ALAI-Congress

2012 – KYOTO

Questionnaire

Session 1
－Developments of New Platforms

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

There is no specific definition of Cloud Service or, more generally, Cloud Computing in Italy. It is normally assumed that the Cloud provider supplies his customers with technology, software and/or storage space that are accessible through an Internet browser. The remote exploitation of resources and the dematerialization of tools available to the users are therefore the main features characterizing the Cloud.

Since there is no "official" definition, the term has become fashionable in different environments and is used quite loosely in various situations. This said, in Italy as in other countries, it is usual to classify Cloud services according to the specific object of the remote exploitation they allow the user to implement:

- SaaS (*Software as a Service*)
- DaaS (*Data as a Service*)
- HaaS (*Hardware as a Service*)
- PaaS (*Platform as a Service*)
- IaaS (*Infrastructure as a Service*)

As to officially shared definitions, we are waiting to see the Communication of the European Commission, that is included in the 2012- 2015 action plan of DG Connect (Telecommunications and Information Society) that can be consulted in http://ec.europa.eu/atwork/synthesis/amp/doc/infso_mp.pdf .

It should be considered that different subjects can be involved in the IP exploitation through Cloud services, namely the Cloud service provider, that normally coincides with the content provider, and the consumer, that is the final user the work or protected material, through the Cloud service.

Moreover, when considered from the point of view of the final user, the deployment and success of Cloud Computing depends on the availability of a broadband high speed Internet connection and on the reliability of the service provider. For the private consumer, a Cloud service consists in having access to his/her documents and files on line and in being able also to modify and/or update them, anytime and everywhere. As an example we can look at *gmail.com*.

The most remarkable features for copyright exploitation seem to refer to so called *on-demand self-service* and *broad network access* of the Cloud technical specifications. This implies also that, thanks to Cloud resource pooling, the service is technically scalable to the extent required by the consumer, the limitation being the economic/technical terms of the contract. Specially the first feature, the on-demand self service, can pose problems as to copyright exploitation and liability since most

applications that allow the exploitation, though residing in the Cloud, are directly operated by the final user.

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

This relationship has been stressed only recently, following the introduction in Italy of Cloud services that are expressly advertised as music or audiovisual services. Music subscription services present in Italy in the last couple of years were not marketed as Cloud services. Even though Cloud based (non music) services have been accessible in Italy for some years, (ex. Picasa, Flikr etc.), this kind of services have not been related to the exploitation of works until the relationship has been stressed by the service providers themselves.

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?

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

While for some time Cloud computing and the relevant applications were mostly presented as services for small and medium size companies that could benefit of the shared utilization of IT resources, recently we are observing a rapid development of Cloud services destined to the general public. "Cloud" has become a sort of Brand to designate advanced services for music and other copyright materials, that consumers can consider not just useful but also "cool".

The consumers' attitude and the marketing tools employed let us think that content providers consider the Cloud as a successful technology for copyright exploitation. This development is nonetheless creating many "gray areas", where doubts arise about the nature of the exploitation. For example, the upload of copyright material in Cloud lockers can be a commercial exploitation being it based on the Cloud service supplied by a commercial provider, either with or without consideration; on the contrary, the upload in a personal Cloud locker may fall into the exception for private copy, if its technical features are consistent with the relevant legal rules.

Also the attitudes of the Cloud service providers vary on this subject.

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?

No case law

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

No case law

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

No case law

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

In principle, the definitions of rights in WIPO treaties can encompass also Cloud services involving the exploitation of protected works. Namely, the configuration of reproduction right and making available right might suffice to qualify the storage in the Cloud and the subsequent access by the subscriber himself or by persons authorized by him as restricted acts.

Nonetheless, the explanation in the agreed statement concerning Article 8 of WCT does not help in the interpretation, since it reads: "*It is understood that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Treaty or the Berne Convention. It is further understood that nothing in Article 8 precludes a Contracting Party from applying Article 11bis(2).*"

When the Cloud service has the form of "platform as a service", various possibilities can be offered to the users, depending on the Cloud technical specifications and on available applications. In some services, the limit between private and public usage can be blurred (see p. 5.), and the Wipo treaties do not seem to supply a clear answer.

