

## **Working Guidelines**

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### **Question Q216A Paris 2010** (Q216B to be considered in Hyderabad)

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

### **Introduction**

In the world of cyberspace:

- National frontiers have little significance
- Nobody is in charge of the system as a whole and its growth is both unpredictable and uncontrollable
- There is an immense volume of traffic
- Works are repeatedly and often automatically reproduced by being stored in computer memory
- Publication and reproduction of works can be achieved with extreme ease.

Many see this fast moving world as testing and challenging copyright's traditional balance between the need to protect creative endeavour and the needs of users to have access to and to use copyright works. Responding to these concerns AIPPI has decided to investigate certain exceptions to copyright protection and the permitted uses of copyright works in the hi-tech and digital sectors. These sectors have become increasingly important, not only for the software business but also for copyright protection in general. Despite the criticism that has been raised against this kind of protection as a matter of principle, one can clearly state that any IP system including copyright protection requires a true balance between the legitimate interests of all parties involved, including the public as a user of copyright works. This raises a number of questions with regard to exceptions of protection and permitted uses. Are existing exceptions appropriate to the technology? Are they realistic in the light of users' expectations? Are they readily understandable? And, bearing in mind among other things the extreme length of copyright – often life plus 70 years - are they suitable to ensure that, in the words of TRIPS "measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade"?

Subject to the approval of the Executive Committee we intend to deal with this extremely broad topic in two parts (Q216A and Q216B) whereby limiting the investigation in each part. Each of Q216A (to be considered in Paris in 2010) and Q216B (to be considered in

Hyderabad in 2011) will consider certain of the numerous issues in this field in order to keep the question manageable. By continuing the studies on the topic at our Executive Committee Meeting in Hyderabad in 2011 we hope to obtain a full study at the end of this two-year cycle.

### **Previous work of AIPPI**

Q57 studied the protection of computer programs and software and a resolution was passed in relation to when patent protection should be available for software related inventions and providing that computer programmes should enjoy copyright protection.

Q182 studied the different levels of database protection at national and international level, discussing the various limitations and exceptions to the protection. A resolution was passed recommending a sui generis or other proprietary right for the protection of databases which require substantial investment irrespective of any copyright protection. Limitations should apply for private use, scientific research, educational use and public security.

The AIPPI Forum Singapore 2007 in Forum Session III discussed Copyright and Digital Rights Management: Moving beyond Protection?

### **Features of the internet: general and technical background**

#### ***Internet Service Providers, clients and servers***

Typically an individual user is connected to the internet via an Internet Service Provider (ISP). Computers which store data for use on the internet are known as servers and computers to which the data is supplied are known as clients. If a client computer wishes to access data held in the memory of a remote server, it must know the electronic address (URL) of the remote server. This URL is first sent to the server of the local ISP, which then contacts the remote server and requests it to transmit the data in question. The data is transmitted from the remote server to the ISP's server, perhaps through intermediaries, and is then sent from the ISP server to the client.

One of the internet's features is that communications pass through the working memories (RAM) of a series of computers from which each computer makes a copy of the material, not at the instigation of the server's owner, but of the client which requested the material in the first place. Because the same item may repeatedly be requested by numerous clients it is commonplace for ISP servers automatically to save a copy of any item that has been requested and to do so for a substantial period, in case it is wanted again. This avoids the need to keep issuing requests to the same remote server. This practice is known as caching. When material is read on a website, it is effectively being downloaded by the user. In order for this to happen, the reader's computer and any intermediary computers will copy the material into their memory. They may or may not also cache it.

#### ***Hypertext links***

Hypertext links connecting web pages are a very common feature of the internet which allows the user to "jump" from website to website in search of content. A hypertext link is a pointer which contains a URL within its definition so that a click on it moves the user to that address.

#### ***Search engines***

Search engines (e.g. Google) have been created to aid the internet user to find sites of interest. The search engine operates by searching the web using a fully automated process.

"Spiders" (sometimes referred to as robots, crawlers or bots) roam the internet searching for key words in the URLs and metadata behind websites.

### ***The exploitation of musical works and films over the internet***

There are two main ways of communicating musical and film works over the internet. The first is webcasting which is the equivalent of broadcasting over the air or via cable. The second is on-demand or interactive services where musical or film works are made available to the public. For music to be communicated on demand over computer networks, the musical work or its sound wave is translated and time-sliced into short bits of binary code. This conversion can be achieved through a variety of processes but the most common is the Musical Instrument Digital Interface which allows the musical work to be stored on computers. The work in the form of a sound file is then uploaded to a computer host to be made accessible to the public.

