Péter TARRAI-Congress
2012 – KYOTO
Questionnaire

Response by the Hungarian ALAI Group

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Session 1
—Developments of New Platforms

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

Response: The "cloud" is a global phenomenon. Its infrastructure, its most well-known applications and its terminology have been developed in other countries which are more advanced in the field of IT technology and business methods. Therefore, it is normal that no specific definition and terminology is applied in Hungary; we use the same concepts and same categories which seem to be, by now, quite well known a broadly used practically everywhere.

We share the view that "cloud" is a new name – a new metaphor – used for certain phenomena the elements of which did exist also before this term emerged and became fashionable. By this, we refer to one of the key characteristics of the "cloud," namely that the users' digital contents, including their personal data as well as copies of protected works and objects of related rights, are not stored in PCs, laptops or other personal devices but on servers operated by others. There were e-mail services (such as those operated by Yahoo and Google) and there were social networks, such as Facebook, etc. The term "cloud" has become fashionable as a result of two parallel developments: (i) some global platforms (Amazon, Google, Apple) launched their huge online storage-space services; (ii) procedures began against certain cyberlocker and similar platforms (RapidShare, Megaupload, YouTube) which were followed with great attention.

We are also aware of the now quite generally applied categorization of the cloud services (private cloud, public cloud, community cloud, hybrid cloud, SaaS, PaaS, IaaS, etc.)

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

Response: It is difficult to interpret this question. Probably, it does not refer to globally available cloud platforms, since in that respect, it is obvious that great amounts of works, performances, sound recordings and so are included in the cloud (see YouTube, RapidShare, Apple iCloud, Apple iMatch, "social networks,"etc.). As regards the situation in Hungary, on the cloud provider side (we emphasize that we speak about the provider side, since, of course, the members of the public, use the services of global cloud platforms), it is, for time being, less typical that the emerging, in general smaller, cloud services extend to the exploitation works and objects of related rights.

It is a further question what is meant by "exploitation." We understand that it probably means business methods for lawful making available of works. Again, we may say that we are aware

of such kinds of global platforms, but, in Hungary probably no such platforms of substantial relevance have been established yet.

In the preceding sentence, the word, "probably" refers to a specific situation from the viewpoint of our response. Namely to this: An international platform has contacted Artisjus, the Hungarian authors' society, to seek authorization for a cloud-based service. The essence of the service is that, if the lawfulness of works uploaded by the users is doubtful, they are replaced in the cloud with lawful copies which then may be downloaded (streamed to) a fixed number of devices. The problem is that, under the contract, Artisjus is bound by commercial secret, and thus, it is not allowed to it to give more information on the agreement.

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?

Response: Again, we understand that those commercial platforms are meant which may have been established in Hungary, since the globally – or at least internationally – available such platforms are well-known to everybody. Furthermore, we also understand that the scope of this question is broader than that of question 2; that is, not only those platforms are meant which are *specialized in exploitation* of works and objects of related rights, but, for example, also advertisement-based social networks (which, of course, may also be relevant from the viewpoint of copyright and related rights due to protected materials uploaded by the users of the networks).

There are such Hungarian platforms; however, interestingly, not with increasing activity and success, but (at least as some of them are concerned) it seems just on the contrary. For example, there is a cloud-based social network – iWiW – which is, however, "fading out" now because the Facebook – in particular, since it has been available also in Hungarian – has been taken over its role step by step. There are also some other smaller cloud-based platforms, like the "Indavideo" streaming platform or "Indavideo" for photos.

In Hungary, cloud services are active rather for the corporate sector (for example, in the form of offering server parks to be used by different companies).

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

Response: It seems that the response to this question is quite obvious: it will be of a growing importance. This is due to the ever more efficient global cloud platforms (Google, Apple, Amazon, etc.) with their huge and rich repertoire, on the one hand, and the proliferation of cheap but poweverful tablets (to replace PCs, laptops and other similar devices which are not cloud-dependent), on the other hand.

Sessions 2 and 3

— Can the Internet Treaties of 1996 play an important role in legal issues raised by "Cloud" Business?

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

Response: There is no court decision yet in Hungary on these issues. What we may mention in this connection is an official opinion of the Hungarian Copyright Experts Council adopted in 2007 (Opinion No. SzJSzT 31/07/1.). The Council had to answer this question which ARTISJUS, the authors' society, had submitted to it: Is copying by end-users with "virtual PVRs," that is, online „personal video recorders," covered by the private copying exception? Such copying takes place when a provider allocates portions of its server storage capacity on which end-users can copy films and other productions, these being usually transmitted in television programs. The users can download such content from the server to enjoy privately. The Council held that where the storage-provider records a copy of a film for making it available from its server for „private" use by its users (directly or through their private storage space), such copying does qualify as free reproduction under the private copying exception.

