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Questionnaire

CROATIAN REPORT

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Session 1

– Developments of New Platforms

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

As it is generally known, a unique definition of the “Cloud” does not exist, and Croatia is no exception. In general, not much has been written in Croatia, in terms of scholarly works on this subject,¹ but it is widely discussed in papers² and publications;³ conferences and workshops relating not only (or not solely) to the protection of copyright.⁴ Several web or Internet portals offer different definitions of the “Cloud”.

The “Cloud” computing or simply the “Cloud” can be defined as Internet-based computing that facilitates sharing of resources, software and information.⁵

It is said that what “Cloud” offers to the users is infrastructure as a service. Therefore, it is not necessary to invest in software and its up-to-date versions when the entire company’s IT sector (usually SME’s) can be administered and maintained by “Cloud” service provider.⁶

Laboratory for Systems and Signals of the Faculty of Electrical Engineering and Computing of the University of Zagreb defines the “Cloud” as a concept of diffusing software environment which uses the Internet as a platform and enables for applications and documents sent from anywhere in the world to be stored and

¹ <http://cit.zesoi.fer.hr/browsePaper.php?issue=36&seq=2&paper=1391> (28/6/2012)

² <http://pogledkrozprozor.wordpress.com/2009/08/29/%E2%80%9Ecloud-computing%E2%80%9C-ili-programaska-rjesenja-u-oblacima/> (28/6/2012)

³ It was subject of joint publication of the Croatian National Computer Emergency Response Team (CERT) and Laboratory for Systems and Signals (LS&S), <http://www.cert.hr/sites/default/files/NCERT-PUBDOC-2010-03-293.pdf> (28/6/2012)

⁴ http://www.hccu.hr/index.php?option=com_content&view=article&id=90&Itemid=112 (28/6/2012)

⁵ <http://www.pctrikovi.com/tutorijali-i-savjeti/cloud-computing.html> (27/6/2012)

⁶ http://www.logis.hr/?page_id=82 (28/6/2012)

safeguarded on pre-planned servers. Five key characteristics of the “Cloud” are also mentioned: service on demand, broad network access, pooling of resources, rapid elasticity and measured service.⁷

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

Firstly, we should distinguish between private and public access to works protected by copyright that are offered through the “Cloud”. As regards private access to content in the “Cloud” there should generally be no harm to the right holders, whereas where public access is offered possible copyright infringements are more relevant. In defining those two terms, we use legal definitions in the Croatian Copyright and Related Right Acts (CRRA, Article 3, subsection 3): “Public is a larger number of persons who are outside of the scope of usual circle of family, friends and other personal relationships.” Article 3, subsection 4 of the Act: “Public exploitation of works protected by copyright is every exploitation of such works made available to the public or exploitation of such works in the space that is accessible to the public, as well as making the access to such works possible in place and at the time that is chosen by the public.”

- 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?

Current situation in Croatia is that increased number of services is being offered in relation to the “Cloud”. One of the first Croatian companies to offer its services in the “Cloud” environment was its biggest mobile and IT provider. These services are classified into different service packages, such as, tCloud Computer; Cloud Server; Cloud Human Resources; Cloud Finance and Accounting; Cloud Car Surveillance; and they are aimed solely at business users to facilitate their working environment and help their businesses and employees to circumvent everyday difficulties imposed by the needs of modern society.⁸ Another IT provider also offers variety of services in the “Cloud”, for example, cloudMarket – first online market of business applications in Croatia.⁹ Moreover, the University Computing Center of the University of Zagreb called “SRCE” (Sveučilišni računski centar) offers to its customers, who are public higher education institutions and public scientific institutes, Virtual Private Server.¹⁰

⁷ <http://sigurnost.lss.hr/Dokumenti/cloud-computing.html> (28/6/2012)

⁸ <http://www.t-com.hr/poslovnictcloud/index.asp> (27/6/2012)

⁹ <http://www.en.metronet.hr/it-usluge/> (27/6/2012)

¹⁰ <http://www.srce.unizg.hr/proizvodi-i-usluge/racunalni-resursi/cloud-virtual-private-server-vps/> (27/6/2012)

Following trends in more developed countries it can be concluded that this market in Croatia will continue to rise, with more domestic companies offering their services in the “Cloud” as well as foreign and multinational companies.

