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Questionnaire

Círculo dAutor – Portugal

Replies provided by Carlos Reis Marques (1 & 4), Alexandre Dias Pereira (2 & 3), Filipa Iglésias (4 & 6), Nuno Conde and Victor Castro Rosa [1 & 5 (5.1, 5.2, 5.3)]

Session 1
－Developments of New Platforms

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

There is no official definition. Anyway, we suppose one can adopt the concept proposed in the report ***'The future of cloud computing. Opportunities for european cloud computing beyond 2010'****, available at* *http://cordis.europa.eu/fp7/ict/ssai/docs/cloud-report-final.pdf**, page 8:*

a 'cloud' is an elastic execution environment of resources involving multiple stakeholders and providing a metered service at multiple granularities for a specified level of quality (of service).

Related with this general concept, it is also useful to take notice on ENISA (European Network and Information Security Agency) definition of 'cloud computing' presented in the report '**Cloud Computing Risk Assessment'**
[available at http://www.enisa.europa.eu/act/rm/files/deliverables/cloud-computing-risk-assessment]
(pages 14-15):

Cloud computing is an on-demand service model for IT provision, often based on virtualization and distributed computing technologies.

The reality of cloud computing exists in Portugal as the same way in all developed countries. There are several Portuguese companies delivering cloud services, in general associated with access to servers and software (SasS) and many e-business solutions are implemented in such technological platforms. So, in general business activities, the existence of "The Cloud" is very well known and adopted by many companies.

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

Concerning the case of Author's Rights and the legal access of their works, the Portuguese cloud platforms aren't yet consistent with the legislation and the author's interest. The major of those solutions are piracy acts.

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?

Some entities managing rights provide access to international platforms, represented by them. There are recent efforts for some national developments.

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

It is much important that the culture/creativity industry ensure their direct representation in that field. For that purpose it is very significant the importance of transnational cooperation for common representation of national works in different countries.

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?

No record found.

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

No record found.

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

No record found.

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 is important notably as the rights of reproduction and making available to the public as well as the protection of technological measures and electronic rights management information as provided for under the relevant provisions and agreed statements of the WIPO Treaties apply to the uses of copyrighted works in the 'Cloud'.

Nonetheless, the 'cloud environment' may require international harmonization of copyright exceptions and limitations concerning some sensitive issues such as: the activities of internet service providers, such as routing, caching, hosting, browsing and linking – the relevant provisions of the US Digital Millennium Copyright Act and the EU Directives on Electronic Commerce and Copyright in the Information Society might provide a starting point for such debate (1); the legality and scope of reproductions for private use in the 'cloud' (2); and several uses of general interest such as digital archives and libraries, concerning in special off-print and orphan works (3).

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?

There are known direct solutions created by authors and publishers, as part of their business model. Is also commonly online market places where is possible the accessment of the works but part of this services have being created as business for others and not the authors or associated rights. As said before, the existence of non-legal platforms providing access to content is increasing and is a serious threat for copyright. The public opinion about the free access to online content and Internet neutrality is generating new adepts to this emerging and dangerous approach for authors and rightholders interests, even they are protected by national and international legislation.

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

Following what was answered before there are all kind of works.

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

When that is the case, normally the right to reproduce and communication to the public, as the cloud service providers are usually a solely intermediary between the rightsholders and the user, declining any intellectual property liability in the content they make available.

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

Normally the access and right to reproduce, although there is not a concrete answer for this question, as it depends on the specific cloud service and its own general conditions and user's agreement. For example, it is the service provider that determines the streaming or the download method for the use of copyrighted material.

5) Can you give any figures regarding both royalty rates and total revenue authors and rightholders receive when their works are being offered in the cloud?

No data available. Normally, royalty rates are not disclosed and this information is absolutely confidential. It depends on the way the work is exploited, the type of work, the artist and its career or strategy. It is a case by case analysis and negotiation.
Nonetheless, we can say, as a mere reference and example, that when a new artist on the music industry gives its work to an aggregator, so that he can distribute the music track digitally on different platforms for download by the users, a percentage of 85% of the total revenue for the Artist and 15% for the distributor is commonly used on standard and simple agreements as a negotiation base point.

