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COPYRIGHT IN THE CLOUD

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SESSION 1 - DEVELOPMENTS OF NEW PLATFORMS

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

The Cloud is an international phenomenon and therefore the most commonly used definition of 'The Cloud' is an international definition. The definition that is often referred to in Dutch literature is the definition given by the American Institute of Standards and Technology that has defined the Cloud as:

> "A model for enabling convenient, on-demand network access to a shared pool of configurable computing resources (e.g., networks, servers, storage, applications, and services) that can be rapidly provisioned and released with minimal management effort or service provider interaction."[2]

In a more everyday use 'The Cloud' is defined as accessing software or other content that is stored remotely on a network of computers (often by third parties) through the internet by personal devices that function as terminals.[3] The two main advantages for consumers are that they do not need to store (a lot of) content on their own devices and that the information is available to them at any time or place (even if they are not in the vicinity of their own computer).

The services offered in 'the Cloud' can take many forms: any kind of use that can be made through a computer can be cloud-based.[4] Therefore it has been commented that 'the Cloud' is not really a new technological system but rather that it is some sort of return to the 'mainframe computer' (of the early 70s) where 'computers' of the individual users were used as terminals to gain access to the applications and/or content of a central computer thereby allowing users to use applications and access/store data and to use the power of the central computer. The main

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[2] Peter Mell and Tim Grance, The NIST Definition of Cloud Computing, Version 15, 10-7-09, csrc.nist.gov/groups/SNS/cloud computing/cloud def-v15.doc. Also: L. Ferreira Pires, *'Wat is cloud computing?'*, Computerrecht 2011/63; K. Sommer, '*Cloud computing: zegen, ramp of uitdaging?*', P&I 2009 (afl. 6).

[3] Downloading and subsequently storing software or content on the user's computer is not included in this definition. One of the essential characteristics of The Cloud is that the content remains stored in the Cloud and it is only *used* on the terminal.

[4] Each of these different forms have – again – different characteristics and different definitions, such as Software as a Service" (SaaS), "Platform as a Service" (PaaS) and "Infrastructure as a Service" (IaaS).

difference between the 'mainframe computer' and 'the Cloud' is that the central computer is now a server that is often controlled by third party providers.

With regard to defining 'the Cloud' it is also worth mentioning that some are skeptical about (what they call) "the cloud-hype" and see it as little more than a marketing tool. They do not see in what precise respect "the Cloud" is fundamentally different from the distribution of content/information through internet-websites that we have known on a widespread scale since the early 90s. Oracle's CEO Larry Ellisson is widely quoted: "*The interesting thing about cloud computing is that we've redefined cloud computing to include everything that we already do. I don't understand what we would do differently in the light of cloud computing other than change the wording of some of our ads*…".[5]

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

Although the use by consumers of Cloud-solutions is rapidly growing there is no specific category of works or performances that is commonly exploited by Cloud only. All types of content are still commonly exploited by other means as well, although we see a trend that f.e. with regard to audio and audiovisual media traditional outlets distributing physical products (such as record stores) are having economic difficulties because demand is shifting to both online purchase of physical products as well as online purchase of content that is distributed by Cloud solutions. A main driver for this economic trend is off course also the wide-spread distribution of illegally distributed audio and audiovisual media through P2P-networks (that in most instances themselves fall within the scope of a Cloud service as defined above).

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?

Nearly all computer users today and even a greater portion of internet users utilize some sort method of Cloud computing and there are many platforms that have specifically been designated for Cloud uses. Given i.a. the increasing availability of fast broadband,[6] a higher penetration of handheld devices (with limited storage)[7], low prices of storage facilities and more general a higher standard of computing technology (which for instance ensures high quality and fast distribution through the cloud as well as f.e. the protection of the data of users of such services) we expect that more users will see benefits in Cloud solutions and will place more of the functions and content

[5] Larry Elisson, Speech at Oracle Open World 2008, 25 September 2008.

[6] The penetration of fixed broadband connections in the Netherlands is 40,6% (with 60,5% of fixed lines providing speed of 10 Mbps and above).

[7] At the moment the penetration of mobile internet devices in the Netherlands is 49,2% (which is up 11,2% year on year).

that are currently stored on their own computers in the Cloud. We therefore foresee a growth of the market of Cloud based solutions.