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

Since the “Cloud” is relatively new concept in the digital area, we can safely assume that it will have a strong impact to copyright. Recent judicial practice (though not in Croatia, where to our best knowledge no such practice exists) has set some of the issues in front.¹¹ However, this question should also be discussed with ISP liability and developments in this field could determine the future of the “Cloud” and copyright.

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?

The right of making available to the public is defined in Article 30 of the CRRA as the exclusive right to communicate a copyright work to the public by wire or wireless means, in such a way that members of the public may access it from a place and at a time individually chosen by them. According to that definition Cloud storage with a public access should be treated as the making available to the public. However, to our best knowledge, there is no case law on the right of making available to the public with reference to “Cloud” storage, retrieval and dissemination. It seems that the Cloud service providers usually do accept that Cloud Business is based on right of making available to the public, and there are no cases known so far where the copyright holders claim that the right of making available to the public was infringed by the cloud services in Croatia.

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

According to Article 175/4 of the CRRA technological measures mean any technology, computer program, device, product or component thereof that in the normal course of its operation is designed to prevent or restrict acts which are not

¹¹ http://iplj.net/blog/wp-content/uploads/2011/03/C04_Melzer_20110315_FINAL.pdf
(28/6/2012)

authorized by the right holder. The technological measures are considered effective where the use of copyright works or subject matters of related rights is restricted by the right holders through the application of an access control or a protection process, such as encryption, scrambling or other alteration of the work or other subject matter or a copy control mechanism, which achieves the protection objective.

According to Article 176/2 of the CRRA, the right-management information means any information provided by the right holders identifying a copyright work or a subject matter of related rights, the right holder, the terms and conditions for use, and their relevant numbers and codes, where they are indicated on a copy of a copyright work or subject matter of related rights or when they appear in connection with their communication to the public.

As far as known, the cloud service providers usually do follow the provisions of the CRRA and there are no cases known so far where the copyright holders claim that the technological protection measures or electronic rights management information were infringed in the cloud environment in Croatia.

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

Since the WIPO Treaties do not contain detailed provisions related to the digital agenda, including the right of making available, and copyright in general is very often infringed on the wide scale, it would be desirable to reconsider the concept of more detailed regulations referring to the copyright in the Internet generally. Within this, the provisions relating to the "Cloud" developments could also be included.

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?

To begin with, it should be noted that in the Republic of Croatia the market of cloud-based services offering copyrighted works is generally underdeveloped. Presumably, this is the result of several factors, most importantly the relatively small size of the market and general state of development of e-commerce. In addition, wide availability of illegal content on the Internet (especially via torrent services) leads to a high percentage of unlawful use of copyrighted works, thereby significantly limiting the possibilities of developing successful business models based on marketing of digital copyrighted works. This is especially true in the case of musical and audiovisual works.

In this context, most promising cloud services offering copyrighted content on the Croatian market are, at the moment, digital bookstores. Currently there are two services operating since 2011 and run by national telecom operators, which seek to gain market share by offering works of both the domestic and foreign authors.

Regarding musical and audiovisual works, although there are a few services, their business model cannot be described as cloud-based. For example, two sites that offer musical works offer their content as .mp3 files with no specific DRM or TPM, with limited time for download after payment.

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

Literary works (VIP and Planet 9 e-books stores); musical works (fonoteka.tportal.hr and cedeterija.hr).

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

No accurate information is available on the rights that rightholders usually transfer regarding Cloud services. However, it is certain that the reproduction right and the right of making available to the public should be transferred to the Cloud service provider. That is so because a large repertoire of works available in the local digital marketplace are in fact works published by providers themselves.

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

In the case of e-book services, users are allowed to reproduce the protected work on up to 6 devices, all of which have to be connected to a single Adobe ID account for the purposes of DRM. Regarding the digital music stores, no terms of use are publicly available. At least some of the services seem to be in a beta stage of development.

