ALAI-Congress

2012 – KYOTO

Questionnaire and Response

Prepared by the Japan group of ALAI

Session 1
－Developments of New Platforms

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

Cloud (=Cloud computing) is a marketing term that shows the form of use of the system. Cloud doesn't consider a physical position of the resource and the provided service that exists in the network.(Cloud's definition with NIST is updated and has been expanded.)

Cloud is the computing that roughly has the following features;

* When he or she wants to use it, the user only can be necessary, and use a necessary resource immediately. (Self-service of on-demand)
* A lot of people share the computing power, and it uses it efficiently.
(It is the user's demand, and dynamically computing resources of the multi tenant method that the resource allocation is possible.)
* The system operates on 365 days of 24 hours.
(The user and the donor always observe the use state of the system resource and can control.)
* The user becomes unnecessary the update of the application and the storage management etc. of data by concentrating the resource on the server side.

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

A large amount of contents are made, and sent now. Therefore, it is difficult for the user to own and to manage a large amount of contents. Moreover, the number of people who think contents to be not the owned thing but a thing used has increased. Therefore, contents are changing into the method that temporarily reproduces contents that Cloud has from the method downloaded to the peripheral device and uses it as for the use of contents.

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?

(1) Amazon and Sony are beginning the music service by the stream reproduction method to use Cloud. Apple is providing integrated service that combines software and the player with the delivery service for the contents user. The system vender consciously keeps the attribute and the kind of the works (musical works, literary works, photographic works, audiovisual works, etc.) and is offering product (ex. Hitachi Virtual File Platform) that can be used for the contents-Cloud environment.

(2) The contents-Cloud environment will be gradually achieved against the background of the person entitled and the entrepreneur who wants to achieve a user who exists in "Use from ownership" trend, distribution under the strong security environment, hardware and the business of contents separately. As for new platforms, platform of various types such as platform intended for platform that suits the kind of the works and all works is achieved.

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

It is important to achieve the works use in the contents-Cloud by the kind of works and the method corresponding to the characteristic of the copyright. For instance, works is preserved only in Cloud and the works use is assumed to be only a streaming method, the download of the book is a method of doing only under an advanced security environment. Thus, it is necessary to offer the book by the method of not causing the copyright 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? 1.2) cloud providers that may be relevant to determine liability for the making available of unauthorized content in the cloud environment?

(**See also* Tatsuhiro Ueno, Consumers, Facilitators and Intermediaries - Infringers or Innocent Bystanders? : The Position in Japan in: Christopher Heath / Anselm Kamperman Sanders (ed.) Consumers, Facilitators, and Intermediaries - IP Infringers or Innocent Bystanders? (in preparation); Tatsuhiro Ueno, Re-Broadcasting of TV Programmes - Public Transmission, in: M. Bälz, M. Dernauer, C. Heath, A. Petersen-Padberg (ed.) Business Law in Japan : Cases and comments, Writings in Honour of Herald Baum, (Kluwer, 2012), p.491)

(1) Online storage service – Tokyo District Court, 25 May 2007, 1979 Hanrei Jihō 100 [Myuta Case]

a) Facts

The plaintiff was preparing to provide an online storage service with which a user could listen to music recorded on his/her own CDs by way of his/her cellular telephone. The plaintiff provided the software, named "Music Uploader". By using the software, a user could transform music files to 3G2 files in his/her PC, upload an online storage server operated by the plaintiff, and download the files to his/her cellular telephones at any time.

The plaintiff filed a lawsuit against the defendant (JASRAC) for declaratory judgment of absence of copyright infringement in order to confirm the legality of the service

b) Findings

The Court dismissed the claim, holding that the online storage service by the plain-tiff was considered to fall under an infringement of the right of reproduction and the right of public transmission on the grounds that the plaintiff was regarded as the agent of the reproduction and public transmission, taking into account the facts that (1) the reproduction of music files onto the server was an essential process in the service, (2) the server, which plays an important role in the service, was owned and managed by the plaintiff, (3) the plaintiff provided the software essential for using the service, (4) the whole system of the service had been designed by the plaintiff, (5) it would be quite difficult for an individual user to listen to music recorded on his/her own CDs by way of his/her cellular telephone without the support of the service, and (6) the reproduction was mainly carried out in the server under the plaintiff's management.

