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Cloud Computing, Digital Lockers and Copyright: The Cloudification of Entertainment (Update)

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It is no surprise that the move to the cloud is in full swing. New methods of content distribution and consumption, coupled with the widespread proliferation of IP-enabled consumer devices, are driving the public's relentless desire for "any content anywhere". The success of Netflix, Hulu, [Amazon on Demand](#), Flickr, and the emergence of novel content authentication and delivery standards like the [Digital Entertainment Content Ecosystem's \(DECE\) Ultraviolet](#) exemplify the entertainment industry's investment in and increased reliance on cloud-based distribution platforms and business models. Now, as music makes a similar move to the cloud with the recent emergence of Amazon CloudDrive, Apple's iCloud and GoogleMusic, stakeholders across all forms of entertainment have officially entered the equation. But while cloud integration continues to gain speed in the foreground, a host of new legal issues are emerging in the background as the convergence of new cloud-based storage mechanisms and channels of distribution with entertainment content continues to usher in novel copyright questions for stakeholders to grapple with. At present, the legal questions currently surrounding digital lockers and the "cloudification" of entertainment content are focused primarily on the balance between copyright holders' exclusive rights to reproduce and publicly perform their works and consumers and service providers ability to make lawful use of such content through emerging technologies, in each instance, without directly or secondarily infringing copyright holders' rights.

1) *Cartoon Network, LP v. CSC Holding Inc.* Among the most recent and important decisions impacting cloud-based storage and distribution of entertainment content was the Second Circuit's 2008 decision in *Cartoon Network, LP v. CSC Holding Inc.* ("Cablevision Case"), which addressed the copyright implications of a cloud-based DVR system. Specifically, cable operator Cablevision Systems Corporation ("Cablevision") announced plans in March 2006 to market a "remote storage DVR system" ("RS-DVR") to allow subscribers without a stand-alone DVR to record cable programs on central hard drives Cablevision maintained at a "remote" location. In response, major networks and studios sued Cablevision in federal court, claiming that the RS-DVR would directly infringe their rights to reproduce and publicly perform their copyrighted works. The [district court agreed](#) and enjoined Cablevision from operating the RS-DVR system without additional licenses from the plaintiffs. Cablevision appealed

and the Second Circuit reversed the decision on all three infringement counts. The first claim rejected by the Appeals Court was that the brief caching of buffering data while Cablevision's system queried whether the customer had actually requested the program be recorded on to the applicable hard drive violated the exclusive right of reproduction. The Appeals Court held that the buffering period was so negligible as to fail the Copyright Act's requirement that a copy of work be fixed in a tangible medium "for more than a transitory duration." This point is potentially significant for future cloud business models given that cloud-based services may enable the storage, manipulation and distribution of content in multiple formats across multiple devices, which will continue to no doubt further implicate transitory caching of content at multiple stages in the process. The second claim reversed by the Appeals Court was that Cablevision was liable for direct copyright infringement for copying programs to the RS-DVRs. Here, the Appeals Court held that Cablevision did not evince the required "volitional conduct" that actually caused the copy to be made and found that Cablevision's conduct in designing, housing, and maintaining a system did not amount to direct infringement. The third and perhaps most controversial claim reversed by the Appeals Court was that the transmission of programming from the RS-DVR to subscribers who requested playback breached the public performance right. Here, Cablevision argued (and the Appeals Court found relevant) that, "because each RS-DVR transmission is made using a single unique copy of a work, made by an individual subscriber" only one subscriber is capable of receiving the transmission of that particular work and thus the performance is not "public". Ultimately, the holding in the Cablevision Case that individualized copies of content specifically streamed to subscribers from remote DVRs constitute private, as opposed to public, performances introduces a lack of clarity regarding the rights necessary for cloud-based transmissions of audio/visual content. Put simply, the question remains as to whether streaming of legally obtained content to an end user from the cloud (e.g., MP3 tracks stored in a digital locker, etc.) implicates the public performance right. As a result, purveyors of cloud-based business models are left considering whether additional authorization is required from copyright holders, and in the absence of obtaining that consent, whether the potential exists that another tribunal could later disagree with the Second Circuit's holding in the Cablevision Case. Furthermore, the application of the holding in the Cablevision Case to alternate fact patterns and business models, as even the court itself acknowledged, provides limited guidance.

"This holding, we must emphasize, does not generally permit content delivery networks to avoid all copyright liability by making copies of each item of content and associating one unique copy with each subscriber to the network, or by giving their subscribers the capacity to make their own individual copies. We do not address whether such a network operator would be able to escape any other form of copyright liability, such as liability for unauthorized reproductions or liability for contributory infringement."

