.com.

"Internet-radio-recorders" are offered as well, like **Flatster.com,** a German provider,[102] offering its clients to record music from online radios, save it on an online storage or/and download it on their own devices.[103] Flatster likens its service to a cassette recorder - realised and automated by means of the internet.[104]
Besides storage space it also offers to its clients the software which searches sources for music, like online-radios, and connects the user to the sources.[105] Another provider is **OnlineMusicRecorder.com.** It is not clear whether the provider itself or its clients are the ones recording the radio songs.[106] All the songs that have been recorded (up to 2.000 new MP3 songs every day) can be downloaded by anyone who has registered. Registration and download are free of charge.[107] The data is encoded and can only be decoded by using the OMR-Decoder which shall ensure that only registered OMR-User can transform the songs into MP3s.[108]

Finally, "Online Video-Recorders" are offered in Germany like **Save.tv**[109] or **Shift.tv.**[110] After logging in, German TV-programmes can be recorded and either be downloaded or streamed to the client's devices. Clients may rent a personal video recorder on a monthly basis to record TV-programmes.[111] The selected programme is stored on this personal video recorder, i.e., in fact on a storage cell which is exclusively reserved for the individual client and which lies somewhere on the interconnected servers of the provider. The client can access his private video recorder (including the stored data) from any place in the world, at any time and as often as he pleases.[112]

101 The files saved with Bayfiles are treated confidentially. No search function is offered to examine Bayfiles' infrastructure and the files are not catalogued nor listed in tables of contents by Bayfiles. Some services provided are free-of-charge; services, with considerably increased performance and user comfort are offered for a charge. Terms of Services of Bayfiles, http://bayfiles.com/tos.
102 Köln, http://www2.flatster.com/flatsterAGB.aspx.
103 http://www2.flatster.com/flatsterSoGehts.aspx.
104 http://www2.flatster.com/flatsterSoGehts.aspx.
105 http://www2.flatster.com/flatsterAGB.aspx.
106 Heise Online, 10.11.2006, *Ein weiterer kostenloser Internet-Radiorecorder am Start*, and the homepage of OnlineMusicRecorder give the impression that like the provider would record the songs automatically and the users can download them. But the web page, in contrast, states that the users would record the songs themselves, www.onlineMusicRecorder.com. Also the (incomplete) quotation within the FAQ, that according to German Law it is legitimate to make or to cause to be made single copies of a work (§ 53 II UrhG), does not clarify whether the provider relies on the first or the second alternative of the clause.
107 www.onlineMusicRecorder.com.
108 See Heise Online, 10.11.2006, *Ein weiterer kostenloser Internet-Radiorecorder am Start*.
109 www.Save.tv, a German provider, Hamburg, http://www.Save.tv/, for more information see above Session 2 and 3.
110 Also a German provider from Unterföhring, Bavaria, http://www.Shift.tv/stv/cms/public/contact_impressum.html. For more information about the service, see above, Session 2 and 3.
111 General Terms and Conditions, http://www.Shift.tv/stv/cms/public/gtac.jsp.
112 See BGH, BeckRS 2009, 17250 Rn.2.

2) In legal terms, to what extent do the operators of such services benefit from its user's private copying exception? Are there any other exceptions under copyright law?
(Note that general exceptions of legal liability are discussed under 5.2).

a) Legal benefits for Cloud storage providers of their user's private copying exception

i) Alleged legality of the whole service
Some providers emphasize in their General Terms and Conditions or advertise on their web page that their service was legal because the actions of the clients would be covered by the private copying exception, e.g., onlinemusicrecorder.com,[113] Shift.tv[114] and Save.tv.[115]

ii) Benefits pointed out in the case law
The exceptions for private copies legalise certain reproductions which are (among others) produced for "private use", § 53 UrhG. Commercial Cloud Providers can never benefit directly from this exception but indirectly if they enable their clients to store private copies on its devices.

In **Save.tv**[116] it was decided that[117] the claimant (a broadcasting organization) had not been injured in its right of reproduction (§§ 87 **I** No. 2, 15 **I** No.1, 16 UrhG) since the copies of TV shows being made with the aid of the online-video-recorder of the defendant (Save.tv) were encompassed by the exception for private copies pursuant to **§ 53 I 1 UrhG**. § 53 **I** 1 UrhG could apply, because the court decided that the "producer" of the copies was **not** the provider of the online-video-recorder (i.e., Save.tv) but its clients who set a fully automated procedure of recording in motion.[118]

113 Frequently Asked Questions, http://www.onlinemusicrecorder.com/.
114 § 9 No. 2 General Terms and Conditions, http://www.Shift.tv/stv/cms/public/gtac.jsp.
115 § 7 General Terms and Conditions, http://www.Save.tv/.
116 See OLG Dresden, GRUR 2011, 413; BGH, 22.04.2009, file number I ZR 175/07, BeckRS 2009, 17249; BGH accepted a revision against the Judgement, Wilder/Beuger/Solmecke, 18.06.2012, http://www.wbs-law.de/allgemein/shift-tv-bgh-nimmt-revision-an-25626/.
117 Same conclusion: OLG Dresden, 12.07.2011, file number Az. 14 U 1070/06, press release http://www.pressebox.de/pressemeldungen/netlantic-gmbh/boxid/435576.
118 "Die mit der Aufzeichnung einer Fernsehsendung mittels eines Online-Videorecorders verbundene Vervielfältigung unterfällt der Privatkopieschranke des § 53 I 1 UrhG, da Hersteller der Kopie nicht der Betreiber des Online-Videorecorders ist, sondern der privilegierte Nutzer, soweit er einen vollautomatisierten Vorgang in Gang setzt." GRUR 2011, 413, Leitsatz 1 der Redaktion.

Thus, the provider benefited indirectly from § 53 UrhG. The decisive precondition for this was that the clients – not the provider of the recorder – were the “producers” of the copies. How to determine the “producer” was clarified in Save.tv and Shift.tv:[119] The person who reproduces the work must primarily be identified by a purely technical consideration since the reproduction as a physical determination is a mere technical-mechanical process. It was said to be of no importance that the client uses technical means which a third party made available.

The private copying exception was even held to legalise master copies being saved during the operation of the online-video-recorder. Such master copies were created in the case that several clients had programmed to record the same TV-show.[120] It was decided that the privilege of § 53 I UrhG did not require that exclusively individual copies for clients were stored on devices which were individually allocated to single clients. Moreover, such a master copy was held to be legal pursuant to § 44a UrhG because it was a pure mechanical intermediate step to produce the individual copy for each client and had no innate economic relevance.[121]

§ 53 I 2 UrhG (which says that the person entitled to private copies may also cause such copies to be made by another person – under certain conditions) was examined in Save.tv[122] as well. Since the clients were the producers themselves, § 53 I 2 UrhG was held not to be applicable.[123]

Note: even though liability for unlawful reproductions was denied, Save.tv was held to be liable for breaching the claimant's right to rebroadcast its shows.[124] Thus the private copying exception did not legalise the whole business concept of Save.tv.

RapidShare:

OLG Düsseldorf (RapidShare I):[125] In contrast to Shift.tv and Save.tv the facts of

119 BGH, 22.04.2009, file number I ZR 215/06, BeckRS 2009, 17250.

120 If TV-shows were requested by several users at the same time Save.tv did only record it once (not several records at the same time) and stored it on the so called recording server; the individual records for the clients were constructed on the so called file server (on which the private video recorders of the clients were installed) by using the master copy. See OLG Dresden, in: GRUR-RR 2011, 413, 414 f.

121 OLG Dresden, MMR 2011, 610, 611; GRUR 2011, 413, 414 f.

122 BGH, 22.04.2009, file number I ZR 175/07, BeckRS 2009, 17249; OLG Dresden, 12.07.2011, File Number 14 U 801/07, MMR 2011, 610 ff. BGH accepted a revision against the Judgement, Wilder/Beuger/Solmecke, 18.06.2012, http://www.wbs-law.de/allgemein/shift-tv-bgh-nimmt-revision-an-25626/.

