Aladda

Asociación Literaria y Artística para

La Defensa del Derecho de Autor

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Questionnaire

SPAIN

(ALADDA. *Asociación Literaria y Artística para la Defensa del Derecho de Autor*)

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Session 1

―Developments of New Platforms

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

From a legal point of view we could define "The Cloud" as a group of services of the *Information Society* that allow storage of data that the user-subscriber can access to from any device connected to the Internet in any given time and from any given place. The information is stored permanently on Internet servers and it is sent to temporary client caches, including laptops, entertainment centres, etc. (in terms of exploitation of the works, it would be a kind of "making available" or a service that can combine storage and public communication of the works).

From the general user point of view we think there is not a very clear perception of what "The Cloud" is. It is also discussed whether there is only one "Cloud" or if there are many of them that coexist in on multiple platforms, applications and different services offered by many companies.

In 2011, the AMETIC (*Asociación Multisectorial de Empresas de la Electrónica, Tecnologías de la información y la Comunicación, Telecomunicaciones y Contenidos Digitales*) predicted that the market for Cloud Computing would achieve 1,800 million Euros in Spain.

However, such market does not focus as much on developing new content exploitation platforms, but rather on the internal migration of businesses data to a Cloud system, either through SaaS (Software as a Service), IaaS (Infrastructure as a Service) or PaaS (Platform as a Service), mainly due to its reduced costs: Companies do not have to invest buying and main-

taining servers and software, they only rent the service and pay according the use that they do of it.

We undoubtedly move forward towards a multi-system of personal devices that will store information in “The Cloud”

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

Not exactly. The Cloud is still a relatively recent phenomenon in Spain for the general public, at least as a concept. There is not a clear perception (except for professionals in the field) that “The Cloud” is necessarily associated to the exploitation of intellectual property, even though the exploitation does take place mainly in it, since most Internet service providers (ISP) use the Cloud to locate its contents. In general, it is considered that The Cloud is only a data storage service to facilitate access to the user who has uploaded the information himself.

The concept of "downloading" (whether legal or illegal) is not yet associated with the concept "The Cloud", although technically they can be related. However, the public perception may be changing as a result of cases like Megaupload, with a strong media impact.

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

There are a number of commercial platforms that use The Cloud as a basis for its operations. Google (with Google Drive) and Apple (with I-Cloud) were the first to do so, both widely used in Spain. Platforms such as Facebook (also with many users in Spain) also use The Cloud system for their operations.

On the other hand, Dropbox offers its services exclusively as a multi-platform service to host files in the Cloud. Dropbox allows users to store, synchronize and share files online mainly between private users.

In Spain, EyeOs was also pioneer in offering services in "The Cloud" to share and access all your computer’s applications and files from anywhere through your account in this service.

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

There is a difference of opinions among experts on whether The Cloud will affect copyright issues the next years to come.

On one hand, some argue that the evolution of The Cloud in the development of copyright issues will be critical in the coming years: Its widespread use is already a reality. It looks like "everything" will be in The Cloud and not on physical storage devices such as computers, hard drives, pen-drive, etc.Therefore, the exploitation of works protected by copyright will take place in "The Cloud".

On the other hand, you could also argue that the main revolution came with the Internet, and that the innovation of The Cloud will be important only because it will change some forms of IP rights exploitation on the Internet, but it will not be decisive: The problems concerning the illegal exploitation of IP rights will be the same before and after The Cloud, although it is true that the storage system that The Cloud provides facilitates and encourages the exchange of content protected by intellectual property rights, whether lawful or not.

As mentioned before, the best example of it is Megaupload, allowing worldwide storage of massive amounts of content, in many cases illegally accessed, but not always.

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 case law specifically related to The Cloud in Spain

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

There is no case law specifically related to Cloud providers in Spain

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

There is no case law specifically related to the technological protection measures in the Cloud environment in Spain

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

We don't have any relevant information on this issue

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?