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

It depends on the casuistic business model on the cloud. Some are intended to provide or deny access to protected works and services in return for payment; other, prevent or restrict merely certain uses of these works or benefits, for example, text printing or reproduction on digital media; others seek to

preserve the integrity by preventing its modification; and certain measures try to control the number or duration of uses made.

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

The art. 217º n.º 1 of the Copyright Code, as amended by Law n.º 50/2004 of 24 August, which transposed Directive 2001/29/EC into the Portuguese legal system, ensures legal protection against the circumvention of a technological nature, with civil and criminal penalties. But it exempts the reproductions for private use, saying that TPM shall not constitute an obstacle to the normal free use. The Portuguese Copyright Code also suggests that rights holders must take appropriate voluntary measures such as the establishment and implementation of agreements between holders or their representatives and the users.

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

Yes, the protection and ensurity of copyright is the main question when offering contents in the cloud and, therefore, its violation, such as an unauthorized use permitted by TPM circumvention, is a problem to tackle and a challenge to face.

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 Portugal, there are several Cloud based services accessible to consumers. Further to the international private storage cloud services indicated above, we may point out the best known digital lockers services: Apple iCloud, Google Drive and Microsoft SkyDrive.

In addition to these international Cloud based services, a special remark must be done to the Portuguese main digital pay television platforms MEO and ZON:

- 'MEO Kanal' is a service which gives the client the possibility to create channels to share videos and photos with family, friends (private channels) or with the community (public channels)
[http://www.meo.pt/conhecer/maisMEO/meokanal/Pages/MEOKanal_Oquee.aspx]

- 'ZON Timewarp' is a free recording feature, exclusive to customers IRIS technology-based Advanced Personal Cloud Recordings, which allows customers to record, automatically, all programs in more than 70 channels, which can be viewed up to 7 days after initial retransmission [http://www.zon.pt/tv/iris/novidades/Pages/Timewarp.aspx].

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).

We have no case law in Portugal, due to the fact that Cloud Computing and Cloud platform services are still a novelty. However, in view of the legal wording of exceptions in the Portuguese Law, the cloud services operators do not seem to benefit from the private copying exception by users.
Art 75 nr.2 *a)* of the Portuguese Code of Copyright and Neighbouring Rights states that "*The reproduction of the work, for private purposes only, on paper or any similar medium, effected by the use of any kind of photographic technique or by some other process having similar effects, with the exception of sheet music and as playback performed by any means by a natural person for private use and for ends that are neither directly or indirectly commercial purposes;"*

In a recent letter addressed by an R-PVR provider to Broadcasters, upon commercial start of a service which remotely stores about 70 different channels' programming for a week, the operator has stressed the personal nature of the recording made by the operator (presumably on the user's behalf, given that it must be user-activated), as well as the individualised character of any recordings made (not fit for third-parties' viewing). Finally, the operator pledged its utmost respect for Copyright, by not allowing the protected content to become available for streaming for any longer than seven days, as well as the fact that it is recorded along with its respective advertising, for the purpose of enabling time-switched viewers' audience measurement. Such references, although not entirely clear, seem to point out that the operator attempts to approach the notion of private copy, but also the ephemeral recording facility, both of which are exceptions which, in fact, do not apply to the case, since the former requires that each copy is made by a natural person, for non-commercial purposes, and the latter is restricted to broadcasters for the purpose of deferred broadcasting (not to be confused with deferred viewing). Furthermore, recent international Case-Law has cast some light over the spreading phenomena of R-PVR, determining that it is not to be regarded as private use.

