ALAI-Congress

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Questionnaire

Answers from Norway

Session 1
— Developments of New Platforms

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

Although there is no authoritative definition, the cloud is generally understood as an external data storage unit or database used to provide a wide spectre of services where data storage capacity is offered to end users.

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

Yes there seems to be a general awareness and understanding that the exploitation of works is strongly related to the growth and development of cloud computing.

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

Yes, there are, and yes, new platforms will probably be established in the near future.

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

The potential importance appears to be great as cloud computing is likely to affect all areas of copyright based businesses and lead to the development of new business models and possibilities with regard to the exploitation of works.

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, our most recent case law regarding copyright infringement on the internet is related to bit-torrent technology and bit-torrent related business models. It is, however, our opinion that several of the general principles behind this case law are applicable in cloud computing scenarios.

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

See the previous answer.

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

No.

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

A good starting point would be to assess whether or not the existing WIPO Treaties leave any legal gaps or unsatisfied legal needs that are due to the development of cloud computing. We do not see such needs with regard to substantive law.

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?

We do not have a detailed overview of the market, but do presume that the services being offered on the Norwegian market will be rather similar to those being offered in other European countries that are comparable to Norway.

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

Musical works, literary works, audiovisual works, photographic works etc.

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

In Norwegian copyright law, the rights of the rightholder in copyright protected works are divided into two main categories, namely the right to make copies of the work (the reproduction right), and the right of making the work available to the public. The exact content of the Norwegian right of making available is, however, different from the making available right found in the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty (Arts. 8 & 10 respectively) as it encompasses the distribution of physical copies (be it by sale, rental, lending or otherwise) of the work to the public, the public display of physical copies of the work and the performance of the work. In Norwegian copyright law the latter notion includes not only the public performance

directly before a public, but also *all forms* of communication of the work to the public over a distance, be it by broadcast or otherwise and includes the making available of the work by wire or wireless means in such a way that the member of the public may access the work from a place and at a time individually chosen by them.

Among these rights one can presume that the right of performance in the form of a communication right adapted to the service in question will be the one which is most commonly transferred. In addition, the transfer of the reproduction right will be necessary to the extent the reproduction of the work in the cloud is made by the service provider, or if it is a part of the cloud service to allow the end user to make non-transient copies of the works in the cloud.

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

This will depend on the nature and purpose of the service and the extent of copyright clearances made by the service provider/end user.

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 we can not. Sorry.

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

We are not familiar with the specific details here.

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

TPM are protected in Norway to the same extent as they are protected in other Europeans countries which are bound by their legal obligations to protect TPM pursuant to article 6 of the EU Information Society Directive. The full text of the directive may be found here: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0029:EN:HTML

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

We are not aware of this, but it seems reasonable to believe that it may be so.

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.

All the above mentioned services are available in Norway.

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).

With regard to contributory infringement, the service provider will usually be free from liability if the provided service is suitable for substantial non-infringing use, such as reproduction for private use, based on a lawfully made representation of the work in question (pursuant to section 12 of the Norwegian Copyright Act). This does, however, only apply to the extent that the reproduction and possible circumvention of TPM is not performed or initiated by the service provider as a part of the service provider´s commercial activities.

Furthermore, pursuant to the third paragraph of section 12 of the Norwegian Copyright Act, the private copying exception does not apply to the reproduction of music and audiovisual works when outside assistance is employed in order to make the reproduction.

Chapter 2 of the Norwegian Copyright Act also contains several provisions either allowing the reproduction or "public performance" of copyright protected works for certain specific purposes (such as educational purposes, and the purpose of making works available for disabled people), or making such reproduction and "performance" subject to extended collective licensing. Most of these provisions are technology neutral, meaning that cloud computing may be used as a means to further the relevant purposes.

One illustrating example of this may be found in section 16a of the Copyright Act which allows archives, libraries and museums to make their collections available to the public (see section 4.3 for an explanation of the Norwegian making available right) by virtue of an extended collective agreement license as provided for in the Act. This making available may be accomplished by archives, libraries and museums through the use of cloud technology.

