Summary Report

Question 216A

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

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1. BACKGROUND

The Executive Committee of AIPPI has included on the agenda of the 2010 AIPPI Congress the issue of exceptions to copyright protection and permitted uses of copyright works in the hi-tech and digital sectors. As highlighted by the Working Guidelines, new uses of copyright works arising from the rapid development of the Internet and digital technologies present an enormous challenge to maintaining the traditional balance between the need to protect creative endeavours and the needs of users to access and use copyright works. As discussed further in this report, the copyright regime governing these new uses is largely based on a series of narrow exceptions and permitted uses specifically introduced to address the new technologies applied in conjunction with more general exceptions and permitted uses.

AIPPI previously studied "protection of computer programs and software" under Q57 and "database protection at national and international level" under Q57. The resulting reports indicated that the application of copyright law to emerging technologies would require continued investigation and monitoring. Further, at the AIPPI Forum Singapore 2007, Session III discussed Copyright and Digital Rights Management: Moving beyond Protection?.

The AIPPI has chosen to investigate this vast topic in two parts: Q216A, which is the subject of this report, and Q216B to be considered in Hyderabad in 2011. This report examines a number of areas where there are significant discrepancies between countries as to: (i) any copyright exceptions/permitted uses for activities of internet service providers (**ISPs**), format shifting or "digitisation" and orphan works; (ii) the existence and application of fair use/fair dealing provisions, and (iii) the recognition of international treaty principles in national law. This report also looks at whether existing copyright exceptions/permitted uses provide a balance between the rights of the user and of the copyright owner, and whether any additional exceptions are necessary to maintain that balance. Finally, this report discusses the appropriateness of greater harmonisation through an exhaustive or prescribed list of exceptions/permitted uses implemented by international treaty, including proposals as to which areas should be harmonised.

The questions posed to the AIPPI National Groups have been met with a high level of interest. In total, the Reporter General has received 37 Group Reports from the following National Groups (in alphabetical order): Argentina, Australia, Belgium, Brazil, Bulgaria, Canada, Chile, China, Ecuador, Egypt, Estonia, Finland, France, Germany, Hungary, Indonesia, Israel, Italy, Japan, Latvia, Mexico, The Netherlands, New Zealand, Norway, Panama, Paraguay, Philippines, Portugal, Singapore, South Africa, Spain, Sweden, Switzerland, Thailand, Turkey, the United Kingdom and the United States.

The individual Group Reports largely provided clear answers to the Working Guideline questions and the majority of them also gave comprehensive and detailed information about specific rules and case law as to the issues outlined above. Some countries including Chile chose not to substantively respond to the questions in light of imminent amendments to national copyright legislation.

Due to the high number of Group Reports, and the differences in the presentation of the national legal solutions, this summary report cannot be considered as a replacement to the detailed rules explained by each individual Group or the case law and examples used by the Groups to illustrate the rules in practice. Therefore, if particular information is required or specific legal issues arise, it is advisable to refer to individual Group Reports. Instead, the Summary Report will highlight the main issues which evolved from the Group Reports and will most likely form part of the Resolution.

2. SUBSTANTIVE LAW

2.1 Exceptions and permitted uses in relation to the activities of ISPs or other intermediaries

The Working Guidelines asked the Groups to present the state of the substantive law in their respective countries as to any exceptions or permitted uses in relation to the activities of ISPs or other intermediaries. The Groups were also asked to report any limitations on those exceptions/permitted uses and any obligations to take steps in relation to infringing customers. Further the Groups were asked to discuss how such obligations affect the scope of the exceptions/permitted uses.

Thematically, the question regarding limitations is more appropriately dealt with in conjunction with an analysis of how obligations of service or access providers with respect to infringing customers affect, if at all, the scope of exceptions/permitted uses applying to service or access providers.

It is important to note that the following discussion relates to exceptions or permitted uses applying to the *activities* of ISPs or other intermediaries and not the ISP or other intermediary itself. Therefore, the availability of any exceptions/permitted uses will depend on the precise nature of the activity rather than the type of service provider.