For example, in the Case National Rugby League Investments Pty Limited v Singtel Optus Pty Ltd [2012] FCAFC 59 decided on 27 April 2012, by the FEDERAL COURT OF AUSTRALIA, the Court has found, in appeal that "When a cinematograph film (or copy) and a sound recording (or copy) were made when a television broadcast of one of the AFL or NRL matches was recorded for a subscriber, (…) the maker [of such copy] was Optus or, in the alternative, it was Optus and the subscriber. It is unnecessary for present purposes to express a definitive view as between the two. Optus could be said to be the maker in that the service it offered to, and did, supply a subscriber was to make and to make available to that person a recording of the football match he or she selected. Alternatively Optus and the subscriber could be said to be the maker for Copyright Act purposes as they acted in concert for the purpose of making a recording of the particular broadcast which the subscriber required to be made and of which he or she initiated the automated process by which copies were produced. In other words, they were jointly and severally responsible for the act of copying. That is our preferred view. (…) "the second question is: If Optus' act in making such a film would otherwise constitute an infringement of the copyright of AFL, NRL or Telstra, can Optus invoke what we would inaccurately, but conveniently, call the "private and domestic use" defence of s 111 of the Act? (…) Our answer is that Optus cannot either as maker alone or as a maker with a subscriber bring itself within the scope of the s 111 exception on its proper construction."

Also in Germany, in a recent Decision, the Landgericht München I (Munich District Court 1) upheld ProSieben Sat1 complaint against the online video recorder Save.tv in a judgment of 13 August 2012 (case no. 7 O 26557/11). ProSiebenSat.1 had asked for an injunction preventing Save.tv from using its programmes. In the District Court's view, Save.tv infringed the broadcaster's rights by using its broadcast signals to record and retransmit ProSiebenSat.1 programmes to its users without permission. The online video recorder was inadmissible because it was not simply used to create private copies, as its operators had argued.

In view of this international Case-Law, and the above referred art. 75 nr. 2 a) of the Portuguese Code of Copyright and Neighbouring Rights, it would be extremely difficult to say that the R-PVR service may benefit from the private copying exception.

It is also important to acknowledge that, although the private copy exception is normally subject to compensation (equitable remuneration), digital services as well as computers, databases and all informatics materials are, for the moment, exempt of any levies, which apply in the analogue world, due to art. 1 nr. 2 of Law nr. 62/98 of 1/9 (Republished by art. 10 of Law nr. 50/2004, of 24/8.

Other exceptions which may, at least hypothetically, be of any use for Cloud-Computing Services are as follows, according to article 75 of the Code of Copyright and Neighbouring Rights:

c) The regular selection of articles from periodic press, under the form of press reviews;

d) The fixation, reproduction and public communication by any means, of fragments of literary or artistic works, when its inclusion in reports of current events is justified by the information purpose pursued;

e) The reproduction in whole or in part, of a work which has previously been made available to the public, provided such reproduction is made by a publicly accessible library, a public archive, a public museum, a documentation centre or a noncommercial scientific or teaching institution, and that such reproduction and the respective number of copies are not intended for the public, are limited to the needs of these institutions' activities and do not aim at obtaining an direct or indirect economic or commercial advantage, including those acts of reproduction needed for the preservation and storage of any works;

f) The reproduction, distribution and public availability for the purposes of teaching and education, of parts of a published work, solely to objectives of education in these establishments and provided no direct or indirect economic or commercial advantage is pursued;

g) The insertion of quotations and abstracts of works of others, whatever gender and nature, in support of their own doctrines or the purposes of criticism, discussion or teaching, and to the extent required by the specific purpose;

h) The inclusion of short pieces or excerpts from third- party works in works intended for education;

i) The reproduction, public communication and making available to the public for the benefit of people with a disabilities of a work that is directly related to the extent required by these specific disabilities and of a non commercial nature;

m) The reproduction, communication to the public or making available to the public, of published articles on current economic, political or religious topics or of broadcast works or other subject – matter of the same character, in case where such use is not expressly reserved;

n) Use of work for the purposes of public security or to ensure the proper performance or reporting of administrative, parliamentary or judicial proceedings;

o) The communication or making available to the public, for the purpose of research or private studies, to individual members of the public by dedicated terminals on the premises of libraries,

museums, archives and public schools, of protected works not subject to purchase or licensing terms which are contained in their collections;

r) the incidental inclusion of a work or other subject-matter in other material.

