

SUMMARY REPORT

Question 216B

Exceptions to Copyright protection and the permitted uses of Copyright works in the hi-tech and digital sectors

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ANALYSIS OF CURRENT LAW AND CASE LAW¹

1. Exceptions or permitted uses applicable to a service provider in relation to user-generated content (UGC)?

The Working Guidelines asked the Groups to analyse the current law in their respective countries as to any exceptions or permitted uses in relation to UGC. The Groups were also asked to report on any limitations on those exceptions or permitted uses, whether those exceptions or permitted uses would also apply to UGC sites which are likely to attract infringing acts, and which types of service provider may benefit from such exceptions or permitted uses. UGC is, broadly, content uploaded onto websites by internet users rather than service providers and, in practice, will cover not only original content but also many third party works and original or adapted works, including the whole of or extracts from films, books and music.

As a preliminary note, many Groups made no distinction between different service providers, whether ISPs (internet service providers, which provide access to the internet by transmitting information from servers to clients), search engines (which search the web to aid the internet user to find sites of interest) or UGC providers such as FaceBook and YouTube (which encourage internet users to upload video and other content onto their sites, making the content publically available to others). Further, several Groups referred to "ISPs" when it appeared from their report that they meant to refer to service providers more generally.

Turning to UGC specifically, numerous Groups, including the UK, Japan, Switzerland, Argentina, Mexico and New Zealand, stated that there is no standing definition of what constitutes UGC. The remaining Groups were either silent as to whether there is a definition of UGC, or set out what they understood the term to mean without reference to

¹ It should be noted that copyright laws relating to electronic works in Canada and Mexico have been the subject of proposed reform recently, and may change in the near future. In Canada, a Bill proposing reform of copyright law recently lapsed due to political administrative reasons, and one of the stated intentions of this Bill was to bring Canadian copyright law in line with advances in technology and international standards. Similarly, in Mexico the ACTA treaty, which relates to copyright in the digital environment, has not yet been ratified due to opposition from internet-related groups, although it has been signed.

any national legislation, which suggests that these Groups also have no standing definition of what constitutes UGC.

All of the Groups stated that there is no specific exception relating to UGC, and that service providers need to rely on more general exceptions to copyright liability in order to be protected from liability. Several Groups identified the exception relating to the making of temporary copies as relevant, although this is better dealt with in question 2 below.

1.1 Hosting

Most of the Groups in the EU, as well as some outside the EU such as South Africa, identified the exception relating to hosting as relevant to a service provider in relation to UGC. The hosting defence in the EU derives from Article 14 of Directive 2000/31 (the **E-Commerce Directive**), and sets out that ISPs that host material on behalf of the recipient of the service are not liable in respect of that information, provided that they have no actual knowledge of any unlawful activity and are not aware of any circumstances from which it would have been apparent that the activity or information was unlawful. The law is still evolving, and the correct interpretation of the E-Commerce Directive has been the subject of a number of references to the Court of Justice of the European Union. As pointed out by the German Group, the European Commission has made clear that this exemption does not apply to claims for injunctive relief, which do not depend on liability on the part of the service provider. The similar exception in South Africa is a hybrid of the EU approach and the Digital Millennium Act in USA.

The hosting defence described above does not apply in the EU where the service provider has actual knowledge of the unlawful content or information and fails to act expeditiously to remove or to disable access to the information upon obtaining such knowledge or awareness. Numerous other Groups (Australia, USA, Japan, Argentina and South Africa, amongst others) outlined that a similar requirement relating to actual knowledge must be satisfied in order for an exemption from copyright liability to apply to a service provider. It is clear from the reports that there is a wide variation between the Groups as to what constitutes actual knowledge and the obligation on the service provider to remove the information. Further, some Groups stated that there is some wider debate as to how these issues should be dealt with.

With respect to what constitutes actual knowledge, one alternative, which is applied in a number of countries, is that the service provider has actual knowledge when it receives a notice giving details of the unlawful nature of the activity or information in question, such that the ISP knows with some precision about the activity or information. Some Groups, such as Spain, clarified that for actual knowledge to be obtained, it is necessary that there is a decision of a competent body that the data is unlawful, and that the service provider knows about this decision. Another alternative is demonstrated in Australia, where a service provider has no defence unless it can be shown that it had no knowledge of the infringing acts occurring using its facilities.

With respect to the removal of information, most Groups in the EU, as well as other Groups (USA, Japan, Brazil South Africa, amongst others), reported that the service provider must act expeditiously to remove or to disable access to the information upon obtaining actual knowledge that information infringes copyright. In many other Groups, the time after obtaining actual knowledge by which the service provider must remove the information varies. In Brazil, for example, the requirement is that the service provider “energetically” acts to curb infringement, after receiving notice that the content is illegal. In several Groups, such as Japan, this requirement on the service provider to remove information only

applies where it is technologically possible for the service provider to take measures to prevent the transmission in question. Several Groups outlined that the service provider must remove access to the infringing content “immediately”, and in Turkey it is within 3 days of actual knowledge.