The first important distinction to make is that certain jurisdictions have added exceptions/permitted uses specifically intended to govern the activities of ISPs and other intermediaries, whereas in other jurisdictions, ISPs and other intermediaries can only rely on more general exceptions/permitted uses as prescribed by national copyright law.

The vast majority of the Groups reported that exceptions/permitted uses applying to activities of ISPs or other intermediaries were recognised in their jurisdiction. The majority of the European, North American and Asian Groups reported that such exceptions/permitted uses were recognised in their jurisdiction. While differences do exist between these jurisdictions, broadly, most of the Groups reported exemptions for:

- Mere conduits
- Caching
- Hosting
- Reproduction where such use is transient or incidental and an integral and essential part of a technological process the sole purpose of which is to enable the transmission

within a network via an intermediary or to enable the lawful use of a copyright work, provided that the technical process has no economic significance (France, Belgium, Germany, the United Kingdom, amongst others).

These exceptions are predominately based on European Directive 2001/29 (the EU Information Society Directive), the European Directive 2000/31 (the EU E-Commerce Directive) and the American "safe harbour" model. It is important to note that the interpretation of the exceptions in the EU E-Commerce Directive is currently the subject of a number of references to the Court of Justice of the European Union.

The remaining Groups reported that the only exemptions/uses available for the activities of ISPs or other intermediaries were those generally available under copyright law. For most Groups, these exceptions/permitted uses are an exhaustive list. As an example, the Canada Group reported that a similar exception includes providing the means of telecommunication necessary for another person to communicate the work. Although not aimed specifically at the activities of ISPs, by and large this exception will apply to all entities acting as Internet intermediaries and will cover caching, hosting or other functions in supporting of the sending, transiting or receipt of the originating communication over a public network.

Of the Groups which reported no ISP activity-specific exceptions/permitted uses, several reported that the issue was under consideration at the legislative level (Argentina, Brazil, Norway, and Thailand, amongst others). For example, Argentina has three legislation proposals based mainly on the European E-Commerce Directive).

The majority of the Reports did not discuss what type of service provider may benefit from any exceptions or permitted uses. The United States noted that one safe harbour provision applied to traditional ISPs only (i.e. connection providers) but that the majority of the relevant legislation (the Digital Millennium Copyright Act) applied to a more general definition of service provider. United States legislation defines service providers as any provider of "online services or network access" which means the safe harbour provisions will nominally apply to User Generated Content (**UGC**).

The majority of the Groups indicated that in order to benefit from any exception, the ISP must have no actual knowledge of the infringing activities. Some jurisdictions require that the ISP make no economic gain that is directly attributable to the infringing activity (as in the United States) while others, such as the United Kingdom do not. As noted by the United States, whether wilful blindness qualifies as knowledge remains a contentious issue, one currently being dealt with in the *Viacomm v YouTube* case. At the moment, a service provider who is aware of facts of circumstances from which infringing activity was apparent will not qualify for safe harbour in the United States.

The majority of the Groups reporting exceptions for the activities of ISPs explicitly or implicitly imposed an obligation to take down allegedly infringing material on notice from the owner. This obligation can be found either enshrined in statue or case law. Often there was an obligation to block access as well. In several jurisdictions, the ISP could be required to disclose the identity of the infringer (as in the United States by subpoena). In no jurisdiction does such remedial action require the ISP to actively seek out infringers, although as to wilful blindness please see the discussion above.

Most Groups indicated concern as to the level of knowledge an ISP has to have before they are obliged to take remedial action (as opposed to any level of knowledge that might be relevant to the exceptions/permitted uses applicable to them).

Most Groups did not make a distinction between single and repeat infringers. In contrast, the United States requires service providers to adopt a termination policy that terminates access of customers who repeatedly infringe copyright material. United States statute does not define repeat infringement and the term has been interpreted loosely. Australia requires carriage service providers (equivalent to ISPs or service providers) to implement a policy of termination for repeat infringers in order to take advantage of exceptions. Closely related is the rule reported by the France Group that when a host has been given notice of some unlawful content, it can be found liable if, after it has withdrawn this content a first time, the latter is once again put online by a different user and the host does not carry out the necessary diligence in order to avoid the repetition of the infringement (*H&K v Google*).