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

Response: In Hungary, there is no such case law yet.

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

Response: In our view, there is no need for any revision of the WIPO Treaties due to the cloud developments. What is needed is adequate interpretation and application of the provisions of the Treaties in the cloud environment.

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).*

Comment: In our view, it may not be fully justified to consider that SaaS cloud services are necessarily of a minor importance and that they generally do not involve the use of works protected by copyright. There are several well-known cloud services for the use of software. We believe that the services of such popular online games as Second Life, OnLive, World of Warcraft (protected by copyright) are good examples for this. Such services may be used through virtual cloud software; there is no need to have one in the users' PCs or other personal devices. We may also mention those simpler video games which are available free of charge through social networks (e.g., Zynga available through Facebook). (They are free of charge but they are part of the business model of the social network portal, since the big number of „visitors" attracts a lot of advertisement money.)

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).*

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

Response: We believe that our responses to the questions under points 2 and 3 concerning Session 1 offers response to this question too.

In Hungary, the global – or, at least, international – cloud services are used (some of them also have Hungarian version; such as YouTube). However, there is no real Hungary-based system of a significant relevance (with the exception of some smaller SaaS services).

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

Response: We believe that our responses to the questions under points 2 and 3 concerning Session 1 offers response to this question too.

3) What rights do rightholders usually transfer to the providers of cloud services?

Response: ARTISJUS, the Hungarian authors' society has negotiated an agreement with a cloud service. However, due to commercial secret reasons, it is not allowed to offer information on such details.

4) What uses of copyrighted material are the users of such cloud services permitted?

Response: If end-users are meant, then the users who upload lawful materials in a way that they do not make it publicly available, in principle, private reproduction takes place. See, however, the official opinion of the Copyright Experts Council mentioned in the response to the question under point 1 concerning Sessions 2 and 3. If access is allowed to the members of the public, the right of (interactive) making available to the public is involved.

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?

Response: Due to commercial secret reasons, no such data are available

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

Response: We understand that, in this question, Hungarian systems are meant. As our previous responses indicate, with the exception of SaaS services, there are no truly relevant systems. We have no information concerning the technical aspects of the TPMs and RMI used.

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

Response: The provisions of the Hungarian Copyright Act (Act LXXVI of 1999, several times amended) in Article 95 correspond – in the form of a nearly verbatim transposition – to Article 6(1) to (3) of the 2001 Information Society (Copyright) Directive of the EU. Under Article 329/B of the Criminal Code currently in force (Act IV of 1978; several times amended), those who manufacture or distribute unauthorized circumvention devices or offer unauthorized circumvention services are punishable up to two years imprisonment and, where these acts are on a commercial scale, up to three years imprisonment.

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

Response: We have no information on such specific problems.

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.

Response: There are such services. For example, the above-mentioned iWiW social network is similar to Facebook, while the also above-mentioned Indavideo and Indaphoto are similar to FlickR.

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).

Response: We refer also in this context to the official opinion of the Copyright Experts Council mentioned in the response to the question under point 1 concerning Sessions 2 and 3.

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?

Response: We are not sure what is meant by this question. However, it seems that it presupposes some narrow interpretation of the right of making available right. In view of the Hungarian law, we cannot report on a "narrow" interpretation.

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?

Response: In Hungary, the liability of providers is regulated in accordance with the well-known provisions of the Enforcement Directive Electronic (2004/48/EC) and the Commerce Directive

(2000/31/EC) of the EU in the Copyright Act (Act LXXVI of 1999) and in the Electronic Commerce Act (Act CVIII of 2001). This means that, in general, the limits of secondary liability are determined by their obligations to respect injunctions and the right of information as provided in the Directives. (Of course, on the right of information, the decision of the Court of Justice of the European Union (CJEU) in the Bonnier case is also applicable for Hungary; see: http://curia.europa.eu/juris/document/document.jsf?text=&docid=121743&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=4604200.)

However, the Electronic Commerce Act goes beyond the rules of the Electronic Commerce Directive in two respects. First, it extends the provisions on the liability of hosting service providers to providers of information location tools (in respect of which the Electronic Commerce Directive does not contain specific provisions) (Article 11 of the Act). Secondly – and more importantly – although the provisions on the conditions limiting the liability of service providers (in accordance with the Directive) have "horizontal" effect (in that they cover not only for copyright infringement, but for all kinds of tortious prejudice and damage generally, such as for defamation and invasion of privacy), with respect to copyright infringements, there is a further condition; namely that the liability of a service provider is limited only if the provider complies with the provisions of Article 13 of the Electronic Commerce Act on a notice-and-takedown procedure.