(2) Space-shifting service for TV Programs - Supreme Court, 18 January 2011, 65-1 Minshū 121, Case No.653 (ju) of 2009 – NHK (Japan Broad-casting Corporation), et al. v. Nagano Shōten Co. Ltd. [Maneki TV Case]

a) Facts

The appellee (the defendant in the first instance) is the provider of a space-shifting service for TV programs called "Maneki TV", which functions by using a product called "LocationFree".

LocationFree, which was sold by SONY, mainly consists of a device called the "Base Station" that incorporates a TV tuner, and digitises broadcast TV programs upon a user's request, automatically transmitting the TV programs via the Internet. A user of LocationFree can enjoy TV programs broadcast in the area where the Base Station is installed, by accessing the Base Station via a PC connected to the Internet, independent of the location of the user.

Therefore, if a user sets up the Base Station at home in Japan beforehand, he/she can enjoy TV programs broadcast in Japan. Accordingly, the LocationFree enables Japanese nationals living abroad to enjoy TV programs broadcast in Japan via the Internet.

The appellee provides a service of hosting the Base Station owned by users. A user sends his/her Base Station to the appellee and the appellee installs the Base Station at its office, and connects the Base Station to a TV antenna and the Internet. The service costs 31,500 yen for admission and 5,040 yen per month.

The appellants, broadcasting organisations, asserted that the service provided by the appellee had infringed the right of making transmittable (sec. 99-2 JCA) and the right of public transmission (sec. 23(1) JCA) and sought an injunction against and damages from the appellee.

The Tokyo District Court, on 20 June 2008, and the IP High Court, on 15 December 2008, dismissed the appellants' claim, holding that the appellee had not infringed the right of making transmittable on the grounds that the Base Station had the function of transmitting information only to a sole corresponding device that had already been set up, and could not be regarded as an "automatic public transmission server" (sec. 2(1)(ix-5)(a) JCA).[1]

The appellants appealed to the Supreme Court. The Supreme Court quashed the decision of the IP High Court and remanded the case to the IP High Court, holding as follows. Based on the decisions of the Supreme Court, the IP High Court upheld the appellants' claim for injunction and damages on 31 January 2012 (IP High Court, 31 January 2012, Case No.10009 (ne) of 2011).

[1] A translation of the decision of the IP High Court is available at http://www.ip.courts.go.jp/hanrei/pdf/20100317215516.pdf.

b) Findings

The purpose of introducing the right of making transmittable into the Japanese Copyright Act is to cover an act in the preliminary stage prior to an actual automatic public transmission. From this point of view, it must be considered that any device which has the function of automatically transmitting information fed in upon a user's request when the device is connected to the internet, is regarded as an automatic public transmission server (Art. 2(1)(ix-5)(a) JCA) in cases in which the transmission using the device is considered to be an automatic public transmission, even though the device has the function of transmitting information only to a sole corresponding device that has already been set up.

And it is reasonable to consider that the agent of an automatic public trans-mission is the person who creates a situation in which information can be automatically trans-mitted from the device upon a receiver's request. In cases in which a device is connect-ed to the internet and information is continuously fed in, it is reasonable to consider that the agent of a transmission is regarded as the person feeding information into the device.

In this case, the Base Station, which is connected to the Internet, has the function of automatically digitising and transmitting information fed in upon a receiver's request. The service at issue connects the Base Station to the Internet, and information is continuously fed into the Base Station. The appellee connects the Base Station with a TV antenna managed by the appellee, sets it up so that the TV programs captured by the TV antenna are continuously fed into the Base Station, and installs and manages the Base Station at its office. Therefore, it is reasonable to consider that the appellee is the person feeding the broadcast TV programs into the Base Station and the agent conducting the transmission through use of the Base Station, even though the user owns the Base Station.

This transmission using the Base Station must be regarded as an automatic public transmission, and the Base Station is regarded as an automatic public transmission server, since any person can become a user of the service by entering into a service contract with the appellee, regardless of any relationship with the appellee, and the user of the service is regarded as an unspecified person from the appellee's perspective and is therefore regarded as the public (sec. 2(5) JCA).

