

**Cloud providers and communication
to the public:**

(joint) liability or safe harbor?

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Cloud models:

1. on demand delivery and cloud access to the same content (iTunes, iCloud, iMatch).
2. broadcasting and cloud access to the same content (UPC Online TV, Cablevision RS-DVR, Shift TV)
3. access to cloud copies of broadcast content intercepted for that purpose by the provider (TVNow)
4. UGC (YouTube, Facebook, SoundCloud)
5. provider operates platform for public sharing of cloud copies (Megaupload.com, Rapidshare)
6. storage in (semi)private lockers: Dropbox
7. etc.



Who is responsible for copyright uses in the cloud?

End user/subscriber

Cloud provider

direct liability

exempted

direct liability

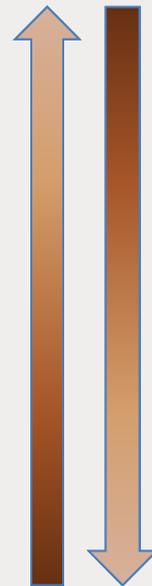
indirect liability

joint liability

joint liability

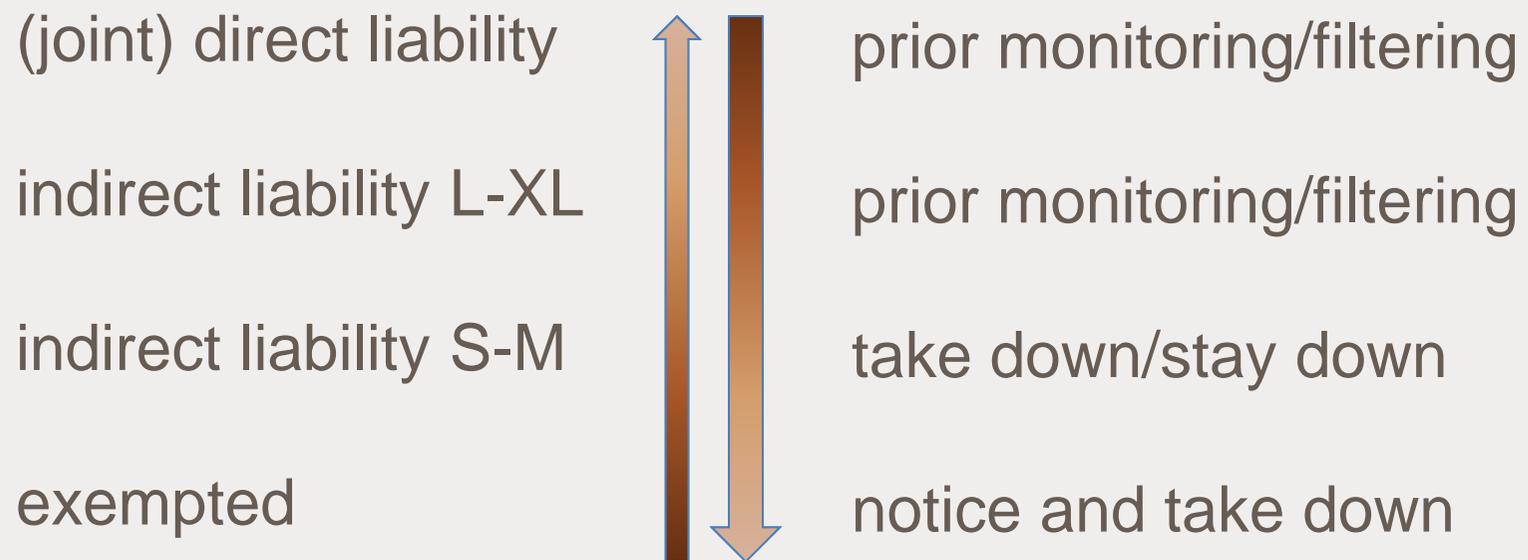
not liable

direct liability





Why is this important? Because it defines the burden of proof and the measures to be taken by the cloud provider to prevent or stop infringement





Creation of cloud copies → reproduction

Access to cloud copies → communication to the public?

Who is responsible for the reproduction?

Who is responsible for providing public access to cloud copies?

- the consumer who uploads a file from his computer or clicks to have a copy made?
- or the provider who operates the system?



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Allocation of responsibility for reproduction tends to preclude provider liability for communication to the public:

- Fed. Ct. of Australia 2012 in *TV Now* (rev'd on appeal)
- US 2nd. Cir. in *Cablevision*
- BGH Germany 2009 in *Shift TV*

no communication to the public because:

1. reproduction is initiated by subscriber (click)
2. reproduction is a private copy
3. no communication to the public because the copy is available to the subscriber only.



But how real is this if the provider allows subscribers (by clicking) to make or have made a cloud copy from a source made available by the provider itself?

- iCloud, iTunes, iMatch: cloud copy available from Apple servers without actual uploading by subscriber
- TV Now: cloud copies of free to air broadcasts
- Cablevision RS-DVR: cloud copies of cable tv

Allowing subscribers to create and access cloud copies in these models is (just another) way of making content available to the public. Here, it makes sense to hold the cloud provider directly liable.



Even if each subscriber is granted access to a separate copy?

Yes. The cloud provider makes the work available to all subscribers.

Article 8 WCT: .. any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them

See Supreme Court Japan in *LocationFree*

But see BGH in *ShiftTV*



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In these models the cloud copy is not made from a source provided by the cloud provider, but from a copy on the subscriber's personal computer/mobile phone/tablet.

Providing access to the cloud copy to other subscribers → communication to the public?



Communication?

yes, access to cloud copy by means of streaming or downloading

to the public?