123 OLG Dresden, in: MMR 2011, 610, 611.

124 The right to rebroadcast its shows is an exclusive right of broadcasting organisations pursuant to § 87 UrhG.

125 Judgement of 27.04.2010 File Number I -20 U 166/09, MMR 2010, 483 ff.

RapidShare showed clearly that RapidShare was not liable as an offender. Not RapidShare itself reproduced the copyright protected works but its clients who were uploading them. RapidShare itself also did not make the works available to the public – but its clients who decided independently of RapidShare to whom they would communicate the links leading to the works. But since RapidShare provided the infrastructure for these copyright-infringing actions, the court examined liability as a disturber. The claimant sought to adjudge the defendant to desist the making available of several (identified) movies. Within the examination of this claim, § 53 UrhG became relevant – even though it is an exception for reproduction(!).[126]
Liability as a disturber requires among others the infringement of auditing duties, the scope of which is determined in accordance with general considerations of reasonableness. Having gained knowledge of an infringement of copyrights, a provider like RapidShare has - among others[127]- to undertake all reasonable steps to prevent similar infringements; otherwise, it will be liable as a disturber. This presupposes an extensive examination of the technical possibilities to inhibit similar cases, whereby one important aspect is to what extent prevention, prohibition and later removal is reasonably possible. After having considered all possible measures to be unreasonable, the court finally examined whether it could prohibit RapidShare to allow its users to store the movies in question on its servers (as the last thinkable measure to accept the claim to desist making certain works available to the public). This was denied, since the storage of videos on RapidShare's servers could be covered by the exception for private copies. That is: the court did not want to prohibit RapidShare to offer storage for uploads which might be legal due to § 53 UrhG. The court admitted that even if the clients uploaded private copies in the sense of § 53 UrhG they were not entitled to reveal the place of storage (Standort) to third parties – which had apparently happened. But RapidShare has had no influence at all on the publication of links by its users so that the court focused on the fact that the mere storage of the movies on the servers of RapidShare could be legal according to § 53 UrhG. Therefore it could not sentence RapidShare to desist offering the storage space to its users.

Thus the possibility that § 53 UrhG legalises the uploads of the clients – among others

126 See OLG Düsseldorf, MMR 2010, 483, 486.
127 See OLG Düsseldorf, MMR 2010, 483, 485.

– made the OLG deny the liability of RapidShare as a disturber (Störer) of the right of making available works to the public, §§ 97 I 1, 19a UrhG.

In RapidShare II[128] the OLG Düsseldorf decided among others on the claim to prohibit RapidShare to have certain movies reproduced on the internet. This claim was rejected since it would also prohibit legitimate behaviour. It was considered to be likely that RapidShare's clients would use the service for legal reproductions pursuant to § 53 UrhG since there can be a legitimate interest to save private copies on the infrastructure of RapidShare instead of their own (big data, more reliable storage infrastructure). If the clients would only use the uploaded copy for themselves it would be legal, § 53 I UrhG.

OLG Düsseldorf (RapidShare III)[129] held that for computer games the private copy exception is not applicable.[130] (Nevertheless there was no liability for unlawful reproduction by the provider since the claimed measures were held to be unreasonable.)

OLG Hamburg[131] changed its jurisdiction to the benefit of RapidShare with reference to § 53 VI UrhG. In a previous ruling the OLG had held that already uploading works on RapidShare's servers would constitute a "making available to the public" of those works. This assessment was explicitly given up arguing that the mere upload of a copyright protected work on the service of a sharehoster like RapidShare was not sufficient to conclude that the uploads must be illegal usage. Among others, the upload to a filehoster could be considered as creating a private copy for incorporation into a private archive (§ 53 II 1 No. 2 UrhG). Such a reproduction would be covered by the exception for "other personal use".[132] As the consequence of this judicial conception, it was concluded that the protected interests of the legally conform users of services like RapidShare had to be considered and protected adequately. This aspect did not weigh enough, however, since the court held nevertheless that

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128 Judgement of 06.07.2010, File Number I-20 U 8/10.

129 Judgement of 21.12.2010, File Number I-20 U 59/10, MMR 2011, 250ff.

130 Apparently this relies on the fact that the audio visual presentation of a computer game is created by software which is protected pursuant to §§ 69a ff UrhG and can only be reproduced under the narrow conditions of § 69c UrhG. See as well remark to RapidShare III, Schröder, MMR 2011, 250, 252.

131 Judgement of 14.03.2012, File Number 5 U 87/09, MMR 2012, 393 ff.

132 Judgement of 14.03.2012, File Number 5 U 87/09, MMR 2012, 393, 395.

RapidShare was obliged to omit making certain works of music available to the public.[133]

b) Further exceptions besides the private copying exception

There are several further exceptions besides the private copying exception under German copyright law, some in form of a compulsory licence and some completely liberalising exceptions.[134] As it could be seen above, exception clauses can become relevant for the liability of a Cloud Provider as a disturber even if they relate to a different type of usage than the one the provider is accused of.[135] Therefore it is not easy to decide which of the several existing exceptions can become relevant for Cloud Providers.

Exceptions in form of compulsory licences:

- § 27 UrhG concerns institutions accessible to the public (like libraries etc.); since this concerns the lending right it will probably be irrelevant for Cloud Providers (unless questions of software usage in Clouds are concerned)
- § 49 UrhG concerns press reviews (affects the right to reproduce, distribute and communicate to the public)
- § 45a UrhG concerns disabled persons (affects the right to reproduce and distribute)
- § 46 UrhG concerns collections for Religious, School or Instructional Use (affects the right to reproduce, distribute and make available to the public)
- § 52 UrhG concerns already published works (affects the right of public communication)
- § 52 a UrhG concerns education and research (affects the right of making

133 One of several reasons for this decision was that RapidShare was considered to be no neutral service provider but to play a more active role by enabling its users to remain totally anonymous, see MMR 2012, 393, 396 ff.

134 See Rehbinder, Urheberrecht, 2010, p. 173ff. I exclude exceptions only valid for software (§69d UrhG) since copyright in software is excluded from this conference. Also the “exception” of copyright pursuant to § 17 II UrhG (exhaustion) is not considered here despite the ECJ`s Judgement “UsedSoft”, 3.7.2012, C-128/11, since it is very unclear if this Judgement will become relevant for any other digital content besides software.

135 See RapidShare I above, p. 25 f.

available to the public)[136]

- § 52b UrhG concerns communication of works on electronic reading places in public libraries, museums and archives (affects the right of making available to the public)
- §§ 53- 54a UrhG not only constitute the exceptions for making a private copy in the above mentioned sense but also for making reproductions for other personal uses, like the own scientific use, for incorporation of the work in one's own archive, for one's own education about issues of the day, and others (affect the right to reproduce)

Some other uses are liberalised completely (meaning: no compulsory licences):

- § 44a UrhG concerning temporary acts of reproduction which are transient or incidental and an integral and essential part of a technological process and whose sole purpose is to enable (a) a transmission in a network between third parties by an intermediary, or (b) a lawful use of a work or other subject-matter to be made, and which have no independent economic significance (affects the right to reproduce), see as well Art. 5 I Directive 2001/29/EC (information society)
- § 45 UrhG concerns administration of justice and public safety (affects, among others, the right of reproduction and of public communication)
- § 47 UrhG concerns school broadcasts (affects the right of broadcasting)
- § 48 UrhG concerns public speeches (affects, among others, the right of reproduction and of making available to the public)
- § 49 UrhG concerns press articles and broadcast commentaries (affects, among others, the right of reproduction and of public communication)[137]
- § 50 UrhG concerns visual and sound reporting on issues of the day (affects, among others, the right of reproduction and of public communication)
- § 51 UrhG concerns quotations (affects, among others, the right of reproduction and of public communication)

136 Case law concerning online studying platforms: OLG Stuttgart, 04.04.2012, File No. 4 U 171/ 11, not yet legally binding, GRUR 2012, 718.
137 In parts a compulsory licence is regulated here, § 49 I 2 UrhG.