3 - The distribution of lawfully reproduced copies is also lawful, to the extent justified by the purpose of the authorised act of reproduction.

4 - The exercise modes of the uses intended In the preceding paragraphs shall not conflict with a normal exploitation of the work nor cause unreasonable prejudice to the legitimate interests of the author.

According to Article 76, some of these exceptions are subject to certain requirements, as follows:

1 - The free use referred to in the previous article must be accompanied by:

a) indication, wherever possible, of the author's and the publisher's name, the title of the work and other circumstances that identify them;

b) In cases of subparagraphs a) and e) n. 2 of the previous article, an equitable remuneration payable to the author and in the analog environment, to the editor by the entity that has carried out the reproduction.

c) In case of subparagraph h) n. 2 of the previous article, a equitable remuneration payable to the author and publisher;

d) In the case of subparagraph p) n. 2 of the previous article, an equitable remuneration to be allocated to the rightsholders.

2 - The works reproduced or quoted, in cases of b), d), e), f), g) and h) n. 2 of the previous article, should not be confused with the work of those who use them, nor the reproduction or quotation can be so extensive that interest for those works is prejudiced.

3 - Only the author has the right to gather in a single volume the works referred to in subparagraph b) of paragraph 2 of the previous article.

Art 152 nr. 2-4 of the Code of Copyright and Neighbouring Rights may also be of some importance: It states that it is legal for broadcasters to record the works to be broadcast, uniquely for the use of their own broadcasting stations, in the case of deferred broadcasting. Such ephemeral recordings must, however, be destroyed in a three month period, within which they may not be broadcast more than three times, without prejudice to a compensation to the author. In case such recordings have exceptional documentary interest, there is a possibility of preservation in official archives or, before these exist, in the public broadcaster's archives, without any prejudice for Copyright.

According to article 187 nr. 2 of said Code, this right, along with all other neighbouring rights awarded to broadcasting organisms, does not apply to the Cable operator which only retransmits third-parties' broadcasts.

Decree-Law nr. 252/94 of 20 October, which has transposed Directive 91/250/CE of 14 May (on the Copyright protection of software) also contains the provision of an exception, for the benefit of software users, which is to make a single support copy in connection with its legitimate use, and to observe, study or rehearsal the software operation in order to determine the ideas and the principles which are the basis of its elements, when downloading, watching, executing, transmitting or hosting the software. There is also a provision for the right of decompilation in the extent necessary to ensure interoperability.

Decree-Law nr. 122/2000 of 4 July, which has transposed Directive 96/9/CE of 11 March (on the Copyright protection of data-basis), allows the application to data-basis of the same exceptions/limitations foreseen in the Code of Copyright and Neighbouring Rights.

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?

Under Portuguese Law, the operator of cloud based services could be compared to the intermediary provider of the server storage service, and the normal rules of liability for the intermediary provider of the server storage service under Portuguese E-commerce Act [Decree-Law nr. 7/2004, of 7 January, available at http://www.anacom.pt/render.jsp?contentId=978408] shall apply.

Therefore, and according to article 16 of Decree-Law no. 7/2004, of 7 January, as amended by Decree Law nr. 62/2009, of 10 March and Law nr. 46/2012, of 29 August, the operator of cloud based services shall only be liable, on common terms, which may include criminal liability, for the information stored, where he has knowledge of an obviously illegal activity or information and does not act expeditiously to remove or to disable access to such information.

As host, the operator of cloud based services may be civilly liable where, faced with his knowledge of circumstances, he is or should be aware of the illegal nature of the information. The common rules on liability shall apply where the recipient of the service is acting under the authority or the control of the provider. As such, there is no narrow interpretation of the "making available right" or communication to the public or public performance right, as long as the Cloud is not used for the purpose of public dissemination of illegal content, but only for personal use of storage capacity.

