ALAI-Congress

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Questionnaire

Blaca (United Kingdom), replies provided by Brigitte Lindner, Florian Koempel, Gaetano Dimita and Paul Torremans

Session 1
Developments of New Platforms

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

There is no official definition. The focus seems to be on worldwide accessibility via the Internet and on servers based ‘somewhere’, out of the jurisdiction.

Cloud services are not really new technological systems. Although a unified definition is difficult, “The Cloud” generally refers to a wide ranging possible shapes and designs. “Cloud computing “broadly describes the service of providing computer storage and computing online facilities to its users who chose to transfer processing and storage facilities to a third party established at a different location.

Cloud computing services, i.e. services which offer platforms for computing services such as processing programs are becoming increasingly frequent amongst others given the availability of fast broadband, speed low prices of storage facilities and more general a higher standard of computing technology (which for instance ensures the protection of the data of users of such services).

Cloud computing services by themselves do not raise copyright concerns; as far as copyright is concerned the main issue relates to Cloud computing services which entail storage facilities enabling the storage and potential sharing of third parties’ copyright protected material such as movies or music (“cyberlockers”). Copyright comes into play if the cloud computing service is not licensed by all right holders (notably, blanket licensing seems the solution to most cloud activities in particular given that the cloud computing service do not know in advance what kind of Copyright material will be stored on their servers). Where copyright licensing societies exists, they offer a solution for the creative works they represent.

During a recent consultation by the U.K.'s intellectual property office on changes to copyright the argument has been put forward that purely “dumb” Cloud storage services should be included within the scope of a private copying exception (without fair compensation). Commercially it is difficult to envisage such a Cloud storage service providing a relevant offer for consumers. Additionally, it won't be possible to differentiate within the legal drafting of such a private copying exception between dumb Cloud storage services and those with added

functionality. In particular, it seems impossible to offer a Cloud storage service without functionality; even the accessibility by the person uploading the material to the Cloud could be considered functionality.

Another question arises as to the place where the cloud computing activity takes place and more specifically who is initiating the uploading, storing and downloading. However this is not a new discussion in the online world; it is currently being considered in the context of more established Internet activities (c.f. the AG opinion in Football Dataco v Sportsradar Case C 173/11: The AG advised that the act takes place where the web server is established and where the communication is received; the case in hand concern the re-utilisation of a database but the findings should be broadly transferable to other copyright relevant acts such as the ones concerning cloud services)

Cloud storage specifically describes the storage of files online in data centres by third parties which are accessible by its users from any terminal or device. Cloud storage services offer a variety of functionalities depending on their specific business model, e.g. Dropbox, mp3.com or Megaupload. It is difficult to define cloud storage services in view of the range of activities offered (e.g. some storage services enable the pure storage of the files stored; others – mainly unlicensed – do not store the files but only provide a link to the same file saved earlier in order to save storage space (so called scan and match services), e.g. Megaupload). The broad range of cloud activities is well described in the questions to section 4 of this questionnaire. All of these services require specific analysis: Software as a Service“ (SaaS), “Platform as a Service” (PaaS) and “Infrastructure as a Service” (IaaS). However for the purposes of this questionnaire focus on platform as a service, i.e. the provision of cloud storage.

In its recent consultation on changes to copyright and more specifically on the introduction of private copying exception into UK Copyright law, the UK INTELLECTUAL PROPERTY OFFICE (IPO) defined private clouds: “Private clouds allow people to store digital files remotely and access them over the internet, instead of storing them locally on a PC or other device.”

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

   The Cloud can be a very useful medium for the use of works and the like on multiple devices at any time and place chosen by the user provided the security of the stored content can be guaranteed.

   Yes, like any exploitation involving the reproduction and communication to the public restricted act applied to cloud storage services (not necessarily to mere cloud computing services which only provide computing services for which the provider owns the intellectual property rights).

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?

Audiovisual works:

Examples from the UK are UltraViolet and iTunes in the cloud.

UltraViolet was launched in the UK on 26 December 2011 by a consortium of film industry companies. In a nutshell, the service presently allows the use of films which are enabled for UltraViolet services on any device, be it a computer, a smart phone or a tablet PC. There are plans for the future to extend this offer to include TV programmes as well.

iTunes in the Cloud features a cloud-based service by Apple for films which has been available in the UK since March 2012. This service allows the use of movies purchased via iTunes on iPad, iPhone, iPod touch, Apple TV, Mac or PC.

So yes, there are already some commercial platforms available. There will be more such platforms offering storage as well as computing services (many not yet licensed) e.g. Dropbox, mp3.com or Megaupload.

