Reply of the Finnish ALAI Group **28 June, 2012**

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Questionnaire

Session 1
－Developments of New Platforms

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

Reply: There are different kinds of cloud services for different purposes available in Finland. A legal definition of "The Cloud" does not exist.

e.g. cloud services

- establishing a server or a centralized IT environment (e.g. for SMEs)

- offering storage space and synchronisation services for private persons as well as for businesses.

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

Reply: Cloud services offer possibilities to use storage space for different purposes. Copyright-protected subject matter can easily be stored and be available for a personal use everywhere. Services may also allow a person to extend his personal sphere to relatives and friends. At some point there may be a question whether private sphere has turned a public sphere.

A phenomenon which has become more common in Finland within the last few years is the emergence of Internet video recording services. These services are offered by telecommunications companies or other service providers. Services may be based on different concepts or techniques. At least some of them may be characterized as "cloud type" services.

As to these services a major copyright question is: Are these services considered private copying, or should they be licensed by the right holders of the broadcast material?

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?

Reply: Yes, there are some Finnish commercial platforms for SMEs. International services, such as iCloud, Windows Live Skydrive, MobileMe etc., are available also in Finland.

New platforms, also domestic ones, will definitely be established in the future. Especially Internet video recording services will become more and more popular.

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

Reply: There are indications in overall networking that all kinds of cloud services will grow and expand in the future. Also the private sphere seems to expand.

This development must be monitored from the copyright point of view.

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?

Reply: No, there is no case law yet. A preliminary investigation in a case against an Internet video recording service provider has been finished and a consideration of charges is still pending.

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

Reply: No, there is no case law on that.

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

Reply: No, there is no case law on that.

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

Reply: The provisions of the WCT and the WPPT set cornerstones to the operations in the information networks, and also in "clouds".

The agreed statement concerning Article 1(4) of the WCT states that "the reproduction right... fully apply in the digital environment, in particular to the use of works in digital form. It is

understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention."

Further, the right of communication to the public in Article 8 of the WCT, as well as the right of making available of fixed performances in Article 10 of the WPPT, retain on demand activities in the Internet within the exclusive competence of authors, performers and producers of phonograms.

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?

   Reply: The understanding is that there are no such lawful services available in Finland at the moment. (The same reply to questions 2-6, and 8.)

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

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

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

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?

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

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

   Reply: The provisions of the Copyright Act fulfil the requirements of Article 6 of the Information Society Directive 2001/29/EC.

Copyright Act (404/1961)
Section 50a Prohibition to circumvent a technological measure (821/2005)

(1) An effective technological measure protecting a work protected under this Act, which has been installed as protection for the work by the author or some other person with the author's permission in making the work available to the public, shall not be circumvented.

(2) An effective technological measure means technology, a device or a component which, in the normal course of its operation, is designed to prevent or restrict acts in respect of the work without the author's or other rightholder's authorisation and by means of which the protection objective is achieved.

(3) The provisions of subsection 1 shall not apply if the technological measure is circumvented in course of research or education relating to encryptology or if a person who has lawfully obtained the work circumvents the technological measure in order to be able to listen to or view the work. A work in which the technological measure has been circumvented for the purposes of listening or viewing shall not be reproduced.

(4) The provisions of subsections 1–3 shall not apply to a technological measure protecting a computer program.

According to Section 50b it is also prohibited to produce and distribute devices for circumventing technological measures.

Section 56e Violation of a technological measure (821/2005)

Anyone who wilfully or out of gross negligence infringes
1. the prohibition to circumvent a technological measure, as provided in section 50a, or
2. the prohibition to produce or distribute devices for circumventing technological measures, as provided in section 50b,

shall be sentenced, unless the act is punishable as a circumvention of a technological measure under section 3 of Chapter 49 of the Penal Code or as a offence of a device for circumventing a measure under section 4 of the Chapter, to a fine for a violation of a technological measure.

8) Is unauthorized circumvention of TPM a practical problem for those offering their content 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.

Reply: Yes, there are such services as described above, including personalized internet video-recorders, available in Finland. (See reply to question 2 of session 1)

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).

Reply: The question whether private copying exception could or should be applied to internet video recorder services, including other copyright matters related to these services are currently being considered in the state administration.

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?

Reply: The situation shall be assessed by taking into consideration the role and activities of the operator. If the operator is not the one who communicates or makes the copyright-protected material available to the public, i.e. the originator of the process of communication, the operator cannot be liable for it.

Furthermore, according to Recital 27 of the Information Society Directive of the European Union (2001/29/EC), the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of the Directive.

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?

Reply: If the service provider does not benefit from the exemption of liability (described under the next question) the service provider may be liable e.g. for aiding and abetting.

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)?

Reply: Finland is, as a Member State of the European Union, bound to Directive on electronic commerce (2000/31/EC) and its provisions on liability of intermediary service providers. The Directive has been nationally implemented by law nr. 458/2002 (Act on Provision of Information Society Services).

Please cite to and briefly describe statutory provisions and relevant case law.

Act on Provision of Information Society Services (458/2002)

Section 15 Exemption from liability in hosting services

When an information society service is provided that consists of the storage of information provided by a recipient (content producer) of the service, the service provider is not liable for the information stored or transmitted at the request of a recipient of the service if he/she acts expeditiously to disable access to the information stored:

1) upon obtaining knowledge of the order concerning it by a court or if it concerns violation of copyright or neighbouring right upon obtaining the notification referred to in Section 22;
2) upon otherwise obtaining actual knowledge of the fact that the stored information is clearly contrary to Section 8 of Chapter 11 or Section 18 of Chapter 17 of the Penal Code (39/1889).

