

ExCo Hyderabad 2011
Adopted Resolution
October 18, 2011

Resolution

Question Q216B

Exceptions to Copyright Protection and the Permitted Uses of Copyright Works in the Hi-tech and Digital sectors

AIPPI

Noting that:

- 1) During the ExCo held in Paris in 2010, Question 216A studied the various challenges to copyright law created by the digital environment.
- 2) The Q216A Resolution (copy attached) confirmed as a basic principle that the digital environment should provide for effective and enforceable copyright protection. In particular, national laws should fully recognize that rights holders have the exclusive entitlement to authorize and control the various activities of production, reproduction, communication, performance and other uses of their copyright works in communication networks such as the Internet.
- 3) The Q216A Resolution concluded that the “Three-Step-Test”, as known from the revised Berne Convention, the TRIPS Agreement and the WIPO Copyright Treaties, is to set the generally-accepted standard for formulating limitations and exceptions to copyright protection in the digital environment.
- 4) Q216A specifically studied the exceptions and limitations of copyright protection and the permitted uses of copyright works as applied to Internet Services Providers (ISPs), format shifting/digitisation/time shifting and the treatment of orphan works.
- 5) Q216B intends to cover further legal questions, which were not dealt with in the Q216A Resolution, namely:
 - a) the international harmonisation of limitations and exceptions to copyright protection;
 - b) the liability of providers of facilities and services for User Generated Content (“UGC”) on the Internet;
 - c) liability for linking activities on the Internet and, in particular, liability as it relates to the activities of Internet search engines;
 - d) liability for the making of transient or temporary copies of copyright works; and
 - e) limitations and exceptions pertaining to private copying and copyright levies.

Considering that:

- 1) National jurisdictions differ considerably in respect of the recognition and implementation of limitations and exceptions to copyright protection and the separate issue of liability defences for the benefit of certain types of intermediaries. This is not a satisfactory state of affairs, in particular with respect to the Internet.
- 2) In recent years, there has been an increasing rise in demand by Internet users for the services of UGC providers. The term “UGC providers” is commonly understood to mean those who furnish a structured platform for UGC, which enables users to upload content to this platform and provide tools to search for UGC. These activities do not include services provided by mere conduits permitting access to UGC. They also do not include facilitating third party contributions, for example by way of blogs, forums etc. where a structured platform is not provided for UGC. Examples of UGC providers include social network platforms such as YouTube, Facebook and EBay. A broad interpretation of the term UGC includes clear cut infringements, but the term also extends to include modified content with genuine creative input. Such creative input can make UGC sites particularly attractive, often containing desirable commentary or artistic expression. If such commentary or artistic expression makes use of third party works protected by copyright law, difficult questions may arise with respect to the boundary between lawful and unlawful use.
- 3) Linking to and from websites is an essential feature of the Internet. User-activated hyperlinking is the most common way to make one's own content or third party content available to a wide number of Internet users. It is not always clear whether the provision of a user-activated hyperlink is actionable under the copyright laws of the various jurisdictions.
- 4) Internet search engines were created to help internet users find content of interest. Search engine results are typically presented as a list of links that direct the user to specific content. The information in the list may consist of web pages, images, information and other types of files. Some search engines also mine data available in databases or open directories. It is possible for a rights holder to prohibit the access of search engines to such content.
- 5) The Q216A Resolution concluded that ISPs may rely on a limitation or exception to copyright protection in the case of transient or temporary copies. This applies if such activity is an integral and necessary part of the technical means that facilitate the transmission, reception or transiting of traffic on networks. In addition, the activity must be solely supportive of a lawful use, with the further requirements that the technical means be content neutral and have no economic significance. In particular, transient or temporary copying may be necessary to enable communications in a network between two parties through an intermediary, or to support some other lawful use. Transient or temporary copying, however, goes beyond the interests of ISPs. For example, such copies may be made in relation to works held temporarily in a private computer's RAM. Specifically, transient or temporary copying in the course of the viewing of streamed copyright works, where the works are not authorised to be made available to the public on the Internet, may be problematic in this context.
- 6) Private copying in the digital age can have a significant economic impact on rights holders. Digital private copies can be made with extreme ease, with no observable loss in quality. In addition, digital private copies can be easily distributed via many different forms of electronic media. In some jurisdictions, private copying is not regulated at all, whereas other jurisdictions provide for an exception from copyright infringement

without compensating the right holder. Other jurisdictions provide for limitations to copyright infringement, linked to a levy system.