### ***User generated content***

In recent years there has been a phenomenal rise in demand for user generated content (UGC) services by users worldwide. In particular there has been an increase in services provided by companies (such as YouTube and MySpace) which encourage internet users to upload video and other content onto their sites making the content generally available to others. In practice not only original content but also many third party works including the whole of or extracts from films and music are uploaded onto these services.

### ***Transient Copies***

The working of the internet involves the constant creation of more or less temporary/transient copies held in the computer's working memory (RAM) or cached. A copyright regime which required the copyright owner's consent for all such copies would, arguably, be unworkable. This issue is addressed in the European Union by providing that transient or incidental copies do not constitute copyright infringement provided that they are an integral and essential part of a technological process, have no "independent economic significance" and enable either the transmission in a network between third parties by an intermediary or the lawful use of the work.

### **Specific issues to be studied**

#### ***The position of ISPs***

It is not the ISP that selects a work to be copied. Since a server may receive many thousands of requests every day, there is no practical means for a human person to be in charge of instantaneously censoring the data held in the memory, although they could delete objectionable material or even block out piratical sites (being sites that comprise or facilitate the downloading of infringing content) if they were given reasonable notice. Other internet communications, such as e-mails, pass into the memory of servers which may retain copies of the content but those who operate the servers have little or no control over the content.

ISPs are potentially at risk of copyright infringement in relation to copies of material made as it passes through their systems or is stored in a cache. The issue of ISPs who function as mere conduits for material has been debated in the case law and by legislators. In addition ISPs which "host" third party material by providing the platform for displaying content such as a website could attract liability for copying or communicating this material to the public. In practice, however, monitoring may be difficult or impossible (see above). The recent eBay cases provide a good example of the kind of conflicts which may arise between intellectual property right holders and ISPs. Although eBay may not be considered a classic ISP since

unlike many ISPs it carries out substantial monitoring of its systems for counterfeits this monitoring is largely after the event, and focused on taking infringing material down. Intellectual property rights holders argued for greater pre-emptive monitoring by eBay.

In the European Union there is currently no general obligation on ISPs to monitor third party content as such. The E-Commerce Directive (2000/31/EC) also provides an ISP with an exception to liability for infringement where it is acting as a "mere conduit" or where works are copied in the course of caching or hosting – provided that a number of conditions are complied with and the infringing material is removed expeditiously once the ISP becomes aware of it. Whereas intellectual property rights holders often argue for an obligation to monitor, many commentators also point to the potential for abuse if the ISP is under pressure to remove material objected to by rights holders without sufficient evidence that it does in fact infringe.

In some countries intellectual property rights holders are establishing systems for co-operating with service (or access) providers to facilitate the identification and notification of customers involved in infringing activities. There are some examples of customers who repeatedly infringe having their access terminated.

An additional issue is the extent to which service providers should be able to avail themselves of any defences available to ISPs. Some commentators argue that these exceptions for ISPs were originally intended to apply to activities of a technical, automatic and passive nature and should not be available to providers who are active providers of a service such as eBay, FaceBook or YouTube.

### ***Digitisation and format shifting***

Digitisation involves converting material into data which can be read by a computer and transferred to other computers, for example a hard copy book or analogue film might be converted into a digital form to allow it to be displayed electronically. This may be very important to preserve archive material in a library and to allow it to be provided to readers in a more accessible form. With regard to the preservation of works it is often libraries, archives and museums that preserve works in a durable format. But private entities are also involved in large scale digitisation efforts. As an example, the Google Book Search project was launched in 2005 with the aim of making the contents of books searchable on the internet. Publishers are also experimenting with free online access to parts or even full texts of books. Digitisation and subsequent display of works involves both reproducing them and potentially communicating them to the public. Many argue that libraries should be afforded greater freedom to digitise their materials in this way; the UK government, for example, is currently consulting on a proposal to allow libraries a limited permission to digitise.

Format shifting involves converting material available on one media to another medium, for example transferring music from a CD player to an MP3 player. Libraries may need to format shift in order to preserve material in outdated formats. Format shifting involves reproducing the work and hence potentially infringing copyright. In many European countries format shifting for personal use is legal. However, this is subject, under the terms of the EU Digital Copyright Directive (2001/29/EC), to schemes that compensate authors usually in the form of copyright levies. For example in France makers of MP3 players or CDs or any other forms of recordable media have to pay a small levy.