1.2 Mere conduit

Some Groups in the EU, as well as some other Groups such as South Africa, stated that the exception for mere conduit (i.e. access providers), found in Article 12 of the E-Commerce Directive, may apply to service providers in relation to UGC.

1.3 General copyright exceptions

In contrast to the vast majority of the other Groups, Swiss law does not provide specific exceptions for ISPs (such as hosting or mere conduit exceptions), and therefore copyright exceptions of general application must be relied upon in Switzerland. On the contrary, the Mexico Group reported that theories based on indirect responsibilities are not recognised in Mexico, meaning that ISPs cannot ultimately be declared as infringers.

1.4 Additional limitations to availability of exceptions

Numerous Groups identified additional limitations to the exceptions to copyright infringement, relating to control by the service provider. South Africa and Japan stated that a service provider must not directly engage in the acquisition or transmission of the information. USA stated that if the service provider has the right and ability to control the infringing activity, it must not receive a financial benefit from the infringing activity. Similarly, in Japan, through a doctrine of vicarious liability known as the "Karaoke doctrine", a service provider could be held liable if it is found to have been managing the site and receiving profits from the infringement. In Canada, internet intermediaries must have no control over the material. Thus, liability may potentially be attracted to service providers in relation to UGC if they exercise some control in the communication of copyrighted material or actively monitor for infringement of copyright law. Therefore, in Canada, for example, it is unclear whether UGC sites such as Facebook and YouTube will be able to avail themselves of an exception since such services arguably exercise some control over the content posted thereto and engage in active monitoring of UGC. There is a similar requirement in South Africa, that the recipient of the service is not acting under the control or authority of the service provider.

Further limitations, or requirements for liability protection for service providers, include the requirement in USA and South Africa that the service provider designates an agent to receive notifications of claimed infringement, the requirement in USA and Australia (amongst others) that service providers adopt a policy to terminate subscribers' and account holders' access to the system if they are repeat offenders and (in USA) inform subscribers and account holders of such policy, and the requirement in the UK that ISPs notify subscribers of reported infringements and provide infringement lists to copyright owners, although this legislation is new and it remains to be seen whether UGC would be treated differently.

As a general rule for interpreting the exceptions, China stated that if infringing uploaded material is very popular (i.e. if it receives a large number of clicks), then a service provider will be held to a higher level of responsibility in terms of copyright infringement for that particular material.

Many Groups made it clear that there is no obligation on service providers to monitor the data which it transmits or stores, or to actively seek facts or circumstances indicating unlawful activity (in the EU, this is enshrined in Article 15 of the E-Commerce Directive). Indeed some Groups, such as Canada, pointed out that if the service provider does monitor the data in such a way then it may indicate that the service provider has control of the copyrighted data, meaning that the service provider may not be able to rely on an exception from copyright infringement.

Albeit not the direct subject of the working guidelines or reports it is interesting to note that in Europe there is a pending discussion on whether when a right holder seeks an injunction against a service provider the service provider should have to do any more than delete the infringing material and secure that it stays down in the future. This could contravene any principle that there is no (general) duty to monitor. For example in Germany in the case of clear-cut infringements, there is a duty to monitor in order to avoid further infringements, which are equally apparent and which have as their basis the same facts and circumstances. This was confirmed to be in line with EU law just recently by the CJEU in "L'Oréal/eBay" (a case which post dates the reports from the national and regional groups). On a related note, the UK Group noted that it is a point of debate whether the courts should order an ISP to introduce as a preventative measure a system for filtering all electronic communications, both incoming and outgoing, passing via its services, in order to identify the sharing of electronic files containing a work in respect of which an applicant claims to hold rights.

1.5 Summary

The majority of Groups felt that the exceptions for service providers are capable of application to operators of UGC sites such as YouTube and social networking sites such as FaceBook. In USA, for example, the courts have interpreted the statutory definition of "service provider" to include such sites. Most Groups that addressed this issue considered that the existing exceptions to copyright infringement for service providers would apply to UGC. For example, the hosting defence in the E-Commerce Directive grants ISPs immunity against liability only in relation to "information provided by a recipient of the service", i.e. UGC as opposed to content created by the ISP. Case law in the UK suggest that materials created by or proactively chosen by the operator of a website were not UGC, whereas user comments on bulletin boards did constitute UGC.

In Spain, it has been expressly held by the courts that the hosting exemption is applicable to YouTube, with the court noting that YouTube has an effective system in place to remove infringing content expeditiously once notified of an infringement.