In the United Kingdom, failure to take down an infringing user's content or block that user's access does not mean the ISP cannot rely on the caching exception. In contrast, immunity for caching under those (other) countries mirroring the EU E-Commerce Directive is conditional on the take-down or blocking requirement.

2.2 Digitisation and format shifting

The Working Guidelines asked the Groups to summarise the position on digitisation and format shifting of copyright works, in particular with respect to any specific exceptions permitting libraries to digitise or format shift for archival or other purposes. Digitisation involves converting material into data which can be read by a computer and transferred to other computers. Format shifting involves converting material available in one medium to another medium.

In general, most Groups indicated that while there were no specific exceptions for archival digitisation or format shifting for archival or other purposes, the more general reproduction exceptions, such as for educational or research purposes, for news and review, and for private copying are broad enough to capture format shifting and digitisation by libraries (Belgium, United States, Australia, Thailand, amongst others). For example, the Indonesia Group reported that the general copyright provisions included reproduction by libraries, scientific or educational institutions and documentation centres of a non-commercial nature solely for the purpose of conducting their activities. These general exceptions are normally qualified by various limitations too numerous to list in full here but which include non-commercial use, legally publically available, type of medium, number of copies permitted and paying a levy to a collecting society. For example, the United States allows consumers to format shift analogue or digital sound recordings but no format shifting of video is allowed. In Italy, images and music can be displayed on the Internet for non-commercial academic or scientific purposes.

Groups indicating specific exceptions for libraries include Switzerland, which explicitly allows libraries, museums and archives to safeguard their collections in digital format, as long as the copies are not used for any economic or commercial purpose.

Several Groups (Switzerland, Egypt, Turkey, amongst others) report a private copying exception, predominately restricted by type of work (i.e. audio, film, etc.) or intended use (commercial or personal). In relation to sound recordings, this private copying exception has been interpreted to allow digital storage of music in Israel. Interestingly, Switzerland allows private copying for use within a small group of friends.

In the United Kingdom, there is no exception for digitisation or format shifting. Therefore, the act of copying a music file from a CD to a computer for use with an MP3 player would be considered an infringement. Libraries do not have any specific exemptions to format shift or make digital copies, although draft legislation is being consulted on whereby certain

institutions can copy a work in different format if "necessary or expedient" for preserving or replacing an item.

Interestingly, format shifting is expected to fall under fair use in the United States, at least in certain circumstances. Time shifting has been held by the Supreme Court to be fair use, as have remote storage digital video recorder services, and the digitization of entire works for the purposes of detecting plagiarism.

Several Groups indicated that their countries had exceptions designed for narrow circumstances, such as format shifting for visually-impaired persons (Argentina, Canada) or the display on the Internet of images and music for non-commercial, academic or scientific purposes (Italy).

Overall, there is a wide range of approaches, ranging from a private copying exception to outright infringement in all circumstances. Several EU Member States have noted this is an area that requires updating, and is best addressed at the EU level.

Several Groups reported that format shifting for limited purposes, including maintaining or operating the library or archives or providing library services, was permissible. The "not for commercial advantage" may preclude Google Books falling within this exception. To be covered by the exception, Google Books would have to show there is no economic purpose to their activities. In many jurisdictions, the private copying exception does not apply if the work is commercially available at a reasonable price in the correct form.

2.3 Orphan works

The Working Guidelines also asked the Groups to indicate any exceptions or permitted uses for orphan works and if so, to discuss the scope of such exceptions or permitted uses. The use of orphan works is particularly problematic for libraries, museums and other similar institutions, as well as commercial groups such as Google, who want to develop digital archives of their collections to facilitate access or preservation where their collections often contain a large percentage of orphan works.

The vast majority of the Groups (Argentina, Australia, Belgium, Bulgaria, China, Ecuador, Egypt, Estonia, France, Germany, Indonesia, Israel, Italy, The Netherlands, New Zealand, Norway, Panama, Paraguay, Philippines, Singapore, South Africa, Spain, Sweden, and Thailand) reported that there are no exceptions/permitted uses specifically applying to orphan works. In these jurisdictions, orphan works are dealt solely by the general copyright exceptions/permitted uses.