There is a great diversity of services and business models related to Cloud Computing technologies offered in Spain, from both national and international origin and with direct and indirect impact in the area of Copyright and Neighboring Rights. Some of these models are the following:

a) **Cloud-based services for end-users**: in this category we include primarily a technological Client-Service model, based on a distributed software or application that distinguishes between service providers (Servers) and service requesters (Clients). Some of the most representatives cases in the Spanish market are:

International services:

i. Spotify: with a relevant penetration in Spanish market, the online Music service Spotify is the leading cloud-based service for music streaming (www.spotify.es).

ii. 24 Symbols: a startup company that offers literacy works (e-books) on the Cloud and available from any internet-enabled device without downloading (www.24symbols.com)

iii. Icloud: Apple's relevant position in the Spanish market makes Icloud one of the most well-known platforms.

Spanish services

iv. Filmin: a streaming service of cinematographic works based on Cloud technologies (www.filmin.es)

v. Soundcloud: cloud platform for independent musicians and labels (www.soundcloud.es).

b) **Cloud Gaming or On-Demand Gaming:** Cloud Gaming models are becoming extremely popular between both end-user consumers and national videogames developers. They are also strategic investments for Multinational Majors of the Videogame industry such as Sony and Ubisoft in their operations in the Spanish market. High-end video games that are delivered from the cloud to computers, TV or mobile devices with no downloads, are becoming much and much common, with important investments from the private sector in this field combined with National Public support programs for research & development (R&D) such as *Plan Avanza* from the Ministry of Industry (www.planavanza.es). Cloud Gaming platforms with major penetration in the Spanish market are Steam Cloud, Gankai and Onlive.

c) **Cloud services for authors:** there are some cloud projects with small impact in the Spanish market that offer cloud services for copyright holders and authors. Some examples are Safe Creative (www.safecreative.org), and online copyright registry, and Xtranormal, a SaaS model for creating online animation works (www.xtranormal.es).

d) **Cloud applications in Education:** in Spain, Universities and Educational Publishers are investing and developing innovative projects for the creation of Cloud environments for e-learning purposes, where copyrighted materials are made available to a large number of students. An example of this typology of projects is University of Salamanca's "Hihola", a Massively Multiplayer Online Serious Videogame for learning Spanish as a Foreign Language (http://vimeo.com/19515243) and based on Cloud technology.

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

The works offered in cloud services in Spain are mainly music, audiovisual works and video-games. Users can download the files or have access to them via streaming. The most well known platforms offering these services are Spotify (music), Voddler, Youzee and Filmin in the film and television arena, in addition to the massive over Youtube or Vimeo.

Spotify (music) and Voddler (films and tv) are two Swedish companies offering a similar service of streaming and provisional file downloading.

Filmin and Youzee and are two Spanish platforms that offer independent movies (the former) and commercial cinema (the latter) in streaming.

In addition to this, there is an important increase of Cloud technologies applied to e-learning services that include a significant amount of copyrighted materials, particularly written and audiovisual works.

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

The casuistry is very diverse. In PaaS services, holders of intellectual property rights must transfer to providers of cloud services the right of reproduction of the contents that will be made available to third party users, whether on an exclusive or non exclusive licence, depending on the type of agreement.

The right to reproduce is transferred in order to enable the providers of these services, such as Voodler, to upload content that will offer its customers from remote servers.

There is also an act of reproduction if the access takes places downloading the files, because downloading content also requires performing an act of reproduction of the files in the users' server.

Moreover, these PaaS services, whether provided in the form of downloading or streaming, require the transfer (from intellectual property rights holders to the services supplier) of the right to display the work publicly. This can also be done in an exclusive or not exclusive licence in the modality of "making available to the public" (*puesta a disposición del público*), of Article 20 of Royal Legislative Decree 1/1996 of April 12 Approving the Revised Law on Intellectual Property, regularizing, clarifying and harmonizing the applicable statutory provisions (Spanish Copyright Law; hereinafter, LPI). Article 20.2.i) of the LPI describes this law as:

> *i) Making works available to the public, using wire or wireless processes, so that any person can have access to them at any given time or place (…)*

However, strictly speaking, streaming also could be included in Article 20.2 of the LPI, in cases where interactivity with the end user would not possible (that is, in cases where the end user could not choose the time and place to access to the works):

> *e)The transmission of any works to the public by wire, cable, optic fiber or other comparable process, whether on subscription or not.*

This has legal implications, since there are some differences in the requirements for transfer of copyright that are necessary to allow the right of "making available to the public" of such works. In some cases the right to display the work publicly can be automatically transferred, whether or not with the obligation to pay a remuneration for that right.