On the other hand, the Australia Group stated that, although ISPs definitely benefit from exceptions, it is unlikely that they would apply to a wider range of other intermediaries such as search providers and social media platforms. Therefore, where UGC infringes copyright, a UGC provider, such as YouTube or FaceBook, is unlikely to benefit from the safe harbours from copyright liability. Similarly, the Philippines Group stated that UGC sites such as FaceBook and YouTube are not classified as service providers for the purposes of the exception to copyright infringement for service providers that merely provide access.

2. Exceptions or permitted uses in relation to temporary acts of infringement.

The Working Guidelines invited the Groups to summarise the exceptions or permitted uses in their respective countries in relation to temporary acts of infringement, in particular with respect to whether transient/temporary copies of electronic works, held for example in a cache or in a computer's working memory (RAM) amount to infringing copies. Most Groups assumed that the work being copied does not in itself constitute copyright infringement.

2.1 Temporary copies

Some Groups, such as the Philippines, Turkey, Chile, Argentina, Mexico and Panama stated that there are no relevant exceptions for temporary copies, and that temporary copies held in a cache or a computer's RAM can therefore amount to copyright infringement. However, most Groups reported that there are exceptions in relation to temporary acts of infringement.

Groups in the EU reported that, pursuant to Article 5 of EU Directive 2001/29, there is a general exception from copyright infringement for transient/temporary copies provided that certain criteria are met, namely that the acts have no independent economic significance in themselves, they are transient or incidental and form an integral and essential part of the technological process, and that their sole purpose is that of enabling either transmission in a network between third parties by an intermediary or a lawful use. Interestingly, Israel, New Zealand and Switzerland have based their exception on the EU model, and contain exceptions drafted in almost identical terms. Provided the conditions are met, copies of electronic works held in a computer's RAM would not be infringing copies. Whilst this exception may be broad enough to exempt from copyright infringement copies held in a cache or in a computer's RAM, there are also specific exceptions in some of these countries relating to caching.

Several Groups (in addition to those Groups with the general exception for temporary copying, set out above) reported that storing temporary copies in a computer's RAM will not constitute infringement. For example, in Canada the courts have held that temporary copies held in a 4-second rolling RAM buffer were non-infringing due to their transient nature. However, this decision is the subject of a leave to appeal the application before the Supreme Court of Canada.

The situation is less clear in the USA, and the debate appears to relate to the amount of time that the copy is temporarily stored in a computer's RAM. The US case of *MAI Systems Corp. v Peak Computer, Inc.* established that electronic works held in a computer's RAM are considered to be copying in a copyright sense, even though the copy disappears when the computer turns off. However, it was also held in *Cartoon Networks LP v CSC Holdings, Inc.* that storage of an electronic work in a buffer for 1.2 seconds was not sufficient to constitute copyright infringement. In short, the exact time limit for temporary copies to constitute copyright infringement is not yet determined.

Some Groups also set out exceptions for temporary copying which are related to the purpose of the copying rather than the manner of the temporary storage of the copy. In the UK, there is an exception to copyright infringement with respect to the temporary copying of computer programs for making back-up copies, decompilation or observing, studying or testing the functioning of the program. In Japan, temporary reproduction is permitted for the purposes of repair etc.. In Australia there is a safe harbour defence for an ISP storing temporary copies of copyright material of its users. In Brazil there is an exception to

copyright infringement if temporary reproduction is necessary for the use of the work. The use must also be authorised by the copyright owner, which acts to exclude from this exception the temporary reproduction of works which are posted on the internet by third parties without prior authorisation from the author. Similarly, in Japan there is an exception permitting reproduction for the purpose of exploiting the reproduced work on a computer.

Further, in Spain, there are two further requirements for the general exception for temporary copying to apply, namely that it does not unjustly prejudice the author's legitimate interests and does not adversely affect the normal exploitation of the work in question.

Notably, Israel has a very broad exception for temporary copies made during or for the purposes of transmitting over the Internet, provided the original copy is not itself infringing. This would seem to provide blanket protection for ISPs, since it can be argued that all of their activities are for such a purpose.

2.2 Caching

Numerous Groups (USA, Japan, Australia, Canada, New Zealand and numerous Groups in the EU, amongst others) reported a specific exception for caching. Caching is defined as where information is stored temporarily, through an automated process, for the purpose of enabling efficient transmission of material to users of the service. In the EU this exception to liability is provided in Article 13 of the E-Commerce Directive, and is subject to certain conditions being met. As for hosting providers, (albeit not directly covered in the reports from national and regional groups) it appears that possible claims for injunctive relief remain unaffected according to the EU system. In USA and Australia, the cache exception is based on the safe harbor model, whereby there is "safe harbor" protection from liability provided that certain conditions are met. In Canada, the exception is dictated by the need to deliver a faster and more economic service and, similarly, the exception only applies in New Zealand when the sole purpose is to enable efficient transmission of material to users of the service.