2) Capitol Records, LLC et al. v. MP3tunes, LLC Another recent and ongoing case potentially impacting the digital locker and cloud computing landscape is Capitol Records, LLC et al. ("EMI") v. MP3tunes, LLC (See Initial Complaint, EMI Summary Judgment Memorandum and [Response](#), [MP3tunes Summary Judgment Memorandum](#) and [Response](#), and recent [Summary Judgment Ruling](#)). Here, multiple record companies and publishers affiliated with EMI have asserted, among others, various copyright infringement claims against MP3tunes, which operates two separate online services—specifically, MP3tunes.com and Sideload.com. MP3tunes.com allows users to store their music collections in online digital lockers, which they can then access from any computer or mobile device with an Internet connection. Sideload.com is a music search engine site that allows end users to search for links on the internet to downloadable music that can be uploaded (or "sideloaded") to an MP3tunes digital locker. Once music is placed in an end user's digital locker, the music becomes available for transmission to any IP-enabled device at the end user's direction. Based on the documents filed to date, EMI has asserted a series of both direct and secondary copyright infringement claims against MP3tunes, including claims that MP3tunes has forfeited its eligibility under the Digital Millennium Copyright Act's (DMCA) Safe Harbor provisions for its illicit conduct in knowingly providing the means for end users to violate EMI's copyrights via Sideload.com and failing to respond to takedown notices. In fact, the majority of EMI's claims are based on the functionality and content made available via Sideload.com, which essentially aggregates URLs linked to digital music files that can be readily downloaded or sideloaded to an online locker. EMI has asserted that the infringing nature of the links posted on

Sideloading.com, as well as the corresponding files that are made available via the linked URLs that are then sideloaded into an MP3tunes digital locker violate EMI's copyrights. While a detailed analysis of the merits of EMI's DMCA and contributory liability theories remain outside the scope of this post (and have yet to be entirely decided by the court), the district court, in its recent ruling on the parties' summary judgment motions, did find that the MP3tunes was entitled to the Safe Harbor protections afforded under the DMCA, but further addressed a key issue emerging in the new cloud-based lockering environment. Specifically, upon receipt of a valid takedown notice from EMI, the court found that MP3tunes had a duty to not only remove links to infringing songs publicly displayed on Sideloading.com, but also a duty to remove songs stored in users' personal lockers which were downloaded from such links. In its defense, MP3tunes claimed that it was only required to remove the URL links on Sideloading.com because only those links were listed on EMI's takedown notices and that it might be subject to lawsuits by users if it actually removed personal property from users' digital lockers. The court, however, rejected this argument, pointing to the DMCA's immunity provisions for service providers acting on valid takedown notices (see 17 U.S.C. 512(g)), and stating that:

"Where service providers such as MP3tunes allow users to search for copyrighted works posted on the internet and store those works in private accounts, to qualify for DMCA protection, those service providers must (1) keep track of the source and web address of stored copyrighted material, and (2) take content down when copyright owners identify the infringing sources in otherwise compliant notices... [Accordingly,] MP3tunes was obligated to remove specific works traceable to users' lockers .. [b]ecause MP3tunes keeps track of the source and web address for each sideloaded song in each user's locker and EMI's notices gave sufficient information for MP3tunes to locate copies of infringing song in users lockers.

In addition to the foregoing claims, EMI also claimed that MP3tunes directly infringes that right of public performance by allowing end users to stream music from their online digital lockers to personal devices. Relying in part on the holding in the Cablevision Case, EMI asserted that MP3tunes violates the public performance right because it uses a "single master" to play songs to multiple users, as opposed to Cablevision which maintained a separate copy of each program for each subscriber who recorded it. In response, MP3tunes replied that it does not utilize a "single master" storage system, but rather a common open source distributed file software system that eliminates redundancy and enables MP3tunes to efficiently store and retrieve the millions of audio files uploaded by its users without employing a duplicative file storing method. Ultimately, the district court held that MP3tunes does not in fact use a "single master" system, but rather a standard algorithm known as "Content-Addressable Storage" to store music files which uses hash tags associated with each uploaded song that ultimately allows for the reconstruction of the exact file the user originally uploaded to the service (i.e., there is no "master copy" of any EMI songs stored on MP3tunes' servers). Still, this determination does not entirely address EMI's infringement claim regarding the right of public performance as the court's holding solely relates to the nature of the specific file storage technology employed by MP3tunes. This is in part due to the fact that EMI's arguments on the public performance issue were largely based on distinguishing the file storing technology used by MP3tunes from the technology employed by Cablevision. In other words, EMI did not address the public performance question by looking at the intended audience of the transmissions enabled by MP3tunes, but rather whether MP3tunes used a "single master" to transmit music to end users. Ultimately, the take away from both the Cablevision Case and the MP3tunes case is that cloud-based delivery, storage and consumption of entertainment content, whether overtly and implicitly, implicates many of the exclusive rights afforded copyright holders and stakeholders need to remain vigilant about allocating risk when the laws in the US and overseas have yet to suitably address the contours of these services and the corresponding technologies at play. We will obviously keep an eye on future developments in connection with cloudification of entertainment content and any case law potentially impacting the future deployment of related cloud-based products and services.

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