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).*

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

Various different types of Cloud services are currently available in Italy, based on different business models offering usage options that can affect differently copyrighted content:

a. UGC platform

Users can upload their content on a public site, that allows the communication to the public on demand (example: YouTube, Dailymotion, etc.). The upload should concern only User Generated Contents and contents under the control of the parties making them available to the platform. Therefore, theoretically, UGC platforms are a tool available to copyright owners for the dissemination of their contents, either directly or by licensed intermediary. However, in most cases the final users upload videos and other materials incorporating copyright works (example: copyright music synchronized

with non copyright moving images, but also commercially recorded songs, published poems, film trailers, etc.), without acquiring the relevant rights.

b. Social Networks

Users upload their own content in their spaces and can authorize other persons to share such content under certain conditions, like being a subscriber of the same service and being accepted as friend etc. (es. Facebook, Picasa, etc.).

If we examine the Usage Terms subscribed by final users for different service models, like UGC Platforms, social networks and other Cloud services that have "sharing" functionalities, we notice that normally one or more clauses explicitly clarify that the user assumes all responsibilities for the content he uploads and/or let other users have access to.

The copyright liability is explicitly accepted by the final users also in other types of services, like services where:

c. Users allow the Cloud Service Provider to scan and match their content and create in their own personal locker a link to the provider's database in order to re-access the content anywhere anytime (ex. i-Cloud).
d. Users upload their own content in the Cloud locker in order to re-access the content anywhere anytime, without giving access to other persons (ex. gmail). They are allowed to use directly the Cloud applications on their content, as this latter was in their own PCs.
e. Different combination of the indicated specifications are possible.

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

Any kind of works or protected matters in digital format can be offered through Cloud services.

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

Not in all Cloud service business models the rightholders directly transfer right to the providers. In fact, as highlighted in the preceding point, in general Cloud service providers qualify themselves as hosting providers and decline any copyright liability in the content uploaded and made accessible through the service. The final users accept this in the service Usage Terms. However, such Usage Terms also provide that the uploader/user licenses the provider to perform all acts necessary to operate the service, including acts on content.

When there is a contractual relationship between the provider and the actual rightholders, it normally consists in a non exclusive license that specifies the scope and extent of the licensed rights. These are 1) reproduction right for services allowing uploads in the service data base and for downloads of copyright content (when requested); 2) communication right; 3) other rights when needed for specific business models. As to collecting societies, the authorization is granted with respect to the rights they manage, i.e. the right of communication to the public and the reproduction right as defined respectively by Articles 3.1 and 3.2 of Directive 2001/29/EC of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information Society.

In fact, all Cloud services allows or facilitates the user's access to the content, and this functionality implies making content available to the user/s, even when the personal Cloud locker are accessible only to the subscriber.

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

This depends on the business model of the Cloud service (see p. 4.1) above).

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?

No figures are available for Italy since Cloud Services are relatively recent. Normally, royalty rates are not disclosed.

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

TPM and DRM depend on the Cloud service business models.

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

The legal definitions of technological measures of protection and of electronic rights management information were introduced in 2003, by means of the new Part II-ter of the Copyright Law. The rules of the international treaties were transposed following the wording of Directive 2001/29/EC, articles 6 and 7. According to art. 102-quarter of the Copyright Law, it is up to rightholders to decide to apply technological measures in order to prevent or restrict acts they do not wish to authorize. The measures are considered 'effective' provided that the objective of the protection measure is achieved. The range of measures is varied and comprehensive: the measures can be operated through a device or a process, such as encryption, scrambling or any other transformation; or they can consist of a software, such as a copy control mechanism. The same applies also to the "residual" measures, those which remain after some of their effects are removed by rightholders for any reason, voluntarily or by virtue of agreements with the beneficiaries of exceptions, or in compliance with an injunction of an authority.

The legal enforcement of the provisions against the circumvention of the technological measures is assisted by criminal sanctions. The list of sanctioned infringements now includes acts like manufacture, importation, distribution, sale, rental, transfer, advertisement of devices, products or services enabling or facilitating the circumvention. Even the relevant preparatory acts, when made with gainful intent, are included.

The Law punishes as well the persons who purchase or rent devices, products or components intended to circumvent such technological measures and the persons who use such circumvention means in order to duplicate or reproduce protected works.

In parallel, it is up to the rightholders to decide about the insertion of electronic information on copyright management in the fixations of copyright works. This applies also to the information that may appear when works are communicated to the public. The information consists in data identifying the work or the rightholders or indicating the terms and conditions.