3. Exception for Private Copying

The Working Guidelines asked the Groups whether there is a private copying exception and, if so, what is its scope. Further, the Groups were asked whether copyright levies should apply for private use and, if so, what uses should be subject to the levy.

There was some overlap in the Groups' responses in the exceptions relating to temporary acts of infringement and private copying. This section covers the exceptions that Groups specifically identified as being applicable to private copying.

Many Groups, such as Ukraine, pointed out that their private copying exceptions are not applicable if the underlying copy itself infringes copyright.

Some Groups noted that there is an exception for private copying of small extracts of a given work for non-commercial purposes.

3.1 Broad exceptions for private copying

Some Groups reported broad exceptions for private copying for personal or family use and other equivalent uses, such as domestic use (Japan, Switzerland, Belgium and New Zealand, amongst others). Similarly, in Israel there is a broad exception for copying for

non-commercial purposes, and in Mexico and the Philippines, individuals and academic institutions may make 1 copy of a work.

3.2 Limitations to private copying exceptions

In Japan, this exception is subject to limitations restricting copying by automated reproducing machines for use by the public, circumvention of technological protection measures, and knowing reproduction of unlawful downloadable content (although this latter restriction is likely to apply for the majority of the Groups). Interestingly, in Switzerland and Belgium, the prohibition on circumventing technical measures does not apply with respect to copying by a person for personal use or closely connected persons, and such copying does not attract a levy.

3.3 Purpose

Those Groups which do not have broad, wide-ranging exceptions for private copying rely instead upon private copying exceptions which are based upon the purpose of the copying more than the identity of the intended recipient. For example, there is a research and private study exception in the UK, although the act should amount to "fair dealing" in order to come within the exception. South Africa and Israel reported a private copying exception within the "fair use" principle. Whilst this term is open to interpretation, commercial use will probably fall outside this exception, whereas copying for non-profit research or other personal purposes will most often be deemed fair. In Switzerland, use or instruction by a teacher within a class is excepted from copyright infringement, and there is an exception in the UK allowing visually impaired persons lawfully in possession of a copy of a copyright work which is not accessible to them because of their impairment to make a personal accessible copy for their own personal use. Further, USA, Brazil, Argentina and Israel (amongst others) reported an exception for private copying provided the copy is intended as a backup copy or for archival purposes.

Several Groups outlined some different limitations to their country's private copying exception. For example, the Philippines and Turkey reported that it is a requirement that copying is not for profit in order for the private copying exception to apply. Others, such as Indonesia and China, noted the requirement that details of the author and title of the work be fully cited. In Romania, in line with the Berne Convention and Agreement of Trade-Related Aspects of Intellectual Property (TRIPS), there are requirements that the exception does not unjustly prejudice the author's legitimate interests and does not adversely affect the normal exploitation of the work, and that the work has already been communicated to the public.

3.4 Format shifting

In many Groups (USA, Australia and Israel, amongst others) there is a private copying exception to allow non-commercial copying by consumers of material into a different format (format shifting). In USA, this is restricted to digital and analogue music. Israel appears to be out of date in this respect, as there is an exception for copying onto tapes, but not digital formats. Whilst format shifting was not explicitly stated to be exempted from copyright infringement by many Groups, a large number of them state that a levy is applied to recording media, such as blank CDs, and recording devices, indicating that format shifting is effectively allowed in these jurisdictions. A large number of Groups were silent as to format shifting, but the UK Group reported that, whilst there is currently no exception for format shifting, it has been recommended that a private copying exception be introduced to allow format shifting.

3.5 Levies

In relation to whether levies are applied, it may be useful to point out that whilst many of the Groups reported that a private copying levy is payable, a number also reported that no private copying levy is charged (such as the UK, Argentina, Panama and Israel, amongst others). A number of other Groups were silent on this issue. Between those Groups where a private copying levy is applied (USA, Japan, Canada, Switzerland, Turkey, amongst others) the media and equipment upon which a levy is applied varies greatly. In many cases, Groups reported attempts to restrict the levy to items which will very likely be used for private copying. For example, in USA, a levy is applied on blank CDs labelled and sold for music user, but not DVDs or generic blank CDs, and is applied on stand-alone recording devices but not generic computer recording devices. Other Groups, such as Turkey, reported that a levy is applied much more widely to all kinds of storage media, including DVDs and hard disks, as well as all technical devices used for reproduction of works.

In terms of copyright levies for private use Brazil stated that, due to technological advances, broad levies applied to private copying have become unnecessary since there are other options such as licensing of works, perhaps on a pay-per-use basis, which give the user the possibility of accessing a whole library of works.

