ALAI-Congress

2012 – KYOTO

Questionnaire

Session 1
—Developments of New Platforms

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

In Poland, I suppose, the Gartner experts' definition is treated as most popular. Gartner defines cloud computing as a style of computing in which scalable and elastic IT-enabled capabilities are delivered as a service to external customers using Internet technologies.

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

By way of introductory explanation to the answers contained in this Questionnaire I would like to point out that there are still no binding legal rules in Poland directly concerning cloud computing but cloud services are already noticed by the representatives of public institutions and debated. Therefore, even though the cloud computing is now becoming more and more popular in Poland, exploitation of works, performances, sound recordings and so on in the Cloud is not clearly regulated yet.

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?

As it was mentioned above – the Cloud Computing is becoming more and more popular in Poland. There are already few platforms established specifically designated for the Cloud and I foresee that a lot of new such platforms will be established in the near future. It will be both kinds of platforms – designed for B2C (*business-to-consumer)* and B2B (*business-to-business*) relations.

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

Currently there are non separate intellectual property law regulations in Poland directly addressing copyright in the context of cloud computing. Therefore the general principles of intellectual property law shall apply. However, in view of the expansion of this technology, in the next few years we will certainly see a lot of development in this area that may be particularly important for cloud computing as for example: (i) data ownership in the Cloud; (ii) Internet Service Provider liability for data/content generated by users; (iii) licensing; (iv) intellectual property protection of the materials made available in the Cloud. It will require serious reform of the copyright law as due to current territorial limitation of copyrights the Cloud poses serious issues from the perspective of the scope of licenses, applicable law and jurisdiction.

Sessions 2 and 3

— Can the Internet Treaties of 1996 play an important role in legal issues raised by "Cloud" Business?

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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?

No, currently there is no case law or examples of good practices in Poland concerning the right of making available to the public with reference to "Cloud" storage, retrieval and dissemination. The presence of the Cloud services in Poland is still very fresh and in consequence the courts were not exposed yet to deal with it.

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

No, currently there is no case law or examples of good practices in Poland concerning cloud provider that may be relevant to determine liability for the making available of unauthorized content in the cloud environment.

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

No, currently there is no specific case law In Poland concerning technological protection measures and Electronic rights management information in the "Cloud" environment.

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

Certainly the WIPO Internet Treaties of 1996 could form a starting point for regulating copyrights and related rights also in the context of the Cloud as the Cloud to some extent is based on Internet access and therefore bears some resemblance to Internet distribution of copyrighted materials.

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).*

<u>Note</u>: 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?

Situation in Poland in this area is generally similar to this in other member states of the European Union and the basic offer of Cloud service providers covers such models as IaaS, PaaS, SaaS.

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

All kinds of works are offered in Poland in the Cloud, but currently majority of them are musical works (iTunes store, iCloud) but there are also services with photographic works, performances etc.

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

Usually the rightholders transfer to the providers of cloud service non-exclusive or exclusive license for the making available to the public of their works or phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.

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

In many cases the users of such services can refer to the uses covered by fair use, which exists in Polish copyright law and is regulated in Articles 23 to 35 of Polish Copyright Law. In Poland there is distinction between private and public fair use. Under private fair use a user can use the copyrighted materials (e.g. record them, copy them etc.) for his own purposes or for people who are in close relationship with him (family, close friends) under condition that it is not of commercial character and is limited to single copies only. Public fair use is strictly regulated and in case of not fulfilling the provisions of Polish copyright law the users may be held liable for infringement of copyrights.

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?

Currently in Poland there are no approved royalty rates specifically applicable to the works being offered in the Cloud.

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

I don't have enough technical knowledge considering topic mentioned in the question to precisely answer it.

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

Both TPM and DRM are protected against unauthorized circumvention in Poland and their circumvention is subject both to civil and criminal liability.

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

I don't have enough technical knowledge considering topic mentioned in the question to precisely answer it.

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.

In Poland all kind of popular private storage cloud services indicated above are available for users (e.g. Google Picassa, G-mail, Facebook, Flickr etc.). One of the most popular cloud services, which is only Polish one is the www.chomikuj.pl (mainly IaaS).

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).

Under Polish law the operators of such services cannot benefit from its user's private copying exception and the normal rules of liability for hosting of user generated content under Polish E-commerce Act shall apply. There are no specific exceptions for such operators under Polish copyright 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?

