

ALAI-Congress  
2012 – KYOTO  
Questionnaire – Responses from Israel ALAI Group

Session 1

– Developments of New Platforms

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

**Remote Storage of digital files**

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

**Yes - If the works are stored, sent or transmitted from a remote storage facility.**

- 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?

**At this time, mostly users use foreign based services**

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

**Very important, especially in regard to online infringement**

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?

**Not as yet.**

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

**Not in regard to cloud providers, but this is case law regarding link aggregators – sites that provide links to infringing copies. It has been held that if these sites are dedicated to encouraging infringement, or contain a high volume of links to infringing content they will be considered secondary infringers.**

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

**No, since there is no statutory basis for this**

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

**The treaties have not yet been ratified by Israel**

#### 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?

**Authors and rightholders use foreign based platforms such as iTunes**

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

**Mainly musical works, as well as applications that may contain various works.**

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

**N/A**

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

**N/A**

- 4) 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?

**N/A**

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

**N/A**

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

**They are not protected under the copyright laws. Where circumvention involves unauthorized access to a computer or computer program, or interference therewith, the provisions of the Computers Act may apply.**

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

**The above platforms are available in Israel.**

- 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).

**The private copying provisions do not apply online under Israeli law.**

### 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?

**I do not believe that they would benefit from narrow interpretation.**

- 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?

**Secondary liability, specifically contributory infringement applies. If the copying is done by the service itself, not by, or at the direction of users, it may be liable as a primary infringer.**

- 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.

**Case law has developed a "notice and takedown doctrine" whereby the provider is exempt from liability unless or until it has actual knowledge of infringement or the infringing activity. If the service is dedicated to encouraging infringement, or contains a high volume of infringing content (or links) they will be considered secondary infringers.**

- 3) 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?

**Providers are not under a general duty to monitor. However, recent case law has indicated that in certain cases, such as where there is a high volume of infringing content (or links), this duty may arise.**

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

**Normally, a bare notice is enough.**

- 5) 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?

**Presumably, yes.**

- 6) 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?

**Link aggregators, offering links to infringing copies of motion pictures and television programs have been shut down.**

- 7) 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?

**A bill is pending that would provide statutory exemptions to ISP's in regard to infringements caused by users of their services, based on the notice and takedown doctrine.**

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

**We see more use of filtering technology on some sites.**

### 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?

**We see use of models such as CC and flickr. I do not believe that these should be considered "copyright avoiding".**

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

**All of the above**

- 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 are no available figures**

- 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.

**One Court considered a case where such a license was infringed where the user did not grant credit to the author. The court awarded damages, but took into consideration the fact that the work was made available on a non-commercial basis and thus awarded a moderate sum.**

## 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?

**If the infringing activity was directed at Israel, then Israeli courts would have personal jurisdiction. The question of what law would be applied is complex. Generally, it would be that of the forum where the infringement occurred. Determining where it occurred is a complex issue. There is some authority that in the case of a broadcast (including streaming), or a download, then if the work was received in Israel, or downloaded into Israel, Israeli law would be applied.**

- 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)?

**Yes, the main national collective rights management organization grants multi-territorial licenses.**

Submitted on behalf of ALAI Israel by Tony Greenman, Tony Greenman Law Offices.