Interestingly, the Spanish Group reported that a distinction has been drawn whereby a private copier is obliged to pay compensation, whereas a company or professional would not owe compensation for private copying due to the different use made of the equipment and media. Similarly, in Sweden products to be used by professionals in their professional activities are exempt from a levy.

4. Copyright infringement of hyperlinking or location tool services provided by search engines, and exceptions or permitted uses in relation to the same

The Working Guidelines invited the Groups to explain the conditions under which hyperlinking or location tool services provided by search engines infringe copyright. In the vast majority of cases, the Groups reported that there were no specific rules relating to hyperlinking or location tool service, and standard copyright principles are applied. It is helpful to split this section by initially discussing linking to content which does not in itself infringe copyright, and at the end of the section discuss linking to content which does in itself infringe copyright.

4.1 Hyperlinking per se

The majority of the Groups (USA, UK, Japan, Australia, Switzerland, Israel, South Africa, amongst others) reported that hypertext linking per se does not constitute copyright infringement. This is where a link is created which, when clicked on, instructs the web browser to go to a new web address, where the work is legally made publicly available. This is not an exception to copyright infringement, but rather does not constitute copyright infringement due to not involving copying in the copyright sense (since by clicking on the link, the user is actually transferred to the website and no reproduction is involved) and/or due to the search engine not performing any of the exclusive rights of copyright owners (including “communicating to the public” the copyright work, since the work will instead be communicated legally to the public on the linked website). Interestingly, the Philippines Group stated that the situation is different in their country, with hypertext linking by search engines constituting an infringement of copyright, since it entails procuring copies of works without the consent of the copyright owner.

Many Groups emphasised the importance of hyperlinks to the efficient operation of the Internet, with some (such as Spain) putting forward the argument that producing hypertext links to content legally published on the Internet cannot constitute copyright infringement for this reason. In the UK and South Africa, an end user could in principle be liable for copyright infringement where he accesses a website through a hypertext link on a search engine results page, in circumstances where the website has not authorised the search engine to display the link. However, search engines are expressly or impliedly authorised to publish hypertext links and extracts of contents, and therefore neither the end users nor search engine are in principle liable for infringement of copyright.

However, many Groups appreciated that the situation may be different with respect to deep linking, inline linking and framing. Deep linking is where a hyperlink links to a specific page or image on a website, instead of that website's main or home page. Inline linking is where graphics from one website are viewable within the main body of a second website (such as the "preview" function on Google). Framing is where a website presents linked content as its own when linking to a third party website. As summarised by the Spain Group, this difference in treatment is largely because the entity that inserts such links (e.g. the search engine) is participating and intervening, to some extent, in how the public communication is made, given that it is providing access to content in a manner which is contrary to the initial desire of the website owner or the creator of the linked work.

Some Groups, including Italy and Switzerland, reported that framing may result in the linking site owner being liable for copyright infringement. In the USA, a search engine's display of a thumbnail version of copyrighted images is not copyright infringement, but it is unclear whether framing full size versions of the same images is an infringement of copyright.

With respect to inline links, the situation in the USA is the same as for framing. The position in Japan is debatable where a search engine provides inline links to infringing contents, whether under the Karaoke doctrine (whereby a service provider can be held liable if it is found to have been managing the site and receiving profits from the infringement) or after failing to remove the link after receiving a notification. Similarly, in Israel, actions which involve the formation or display of abstracts of the work may constitute copyright infringement.

4.2 Linking to infringing content

Turning to what happens if a link provided by a search engine provides access to content which itself infringes copyright, there seems to be a common approach in some countries (including UK, Australia, Canada and Switzerland) to look at how the service is used, the service provider's intentions, and whether the service provider can be said to be authorising infringement. In the *Newzbin* case in the UK, a company, which provided a search facility and hyperlinks enabling users to download unlawful copies of films, was liable for copyright infringement since, amongst other reasons, it clearly knew that its service was used mainly for unauthorised downloading of infringing copies. The court will look at how a service is being used when coming to a conclusion on copyright infringement. Similarly, in Australia linking could infringe a copyright work where it amounts to a linker authorising acts of copyright infringement by internet users.

In Canada, a helpful distinction is made between "automatic" hyperlinks, which contain a code embedded in a web page that instructs the browser, upon entering the site, to automatically download a file from a second site, and "user-activated" hyperlinks, which require a user to click on the link in order to activate it. Only the former constitutes

authorising copyright infringement, as the service provider in this situation holds itself out as responsible for the material. Similarly, in Switzerland, there may be infringement where a website offers a catalogue of content offered on other websites that can be accessed through links directly onto that content.

A number of Groups, including China, Spain, Italy and Belgium, reported that the removal of the link on actual awareness of the infringement is required, although in Spain actual awareness will only occur through awareness of a decision of a competent authority. In Italy, a search engine has been ordered by the courts to remove a link to a website which contained copyright infringing content.