### ***Orphan works***

An orphan work is a work for which it is difficult or impossible to contact the author. This may make it impossible for a person wishing to use the work to obtain permission to use it. Difficulties in clearing rights for orphan works are a significant problem for libraries and also

for other commercial players such as Google who wish to digitise works. A report by the Carnegie Mellon University Library details a systematic study of the feasibility of obtaining permission to digitise and provide web-based access for its collection, during which it discovered that for 22 percent of the books in the study the publishers could not be found. (Quoted by the recent UK Gowers Review into the intellectual property framework.) International treaties do not currently appear to allow exceptions to copyright for orphan works as such. Ideas for dealing with this problem have included requiring registration of copyright or limiting liability for use of such works so that, for example, a party using an orphan work after a reasonable search might only be liable for a fair royalty. The question what constitutes a "reasonable" search could, however, be a difficult one.

### ***Fair dealing/use***

"Fair dealing" exceptions allow use of the whole or part of a copyright work to be used for a limited purpose, for example for private study, for criticism or review of other copyright works or for news reporting. Fair dealing exceptions are often found in common law jurisdictions, though we believe that similar exceptions often apply in other jurisdictions without attracting the label "fair dealing" as such. Fair dealing should not be confused with the US concept of "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 account among other things of the purpose of the use and the effect it may have on the value of the work. Fair dealing/use may be relevant to any service which deals in content. The question whether an exception applies will depend on the particular circumstances, for example whether a particular use is truly a reasonable use in relation to, say, criticism or review. Fair dealing type exceptions may have a particular relevance to online services in some cases – for example in 2002 a US Court of Appeal for the Ninth Circuit decided that use of photographic images as "thumbnails" constituted fair use. The thumbnails were used as pointers to hypertext links (though other aspects of the use of the images was not regarded as fair use).

### ***Normal exploitation***

International copyright treaties provide that exceptions and limitations to copyright must be confined to special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author. It is important that exceptions and permitted uses relating to the hi-tech and digital sectors do not overstep this mark. We believe that the case law of different countries approaches this proviso in different ways.

### ***Exhaustive list***

Currently the international copyright treaties do not provide for an exhaustive list of possible copyright exceptions. By contrast the European Digital Copyright Directive does provide such a list. Member states are not obliged to implement any of the exceptions and permitted uses in this list (other than the exception in relation to transient copying referred to above) but they are not permitted to incorporate additional exceptions except in very limited circumstances. The object of the Directive is to promote harmonisation of copyright laws across Europe and cross border activity in the context of an increasingly globalised digital sector.

## Questions

The purpose of Q216A is to explore exceptions to copyright protection resulting not from issues of eligibility/qualification for protection but from various exceptions, permitted uses or defences. As stated above, this purpose is of itself extremely broad ranging. As such, the work will be limited to a small number of the potential exceptions, permitted uses or defences.

### ***Questions about specific exceptions or permitted uses existing in your country/region***

1. What exceptions or permitted uses apply in relation to the activities of an ISP or other intermediaries? Are there any limitations on those exceptions/uses, for example when the ISP is put on notice of unlawful content? Which types of service provider may benefit from such exceptions: would they, for example, apply to UGC sites such as YouTube or social networking sites such as FaceBook?
2. Do service or access providers have any obligation (in co-operation with intellectual property right owners or otherwise) to identify, notify or take remedial steps (including termination of access) in relation to their customers who infringe? Is the position different depending on whether the customer has only infringed once or has carried out repeated infringing activities? Do any such obligations affect the scope of the exceptions or permitted uses that apply to those service or access providers?
3. What exceptions exist for "digitisation" or to allow for format shifting of sound recordings, films, broadcasts or other works?
4. Are there specific exceptions permitting libraries to format shift or to make digital copies for archive or other purposes?
5. Are there exceptions or permitted uses allowing the use of orphan works? If so, what is their scope?
6. What, if any, fair dealing/fair use provisions apply? Are there any examples of fair dealing/use provisions having a particular application to Library/search facilities such as Google Book Search?
7. How does the law in your country/region understand 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?
8. Are there any other exceptions or permitted uses which you consider particularly relevant to the hi-tech and digital sectors with regard to ISPs, digitisation and format shifting or orphan works?

### **Your views**

- (a) In your opinion, are the exceptions to copyright protection for (i) the activities of an ISP (ii) digitisation or format shifting; and (iii) orphan works, and the fair dealing/fair use provisions that apply to Library/search facility applications in your country/region suitable to hold the balance between the interest of the public at large and of copyright owners in the hi-tech and digital sector?
- (b) Are these exceptions and permitted uses appropriate to the technology, understandable and realistic? Do they contribute to a situation where copyright is enforceable in practice?

- (c) What, if any, additional exceptions would you wish to see relevant to these areas?
- (d) Given the international nature of the hi-tech and digital fields, do you consider that an exhaustive list of exceptions and permitted uses should be prescribed by international treaties in the interests of international harmonisation of copyright? Might you go further and say that there should be a prescribed list? If so, what would you include?

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