The only Groups to report an exception/permitted use specifically for orphan works not limited by type of use are Turkey and the United Kingdom. In Turkey, an orphan work can be copied, published and reproduced unless authorship is proven. This exception appears to operate automatically i.e. without application to a governmental authority or licensing body for permission or licence. In the United Kingdom, statute provides exceptions for the use of a literary, dramatic, musical, artistic work or film where it is not possible by reasonable inquiry to ascertain the author's identity, and it is reasonable to assume copyright has expired or that the author died 70 years or more ago.

Other Groups reported permitted uses for certain purposes or by a specific body. The United States Group indicated a more limited permitted use for orphan works for the purposes of research, subject to certain conditions. The United States also has a limited exception for libraries to make copies of certain orphan works. As indicated in the section on digitisation and format shifting, the Belgium Group reported that certain non-profit

making organisations, including all publicly accessible libraries, museums and archives can reproduce all works in their collections for archival purposes and for preservation. In the United States and Belgium, amongst others, the key factor is that the usage is not for commercial purposes. In Portugal, statute appears to allow the free use of works made available to the public (including orphan works) provided such use is made by a public library, archive or other public institutions providing education and research. As one can see, these permitted uses are limited by the type of use or the type of body using the work.

Several other Groups (Canada, Hungary, Japan and Mexico) have mechanisms whereby a person wishing to use an orphan work must make an application to the relevant governmental authority (in Canada, the Copyright Board of Canada, in Hungary, the Patent Office, and in Japan, the Commissioner of the Agency for Cultural Affairs) to obtain a licence to do so. The authority will issue a licence when it is satisfied that the applicant has made reasonable efforts to locate the owner and that the owner cannot be located. Several countries (including Finland, Latvia, Mexico, Norway and Switzerland) indicated that the use of orphan works may fall under collective management schemes.

In the United Kingdom, the creation of an extended licensing scheme is being considered under proposed legislation (the Digital Economy Bill).

Argentina reported that there may be an exception for orphan works by analogy, where the general rules on *res nullis* and "lost objects" may mean a person wishing to use an orphan work can ask the permission of the Court to use the work for a fair royalty.

Interestingly, in Brazil, the State has the obligation to defend the integrity and authorship of works in the public domain, which includes works that have no living or known authors. The response from the Brazil Group did not indicate what that obligation entails. The Brazil Group noted that in practice, defining what "unknown" author means is problematic and that alleging that the "author was thought to be unknown" is no safe harbour if the author or copyright owner appears after the work in question has already been used. The Brazilian government is dealing specifically with this question in a forthcoming revision of the Copyright Statute.

Many Groups report that there is little or no statutory or judicial guidance on what constitutes a "reasonable" search for the author of an orphan work.

Several reports, such as those of Spain and France, indicated that the lack of provisions relating specifically to orphan works was a growing concern, particularly for libraries and other archival institutions. From the reports, there appears to be a clear desire for the issue of orphan works to be addressed either at the national or regional level, in particular in the EU.

As noted in The Netherlands' response, the EC Copyright Directive does not provide for an exception for a right of reproduction for orphan works. Therefore, Member States cannot introduce a specific exception for orphan works in their national laws because the EC Copyright Directive has an exhaustive (and optional) list of exceptions. This impediment to developing orphan works exceptions was also noted by Spain.

There is currently an EU project underway to determine how to facilitate the digitisation of orphan works and to set a common EU standard on the level of diligence required in searching for the author of an orphan work.

It is therefore clear that the approach to the use of orphan works varies considerably across the Groups and in many jurisdictions is in a state of flux. National law is largely silent on

orphan works and where there are permitted uses or exceptions, they are through a licence regime or limited to types of uses and certain bodies such as libraries and educational institutes.