Switzerland broached the topic of criminal liability on the part of the search engine. A recent decision shows that providing "automatic" hyperlinks to infringing content can result in the operator of a website being guilty as an accessory to the crime of copyright infringement. As with the *Newzbin* case in the UK, the court looked at how the service was being used, and it was important that the website operator knew that the users would be committing copyright infringement by accessing the links he provided. Switzerland noted that such knowledge is unlikely to be found on the part of a simple search engine, apart from by notification.

5. Other relevant exceptions or permitted uses

The Working Guidelines asked the Groups whether there are any other exceptions or permitted uses which the Groups considered particularly relevant to the digital environment (not previously studied in Q216A).

The majority of the Groups reported that there were no other relevant exceptions or permitted uses.

The most common additional exception and permitted uses which were considered relevant by the Groups were the exceptions for reverse engineering, decompilation and interoperability (Japan, Switzerland, Israel and Philippines, amongst others). In addition, exceptions for the making of derivative work, for making a copy in a format for the benefit of people with a disability or blind people, and the first sale doctrine, whereby a purchaser may transfer copyrighted materials that have been sold or transferred under the authority of the copyright holder to another within the permission of the copyright holder.

HARMONISATION

6. Adequacy of existing copyright exceptions and permitted uses

The Working Guidelines invited the Groups to opine on whether the exceptions to copyright infringement for UGC, transient/temporary copies, private copying and hyperlinking are suitable to hold the balance between the interest of the public at large and of copyright owners in the hi-tech and digital sectors, whether these exceptions are appropriate to the technology, understandable and realistic and whether they would like to see any additional exceptions relevant to these areas.

Many Groups (Spain, Poland, Canada and the UK, amongst others) reported that the system in their country for protecting copyright is based on a framework preceding the digitisation boom, and it is therefore necessary to specifically introduce and modify

legislation to bring the law into line with the changes which have taken and are taking place in the digital environment. This is particularly evident in Canada, where owners of copyrighted works have seen large-scale infringement take place via peer-to-peer sites, but have largely avoided litigation because of legal uncertainty and lack of legal protection.

Numerous Groups expressed a concern that technology is evolving at a rate which makes it impossible for the law to keep pace. Many Groups reported that they would be grateful for guidance on some newer issues that have arisen with modern technology, such as issues relating to UGC and hyperlinking. Interestingly, the Brazilian Group reported that it was an advantage that the relevant copyright exceptions in Brazil are general and not technology-specific because, due to technological changes, the more specific a law, the faster it will become obsolete.

6.1 UGC

Many Groups, including Switzerland and the Philippines, reported that the law in this area is undeveloped and that it would be helpful to have clear legislation regarding UGC. Some Groups, such as Estonia, reported that there is a need for a unified regulation on UGC, so as not to leave the development of the law to case law and risk forming fragmented law on the issue.

On the other hand, some Groups, such as Switzerland and Brazil, reported that even though there is no general limitation for UGC, there is no need to change this at present, since an adequate balance is struck between the interests of the public at large and the copyright owners. Other Groups, including Argentina, reported that the lack of specific rules on copyright exceptions in the hi-tech and digital sectors, including relating to UGC, result in an adequate balance not being struck between the interests of the public at large and the copyright owners.

The Japanese Group outlined a concern regarding the limitation to the exception from copyright infringement that the service provider must not manage and receive a profit from the infringing activities, that these criteria can be difficult to interpret and therefore hinder the development of new services.

The Polish Group reported that there is a need in the EU to more obviously draw a distinction between different service providers with respect to UGC, such as those which provide a purely technical role in the hosting and those that actively encourage users to upload UGC (such as YouTube and FaceBook).

The Swiss Group concluded in its report that the lack of a clear exemption from liability of ISPs with regard to UGC is not appropriate for digital technology.

6.2 Transient/temporary copies

Many Groups (Japan, Poland, Switzerland, Belgium and Brazil, amongst others) reported that the current exceptions are suitable to achieve a proper balance between the interests of the public at large and copyright holders, and that this is appropriate to the technology, understandable and realistic.

However, some Groups, such as Spain, reported that the law does not in all cases maintain the balance between the interests of the public at large and of copyright owners. The Spanish Group recommended a relaxation of the requirements in the EU for the exception from copyright infringement for transient/temporary copies that the acts have no

independent economic significance in themselves, they are transient or incidental and form an integral and essential part of the technological process, and that their sole purpose is that of enabling either transmission in a network between third parties by an intermediary or a lawful use.

6.3 Private copying

Some Groups (Japan and Poland, amongst others) reported that the parallel application of the private use exceptions and the system of private copying levies achieves a proper balance between the interests of the public at large and copyright holders, and it is appropriate to the technology, understandable and realistic. Some Groups, such as Belgium, did not feel that this was the case in their country.