The unlawful removal or alteration of the electronic rights-management information is punished by the same penalties as the trafficking of circumvention devices. Equal penalties are applicable in the case of distribution, commercial importation, broadcasting and public communication of copyright works whose electronic information has been removed or altered.

In addition, civil remedies apply also to marketing or possessing for commercial purposes any means whose sole purpose is to facilitate the unauthorized removal or the circumvention of technological protection measures.

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

No case law exists yet. For popular streaming services like YouTube, circumvention software allowing download are very common and easily accessible.

As to usage terms currently applicable to widespread Cloud services exploiting copyright content, DRM are used to enable devices authorized under the same subscriber's account (ex. 10 devices for i-Cloud and Amazon Cloud). This is intended also to make circumvention less attractive.

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.

Yes, several Cloud based services are accessible to Italian users. The best known of such services used by consumers are:
a. digital lockers; iCloud and very soon Amazon Cloud, that are expressly targeted to music content, but also Nuvola Telecom Italia, which considers itself to be a merely passive hosting provider.
b. UGC platforms, such as YouTube, Daily Motion and others.
c. Social networks such as Facebook.

In addition to these platforms, also remote recorder services are offered to the public, although without large success. This kind of services created a legal case when the exception for private copying in art. 71-sexies of the Copyright Law was modified, inserting a provision extending the limitation for private copying to "remote video recording systems". The definition of such systems is not retrievable in the Copyright Law. The same amendment specifies that the provider of the remote video recording service has the obligation to pay a remuneration calculated on the basis of the service fees. The right holders have successfully opposed the qualification of such a service under the private copying exception, based on the provision mentioned above concerning the requirements of the private copy. The European Commission (letter n. 29900 DG Markt/D1/DB/D (2009)) has asked for the deletion of this provision, because the provision does not qualify for inclusion in the list of exceptions provided for in the *acquis communautaire*, and in particular is not compatible with Directive 2001/29/EC.

The technical functionalities of the Cloud service should be examined case by case in order to determine if they can qualify as private copy or not.

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).

It is not clear yet. If we read the usage terms of most Cloud service, they have their subscribers accept clauses indicating that such subscribers are the only liable for legal acquisition of the content stored in the Cloud, including but not limited to copyright liability.

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?

This refers to the concept of "public" performance established in the Copyright Law. The Italian Law contains the definition of "public" in art. 15 referring to performing right. Such notion exempts only performances within the normal family circle, of a community, a school or a retirement home, and specifies that such performances are not considered public as far as they are without any gainful intent (art. 15). The cases of family circles and retirement houses are similar, since both refer to premises where people live their intimate life. It is noted that gainful intent is not a qualifying feature of performing right that is protected in all cases.

This notion must be interpreted taking into account also recent rulings of the ECJ.

The judgment of the ECJ in Case C-306/05 of 7 December 2006, Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA recalls that the term 'public' refers to an indeterminate number of potential television viewers, taking into account also the cumulative effects of making the works available to viewers that, taken separately, would be of limited economic interest.

In that regard, in case C-135/10 Società Consortile Fonografici (SCF) v Marco Del Corso, the European Court makes clear that the situation of each user and of all the persons to whom he communicates the protected phonograms must be assessed. In that context, account must be taken of several complementary criteria, which are interdependent. For clarity's sake, they are listed here but only the second criterion and the difference between compensation rights and exclusive rights seem to be relevant in the case of Cloud services.

Those criteria include, first, according to the case-law of the Court, the indispensable role of the user. Second, the Court has identified certain aspects of the concept of public. Thus, the term 'public' refers to an indeterminate number of potential listeners and a fairly large number of persons. In the case at stake, the dentist's patients were deemed to form a very consistent group of persons and thus constitute a determinate circle of potential recipients, and not persons in general. That was key to exclude the qualification of "public". Moreover, they have access to certain phonograms by chance and without any active choice on their part. It is clear that in the context of Cloud services there is an active choice on the part of the listeners, and public communication right (more specifically: making available right) cannot be excluded.

Third, the Court has held that the profit-making nature of 'communication to the public' is also a relevant criterion. Furthermore, the Court identifies a difference between related rights as *compensation rights* on one side and authors' rights as *preventive rights*, on the other. However, the difference between neighboring rights and authors' rights does not subsist in the case of making available right, which is involved in cloud services.