Resolves that:

- 1) In respect of limitations and exceptions to copyright protection, national laws should be harmonized relying on the Three-Step Test. Due to cultural differences amongst states, a full harmonization may be very difficult to achieve. Harmonization should at least be achieved for some of the limitations and exceptions applicable for Internet uses adopting the following guidelines:
 - a) The system of limitations and exceptions should be sufficiently flexible to treat new technologies and emerging business models.
 - b) The system must provide for adequate legal certainty in the application of the limitations or exceptions.
 - c) The system should have minimum standards for compliance, for example a non-exhaustive list of specific Internet-related limitations and exceptions, in particular as set out below.
- 2) Rules concerning the liability of UGC providers have to strike a fair balance between protecting the desired function of UGC providers to easily communicate users' creations to the public and safeguarding the rights holders' interests to exclusively authorize and control use of their copyright works. National and international law should provide for the following principles:
 - a) In general, there should be no obligation on UGC providers to monitor for infringing activity, except as set out below.
 - b) UGC providers storing third party content should at least have a fair and reasonable duty to remove (take down) and prevent further uploading (stay down) of the same infringing content by the same infringer in situations where such UGC providers are furnished by the relevant rights holder with prima facie evidence of the specific infringement. A quick and simple dispute resolution procedure should be available, enabling the user to argue the legality of the content. If the UGC provider does not fulfill its duty to take down and take reasonable measures to ensure stay down of the specific content, the UGC provider may be liable for copyright infringement as if it was the underlying infringer.
 - c) A UGC provider wilfully facilitating, enabling, cooperating with or contributing to infringing activity should be held accountable for the underlying infringement as if the UGC provider was the underlying infringer. The same principle should apply if the UGC provider makes the users' infringing content its own content.
- 3) Providing user-activated hyperlinks to a copyright work, in and of itself, should not be considered a reproduction of the work. Also, providing such hyperlinks to a copyright work that has already been made available to the public on the Internet with the authorization of the relevant rights holder does not, by itself, constitute a further act of making such a work available to the public. However, providing hyperlinks may attract liability by contributing to acts of copyright infringement in relation to the targeted work.
- 4) Search engines, when helping users to find and access copyright works that have already been made available to the public on the internet with the authorisation of the right holder should be able to rely on exceptions or limitations and, beyond these on implied licenses, if provided by national jurisdictions.

- 5) In respect of transient or temporary copies, there should be specific limitations or exceptions to copyright infringement as follows:
 - a) In relation to a computer program, the making of transient or temporary copies should be exempted from copyright protection, where such copies are necessary to perform or secure a lawful use of the said computer program.
 - b) In relation to all other works transiently or temporarily reproduced in an end user's computer memory, the making of such transient or temporary copies should be exempted from liability for copyright infringement, where the copies are supportive of a lawful use, and the technical means employed are content neutral, and the copies have no economic significance.
- 6) Copyright exceptions and limitations should allow for the private copying of electronic works. This exception or limitation should apply to non-commercial use only. Distribution to the public or public communication should not be covered by this exception. National legislation may further restrict the distribution or communication of private copies (for example by restricting private copies to personal use by the owner of the original copy, for as long as ownership of the original copy is retained). In addition, national legislation may provide for a general exemption in relation to certain types of works or certain forms of exploitation captured by the private copying exception.
- 7) It is proposed to have a separate question addressing the specific issue of levies for exceptions or limitations to copyright protection.

Attachment

Exceptions to Copyright Protection and the Permitted Uses of Copyright Works in the Hi-Tech and Digital Sectors

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Observing that :

- 1) In the digital environment, copyright works may be reproduced and publicly communicated with extreme ease and with no observable loss in quality. Further, with reference to the Internet, such activities oftentimes transcend national borders.
- 2) This has presented various challenges for copyright law, namely:
 - a) For rights holders, it has become increasingly difficult in the information age to effectively enforce the general principle of copyright law that the owner of copyright and those claiming under him are exclusively entitled to authorise and control the various activities of production, reproduction, communication, performance and other uses in respect of copyright works.
 - b) In many jurisdictions, existing limitations and exceptions to copyright protection have been applied to the new realities of digital and information technologies. This has created difficulties in terms of maintaining the traditional balance in copyright law between the need to protect creative endeavours and the needs of users to access, use and disseminate copyright works.
 - c) In the particular context of the Internet, questions surrounding limitations and exceptions to copyright protection, as well as the enforcement of copyright, must very often be assessed under the laws of numerous jurisdictions, with differences in national laws thereby creating unacceptable legal uncertainty for both rights holders and users alike.
- 3) For limitations and exceptions to copyright protection, all countries that have acceded to international copyright treaties, such as the Revised Berne Convention, TRIPS and the WIPO Copyright Treaty, are called upon to follow the guiding principle that such limitations and exceptions must (i) be restricted to certain special cases, (ii) not conflict with a normal exploitation of the copyright work and (iii) not unreasonably prejudice the legitimate interests of the author (known as the "Three-Step Test"). National jurisdictions, however, differ considerably as to their recognition and implementation of such limitations and exceptions. This is not a satisfactory state of affairs, in particular for digital uses of copyright works on the Internet.
- 4) Internet service providers and other Internet intermediaries ("ISPs") have developed new business models for the digital environment to service Internet users. On the one hand, such business models have created new commercial and cultural opportunities properly grounded upon duly authorised uses of copyright works; on the other hand, the same business models have also been used to perpetrate copyright infringement, frequently on a massive scale. It is not possible or feasible in the foregoing instances to identify and pursue the directly infringing party, namely the internet user. In contrast, ISPs are often best-placed to ascertain the sources or destinations of infringing works, and to effectively put an end to or at least impede infringing activity.