Accordingly, the decision under appeal must be reversed and this case shall be remanded to the original court for further examinations.

c) Comment

Under the Japanese Copyright Act,[2] an author shall enjoy the right of public transmission (Sec.23(1) JCA). The author's right of public transmission is the right to effect a public transmission of a work (Sec.23(1) JCA) and a public transmission is defined as the concept which covers wired and wireless broadcasting as well as interactive public transmission (Sec.2(1)(vii-2) JCA). The right of public transmission includes the right of making transmittable of the work in case of an interactive public transmission (the part in parentheses in Sec.23(1) JCA).[3] On the other hand, a broadcasting organization shall enjoy the right of making transmittable (Sec.99-2 JCA).

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[2] Translations of the Japanese Copyright Act are available at <http://www.japaneselawtranslation.go.jp/> and <http://www.cric.or.jp/cric_e/clj/clj.html>. For a commentary of the JCA in English of the JCA, see Tatsuhiro Ueno, Chapter 22 (Japan) in: Silke von Lewinski (ed.) Copyright throughout the World, (Thomson / West, loose-leaf from 2008).

[3] *See* Peter Ganea, in: Ganea/Heath/Saitô (eds.), Japanese Copyright Law: Writings in Honour of Gerhard Schricker, (Kluwer, 2005) p.57.

The act of making transmittable of a work or a broadcast corresponds to the act of "making available to the public" provided in the international treaties (WCT Art. 8; WPPT Arts. 10 and 14). For this reason, the unauthorized uploading of another's work or broadcast will constitute an infringement of the right of public transmission of the author or the right of making transmittable of the broadcasting organization, irrespective of whether or not the transmission has actually been carried out.

In this case, a user of this service can enjoy only the live TV programs on a real-time basis, because the defendant uses the device with the function of only capturing and transmitting TV programs via the Internet upon a user's request. Under the Japanese Copyright Law, such transmission shall be considered as an automatic public transmission. An automatic public transmission is defined as a public transmission that occurs automatically in response to a request from the public (Sec.2(1)(ix-4) JCA). In other words, a public transmission where information is transmitted only at the request of a user and this is carried out automatically is an automatic public transmission. Therefore, an internet broadcasting (simulcasting) where TV or radio programs are transmitted on a real-time basis over the Internet and a webcasting in the Internet are regarded as an automatic public transmission under the Japanese Copyright Act.[4] [5]

Accordingly, the right of making transmittable of a broadcasting organization (Sec.99-2 JCA) shall cover the transmission of the broadcast on a real-time basis in this case, although a broadcasting organization shall have the rights of re-broadcasting and wire re-broadcasting under the Japanese Copyright Act (Sec.99 JCA).

The problems in this case are whether the transmission in this service is considered to be "public" and the defendant is considered to be the actor of the public transmission.

The Tokyo District Court and the IP High Court dismissed the plaintiffs' claim, holding that the defendant does not infringe the right of public transmission and the right of making transmittable on the grounds that the Base Station of the device (LocationFree) has the function of transmitting information only to a sole corresponding device that has already been set up and cannot be regarded as an "automatic public transmission server" (Sec.2(1)(ix-5)(a) JCA).

On the other hand, the Supreme Court held that the transmission using the device (LocationFree) is considered to be an automatic public transmission, even though the device has the function of transmitting information only to a sole corresponding device that has already been set up on the grounds that any person can become a user of the service by entering into a service contract with the defendant, and that the user of the service is regarded as an unspecified person from the defendant's perspective and is therefore regarded

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[4] Ueno, *supra* note 2 at 22-26 et seq. *See also* Moriyuki Kato, Chosakuken hô chikujô kôgi [Commentary on the Copyright Act], 5th revised ed. (CRIC, 2006) p. 42 (in Japanese).