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

Again the casuistry is very diverse. In most cases the permitted use of a protected content is only its screening through streaming, that is, the user can have access and enjoy the protected work for a period of time, being unable to download it or to make a copy for his private use. In the Cloud Gaming, the most common practice is online playing without download.

In some cases, temporary downloads are allowed. Some illegal services allow the permanent download without having the proper permissions to do so.

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?

Unfortunately it is not possible yet, due to the fact that there is a wide variety of industries and business models and different sort of authors and rights holders that require a case-by-case analysis. At the moment there isn't any public study in Spain with such cross-sector data, and most of the existing reports and studies include information regarding all kinds of online exploitation and digital business models, without making a distinction between Cloud and Non Cloud ventures.

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

In a Client-Server technological structure with no download (which is one of the most common Cloud models in Spain), the circumvention of technological protection measures is much more difficult, due to the fact that the copyrighted content is in the cloud (the Server) and not in the user's computer or device where the Client (a software) is installed. In this kind of models, DRM are usually incorporated in the Client end and it acts as a key for accessing to the protected Work and a tool for controlling the use. This is one of the reasons

why this model is very appreciated by the Videogame Industry in Spain and massively used in music streaming models based on subscriptions.

Regarding other Cloud models other than the Client-Server without download, the casuistry is complex and goes from TPM and DRM incorporations to fully free systems.

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

In Spain, the pertinent Legislation is aligned with the EU Directives, and the transposition of the Directive 2001/29/EC (*Infosoc Directive*) into national law was almost literal. Title V of the LPI provides for the protection of technological measures (TPM) and information rights management (DRM).

The Spanish Copyright Law foresees civil sanctions against those who undertake acts of circumvention of effective technological measures, either consciously or as result of neglicence (art. 160.1 LPI) and the preparatory acts are also considered illegal (art. 160.2). In addition to this, the Spanish Law provides for specific rules for technological measures on software (art. 160.4, art. 102 and 103 TRLPI).

> *1. holders of intellectual property rights recognized by this Act may bring an action under Title I of Book III against those who, knowing or having reasonable grounds to know, circumvent any effective technological measures.*
>
> *2. The same actions may be brought against those who manufacture, import, distribute, sell, rent, lend, advertise for sale or rent or own commercial purposes devices, products or component, and against those who provide a service that, for any effective technological measures:*
>
> *a) Is subject to promotion, advertising or marketing to circumvent, or*
> *b) only has a limited commercially significant purpose or use outside the circumvention of, or*
> *c) Is primarily designed, produced, adapted or performed for the purpose of enabling or facilitate the circumvention of protection.*
>
> *3. Technological measure means any technology, device or component that, in its normal operation, is designed to prevent or restrict acts, in respect of works or other subject-matter, that do not have the permission of the copyright holders of intellectual property to be exploited*

Technological measures are considered effective when the use of the protected work or services is controlled by the rightholders through the application of an access control or a method of protection such as encryption, scrambling or other transformation of the work service or a copy control mechanism which achieves this protection objective.

4. What is disposed in the preceding paragraphs does not apply to technological measures used to protect computer programs, which shall be subject to its own rules. ... "

Regarding to TPM circumventions and preparatory acts, the Spanish Criminal Code considereres them a criminal offence under art. 270.3. However, a very strict interpretation of the requirements of lucrative intent (*ánimo de lucro*) and prejudice of third parties (*perjuicio a tercero*) has reduced its scope of application.

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

The Cloud exploitations of protected Works are not perceived by the Creative industries as a serious problem from the point of view of TPM circumventions. On the contrary some sectors, such as Videogames, it consider them a much safer alternative than more traditional ways of commercialization.

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

9) 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.

In addition to those services mentioned above, there is the American service Dropbox, widely used in Spain. Its purpose is essentially offering a hosting platform in the cloud.

The Spanish national telecommunications operators -such as Telefonica or ONO-do are also offering them services in The cloud, including private storage and content sharing for business. In particular, Telefonica has already launched services such as a virtual data center (aimed at providing information and communication technology infrastructure and telecommunications) or the personal cloud (data storage for individuals).