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

In the coming years the Cloud will gain importance as a method for both rightholders and users to distribute and use works. The Cloud will considerably change the ways in which revenues are made in the distribution chain of copyrighted content. The combination between technological protection measures and the ability to deliver 'content as a service' (rather than 'content as a product') provides for huge commercial opportunities and will give rightholders greater control over their works. These new usages and business models will pose various interesting questions to copyright (but also to copyright law as a system). Depending on the dominance (and success of) Cloud-distribution we could expect renewed questions with regard to exhaustion of copyright (or the interests that this concept originally sought to protect), contractual exclusion of copyright exceptions, and the relation between TPMs and copyright exceptions. In addition to these issues (and the issues addressed in this questionnaire) questions can come up with regard to territoriality and the freedom of services (spurred by the technical possibility to exploit the same work in different countries against different prices), and f.e. with regard to possible database rights in the collection of materials that the Cloud provider (and possible conflicts between database-rights and copyrights).

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?

There is no Dutch case law specifically with regard to Cloud storage. However, in recent years there were a number of cases with regard to the right of making available to the public by hosting providers and bit torrent/P2P-websites that can provide some guidance with respect to the right of making available to the public in connection with Cloud storage, retrieval and dissemination.

As a general rule it has been accepted that putting copyrighted content on a (cloud) website that is accessible to the public is a form of "making available to the public". This will also be the case

when the content is put on the website in such a way that it is accessible only to friends and relatives. In view of existing case law it seems likely that 'non-public' must be narrowly interpreted and confined to sharing content with a closed circle of relatives and friends or a similar group.[8] This is because the case law requires fairly close personal ties between the persons concerned if the sharing is to qualify as 'non-public'. Close ties of this kind do not generally exist in the case of social networks such as Facebook and Myspace.[9] The question whether the user that is putting content on a website is 'making available to the public' is therefore a fairly straightforward question and the answer to that question automatically follows from standard case law.

In contrast, the question whether the Cloud storage provider is making content available is more difficult. In the Dutch landmark case between the Scientology Church and the hostingprovider XS4ALL the Court in The Hague held that an Internet Hosting Provider is not 'making available to the public' because it merely provides the technical facilities for enabling the communication to the public by others.[10] In this decision the Court made direct reference to the Agreed Statement of the WIPO-treaty that expressly excludes the mere provision of technical facilities from the scope of protection offered by the exclusive right of making available to the public. The same line of reasoning has been used in more recent cases with regard to filesharing websites that do not themselves store content on their own servers (, but are directing consumers towards websites that offer (infringing) content.[11] In this 'technical approach' of the concept 'making available' there is no copyright infringement if the content is not stored on the own computersystem/server.[12]

Interestingly, last year in a series of judgments on Article 3 of the Copyright Directive[13] the European Court of Justice has provided further guidance on the concept of 'making available to the public'.[14] It could be argued that the ECJ takes a more 'functional' approach to the concept

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[8] Supreme Court 9 March 1979, NJ 1979/341 (*Willem Dreeshuis*); ECJ 7 December 2006, Case C-306/05 (*Rafael Hoteles*), although it has been held by the ECJ that the 'public' that gathers in the waiting room of a dentist does not constitute such a public; ECJ 15 March 2012, IER 2012/28 (*SCF/Del Corso*).

[9] TNO/SEO/Ivir-report "*Ups and downs - Economische en culturele gevolgen van file sharing voor muziek, film en games" 2009*, p.53.

[10] District Court The Hague 9 June 1999, BIE 1999/489 (*Scientology/XS4ALL*).

[11] District Court The Hague 22 March 2011, IER 2011/44 (*Premier League/MyP2P*), District Court Haarlem 11 February 2011, IEPT 20110209 (*Brein/FTD*); Court of Appeals The Hague 15 November 2010, LJN BO3980 (*FTD/Eyeworks*); District Court Amsterdam 16 June 2010, IEF 8997 (*Brein/The Pirate Bay*); Court of Appeals Amsterdam 16 March 2010, IER 2010/78 (*Shareconnector*); Court of Appeals Den Bosch 12 January 2010, IER 2010/34 (*CMore/MyP2P*); District Court Utrecht 26 August 2009, B9 8127 (*Brein/Mininova*); District Court Den Bosch 8 July 2008, IEF 6425 (*Brein/Euroaccess*); Court of Appeals Amsterdam 3 July 2008, IEF 6399 (*Leaseweb/Brein*); District Court The Hague 5 January 2007, IEF 3191(*Brein/KPN*); District Court Amsterdam 24 August 2006, IEF 2531 (*Brein/UPC*); Court of Appeals Amsterdam 15 June 2006, IEF 2208 (*Brein/Technodesign*).