It is impossible to give an answer, due to different views presented by the representatives of doctrine and the lack of jurisprudence.

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?

According to Polish Act on Rendering Electronic Services the Internet Provider will be liable for the material put into the cloud by users only when (i) ISP having knowledge about infringing character of the materials or (ii) having received reliable information about infringing character of the materials had not blocked or deleted it immediately. There are some academics that are arguing in favour of application of civil law liability applicable to aiding to the provided of the cloud but this is not a widely accepted position yet.

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.

As it was described in the question above, according to Polish Act on Rendering Electronic Services (which implemented the EU e-Commerce Directive) the Internet Provider will be liable for the material put into the cloud by users only when (i) ISP having knowledge about infringing character of the materials or (ii) having received reliable information about infringing character of the materials had not blocked or deleted it immediately. So the exemption from liability in Poland is the same as in the EU e-Commerce Directive and fulfilling the prescribed conditions results in total exemption of the operator from liability.

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?

In Poland ISPs or cloud service providers are not obliged to monitor or filter the content published by the users. In accordance with the Polish case-law when introducing such monitoring the ISP or cloud service provider takes a risk that if he fails to identify the infringing content and will not remove it, he may bear liability for such infringement. It is important to note however that currently in the Polish Act on Rendering Electronic Services there is no official notice-and-takedown procedure. As it was mentioned above in case of receiving reliable information about infringing character of the materials ISP should block or delete it immediately. Recently the Polish Government officially published the draft amendment to the Act on Rendering Electronic Services which provides for the three steps notice-and-takedown procedure but these amendments are not adopted yet and it is not known when and if they will become a binding law.

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

The definition of reliable information about infringing character of the materials is still being discussed in Poland. Nevertheless in case of receiving such reliable information the ISP should undertake reasonable steps to verify whether it is in fact grounded and justified. In general the rightholder has to substantiate his claims by proving that in fact he is the rightholder and by proving circumstances which make him believe his rights were infringed. There are however no provisions that would indicate any specific evidence that has to be presented by the rightholder to have infringing content removed.

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?

No, we are not aware of any such contracts between cloud service providers and rightholders in Poland.

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?

We are not aware of any of such case in Poland.

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?

As it was mentioned above recently the Polish Government officially published the draft amendment to the Act on Rendering Electronic Services which provides for the three steps notice-and-takedown procedure. These amendments also provide for an exception of liability for search engine services providers. These amendments are not adopted yet and it is not known when and if they will become a binding law.

9) Do you see any progress regarding filtering technology?

No, we do not see any particular progress regarding filtering technology in Poland.

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?

In Poland Open Source licences or CC licenses are used but are still rather a niche either used by debuting authors who are more interested in attracting interest of the users than generating income or by more underground artists who make it part of their ideology to share their works for free.

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

In Poland CC is most often used by music and graphic artists, to some extent also with regard to literature. There are even some net labels or net publishers who operate purely on the basis of CC model. There are also some software developers that make their products available on the basis of Open GNU licenses.

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

We are not aware of the figures. Usually the income is generated through ads displayed on web pages where such works are made 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.

Yes, there are some legal obstacles with regard to use of open content and CC licenses, in particular with regard to their validity (under Polish law assignment of rights or exclusive licenses has to be in the written form under the pain of nullity) as well as to their enforceability if they deviate seriously from the statutory regulations. In general however if the conditions of a given open content or CC license are clear, there should be no problem with enforcement.

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?

In Poland there are some specific private international law rules which apply for intellectual property law. According to article 35 of Polish Civil Code Procedure the court having jurisdiction over the delict claim is the court in which circuit the event causing the damage occurred. Moreover in accordance with article 46 paragraph 3 of Act of 4 February 2011 Private International Law the protection of intellectual property shall be governed by the law of the country under which the protection is claimed. These Polish regulations are also compliant with European Union regulations, especially Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II). The article 8 “Infringement of intellectual property rights” stated that the law applicable to a non-contractual obligation arising from an

infringement of an intellectual property right shall be the law of the country for which protection is claimed. This kind of proceeding with the infringements of intellectual property rights is consequently confirmed in the Court of Justice of the European Union jurisprudence.

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)?

No, national collective rights management organizations are not granting multi-territorial licenses and currently they do not have any cloud-specific license models when it comes to collective licensing. This may however change in the future as these organizations are becoming more and more aware of the challenges to the traditional collective licensing model that are posed by cloud services.

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