However, it is useful to know that there has been a narrow interpretation of Copyright breach by a very recent Decision of the District Attorney, following the evaluation of 2.000 complaints for alleged breach of Copyright by means of Peer-to-Peer File Sharing, through the use of Bit Torrent, based on three grounds: a) the obvious impossibility to allocate means of investigation to such a number of Complaints; b) the technical impossibility to find the person or persons which have uploaded /downloaded copyright protected works without licensing, based only on the IP addresses of such persons; c) the DA's conviction that downloading may be legal, even if the user doesn't stop its interactive activity immediately after having downloaded the content of its choice. It follows an article by a Law Professor which claims that downloading is always legal independently from the legality of the source, whereas uploading may also be legal if it is only performed for the purpose of downloading content - that is, public sharing of content is not directly envisaged - provided that the user stops immediately its activity after obtaining what he/she wants. In that case, only the initial uploader of such content may be held criminally responsible. There is a Legal opinion from the DA's Office which invokes this legal position although referring to it in rather doubtful terms, as any legal thesis is naturally subject to further discussion and exchange of views.

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?

In Portugal, there is no distinction between different levels of liability. There is a major distinction between criminal and civil liability, whereas criminal liability can encompass direct liability (subdivided into moral authorship and material performance) and liability as abettor (which may be somewhat similar to contributory liability, in facilitating criminal performance. However, inducement would be better qualified as moral authorship, which is a form of direct, not indirect, liability.

Different kinds of intensity apply to criminal intent (premeditation or direct intent, indirect intent, eventual intent). Absent any criminal intent, there can also be cases of crime performance by negligence and even for omission, in certain types of crime. In civil liability there is a well established reference criterion which is the *bonus paterfamilias.* There is also a distinction between guilt and mere negligence. In civil terms, a few legally described activities imply objective liability also known as risk liability. This is as closer as the system goes to vicarious liability, but there is no legal provision which qualifies hosting or any Internet service provision as a risk activity, so there is no liability without guilt or subjective causes.

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.

Yes, since we may consider that Cloud service providers are hosts, thus benefiting from art. 16 of Decree-Law 7/2004 of 7 January: according to this provision, as amended by Decree Law nr. 62/2009, of 10 March and Law nr. 46/2012, of 29 August, the operator of hosting services, as an intermediary service provider, shall only be liable, on common terms, for the information stored, where he obtains knowledge of an obviously illegal activity or information and does not act expeditiously to remove or to disable access to such information. According to legal interpretation, the reference to "common terms" may include criminal liability, as opposed to nr 2 of the same article, which states that "*there may be civil liability whenever, according to circumstances known, the service provider is or should be aware of the illicit nature of such information".* According to nr. 3, the common rules on liability shall apply where the recipient of the service is acting under the authority or the control of the provider."

One of the current obstacles to rightsholders successful intervention seems to be art. 18 nr. 1 because, according to its terms, the intermediary services provider is not legally compelled to remove the content or to disable access to it, unless there is a case of *obvious* illegality. Furthermore, art. 18 nr. 6 expressly exempts ISPs from liability for not having removed or disabled access to content upon demand, whatever decision is taken by the supervision authority, when the illegality of such content is not *obvious*, a rule with which some lawyers and legal advisers disagree, in view of the E-Commerce Directive distinction between the cases of *obvious* illegality, for civil liability purposes, and subjective knowledge driven by third parties' notification (available at http://ec.europa.eu/internal_market/e-commerce/directive_en.htm as well as at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:178:0001:0016:EN:PDF.)

There is no regulated procedure of notice and action in Portugal, therefore some rightholder's representatives are claiming that there should be one, as an implementation of the above referred Decree-Law. It is known that the E Commerce Directive doesn't introduce the need to regulate on that matter at Member State level, but some sectors claim that further harmonization would benefit the common objective to fight Copyright Piracy. According to art. 21 nr. 2 of said Directive, , the first report shall in particular analyze the need for proposals concerning the liability of providers of hyperlinks and location tool services, as well as 'notice and take down' procedures and the attribution of liability following the taking down of content. The report has also analyzed the need for additional conditions for the exemption from liability provided for in Articles 12 and 13 of said

Directive, in the light of technical developments, and the possibility of applying the internal market principles to unsolicited commercial communications by electronic mail.

