

Music in the Cloud – A Business and Legal Primer

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What is cloud computing?

A simple definition of cloud computing is a hosted service providing scalable access by a computer user to personal computer files remotely stored on one or more host servers. The benefit of cloud computing is said to be primarily two-fold: First, it allows a user to access files, together with computing resources and IT services, without “high demand” on the their computer’s hardware and software; and second, if the service permits, it allows a user to have access to those files anywhere, anytime, from any platform device.

As recorded music can, of course, be reproduced and stored in a computer file (MP3 being the most common computer file format, with Apple’s proprietary AAC format a close second), the current development of cloud services now promises a transformation in the way consumers access music. Portability, accessibility and interoperability are the touchstones of that expected transformation.

Currently, a majority of consumers download music files directly onto their computers or other playback devices, where the file is stored on the device’s hard drive. To transfer the music to another device, the file must either be burned onto a CD, put onto a flash drive, emailed, or one device must be synced to the other via a cable or other direct connection using a synchronization program.

With cloud music services, entire music libraries are stored in and mobilized from the cloud (in a variety of fashions, depending on the service), and a user can listen to music in his library from any device without performing any syncs or transfers. The cloud therefore promises, among other things, to allow unlimited access to music in the form of on-demand streaming and offline listening, while saving time and computer space.

What types of cloud music services are available?

Music Service Provider	Platform	Allows User's Own Music	Mobile Offline Listening	Auto Sync	Storage Space	Price
iTunes Match	iOS; Web-based computer with iTunes	Yes	Yes	Yes	25,000 songs	Free for iTunes music; \$24.95/yr for non-iTunes music
Amazon's Cloud Drive	iOS (vis Cloud Player Website); Android; Web-based computer	Yes	Yes (Android only)	Yes	Up to 1000GB	Free for 5GB then \$1/GB/yr
Google Music	iOS (Google Music web application); Android; Web-based computer	Yes	Yes (Android only)	No	25,000 songs	Free (while in Beta)
SoundCloud	iOS; Android; Web-based computer	Yes (recording and uploading your originally-created music)	Yes (if creator allows their sound to be downloaded)	No	unlimited upload minutes	Free for 120 upload minutes up to \$740 for unlimited
MP3Tunes	iOS; Android; Web-based computer; PlayStation 3; Xbox 360; Tivo	Yes	No	Yes	Up to 200GB (about 40,000 songs)	Free for 2GB (about 400 songs)
Murfie	Web-based computers	Yes (User mails CDs to Murfie to be transferred into the cloud to sell or trade)	Yes	No	1,000 CDs	\$1/CD or \$24/yr

What are the legal issues?

Music in the cloud will change how the public acquires, stores, and accesses music. Its expected benefits to the consumer pose potential threats to artists and record labels, however. In addition to the potential to further shift public perception away from the idea of music as a good (as opposed to service), cloud computing raises several distinct legal and public policy issues – among them, copyright infringement, music piracy, user privacy, and system security.

- I. Copyright Infringement: Generally, copying a work without permission violates the exclusive reproduction right of the copyright owner. The transfer of a music file from one device to another may violate that right and also be a violation of the copyright owner's exclusive right to distribute his or her copyrighted work. The issue here is whether music service providers or users have the right to reproduce owned or licensed content when transferred from its original form to a digital file in the cloud.
 - a. Direct Infringement: Music service providers and users may be directly liable for making copies of music files.
 - i. Public Performance Rights: Streaming an unauthorized copy of a song using a “master copy” of the song through a device may violate a copyright owner's exclusive public performance rights. In *Capitol Records, Inc. v. MP3tunes, LLC*, 2011 WL 5104616 (S.D.N.Y. Oct. 25, 2011), EMI Music Group along with fourteen other record companies and music publishers sued MP3tunes, alleging vicarious, contributory and direct copyright infringement. With respect to direct infringement, EMI argued that MP3tunes violated its public performance rights by employing a “master copy” to rebroadcast songs to users who uploaded different

copies of the same recording. The court, however, found that MP3tunes employed no such master copy and therefore could not be found liable for direct infringement.

ii. Reproduction: A copy of the music file is made when it is uploaded into the cloud.