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

Cloud-based services are an innovative development which may change considerably the ways in which works and the like are disseminated and used in the online environment. Users will be enabled to establish their personal collection of music, films, games and other cultural products which they can access anywhere and at any time. In the near future, cloud computing services in the widest meaning will become increasingly important given available external storage and broadband availability; cloud based services are predicted to constitute the majority of internet related activities. This is the reason why the European Union represented by the European Commission focuses on policy on cloud for instance in the European Cloud Computing Strategy which will be finalised in the course of the summer 2012; this strategy will address the framework for Cloud computing services as well as explore further options for partnerships. One of the main advantages of such a Cloud computing service is that it removes the need for storage capacity on the hardware to save files and to run computing programs. E.g. more and more storage intensive programs such as virtual games are cloud based enabling the users to access the gaming platform with handheld devices given that the latter do not require access to enormous hardware facilities for complex computing activities if they can be outsourced to external online platforms.

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?

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

11. In the United Kingdom there is no express reference in case law to cloud storage, retrieval and dissemination services as far as the right of making available to the public is concerned. There are however cases concerning the liability of Internet service providers for authorising restricted acts which could be relevant for this question. It is expected that these judgements will be applied to cloud services mutatis mutandis. The judge in Dramatico et alia v BSkyB et alia (2012), applied the definition of authorisation relying on factors identified in the previous judgement 20C Fox v Newzbin (2010):

- the relationship between the alleged authoriser and the primary infringer
- whether the equipment/ means supplied constitute the means used to infringe
- whether it will be used to infringe
- the degree of control of the alleged authoriser
- whether he is taking any steps to prevent infringement

12. Judge Arnold held that the operators of the Pirate Bay (which could be described as an service similar to a cloud service provider for the purposes of copyright) authorised the infringing activities of its users (both by copying or communicating to the public; maybe even through public performance) and that their activities go beyond merely enabling, or assisting infringement. The activities of an Internet service provider are different to a manufacturer of high speed twin tape recorder. In applying the factors, established in the Newzbin case, he found as regards the Pirate Bay:

- Regarding the relationship between the alleged authoriser and the primary infringers, he held that the features offered by the alleged authoriser were plainly designed to provide users with the easiest and most comprehensive service possible, i.e. to promote the download of torrent files by its users. It is not merely a passive repository of files but

moreover goes to great length to facilitate and promote the download of files by its users

- the means supplied, i.e. the indexed torrent files constitute exactly the means necessary to infringe
- copyright infringement is not only inevitable but is also the main objective of the service
- The website operator has the required degree of control; the website states that torrents can and will be removed under certain conditions.
- The website operator is not taking any steps to prevent infringement; moreover they are expressly encouraging infringement.

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

13. Not to my knowledge.

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

14. The Treaties address the restricted acts which occur in a "Cloud" environment, in particular reproduction, communication to the public, and distribution (which seems mainly used in the US). The WIPO treaties will continue to apply also in the "Cloud" environment.

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?

For the audiovisual field, see above, Session 1, Question 3.

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

Ultraviolet: presently films, in future also TV programmes
iTunes: music, books, films and TV programmes

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

The scope of rights which are transferred by rightholders to the providers of cloud services depends of course on the ways in which a work may be used in a particular service. This being said, the storage of the work in the cloud and the subsequent streaming or downloading require at least the grant of the rights in respect of reproduction (Sec. 17 CDPA) and of communication to the public (Sec. 20 CDPA) which includes the making available right (Sec. 20(2) CDPA).

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

<u>Audiovisual works</u>

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?

This information is confidential – at least insofar as the audiovisual sector is concerned.

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

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, namely access and copy/use controls.

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

UK law protects TPMs in Sections 296ZA-F CDPA. Rightholders are granted a civil right of action against the circumvention of an effective technological measure which has been applied to a work as well as against the making and commercially dealing in circumvention devices and the provision of respective services. Criminal sanctions exist only with regard to devices and services designed to circumvent effective technological measures but not with regard to the act of circumvention itself.

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

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.

A variety of business models are already available, some of the licensed by creators and right holders.

As far as technological protection measures is concerned the legislation is in Sections 296ZA onwards of the CDPA 1988 which constitutes the implementation of Articles 6 and 7 of the European Copyright Directive. In general, technological protection measures and digital rights management do not play a prominent role in the cloud environment; the main concern is the limitation of the access for the owner of the specific cloud service. This is important for copyright as well as data protection purposes, and can be achieved through different coding mechanisms for the storing and computing in the cloud.

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.

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).

In the United Kingdom, there is currently no specific exception for private copying; Section 70 of the CDPA 1988 only provides a limited private copying exception for the purposes of time shifting. Following the recommendations of Professor Hargreaves in his review of intellectual property, May 2011, the UK Government represented by the IPO is considering the introduction of private copying exception (without fair compensation) but the actual scope is subject to an ongoing consultation. Based on the recommendations by Professor Hargreaves, Government intended to introduce a narrow private copying exception, allowing copying of content legally owned by an individual (such as a CD or DVD) to another medium or device owned by that individual (such as a personal multi-functional device or an mp3 player), for their own, strictly personal, use. In their rather creative impact assessment this would create a new market for iPods and similar devices which could grow the UK economy by up to £2 billion per annum at the upper end of possible outcomes. It is not clear whether the thinking of the UK government has evolved as of July 2012.