[5] The point is that a transmission itself to a user is individually initiated by the user's request. Therefore, even if the object of the transmission is a live TV Program or live broadcast, namely in case of simulcasting or webcasting, the fact that the user's request individually initiates the transmission to the user suffices to qualify such transmission as an automatic public transmission under the Japanese Copyright Act. On the other hand, under the German Copyright Act, the prevailing opinion instead tends to subsume a simulcasting and a webcasting over the Internet under the notion of broadcasting (Sec.20 of the German Copyright Act) rather than making available to the public (Sec.19a of the German Copyright Act). *See e.g.* Schricker/Loewenheim-v. Ungern-Sternberg, Urheberrecht Kommentar, 4. Aufl. (Beck, 2010) Vor §§20ff. Rn.7 und §20 Rn.45ff; Haimo Schack, Urheber- und Urhebervertragsrecht, 5. Aufl. (Mohr Siebeck, 2010) Rn.464. *See also* OLG Hamburg, Urteil vom 08.02.2006, NJW-RR 2006,1054,1055 – Cybersky.

as the public. Under the Japanese Copyright Act, the public is considered to be unspecified or a large number of persons, while a small number of specific persons do not constitute the public (Sec.2(5) JCA).[6] Therefore, even one person shall constitute the public, if he/she is unspecified.

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

No.

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

The role of the WIPO Treaties will no doubt remain important in the "Cloud" environment.

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?

As for service under a present Cloud environment, there are a lot of services in which the copyright holder offers the management works, and the SaaS type is most in the service type. Various books are kept, and moreover, service type (IaaS) that various services can be achieved is difficult flexible management and operation, and stages where the trial service was

There is a large amount of demand, and audiovisual works and musical works for which the bulk file is necessary are usually served by special Cloud of the SaaS type. Moreover, musical works tend to be offered by the streaming method in the Cloud environment.

[6] Ueno, *supra* note 2 at 22-24 et seq. *See also* Kato, *supra* note 4 at 70 (in Japanese).

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

The provider is entrepreneur who offers ICT resource (I a a S), middle software (PaaS), and the application software (SaaS), and it is usually irrelevant to contents and the copyright. Moreover, the copyright holder might own the ICT resource for Cloud, and the provider entrust operation and management.

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

The user can use the audiovisual works by accessing Cloud where the works was stored. The method of use is a streaming method or a download method, and the use method is different depending on the provider.

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?

Making the contents circulation Cloud is a change in a physical form of the circulation system. and this change is not a change that influences the copyright. The contents demand might expand due to the spending cut by the Cloud environment and the decrease in the use charge, and the income of the copyright holder increase.

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

In the Cloud environment, a large amount of, mobile terminal (for instance, smart phone that has the function performance more than the personal computer) is connected with the system, and it has a bad influence for security. Therefore, advanced DRM and TPM of the monitor, the sign detection, and the damage minimization, etc. of security are adopted by the. contents-Cloud. Moreover, the security technology using the characteristic of the works is adopted.

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

The prevention of an unlawful reproduction is a basic function. For instance, audiovisual works of the TV program etc. (animation data) became the ages of the multi device used with large screen TV, a tablet terminal, a smart phone, and smart TV. The application program that transmits the television program under broadcasting from the HDD recorder to the portable terminal circulates, too. Social TV on which SNS becomes a broadcasting station (delivery base) has extended, too. The mechanism that contents are shared is necessary in two or more terminals (large screen TV, tablet terminal, smart phone, and smart TV, etc.) that the individual has in the multi device used age. However, TPM that defends copyrighting while sharing the synchronizing contents with two or more equipment that the individual has is in the development phase.

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

In a peculiar problem to the Cloud environment, the problem to assume the virtualization on the resource and the network to be a cause is most. However, these problems do not come to light, and have stayed from no distribution and no use of a lot of works in the Cloud environment in the future problem.

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).*

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.

Yes, there are such services as described above, in which users could store their private copies in the cloud. At this point, personalized internet- video recorder services are available in Japan but its legality I is still under dispute in the court. For the details, see 5.2.

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 operators do not benefit from its user's private copying exception. On the contrary, the operators may run a risk of bearing direct copyright infringement liability as a result of their providing such private copy's storage services.
That is why the legality of the services would depend on case-by-case analysis. For the details, see 5.2.

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?

N/A

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?

There is no statutory law or Supreme Court judgement whether or not a cloud service provider would be liable in the case that a user of the service uploads the contents that infringes the copyright or on the grounds of liability.