Another copy of the music file is made when it is downloaded from the cloud.

Users and providers who reproduce unauthorized files into the cloud to distribute or sell these files (a la Grooveshark) are potentially infringing on the exclusive rights of copyright owners.

b. Indirect Infringement: Providers may be indirectly liable for the direct infringement of a third party user.

i. Contributory Infringement: Record labels and music publishers may argue that cloud computing service providers are liable for contributory infringement. A service provider will generally be held liable for contributory infringement if 1) there was direct infringement by a third party and 2) they knew of and materially aided the infringement. Accordingly, once a cloud music service is put on notice that their service provides access to unauthorized works, they must disable access to the material in order to avoid liability of contributory infringement. The seminal case on the subject remains *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), which held that the sale of copying technology is not contributory infringement if the product sold is capable of substantial non-infringing uses. In that case, Sony was found not liable for copyright infringement because the making of individual copies of complete television shows for the purpose of time-shifting was deemed fair use.

In the *MP3tunes* case, the court granted EMI's motion for summary judgment as to its contributory infringement claim. The court found that MP3tunes knowingly and materially aided its users' copyright infringement by continuing to store such content even after receiving EMI's takedown notices. While MP3tunes did remove the links to infringing content (i.e., prevented others from accessing such content), to avoid contributory liability, MP3tunes also needed to delete the actual infringing files from individual users accounts. The court also rejected MP3tunes' argument that its cloud service was capable of substantial non-infringing uses on the grounds that MP3tunes continued to have an on-going business relationship with the infringing users even after being made aware of their infringement.

- ii. Vicarious Infringement: A cloud service provider will be vicariously liable for the actions of an infringing user where 1) the provider has the right and ability to control the infringer's acts and 2) when the provider receives a direct financial benefit from the infringement. Unlike contributory liability, the provider need not have knowledge of the infringement. The revenue that the providers receive from users for cloud services will likely be considered a direct financial benefit since consumers may be attracted to the service by the existence and availability of the infringing activity.
- iii. Inducement: In *MGM Studios, Inc. v. Grokster, Ltd*, 545 U.S. 913 (2005), a peer-to-peer direct file sharing case, the Supreme Court considered an inducement theory of infringement. The Court held that "one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other

affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties.” Cloud service providers that purposefully encourage copyright infringement by promoting the transfer of unauthorized copies of music files may therefore be liable for inducing infringement.

c. Defenses to Copyright Infringement:

i. Digital Millennium Copyright Act: The DMCA provides a safe harbor for service providers. Liability is limited if 1) a third party initiates or requests transmission of copyrighted material, 2) the service provider does not select the material, 3) the service provider does not select recipients of the material, 4) the service provider does not retain copies of the material, and 5) the service provider transmits material through its system without modification of its content. In *MP3tunes*, the court found that MP3tunes was protected under the DMCA. Although still open for appeal, this ruling fosters confidence and encouragement for the technological progression of the cloud era for music services as long as cloud music service providers adopt and reasonably implement compliant notice and take down procedures. If the providers are found to be eligible for immunity, indirect infringement claims will most likely be moot.

ii. Fair Use: In determining whether the use made of a work in any particular case is fair use, the factors to be considered include 1) the purpose of the use, 2) the nature of the work, 3) the amount and substantiality of the portion used, and 4) the impact of the use on the actual or potential market. Uploading for the purpose of distribution and sale is not defensible as fair use; however, uploading for personal use will likely be. Although the entirety of the music file is copied, the impact of copying for

personal use arguably has little to no impact on the market since the user has already purchased the work.