10) 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 3.2.2).

The question seems to contain a paradox which leads to a dead end. By definition the beneficiary of the private copy limit is the user, and not any other person (or entity) that provides a service. In the analogical world, when someone uses a photocopying service, the copy, even if it is for the private use of the person who orders it, is public from the standpoint of who makes the copy. This is true even when it is the user who materially makes the copy using a photocopy machine that is made available to the general public by a company or institution (it would be the classic case of coin-operated photocopying machines that are available to students at the University premises). In this regard, art. 10 of RD (Royal Decree) 1434/1992 provides:

"Art 10 (assumptions not included in the obligation.) - 1 For the purposes of the provisions of this title, the following will not have consideration of reproductions for private use of the copyist within the meaning of paragraph 2 of Article 31 of the LPI a) those made in establishments engaged in the business of making of photocopies to the general public, or who have devices available to the public to carry out such activity

b) Those that are for collective use or ar distributed for a price.
2. In order be able to make the reproductions referred to in the previous provision prior authorization from rights holders must be obtained.
3. [...] "

The key question is who carries out the copy: the user, that "uploads" his or her works to The Cloud or the company providing The Cloud service?

If it could be understood that is the user who makes the copy using the means of others, the exception for private copying would apply. It is important to keep in mind that Spanish Law does not require that copies need to be made using your "own resources". Neither is this specifically required by art. 5.2, b) of the European Directive 2001/29/EC on copyright of the information society (*Infosoc Directive*). Hardly anyone would suggest that it would be acceptable to exclude from the exception for private copying the copy made using a friend's computer or even a laptop provided to an employee or professional by his or her company.

However, it is a highly questionable interpretation, since it would be arguable that the copy is really made by the company providing the cloud service, which also facilitates user access from anywhere, anytime. It is the company providing the service who "has" the copy, as the hundreds of users of services like Megaupload have discovered. It should be noted, moreover, that when the intention is to allow the beneficiary of an exception to the right of reproduction to use any third party in order to make a copy, it is stated explicitly. In this regard, art. 5.2, d) of the European Directive 2001/29/EC (*Infosoc Directive*) allows broadcasters to make ephemeral recordings "on their own" for their own emissions. The same Directive recites in its Preamble (num. 41) that "*it is understood that the broadcaster own facilities include those of a person acting on behalf of and / or under the responsibility of the broadcasting organization*" (on this issue, STJUE of 2 / 5/2102, C-510/2010, *Case DR/TV2 Danmark*)

If, despite the dogmatic and regulatory obstacles, a broad interpretation of the private copying would be finally accepted (a question that, ultimately, must be clarified by the ECJ in the EU), there should be established an appropriate mechanism to ensure that the copyright holders can have a fair compensation for allowing private copying. In the analog world, a person might want to have multiple copies of a CD (you may want to have one at your home, summer residence, at your work, in your car ...). All of them would be private copies and every equipment or material used would pay something as compensation for private copying. In the cloud, however, a single copy can give you access to the work from any location. The impact of this hypothetical private copying would be much higher. And it is also important to remember that more people could have very easy access to it, and that we should raise the question of whether these people belong to the domestic environment of the user or if we are in front of a public display or “public communication”

As seen, the issue of implementation of the private copying exception for the benefit of cloud service providers is unclear. For now, in Spain we have no case law. In that situation, the most prudent response is negative: The cloud service operators do not seem to benefit from the private copying exception by users.

Regarding the second part of the question, the answer must be negative also in this case without a doubt. There are no other exceptions that can protect the copying services in The Cloud. In particular, we must dismiss the exception of "technical copies" of art. 31.1 of the LPI Spanish (Article 5.1 of European Directive 2001/29/EC) for the simple reason that such an exception only allows copies "provisional" status of copies without the cloud and that this copy has to have no economical value.

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

11) 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?

