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Impact of digitalisation and legal tech on IP law: part two – cloud computing and SaaS

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The days when lawyers could afford to think that digitalisation was irrelevant in legal services and clients could afford to have lawyers who had no idea about technology are over. This series of articles discusses digitalisation and legal tech in the context of their use in IP law.[(1)] This article, the second in the series, looks at how intellectual property can be protected in the context of cloud computing, including the increasingly popular software-as-a-service (SaaS) applications.

What is cloud computing and SaaS?

"Cloud computing" refers to a model in which data – instead of being stored on a local computer – is stored, managed and processed on a cloud on the Internet. Thus, instead of a local IT infrastructure, a virtual IT infrastructure (ie, virtual computing, network and storage resources) (known as the "cloud") is accessed. These virtual resources can be quickly provisioned, scaled or deactivated based on the user's needs, providing flexibility and cost efficiency.

Cloud computing is employed by companies in a variety of ways. The most popular usage is the SaaS model. This is a distribution model in which the software (ie, the application) is not installed and operated on the user's own computer, but on a cloud on the internet that the user accesses via an internet connection (eg, through a website). The advantage of this is that the user is not required to install a program (ie, software) on their own computer and need not worry about software updates or local storage space. This is the responsibility of the SaaS provider that makes the software available in the cloud. The user usually pays a monthly subscription fee (ie, a licence).

A well-known example of an SaaS provider is DeepL. This provider enables users to enter and upload content on a website and create translations with AI technology.

How to protect intellectual property in regard to SaaS applications

As companies are increasingly distributing software in the form of SaaS, IP lawyers are faced with the question of what to consider when drafting SaaS agreements (eg, general terms and conditions for a SaaS application provider). Since many SaaS applications are typically built in a way that enables users to enter or upload content, the following aspects need to be taken into account in particular.

Content ownership

One of the primary concerns in cloud computing is determining ownership over the content uploaded and processed by the software in the cloud. This includes content entered and/or uploaded by the customer into the SaaS platform as well as all deliverables of the SaaS service (ie, the results created by using the application or, for example, the training data automatically generated by the software to continuously improve the results). Typically, all (copy)rights regarding the (processed) content and all outputs remain with the user.

Rights of use

The SaaS provider must grant the user the necessary rights to use its services for its own purposes during the term of the contract. This generally includes the non-exclusive, non-transferable and non-sublicensable right to use the software.

Second, the user must grant the SaaS provider all rights required for operating the SaaS service – in particular, the right to access, edit and transmit the content entered and/or uploaded by the customer into the SaaS platform, as well as the right to store the content, at least to the extent technically required for the provision of the services (eg, caching or intermediate storage of data).

Infringement of third-party intellectual property

In connection with the mutual granting of various rights of use, it is crucial that both parties indemnify each other against claims arising from copyright infringements of third parties. For example, the user alone should be liable if their content contains third-party trade secrets or other information that they are not allowed to disclose. Similarly, the SaaS provider alone should be liable if the software provided to the costumer contains third-party software that the SaaS provider is not allowed to pass on commercially.

Comment

Cloud computing and, in particular, SaaS applications are business models that have evolved significantly in recent years and continue to do so. While there is not yet much specific legislation or case law on the subject, most IP matters that arise in cloud computing can be resolved through specific contractual agreements. Seeking legal advice from IP experts well-versed in cloud computing is essential to effectively address these issues.

For further information on this topic please contact Claudia Csáky or Sarah Kasslatter at GRAF ISOLA Rechtsanwälte GmbH by telephone (+43 1 401 17 0) or email (c.csaky@grafisola.at or s.kasslatter@grafisola.at). The GRAF ISOLA Rechtsanwälte GmbH website can be accessed at www.grafisola.at.

Endnotes

(1) For the first article in the series please see "Impact of digitalisation and legal tech on IP law: part one – blockchain and smart contracts".