2.4 Fair dealing/fair use provisions

The Working Guidelines asked the Groups to summarise any fair dealing/fair use provisions that apply to copyright works, in particular those having application to library or search facilities such as Google Book Search. "Fair dealing" exceptions allow the use of the whole or part of a copyright work for a limited purpose where such use is fair. In essence, it operates as an extra condition that must be met in order to rely on certain exceptions and permitted uses. This is in contrast to "fair use" which is a wider exception allowing the use of a limited amount of third party copyright material subject to a balancing test which takes into account, amongst other factors, the purpose of the use and the effect it may have on the value of the work. Common law jurisdictions often have fair dealing exceptions and analogous exceptions can be found in other jurisdictions. The concept of fair use is used predominately in the United States. These type of exceptions are particularly relevant to the hi-tech and digital sectors, where they can provide a defence for certain activities that would otherwise not fall under any more narrow exception or permitted use.

Groups have clearly approached this question differently. The terms "fair use" and "fair dealing" were sometimes used interchangeably. For example, the Thailand Group indicated they had a fair use provision but that such provision was exhaustive. Most countries made reference to fair use provisions when they said they didn't have any "fair" type exceptions. It is unclear whether this means they may have unreported "fair dealing" exceptions or that they did not make a distinction between "fair dealing" and "fair use".

Broadly stated, the Group responses can be divided into two categories: those Groups with an exhaustive list of fair dealing or fair use exceptions and those Groups with exceptions, exhaustive or otherwise, that are analogous to fair dealing/fair use exceptions but which are not characterised as such.

The common law jurisdictions evidenced the most well developed "fair dealing" exceptions. Broadly, these exceptions encompassed fair dealing for the purpose of non-commercial research or study, criticism or review and reporting current events. Other countries such as China, Egypt, Estonia, and Indonesia also reported limited fair dealing purposes.

The United States concept of fair use, which is a wider exception than fair dealing, embracing the purpose of the use and the effect it may have on the value of work, was also reported by Singapore, Israel and China. For China, the exception is solely in relation to Internet use. Some Groups reported that fair use was clearly not party of their copyright regime, such as in Japan where the courts have explicitly rejected a defence of fair use in any situation.

Various factors are taken into consideration when determining whether a use is "fair", including the purpose and character of the dealing, nature of work or adaptation, and whether the work is commercially available. Some jurisdictions restrict the amount of work that may be used for a fair dealing purpose. For others such as the United Kingdom, the use of the entire work for fair dealing purpose such as criticism or review is allowed.

Several Groups noted that a determination of what defines "fair" is problematic and has been inconsistently applied by the courts.

As noted by several Groups, there is often considerable overlap with other copyright exceptions, such as format shifting.

Interestingly, Spain cites its direct implementation of the three-step test (as to which see 2.5 below) into domestic law as a sort of fair dealing provision designed to prevent the exceptions to copyright protection from being interpreted too broadly.

The second category of responses were those Groups indicating exceptions where a work may be used in certain specified situations but such exceptions are not designated as fair dealing/fair use as such and may have to be justified on the basis of specified criteria. Such analogous exceptions include:

- Quotation right
- Reporting on current events
- Research and education

Some Groups such as Ecuador reported no fair dealing/fair use exceptions, analogous or otherwise. Whether this means there are no general exceptions that are similar to those seen in fair dealing/fair use exceptions is unclear.

Only Belgium reported a fair dealing/fair use provision with specific application to library search facilities, for internal search engines in libraries. However, several Groups indicated there were provisions that would have particular application to library search facilities, particularly those for research and education. Interestingly, in Canada, the Supreme Court has held that the general principle of fair dealing under Canadian statute as applied to research activity is not necessarily limited to non-commercial or private contexts, which may therefore include Google Book Search. Conversely, in the United Kingdom, Google Book Search would not be recognised as a prescribed library because it is a for-profit organisation.

Interestingly, there was widespread discrepancy as to whether Google Book Search would fall under fair use/fair dealing or general copyright exceptions. Indonesia reported that Google Book Search will not violate copyright protection. Israel said that Google Book Search would be questionable while Mexico and Paraguay were emphatic that it would not be allowed under copyright law. As well, Japan indicated that the activities of Google Book Search, as a private for-profit company, will infringe the rights of reproduction and public transmission. In one Japanese case, digitised book summaries available for a fee was held to be an infringement of the public transmission right. The Japan Group noted that there are proposed new exceptions for search-engine business operators, but this will still not exempt Google Book Search from liability.