- § 52 I 3 UrhG concerns events organized by the Youth Welfare Service, the Social Welfare Service, the Prisoner Welfare Service, the Old Persons Welfare Service and school events on condition that they are only accessible to a specifically limited circle of persons (affects the right of public communication)
- § 55 UrhG concerning reproductions by broadcasting organizations (in other legal areas – like tele-media law – Cloud Providers are partly considered to be broadcasting organizations;[138] it is, however, not clear whether Cloud Providers will be considered to be broadcasting organizations in the sense of this clause as well)
- § 55a UrhG concerns the editing and reproduction of database works
- § 56 UrhG concerns commercial enterprises which sell or repair visual or sound records, or equipment for their manufacture or communication, or for reception of broadcasts; they may record works on visual or sound fixations and may publicly communicate such recorded or broadcast works, in so far as this may be necessary to exhibit such equipment and devices to the public or for the repair thereof (affects the right to reproduction and public communication); this exception could only apply to Clouds if the object of purchase which shall be exhibited is a Cloud[139]
- § 57 UrhG concerns works which may be regarded as accessories of secondary importance with regard to the actual subject of the reproduction, public communication etc. (affects, among others, the right to reproduce and to communicate to the public)
- § 58 UrhG concerns measures of advertisement by organizers of exhibitions or public sales (affects, among others, the right to reproduce and to make a work available to the public)
- § 59 UrhG concerns works on publicly accessible places (affects, among others, the right to reproduce by clearly defined methods as well as the right to communicate to the public)
- § 60 UrhG concerns portraits (affects, among others, the right to reproduce)

138 See, e.g., BGH in RapidShare, Press Release No. 114/2012 – judgement not yet published.
139 Which is conceivable: e.g. a private cloud for a household or a smaller company.

5.2 – Copyright-avoiding models on the basis of – presumed – exceptions to copyright liability or limited interpretations of the “making available” right

1) **To what extent do the operators of Cloud Services benefit from a narrow interpretation of the making available (or communication to the public, or public performance) right?**

Cloud Providers would clearly benefit if “public” was so narrowly interpreted that the users of the Cloud were considered to be no “public” but a private, interconnected circle. In this case the making available to the “private” circle would not require a licence. No judgements concerning this question could be identified. In RapidShare I, however, it was indicated that works offered by a purely intercompany Cloud Service would not be “made available to the public” - only if the works were also intended to be used by external people.[140] This opinion is, however, surprising since § 15 III 2 UrhG defines “public” much broader.[141]

What is interpreted narrowly by German courts is the question of who is the one making works available to the public and thus can be liable as an offender. E.g., in all recent RapidShare judgements, it was held that RapidShare which only provides the technical means for making protected works available to the public by its clients had not committed this action itself. A broader interpretation by OLG Hamburg which had considered RapidShare itself to be the one making the works available to the public has been given up explicitly in the latest decision of 14.03.2012.[142] The main argument for this interpretation was that only RapidShare's users decided on making the works available to the public - not RapidShare itself.
The advantages of this interpretation for RapidShare as a Cloud Provider are that it cannot be liable as an offender. The comparably strong liability as a participant requires at least conditional intention (bedingter Vorsatz) concerning the main offence

140 OLG Düsseldorf, MMR 2010, 483, 485. The court explicitly talks about an intranet: works provided in an intercompany network were considered to be made available to the public only if third parties were intended to access the works as well (wenn die Daten “Außenstehenden” bestimmungsgemäß zugänglich sind).
141 In the case of an in-company celebration the members of one company were considered to be “public” in the sense of German copyright law, see BGH, NJW 1955, 1356 – Betriebsfeier.
142 OLG Hamburg, MMR 2012, 393 ff.

(Haupttat), which includes intention concerning the illegality of the uploads of the clients. This was denied by arguing that illegality of the uploads was not inherent to the business model.
Thus the “narrow” interpretation of who is the one making works available to the public plus the general acceptance of share hosting services as being legally neutral leads to the advantage for RapidShare that it can only be liable as a disturber. Examining the conditions of liability as a disturber, the interpretation of “making available to the public” became relevant again to determine the scope of the duty to desist, which was claimed against RapidShare. Since RapidShare neither made the works available to the public itself nor did it make its clients do it,[143] its contribution to the infringement is confined to enabling its clients' infringing behaviour. It was decided that the mere enabling could not be prohibited.[144]

Another advantage of the narrow interpretation of the making available right that can be illustrated with YouTube vs. GEMA are the higher hurdles to liability:[145] Since YouTube did not make works available to the public itself, but only its users did so, it could only be liable as a disturber. The making available of the technical infrastructure for the infringements by its users was said to be a sufficient contribution to let auditing duties and duties to behave come into existence. Only if the existence and breach of such duties can be proven, such a provider is liable at all.

One could also consider **Save.tv**[146] as a decision which interprets the making available to the public[147] quite narrowly, since this type of use was denied due to the technical process taking place. The relevant works had not been offered to the public out of Save.tv's sphere of access. They were only recorded to the private video recorders of the individual clients. That is, as soon as the works were within the sphere of access of Save.tv, they were not provided to the public but had already been called by the individual users. Hereby it was considered to be irrelevant that all clients of Save.tv together might constitute a “public”. Thus the claim to prohibit Save.tv to make works available to the public was dismissed, i.e., a clear advantage. But all in all it did not

143 RapidShare had only internal contractual relationships to the single users not to the whole internet public and it was the exclusive decision of its clients whether to make the works available to the public or not.
144 OLG Düsseldorf (RapidShare I), MMR 20110, 483, 485.
145 LG Hamburg, ITRB 2012, 128 even though these higher hurdles were overcome in this case.
146 OLG Dresden, MMR 2011, 413, 418.
147 In this case pursuant to §§ 87 I No. 2 Alt. 2, 15 II No. 2, 19a UrhG.

lead to a total acquittal of Save.tv. It was held to be liable for infringing the right to broadcast, §§ 87 I No. 1 Alt.1, 20 UrhG, which requires that the content of a show is rendered accessible to the public by certain technical means. This concerned the process before the TV-shows were stored on the private video recorders: Save.tv received the signals of the TV-shows by an antenna and transferred them to the video recorders (which are attributed to the clients as the ones who are considered to be producers of the fully automated reproduction). Since it was possible that the signal of a certain TV show was transferred to several video recorders of clients which are not connected personally and therefore must be considered as “public”, the court held that the works were rendered accessible to the public in the sense of §§ 20, 87 I No. 1 Alt. 1 UrhG and thus the right of broadcasting had been infringed.[148]
Hence the “narrower” interpretation of “public” in § 19a UrhG was somehow “compensated” by the broader interpretation of public in § 20 UrhG.

2) **According to the law in your country, what is the legal status (primary or secondary liability - contributory infringement or vicarious liability; aiding and abetting, other liability such as an inducer, “Störer”) of the provider of Cloud Services with regard to copyright infringing content uploaded by its users?**

Abstract:
A provider can be liable pursuant to **§ 97 UrhG as a primary infringer, an agitator, an aider and abettor or as a disturber (Störer)** (even though sometimes liability as a disturber is subsumed under §§ 823, 1004 BGB mutatis mutandis).
A provider is considered to be an offender if it either commits the infringement of copyright itself or if its clients' infringements can be attributed to it because it has either caused/provoked (veranlassen) it or has adopted the infringement as its own (sich zu eigen machen).[149]
Liability as an agitator or aider and abettor requires (among others) that there is at least conditional intent for the infringement of copyright (which is the most delicate precondition in case of providers).