[12] Hosting providers are thus able to benefit from this technical approach in two ways: i) in case content is placed on their server it can be argued that the provider is merely providing technical facilities, ii) in case it is not placed on the own server it can be argued that it is merely providing access to a third party who is making available.

[13] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society

[14] ECJ 4 October 2011, IER 2012/3 (*Premier League*); ECJ 13 October 2011, C-431/09 (*Airfield*); ECJ 24 November 2011, IER 2012/28 (*Circus Globus*); ECJ 15 March 2012, IER 2012/28 (*SCF/Del Corso*); ECJ 15 March 2012, IER 2012/28 (*PPL/Ireland*).

'making available to the public' in these decisions. The ECJ held that, in order to establish whether a user is making a communication to the public, the judge must first consider whether the user 'intervenes', in full knowledge of the consequences of its action, to give access to a broadcast containing the protected work to its customers, and if "without its intervention the customers cannot enjoy the works broadcast, even though they are physically within the broadcast's catchment area".[15] Second, the Court held that it is relevant whether the intervention results in reaching a 'new public'. Third, the Court held that it is not irrelevant that a 'communication' is of a profit-making nature.[16]

In a decision by the District Court of Amsterdam of 12 September 2012 the Dutch judge gave its first application of these new concepts of the ECJ in an internet environment.[17] In applying the criteria 'intervention', 'new public' and 'profit' the Court held that the placing of link to a website with leaked Playboy pictures of Dutch reality personality Brit Dekker constituted a 'making available to the public' of the content (even though the content itself was not placed on the server of the defendant, Dutch blog Geen Stijl). This was the third time a Dutch Court took a more functional approach to the concept of making available. In 2010 the District Court in The Hague[18] had also held that a Usenet forum with information regarding Usenet-files on different servers constituted a making available of this content. This decision was overturned by the Court of Appeals in The Hague.[19] The District Court Amsterdam also held that Usenet serviceprovider News Service Europe autonomously infringed copyrights.[20]

These cases can have significance in answering the question whether a Cloud provider makes content 'available to the public'. In a more technical approach it could be argued that Cloud providers are 'merely providing technical facilities'. In contrast, in a more functional approach criteria such as 'intervention', the reaching of a 'new public' and 'profit' determine whether the content is made available to the public. The technical approach gives way to difficulties in the Cloud environment given the fact that in providing 'physical facilities' some Cloud providers *de facto* function as 'on demand' radio- and televisionservices and can play an important central role in the exploitation of copyrightable works on the internet (and are also not only commercially benefitting from the technical service but are also (directly) benefitting from the exploitation of this content because they also enjoy revenues associated with the consumption of that content (f.e. through advertisements). A more functional approach on the other hand seems to provide for less legal security.

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[15] ECJ 7 December 2006, Case C-306/05 (*Rafael Hoteles),* §42; ECJ 4 October 2011, IER 2012/3 (*Premier League*), §195

[16] ECJ 4 October 2011, IER 2012/3 (*Premier League*), §204

[17] District Court Amsterdam 12 September 2012, LJN:BX704 (*Playboy/Geen Stijl*).

[18] District Court The Hague 2 June 2010, IER 2010/20 (*FTD/Eyeworks*).

[19] Court of Appeals The Hague 15 November 2010, LJN BO3980 (*FTD/Eyeworks*).

[20] District Court Amsterdam 28 September 2011 (*BREIN/News Service Europe*).

