



CLOUD-BASED MUSIC SERVICES: LEGAL ISSUES TO CONSIDER

Cary Sherman and Jonathan Potter

Cary Sherman is President of the Recording Industry Association of America. He was previously General Counsel of RIAA, and senior partner in the Washington, D.C. law firm of Arnold & Porter. This paper does not necessarily reflect the views of the RIAA.

Jonathan Potter is Principal, RPG Strategies. He was previously Founder and Executive Director of the Digital Media Association, and an associate in the Washington, D.C. office of Weil, Gotshal & Manges.

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I. INTRODUCTION

If all the buzz and hype in the media are to be believed, cloud-based services are the “next big thing” on the Internet generally, and for music services in particular. These services are intended to enable music fans to access any music they want, whenever they want, wherever they want. But what exactly is a “cloud-based music service”? How does it differ from the less-excitedly-named “locker services” that have been around for years?

Some believe that a simple locker service involves the storage of an individual’s media files, with the opportunity to access those files from any location and on multiple devices. Cloud-based music services, by contrast, are viewed as much broader in scope, offering subscribers access to music they don’t already own (and music services they want, like recommendation engines and the like).

There has been a lot of publicity about forthcoming cloud-based music services from companies like Google and Apple, and Amazon scored a public relations coup when it announced the launch of its locker service on March 29, 2011. Yet even these relatively modest offerings (in terms of functionality) have given rise to a frenzy of speculation among certain stakeholders and in the media about the need for licenses by such services. This paper attempts to identify the issues that are raised by locker services and also issues raised by more robust cloud-based services.

II. STAKEHOLDERS

The most obvious stakeholders in a locker music service include the music service provider, the owners of the copyright in the sound recording (generally the record label) and the musical composition (generally the music publisher), and the end user. But there are many more stakeholders lurking in the background that can have a profound impact on a service’s legality, licensing arrangements and economics.

- Music creators (both the artist and the songwriter) may have contractual rights that are implicated by the service. The attitudes of their managers may be critical.
- Performing rights organizations and mechanical licensing organizations may administer certain rights.
- ISPs and telecommunications networks may be impacted by the service, especially if it involves high-bandwidth audiovisual streaming.

Thus, even though the number of negotiators “in the room” may be small, numerous parties have a role and stake in the outcome of these services, and may become litigants or influence negotiations. In addition, we should note the very real possibility that freeloaders and commercial pirates may seek to take advantage of the service’s structure to acquire or distribute music in a manner not authorized by the service.

III. WHAT IS A CLOUD-BASED OR LOCKER MUSIC SERVICE?

There has been a lot of discussion in the media about cloud-based music services, and as stated above, relatively little agreement on terminology to describe different types of services. Both cloud-based and locker music services share the characteristic that music files are stored remotely, but that is often where the similarities end. Business models for these services may include one or more of the following attributes:

Remote storage that is:

- Secure, authenticated and limited for back-up of purchased / legitimately acquired files for a single, unique user
- Storage of all files acquired by a user without consideration of source
- Unauthenticated storage that permits several users to store files in an account
- Storage that permits acquisition of music from multiple sources (i.e. sideloading as well as uploading)
- Storage that is populated by the service provider (directly or via links to master copies) based on files owned, possessed or selected by the user
- Storage that is populated by the service provider based on service provider recommendations based on user preferences / known user buying history

Optimization

- Files uploaded to the cloud are replaced or supplemented by the service provider with better quality files (i.e. higher quality format, inclusion of proper metadata, etc.)
- Service provider provides additional versions of the file that are optimized for particular uses on particular devices

Access/Consumption

- Streaming to one or multiple devices
- Downloading to one or multiple devices
- Simultaneous access from multiple devices
- Number of devices to which simultaneous access is offered, over what period of time

Ancillary Services

- Access to millions of additional tracks, not owned by the user.
- Access to additional content, such as lyrics, liner notes, artwork, music videos, premium fan content, games, VIP access to events, etc.
- Interactive services, such as ability to create mashups, videos, etc. for personal, non-commercial use
- Ability to create/share playlists, etc.
- Social networking features
- Linking to a user's other accounts for other services (to either give the service additional information to make user recommendations, to permit user to supplement his library with music purchased from other sources, to permit users to share their mashups with friends, etc.)