148 OLG Dresden, MMR 2011, 413, 418.
149 Dreier/Schulze, Urheberrecht, § 97 Rn.23.

There is a current discussion in copyright law whether a provider which is no (primary) offender in the above mentioned sense can nevertheless be seen as an offender if its actions in the course of business constitute the serious danger that third parties infringe copyrights. The BGH is reluctant to take this approach.[150]

Claims against offenders, agitators, aiders and abettors can aim at a cease and desist order (§ 97 I UrhG) and if the offender acted with intent or negligence at damages (§ 97 II UrhG).

A provider which does not fulfil the conditions for liability as an offender, agitator or aider and abettor can still be liable as a **disturber (“Störer”)**.[151] Such claims only aim at a cease and desist order. They require that the disturber contributed knowingly and adequately-causal to the illegal infringement and that it was actually and legally possible as well as reasonable/acceptable (zumutbar) for him to prohibit and prevent the immediate infringement of copyright. The precondition “reasonable/acceptable” leads to the question of whether there is a breach of auditing duties/ duties to survey (Prüfungspflichten). Normally such a duty only arises once the infringement is known to the disturber. Once he knows about the infringement he has to react immediately, § 10 I No. 2 TMG.

Case Law:

RapidShare:[152] Liability as primary offender was clearly rejected. If anything, liability as a disturber came into consideration. In one case this was accepted (OLG Hamburg), three times it was denied (OLG Düsseldorf). One of the latter cases was reviewed by the BGH which held in its not yet published decision[153] that RapidShare might be liable as a disturber due to a breach of duty to prevent its clients from infringing copyrights since it had not applied a filter for words.

YouTube vs. GEMA:[154] Liability as a primary offender was rejected because YouTube

150 See habilitation speech of Dr. R. Podszun, 19.07.2012 p. 12.
151 Find more details at Dreier/Schulze, Urheberrecht, § 97 Rn.33 f. The courts are not consistent whether to grant this claim under § 97 UrhG or § 1004 BGB mutatis mutandis.
152 See above and: OLG Hamburg, MMR 2012, 393 ff; OLG Düsseldorf, MMR 2010, 483 ff, 702ff, MMR 2011, 250 ff.
153 Judgement of 12.07.2012, file number I ZR 18/11 – Alone in the dark.

had not adopted the contents of its users as its own. The relevant criteria to find out whether it had adopted the users' contents as its own or not were the following:[155]

- Is there an editorial control of the videos by YouTube?
- How are the videos presented?
- What is the editorial core content of the internet offer?
- To whom are the videos assigned commercially (e.g., has the provider been granted unlimited licences for its own commercial usage)[156]?

YouTube was however held to be liable as a disturber since it had contributed sufficiently to the infringement by enabling third parties to infringe even though it had been possible to prevent it. Illegal uploads on YouTube were held to be no rare “phenomena”; hence, an action against it could have been expected.

Kino.to:[157] criminal liability as a primary offender was found.

Marions-kochbuch.de:[158] liability as primary offender was found because Chefkoch.de had adopted the content uploaded by its users as its own.

Save.tv:[159] liability as primary offender concerning the right of broadcasting was accepted.

154 LG Hamburg, ITRB 2012, 128 ff.
155 Summarized like this in the habilitation speech of Dr. R. Podszun, 19.07.2012 p. 10.
156 If the licence can be withdrawn any time without limitations there is, however, no strong commercial assignment, see LG Leipzig, in MMR 2012, 404, 405.
157 LG Leipzig, 11.04.2012, file number 11 KLs 390 Js 183/11.
158 BGH, GRUR 2010, 616 ff.
159 BGH BeckRS 2009, 17249, OLG Dresden, MMR 2011, 610.

3) In your country, do Cloud Service providers benefit from an exception to liability (such as, e.g., under the EU e-Commerce Directive), and if so, to what extent (e.g., total exemption from liability or exemption only from duty to pay damages)?
Please cite to and briefly describe statutory provisions and relevant case law.

Yes. The standards of the E-Commerce-Directive have been implemented in §§ 7-10 TMG.[160] First, none of the exceptions applies to the provider's own content, § 7 I TMG.[161] Second, those exceptions primarily affect liability as an offender, i.e., if they apply no damages can be claimed. Their applicability to the general Störerhaftung (which aims at elimination and omission of infringements) is not clear. According to the wording of § 7 II TMG, at least § 7 II 1 TMG[162], which limits liability of providers by denying a general obligation to monitor, should be applicable to the general Störerhaftung as well.[163] That is, providers will neither be liable as a disturber for not monitoring the information which they transmit or store nor for not actively seeking facts or circumstances indicating illegal activities – provided there was no evidence of an infringement.[164] Pursuant to § 7 II 2 TMG,[165] however, §§ 8-10 TMG shall not affect the possibility of requiring the service provider to terminate or prevent an infringement. This suggests that §§ 8-10 TMG are not applicable to Störerhaftung.[166] In the case law and the legal literature it is, however, controversial whether or not §§ 7-10 TMG apply to the general Störerhaftung pursuant to §§ 823, 1004 mutatis mutandis BGB or § 97 UrhG respectively.[167]

160 Altenhain, in: Münchener Kommentar zum StGB, Vor § 7 TMG Rn.1.

161 The differentiation between own content and content of other persons finds no exact equivalent in the E-Commerce-Directive. The latter assumes this, however, by only regulating exceptions for “information provided by a recipient of the service”, see Art. 12 I, 13 I, 14 I E-Commerce-Directive, see Hoffmann, in: Spindler/Schuster, Recht der elektronischen Medien, 2011, § 7 Rn. 6.

162 Complies with Art. 15 I E-Commerce-Directive.

163 See, Müller-Broich, Telemediengesetz, 2012, § 7 Rn. 9 with further references; Hoffmann, in: Spindler/Schuster, Recht der elektronischen Medien, 2011, § 7 Rn. 30, approving the relevance of § 7 II 1 TMG for preventive injunctive reliefs in intellectual property law; Dreier, in: Dreier/Schulze, Urheberrecht § 97 Rn. 33 with reference to the jurisdiction.

164 In this spirit also BGH, decision of 12.07.2012, not published yet, in its press release No. 114/2012 which examined Störerhaftung. The BGH held that RapidShare, as a provider in the sense of the TMG, was not obliged to generally monitor whether content which is stored on its servers infringed copyrights. Such an extensive auditing duty was not even demanded due to the fact that the service of RapidShare was particularly prone to infringements of copyrights because legal possibilities to use the service were widespread and common.

165 Which complies with Art. 12 III, 13 II, 14 III E-Commerce-Directive.

166 Hoffmann, in: Spindler/Schuster, Recht der elektronischen Medien, 2011, § 7 Rn. 32 with reference to recital 46 E-Commerce-Directive. He also points out the possible conflict of values between § 7 II 1 and 2 TMG, Rn. 35 ff.