The Copyright Act of Japan does not have an explicit provision of secondary infringement liability (equivalent of the contributory infringement and vicarious liability in the US). However, given the court cases so far, there is a possibility that cloud service providers could be liable for copyright infringing content uploaded by users by the following reasons:

(i) If considered as a joint tort (including solicitation and assist), in light of the general principles of civil law, the cloud service provider is liable to damages. However, as a prevailing understanding of the copyright law of Japan, joint tort-feasor who is not a direct infringer cannot be demanded an injunction for the only reason being a joint tort-feasor. Thus, there is a possibility cloud service providers could be liable to damages as a joint tort-feasor for infringement of reproduction or public transmission rights by user.

(ii) In case there is a circumstance that an act of direct user of the copyrighted work (hereinafter, A) can be equated to an act of a non-direct user (hereinafter, B), the act of A will be deemed as an act of B. If the act of B is deemed an infringement, then B will be referred to as "Normative Infringing Party", and B will be not only responsible for damages but it can be demanded an injunction. Also, in determining whether B is Normative Infringement Party or not, if the act of A is illegal or lawful is not conclusive.

(iii) As an example of the acts of A and B can be equated in the (ii) above, there is a concept called the Karaoke Doctrine. In Karaoke Doctrine, in case B manages or controls an act of A and the operating profit resulting from the act of A belongs to B, then the act of A and B will be equated. (The Karaoke Doctrine is similar to vicarious liability of the United States, however, there is one important difference. In the Karaoke Doctrine, the act of A needs not to be an infringement of the copyright.)

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.

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

(i) In our country, corresponding to the e-commerce Directive in EU or DMCA safe harbour law in the US is the Act on the Limitation of Liability for Damages of Specified Telecommunications Service Providers and the Right to Demand Disclosure of Identification Information of the Senders (the Act). According to the Act, if there is an

infringement caused by a distribution of information on network equipment operated by a provider, the provider will not be liable to damages except for the case in which 1) a preventive measure is technically possible to avoid transmission of such information and 2) (a) the provider is aware of the infringement, or (b) is aware of the information distribution and there is reasonable ground to have knowledge of the infringement. However, if the provider is the sender of such information, the above-mentioned limitation of liability will not be applied.

(ii) There have been no Supreme Court judgements discussing the association between Cloud service providers and the Act.

(iv) It is not clear whether Cloud service providers are considered as a "provider" in the Act. Because the Act originally targeted cases where the public accesses uploaded information, it was assuming a "provider" to be a website hoster and an electronic bulletin board administrator. As for the cloud services, access to a specific information, many cases, is done by a specific individual and there are few discussions as to whether a cloud service provider can be considered as a "provider" in the Act at courts or in academia.

(v) Suppose a cloud service provider is considered as a "provider" in the Act, , for the reasons described below, there is a possibility that limitation of liability provided by the law may not be applied:

In "TV Break case" which disputes whether an operator of a video sharing site that assumed posting of TV programs by users without consent from right holder was liable to damages or not. The High Court judged that the subject of content replication on the site and public transmission to be the site operator. (Reasons were the operator managed and controlled the site, the operating profit belongs to the operator, it did not take any effective measure to prevent infringement even though there was a high probability of infringement, it let go with the situation while it was aware of the infringing videos.) In this judgement, the site operator is the person himself who infringes, that is considered as the "sender" in the Act, and therefore, limitation of liability was not applied.

Suppose a provider of cloud services is determined as the subject of replication and public transmission (see answer to question 5.2.2), applying the ruling of the TV Break case makes the service provider to be the "sender" in the Act, and the limitation of liability may not be provided.

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?

(i) Providers to which the Act applies have no obligation to proactively monitor information uploaded by users.
In addition, the Act does not oblige provider to delete or suspend transmission of copyright infringing content, even though the provider becomes aware of such content being distributed over the network facilities operated by the provider. However, providers normally delete or suspend transmission of infringing content immediately because otherwise it might not be applied to the limitation of liability, unless there is a special case when a measure to suspend transmission is technically impossible.