- 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?

No accurate or verifiable figures have been disclosed to the public.

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

E-book stores offer their content in EPUB and PDF formats, protected by Adobe Digital Editions DRM technology. Regarding the digital music stores, it seems that there are no DRM measures currently employed.

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

Legal protection of TPM is regulated in Article 175 of the CRRA, which reads:

(1) The circumvention of effective technological measures designed to protect the rights provided by this Act shall represent the infringement of such rights, unless otherwise specially provided by this Act.

(2) The circumvention of technological measures shall also mean, under this Act, manufacture, import, distribution, sale, rental, advertisement for sale or rental, or possession for commercial purposes of technology, computer programs, devices, products or components, or the provision of services which:

- are promoted, advertised or marketed for the purpose of circumvention of technological measures,

- have only a limited commercially significant purpose or use other than to circumvent technological measures,

- are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of effective technological measures.

(3) A request may be filed against a person who knew or had reasonable grounds to know that she or he was circumventing or enabling the circumvention of technological measures. It shall be considered that the person who acts in the manner described in paragraph 2 of this Article has reasonable grounds to know that she or he is circumventing or enabling the circumvention of technological measures.

(4) For the purposes of this Act, technological measures shall mean any technology, computer program, device, product or component thereof that in the normal course of its operation is designed to prevent or restrict acts, which are not authorized by the right holder under this Act. The technological measures shall be considered effective where the use of copyright works or subject matters of related rights is restricted by the right holders under this Act through the application of an access control or a protection process, such as encryption, scrambling or other alteration of the work or other subject matter or a copy control mechanism, which achieves the protection objective.

(5) The provisions of this Article shall not apply to computer programs.

Also, it is worth mentioning that Article 176 of the CRRA provides for a legal protection of rights-management information. This Article reads as follows:

(1) Copyright and related rights under this Act, shall be also infringed by a person who knowingly, without authority, removes or alters any electronic right-management information, produces, distributes, imports for the purpose of putting them on the market, broadcasts, communicates to the public or makes available to the public a copyright work and subject matter of related rights from which the electronic right-management information has been removed or altered without the authorization of a right holder, and who knows or has reasonable grounds to know that she or he causes, enables, facilitates or conceals the infringements of the rights under this Act.

(2) Right-management information, under this Act, shall mean, any information provided by the right holders identifying a copyright work or a subject matter of related rights, the right holder, the terms and conditions for use, and their relevant numbers and codes, where they are indicated on a copy of a copyright work or subject matter of related rights under this Act or when they appear in connection with their communication to the public.

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

At present, it appears that local content providers have not been faced with problems of circumvention of TPM and DRM. However, this conclusion is strongly connected with and limited by the above mentioned context regarding the actual use of cloud-based services for marketing digital content. It is reasonable to expect that the issues of TPM and DRM circumvention will become more prominent as local cloud-based services gain more of the market share.

On the other hand, one cannot underestimate the fact that local enterprises already (indirectly) face negative consequences of the unauthorized circumvention of TPM

and DRM on a global level, since it is significantly harder for them to develop sustainable business models in the context characterized by wide availability of unlawful content.

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., FlickrR) and mixed-forms (such as, e.g. Facebook) but also so-called internet-video recorders and possible other forms of private storage services.

Cloud-based storage services provided by Croatian companies for the local market are orientated primarily to business customers (B2B). Most of the Croatian telecoms offer several services that help business clients store data in the cloud.

On the other hand, most of the popular storage and sharing platforms such as Picasa, Flickr, Dropbox, Box.net, Google Drive, etc., as well as social network platforms such as Facebook or Google Plus are both available and widely used in Croatia. However, DRM systems in place limit access to territorially unlicensed content.

- 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).

To our best knowledge, there is currently no case-law regarding the issues of legal responsibility of storage services and other Internet intermediary service providers for the possible breaches of copyright law. Furthermore, the nature of the services offered makes it very unlikely that the statutory exceptions have any impact on the business model of the service provider.

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?