167 The courts are inconsistent in both: whether to apply § 97 UrhG or §§ 823, 1004 BGB mutatis mutandis and whether to apply §§ 7-10 TMG in case of the general Störerhaftung, see among others OLG Düsseldorf, MMR 2010, 483 (RapidShare I) which applies §§ 823, 1004 BGB mutatis mutandis and denies applicability of §§ 7-10

The general Störerhaftung is limited by the requirement of a breach of (auditing) duties.[168] In this context some valuations laid down in §§ 8-10 TMG can become relevant (which might justify the classification of this requirement as an exception of liability in the sense of the question). A provider which has reacted immediately after gaining knowledge of an infringement of rights by contents of its users (not of its own!), is not liable as a Störer;[169] a valuation which reminds of § 10 I No. 2 TMG.[170]
The same conclusion was drawn by the OLG Hamburg[171] which additionally argued with case law of the ECJ in which Art. 14 I, 15 I E-Commerce-Directive had been applied for a "neutral" service provider. This EU case-law was held to correlate with the German jurisprudence.[172]

In conclusion: even though the formal applicability of §§ 7-10 TMG is controversial within the Störerhaftung, some valuations laid down in §§ 7-10 TMG for exceptions from liability (differentiation between own content and content of third parties and the duty to react immediately after gaining knowledge) are valid in the Störerhaftung as well. If other than the provider's own content infringe copyrights and the provider has

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TMG in contrast to LG Hamburg, ITRB 2012, 128 f (YouTube) which applies § 97 UrhG and § 7 TMG (not explicitly though) and § 13 TMG, or BGH, GRUR 2010, 616 ff (Marions Kochbuch) which applied § 97 UrhG and §§ 8-10 TMG. In the latter decision the BGH, however, remarked that §§ 8-10 TMG could not completely exclude injunctive relieves which are based in copyright law. See on this controversy also Podszun, habilitation lecture, p. 6; Nordmann, in: Lehmann/Meents, Handbuch des Fachanwalts Informationstechnologierecht, 2. Auflage, 2011, chapter 16 Rn. 124, both referring to BGH, Internetversteigerung I, MMR 2004, 860, 863.

168 Which is one element of testing the "reasonableness" (Zumutbarkeit) of the claimed right against the disturber. See v. Wolff, in: Wandtke/Bullinger, Urheberrecht, 2009, §97 Rn. 16; OLG Hamburg, RapidShare II, MMR 2012, 393, 396 with further references to the continuous jurisprudence of the BGH; OLG Düsseldorf (RapidShare I), MMR 2010, 483, 484 with further references.

169 In this spirit **BGH**, decision of 12.07.2012, not published yet, in its press release No. 114/2012. It was held that an auditing duty would arise only once **RapidShare** had been notified of a clear infringement by a particular content uploaded by its clients. Even the **BGH, Internetversteigerung I** to which the OLG Düsseldorf referred when saying that §§ 8-10 TMG were not applicable, it was held that it was not reasonable for a provider (eBay) to control all offers before they were published since such a duty would put into question the whole business model. But as soon as the provider was informed about a clear infringement it had to freeze the offer immediately (and here § 11 S.1 No. 2 TDG was quoted which corresponds to § 10 S.1 No. 2 TMG!) and prevent similar infringements. **LG Hamburg**, MMR 2012, 404 ff. - **YouTube**.

170 Equivalent to Art. 14 I (b) E-Commerce-Directive. This opinion is shared by commentators of the YouTube decision (LG Hamburg, MMR 2012, 404 ff.) who interpret the Judgement as an application of the TMG (in particular § 10 S. 1 No. 2 TMG (Hansen, LG Hamburg, ITRB 2012, 128) or rather criticize the wrong interpretation of Art. 15 E-Commerce-Directive (Leupold, LG Hamburg, MMR 2012, 404, 409). See also Dreier, in: Dreier/Schulze, Urheberrecht § 97 Rn. 33 with reference to the jurisdiction.

171 OLG Hamburg, RapidShare, MMR 2012, 393, 396 held that it was not acceptable (zumutbar) for RapidShare to audit every uploaded content; only if a clear infringement is communicated, the concrete offer must be locked immediately and measures must be taken to prevent similar infringements.

172 Therefore the OLG examined in great detail whether RapidShare was a "neutral" service or not and concluded that it was not (because it enabled its users to remain completely anonymous. See ECJ, L'Oreal vs. E-bay, GRUR 2011, 1025 ff; OLG Hamburg, RapidShare, MMR 2012, 393, 396 ff (399).

no knowledge of it, it is not liable at all.

Case law concerning the interpretation of §§ 7, 10 TMG/ Art. 14, 15 E-Commerce-Directive, namely the differentiation between “own” content and other (non-own) content. Case law concerning the determination of whether the provider has acted “expeditiously to remove or disable access to” the infringing information (§10 I No. 2 TMG/ Art. 14 I lit.b E-Commerce-Directive) is described under question 5.2.4.

Differentiation between “own” content and other (non-own) content:

BGH (Marions-Kochbuch.de)[173]: it was held that Chefkoch.de had adopted the pictures uploaded by its users as its own.[174] “Own” contents are not only contents made by the provider itself but also other contents which the provider adopts as its own. To determine this, an objective view on the basis of an overall observation (Gesamtbetrachtung) of all relevant circumstances was taken. It was decided that an understanding user of the internet would have the impression that the pictures had been adopted by Chefkoch.de as its own. The provider had editorially controlled the pictures and recipes before unlocking them as to their completeness and correctness. In the print version, pictures and recipes appeared under a well visible emblem of Chefkoch.de. Recipes constitute the editorial core content of the whole web page of Chefkoch.de and in its General Terms and Conditions Chefkoch points to the editorial control of its contents. Moreover, via the General Terms and Conditions, Chefkoch is granted licences for all uploaded data (recipes, pictures, texts) to reproduce them and to pass them to third parties and Chefkoch had actually offered recipes to third parties for commercial use. Thus Chefkoch strongly exploited the rights being granted to it on other people's contents and hence attributed the content economically to itself.

Due to all these circumstances it was held to be of no importance that users of the web pages of Chefkoch could recognize that the content provided there did not originate from Chefkoch but from third parties.

Chefkoch was held to have shown too little distance from the published content to consider it to be other than “own” content. Since the provider did not restrict its contribution to pure carriage or privileged caching or hosting in the sense of Art. 12-14

173 BGH, GRUR 2010, 616 ff.

174 BGH, GRUR 2010, 616, 618.

E-Commerce-Directice (EG 2000/31/EG), the liability of the provider was not excluded.

YouTube:[175] The uploaded videos on YouTube were held to be no “own” content. The court applied the same approach as above (objective view; understanding user..) The relevant criteria were:
- editorial control of uploaded content? (no)
- the manner of presenting the content (in the case: every understanding user knows that the videos are made by third parties – not by YouTube)
- are the uploaded contents part of the editorial core content of the web page? (there was no “core content” since there was no editorial control at all and very diverse uploaded data)
- does the provider allocate the content to itself economically, e.g., by letting users grant to it the licenses for commercial use of the content (in the case of YouTube: no strong economic allocation was given, since the licences were freely revocable. The fact that the service was not for non-profit reasons but that YouTube wanted to realise profit by advertisements was not enough).

4) **Also according to the law in your country, what duty of care is owed by Cloud Service providers to monitor and eventually remove copyright infringing content?**

Duty of care concerning own content:
Pursuant to § 97 I UrhG an action for injunctive relief can be brought against Cloud Service providers which infringe copyrights with their own contents. For this claim (aiming to sentence the wrongdoer to cease and desist – if there is a danger of

175 LG Hamburg, MMR 2012, 404 ff.

repetition – the infringement of copyright) no specific breach of duty must be proven.

