ALAI-Congress

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Questionnaire

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Session 1
－Developments of New Platforms

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

Answer: There is no official definition. "The Cloud" is normally understood to embrace different forms for worldwide accessibility via the Internet. Hence, it may offer access to IT resources via the Internet - such as storage, Gmail, Facebook and Google Apps - standardized communication from one person to the masses, database answering to questions, self-service, scaling resources and distributed/visualized infrastructure. Cloud computing services may therefore offer platforms for processing programmes, computing technology and storing facilities.

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

Answer: Certainly, like any act of exploitation involving the restricted acts of reproduction and communication to the public, such acts applied to cloud storage or other Internet oriented services may confront the restrictions of the rightsowners.

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?

Answer: Yes, there are already some commercial platforms available, normally originating from domains outside Sweden, such as iTunes, iCloud, Windows Live Skydive, MobileMe, UltraViolet etc.

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

Answer: The innovative development of cloud-based services may change considerably the ways in which works and related rights are disseminated and used in the online environment. Those developments will be increasingly important given availability of external storage and

broadband availability. We are pretty sure that cloud based services are predicted to constitute the majority of internet related activities in the years to come. One indication of this is the EU Commission's recently launched European Cloud Computing Strategy to be finalized this summer of 2012. Obviously the success of cloud computing mainly lies in its capacity to remove the need for storage on the hardware to run computing programs of the individual user, thus enabling the users to access to platforms with handheld devices.

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?

Answer: No directly adequate case law, but several cases on e.g. bit torrent uses, and related business models, that may indicate applicable law for 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?

Answer: See previous answer.

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

Answer: No

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

Answer: Obviously, the WIPO Treaties address restricted acts occurring in a cloud environment, in particular reproduction, communication to the public and, possibly, distribution. But it should be investigated whether the treaties leave any legal gaps or unsatisfied solutions to cloud uses.

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?

Answer: See our answer above, Session 1, Question 3, for the audiovisual field.

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

Answer: Ultraviolet: films, in the near future probably also TV programmes
iTunes: music, books, films, photographic works, video clips and TV programmes

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

Answer: In Swedish copyright law, the rights of the rightsholder in copyright works are divided into two main categories, namely the reproduction right and the right of making the work available to the public. The exact content of the Swedish right of making available is, however, somewhat 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 and the broadcast of the work. 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 a 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?

Answer: As for audiovisual works, UltraViolet grants the account holder a kind of "lifetime licence" to use UltraViolet-enabled content in a variety of ways from his account in the cloud. The account can be shared by the account holder with up to five account members. Once a film has been added to the Ultraviolet collection of the user, a variety of options for streaming the work over the internet, downloading it for offline viewing or playing it back on

a disc on a device at the user's choice exist (so-called UltraViolet Rights). The exact scope of the UltraViolet Rights in a particular case depends on the terms of purchase from the UltraViolet retailer.

iTunes in the Cloud synchronises purchases from the iTunes store so that all purchases can be used on all Apple devices such as iPhone, iPad, iPod touch, Apple TV, Mac, or a PC.

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?

Answer: No, this information is generally confidential, in particular as the audiovisual sector is concerned.

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

Answer: As we understand it the TPMs and DRM employed for the use of audiovisual works in cloud services, notably Ultraviolet, are identical to those used in more traditional ways of use, such as access and copy or use controls.

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

Answer: The Swedish Copyright Act expressly protects TPM fully to match the requirements of Article 6 of the Information Society Directive 2001/29/EC.

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

Answer: As has been indicated in the beginning, security of the stored content is paramount. However, even the most sophisticated TPMs can be the object of manipulation. For this reason, legal protection against the circumvention of TPMs as well as against the dealing in devices and the provision of services designed to circumvent TPMs is vital for the development of new business models in cloud services.

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.

Answer: All the above mentioned services are available in Sweden.

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).

Answer: 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 Swedish 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 Swedish Copyright Act, the private copying exception does not apply to the reproduction of e.g. music and audiovisual works when outside assistance is employed in order to make the reproduction. Accordingly, for this provision to apply, the service provider must be the considered to produce the copy in question, e.g. when the individual user gets a copy via disposal of the service providers "hard disc on the Net". It is certainly not a given thing that the service provider actually makes a copy insuch a situation.