- 5) Format shifting involves converting material into another, often digital format. The national jurisdictions currently offer varying limitations or exceptions to copyright protection in order to allow for legally permissible format shifting, e.g. for private use or for non-commercial institutions such as libraries, museums, etc. However, few jurisdictions allow format shifting for commercial purposes.
- 6) Orphan works may be encountered for different categories of works, e.g. literary, photographic and audiovisual works. The use of orphan works is in particular relevant for non-commercial libraries, museums and similar institutions, but also for commercial entities and uses. Only very few national jurisdictions, however, have a specific regime in place governing the lawful use of orphan works. To make it possible to use orphan works legally on an international scale, in particular on the Internet, national legislation should be harmonised accordingly.

Resolves that:

- 1) Effective and enforceable copyright protection should be safeguarded in the digital environment.
- 2) The rights holder should be fully recognised under national laws as being exclusively entitled to authorise and control the various activities of production, reproduction, communication, performance and other uses in respect of copyright works in communication networks such as the Internet. Copyright law should therefore provide for an efficient enforcement against infringing activities in such communication networks. These infringing activities should in general not be rendered exempt from liability by way of compulsory licences, mandatory levies or expansive limitations/ exceptions to copyright protection. For the purposes of this paragraph uses in “communication networks” does not include uses in broadcasting.
- 3) For limitations and exceptions to copyright protection in the digital environment, the Three-Step Test referred to above sets the generally-accepted standard. In this regard, national laws should be harmonised relying on the Three-Step Test.
- 4) For efficient and effective enforcement of copyright in the context of the Internet, the rights holder should be entitled to address all parties that enable, facilitate or contribute to any acts of copyright infringement, including a regime for ISPs to provide the information necessary for such enforcement with due regard to user’s rights. Such parties should include not only those users who are engaged in acts of direct infringement, but in general also ISPs according to the principles set out below.
- 5) As ISPs or the Internet traffic they administer often operate on an international level, national rules pertaining to ISP liability should be harmonised. It is preferable that national and international law provide for guiding principles on the matter, including the following:
 - a) In general, there should be no obligation on ISPs to monitor for infringing activity, except as set out below.
 - b) Host providers storing third party content should in general have a fair and reasonable duty to remove and prevent further uploading of specific infringing content, where such host providers are furnished by the relevant rights holder with prima facie evidence of an infringement.
 - c) Access providers should in general have a fair and reasonable duty to block access to copyright infringing material, where such access providers are furnished by the relevant rights holder with prima facie evidence of infringement.

- d) An ISP willfully facilitating, enabling, cooperating with or contributing to infringing activity should be held accountable for the underlying infringement as if the ISP was the underlying infringer.
 - e) ISPs may rely on a limitation or exception to copyright protection in the case of transient, temporary or ephemeral reproductions of copyright works, if such activity is an integral and necessary part of the technical means that facilitate the transmission, reception or transiting of traffic on networks (such as the Internet) or is solely supportive of a lawful use, provided that the technical means are content neutral and have no economic significance.
- 6) Subject to laws that may govern access to works by the visually impaired or by any other disabled person format shifting should be available for commercial business models by way of licence only. For private and non-commercial uses, limitations or exceptions to copyright protection may be provided in cases where the limitation or exception in question meets the Three-Step Test.
- 7) National laws should provide for internationally harmonised and dedicated rules enabling private, non-commercial or commercial users to reproduce and use orphan works, in particular in situations where it is not reasonable to assume that the term of protection for a work has expired. Appropriate rules should be provided for all categories of work. National laws should require a diligent inquiry so as to ascertain the relevant right holder's identity. Further, the right holder should be guaranteed a fair remuneration for the use of the work and retain the option to re-claim the work for his further exclusive exploitation. The user's continued bona fide reproduction and use of the copyright work should be reasonably protected.