However, if damages are claimed pursuant to § 97 II UrhG, the infringement of copyright must have been intentional or a result of negligence (intent means: willingly or knowingly; negligence means: against due diligence (entgegen der im Verkehr erforderlichen Sorgfalt, § 276 II BGB); the "due" or "necessary" diligence must not be confused with the common practice). There are high requirements on keeping the due diligence: someone who wants to use somebody else's copyrighted work must obtain certainty about the existence of a copyright and about the scope of his right to use the work. Thus there are auditing and investigating duties.[176]

Duty of care concerning other than one's own content:

As soon as other than one's own content is concerned, the so called Störerhaftung applies if the Cloud Provider has somehow contributed willingly and adequate-causally to an illegal infringement of copyright provided that it was legally and factually possible and reasonable for him to stop or prevent the immediate infringement.[177] Störerhaftung shall not lead too easily to liability of third parties. Thus the BGH additionally requires the breach of auditing duties (Verletzung von Prüfungspflichten) the scope of which is determined by what is reasonable (zumutbar) in the circumstances of the individual case.[178] Hereby the function and tasks of the provider and the personal responsibility of the person directly committing the illegal infringement must be considered.[179] In case that infringing content has been uploaded on servers of Cloud Providers they have to take all technically and economically reasonable steps – without endangering their own business model – to prevent that the work is offered by different users again over their servers.[180] In general, auditing duties only come into existence after the provider has gained knowledge of the infringement. Once it knows hereof, it has to react immediately (§ 10 I No. 2 TMG, Art.14 I lit.b E-Commerce-Directive, "give notice-and-take-down-procedure"). Moreover, providers are obliged to ensure that similar infringements are not repeated. However, a general duty for providers to control

176 See Dreier, in: Dreier/Schulze, Urheberrecht § 97 Rn. 57.
177 See Dreier, in: Dreier/Schulze, Urheberrecht § 97 Rn. 33, summarizing the permanent jurisdiction of the BGH.
178 See Dreier, in: Dreier/Schulze, Urheberrecht § 97 Rn. 33, summarizing the permanent jurisdiction of the BGH.
179 OLG Hamburg, File number 5 U 87/09, RapidShare, MMR 2012, 393 ff.
180 See BGH, RapidShare, 12.07.2012, File Number I ZR 13/11, only press release (No. 114/2012) published yet.

contents of their users does not exist (see § 7 II TMG, Art. 15 I E-Commerce-Directive). As long as they do not know about infringing content and are not aware of facts or circumstances out of which the illegal action or information becomes apparent, they are generally not liable at all (§10 I No. 1 TMG, Art. 14 I lit.a E-Commerce-Directive).[181] (These rules correspond with those developed for the liability of providers of online market-places which were explicitly held to be applicable to share-hosting services by OLG Hamburg).[182]

Case-specific explanations specifying the above introduced general determination of the duty of care to monitor and remove copyright infringing content:

There is detailed and sometimes controversial jurisdiction concerning the concrete duties of Cloud Providers.

RapidShare:

The **BGH**[183] decided that RapidShare might have complied with its duty to take "all technically and economically reasonable steps to prevent – without endangering its own business model – that the work[184] was offered by different users again over its servers" by using a word filter. Auditing duties can even range over admitting hyperlinks of certain link collections which lead to data saved at RapidShare's servers. It was held to be principally reasonable/acceptable (zumutbar) to control collections of links by third parties which lead to the infringed work on the servers of RapidShare. The judgement of the OLG Düsseldorf[185] was repealed and the case was remanded back to the OLG Düsseldorf because the fact-finding concerning the reasonableness of auditing measures was not sufficient to decide on the question of a breach of duty by the file hoster. It is not apparent (yet) that the BGH criticises legal statements of the OLG Düsseldorf.

OLG Hamburg[186] differentiated between share-hosting providers which merely fulfil a

181 Dreier, in: Dreier/Schulze, Urheberrecht § 97 Rn. 33 with reference to the jurisdiction. Alike: OLG Hamburg, File number 5 U 87/09, RapidShare, MMR 2012, 393 ff.

182 File number 5 U 87/09, RapidShare, MMR 2012, 393 ff.

183 12.07.2012, File number I ZR 18/11 (only press release published yet), see http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/list.py?Gericht=bgh&Art=en&sid=429da583e82dd0e1856b1c5c23a2070f.

184 In the case a computer game "alone in the dark".

185 RapidShare III, 21.12.2010, MMR 2011, 250 ff.

186 14.03.2012, File Number 5 U 87/09, MMR2012, 393, 397 ff.

purely “neutral” function by only providing the infrastructural and technical means for the infringements of third parties and those who play a more active part by suggesting its users tendentiously to commit infringements of copyrights. For the latter, higher duties of care would exist than for the former. The court decided that RapidShare was such an active provider due to its structural specialties (it allowed its users to remain completely anonymous) and because it had been soliciting obviously illegal activities in former times (even though RapidShare had ceased this in the meantime, the court decided that the past advertising was still effective in the relevant circles). RapidShare had to comply with higher duties than only the notice-and-take-down-procedure. The decision of the ECJ “Scarlet Extended SA vs. SABAM” was discussed.[187] In conclusion it was held that RapidShare had not fulfilled its duties:[188] its “**abuse division**” was no measure at all but only serves to take measures and thus has to be as big and well equipped as necessary to comply with the auditing duties. A **limitation of downloads** must be carried out to reduce infringements even if this has no drastic effect. The **notice in** RapidShare's **General Terms and Conditions** that it is unlawful to upload copyright protected works was considered to be a necessary but not sufficient measure. The introduction of a **registration procedure** was considered to be

187 A case concerning “neutral” service in the sense of the OLG Hamburg in which a measure had been accounted unreasonable which required a pure internet service provider to establish a temporary unlimited, general and pre-emptive filtering system for all users and for all in- and outgoing communication at its own expense. On the other hand it was reasonable to carry out a manual control of suspicious offers filtered by a certain software.

188 OLG Hamburg, MMR 2012, 393, 400.

insufficient since it was not coercive and only enabled third parties to download more quickly (why should the uploading parties waive their anonymity to enable third parties a quicker download?). Naturally, **infringing content** must be **deleted just as the account** of the infringing person (already after the first detected infringement! But the user must be notified of this in advance so that he can react and save legal data elsewhere). Since RapidShare is an “active” provider (see above), it cannot argue that the **injured party could identify infringing** offers him-/herself. A **MD5-Filter** can only detect exact identical data and is therefore not sufficient. As to a **word filter,** it is not reasonable to oblige RapidShare to apply a word filter before the upload of a data to prevent infringements of copyright effectively since this could also detect legal (private) copies. RapidShare does not need to manually control all data with a suspicious name. If the use of a word filter did not lead to clear results as to whether the data was uploaded legally or not, the provider is not obliged to control the link manually. Such pro-active measures are unreasonable. But the correlating reactive duty to eliminate infringing content afterwards exists, namely: deleting infringing download links, further searching for further similar infringements of the same work (look for further links with identical and similar names); RapidShare has also to control the immediate surroundings of a link (whether it indicates an infringing content of the link). RapidShare's duty is not limited to control known link resources but there is a **general duty to observe the market** with reference to infringing contents which are offered via links to RapidShare's service (i.e.: search engines like Google, FaceBook, Twitter and similar services must be controlled with suitably formulated queries - **control of link collections).** If those measures were not practicable or prove to be not efficient enough, RapidShare should think of introducing a duty to register and to collect and control certain master data.

Note: an appeal on points of law was lodged to the BGH in this case and is still pending.[189]

OLG Düsseldorf:[190] since the business model of RapidShare is not based on the use of illegal content it is not acceptable for the provider that auditing duties put its whole business model in question. The mere admittance of third party's conduct cannot be

189 File Number I ZR 80/12, see the note of the editorial department in MMR 2012, 393, 403. Not decided yet (24.08.2012).

190 27.04.2010, File Number I-20 U 1166/09, MMR 2010, 483 ff.

prohibited. A word filter was not effective since the names of the movies in question were too trivial. Thus locking whole words would limit the freedom of speech inadequately. Moreover locking certain names is improper since names of data can be changed any time and the users do not depend on file names since they can use external links. A focused human control of certain contents with an increased possibility for infringement is not realistic due to the great manpower requirements. The blocking of certain IP-addresses is considered to be unacceptable since it is constantly used by so many different people that the probability to detect a further infringement is disproportionally low. Thus all named measures were considered to be not sufficiently suitable to detect infringements. Link collections are outside of RapidShare's scope of power thus it is impossible for RapidShare to influence them and their configuration. There is no obligation to search other than own contents for infringements the share-hoster does not know about. Without a business connection between the share-hoster and the provider of link collections which makes the share-hoster benefit from the success of the latter, a manual control of the links is not acceptable. Finally, RapidShare could not be prohibited to have copies of the works in question saved on its infrastructure since this could be a legitimate upload, covered by the exception for private copies, § 53 UrhG.