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

Again, there is no case law specifically concerning Cloud-providers. Cloud-providers will generally benefit the legal indemnity if they can be regarded as a 'hosting service' within the meaning of article 14 of the E-Commerce Directive[21] and the Dutch Civil Code (article 6:196c paragraph 4). Once a Cloud-provider qualifies as a hosting provider it can still act unlawfully if and in so far as a) they are notified of the presence of copyrighted content, b) there are no reasonable grounds for doubting the correctness of this notification, and c) the Cloud provider does not then take action as quickly as possible to remove this information from their computer systems or make this information inaccessible.
The main question is whether a Cloud-provider can be regarded as a hosting service. The only case law about this question regards internet auction websites. In the recent L'Oreal/Ebay-decision[22] the ECJ has ruled that an intermediary would not be able to invoke the hosting safe harbor if it:

> 113. […], instead of confining itself to providing that service neutrally by a merely technical and automatic processing of the data provided by its customers, plays an active role of such a kind as to give it knowledge of, or control over, those data […].
> 116. Where, by contrast, the operator has provided assistance which entails, in particular, optimising the presentation of the offers for sale in question or promoting those offers, it must be considered not to have taken a neutral position between the customer-seller concerned and potential buyers but to have played an active role of such a kind as to give it knowledge of, or control over, the data relating to those offers for sale. It cannot then rely, in the case of those data, on the exemption from liability referred to in Article 14(1) of Directive 2000/31.

The concepts of the L'Oreal/eBay-judgment were first applied in The Netherlands by the Court of Appeals of Leeuwarden in a case between chairproducer Stokke and Marktplaats (an online marketplace that was acquired by eBay). The Court interpreted the rule of L'Oreal/eBay as meaning that Marktplaats can invoke the hosting safe harbor if it has taken a neutral position between the user (who placed the content on the platform) and the customer (to whom the content was made available) and that it cannot if it has played an 'active role' between these both parties. The Court held that Marktplaats was neutral, because it had no involvement with the actual content of the advertisements (the works that were placed on its platform), and because it treated all different users who placed content online equally. The fact that Marktplaats was heavily

[21] Directive 2000/31/EC of the European Parliament and the Council of 8 June 2000 on certain legal aspects of information society services in particular electronic commerce, in the internal market.
[22] ECJ 12 July 2011, BIE 2011/107 (*L'Oreal/eBay*)

advertising its platform did – according to the Court of Appeals – not mean that Marktplaats had an "active role" since all of its users were profiting equally from these efforts. The Court therefore concludes that Marktplaats can invoke the hosting safe harbor for the infringements on its service.

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

There is no case law directly related to the Cloud Environment.

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

Among the provisions of the WIPO Treaties with particular significance for the protection of copyright and related rights in the Cloud context are the requirements concerning technological protection measures and the "making available" right. It would be helpful to explore the boundaries of these rights. For example, as noted before the concept of 'mere physical facilities' in the Agreed Statement need clarification given the fact that in providing 'physical facilities' to consumers some Cloud providers *de facto* function as on demand radio and television services and can play an important central role in the exploitation of copyrightable works on the internet (and are not only commercially benefitting from the technical service offered, but are also (directly) benefitting from the exploitation of this content because they can enjoy revenues associated with the consumption of that content (f.e. through advertisements).[23] In addition, with some services the limit between private and public usage can be blurred and the WIPO Treaties do not provide a clear-cut framework.

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

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

There are many services that authors and rightholders can use to exploit their content. Most types of content have own platforms for the distribution. With regard to music there are many streaming music services that allow rightholders to exploit their music online, as well as online

[23] This could spur the debate on the technical approach vs. functional approach of the making available right.

websites for digital distribution of content through downloading.[24] These services are fastly gaining popularity.[25] With regard to audiovisual works there are both webbased and cable Video-on-demand services.[26] This is also where we see a convergence of 'traditional' media (such as TV) and internet media.[27] For example, the Dutch broadcasters use a co-owned Cloud platform on which (missed) episodes of TV series are placed that can be watched on internet devices and the identical Cloud-service is also available on TV with cable subscription. There are also many user-generated content services, which allow end-users to upload their content to the Cloud. These services exist for all types of content: photo's (Flickr, Picasa), music (Youtube, MySpace), and video (Youtube, Vimeo). There are also more general Cloud storage platforms that facilitate content distribution. These types of services are not regularly used by rightholders to offer copyrighted content to the public. Some rightholders however do also use social network cloud solutions (such as Facebook) to offer content to the public.

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

See previous question.