Generally speaking, the information society service providers in Croatia usually do not benefit from a narrow interpretation of the making available or the communication to the public or public performance right. They tend to respect, with more or less enthusiasm, the interpretation of those definitions as wide as the powerful right owners (such as music publishers and the publishers of printed editions) and the collective management societies tend to understand them. According to our best knowledge, so far there are no cases concerning those issues. So is to expect the same also in relation to the cloud services in Croatia. However, it is conceivable that with developing of the Cloud business also certain models and services could develop that would take advantage of the statutory exemptions and limitations and base their business models around it.

- 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?

The Croatian legal system has adopted the framework laid down in Directive 2000/31/EC (EU e-Commerce Directive) which has been fully implemented in the Electronic Commerce Act (ECA). The provider of the information society services, according to Article 16 of the ECA, cannot be held liable for the content of electronic transmission provided that he functions as “a mere conduit” (Article 12 of the E-commerce Directive). Articles 17-21 of the ECA lay down the criteria for exemption from secondary liability, which also correspond to the framework laid down in the e-Commerce Directive. The same provisions should also apply to the provider of cloud services. Generally speaking, the information society service providers in Croatia usually do not benefit from a narrow interpretation of the making available or the communication to the public or public performance right. They tend to respect, with more or less enthusiasm, the interpretation of those definitions as wide as the powerful right owners (such as music publishers and the publishers of the printed editions) and the collective management societies tend to understand them. According to our best knowledge, so far there are no cases concerning those issues. So is to expect the same also in relation to the cloud services in Croatia. However, it is conceivable that with developing of the Cloud business also certain models and services could develop that would take advantage of the statutory exemptions and limitations and base their business models around it.

- 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.

According to Article 21 of the ECA, there is no general obligation for providers, when providing the information society services, to monitor the information which they transmit or store, nor a general obligation to actively seek facts or circumstances indicating illegal activity. Consequently, cloud service providers benefit from an exception from liability as regulated in Article 16 of the ECA, which exempts the information services provider (and consequently the cloud service provider) from liability. But, information society service providers are obliged to promptly inform the competent public authorities of alleged illegal activities undertaken or information provided by recipients of their service. They are also obliged to communicate to the competent authorities, at their request, information enabling the identification of recipients of their service with whom they have storage agreements, in order to prevent criminal activities and infringements of rights. If they fail to meet their obligations, they are regarded responsible for the infringement of copyright, and their responsibility, depending on the circumstances of each particular case, may also be the duty to pay damages, which includes the full indemnification *in solidum* with the direct infringer.

However, according to our best knowledge, there is no relevant case law regarding the cloud services in Croatia. The Croatian legal system has adopted the framework laid down in Directive 2000/31/EC (EU e-Commerce Directive) which has been fully implemented in the Electronic Commerce Act (ECA). The provider of the information society services, according to Article 16 of the ECA, cannot be held liable for the content of electronic transmission provided that he functions as “a mere conduit” (Article 12 of the E-commerce Directive). Articles 17-21 of the ECA lay down the criteria for exemption from secondary liability, which also correspond to the framework laid down in the e-Commerce Directive. The same provisions should also apply to the provider of cloud services.

- 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?

As all other information society service providers, including the cloud service providers, are not obliged to actively monitor the infringing content, but once they are informed by the right holder on the infringing activities or obtained such knowledge or awareness in another way, they are obliged to remove the infringing information of disable access to such information.

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

There are no specific rules on evidence that the right holder has to present in order to have infringing content removed. However, Article 177 of the CRRRA stipulates that is sufficient for the rightholder to provide any evidence showing reasonable ground to believe that the right has been infringed. On the other hand, the infringing party has to prove that he has the right to use the work in particular manner.

- 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?

To our best knowledge, no contracts have been concluded that involve cloud service providers and rightholders and it is certain that collective management societies have not concluded any contract with the cloud service providers.

- 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?

According to our best knowledge, there are no such cloud services, neither there have not been any procedures against an offending cloud service in the Croatian judicial or administrative practice.

- 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?

In Croatia, there are discussions on amendments to the Criminal Act which could result in detailed provisions concerning the liability of information service providers. We believe that their liability shall be increased.