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?

As said, all usage terms of Cloud services have the final user accept direct liability for the content they upload and exploit through the Cloud.

The copyright liability of the service provider is involved :
a. when the content is directly exploited as in the case of i-Cloud (primary liability);
b. when the provider can be considered as an "active" hosting provider;
c. when the "passive" hosting provider fails to address the competent authority having knowledge, directly or indirectly (through the rightowner's notice) that the Cloud service hosts infringing content.

See also the reply to the following question.

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.

Italy, as other European Union member states, has implemented the European directive 2000/31/EC on e-commerce through Legislative Decree 70/2003. The implementation was almost literal so that art. 14, art. 15, and art. 16 of legislative decree 70/2003 contain exemptions from liability, provided that certain conditions are complied with. These articles state also that, without prejudice to the powers of the judicial authority, in case of mere conduit, caching, and hosting, the competent authority (namely the Authority for Communications) can order the service provider to prevent or to stop the infringements realized through its service.

Cloud service providers can be qualified as hosting providers according to the definitions in the Directive and in the implementing Decree 70/2003.

Notwithstanding the exemptions granted to hosting and other service providers, Italian courts adopted a pragmatic approach, leaving the interpretation of the scope and persistence of the safe harbors to a case by case evaluation.

The cases decided by Italian courts do not concern specifically Cloud services as such, but some rulings refer to hosting providers, defining differences between passive and active hosting activities. Some of the principles there stated may be extended to Cloud services, because judges tend to interpret the exemption from liability restrictively, where the activity is not deemed to be merely passive.

In the preliminary ruling of RTI-Mediaset v. Google-YouTube, the Tribunal of Rome recognized the liability of Google as hosting provider and its duty to remove the material illegally uploaded upon notice of Mediaset, the legitimate owner of the exclusive rights of broadcasting and making available under art. 79 of the Copyright Law. In FAPAV v. Telecom Italia, FAPAV (the Federation against Audiovisual Piracy) requested an injunction, in order to block the access of users of Telecom Italia to certain web sites that allegedly offered illegal access to movies. In its ruling, the Court of Rome (April

14, 2010) recognized that, according to articles 14 and 17 of Legislative Decree of April 9, 2003 n. 70, Telecom was exempt from liability as a mere conduit, but stated that it should have informed the competent authority about the activities notified by FAPAV.

In the case RTI v. IOL, the Order of June 7, 2011 states that the configuration of a hosting provider as defined in Article 16 of the Legislative Decree 70/2003 does not fully correspond to the hosting service involved. The Judge considers that the degree of liability differs in case of "active hosting", as opposed to mere "passive hosting". Active hosting is evidenced by the insertion of ads in user-generated videos and content indexing that facilitates users' searches. Consequently, prohibitory injunction was decreed as requested by the claimant RTI whose ownership was accepted with reference to neighboring rights as a broadcaster (Article 79 of the Copyright Law) and as an audiovisual producer (Article 78-ter).

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?

In application of above mentioned Legislative Decree 70/2003, the service provider does not have any duty to monitor the content he carries or hosts. When he receive the notice that a user of his services is infringing the law, or when he has actual knowledge of the infringement, he has the obligation to defer the case to the competent authority without delay. No clear definition about acceptable delay is quoted.

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

This issue has been lively and extensively debated when the Communications Authority in Italy (AGCom) proposed to introduce a Regulation in order to limit the dissemination of contents in violation of copyright. The power of Agcom in respect of service providers refers to art. 14.3, art. 15.2, and art. 16.3 of mentioned Legislative Decree 70/2003.

Due mainly to the strong opposition of a number of trade associations of internet service providers, Telco companies and other important lobbies, no Regulation has been adopted. The Authority decided to postpone the adoption until the enactment of a Law clarifying and defining the scope of AGCom powers in the field of copyright.

Consequently, without prejudice to the duty described in the reply above, the rightholder has the possibility to ask the removal of the infringing content only according to tools and procedures made available by the Cloud service provider (if any), that are normally inspired by the DMCA, being many providers affiliated to US companies.

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?

Yes.

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?

Currently, there are mainly offers for Cloud coupled with private ADSL subscriptions that include Cloud lockers. In such cases, the Telco company denies any liability either direct or subsidiary for the content and invokes privacy regulations to state that they have the strict obligation to ignore the actual content of the Cloud lockers they make available to their subscribers.