(ii) Whether or not cloud service provide can be considered as a “provider” in the Act is not known, however, suppose it is applicable, (i) above should be the answer to the question.

However, according to the logic of TV Break case judgment, if a provider does not take effective measures to prevent infringement, or leaves the infringing information as is, there is a possibility that the provider of the cloud services can be determined as the subject of reproduction and public transmission. In such case, there is a possibility that the provider can be regarded as the sender as in the Act and therefore, it will not be applied to the limitation of liability to damages. Therefore, cloud service providers are required to take measures to prevent infringements. However, effective measures are not defined precisely, and consequently, there could be cases where more proactive monitoring duties are demanded.

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

Unlike DMCA, the Act does not specify the item details to be notified to service provider by right holders.

Although there is no provision of law, there are private guidelines specified by provider organization and right holder organization. The guidelines specify the format to be used by right holder for notification. It specifies the following information to be notified: 1) right holder name and address, 2) URL and other information to identify infringing content, 3) description of right holders work (the infringed work), 4) explanation of the rights infringed, 5) explanation that the right holder reserves the right and has not licensed, 6) the status of infringement.

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?

I do not know about the case between cloud service providers and rightholders. According to news report, JASRAC, a dominant rights management association for music in Japan, entered into a license agreement that gives a license to exploit the music to a video sharing service provider of when a user uploads the video and such video contains certain the music.

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?

For music locker service that is often noted as a kind of cloud services, there was a district court's judgment for MYUTA case in 2007. In this case, liability by the operator of the music locker service that allows users to download on their mobile phones and listen to the music ripped and uploaded from CD by users was disputed. The court ruled the service operator to be the subject of sending to the users, and concluded copyright infringement exists unless the operator acquire license from right holders. The main reasons for the operator to be the subject of reproduction and transmission were that the operator manages

and controls the entire system, including the servers, and back then in 2007, for users without the service in question, it was reasonably difficult to make the music content of CD available on mobile phones to listen to. The service was discontinued thereafter.

In addition, although it was not a cloud service, in both Rokuraku II case (storage service for video recording/transmitting devices for TV programs) and Maneki TV case (storage service for TV program transmitting devices), Supreme Court ruled that the service providers are the subject of reproduction and transmitting on those devices and concluded there was a copyright infringement unless they are licensed by TV stations.

On the other hand, there are many simple online storage services that are not specific to music content and do not convert file. They operate for many members. However, there have been no known lawsuits to date for copyright infringement.

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?

No particular discussion at this moment.

9)	Do you see any progress regarding filtering technology?

N/A

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?

Yes. CC licenses or other open content licenses are available in general. One example is "Free Use Mark" that has been promoted by the Japanese Copyright Office. This mark is intended to show three different uses: "Free Copy Uses" (No Adaptation); "Non Commercial Uses for the Disabled"; and "Non Commercial and Educational Uses." See the Marks at http://www.bunka.go.jp/chosakuken/riyoumark.html .

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

There is no information on that point available.

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 information on that point 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.

No legal obstacle exists against the use of such voluntary license scheme since "freedom of contract" is legally warranted.

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?

i) 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?

a) International jurisdiction

In terms of registration of copyright, it falls within the exclusive jurisdiction of Japanese courts if the registration is made in Japan (Article 3-4 of the Act of Civil Procedure). Translation of the Japanese law is available at http://www.japaneselawtranslation.go.jp/?re=01

Concerning the international jurisdiction of copyight infringement, see "The Ultraman Case" as follows.

http://www.tomeika.jur.kyushu-u.ac.jp/result.php?s=3bf7c5d88efe03f9924dec52bc2eeb0b&c=ae65f0257fa2d04ce6a86f1c5474f23d

b) applicable law

Regarding injunctive relief of copyright infringement, an applicable law rule is "lexi loci protectionis" (law of the country for which protection is sought). In terms of damages, it is regarded as tort liability, therefore, Article 17 of the Act on General Rules for Application of Laws will apply. Article 17 of the Act on General Rules for Application of Laws is as follows.

Article 17 the Act on General Rules for Application of Laws (Tort):
The formation and effect of a claim arising from a tort shall be governed by the law of the place where the result of the wrongful act occurred; provided, however, that if the occurrence of the result at said place was ordinarily unforeseeable, the law of the place where the wrongful act was committed shall govern.