- II. Piracy: The advent of cloud music services has the potential to encourage music piracy by allowing users to upload their entire music libraries, including pirated music, into the cloud. Realistically, many music files probably landed in a user's library through illegal downloading. Cloud music services therefore allows for the transfer of pirated files into the cloud. Apple and other cloud music services that have licensing agreements with record labels have found a way to essentially require users to retroactively pay for their pirated music. Users who are willing to pay for space in the cloud are basically paying back record labels for the songs they have already illegally downloaded. With a license agreement in place, record labels receive a percentage of the revenue made from users paying for the cloud service.
- III. Licensing: Without licensing agreements, the cloud opens up the possibility of illegal sharing and distribution of files. The reproduction, distribution, and public performance of unauthorized songs could be subject to violation of the copyright holder's exclusive rights. Amazon's Cloud Drive allows users to mobilize their music library by uploading their files into the cloud. Amazon first launched their service without obtaining license agreements with record labels. Amazon reasoned that their users already owned the music they stored in their library and there was no need to obtain a license agreement. However, since Amazon makes money from users uploading songs into Cloud Drive, record labels want royalties and will not receive anything without a license agreement. Public reports suggest that Amazon is now working on obtaining retroactive licenses with record labels.
- IV. User Privacy: Cloud computing presents potential privacy issues since users must generally consent to the service provider accessing his or her files. For example, Amazon's Cloud

Drive Terms of Use, Section 5.2 Our Right to Access Your Files states “You give us the right to access, retain, use and disclose your account information and Your Files: to provide you with technical support and address technical issues; to investigate compliance with the terms of this Agreement, enforce the terms of this Agreement and protect the Service and its users from fraud or security threats; or as we determine is necessary to provide the Service or comply with applicable law.” As a result, the users of Amazon’s Cloud Drive may potentially be subject to the exploitation of their personal information by Amazon. A second, more serious, privacy issue presents itself if users are able to access the files of other users. Users’ files are uploaded into the cloud where unknown users may potentially have the ability to access personal files. By uploading files into the cloud, users risk sacrificing their privacy interest in those files.

- V. System Security: Security breaches, glitches, and bugs in electronic services happen. In June of 2011, a consumer class-action lawsuit was filed against Drop-box when a glitch in the service allowed login access to millions of drop-box accounts using any password. When uploading their personal files into the cloud, users should be willing to risk flaws in security, and should probably be warned accordingly.
- VI. International Jurisdictions: By nature, copyright law is territory specific. The cloud reaches globally and rights in the same work may fall under different jurisdictional laws. For example, as a result of the restrictions of U.S. and international copyright law, Pandora Radio blocks access to non-U.S. listeners. In Canada, Canadian copyright law applies to transmissions that have a “real and substantial connection to Canada.” In analyzing copyright issues, the European Union looks at where the transmissions were emitted and where they were received. Clearance in the EU must be obtained on a territory-by-territory basis by obtaining a license

from the collective rights management organization of each country it streams to. U.S. copyright law may apply as long as either the communication originates in the U.S. or the content is received in the U.S. As a result, without international copyright agreements (or treaties), jurisdictional distinctions of copyright law theoretically prevent music from streaming internationally. See David M. Given, *A Modern Pandora's Box: Music, the Internet, and the Dilemma of Clearing Public Performance Rights*, 26 Entertainment & Sports Lawyer 3:1 (2008).

Conclusion:

Overall, the development of this cloud-based movement will be driven by several factors beyond simply the legal issues discussed here. User preferences and business priorities will greatly influence the evolution of the cloud. The cloud era has and will continue to face challenges in balancing the economic interests of all parties involved and the legal implications of those interests. The law adapts to innovations such as cloud computing, but legal precedent can be hard to move sometimes. The cloud has introduced a new level of convenience, flexibility, and ease of use for the consumer. Delays in adapting the current law to the cloud era may impede the success of this technology. Lawyers should be prepared to address these issues.

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