2.5 International treaties and the three step test

The Working Guidelines also asked the Groups to address the approach taken in their countries with respect to the requirement of international treaties that exceptions to copyright must not conflict with a normal exploitation of the work and must not unreasonably prejudice the legitimate interests of the author, often referred to as the "three step test".

The extent and manner by which international treaties are incorporated into national law varies greatly from country to country and consequently, there is widespread discrepancy as to how the three step test is approached.

The vast majority of Groups indicated that the approach taken in their jurisdictions was the pre-legislation approach, whereby although national legislation does not explicitly incorporate international treaty provisions, the legislation has been formulated so as to be compatible with all international treaty requirements.

Other Groups reported that the approach in their jurisdictions was to use the same wording as the three step test but to not explicitly incorporate international treaties into national legislation. Interestingly, Belgium noted that its "partial" approach, whereby fragments of the three step test were included in some exceptions to copyright, had been criticised by Belgian commentators. It has been mentioned in the preparatory works of the Belgian Copyright Act that the three step test remains a guideline for the courts, but the role of the three step test still remains unclear.

Only a few Groups reported that the international treaty requirements were directly incorporated into national law by reference to specific international treaty provisions (such as Spain and Panama).

The vast majority of Groups were confident that their copyright exceptions/permitted uses were compatible with the international norms. However, there was great discrepancy as to whether courts are required to consider the three step test directly. For example, in Sweden and Panama, the test is considered a rule of interpretation only. In The Netherlands, the courts have applied the test directly. The United Kingdom Group reported that following recent Court of Justice of the European Union jurisprudence, the United Kingdom may be required to consider the 3 step test directly, rather than relying on the pre-legislative approach. In contrast, Mexico notes that it is clear that the 3 step approach cannot be invoked directly.

Therefore, not surprisingly, there is also great discrepancy as to whether a use which meets all the requirements of an exception or permitted use will not fall under the exception or permitted use if such use fails the three step test. Some Groups report that if the exception conditions are met, it is unlikely there still exists a conflict with a normal exploitation of the work or unreasonable prejudice to the legitimate interests of the author (Estonia), whereas others indicate that the courts have actively considered the three step test once the requirements for an exception have been met. For example, in France in the *Mulholland Drive* case, the private copy exception did not prevent a protective technical measure designed to stop DVD copying from being inserted into DVDs, when such copy would affect the normal exploitation of the work, taking into account the economic effect such a copy would have. Hungary has taken the same approach as France.

Several Groups reported that there is no case law specifically interpreting or construing the requirements of international treaties that exceptions to copyright must not conflict with a normal exploitation of the work and must not unreasonably prejudice the legitimate interests of the author.

It is clear, at least in the EU that this issue of direct application could become increasingly important in relation to exceptions and permitted uses for copyright in the hi-tech and digital sector.

In general, the Groups' responses to this question were less robust than the other questions. Several groups including New Zealand merely indicated that they were party to international treaties relating to copyright such as TRIPs, the Berne Convention, and the WIPO Copyright Treaty. This question was not addressed clearly or at all by several Groups.

3. ADEQUACY OF EXISTING COPYRIGHT EXCEPTIONS AND PERMITTED USES

Most Groups reported that in their opinion, the exceptions to copyright protection have been generally acceptable in terms of striking a balance between the public interest and the rights of copyright owners but that the exceptions needed to be re-interpreted or expanded in light of new uses arising out of new technologies in order to ensure the correct balance and ensure enforceability.

Many Groups (such as Brazil) indicated their current exceptions were too narrow. They suggested their national legislatures should amend or create legislation dealing with exceptions and permitted uses for new technologies. Some countries indicated they felt their national copyright regime was not adequate and proposed amending or passing legislation to reflect the spirit of the EU E-Commerce Directive (although the scope of this Directive is currently a hot topic e.g. meaning of hosting exemption).

Those Groups with limited or no specific copyright exceptions for ISPs, digitisation/format shifting or orphan works indicated a need for revised legislation (including Argentina, and Bulgaria, amongst others).

China was the only Group to report their copyright regime was sufficient and required no further additions or amendments.