- 9) Do you see any progress regarding filtering technology?

So far we do not see any progress regarding filtering technology in Croatia. However, the perspective depends on the definition of filtering technology. Content filtering technology is vulnerable to content formatting, format encryption and adoption of filtering standards. IP filtering is vulnerable to circumvention measures immanent to standard Internet protocols. At this stage of the Internet's technological development, basic communication technologies preclude efficient filtering. CC licenses are seeing use in educational and scientific venues, specifically as a way to enable access to thematic content. We are not aware of CC or other open content licenses being used in commercial cloud context.

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?

CC licenses are seeing use in educational and scientific venues, specifically as a way to enable access to thematic content. We are not aware of CC or other open content licenses being used in commercial cloud context.

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

Mostly scientific works and related technical literature.

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

There is no publicly available data regarding the generated income.

- 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.

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 are reluctant 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.

There is no national case law regarding enforceability of CC and other open content licenses in Croatian courts. However, with regard to the common European continental legal tradition, experience with recent Dutch, French and German cases that have confirmed the applicability and enforceability of CC and other licenses may apply.

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?

The basic domestic legal source of private international law in the Republic of Croatia is the Resolution of Conflict of Law with the Laws of Other Countries in Certain Relations Act (hereinafter: the PIL Act).¹² This Act dates back to the early 1980s and was only marginally modified when incorporated into the Croatian legal order in 1991. This is the codification of both the conflicts and procedural rules relevant to matters having an international element. It applies whenever both international treaties in force in Croatia and special domestic laws do not contain a specific rule.¹³ However, it does not contain the private international law rules specific to the copyright issues or intellectual property issues, apart from the provisions on the law applicable to contracts on author's right and contracts on technology transfer.¹⁴

In reply to the question on the grounds for establishing the jurisdiction of Croatian courts in a lawsuit against a foreign intermediary who makes it possible for infringements to occur or to impact in the forum, it has to be noted that there are no specific jurisdiction rules for intellectual property matters. In the lawsuit regarding the issue of intermediary enabling an infringement occurring or impacting the territory of Croatia, there is a possibility to rely on the general heads of jurisdiction and special heads for torts.

Under the former heads, the Croatian courts shall have international jurisdiction if a defendant is domiciled (natural persons) or has its seat (legal persons) in Croatia. The Croatian courts shall also have jurisdiction if a defendant is domiciled neither in Croatia nor in another country, but has residence in Croatia. If litigants are Croatian nationals and a defendant has residence in Croatia, the Croatian courts shall also have international jurisdiction. The jurisdictional rule on joinder of parties provides that if two or more defendants are sued on the same legal and factual grounds, and between whom this legal and factual connection existed even before the lawsuit was initiated, the Croatian courts shall have supplemental jurisdiction to adjudicate the case against all the defendants, provided one of those defendants has domicile or seat in Croatia.¹⁵ Although not reported to have been used in practice since the late 1960s, it is necessary to mention here the provision of the PIL Act on the so-called retorsion head of jurisdiction: Where the law of a foreign state provides a criterion for establishing the jurisdiction of its courts in the proceedings against a Croatian national, the same criterion, although not provided in Croatian law, may be used for establishing the jurisdiction of the Croatian courts in the proceedings against the national of that foreign state.¹⁶

In addition to the general heads of jurisdiction, all of which may be used in tort (including the infringement of intellectual property) cases, special head of jurisdiction for torts provides that the Croatian court shall have the jurisdiction if the damage has occurred on the territory of the Republic of Croatia.¹⁷ The Croatian scholars have not been unique in interpreting this provision. Some tend to believe that the phrase

¹² OG SFRY 43/1982 and 72/1982, OG RC 53/1991.

¹³ For the list of treaties the reference is made to I Kunda, Croatia, in T Kono (ed), *Jurisdiction and Applicable Law in Matters of Intellectual Property/La compétence et la loi applicable en matière de la propriété intellectuelle* (Hart Publishing, 2012) para. 7.

¹⁴ Art 20 of the PIL Act.

¹⁵ Art 46(1)-(4) of the PIL Act.