If the owner of the pertinent right claims that a service provider is making accessible any information that infringes its right, that owner may serve a private or public notice, with full evidentiary effect, on the service provider to demand the latter to remove, or to disable access to, the information in question. This notice must specify the following: (a) the right-owner with its name, telephone number, main postal address, and electronic-mail address; (b) in what work or other media production the pertinent right is claimed and facts probative of the infringement; and (c) data identifying the information in question. (Article 13(1) and (2).)

Within 12 hours from the receipt of the notice, the service provider must remove or disable access to the information identified in the notice. Within 3 days, it must inform the user of its service, who has provided the information in question, of the terms of the notice requesting removal or disablement of access. (Article 13(4).) Within 8 days from the user's receipt of such notification of the removal or disablement of access, the user of the service may request, in a private or public notice with full evidentiary effect, that the information be restored to the system. Such a counter-notice must specify (a) the user of the service with the requisite contact information set out above for the right-owner, (b) the information claimed to be infringing, and (c) the prior network location of this information. Further, the counter-notice must include a statement that, with appropriate justification, explains why the information in question is not infringing. The service provider, upon receipt of the counter-notice, must restore the information, or access to it, within its system. It must also inform the right-owner of the terms of the counter-notice and the restoration of the information. (Article 13(6) and (7).)

If, after being apprised of the initial notice, the user of the service admits the infringement or does not submit a counter-notice within the required 8-day period, the service provider must maintain the removal of, or disablement of access to, the information in question. (Article 13(8).) Within 10 days of the receipt of a counter-notice, the right-owner has the options of filing a civil suit to obtain a temporary injunction and ultimately a permanent injunction to restrain the infringement or of initiating a criminal proceeding. Within 3 days of filing a civil suit or starting a criminal proceeding, the right-owner must send the service provider a copy of the pleadings or process commencing the pertinent action, and the service provider must remove or disable access to the information again as it did before, that is, within 12 hours. (Article 13(9).) The right-owner has to notify the service provider of any temporary injunction or

final judicial decision on the merits issued in the case. The service provider, depending on the judicial outcome, must either restore the information in question or maintain its removal or disablement of access. (Article 13(10).)

The service provider is not liable for removing or disabling access to the information in question, provided that it has acted in good faith and in harmony with the pertinent provisions of the Electronic Commerce Act. (Article 13(12).)

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.

Response: We refer to our response to the preceding question.

There is no case law in this respect. However, the notice-and-take-down system is applied adequately. It is mainly ProArt – an anti-piracy alliance of Hungarian owners of copyright and related rights – which send a number of notices. The statistical data received from them on the last two years offer the following picture:

The total number of the notices sent in 2010 is 949 notices.
The total number of removed cyberlocker links in 2010 is 156334 links.
The total number of the notices sent in 2011 is 766 notices.
The total number of removed cyberlocker links in 2011 is 183859 links.

Providers do co-operate and fulfil their take-down obligations. No counter-notice has been presented.

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?

Response: The Hungarian Electronic Commerce Act mentioned above, in accordance with the Electronic Commerce Directive, does not provide for a general monitoring obligation (Article 7(3) of the Act). Concerning possible non-general obligations, there is no case law yet. As regards the obligations of providers to remove infringing content; see our response to question 2 above.

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

Response: See our response to question 2 above.

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?

Response: As indicated above, there are such contracts, but – for commercial secret reasons – the contracting parties are not allowed to grant information.

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?

Response: We note that, in this context, the euphemistic expression "copyright-avoiding cloud services" possibly mean pirate services. Fortunately, we cannot report about the success of such Hungarian services.

It is another matter that there have been successful raids in Hungary in recent years as a result of which several warez and torrent sites have been closed; however, such "services" may not be characterized as cloud services.

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?

Response: For the time being, there no legislative changes are foreseen in Hungary in this respect. From the viewpoint of the Hungarian law, much depends on what is happening in the EU. It seems obvious that the obligations of providers to cooperate with rights owners and their liability would have to be increased. However, the success of the aggressive lobbying of the IT industries (and of the artificial hysterical campaign of their agents) in the July 3, 2012, anti-copyright vote of the European Parliament concerning the watered-down version of the ACTA (which is in accordance with the current EU *acquis*) indicates that this will not be easy.

9) Do you see any progress regarding filtering technology?

Response: We understand that the question mainly relates to filtering technology and not to the possible legal obligations to apply such technology.

The Hungarian software industry is quite developed, but we have not received information on specific filtering technology developments. At the international level, filtering technology is obviously develops in a way that it may become an ever more efficient means to prevent and eliminate online infringements.

In its *Sabam v. Netlog descision* (C-360/10), the CJEU mainly concentrated on what hosting service providers are *not* obligated to do on the basis of the interpretation of the various – not always duly harmonized – directives on different issues. It stated that they

> "must be interpreted as precluding a national court from issuing an injunction against a hosting service provider which requires it to install a system for filtering:
>
> – information which is stored on its servers by its service users;
> – which applies indiscriminately to all of those users;
> – as a preventative measure;
>
> – exclusively at its expense; and
> – for an unlimited period,
>
> which is capable of identifying electronic files containing musical, cinematographic or audio-visual work in respect of which the applicant for the injunction claims to hold intellectual property rights, with a view to preventing those works from being made available to the public in breach of copyright."