According to the E-Commerce Directive First Report, available at
http://ec.europa.eu/internal_market/e-commerce/directive_en.htm#firstreport,
"*the Commission has actively encouraged stakeholders to develop notice and take down procedures and has systematically collected and analysed information about emerging procedures. (…) The Commission has participated in European and international fora where notice and take down procedures have been discussed. (…) Analysis of work on notice and take down procedures shows that though a consensus is still some way off, agreement would appear to have been reached among stake holders as regards the essential elements which should be taken into consideration. Although some further work among stake holders seems to be necessary to clarify a number of outstanding issues, the Commission at this stage does not see any need for a legislative initiative".* More recently, in January 2012 the Commission announced an initiative on "notice-and-action" procedures in the Communication "*A coherent framework for building trust in the Digital Single Market for e-commerce and online services"*, available at
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0942:FIN:EN:PDF
and there was a public consultation on this subject, so there's reason to believe that there will be an initiative on a harmonized notice and action procedure. However, Member States are not depending upon this initiative to implement this kind of rules.

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?

According to art. 12 of Decree-Law nr. 7/2004 of 7 January, internet service providers are not subject to a general monitoring obligation upon the information transmitted or stored, or any duty to investigate the eventual practice of illicit activities. However, according to art. 13 of the same Decree-Law, there is an obligation towards the competent entities to:

Notify immediately when ISP become aware of illicit activities in relation to their services;

a) Upon requirement, identify the services' customers with whom ISPs have hosting services agreements;
b) Immediately comply with determinations aimed at preventing or terminating any breach, namely to remove or to disable access to any information;
c) Provide lists of hosted sites' holders, upon requirement.

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

As previously mentioned, there is no regulated Notice and Action procedure, so there is no standard requirement in terms of evidence to be produced in order to notify an ISP that there is illegal subject-matter in a website or being made available through the IP address corresponding to its service. However, the following evidence, used in Criminal Complaints presented by Collecting Societies representing music rightsholders, can be used as an example of what evidence would be valuable for an eventual notice and action procedure.
Normally, complaints are made against unidentified users of P2P file sharing networks, by presenting the Public Prosecutor with one CD-Rom per user, identified by nick-name or IP address, with:

a) The "screenshot" in "jpeg" format, of the image obtained when using the software "SmartWhois", which is able to identify the ISP that awarded the relevant IP address;
b) Some musical files obtained through illegal download (duly authorized, for the purpose of complaint);

c) Three “screenshots” of different moments of the download procedure, taken when it was performed by the Complainant, to demonstrate it could be done by anyone who so desired, at said moment;
d) A list of all the musical files available for download in the website or webpage which is the subject of complaint, both in “excel” form and in “screenshot” of the image representing such databases.
e) A report of transfer with three files of different stages of communication (transfer of data-packets) between the host and the client machines, taken in the format “CommView Capture file”;
f) Three files in “pdf” format, which refer to the first “packet” to be transferred between the host and the client machines. These files contain the essential elements for verifying the communication, namely the IP addresses of both sender and recipient, the P2P service used, the date when the communication (download) takes place, the transferred file and, if possible, the user “nick-name” as well as the content “hashcode” which uniquely identifies the protected work.
g) A statement duly signed by the legitimate rightholder according to which no authorization was given for the users of such P2P software to upload or download any of the works.

This is simply an example of evidence that could, at least theoretically, be presented to an ISP supposing the Complainant wanted to be as accurate as possible and to give the ISP full knowledge of the illegal activity being carried out through its service.