Since damages for copyright infringement is regarded as tort liability, Articles 18 to 23 would be applicable.

Concerning license agreement, Articles 7 to 12 of the the Act on General Rules for Application of Laws will be applicable.

(Choice of Governing Law by the Parties)
Article 7 The formation and effect of a juridical act shall be governed by the law of the place chosen by the parties at the time of the act.

(In the Absence of Choice of Governing Law by the Parties)
Article 8 (1) In the absence of a choice of law under the preceding Article, the formation and effect of a juridical act shall be governed by the law of the place with which the act is most closely connected at the time of the act.
(2) In the case referred to in the preceding paragraph, if only one of the parties is to provide a characteristic performance involved in a juridical act, the law of the habitual residence of the party providing said performance (in cases where said party has a place of business connected with the juridical act, the law of the place of business; in cases where said party has two or more such places of business which are connected with the juridical act and which are governed by different laws, the law of the principal place of business) shall be presumed to be the law of the place with which the act is most closely connected.
(3) In the case referred to in paragraph (1), if the subject matter of the juridical act is real property, notwithstanding the preceding paragraph, the law of the place where the real property is situated (lex rei sitae) shall be presumed to be the law of the place with which the act is most closely connected.

(Change of Governing Law by the Parties)
Article 9 The parties may change the law otherwise applicable to the formation and effect of a juridical act; provided, however, that if such change prejudices the rights of a third party, it may not be asserted against the third party.

(Formalities for Juridical Act)
Article 10 (1) The formalities for a juridical act shall be governed by a law applicable to the formation of the act (the initially applicable law prior to the change shall govern if the law was changed under the preceding Article after the juridical act).
(2) Notwithstanding the preceding paragraph, the formalities that comply with the law of the place where said act was done shall be valid.
(3) For the purpose of the application of the preceding paragraph, with regard to a manifestation of intention to a person in a place governed by a different law, the place from where the notice of such manifestation was dispatched shall be deemed to be the place where said act was done.

(4) The preceding two paragraphs shall not apply to the formalities for a contract concluded between persons in places governed by different laws. In this case, notwithstanding paragraph (1), the formalities for a contract that comply with either the law of the place from where the notice of offer was dispatched or the law of the place from where the notice of acceptance was dispatched shall be valid.
(5) The preceding three paragraphs shall not apply to the formalities for a juridical act to establish or dispose of a real right (a right in rem) with regard to movable or immovable, or any other right requiring registration.

(Special Provisions for Consumer Contracts)
Article 11 (1) Even when the law applicable to the formation and effect of a contract (excluding a labor contract: hereinafter referred to as a "Consumer Contract" in this Article) between a consumer (meaning an individual, excluding an individual who becomes a party to a contract as a business or for a business; hereinafter the same shall apply in this Article) and a business operator (meaning a juridical person and any other association or foundation and an individual who becomes a party to a contract as a business or for a business; hereinafter the same shall apply in this Article) as a result of a choice or a change of law under Article 7 or Article 9 is a law other than the law of the consumer's habitual residence, if the consumer has manifested his/her intention to the business operator that a specific mandatory provision from within the law of the consumer's habitual residence should be applied, such mandatory provision shall also apply to the matters stipulated by the mandatory provision with regard to the formation and effect of the Consumer Contract.
(2) Notwithstanding Article 8, in the absence of a choice of law under Article 7 with regard to the formation and effect of a Consumer Contract, the formation and effect of the Consumer Contract shall be governed by the law of the consumer's habitual residence.
(3) Even where a law other than the law of a consumer's habitual residence is chosen under Article 7 with regard to the formation of a Consumer Contract, if the consumer has manifested his/her intention to the business operator that a specific mandatory provision from within the law of the consumer's habitual residence should be applied to the formalities for the Consumer Contract, such mandatory provision shall exclusively apply to the matters stipulated by the mandatory provision with regard to the formalities for the Consumer Contract, notwithstanding paragraphs (1), (2) and (4) of the preceding Article.
(4) Where the law of a consumer's habitual residence is chosen under Article 7 with regard to the formation of a Consumer Contract, if the consumer has manifested his/her intention to the business operator that the formalities for the Consumer Contract should be governed exclusively by the law of the consumer's habitual residence, the formalities for the Consumer Contract shall be governed exclusively by the law of the consumer's habitual residence, notwithstanding paragraphs (2) and (4) of the preceding Article.
(5) In the absence of a choice of law under Article 7 with regard to the formation of a Consumer Contract, notwithstanding paragraphs (1), (2) and (4) of the preceding Article, the formalities for the Consumer Contract shall be governed by the law of the consumer's habitual residence.
(6) The preceding paragraphs of this Article shall not apply in any of the following cases:
(i) where a business operator's place of business that is connected with a Consumer Contract is located in a place governed by a different law from the law of a consumer's habitual residence, and the consumer proceeds to a place governed by the same law as the law of the place of business and concludes the Consumer Contract there; provided, however, that this shall not apply where the consumer has been, in the place of his/her habitual residence,