The provisions in paragraph 1 shall not apply if the content producer is acting under the authority or the control of the service provider.

There is no case law on the application of this provision to 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?

Reply: There is no duty for the service provider to monitor.

There is
1) a duty to disable access to the infringing content (Section 16: "*On application by a public prosecutor or a person in charge of inquiries or on application by a party whose right the matter concerns, a court may order the service provider, referred to in Section 15, to disable access to the information stored by him/her if the information is clearly such that keeping its content available to the public or its transmission is prescribed punishable or as a basis for civil liability. - - -*")

2) a duty to prevent access to material infringing copyright or neighbouring right (Notification procedure, Section 20: " *A holder of copyright or his/her representative may request the service provider referred to in Section 15 to prevent access to material infringing copyright as prescribed in this Section and in Sections 22-24. The same applies to a holder of neighbouring right and his/her representative if it concerns material infringing this right. - - -*")

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

Reply:
1) An order to disable access to the infringing content (Section 16): According to the legislative history, an order may be given if the infringement of copyright is manifest.

2) Notice and take-down: According to Section 22, the notification must be made in writing or electronically so that the content of the notification cannot be unilaterally altered and that it remains available to the parties.

The notification must include: 1) the name and contact information of the notifying party; 2) an itemisation of the material, for which prevention of access is requested, and details of the location of the material; 3) confirmation by the notifying party that the material which the request concerns is, in his/her sincere opinion, illegally accessible in the communication network; 4) information concerning the fact that the notifying party has in vain submitted his/her request to the content producer or that the content producer could not be identified; 5) confirmation by the notifying party that he/she is the holder of copyright or neighbouring right or entitled to act on behalf of the holder of the right; 6) signature by the notifying party.

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?

Reply: There is no information available on such contracts.

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?

Reply: No services have so far been banned or 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?

Reply: Such legislative changes are not under discussion in Finland.

However, as regards Internet video recording services and their operators, the question whether private copying exception could or should be applied to internet video recorder services, including other copyright matters related to these services are currently being considered in the state administration.

In the context of the European Union and the European Digital Single Market, the evaluation and improvement of the E-commerce Directive is one of the five priorities.

According to the Communication of the European Commission – "A coherent framework for building trust in the Digital Single Market for e-commerce and online services" COM(2011) 942 final: *"It is, however, necessary to improve the implementation of the Directive (in particular through better administrative cooperation with the Member States and an in-depth evaluation of the implementation of the Directive), provide clarification, for example*

concerning the liability of intermediary internet providers, and take the additional measures needed to achieve the Directive's full potential, as identified in the current action plan."

9) Do you see any progress regarding filtering technology?

Reply: No opinion on that.

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?

Reply: The use of CC licenses has become more common. There is no empirical data available on their use in Finland.

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

Reply: There are no studies on this matter. In the scientific field CC or open content licenses are highly promoted.

In literature and music such licenses are used as well.

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

Reply: There is no such information available.

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.

Reply: There is no specific information available on this.

According to the strong principle on "freedom of contract", authors and other right holders may use their economic rights as they wish, e.g. by using CC- and open content licenses.

Moral rights of authors and performing artists may be waived by them only in regard of use limited in character and extent (Section 3(3) of the Copyright Act).

The freedom of contract has been limited only in regard of computer software and databases. These provisions in Sections 25j, 25k and 49 are for the benefit of the user of a software or a database, and they are based on the European Union Directive on the legal protection of computer programs 91/250/EEC and Directive on the legal protection of databases 96/9/EC.

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?

   Reply: No, there are no specific rules.

   In the European level, the same questions and possible problems have been raised into discussion. The European Union wide solutions are needed.

   The elementary question is whether the international enforcement of rights is efficient. If the potential infringer is operating from abroad and has no office in Finland it is almost impossible to sue him in Finland.

   According to Section 5 of the Penal Code, Finnish law applies to an offence committed outside of Finland that has been directed at a Finnish citizen, a Finnish corporation, foundation or other legal entity, or a foreigner permanently resident in Finland if, under Finnish law, the act may be punishable by imprisonment for more than six months.

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)?

   Reply: According to the information received from GRAMEX (Copyright Society of Performing Artists and Phonogram Producers in Finland) cross-border licenses are granted in the following cases:
   1) simulcasting (simultaneous distribution of a broadcast in the Internet)
   2) webcasting ("Internet-radio")
   3) Catch Up-/On Demand -services by broadcasting organisations

   The licensing is based on certain framework agreements of IFPI. In this context, the pricing and legislation of the destination country are applied.

   As to the licensing of background music services (e.g. from Finland to restaurants and shops in other countries, at the moment in 16 countries), it is based on agreements between collective organisations in different countries. The pricing and legislation of the destination country are applied.

   The domicile of the service provider does not play any role. E.g. the use of a Swedish internet radio in United Kingdom may be licensed by GRAMEX.

The licensing of cloud services is up to the record companies themselves.

According to the information received from the Finnish Composers' Copyright Society TEOSTO the use of international services, such as Spotify, Sony Music Unlimited, Rara.com and Microsoft Zune VOD are licensed by TEOSTO in Finland.

TEOSTO does not grant multi-territorial licences yet.

Please send your replies by email to Mr Tomoki Ishiara at ishiara@translan.com by **30 June 2012**