Operators do not benefit from a narrow interpretation of the "making available" right in any way. The right of "Comunication to the public" of art. 20 of the LPI, and especially its modality of *(i) Public access to computer databases by means of telecommunication, where such databases incorporate or constitute protected works. (art 20.2.i)* cannot be interpreted narrowly, at least regarding the rights of the authors (arts. 2 y 17 LPI). The use of a service in The Cloud implies undertaking the act of "making available" of the protected works hosted in the Cloud. The subsequent download by the user will be, moreover, an act of reproduction.

12) 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?

Spanish Copyright law does not address this question specifically, therefore the issue should be resolved by applying the general rules of responsibility of the Civil Code, the Penal Code, and the rules of Ley 34 /2002, of services of the information Society and Electronic Commerce. To date, case law is silent on this issue in Spain.

Service providers hosting content in The Cloud will not be held responsible for the legality or illegality of the content that they host if they met the requirements provided in Article 16 of Law 34/2002 of 11 July, of Services of the Information Society and Electronic Commerce (LSSI)

1. Service providers of an intermediation service consisting of hosting data furnished by

the recipient of this service will not be hold responsible for the information stored at the request of the recipient, provided that:

a) They do not have actual knowledge that the activity or stored information is unlawful or that it injures property or rights of a third party that can be awarded damages b) If they do, they must carry out their best efforts to remove or block all access to them.

It will be assumed that the service provider has the actual knowledge referred to in paragraph a) when a competent authority has declared the illegality of the data, ordered its removal or prohibition of access to them, or else declared the existence of the injury, and the service provider knows the corresponding resolution, without prejudice of the procedures for detection and removal of content that the service provider can apply under voluntary agreements and other means of effective knowledge that may be established.

2. The exemption from liability provided for in paragraph 1 shall not operate if the recipient of the service is acting under the direction, authority or control of its service provider.

13) 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.

It is uncertain whether service providers in the Cloud could benefit from a liability exception in Spain. The question would be if they are considered "hosting providers" (*prestadores de alojamiento*) within the meaning of Ley 34/2002, of Services of Information Society and Electronic Commerce (LSSI)

The responsibility of these “hosting providers” is governed by Art. 16 LSSI, which implements in Spanish Law Art. 14 of the Directive on Electronic Commerce. As we have seen in the previous question, the LSSI 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.

However the Spanish legislator has ignored the reference to the Directive that (at least regarding the compensation) hosting providers cannot ignore facts or circumstances that can infer that the activity or information may be of illicit nature, thus omitting the idea constructive knowledge for civil cases of Art 14 of the Directive.

Moreover, the Spanish legislature has tested a definition of actual knowledge (art. 16.1.II LSSI), stating that such knowledge exists only when a competent authority has declared the illegality of the data, and the provider is aware of this decision, and when the provider has not applied a screening and withdrawing procedure adopted voluntarily or when by other means that could apply the service provider may acquire effective knowledge.

The Spanish Supreme Court has established a broad interpretation of what needs to be understood by "actual knowledge" of Article 16. 1 LSSI. Indeed, faced with the question of whether the definition of art. 16.1 II is an open or closed list, the cases of 12.9.2009 (case "Putasgae"), 18.05.2010 (case "Quejasonline") and 10.2.2011 (case "To the barried") have pointed out, in cases of violation of the right to privacy, that existence of "actual knowledge" can be proved also from the communication by the individual affected or with other data that can become evidence (as, for example, with a direct insult to a person). Thus the Supreme Court interpretates of the rule according to the Directive, understanding that there may have actual knowledge also when the provider is aware of facts or circumstances revealing the illegality of the content hosted (constructive knowledge).

This doctrine has been applied cases of websites, blogs or forums that allow user comments, all of them activities that fit under Spanish case law in the "safe harbor" described in the art. 16 LSSI, so that a question might arise on whether it could also be applicable by analogy to the service provider in the cloud.

14) 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?

The generic concept of "*duty of care*" is associated in Spain to the concept of "*diligence of a good father (i.e the average man)*" set in the Civil Code.

However, regarding infringement of intellectual property rights on the Internet, and following the guidelines of EU case law on the subject (case C-360/10, SABAM v. Netlog NV), that duty of care may not result in the possibility to require suppliers of internet services, particularly hosting services, of previous monitoring and / or filtration and removal of possible illicit content, as this could lead to an infringement of the right of privacy and the freedoms of information and of corporation activities.