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?

In Italy, there is no remarkable discussion on Cloud computing in the public or political arena. We can assume that the issue is absorbed by the debate on AGCom regulation (see p. 5.2.5. above).

9) Do you see any progress regarding filtering technology?

No.

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?

In Italy, open content licenses are actually employed by rightholders in specific sectors, mostly for academic and scientific publications produced in universities or for materials disseminated for teaching purposes. At this stage, it is practically impossible to define if and how Cloud based exploitation concerns open content.

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

In general, CC licenses are used mainly for scientific works and possibly for literary works. The use of open content licensing schemes in the musical and audiovisual fields is marginal.

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

Not available.

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.)

Open content licenses and CC licenses are perfectly legal in Italy and no legal obstacles are met by authors that want to use them. This principles notwithstanding, the combination of normal commercial licenses and CC licenses for non-commercial usages for the same works or repertoire is not practiced, essentially for operational reasons. It should also be noted that there are no known cases where authors try to enforce commercial licenses for works already disseminated under CC or open licenses. More generally, it can be observed that authors do not fully understand the consequences of the release of their works under CC and similar licenses.

We are not aware of requests to receive a share of private copying remuneration possibly accruing to videograms or phonograms released under CC licenses.

The level of the remuneration is established by the Decree of the Ministry of Culture of December 29, 2009, and its explanatory statement takes explicitly into account the statistics on the usage of blank media and recording devices to copy protected phonograms and videograms. The statistics determine the proportion of usages attributable to private copying as defined in the law, excluding therefore non-copyright data and PD works/materials. We may assume that private copying of CC works is considered outside protected materials in the statistics, either because CC works do not belong to the categories of phonograms and videograms indicated by the rules on the private copying exception, or because they allow a treatment similar to PD works.

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?

General private international law rules are applicable to Copyright.

For contractual obligations, the applicable law is determined according to Regulation (EC) n. 593/2008 of June 2008 (Rome I); for non-contractual obligations, it is determined according to Regulation (EC) n. 864/2007 of July 11, 2007 (Rome II). In all cases where there may be doubts of the applicable legislation, the Law of May 31, 1995, n. 218 containing the general rules on conflicts of laws applies.

Copyright and the relevant exceptions uniformly apply to all rights exercised in Italy, irrespective of nationality of the right owner of the work or the protected subject matter and irrespective of the residence or nationality of the intermediary.

As to infringements of copyright and related rights, the principle that the Italian law applies whenever they produce damages in the territory was confirmed by the Supreme Court in the case against the well-known site www.piratebay.org, whose servers were located abroad. Judgment of September 29, 2009, n. 49437 considers that the crime under art 171, par. 1, lett. a-bis of the Copyright Law is accomplished at the place where the user downloading the illegal file is located. Moreover, the Supreme Court retains the joint liability of the site indexing the works made available for file-sharing without authorization and, consequently, the Court of the merits has the power to order the ISP to block the access to the site, even if it is located abroad.

This is the only precedent as far as judicial claims against a foreign intermediary is concerned. In all cases where there is a copyright liability of the intermediary for infringements occurring in Italy, we can assume that the applicable law would be the law of the country where the harm is realized. The principle seems to be indirectly confirmed by the recent ECJ Judgment in Case C-5/11 of June 21, 2012 concerning the distribution right.

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)?

The Italian collective rights management organization SIAE grants multerritory licenses covering the repertoire of its own members. Only recently Cloud services specifically dedicated to music have been launched in Italy. Multiterritory licenses for the repertoire administered by SIAE, are issued under non disclosed terms. In general there is no "Cloud" specific standard license, because terms and clauses depend on the kind of service implied in the Cloud user's registration or subscription (for example, "scan and match", with subsequent stream from the personal locker; re-download tracks sold à la carte; subscriptions for access to the Cloud service music library by streaming and tethered downloads, etc.).

Normally, as far as it is known, the licenses granted by SIAE contain a clause concerning jurisdiction and choice of law. The designated forum is the Court Rome (Italy) and the applicable law is the Italian Law or, depending on the bilateral agreement, the law is determined according to EC Regulation No 593/2008 of June 2008 on the Law applicable to contractual obligations (Rome I).