Security and Authentication

- Registration of devices; ability to change registration of devices
- Registration of user, number of authorized users permitted to access an account
- Security to avoid abuse, theft of content, theft of personal information, etc.

IV. LEGAL ISSUES

The scope, nature, features, technical operations and restrictions of the service will bear a critical impact on the legal analysis regarding licensing. Below are some of the issues one should consider in making this analysis. Exhibit A includes a list of statutes and cases that may be relevant in this inquiry.

Reproduction – Uploading or Side Loading Content Into the Cloud. When a copy of a work is made and stored remotely: Who has “made” the copy – the end user, or the service? Was the original copy lawfully acquired by the party that is “making” the new copy? If the originating copy was licensed, does the license permit the additional reproduction? More generally, is it lawful for a user to make a copy of a musical recording absent an express license to do so (i.e. under a fair use or alternative implied (e.g., personal) license theory)? Is it lawful for a third party to make such a copy on the user’s behalf? Do commercial third parties have the right to stand in the shoes of the user and make copies?

Streaming. Once copies have been placed into the locker, who will have access to the music, and what type of access is permitted? For example, if a user or the service places a copy of a legitimately purchased musical recording into remote storage, does the service have the right to stream the recording (i) to one device, (ii) to multiple devices, or (iii) to multiple devices / multiple accounts at the same time? Does the service have the right to stream the recording (i) just to the user who uploaded the file, (ii) to others who have access to the user’s account, (iii) to friends or family of the user, (iv) to strangers who have no relation to the user? Is there a limit on the number of streams that can be offered? Are streams to the initial uploader and/or other users/devices considered public or private performances? If a stream qualifies as a public performance, does it fall within a compulsory license, or within the exclusive rights held by the rights owners? Who is responsible for the performances? When is the service provider responsible for acts by its users?

Downloading/Distribution. Further issues arise if the service permits downloading – essentially distribution – of the file. Is distribution occurring from a central or limited number of files (i.e. not the actual file uploaded by the user, but a reference copy held by the service)? What if the original file was not legitimately acquired, or the circumstances of its acquisition are not known? Does the service have the right to distribute the recording (i) to one device, (ii) to multiple devices, or (iii) to multiple devices/multiple accounts at the same time? Does the service have the right to distribute the recording (i) just to the user who uploaded the file, (ii) to others who have access to the user’s account, (iii) to friends or family of the user, (iv) to strangers who have no relation to the user? Is there a limit on the number of downloads that can be made? Who is responsible for the distribution? When is the service provider responsible for acts by its users?

Optimization/Creating a Derivative Work. To optimize the user’s experience, a service could modify the music file, or provide a copy of a different file, to ensure it is optimized for playback on the particular requested device. However, this involves changing the file that was uploaded by the user and as it was originally distributed by the rights holder. Are such modifications (and additional reproductions) permissible absent authorization from the rights holder?

Liability of the Service Provider. Is the service provider liable for direct infringement in any of the scenarios noted above if it is unlicensed? What about secondary liability? In which scenarios can the service provider take advantage of the safe harbors in the DMCA, and when are those safe harbors unavailable? Does the service have an obligation to take steps to avoid abuse of the service? What liability exists if the service does not take meaningful steps to avoid abuse?

Other Legal Issues. In addition to the core copyright issues noted above, a service needs to consider other implications of providing cloud based services to users. For example:

- Tax Implications. What are the tax implications of providing a downloading or streaming service? States have varying laws on when taxes are imposed on digital goods or services.
- International Implications. Copyright law is inherently territorial. What happens if a service has users outside the United States? While there is some harmonization, different jurisdictions nonetheless have different rules on what is and isn't permissible absent a license, and how licenses are issued. Also, it is often the case that the rights in the same work may be held or administered by different parties in different jurisdictions.

V. CONCLUSION

As this paper is intended for legal background, it identifies only the legal issues raised by locker/cloud music services. We have not addressed any business issues – most notably whether a user experience can possibly be optimized by an unlicensed service.