From the viewpoint of the chance of filtering technology to be used to contribute to the fight against online infringements, the decision of the Hamburg Court (Landgericht Hamburg) in the GEMA v. YouTube case (No. 3100 461/10 adopted on April 20; under appeal) is more promising

(and it seems it is also in accordance with the *acquis*). On the basis of a due application of the proportionality test, it has found that the YouTube cannot get rid of liability for the infringements committed by its users by only taking down infringing contents when it is informed of them. According to the Court, it is reasonable to demand from the YouTube that it, after having been alerted of an infringement, prevent future uploads of the same works (the same recording) by using filtering software; the more so since such software is already available to YouTube in the form of its Content-ID software, which the it has developed itself.

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 rightholders with respect to cloud-based exploitations of works?

Response: We have noted that, in this question, "copyright-avoiding business" does not mean the same as in the case of question 7, above.

CC licenses exist and applied also in Hungary. However, they are mainly used by those atypical authors who, for some reasons (in general, because they have income from other sources) do not care for copyright. If we may still speak about business-oriented use of CC licenses, it may be the case where musicians upload a recording for free availability in the hope that, through its possible popularity, they may get income through other channels. There is some limited information on this in anecdotal form, but we can hardly speak about duly developed "business."

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

Response: See our response to the preceding question.

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

Response: There is no such data. See our response to question 1 above.

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.

Response: The only perceived problem is the possible conflicts with the collective management system.

It is well-known that certain European authors' societies (such as SACEM, BUMA, SGAE, KODA, TEOSTO) have some "pilot projects" allowing their members to allow the use of their works under CC licenses for non-commercial purposes mainly on their own websites. It seems, however, that this possibility is of quite a limited use, for the time being. Artisjus, the Hungarian authors' society does not have yet such a system.

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?

Response: It is to be noted that, in this respect, we have to take into account those EU rules which bind Hungary. Any special Hungarian rules may only prevail in those respects which are not covered by those rules.

First of all the well-knows relevant provisions of the following regulations should be taken into account: (i) Council Regulation (EC) No. 44 of 22 December 2000 on the jurisdiction and the recognition and enforcement of judgment in civil and commercial matters; (ii) Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I); and (iii) Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).

It seems worthwhile mentioning the opinion of the Advocate General in the Football Dataco Ltd and others v Sportradar GmbH and other case (Case C-173/11) on June 21 since it is relevant from the viewpoint of the above-mentioned Council Directive on jurisdiction. The opinion states, inter alia, as follows:

> " Where a party uploads data from a database protected by sui generis right under Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases onto that party's web server located in Member State A and, in response to requests from a user in another Member State B, the web server sends such data to the user's computer so that the data is stored in the memory of that computer and displayed on its screen, the act of sending the information constitutes an act of 're-utilisation' by that party.
>
> "The act of re-utilisation performed by that party takes place both in Member State A and in Member State B."

That is, in the case of making available for downloading, the use takes place in the territory of both States concerned; both of them have jurisdiction.

The Hungarian International Private Law Act includes a provision in its Article 19 on applicable law concerning copyright (which seems to be in accordance, *inter alia*, with Article 5(2) of the Berne Convention): "Matters concerning authors' rights shall be judged in accordance with the law of the country where protection is claimed." This is interpreted to mean the law of the country of the use of a work.

The Act contains, *inter alia*, the following provisions on law of obligations aspects:

> Article 24. The provisions of Articles 25 to 30 shall be applied to those aspects of the law of obligations to which are not covered by Regulation (EC) No 593/2008 of the European

Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations.

Article 25. For a contract that law shall be applied which was chosen by the parties at the time of the conclusion of the contract, or later for the entire contract or for a part thereof. The choice of law shall be explicit, or it shall be possible to establish it with full certainty on the basis of the provisions of the contract or of the circumstances of the case. In the absence of choice of law, the law applicable for the contract shall be established in accordance with Articles 26 to 26.

[Article 27 is on certain categories of contracts that are irrelevant from the viewpoint of copyright.]

Article 28. For other contracts, in the absence of choice of law, that law shall be applicable to which the contract – in view of the essential elements of the contractual relationship – is the most connected. [*This tends to be also the law of the country where the use of works takes place*.]

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)?

Response: Artisjus, the Hungarian authors' society does not have specific tariffs for cloud services. What we may know of the above-mentioned existing agreement of the society with a musical cloud service, it is that it does not extend to multi-territorial use.

[End of response to the Questionnaire]