ISP activities

With regards to additional exceptions, many Groups reported that in order to promote enforceability and to ensure exceptions and permitted uses are appropriate to the technology, the boundaries of current exceptions for ISP activities need to be clearer and, if necessary, new exceptions added.

Several Groups, including Australia and the United Kingdom, expressed concern as to what point ISPs should be held responsible for the activities of their users and how far should the obligation to take remedial steps against infringing users extend i.e. active policing or remedial steps only on notice. As the Australia Group noted, this is a policy consideration whereby legislators need to determine if ISPs should be held morally, socially and legally responsible for what their users are doing online. The Australia Group queried whether the focus of the law should continue to be on suing individuals

Several Groups suggested a new exception for UGC activities as such services arguably fall outside the exceptions in the EU E-Commerce Directive, amongst others. It is also unclear whether UGC is covered by existing exceptions, such as quotation for criticism or review, incidental use and caricature, parody or pastiche. The concern is that a risk-adverse service provider would immediately remove any potentially infringing content altogether and in removing such content before infringement is proven, the ISP may prevent the publication of original works contrary to the public interest. However, such an exception would have to be carefully proscribed so as to ensure compatibility with the three step test.

Orphan works

It follows from the Groups Reports that there is widespread consensus as to the need for a resolution to the treatment of orphan works. However, the scope of any exceptions for the use of orphan works needs to be further debated in the Working Committee as to whether a solution should be extended to commercial as well as non-commercial purposes. The Belgium Group indicated that a new exception is not required for non-commercial purposes

as extending the current licensing system is more appropriate. A solution should be on an international or at least a European level, as in a cross-border digital society it makes little sense that different countries have different criteria concerning context and usage of the complex issue of orphan works.

Format shifting and digitisation

Many Groups advocated amendments for format shifting, specifically to allow library innovation in the public interest while protecting the rights of copyright owners. Some Groups, such as Israel, indicated that current exceptions were already adequate for archival purposes.

Fair use/fair dealing

Several Groups such at the United Kingdom, Belgium, and Canada called for guidance on the application of fair use/fair dealing concepts to existing exceptions and permitted uses.

4. HARMONISATION

Although all Groups indicated a desire for increased international harmonisation with respect to copyright exceptions and permitted uses for the hi-tech and digital sectors, there is a large discrepancy about how such harmonisation should be facilitated. Please note that some Groups seemed to make a distinction between the terms "mandatory" and "prescribed" which led to it being unclear whether the Group advocated a prescribed list or not.

Many of the Groups (Argentina, Bulgaria, Brazil, Canada, China, Egypt, Finland, Germany, Hungary, Japan, Latvia, The Netherlands, Norway, Portugal, and Thailand) strongly indicated that given the rapidly changing nature of the digital environment, an exhaustive or prescribed list of copyright exceptions for the hi-tech and digital sectors is not appropriate. As the United States Group noted, it has traditionally been a matter for each country to establish their own exceptions according to their unique social, cultural and economic environment; this is the spirit of the three step test as well as the minor exceptions doctrine in the Berne Convention. Indeed, the United Kingdom Group went further and argued that a prescribed list is contrary to the agreed statement on Article 10 of the WIPO Copyright Treaty which reaffirms that signatories can “carry forward and extend into the digital environment exceptions and limitations in their national laws” and that they may “devise new exceptions and limitations that are appropriate in the digital network environment.”

Many Groups, including The Netherlands and France noted that an exhaustive list would be almost impossible in practice to agree upon, as the international framework must be acceptable for countries at significantly different stages of development and with significantly different social, cultural and economic needs.

Most Groups stressed that an exhaustive list would limit flexibility which is a key requirement for an enforceable copyright regime. As well, The Netherlands noted that reducing any flexibility by prescribing an exhaustive list is likely to diminish the acceptance of the international copyright system in developing countries.

Although these Groups felt an exhaustive or prescribed list is not appropriate, many indicated that guidelines as to the scope and application of existing exceptions would be incredibly valuable and would allow each country to enact the appropriate enabling laws within the framework of the guidelines, taking into account national circumstances

(Panama, Philippines, Egypt, and Finland, amongst others). Some Groups felt that such guidance should be issued by WIPO or another similar treaty organisation.