A few Groups, including Spain and Switzerland, reported that the exceptions for private copying are adequate, but the system of levies for private copying is not adequate. The ongoing litigation in Spain relating to such levies shows the inadequacies in that system. The Swiss Group reported that the levy system in Switzerland requires adaptation to recent digital technology and uses of work on the internet. The UK Group reported that a recent report in the UK recommended that no levies be introduced. Similarly, Switzerland noted that, given the evolution of technology (increasing hard disc capacity, online storage facilities, etc.), alternative solutions may need to be explored such as a levy on storage capacity in personal computers, or a flat-rate remuneration for access to protected work on the internet (such as Spotify). There was also an acknowledgment by some Groups, such as South Africa, that any private copying levy should not be applied to copying for some uses, such as use for educational purposes.

The Japanese Group reported that there has been much criticism of the levy system in Japan, including that the levies are for a set amount of money at the time of purchase, regardless of the frequency or purpose of reproduction.

The Canadian Group reported that it is crucial for time-shifting and format-shifting exceptions to be introduced in order to allow users to make use of private copying exceptions in Canada. Similarly, in the UK the time-shifting exception is likely to be interpreted narrowly so as not to cover the making of recordings for placing in a collection for repeated viewing or listening. Given the freedom afforded to users by modern technology, such as the ability to copy CDs and DVDs onto PCs for uploading to various portable devices, the UK Group reported that the current private copying exceptions regime in the UK is not appropriate to the technology. The UK Group also suggests that format-shifting for private use should be exempted to reflect the reality of digital age users.

On a related note, the Japanese Group reported that adjustments need to be made to the private use exceptions and the system of private copying levies in view of recent developments in copyright protection technologies.

6.4 Hyperlinking

Some Groups pointed out that there is insufficient jurisprudence on hyperlinking, and that clear laws should be introduced to specifically cover the various categories of hyperlinking (Spain, Poland and Canada).

On the other hand, some Groups stated that the interests of the public at large and of copyright owners are balanced and that the law in this area is appropriate, understandable

and realistic, despite there being no specific limitation applicable to hyperlinking (USA, Switzerland and Estonia).

Several Groups, including Switzerland, indicated that there is some uncertainty regarding the level of knowledge that a link provider must have before being liable for contributing to copyright infringement, and reported that they would welcome some clarity on this issue.

7. Harmonisation through an exhaustive or prescribed list of exceptions and permitted uses

The Working Guidelines asked the Groups whether, given the international nature of hi-tech and digital fields, they consider that an exhaustive, or even a prescribed, list of exceptions and permitted uses should be prescribed by international treaties in the interests of international harmonisation of copyright.

Most Groups (Japan, Spain, Poland, Romania, Australia, the UK and Canada, amongst others) indicated that it is desirable to seek international harmonisation, for reasons such as the promotion of development in the hi-tech and digital fields. Several Groups (Poland, Switzerland, Australia and Estonia, amongst others) pointed out that international harmonisation is particularly important in this area given the inherent international scope of exploitation of works in digital form. Interestingly, the Canadian Group reported that, unless Canada's copyright laws are consistent with dominant international practice, barriers may be raised to Canadian owners in terms of exploitation of their works and to Canadian users in terms of their ability to obtain legitimate access to content that is available in other jurisdictions.

Numerous Groups acknowledged that, in order to achieve harmonisation, the preparation of a list of exceptions and permitted uses for copyright infringement would be necessary. However, there was a vast difference of opinion between these Groups as to whether the list should be prescribed, exhaustive or non-exhaustive.

Several Groups, including Spain, Belgium and Argentina, recommended a prescribed list of copyright exceptions, with the Belgian Group specifying that this is because a list of optional exceptions cannot lead to a real harmonisation.

Some Groups, such as Japan, reported on the importance that the national diversity of copyright law should be preserved. A larger number of Groups (Japan, Switzerland, Canada, the UK, Chile and Estonia, amongst others) commented on the importance of respecting the different cultures of countries. For this reason, several Groups, such as Japan, reported that a prescribed list should not be prepared, but instead an exhaustive list which offers a certain degree of flexibility and freedom of choice would be appropriate for harmonisation. The USA reported that an exhaustive list would be useful, but noted that using international treaties to promulgate and adopt the exhaustive list is historically problematic. However, the Canadian Group pointed out that whilst such a list may aid certainty in the marketplace, countries may wish to have the power to include exceptions not included on the list if they wish. Further, some Groups, including Spain, pointed out the risk of creating areas of uncertainty or impunity if the route recommended by Japan is taken. The Swiss Group observed that this situation that Spain warned of, which may lead to copyright owners forum shopping, may also arise if a list is not created and there is no international harmonisation.