Also in RapidShare II[191] it was decided that there were no reasonable measures for RapidShare to prevent the unlawful making available of works by its clients.

YouTube.[192] In YouTube the court made several suggestions on how to comply with auditing duties: From the time of gaining knowledge thereof the provider has to immediately lock infringing videos and take measures to prevent future uploads. For this it has to use its own **content-ID-program** and an **additional word filtering software** (and potentially a **specific dispute procedure** in which the user is informed about the possible infringement and is enabled to comment on it). A duty to control the complete existing stock of data does not exist however.

191 OLG Düsseldorf, MMR 2010, 702 ff.
192 LG Hamburg, 20.04.2012, File number 310 O 461/10.

5) What evidence must a rightholder present in order to have infringing content removed?

The burden of proof for all preconditions of a claim pursuant to § 97 UrhG lies on the plaintiff.[193] He has to prove all factual preconditions (the right of information which is deduced from § 97 I 2 UrhG[194] only serves for the calculation of damages, not to find out about the infringement itself).[195]
The injured person must particularly prove that he is the holder of the injured right, the action of infringement, etc., all quoted above.
No specifics of the Cloud situation could be identified. In particular there is no reversal of burden of proof.

6) In your country, are there any contracts that have been concluded between Cloud Service providers and rightholders concerning the use of copyrighted material by the users of the Cloud Services?

There is a licence agreement between Omnifone and the GEMA. Omnifone offers among others Cloud-based music services; GEMA is the German collecting society for composers, scriptwriters, publishers of music and other rightholders. According to GEMA this was the first licence agreement for a widespread service for music subscriptions.[196] More details are not available. Being asked whether standardized clauses for Cloud Services had been developed, the GEMA did not respond.
The GEMA also negotiates with Spotify and YouTube.[197] YouTube did not agree to the demanded one cent per played video.[198] After the decision of the LG Hamburg in YouTube vs. GEMA, both parties announced to return to the negotiating table.[199]

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193 OLG Düsseldorf, RapidShare I, MMR 2010, 483, 484
194 Wild, in: Schricker/Loewenheim, Urheberrecht, 4. Auflage § 97 Rn. 187.
195 Wild, in: Schricker/Loewenheim, Urheberrecht, 4. Auflage § 97 Rn. 209.
196 GEMA, press release, 23.01.2011, https://www.gema.de/presse/pressemitteilungen/presse-details/article/omnifone-und-gema-schliessen-deutschlands-ersten-lizenzvertrag-fuer-umfassenden-musik-abonnementdien.html.
197 Golem, 13.03.2012, http://www.golem.de/news/gema-Spotify-in-deutschland-ohne-gema-vertrag-gestartet-1203-90468.html.
198 Pressemitteilungen-online.de, 29.07.2010, http://www.pressemitteilungen-online.de/index.php/lizenzstreit-nun-vor-gericht-gema-wollte-1-cent-pro-videoaufruf-von-YouTube/.
199 Stern, 20.04.2012, http://www.stern.de/digital/online/urteil-im-fall-gema-vs-YouTube-bye-bye-rivers-of-babylon-1816380.html.

7) **In your country, what copyright-avoiding Cloud Services are operating successfully, and what services that sought to be avoiding copyright have been banned and eventually shut down?**

Kino.to had been shut down in June 2011 due to the suspicion of being a criminal association for committing infringements of copyrights.[200]
All other Cloud Services mentioned above still operate.

8) **In your country, are there any legislative changes under discussion as regards the liability of service providers who provide for Cloud Services? In particular, do you think that liability of service providers will be reduced or, rather, increased?**

The German Minister of Justice declared[201] that the proper instruments to regulate copyright in the internet convincingly and all-embracingly have not yet been found. The position of the rightholder shall be strengthened. A new draft for the German copyright act shall be presented after the summer break. Supposedly the liability of service providers will be increased.

9) **Do you see any progress regarding filtering technology?**
No.
There is however an extensive discussion on filtering technologies in the courts (to determine which "reasonable" duties a Cloud Provider has to fulfill). For example, in YouTube vs. GEMA,[202] the provided MD5-Filter[203] and the selfmade content-ID-Program which enables to identify sound recordings were not held to be sufficient. In addition to those purely technical measures, a system was held to be necessary which enables an immediate dialogue between rightholders and the user who had uploaded the work in question (which was sufficiently realised by the "dispute-procedure" provided). Moreover, the court demanded – in an obiter dictum – the introduction of a word-filter in combination with another dispute procedure: After being informed of an

200 See http://www.computerbild.de/artikel/cb-News-Sicherheit-Kino.to-gesperrt-Nutzer-Folgen-Raubkopien-6251384.html.
201 See Interview of Sabine Leutheusser-Schnarrenberger, Minister of Justice, in: Spiegel, 24/2012, p. 26 ff.
202 LG Hamburg, MMR 2012, 404, 406f.
203 Message-Digest Algorithm 5.

infringement of copyrights, YouTube shall filter out all new uploads with the same title as that of the protected work by means of the word-filter. Since a work with the same title might nevertheless not infringe copyright, the court suggests an additional information procedure: YouTube informs its user that his upload has the same title as a protected work whose right holder had not agreed to publishing it on YouTube. Only if the user confirms that his upload would not infringe this copyright the upload can be finished. However a link to this uploaded data should be sent to the right holder of the work with the identical title enabling him to control whether his right is infringed or not.[204]

In conclusion: filtering technologies progress in so far as they are complemented with communication procedures.

5.3 – "Copyright-avoiding" business models operated by authors for the "Cloud"

1) **In your country, is there a noticeable use of "copyright-avoiding" business models, such as Creative Commons (CC) or comparable open content licenses by right holders with respect to Cloud-based exploitations of works?**

The above quoted Cloud Services do not particularly characterise themselves with creative commons or other open content licenses. But as it can be seen above (session 4 question 3 and 4), wide freedoms for the users are granted without any reward.

Clipfish.de writes in its General Terms and Conditions that it enables its users among others "to share the contents with a broad and open Community." All offered services by Clipfish are exclusively offered for private use – no commercial use permitted.[205] Furthermore, it says that the purpose of the community requires that all its contents are freely accessible for third parties and can be used by third parties for their own

204 In German literature this suggestion is criticised because it would not sufficiently recognise Art. 15 E-Commerce-Directive, Art. 3 I 2004/48 Directive and Art. 8 and 11 of the charter of fundamental rights of the European Union. Remark of Leupold to YouTube, MMR 2012, 404, 409.

205 General Terms and Conditions of Clipfish, II.

purposes. **SoundCloud** has around 16.800 cc-licenced tracks uploaded. The **Project Gutenberg** offers works whose copyright has already expired (or whose authors have agreed).

But there are other Cloud Services - not yet mentioned – like the German Wikipedia,[206] which grants all its contents under a free licence (like the GNU Free Document Licence or the Creative Commons Attribution ShareAlike Licence.)[207]

Further models using CC(-like) licences, concerning:

- pictures: e.g., commons.Wikimedia ("freely usable" content),[208] flickr ("CC")[209]

- music: e.g., netlables ("CC"),[210] freemusicarchive ("Creative Commons and other licences")[211]

- software: e.g., kde,[212] gnu,[213] opensuse[214] (GNU-GPL and other free/open source)

2) **If so, in what areas (music, literature, audiovisual works, scientific works etc.) are such licenses most often used?**

Music, works of language (including software), pictures.

3) **Are there any figures available as to how the authors of such works generate income from such Cloud-based exploitations, and how much?**

No.

206 The services of Wikipedia are stored on several servers (currently around 370 server in Tampa and Amsterdam), http://de.wikipedia.org/wiki/Wikipedia.
207 See German Wikipedia, http://de.wikipedia.org/wiki/Wikipedia.
208 http://commons.wikimedia.org/wiki/Main_Page.
209 http://www.flickr.com/creativecommons/.
210 http://netlabels.de/.
211 http://www.freemusicarchive.org/.
212 http://www.kde.org/community/whatiskde/.
213 http://www.gnu.org/.
214 http://de.opensuse.org/Hauptseite.