¹⁶ Art 48 of the PIL Act.

¹⁷ Art 53(1) of the PIL Act.

'damage occurring in the Republic of Croatia' has to be construed restrictively to encompass only those situations in which the place of the damage, i.e. the consequences of tortious act (*locus damni*) is located in Croatia. Other scholars hold that irrespective of this phrase the broader interpretation, in line with the doctrine of ubiquity according to which the damage occurs both, in the place where the tortfeasor acts (*locus actus*) and in the place where the consequence of such wrongful action is felt (*locus damni*), would be more appropriate. However, this would exclude the possibility of bringing a lawsuit in Croatia if only an indirect damage occurs there, as has been confirmed several times over the past 15 years by the Supreme Court of the Republic of Croatia.¹⁸ The judicial interpretation of this provision, i.e. of the scope of the *locus delicti commissi*, in the event of an infringement of an intellectual property right has not been reported. Likewise, the Croatian scholars, because discussing this issue primarily within the European Union context, did not take either position. Thus, the issue whether an act taking place in the territory of one country may qualify as an act of infringement of the right protected in another country for the purpose of establishing jurisdiction, remains unanswered in the Croatian law.

The international jurisdiction of Croatian courts in tort may additionally be based on the tacit prorogation where a defendant enters a plea in merits without challenging the jurisdiction.¹⁹ Yet, based on the wording of Article 53(1) of the PIL Act, it appears that Croatian law does not allow parties to explicitly agree on international jurisdiction in tort cases. It also has to be added that all the criteria for international jurisdiction available in tort cases are available also to the plaintiffs in the proceedings against insurers on the grounds of direct action for third-party liability, provided that direct action is allowed under the applicable law, as well as for recourse against regress debtors on the grounds of liability for damages.²⁰

It is important to restate that there are no special conflict-of-laws provisions in the Croatian law that would designate the law applicable to infringements of intellectual property rights, either of the primary infringer or the secondary one. Hence, the general conflict-of-laws provision for non-contractual obligations should be decisive. It provides that the law applicable to non-contractual liability for damages, unless otherwise provided by another legal instrument, is the law of the place where the act was committed (*lex loci actus*) or the law of the place where the consequence has occurred (*lex loci damni*), dependent on which of them is more favourable to the injured party. The same law is also applicable to the non-contractual liability occurring in relation to the quasi-contracts (*condictio sine causa* and *negotiorum gestio*).²¹ There is a special conflict-of-laws provision on the illegality of the alleged

¹⁸ In the Supreme Court of the Republic of Croatia decision No. Rev 2390/94 of 3 September 1997, published in (1998) 4 *Sudska praksa* [Court Practice] 91, it was clearly stated that the term 'occurrence of damage' means the bodily injury, death or damage to a thing. This was transformed into the legal opinion accepted at the meeting of the Supreme Court Civil Law Section (III/07) Su-IVg-46/2007-3 held on 26 February 2007. See also the Supreme Court of the Republic of Croatia decisions Rev-758/1995-2 of 6 May 1998, accessible at: sudskapraksa.vsrh.hr/supra/, and Revt-51/03-2 of 27 February 2007, accessible at: sudskapraksa.vsrh.hr/supra/.

¹⁹ Art 50 of the PIL Act.

²⁰ Art 53(2) of the PIL Act.

²¹ Art 28(2) of the PIL Act.

tortuous act, which states that this illegality is governed by either the law of place where the act was committed or the law of the place where the consequence has occurred, and if the act was committed or the consequence has occurred in more than one place – it is sufficient that the act is illegal under the law of any of those places.²²

The cited provision on the law applicable to torts seems inappropriate for certain special types of delicts, and this is specifically so in cases concerned with the infringement of intellectual property rights, where as a consequence of the principle of territoriality of these rights, the acts committed in the territories outside the borders of the country for which the protection is claimed, are not considered infringing acts. It is therefore suggested that the provision of Article 28 of the PIL Act should be applied in the adjusted manner to the infringements of intellectual property rights taking account of the fact that such rights are territorial, meaning that they provide their holder with the protection against third parties only for the acts taking place within the country of protection. Such approach eventually reduces the *locus delicti commissi* only to the single connecting factor which corresponds to the *locus protectionis* and eliminates the plurality of potentially applicable laws to the law of the country of protection. Thus, the *locus protectionis* as a special connecting factor for infringements of intellectual property rights may be understood as the embodiment of the *locus delicti commissi* as a connecting factor for the torts in general. Otherwise the principle of territoriality of intellectual property rights would not be respected.

