The right of communication to the public in the cloud: An EU perspective

PROF. ESTELLE DERCLAYE
UNIVERSITY OF NOTTINGHAM

ALAI CONFERENCE
KYOTO, 17 OCTOBER 2012

Legal framework

- Art. 8 WCT, 10 and 14 WPPT
- Art. 3 and 8(3) InfoSoc directive
- Art. 14 and 15 E-Commerce Directive
- Art. 3, 8, 9 and 11 Enforcement Directive

CJEU case law on copyright enforcement measures involving ISPs and hosts

- *Promusicae* and *Bonnier*
- *Scarlet v SABAM* and *SABAM v Netlog*
- *L'Oreal v eBay*
- *Google France v. Louis Vuitton et al.*
- *UPC Telekabel Wien*

Implications for cloud computing providers (CCP)

- If user communicates content to the public on a CCP's platform, RH may use notice and take down in art 14 ECD
- + may also try to obtain injunction against the CCP, but probably only against a specific act of a particular client
- CCP will then have to block the infringing content posted by that user, arguably also for the future (as per *L'Oréal*).

Implications for cloud computing providers

- Questions remain unanswered:
  - must courts strike the balance between the different fundamental rights of the 3 stakeholders in all the cases where a permanent general injunction is not requested?
  - may courts issue stay-down orders? Unclear from *L'Oréal*
  - CCP could be obliged to suspend or terminate a repeat infringer's account if the CCP carries on receiving notifications from right holders // Facebook/YouTube terms - proportionate under art. 3 Enforcement Directive?

CJEU case law on communication to the public

- distributing TV signals in hotels generally (*SGAE*)
- providing, in the hotel's bedrooms, apparatus (other than tvs and radios) and phonograms in physical or digital format so that the guests can hear them by means of the apparatus (*Phonographic Performance v Ireland*)
- transmitting broadcast works, via a television screen and speakers, in a pub (*Football Association Premier League*)
- distributing radio signals (music) in a dental practice (*Società Consortile Fonografici (SCF) v. Marco Del Corso*

CJEU case law on communication to the public: factors

- 1) public means an “indeterminate number of potential [television] viewers or [radio] listeners” and a “fairly large number of people”
- 2) must be a new public i.e. “different from the public at which the original act of communication of the work is directed”
- 3) public must be targeted and receptive
- 4) public is present at the place of the operator’s (hotel, pub, dentist) transmission, but is not present at the place where the communication originates, that is to say, at the place of the representation or performance which is broadcast
- 5) operator is intentionally distributing the works i.e. without the intervention of the hotel, pub or dentist, the new public cannot receive the sign3als
- 6) the operator’s communication is for profit
- + the mere provision of physical facilities is not a communication to the public.

CJEU case law on communication to the public: factors

- Irrelevant factors:
  - 1) whether the customers have or not switched the TV or radio on - it is sufficient that the apparatus and the signal or protected content are provided (art. 3 Infosoc and art. 8 WCT say "in such a way that the persons forming that public *may* access it
  - 2) which technique is used to transmit the signal
  - 3) whether the place where the communication takes place is private or public
- CJEU says that communication to the public must be interpreted in accordance with international conventions inc. WCT, WPPT

Case law convergence

- There is convergence between the EU case law on article 14 ECD and on the right of communication to the public.
- Under the right of communication to the public case law, the role of the operator must be that it intervenes to give access to the content in full knowledge of the consequences of its actions.
- Under article 14 ECD case law, to benefit from the safe harbour, the provider's role must be 'of a mere technical, automatic and passive nature', which implies that that provider 'has neither knowledge of nor control over the information which is transmitted or stored'. In other words, the question is whether the ISP's role is neutral.
- Arguably, intervention with knowledge on the one hand and having an active role or controlling on the other are the same thing.

Scenario 1 = 'private cloud' (e.g. email service, music locker)

- All is private unless:
  - User could use his music locker to animate a party or use email account to email third party or derivative copyright works to a vast number of people => user liable, but CCP? Factors 5 and 6 of the EU communication to the public case law (intervention and profit) fulfilled?
  - CCP communicates works generated by the user, either intentionally or negligently for instance leaking => art 14 ECD does not apply and CCP liable under art 3 InfoSoc directive (but email ≠ social networking if user gave licence)

Scenario 2 – 'public cloud' (e.g. YouTube)

- YouTube – art 14 ECD but totally neutral? No, if suggests content as controls what user s see: factors 3 and 5 fulfilled // *Google France*
- National case law diverges on liability in this case: some ruled sheltered by art 14 ECD, some didn't

Other difficulties CCP may face

- Commission Staff Working Document "*Online Services, including E-Commerce, in the Single Market*"
- National case law interpreting ECD => uncertainties, owing to technological developments since the adoption of the ECD and owing to vagueness of some terms used in the ECD:
  - Unclear definition of intermediary activities in art. 12-14
  - Unclear conditions for benefiting from safe harbour in art. 12-14
  - Variety of "notice-and-takedown" procedures
  - Extent of monitoring allowed under art. 15 is unclear

Conclusion

- WIPO treaties + Beijing Treaty not outdated as such but may need clarifications and additions
- *UPC Telekabel Wien* should shed more light on the extent of an obligation of 'specific monitoring or action'.
- In EU, at the moment, whether CCP is liable will depend on extent of involvement, activity, control
- Different shades = All one can say is that the more involved, the more likely the host will be liable

Conclusion

- RH can use injunctions for present and future infringements relating to a single or more repeat copyright infringers acting on CCP's platform.
- But stay-down injunctions unlikely to be acceptable
- In any case, many hosts' terms already provide for termination in case of repeat infringements.
- The problems with these terminations are the danger of censorship and lack of a possibility of defence from the user.

Thank you for your attention

estelle.derclaye@nottingham.ac.uk
University of Nottingham, School of Law
http://www.nottingham.ac.uk/law/people/estelle.derclaye