Chapter 2 of the Swedish 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 sections 16 and 42 d) of the Copyright Act which allows archives, libraries and museums to make certain copies from their collections available to the public 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?

Answer: As implied in our answer to question 4.3, the making available right set out in the Swedish 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 Sweden 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. Still, the core legal issue seems to be if the operator of a cloud service is liable for such communication to the public that follows from the individual user's upload of protected files and disposal of the cloud service, thus resulting in storing and public availablility.

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?

Answer: 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.

Answer: The e-Commerce Directive has been implemented in Swedish Law, including articles 14 and 15 of the directive.

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?

Answer:There is a special Swedish enactment on “Responsibility for Electronic Bulletin Boards” (1998:112). It does not merely apply to BBSes, but also to most services providing information on the Internet, such as WWW services, Usenet News services etc. It can be seen as a Swedish attempt to handle the same problems which caused the famous Communications Decency Act in the USA. A supplier of Internet-based information services is to some extent responsible for illegal content in these services, even if these illegal contents have been submitted by users of the service. This responsibility is limited to what is *obviously* illegal according to certain other acts, e.g. racial agitation, child pornography or copyright infringement. To fulfil the requirements of the law, the supplier must supervise the contents of of the service. For areas where illegal contributions are common, the provider of such an area, must check regularly and *remove* illegal content.

More generally speaking, 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?

Answer: The removal of copyright infringing content is considered a civil remedy, thus it is Sufficient if the rightholder presents evidence sufficient to establish a preponderance of evidence. The above, in 5.2 4), mentioned Swedish Bulletin Board Act presupposes liability only if “obviously illegal” material is not removed from the BBS.

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?

Answer: Not to our knowledge

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?

Answer: There seems not to be any case-law demonstrating this.

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?

Answer: In general is concerned the e-Commerce Directive, which is due for review at European level; the result of that procedure is not yet apparent. The Enforcement Directive was implemented a few years ago in Sweden, basically offering stronger instruments in a civil procedure to get customer information from ISP:s. The Enforcement Directive is also up for review potentially addressing the role of service providers.

9) Do you see any progress regarding filtering technology?

Answer: According to our information filtering technology is available and also already applied by some service providers (e.g. YouTube).

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?

Answer: The use of CC licenses has become more common.

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

Answer: Texts (on blogs), photos and software.

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

Answer: 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.

Answer: To the best of our knowledge Creative Commons seems to be the answer best at hand: It is a licensing system based on Copyright; the right holder decides (ideally based on an informed choice) to give away his rights under certain specific conditions according to his choice: for instance stipulating the non-commercial nature of the intended use. Some business models are in operation based on Creative Commons licences (e.g. Jamendo) but we are not aware of any noticeable impact on the use of music or other creative works through the availability of such open content licenses (maybe FlickR is a more relevant example). We do not see any problems with Creative Commons licences if the author is aware of the limitations of using such a licence, in particular in view of the limited financial remuneration; he cannot be a member of a collecting society and participate amongst others in public performance revenue or private copying remuneration.

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?

Answer: There are no explicit international private law provisions in the intellectual property legislation of Sweden. However, it does follow from article 5(3) of the Lugano Convention (to which both Sweden and the other EU states 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 in Sweden, 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) cannot be used analogously for other cases than the one defined in that directive.

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)?

Answer: According to the information received from the performing rights society of Sweden, STIM and the Swedish group of IFPI cross-border licenses are granted in some cases, such as simulcasting (simultaneous distribution of a broadcast in the Internet) webcasting ("Internet-radio") and Catch Up-/On Demand -services by broadcasting organisations, plus some licensing based on certain framework agreements of IFPI. On those instances, the pricing and legislation of the destination country are applied.

As to the licensing of background music services (e.g. from Sweden to restaurants and shops in other countries), it is based on agreements between collective organisations in different countries. The pricing and legislation of the destination country are applied.