solicited by the business operator to conclude the Consumer Contract in a place governed by the same law as the law of the place of business;
(ii) where a business operator's place of business that is connected with a Consumer Contract is located in a place governed by a different law from the law of a consumer's habitual residence, and the consumer has received or has been supposed to receive the entire performance of the obligation under the Consumer Contract in a place governed by the same law as the law of the place of business; provided, however, that this shall not apply where the consumer is, in the place of his/her habitual residence, solicited by the business operator to receive the entire performance of the obligation in a place governed by the same law as the law of the place of business;
(iii) where at the time of conclusion of a Consumer Contract a business operator did not know a consumer's habitual residence, and had reasonable grounds for not knowing that; or
(iv) where at the time of conclusion of a Consumer Contract a business operator misidentified the counterparty as not being a consumer, and had reasonable grounds for making such misidentification.

(Special Provisions for Labor Contracts)
Article 12 (1) Even where the applicable law to the formation and effect of a labor contract as a result of a choice or change under Article 7 or Article 9 is a law other than the law of the place with which the labor contract is most closely connected, if a worker has manifested his/her intention to an employer that a specific mandatory provision from within the law of the place with which the labor contract is most closely connected should be applied, such mandatory provision shall also apply to the matters stipulated in the mandatory provision with regard to the formation and effect of the labor contract.
(2) For the purpose of the application of the preceding paragraph, the law of the place where the work should be provided under the labor contract (in cases where such place cannot be identified, the law of the place of business at which the worker was employed; the same shall apply in paragraph (3)) shall be presumed to be the law of the place with which the labor contract is most closely connected.
(3) In the absence of a choice of law under Article 7 with regard to the formation and effect of a labor contract, notwithstanding Article 8, paragraph (2), the law of the place where the work should be provided under the labor contract shall be presumed to be the law of the place with which the labor contract is most closely connected with regard to the formation and effect of the labor contract.

ii) 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?

Regarding personal jurisdiction, rule of "The Ultraman Case" will apply as above-mentioned.

As long as we apply "market impact rules" in copyright infringement, "law of the country for which protection is sought" would be Japanese law if the infringement act targets Japanese market (See File Rogue Case). However, we do not have any case regarding the

applicable law of the third party liability. Therefore, we cannot provide definitive answer to this question.

Details of the applicable law in Japanese copyright law is articulated in Ryu Kojima, Ryo Shimanami and Mari Nagata, Applicable Law to Exploitation of Intellectual Property Rights in the Transparency Proposal, in Jürgen Basedow, Toshiyuki Kono and Axel Metzger (eds.), INTELLECTUAL PROPERTY IN THE GLOBAL ARENA: JURISDICTION, APPLICABLE LAW, AND THE RECOGNITION OF JUDGMENTS IN EUROPE, JAPAN AND THE US (Mohr Siebeck 2010), pp.179-228.

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)?

In terms of music industry, the biggest collecting society, JASRAC, concludes reciprocal representation agreements with 117 copyright societies covering 88 countries and 4 territories (H.K., Taiwan, French New Caledonia, Macau) around the world. See http://www.jasrac.or.jp/ejhp/international/index.html