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

Typically, rightholders do not transfer copyrights to the providers of Cloud services. They will grant a license to providers the scope of which depends on the particular service. With the exploitation of mainstream audio and video content this license will only be granted for non-commercial private use by end-consumers in the Netherlands. With regard to other types of content licenses usually are broader, but no general remarks can be made about the content of these licenses as there is a great variation. Typically, the minimum license that is used requires permission for non-commercial private use but some Cloud service providers (most notably with regard to user generated content) have terms and conditions in place that go so far as that they

[24] In the SEO-report "*Digitale Drempels*" (p.8) it is mentioned that in the Netherlands according to Pro-Music there are 34 legal music services active; these include both downloading and streaming services: 7digital, Countdownload, Dance-tunes, Deezer, downloadmusic.nl, eMusic, GlandigoMusic, iTunes, Jaha, Jamba, Last.fm, legal download, Mediamarkt, Media Gigang, Mikimusic, MP3 Downloaden, MSN Muziek Downloads, MTV, Muziek.nl, Muziekweb, Nokia Music, Radio 538, rara.com, Saturn, Sony Ericsson Playnow Plus, Spotify, Talpadownloads, TMF, TuneTribe, Vodafone, You Make Music, YouTube, zazell.nl, Zoekmuziek. The three most prominent Cloud (streaming) services are Spotify, Deezer and Rara. iTunes is market leader in the segment of legal downloading.

[25] In 2011 the number of paying subscribers to streaming music services grew from 8 million to 13 million worldwide (SEO-report '*Digitale Drempels*', p. 5).

[26] On demand television content is gaining popularity. In 2011 75% of TV-owners and 20% of computer-owners used these services. In 2012 Dutch inhabitants are watching more movies through Video-on-demand services than they are purchasing DVD's and Blu-Rays in stores (SEO-report '*Digitale Drempels*', p. 27).

[27] For example through ConnectedTV or WebTV. Approximately 20% of Dutch households have a television that is connected to the internet. It is expected that this figure will increase by 300% in the next two years (SEO-report '*Digitale Drempels*', p. 25).

transfers all copyrights (and database rights) to them the moment that the content is placed on their platform.

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

End users are typically permitted to make private, non-commercial use of the material. Again, there is no uniformity in terms and conditions used by Cloud providers. In some instances users are allowed to make broader use of the copyrighted content (f.e. on the basis of CC-license mentioning the author). The types of specific uses permitted vary and depend on the Cloud service provider and the type of content offered; with open-source software offered in the Cloud one of the purposes of open distribution will be to allow users to adapt the work. Such rights will (normally) not be granted to users of photographs, music, or video.

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

There are not many figures that can be given with regard to royalty rates and total revenue. However, there are some figures known with regard to streaming music. Although these figures are recent these rates and total revenue are liable for change because of the rapid growth of Cloud distribution of music. This could lead to higher tariffs (because tariffs were set low to gain market share in an emerging market and to provide a cheap alternative to illegal downloading). In the Netherlands in the first half of 2012 EUR 2,7 million Euro's was earned by the industry with streaming music (which is 6 times as much as the first half of 2011).[28] The tariffs that Spotify paid to Buma/Stemra are a fixed component of EUR 0,85 per user and 0,03 cents per streamed song.[29] According to some other sources artists earn 0,06 cents per streamed song.[30]

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

Cloud service providers use various DRM schemes. Because of their nature details of such technical measures are not publicly available, but we can make a distinction between various types of TPMs that Cloud service providers use. Firstly, many service providers (especially providers that offer streaming services) use TPMs that prevent users from downloading content; users are allowed to watch or listen to the content, but they are not allowed to store it on their device. Other providers (such as f.e. Spotify) do allow storage (against additional payment) but the stored content can only be used on the specific device and cannot be moved to another device. In other words, the content is copy-protected and only specific types of use are allowed (thereby often

[28] NRC Handelsblad 8 September 2012, Marc Hijink, '*Verdwalen in twintig miljoen liedjes*'.

[29] SEO-report '*Digitale Drempels*', p. 10.

[30] DePers 14 March 2011, R. Thomesen, '*Beter dan illegale muziek*'.

blocking usage that would otherwise be permitted on the basis of copyright exceptions). Moreover, the TPMs allow the provider to retain control over the content; once the subscription to "Content as a service" ends the downloads will be erased from the device or DRM schemes are used (mostly with audiovisual content) to provide 'time-windows' in which the content has to be used; when the time is up access to the content is blocked. Finally, many providers use login systems (username/password), which enable users to safely store private information and provide Cloudprovider with greater control over the use that is made with the content.