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?

It is debatable whether the act of making available or communicating to the public or public performance arises in the scenario of a purely private cloud storage service, i.e. if the person storing the files he owns on a third party storage platform is the only person accessing the files. Whilst there certainly is making available and communication, the question of whether this is "to the public" needs further consideration. It certainly is making available or communicating to the public in case various persons have access to specific cloud storage. This could for instance

occur if the access key has been shared and there is no limitation on access to the storage facility provided by the cloud computing service. It is not clear whether the transmission of files of one person to the cloud storage followed by him re- accessing it can be considered to be "to the public."

Similar questions arise whether storing and accessing files from the cloud constitutes a public performance; in particular debatable is whether the public is present at the place where the communication originates if the place of uploads onto the cloud storage service is the same as the place of download (e.g. same user of the service). C.f. Recital 23 of the Copyright Directive.

2) According to the law in your country, what is the legal (primary or secondary liability - contributory infringement or vicarious liability; aiding and abetting, other liability such as an inducer, "Störer") of the provider of cloud services with regard to copyright infringing content uploaded by its users?

As elaborated in response to section 2 and 3 (number 1) of this questionnaire the provider of cloud services is likely to be considered as authorising in the United Kingdom; however, this has not been tested as regards cloud services (but as regards Internet service providers such as the Pirate Bay and Newzbin).

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.

As a member of the European Union the United Kingdom has implemented the e-Commerce Directive and in particular Article 14 thereof (Section 19 of the electronic Commerce (EC Directive) Regulations 2002). This limits the liability of Internet (including cloud) service providers if they have no actual knowledge of the infringing content.

There are limitations to the limitation of liability of Internet service provider: Once he receives actual knowledge of the infringing content the cloud service provider like any other Internet service provider must act to remove or disable access to the infringing content. The limitation does also not apply if the cloud service provider is aware of facts or circumstances from which the illegality of the content in question should have been apparent.

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?

Recent cases by the Court of Justice of the European Union have established some parameters of the duties of care of Internet service providers to monitor. Whilst they have provided guidance in clear-cut cases, they have not positively stated the actual requirements of Internet service providers In the L'Oreal case (CJEU Case C-324/09) the Court denoted that the Internet

service provider needs to undertake further activities if he has been playing a more “active role “in the infringement in order to qualify for the limitation of liability under the e-commerce directive; in the SABAM cases (e.g. SABAM v Netlog: C-360/10), the Court 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. (c.f. Article 15 e-Commerce Directive). The cases referred to the facts at hand when deciding the duty of care; a positive definition of the duty of care cannot be deduced.

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

This depends on the approach taken by the Internet service provider; for instance Google operates a policy of flagging inappropriate content including for copyright infringement. On the website they outline what information is required before removing the video for copyright infringement (copyright infringement notification - http://www.youtube.com/t/copyright_notice .

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 assume that there are contracts between cloud service providers and right holders which also cover the use of copyright material by the users of the cloud service but we have no detailed knowledge of the exact nature of such agreements.

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?

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?

As far as the liability of service providers in general is concerned, the e-Commerce Directive is due for review at European Union level; the scope of such review is not apparent as of yet. In a similar vein, the Enforcement Directive is also up for review potentially also addressing the role of service providers.

9) Do you see any progress regarding filtering technology?

According to our information filtering technology is available and also already applied by some Internet service providers; c.f. Audible Magic and Cleanfeed. We note that deep packet inspection is not widely applied due to concerns with data protection as well as available infrastructure.

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?

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

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

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

We understand that Creative Commons 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.

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.

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 specific rules for intellectual property. Our intellectual property legislation remains silent on this point. In the private international law instruments one finds the reference to the lex loci protectionis in the Rome II Regulation and in terms of choice of law that is bound to be the starting point. In terms of jurisdiction the Brussels I Regulation will play a key role and specifically articles 2 and 5(3) (as clarified in the *Painer* case). It is here that local damage may play a role in the jurisdiction context.

Court in the UK have only just accepted that they have jurisdiction over cases that involve foreign copyright, so it should not come as a surprise that there is still a lot of uncertainty in this area and no cases that deal really with the scenario at hand. It is encouraging though that the Supreme Court seems prepared to seek inspiration in the work that has been done by the CLIP group (the CLIP principles were referred to in the judgment) and does take into account the academic publications in the area and the published version of the ALI Principles.

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)?

Multiterritorial licences are granted, but no further information was available on a non-confidential basis.

Please send your replies by email to Mr Tomoki Ishiara at ishiara@translan.commailto:sam@icla.ie by 30 June 2012