The Australian and Mexican Groups suggested that a non-exhaustive list is to be preferred so as to enable the legislation to keep up with the changing technology. This appears to be

in line with the view of the Canadian Group. The Mexican Group suggests this approach in conjunction with the application of Three-Step Test (described below).

The Bulgarian Group made the sensible point that, for a list to work, it is first necessary for the whole copyright regime to be harmonised internationally, since a harmonised list of exceptions does not seem appropriate where the general rules to which such exceptions will apply are not fully uniform.

Several EU Groups reported that the European Community Directives establish an exhaustive list of exceptions, which could serve as a model. The Israeli Group also reported that the list in Israel's legislation could usefully be used for guidance.

Some Groups indicated that an exhaustive or prescribed list is unlikely to be the best way to progress (Romania, Switzerland, Canada, the UK and Thailand, amongst others). The Swiss and Thai Groups reported that technology is moving so rapidly that a treaty containing an exhaustive list might be out-of-date as soon as it is adopted, and that a more flexible approach should be taken.

Many Groups reported that all countries should apply the general standards of the Three-Step Test when interpreting and applying copyright exceptions (Spain, Switzerland, Canada, the UK, Belgium, Chile, Mexico, Italy, Sweden). Some of the Groups, such as Mexico, suggested this in addition to a list of exceptions. The Three-Step Test imposes constraints on the possible limitations and exceptions to exclusive rights under national copyright laws, and was first applied in Article 9(2) of the Berne Convention in 1967. The test is as follows:

“Members shall confine limitations and exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rights holder.”

8. CONCLUSION

Based on the Group Reports it seems that the Working Committee will have a significant task in examining a number of issues in which the majority of the Groups expresses some concerns. Such issues include:

- whether, in progressing further harmonisation on the issues listed below, exhaustive or prescribed lists of exceptions/permitted uses would be appropriate or not. If not, should a non exhaustive list be provided? How should any such list be formulated?
- whether there is a need to address the specific problem of UGC and the role of ISPs or other service providers as regards UGC? If yes, what exceptions/permitted uses should be available to ISPs or other service providers in this regard (potentially as regards hosting, mere conduit of information etc) and in what circumstances?
- Can ISPs or other service providers rely on exceptions or permitted uses in relation to UGC where they had actual knowledge of the infringing activity or should have had such knowledge or alternatively where they exercise some control over (or indeed create or choose) and/or receive financial benefit from UGC that is posted?

- What type and level of remedial action should ISPs and other service providers be required to take in relation to infringing UGC? Should we differentiate between claims for injunctive relief and relief more generally e.g. for damages? Is there a distinction between the obligations of, for example, service providers who actively promote the uploading of UGC (eg FaceBook or YouTube), host providers storing UGC and/or mere access providers? Should each of these providers have to actively police infringing UGC or simply take down and/or block access to infringing UGC? Should such providers be required to notify subscribers and/or copyright owners of copyright infringements? Should they have to implement preventative measures eg electronic filters to identify infringing UGC?
- The development of an exception for transient/temporary copies of electronic works and whether such exception should be subject to limitations such as that the acts have no independent economic significance in themselves, they are transient or incidental and form an integral and essential part of the technological process and that their sole purpose is that of enabling either transmission in a network between third parties by an intermediary or a lawful use.
- Should there be specific exceptions for temporary copying related to the purpose of the copying eg (1) in relation to computer programs for making back up copies, decompilation or observing, studying or testing the functioning of the program; or (2) in relation to works held in a cache or in a computer's RAM?
- The development of an exception for private copying of electronic works and whether such exception should be subject to limitations such as non commercial use, research and private study, how many copies, distribution to whom, back up or archival copies, use for access by disabled persons, etc keeping in mind the need to protect the rights of copyright owners? (The Working Committee should also consider whether existing AIPPI Resolution Q216 is satisfactory as regards format shifting for private use or whether a further resolution is required in this regard).
- Should copyright levies apply for the private copying of digital works? If not, what, if any alternative solutions should be used to fairly compensate copyright owners (e.g. licence fees or other remuneration for access to protected works on the Internet)?
- It seems that there is consensus that hyperlinking of itself entails no reproduction of the work and thus does not constitute copyright infringement, where the work, as linked to, is legally publicly available. Can AIPPI reach a resolution on the position on deep linking, in-line linking and/or framing perhaps by reference to the degree of participation/intervention by the entity that inserts the links?
- For links to infringing content, can AIPPI reach a resolution that if, in all the circumstances, it appears the service provider is authorising infringement it is liable? If it is not liable can the right holder at least raise a claim for injunctive relief against the service provider?
- Clarification as to the application of the "three step test" with respect to any relevant copyright exceptions or permitted uses. Should national laws be harmonised relying on the three step test?
- The Working Committee should have regard to AIPPI's resolution Q216 and whether and to what extent that resolution already covers any of the issues set out above.