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

Article 6 of the Copyright Directive has been implemented in Dutch law (article 29a DCA); the circumvention of technological protection measures is illegal. Technological protection measures have been defined as "technologies, devices or components which in the normal course of their operation serve to prevent or restrict acts in respect to works, which are not authorized by the author or his successor in title.". Therefore, any technological measure aimed at preventing or restricting any act which ha not been authorized by the right holder seems to fall within the broad scope of the provision. It is not required that the measures are perfect.[31] It has been held that a protection of username and password can be regarded as an effective measure.[32]

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

Yes, unauthorized circumvention of TPMs is a practical problem for rightholders. The main advantage for Cloud providers is the fact that content is stored on their own servers which gives them greater control over that content and which allows them to sell 'content as a service'. TPMs are instrumental in reaching that goal. Circumvention of TPMs will give users a more free use of the content and will therefore hinder the business model of the Cloud provider.

[31] TK 2001/2001, 28482, nr.3, p. 57.

[32] District Court Amsterdam 11 november 2004, IER 2005/7 (*ANP/Novum*).

SESSION 5 - COPYRIGHT-AVOIDING BUSINESS MODELS

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?

There are plenty of examples of services that offer such a storage solution. Many of such services are aimed at a certain type of files, such as photography (Flickr and Picasa) and video (Youtube, Vimeo) and leave the choice to the users to privately store the content and to share it with limited number of other users. Such possibilities also exist with the more general cloud based solutions. Because all services leave the possibility that the files can be shared with others (even if the setting is private) it must be emphasized that these services are not totally private. 'Private' in these types of services means that the content is not made generally available (for everyone to see); it is left to the choice of the user to whom he provides access to the 'privately' stored files, and more often than not the 'private'-files will be shared with others.

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).

Cloud services require that a reproduction is made on the server of the operator of the Cloud service. The question that has to be answered before we get to the application of the private use exception is who makes that reproduction? is it the user that 'uploads' his or her works to The Cloud or the company providing The Cloud service? Or both?[33]

It could very well be argued that with regard to acts of reproduction by consumers a copy stored in the cloud qualifies as a private copy provided that they meet the criteria as set out in article 5 sub2b of the Copyright Directive (article 16c DCA).[34] The fact that the copy is made on the

[33] In 1999 - in the context of the liability of a hosting provider - it was held that a hosting provider did not make such a reproduction on its own system, because these reproductions were dictated by technology and are not so much the result from an action of the hosting provider, but rather are a result of an action by the user; District Court The Hague 9 June 1999, BIE 1999/458 (*XS4All/Scientology*].

[34] A copy may be made for private use if the following conditions are fulfilled (article 16c (1) Copyright Act): - it is made by natural persons (not by businesses, institutions or organizations); - without any direct or indirect commercial aim; -exclusively for private practice, study or use (i.e. not for practice, study or use by third parties); - the number of copies remains limited. Under section 16c (2) of the Copyright Act, an additional condition for making digital copies for private use is that a fair compensation is paid.

system of the Cloud provider does not make any difference. Dutch Law does not require that copies need to be made using your "own resources".[35]
It must be noted however that the reproduction should not be made available to third parties. Making copies for friends and third parties is not covered by private use and in that case the reproduction no longer is for own use. Furthermore, Dutch Copyright law lacks a provision for digitally copying in the business environment. Cloud services meant as a business solution for external storage therefor cannot legally rely on any Dutch user's copyright exception.

There are various interesting sides to private copying in the Cloud. For example the 'fair compensation' for the damages resulting from such a copy. The damages resulting from this copy will be much higher than 'ordinary' private copies, because of the universal access and many functions that can performed with Cloud storage.[36] Furthermore, who will be liable to pay the fair compensation? A question that is all the more prominent given the international nature of most cloud solutions, which also confronts us with questions regarding applicable law.
In as far as reproductions are made by the Cloud provider there is no ground – also because of the commercial interests of Cloud providers – to let the Cloud provider benefit directly from a private copying exception (any exclusion from liability should be governed by article 14 of the E-Commerce Directive).