For example: will a consumer prefer having to manually upload each recording to a cloud server, or will a consumer prefer having the music service scan her hard drive, identify the music in her collection, and then instantaneously declare her locker filled with the highest-quality versions of all the music in her collection? Similarly, would a music service prefer having to provide server space for hundreds of millions of copies (one copy of each user's separately uploaded recording), or would the service prefer maintaining one pristine copy of that recording to be made accessible to every user who wants to hear it?

That is why, notwithstanding all the legal questions identified above, we believe the issues will ultimately be driven by user preferences, business priorities, and ultimately common sense licensing. The challenge for all stakeholders will be whether licenses can be negotiated quickly, and on economic terms that work for all interests, so that legal uncertainties do not delay introduction or impede success of exciting new offerings.

EXHIBIT A

RELEVANT STATUTES AND CASES

STATUTES

- 17 USC §101
- 17 USC §103
- 17 USC §106
- 17 USC §107
- 17 USC §108(c)
- 17 USC §109
- 17 USC §114
- 17 USC §115
- 17 USC §117(2)
- 17 USC §512
- 17 USC §1001 et. seq.
- 17 USC 1201 et. seq.

CASES

- *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994)
- *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985)
- *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005)
- *Sony Corp. of Am. V. Universal city Studios, Inc.* 464 U.S. 417 (1984)
- *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001)
- *In re Aimster Copyright Litigation*, 334 F.3d 643 (7th Cir. 2003)
- *American Geophysical Union v. Texaco, Inc.*, 60 F.3d 913 (2d Cir. 1994)
- *Arista Records, LLC v. Launch Media, Inc.*, 578 F.3d 148 (2d Cir. 2009)
- *BMG Music v. Gonzalez*, 430 F.3d 888 (7th Cir. 2005)
- *Cartoon Network LP, LLP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008), cert. denied 129 S. Ct. 2980 (2009)
- *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259 (9th Cir. 1996)
- *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 119 (4th Cir. 1997)
- *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003)
- *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511 (9th Cir. 1993)
- *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007)
- *Recording Industry Ass’n of Am. v. Diamond Multimedia Sys. Inc.*, 180 F.3d 1072 (9th Cir. 1999)
- *S.O.S., Inc. v. Payday, Inc.*, 886 F.2d 1081 (9th Cir. 1989)

- U.S. v. American Soc. of Composers, Authors, Publishers, 627 F.3d 64 (2d Cir. 2010).
- Wall Data Inc. v. Los Angeles Cty. Sheriff's Dep't, 447 F.3d 769 (9th Cir. 2006)
- Worldwide Church of God v. Philadelphia Church of God, 227 F.3d 1110 (9th Cir. 2000)
- Adobe Systems Inc. v. One Stop Micro, Inc., 84 F. Supp. 2d 1086 (N.D. Cal. 2000)
- Arista Records, LLC v. Usenet.com, Inc., 633 F. Supp. 2d 124 (S.D.N.Y. 2009)
- Basic Books, Inv. v. Kinkos Graphics Corp., 758 F. Supp. 1522 (S.D.N.Y. 1991)
- Gladys Music, Inc. v. Arch Music Co., Inc., 150 U.S.P.Q. 26 (S.D.N.Y. 1966)
- Live Nation Motor Sports, Inc. v. Davis, No. 3:06-CV-276-L, 2007 WL 79311 (N.D. Tex. 2007)
- Marvel Enters., Inc. v. NCSOFT Corp., No. CV 04-9253RGKPLAX, WL 878090 (C.D. Cal. 2005)
- Sega Enters. Ltd. v. MAPHIA, 857 F. Supp. 679, 687 (N.D. Cal. 1994)
- Sony Pictures Home Entm't Inc. v. Lott, 471 F. Supp. 2d 716 (N.D. Tex. 2007)
- UMG Recordings v. MP3.com, 92 F. Supp. 2d 349 (S.D.N.Y. 2000)
- UMG Recordings, Inc. v. Veoh Networks, Inc., 620 F. Supp. 2d 1081 (C.D. Cal. 2008) (on appeal)
- Universal City Studios, Inc. v. Nintendo Co., 615 F. Supp. 838 (S.D.N.Y. 1985)
- Viacom Int'l, Inc. v. YouTube, Inc., 718 F. Supp. 2d 514 (S.D.N.Y. 2010) (on appeal)