Moreover, besides the duty of care, regarding the removal of content, such action may be required either to offenders themselves or to the intermediation service providers that make possible access to those contents, in each given case of infringement of intellectual property rights, and as a precautionary measure or permanently, under the provisions of articles 138 of the Spanish LPI.

In addition, a procedure has recently been developed for expedited administrative removal of content in this type of infringements of intellectual property rights, including also the removal of some of hosting services in the event that removal is not possible, in the terms provided in the *Disposición Final 43.4 de la Ley 2/2011, de 4 de marzo*, *de Economía Sostenible*, developed on its turn by the Royal Decree 1889/2011, of December 30th 43.4 regulating the procedures of the Commission on Intellectual Property (commonly named as the "*Ley Sinde*"), all this according with the provisions of articles 8 and 11 of the LSSI, which are modified in part.

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

According to the administrative procedure mentioned above, and in line with the requirements in the context of court proceedings by civil action (except in regards the aim of profit), the right holder seeking the withdrawal of infringing content should include in its request for withdrawal:

b) Accreditation by any proof of evidence admissible in law, of ownership of intellectual property claimed (...).
c) Accreditation by any evidence admissible in law, that the alleged work or is being exploited, lucrative or not, through the Information Society Service that is interpelled in the application, identifying, describing and placing this activity.
d) A statement that authorization has not been granted for the operation performed in the Information Society Service interpelled in the application.
e) Evidence of coincidence, direct or indirect, in each of the Information Society Services to be interpelled by the application of profit or damage caused or that could be caused to the owners that do not have the obligation to bear.
f) The data available to the applicant to enable or assist the identification of the perpetrator by means of locating services information society against whom the procedure is directed, and that allow communication with the Webs that provided the services, including, where appropriate, the relevant data of the service provider (…)

16) 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 have no specific information on such contracts.

17) 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?

Regarding the first question, we are not aware of the existence of any copyright-avoiding cloud services that are operating successfully.

Regarding the second question, through the administrative procedure mentioned before which entered into force last February, it is intended to remove audio visual content and / or block the access to web pages, of those who have not obtained the necessary authorizations and those who cannot fall into any exception of the exploitation rights.

To the date the Administration has received several requests, but only a few orders for removal or blocking have been issued (about 10).

18) 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?

This reform has already been carried out. Liability of Service Providers in The Cloud has been increased, given the case that they do not cooperate in the administrative procedure described above. Thus, in the case of non-collaboration under the terms of the norm, it will be considered that they have "actual knowledge" in order to be fully responsible for the offense carried out, and may be held liable for administrative penalties of up to 600,000 Euros.

19) Do you see any progress regarding filtering technology?

They cannot be imposed legally, but they have been new progresses at a technical level

5.3 – „Copyright-avoiding“ business models operated by authors for the “Cloud”

20) In your country, is there a noticeable use of “copyright-avoiding” business models, such as Creative Commons (CC) or comparable open content licenses by righthholders with respect to cloud-based exploitations of works?

Creative Commons licenses are well known and widely used but they are not particularly associated with works operating in The Cloud.

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

Creative commons are mostly used in the academic arena:

http://www.uoc.edu/uocpapers/8/eng/index.html

in some on-line art magazines:

http://www.a-desk.org/spip/spip.php?page=prueba-sommaire&lang=ca

and some institutions are starting to use them in the information sheet provided to visitors, such as the *Fundació Tàpies*

http://cat.creativecommons.org/?p=170

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

There are no available data at the moment

23) Also in your country, what legal obstacles authors are 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.

The most important problem of the CC licences is the issues related with moral rights: If a right holder makes available on the internet protected content with an open licence and a third party uses it in a way that moral rights are deemed to be violated, the right holder may still be entitled to sue the third party for violation of moral rights.

At least one collection society (VEGAP, the visual artists collecting society) allows artists to separate from collective management works that the he or she chooses to licence with creative commons licences.

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 interna-

tional law that apply in these circumstances? In particular do your country's the 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?

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)?

There are no such multi-territorial licenses nor specific licenses for The Cloud. A EU Directive on collective management is currently being developed, making possible a pan-European licensing model.