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?

As was indicated above, Cloud operators can benefit from a technical interpretation of the "making available" right in the sense that it is easily held that they are merely providing the physical facilities. The legal doctrine tends to favor this technical approach to the right to make available (with an important exception for the '*safe harbour*'-provision, which is also a technical consideration), and it remains to be seen whether the recent jurisprudence of the ECJ on the making available right has opened the way for a more functional approach of the making available right.

[35] Neither is this specifically required by art. 5.2, b) of the Copyright Directive.

[36] Which in contrast will also have it bearing on the setting of the height of the home copying levies on other media. This aspect of The Cloud has not escaped the attention of the Dutch Parliament. In particular, when reviewing the private copying system, the Parliament considers that more of our information is located 'in the cloud' (TK, 2011–2012, 29 838, nr. 46).

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?

See above

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)?

The E-Commerce Directive was transposed into Dutch law, largely in the framework of the Dutch Civil Code, in 2004..In the area of copyright its most important provisions concern the rules that immunize internet service providers from liability for damages that result from infringing third-party content (new article 6:196c of the Dutch Civil Code, transposing articles 12-14 of the Directive). Article 6:196c DCC disclaims liability for these providers when they don't have actual knowledge that the information stored is illicit or that it harms intellectual property rights of a third party that can claim compensation. Providers are also exempted if they acquire such actual knowledge but act with diligence to remove or block all access to the contents. This limits the liability of Internet (including cloud) service providers if they have no actual knowledge of the infringing content.

Whilst the E-Commerce Directive immunizes internet service providers from liability for damages that result from infringing third-party content (new article 6:196c of the Dutch Civil Code), injunctive relief is not ruled out. As court decisions in the Netherlands reveal, injunctive relief may sometimes come in the form of court orders to terminate Internet accounts or to identify infringing internet subscribers.[37]

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?

This is also a question of EU-wide harmonized law, more specifically the tension between articles 14 and 15 of the E-Commerce Directive. Recent case law of the ECJ have established some parameters of the duties of care of Internet service providers to monitor. In the SABAM case[38],

[37] See Court of Appeals Leeuwarden 22 mei 2012 LJN: BW6296 (*Stokke/Marktplaats*) where the court observed that the hosting safe harbor is directed at immunity for damages and explicitly leaves room for injunctions, also on the basis of Articles 8 and 11 of the Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights. Also District Court of Amsterdam 5 January 2007, AMI 2007, p. 55-58 (*Brein/KPN*).

[38] ECJ 16 February 2012, C-360/10 (*SABAM/Netlog*).

the ECJ stated that the Internet service provider cannot be obliged to install *a general* filtering system, covering all its users, in order to prevent the unlawful use of musical works, as well as paying for it. In the case between Stokke and Marktplaats the Court of Appeal in Leeuwarden that Article 15 E-Commerce Directive does not stand in the way of imposing obligations to monitor for infringements in specific advertisements, for instance a monitoring obligation for the specific selection of advertisements that contain the text STOKKE or TRIPP TRAPP (a selection that can be easily made with the use of a filter). The Court clarifies however that injunctions have to remain reasonable and proportionate and are not allowed to become unreasonably expensive or result in obstructions of legitimate trade. The Court concludes that none of the injunctions it was asked to impose on Marktplaats would be proportionate. It relies mostly on the argument that the costs of imposing such obligations on Marktplaats would be disproportionately high, compared to the costs of Stokke.

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

There are no criteria that follow from the law or jurisprudence other than the basic requirements regarding burden of proof (i.e the right holder must provide evidence of the existence of the right, that the right is vested in him and that the content he seeks to have removed is infringing this right); when these three facts have been proven and the Cloud provider does not take action it will be difficult for the Cloud provider to invoke the '*safe harbour'*-clause of article 6:196c DCC. In practice the evidence that is required (in order to have the content promptly removed) largely depends on the approach taken by the Cloud provider and the specific (often standardized) different notice and take down policy that that Cloud provider uses.

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?

See above, there are many Cloud operators that use copyrighted materials with the consent of rightholders.

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?

N/A

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?