4) **Also in your country, what legal obstacles are authors faced with when making use of open content and CC-licenses?**
Examples might be the unenforceability of such licences; the refusal to award damages for unauthorized commercial use of works that have been made available only for non-commercial use; collecting societies refusing to represent authors who want to market some of their works under a CC-licence; the exclusion of CC-authors from receiving remuneration under a private copying regime etc.

No, there are no legal disadvantages for authors using CC-licences at all. According to German law,[215] the collecting societies are obliged to represent authors which belong to their field of action. Naturally any right holder can only grant an open content licence if the concerned rights to use have not been granted elsewhere, e.g., to a collecting society.[216] I.e., for one and the same work a CC-licence and representation by a German collecting society are mutually exclusive. But no discrimination at all can be identified towards authors who grant CC-licences for some of their protected works and want to be represented with regard to their other works by a German collecting society.

Session 6 - Future Model of One-Stop-On-Line Licensing in the Cloud Environment

1) **Does your country have specific private international law rules for copyright in particular and for intellectual property in general or are there general rules of private international law that apply in these circumstances?** *In particular do your country's rules of **judicial competence (personal jurisdiction)** make it possible to sue a foreign intermediary who makes it possible for infringements to occur or to impact in the forum? **Which law applies** in such instances? Would the law applicable to the primary infringement apply? Would the law of the intermediary's residence or place of business apply?*

There is no specific **private international law** rule only for copyright but for intellectual property in general: Art. 8 Rome II[217] determines as applicable law for infringements of

215 See § 6 UrhWG, Urheberrechtswahrnehmungsgesetz.
216 Paul, in: Hoeren/Sieber, Multimedia-Recht, 2012, part 7.4. Rn. 139.
217 Regulation EC/864/2007.

intellectual property rights – including copyright – the law of the country for which protection is claimed (lex loci protectionis, or Schutzlandprinzip). Art. 8 Section 2 Rome II provides an exception for infringements of unitary Community intellectual property rights which is not applicable in case of copyright. Hence copyright is not treated similar to other intellectual property rights. The law applicable pursuant to Art.8 Rome II may not be derogated, Art. 8 III Rome II.

As to the applicable law, the main problem with Clouds is that all legal orders could be applicable (since the infringing action "in / out of a world wide Cloud" could affect all existing territories).[218] It is highly controversial how this "impracticable result" could be avoided.[219]

The **judicial competence** is regulated in the EuGVVO[220] and the ZPO.[221] For infringements of copyrights Art. 5 No. 3 EuGVVO is applicable. Accordingly, persons who are domiciled in a Member State of the EU[222] may be sued in another Member State *in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur.* (The latter shows that rule of judicial competence also applies to preventive injunctive reliefs.)[223] Art. 5 No. 3 EuGVVO thus implements the Schutzlandprinzip as well. The site of occurrence is the place of the causal event and the place at which the damage has occurred but not the place of the purely indirect (additional) damage. In cases taking place in the internet it is said to be decisive where the web presence shall have the intended impact.[224]

If the EuGVVO is not applicable (because the defendant is not domiciled in a Member State and Art. 22 and 23 EuGVVO are not applicable), the internationally competent jurisdiction of German Courts is given if there is a local jurisdiction pursuant to §§ 12 ff ZPO.[225] The most relevant clause is § 32 ZPO which is the German counterpart to Art. 5 No. 3 EuGVVO and declares the court to be responsible for those delicts which have been committed in its district. This encompasses the place of action (Handlungsort) as

218 See among others: Nägele/Jacobs, ZUM 2010, 281, 284; Schulz/Rosenkranz, ITRB 2009, 232, 236; Meents, in: Handbuch des Fachanwalts Informationstechnologierecht, 2. Auflage 2011 Kap. 7 Rn. 271.

219 Nägele/Jacobs, ZUM 2010, 281, 284 f.; Marko, in: Blaha/Marko/Zellhofer/Liebel, Rechtsfragen des Cloud Computing, Medien und Recht Verlag, Wien 2011, S. 48.

220 EC/44/2001.

221 Zivilprozessordnung.

222 Without Denmark, Art. 1 III EuGVVO.

223 Dreier, in: Dreier/Schulze, Urheberrecht, Vor §§ 120 ff Rn. 61.

224 Dreier, in: Dreier/Schulze, Urheberrecht, Vor §§ 120 ff Rn. 61.

225 This relation between international and local jurisdiction is an unwritten rule of German law, see Dreier, in: Dreier/Schulze, Urheberrecht, Vor §§ 120 ff Rn. 63; alike: Katzenberger, in: Schricker/Loewenheim, Urheberrecht, 4. Auflage 2010, Vor §§120 ff Rn. 170.

well as the place where the protected right was infringed (Erfolgsort). In the case of copyright infringement, both places are the same: the copyright is infringed where the work is either reproduced, made available to the public, broadcasted etc. without a licence.

For the case of making a work available to the public the same problems arise as above to determine the **applicable law**. Some argue that the relevant action takes place at every place from which the work can be accessed (in case of web services, that would be every court district with internet access!) – possibly limited in cases of abuse of rights.[226] Others think this interpretation is too broad since § 32 ZPO is based on the idea of making the court with the closest connection to the facts responsible. Thus it is argued that only those courts should be responsible on whose districts the internet presence is intended to have an effect ("bestimmungsgemäße Auswirkung").[227]

2) **Does your national collective rights management organisation grant multi-territorial licences and are there Cloud-specific licence models when it comes to collective licensing?** *If so, does this include rules on cross-border contracts (including jurisdiction and choice of law aspects)?*

No. Currently the conventional national collective rights management organisations cannot grant multi-territorial licences (no one-stop buying).

But firstly there is a new proposal (11th July 2012) for a directive of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market,[228] which aims among others to facilitate "the multi-territorial licensing of the rights of authors in their musical works by collecting societies representing authors".[229] Secondly a German GmbH has been founded, called CELAS.[230] It is jointly owned by the German GEMA[231] and the British MCPS-PRS.[232] This company is entitled to grant pan-European licences[233] for the whole Anglo-American repertoire of the music publisher EMI Music Publishing.[234]

226 LG Hamburg, file number 308 O 271/07, ZUM-RD 2008, 202, 204.
227 See: Katzenberger, in: Schricker/Loewenheim, Urheberrecht, 4. Auflage 2010, Vor §§120 ff Rn. 172 with many more references; Dreier, in: Dreier/Schulze, Urheberrecht, Vor §§ 120 ff Rn. 64 with further references.
228 COM (2012) 372.
229 COM (2012) 372, Explanatory Memorandum 1.1.
230 http://www.celas.eu/CelasTabs/About.aspx.
231 That is the German collective rights management organisation for musical works.
232 This is the British music Collective Rights Manager.

As to Cloud-specific licence models: in January 2011 the GEMA concluded a contract with Omnifone for an all-embracing music-subscription-service for – among others – the extensive provision of Cloud-based music-services.[235] This is said to be the first licence agreement in this area which is believed to be trend-setting but neither this agreement nor standardized Cloud-clauses have been published so far.

233 For 42 European Countries, see http://www.celas.eu/CelasTabs/Territories.aspx.

234 EMI Music Publishing Europe Ltd. For more details see Heyde, Die grenzüberschreitende Lizenzierung von Online-Musikrechten in Europa, Stämpfli Verlag, C.H. Beck Verlag, 2011, p. 136 ff.

235 https://www.gema.de/de/presse/pressemitteilungen/presse-details/article/omnifone-und-gema-schliessen-deutschlands-ersten-lizenzvertrag-fuer-umfassenden-musik-abonnementdien.html.