A minority of Groups (including Australia, Latvia, and Portugal) indicated that it is reasonable to suggest a non-exhaustive list of exceptions. An encompassing definition of permitted use would lend itself better to effective interpretation and application by the courts so as to apply to a wide variety of different circumstances (South Africa).

Several Groups noted that rather than an exhaustive or prescribed list, the three step test is the best method to facilitate harmonisation (Hungary and Mexico, amongst others). However, as discussed above, the application of the three step test varies from country to country.

On the other side, a significant number of Groups supported the idea of an exhaustive or prescribed list. There were several reasons indicated for supporting an exhaustive or prescribed list, including the global nature of the hi-tech and digital fields warranting a global response and that previous attempts at optional lists had resulted in a low level of harmonisation. For example, Belgian suggested that harmonisation should be facilitated through the international treaties on copyright by introducing an exhaustive list of mandatory exceptions and an exhaustive list of optional exceptions, such as in the EC Information Society Directive.

Many groups stressed that any exhaustive list must have enough flexibility to address future technological developments. To retain flexibility, Canada, Brazil and others have suggested including general concept of fair dealing provision that is not restricted to particular classes of users or works. In a similar vein, Spain emphasized the need to establish an exhaustive list with an open clause to enable the system to be adapted as the hi-tech and digital sectors evolved.

Not surprisingly, there is great discrepancy as to the contents of the proposed exhaustive or prescribed list. Suggested exceptions include provisions for:

- digitisation and format shifting for libraries with non-commercial purposes
- orphan works
- provisions for ISP activities whereby liability is fault based
- fair use by libraries
- quotation right

An exhaustive or prescribed list should not only establish a list of exceptions but also list their conditions for application and enforcement.

Several Groups including France indicated that while they supported an exhaustive or prescribed list, there would be difficulties in agreeing on mandatory exceptions.

Bulgaria suggested an exhaustive list with a broader formulation as exceptions should not increase in number but be applied to new technologies.

Several Groups reported that greater harmonisation may be appropriate for limited uses, such as format shifting for visually impaired persons.

Switzerland suggested an harmonised exception for ISPs and for the use of works in the course of electronic search tools.

5. 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 expressed 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 an exhaustive list, prescribed or otherwise, is necessary or even appropriate for exceptions and permitted uses for the activities of ISPs and other intermediaries. Further, if such a list is necessary and appropriate, what exceptions and permitted uses should be included. If no such list is necessary, what exceptions/permitted uses should be available to ISPs and in what circumstances?

- whether ISPs can rely on exceptions or permitted uses where they did not have actual knowledge of infringing activity but should have had such knowledge.

- what level of remedial action should ISPs be required to take against infringing users i.e. should they have to actively police infringing content or simply take down infringing content or block user access.

- whether there is a need to address the specific problem of UGC and the role of ISPs in policing the content on UGC sites, and how to best address this problem.

- the development of an exception for format shifting for libraries, museums and other institutions and whether such exception should be subject to limitations such as being necessary, expedient and/or not for commercial advantage.

- whether an exception for private copying should be further developed in relation to digitisation and format shifting and if so, what should be the scope of the exception i.e. how many copies, distributed to who, etc keeping in mind the need to protect the rights of copyright owners.

- a resolution to the treatment of the use of orphan works for both commercial and non-commercial purposes. This is a particular issue for the copyright system as a whole, not just for the hi-tech or digital sectors in particular. AIPPI will need to consider the level of inquiry (if any) required to ascertain the author's identity, the possibility of a mechanism for applying to a governmental authority for a licence for use and the scope of any such scheme, and how the legal treatment of the use of orphan works can facilitate the digitisation of those works.

- clarification as to the application of fair dealing/fair use provisions and the "three step test" with respect to copyright exceptions or permitted uses i.e. are such provisions mere guidelines or a required further condition. Should the "three step test" be directly applicable to exceptions/permitted uses of copyright in the hi-tech and digital sector?

- In recommending solutions to the issues set out above it will be helpful for AIPPI to express its views on whether those solutions should be at an international level or, for example, a European level