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 implied in our answer to question 4.3, the making available right set out in the Norwegian Copyright Act is a technology neutral right which is meant to cover all forms of exploitation of copyright protected works except the reproduction of works. Thus it would appear that a narrow interpretation of the making available right in Norway would be contrary to the nature of and fundamental considerations behind the right.

From a theoretical point of view one should expect that a narrow interpretation of the "public performance right" would limit the scope of copyright protection and allow a more extensive unauthorized exploitation of copyright protected works. The practical implications of this will,

however, depend on the specific interpretations and whether or not these are sufficient to provide legal predictability to such a degree that one may develop new business models based on these interpretations.

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?

Contributory infringement is punishable and will also be subject to liability for damages if the upload of copyright infringing content is facilitated or encouraged, either directly or indirectly, by the service provider. This also applies if the service provider was originally unaware of the copyright infringing nature of the uploaded content, but decides to remain passive even after obtaining such knowledge. For further details, see our answer to question 5.1.4

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.

The e-Commerce Directive has been implemented in Norwegian law as a part of our obligations pursuant to the EEA-agreement, including article 14 and 15 of the directive. Please see our answers to 5.2.2 and 5.2.4 for a brief description of the practical implications of these exceptions.

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?

Cloud service providers do not have an explicit obligation to monitor and eventually to remove copyright infringing content (which is in accordance with article 15 of the e-Commerce Directive). The failure to take either of these measures may however, depending on the circumstances, be regarded as a facilitation, or direct or indirect encouragement, to copyright infringing activities and be subject to punishment or/and liability if the actions/non-actions of the service provider may be characterized as a negligent or wilful contribution to copyright infringement.

Furthermore, the service may be subject to a preliminary injunction (comparable to article 8.3 of the Information Society Directive) and the Courts may order the blocking of the service.

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

The removal of copyright infringing content is considered a civil remedy, and thus it is sufficient if the rightholder presents evidence sufficient to establish a preponderance of evidence.

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?

We are not aware of this.

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?

We still have not developed case law with regard to 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?

The Norwegian Ministry of Culture has recently presented a draft bill which aims to strengthen the enforcement of copyright on the internet. Even though liability is not explicitly addressed in the draft, it does impose several new obligations upon internet service providers (for instance the obligation to block access to web pages containing copyright infringing content). It seems plausible to expect that the failure to live up to these obligations may be regarded as relevant with regard to the assessment of liability for contributory infringement.

9) Do you see any progress regarding filtering technology?

Not that we are aware of, we do, however, never underestimate the power or speed of technological progress.

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?

Not that we are aware of.

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

We have no information on this issue.

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 that we are aware of.

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.

We are not aware of any such obstacles.

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

1) Does your country have specific private international law rules for copyright in particular and for intellectual property in general or are there general rules of private international law that apply in these circumstances? In particular do your country's rules of judicial competence (personal jurisdiction) make it possible to sue a foreign intermediary who makes it possible for

infringements to occur or to impact in the forum? Which law applies in such instances? Would the law applicable to the primary infringement apply? Would the law of the intermediary's residence or place of business apply?

There are no (explicit) international private law provisions in the intellectual property legislation in Norway. However, from a European perspective, it does follow from article 5(3) of the Lugano Convention (to which both Norway and the EU are bound) that a person domiciled in a State bound by the Convention may, in another State bound by the Convention, be sued in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur. With regard to the choice of law issue, one may presume that the principles of either ex loci protectionis or lex loci delicti commissi, as expressed in article 8 of the Rome II Regulation (864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations), may be applicable even if Norway is not bound by the Rome II Regulation.

However, the identification of the delicti commissi is as a rather difficult task as there are no clear rules in the EU which regulates this issue, and the application of the uplink-principle found in article 1(2)(b) of the Satellite Directive (93/83/EEC) seems rather dubious.

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)?

Not that we are aware of.