There are currently no legislative changes under discussion in Dutch Parliament. On a European level the European Commission announced in January 2012 an initiative on 'notice-and-action'-procedures.[39] The main aim is to further harmonize and sharpen 'notice-and-action'-procedures also in view of the growing volume of statutory and case law in the Member States, which – according to the European Commission - makes it appear necessary to set up a horizontal framework for 'notice and action'-procedures . In response to the 2010 public consultation on E-Commerce, stakeholders had indicated that these procedures should lead to a quicker takedown of illegal content, should better respect fundamental rights (in particular the freedom of expression) and should increase legal certainty for online intermediaries. On 4 June 2012, the European Commission launched a public consultation on procedures for notifying and acting on illegal content hosted by online intermediaries, which ended on 11 September 2012.[40]

9) Do you see any progress regarding filtering technology?

There is a constant progress in filtering technology.

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?

Creative Commons licenses are well known and widely used. In particular software are noticeably licensed under an open source model. CC licenses are also frequently used by academics. They are also used by artists and performers that want to present themselves to the public.

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

CC-licenses are used in all work categories, but are most closely associated with photographs, software and scientific works.

[39] Commission Communication, 11.1.2012, COM(2011) 942 final, "*A coherent framework for building trust in the Digital Single Market for e-commerce and online services*".

[40] See http://ec.europa.eu/internal_market/consultations/2012/clean-and-open-internet_en.htm.

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 figures are known. One of the goals of CC is to encourage creators and rightholders to experiment with new ways to promote and market their work.

4) Also in your country, what legal obstacles are authors faced with when making use of open content and CC-licenses?

See above

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?

Yes, it is possible to sue the Cloud provider in he Netherlands if the service is aimed at he Netherlands.[41] Whether a particular service is aimed at the Netherlands follows from the specific circumstances of the case (f.e. whether Dutch content is made available, whether Dutch language is used etc.). In such instances Dutch Law will apply but only with regard to the part of the service that is offered in the Netherlands[42] The law applicable to the primary infringement or the intermediary's residence/place of business will not apply[43]

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

[41] Supreme Court 18 februari 2005, LJN AR 4841 (*De Lotto/Ladbrokes*).

[42] Court of Appeals Amsterdam 13 March 2012, AMI 2012/17 (*PR Aviation / Ryanair*)

[43] In that respect please note that the 'country of origin'-rule of the E-Commerce Directive does not apply for infringements on intellectual property.

The national collective rights management organization BUMA/STEMRA has concluded cloud specific license with inter alia cloud music providers.[44] These cloud music providers have concluded agreements that give them permission to offer streams for non-commercial private use. These licenses are limited to the Netherlands and BUMA/STEMRA does – at the moment – not grant multi territorial licenses.[45] Previously BUMA/STEMRA gave out multi-territorial licenses, but in 2008 it was sued by the British PRS. Buma had granted a pan-European license to Beatport.com for online music use (for the total world catalogue, including the PRS catalogue). The District Court in Haarlem held that this was not allowed on the basis of an earlier agreement between PRS and BUMA.[46] In 2009 Buma started proceedings against FreshFM that made music belonging to the Buma-repertoire available in the Netherlands on the basis of a license which was granted by PRS. The District Court in Amsterdam ordered FreshFM to terminate its broadcast of Buma repertoire in the Netherlands, because the PRS license is only effective in the UK.[47]

On a European level, the European Commission has submitted proposals to create a legal framework for the collective management of copyright, with a view to enabling multi territory and pan-European licensing.[48]

[44] Such as Spotify,□ Rara,□ Sony,□ Omnifone,□ Xbox Music,□ Deezer,□ Last.fm,□ Rdio,□ Ziggo,□ Youtube,□ 22 tracks,□ Xbox Music. List published on http://www.bumastemra.nl/over-bumastemra/faq/.

[45] SEO states that Buma/Stemra has granted between 50 and 70 licenses to legal online music services. All these licenses are limited to the Netherlands.

[46] District Court Haarlem 19 August 2008 (*PRS/Buma*). This decision was upheld by the Court of Appeal of Amsterdam 19 January 2010 (*Buma/PRS*).

[47] District Court Amsterdam 9 July 2009 (*Buma/Fresh FM*) and District Court Amsterdam 26 May 2010 (*Buma/Fresh FM*).

[48] See Proposal for a Directive of the European Parliament and of the Council on the collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market, 17 July 2012, 2012/0180 (COD).