If the formal notice and action procedure were to be implemented by the legislator, the requirements would not be so many, even because the ISP should take upon its shoulders to verify by himself what illegal actions are being undertaken, based on a simple notification merely identifying the IP address or the website, and the name of the works, signed by the rightholder or any representative of the latter, which must duly identify himself and provide its electronic address, for the ISP to answer back upon subsequent notification of its Client. It is strongly advisable that there is a standard form for these notifications, indicating the kind of evidence which is to be deemed as essential for the ISP to be forced to act.

Only ISPs can provide important data such as MAC addresses of PC, traffic URLs, remote location’s URL, that enable Complainants to reach, at least, the place from where the work was provided, if not the person who made it available (a subsequent investigation which can be done, according to regular habits and details of traffic).

Nevertheless, it remains extremely difficult to identify the people which have breached the law.

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?

Yes, there are, but normally such contracts are concluded online, by ticking a box, as necessary formality to access the service, and normally few people read it. All these contracts expressly exclude the host’s liability for the content stored in its facilities. The Client must assume full accountability for whatever content he/she uploads/downloads. Besides, even if there were no such contractual provision, the Law would exclude the Cloud service provider liability, as above referred.

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?

There is no case of shut down of any Cloud services, even because the service is relatively new to the public.

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?

According to recent news published by the press (September/October 2012) the legislation which allows the fight against piracy, namely by blocking access to websites, blogs or hyperlinks which help piracy to be disseminated, as well as an implementation of private copy levy in all digital devices and data hosting equipments, is the next priority for the Government, in the field of Culture. This will certainly hit internet based activities such as Cloud services, if not as a potential piracy instrument, at least as a common private use facilitator, which is expected to grow exponentially in the next few years, also thanks to the massification of tablets, mobile computers and smartphones.

There is also an opportunity to bring up the subject since the recent termination of 2000 piracy complaints has aroused a discussion in turn of what is legal and what is not in downloading/uploading musical works, namely through the use of software such as Bit Torrent, Kazaa, e-Mule and LimeWire.

9) Do you see any progress regarding filtering technology?

Since ISPs are not obliged to monitor or filter any contents, there is no information of any new filtering systems. However, at international level, and on an entirely voluntary bases, there are very interesting projects, such as the one available on http://www.linkedcontentcoalition.org, which "threatens" to create a new technological standard to enable rightsholders to easily control the use of their respective works in any digital platform through fostering interoperability and common metadata, on a worldwide level.

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?

There is no information of such use. Creative Commons Licenses are essentially used for academic research, several Educational Projects, papers and studies carried out by observatories such as the OBERCOM (E-Communications and Media Observatory). There is no connection with Cloud services.

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

Scientific, academic and research areas.

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

No data 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 data available.

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?

It is important to consider the various sources of law applicable to intellectual property law and copyright in particular: the international sources such as the conventions, which essentially aim to harmonize intellectual property law, but also establish rules of private international law; the communitarian sources such as Roma I e Roma II, for contractual obligations and non-contractual obligations; and the national sources, namely applicable to the rights and infringements exercised in Portugal.
Resulting from the primacy of international law and EU law over national law, the regulation Rome I and Rome II prevails in determining the applicable law. Due to the diversity of different legislation, the recent European Union strategy for Cloud Computing aims to unify the framework and standards should be identified by 2013. Cloud providers and users are looking for clearer rules when it comes to the delivery of cloud services regarding the question where legal disputes will be resolved or how to make sure that it will be easy to move data and software between different cloud providers.

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, the main national collective rights management organization (Portuguese Author's Society – SPA) does not grant multi-territorial licences, but it has agreements between collective organisations in different countries. It is envisaged the creation of a Pan-European portal composed by all musical societies located in the European Economic Area for the online multi-territorial licensing.
There are no cloud-specific licence models, but the recent strategy from the european union for cloud computing aims to establish model contracts by 2013 for cloud computing that make legal obligations clear. Also, there is a much anticipated proposal for a directive of the European Parliament and of the Council on collective management of copyright/related rights and multi-territorial licensing of rights in musical works for online uses in the internal market, aiming to facilitate "the multi-territorial licensing of the rights of authors in their musical works by collecting societies representing authors".