The Croatian case law does not seem to be particularly appreciative of the problems related to application of Article 28 of the PIL Act to the infringement of intellectual property rights. The High Commercial Court pointed out that the provision of Article 28 of the PIL Act relates to the non-contractual obligations and that these provisions are ‘also in accordance with Article 5 of the Berne Convention which provides, for the means of redress for the protection of copyright, and the law of the country in which the protection is claimed is to be applied’. Consequently, the Court concluded that the Croatian law is applicable.²³

It is difficult to give a straightforward reply under the Croatian law to the question regarding whether the intermediary’s infringement would be subject to the same law as the primary infringement or would be treated as a separate act of infringement under the conflict of laws. In any case, there seems to be no grounds to apply the law of the country where the intermediary’s residence or place of business is located, unless this is either the *lex loci actus* or the *lex loci damni*, ie pursuant to here advocated interpretation, the *lex loci protectionis*.

In this context it is important to mention the provisions of Articles 3 and 4 of the Electronic Commerce Act.²⁴ The former titled “Application of Law” provides that the information services provider having its seat in the Republic of Croatia shall act and provide services in compliance with the laws and other legal instruments of the Republic of Croatia. Article 4 titled ‘Exception to the Application of Law’ provides that

²² Art 28(3) of the PIL Act.

²³ The High Commercial Court, Pž-277/08–3 of 9 December 2009, annulling the decision of the Commercial Court in Rijeka, P-749/2002 of 12 October 2007 on the merits and remanding the case back to the Commercial Court for deciding anew.

²⁴ OG RC 173/03, 67/08, 36/09 and 130/2011.

the provisions of Article 3 shall not apply to the information services provider having its seat in another EU Member State, even in cases where the service is targeted towards the citizens of the Republic of Croatia. Furthermore it is stated that the latter exception does not apply to subjects in the several mentioned areas, one of which being 'copyright and related rights, as well as industrial property rights'.²⁵ In the midst of the heightened discussion about the legal nature of these provisions among the European scholars, in 2006 the Croatian scholars took the view that both the respective provisions of the Croatian Electronic Commerce Act and the Electronic Commerce Directive are conflict-of-laws rules.²⁶ This does not seem to be contrary to the Electronic Commerce Directive which, although in its Recital 23 it declares not to provide for any conflict-of-laws rules rather the rules guaranteeing the freedom to provide services in the internal market, does not seem to prevent its transposition in such form.²⁷

- 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)?

Croatian collective management organisations (CMO) generally do not grant multi-territorial licences even in cases related to the on-line use. However, on a single occasion, in the mid '90, the performers' CMO reported that they have granted a licence for the purpose of use of the performance by a Croatian singer in an Australian film. This contract had no cloud-specific clauses whatsoever.

²⁵ It is interesting to note that the most recent amendment to the Electronic Commerce Act added the following provision of Article 1a: 'This Act contains provisions in accordance with the Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce ('Electronic Commerce Directive').'

²⁶ Hrvoje Sikirić, 'Mjerodavno pravo za ugovore u elektroničkoj trgovini u hrvatskom i europskom međunarodnom privatnom pravu', 56 *Zbornik Pravnog fakulteta u Zagrebu* 2006, 739, 51.

²⁷ Interpretation *arguentum a contrario* of the judgment of the Court of Justice of the European Union in Cases C-509/09 and C-161/10, *eDate Advertising GmbH v X* and *Olivier Martinez and Robert Martinez v Société MGN Limited*, where stated that the provision of Article 3 of the Electronic Commerce Directive' must be interpreted as not requiring transposition in the form of a specific conflict-of-laws rule'.