- yes, if the cloud copy is shared with subscribers outside the private circle of the subscriber who uploaded the file
- or: yes, if the cloud copy is shared with subscribers outside the private circle of the provider?



Who is responsible for the communication to the public in the cloud?

Somebody has to be responsible:

- the subscriber who uploads the file to the cloud?
- the cloud provider?
- or both?



Where do you look at?

Do you look merely at who uploaded the file to the cloud?

If so, the uploading subscriber will be responsible for the communication to the public in the cloud. Liability of the provider will be limited to indirect liability or subject to safe harbor regime



Or do you look at the entire role of all parties involved?

Cloud provider: creates and operates platform for storage and access, defines subscription terms, the scope of uploading (type of content, software, format, capacity, bandwidth), the scope of use (private, public, duration), the presentation of the content and the search functionalities

Subscriber: uses the platform to upload specific content within the terms and conditions set by the provider. If possible within these terms, the subscriber defines who may access the cloud copy.



1. selecting the content of the file to be uploaded
 2. creating the cloud copy
 3. determining scope of access
-
4. operating a system for storage and access
 5. providing access
 6. defining subscription terms
 7. defining the software, file format, type of content
 8. determining the scope of use and sharing
 9. determining the presentation
 10. determining search functionality



Only 1-3 relevant for copyright liability? No, shift from safe harbor to indirect or direct liability may occur if the cloud provider takes more active control in areas 4-10.

More in particular, the provider will assume liability if he:
-limits/defines scope of content to be uploaded. Note that provider may control content without selecting individual content: popular content within the defined scope of content is likely to be uploaded.

-allows for and stimulates sharing

-controls the presentation, categorizes the content

-facilitates the search of content

-commercially exploits popularity of uploaded content



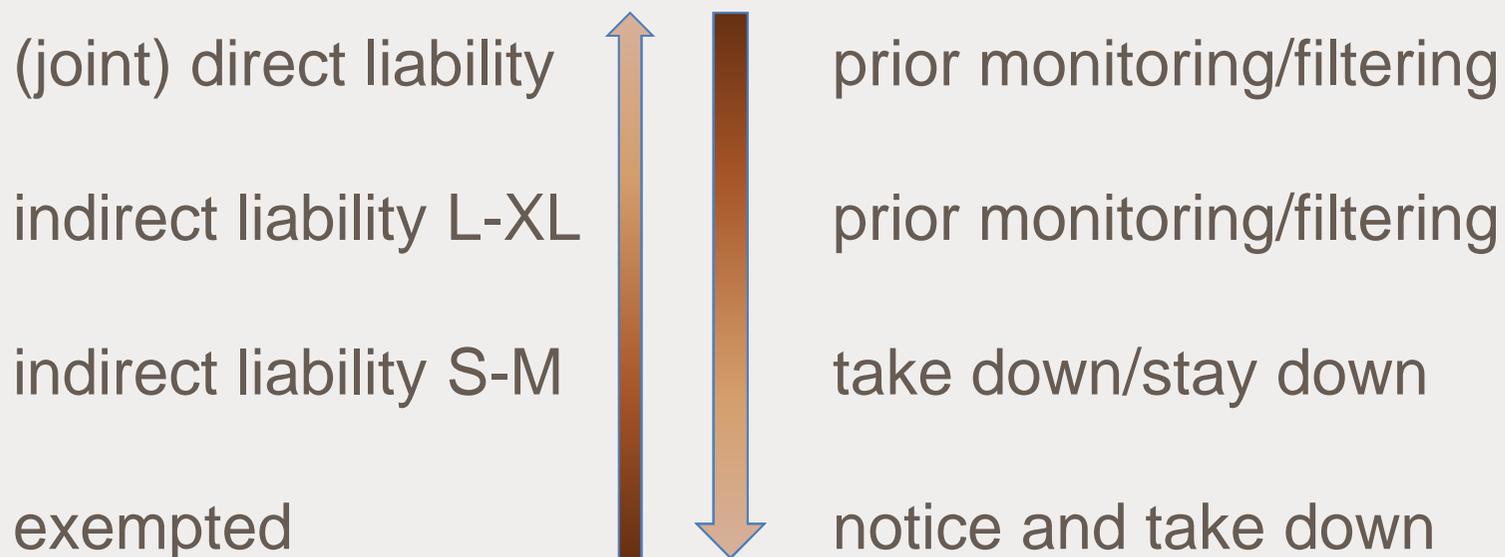
The more the cloud provider is active in one these areas, the more likely liability will move from safe harbor to indirect liability or even direct liability.

Instead of being a mere hosting provider, the cloud provider becomes a publisher.

Complication: relevant actions by different parties. E.g. cloud access and search functionality offered by different parties (cf. Rapidshare, Kino.to)



The challenge for courts today is to define exactly where the provider's liability changes from safe harbor into indirect liability or direct liability and what measures are appropriate in these regimes.





Only very limited guidance in copyright treaties

WCT Agreed Statement 8:

It is understood that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Treaty or the Berne Convention. It is further understood that nothing in Article 8 precludes a Contracting Party from applying Article 11bis(2).



- no supranational legislation on joint liability.
Requirements under national law do not always fit the cloud environment – concerted action
 - no supranational legislation on indirect liability
 - uncertainty about scope of safe harbor regimes in national laws and e-commerce directive 2000/31/EC
- role of case law predominant; no consistency so far
- courts (ECJ) acting as lawmakers



In this developing and still largely uncertain area, study of case law and comparative analysis is crucial and will support the development of consistent case law and legislation

Role of ALAI important:

-ALAI 2012 national reports

http://www.alai.jp/ALAI2012/program/national_report-e.html

-intermediary liability on the agenda of ALAI 2013



Thank you

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