

## Question Q216B

**National Group:** Turkish Group

**Title:** **Exceptions to Copyright protection and the permitted Uses of Copyright works in the hi-tech and digital sectors**

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## Questions

### I. Analysis of current law and case law

The Groups are invited to answer the following questions about specific exceptions or permitted uses existing in their national laws:

1. *What exceptions or permitted uses apply to a service provider in relation to user-generated content (UGC)? Are there any limitations on those exceptions/uses, for example when the service provider is put on notice of unlawful content uploaded by internet users? Would they also apply to UGC sites which likely attract infringement? Which types of service provider may benefit from such exceptions: What content does your jurisdiction define as UGC? Would exceptions for UGC, for example, apply to UGC sites such as YouTube or social networking sites such as FaceBook?*

There is neither a specific provision nor division under Turkish Law regarding exceptions or permitted uses apply to a service provider in relation to user-generated content (UGC).

In pursuant to the Law on Intellectual and Artistic Works (hereinafter referred as "Law no. 5846") there are three main exceptions of copyright protection and the permitted uses of copyright works:

## **1. For Considerations of Public Order**

The rights afforded to authors shall not prevent a work from being used as evidence in court or before other authorities or from being the subject matter of penal or criminal proceedings. Photographs may be reproduced and published in any form by the authorities or on their instructions for reasons of public policy or for judicial reasons without the author's consent. However the general rules of public policy that forbid the putting of a work into commercial circulation by any means, its performance or exploitation in any form, or subjecting them to authorization or controls, shall remain unaffected.

## **2. For Considerations of Public Interest**

### **- Legislation and Jurisprudence:**

The reproduction, diffusion, adaptation or use in any other manner of laws, bylaws, regulations, notifications, circulars and court decisions that have been officially published or promulgated shall be permissible.

### **- Orations:**

The reproduction, public recitation or broadcasting by radio or other means of speeches and addresses given in the Grand National Assembly or at other official assemblies and meetings, or in courts of law or at public meetings, shall be permissible for the purpose of giving news and information.

### **- Freedom of performance**

Published works may be freely performed in every education and instruction institution for the purposes of direct education and instruction and without any purpose of direct or indirect profit, if the name of the author and the title of the work are cited in usual manner.

### **- Selections and Compilations for Purposes of Education and Instruction**

Reproducing selected and collected works from published musical, scientific and literary works and from publicly exhibited works of art clearly made for the purposes of education and instruction within the necessary limits of the purpose shall be permissible.

### **- Freedom of Quotation and Borrowing**

The quotation of a few sentences or passages from an already published work in an independent work of science or literature; the use of certain elements of a published musical work, such as themes, passages or ideas, in an independent musical work; the reproduction of artistic works that have been made public and of other published works in a scientific work to the extent that such reproduction is justified for the purpose of explaining the text and showing by projection or other means of artistic works that have been made public where such showing accompanies a lecture and serves the purpose of explaining the subject are permissible if quotation is clearly shown and for scientific works, the passage from which the quoted part has been taken must be shown as well in the quotation.

### **- Newspaper Content**

Daily news and information communicated to the public by the press or radio may be freely quoted whereby the limitations brought with the Press Code shall remain unaffected.

### **- News**

It is permissible to record on devices permitting the transmission of signs, sounds, images or passages from intellectual and artistic works relating to current events, provided that it is done in the nature of an interview. Accordingly, the reproduction, dissemination, performance and broadcasting of passages quoted in such manner by radio are permissible.

## **3. For Considerations of Private Interest**

### **- Personal Use**

It is permissible to reproduce intellectual and artistic works for personal use not involving purposes of publication or exploitation for profit. However, such reproduction may not

unreasonably prejudice the legitimate interests of right holders or conflict with normal exploitation of a work.

- Copy and Exhibit

Works of art permanently situated on public streets, avenues or squares may be reproduced, publicly projected on a screen or broadcasted by radio or similar means in the form of drawings, graphics, photographs and the like.

All the above explained limitations and permitted uses are applicable to UGCs. According to Turkish Law there is no specific exception with regards to service provider, host provider and also content provider in terms of copyright issues.

However, responsibilities of service providers, host providers and content providers are defined under Law No. 5651 on the “Regulation of Broadcasting on the Internet and Suppression of Crimes Committed by Means of Such Broadcasting” (hereinafter referred as Law No. 5651) with regards to limited number of crimes. According to Law No. 5651 service providers and host providers are not responsible from the content uploaded by the users, unless they have been put on notice of the unlawful content. Therefore these provisions can be interpreted with regard to copyright issues as a limitation on the exception of service provider and host provider. Having said this it must be emphasized that there is no direct definition for UGC but UGCs definition of a host provider fall under the definition of a host provider under Law No.5651. And exceptions of these UGSs as stated above apply to UGC sites such as “YouTube” and social networking sites such as “Facebook”.

In addition to this, although not regulated in detail, sanctions applied to violations caused by user-generated content are stipulated under Article 4 bis of Law No. 5846. This article provides for notice and takes down in cases of copyright infringement. This limitation also applies to UGC websites.

There are court cases pending against the video sharing websites and other mainstream web portals access to which have been banned for several years. Furthermore, access to web 2.0 based services such as myspace.com, Last.fm, and Justin.tv have been blocked by courts and Public Prosecutors' Offices based on copyright infringement as per Article 4 bis of the Law No. 5846. The law requires the hosting, content or access providers to take down the infringing content from their servers within three days upon notice given to them by the right holders. If the allegedly infringing content is not taken down or if there is no response from the providers, the right holders can apply to a Public Prosecutor for a blocking order, and the blocking order is executed within three days. This legal remedy is therefore predominantly issued with regards to copyright infringements.

2. *What exceptions or permitted uses apply in relation to temporary acts of infringement? Do transient/temporary copies of electronic works, held for example in a cache or in a computer's working memory (RAM) amount to infringing copies?*

There is no specific exception or permitted use that applies in relation to temporary acts of infringement under Law No.5846. Transient/temporary copies of electronic works, held for example in a cache or in a computer's working memory amount to infringing copies according to Law No.5846 in which the right of reproduction is extended to loading, displaying, running, transmission and storage of a computer program where such acts require the temporary reproduction of the computer program.

3. *Is there a private copying exception? If so, what is its scope? Should copyright levies apply for private use? If so what uses should be subject to the levy?*

Under Law No. 5846 there is a private copying exception, which applies to all types of works. This exception has been evaluated and explained in detail under Question 1, Part 3 of the Turkish Group's report on Q216A and also under Question 1 above. With respect to the scope of the exception, we refer to Question 1, Part 3 of the Turkish Group's report on Q216A and to the Question 1 above.

Law No. 5846 requires payment of a levy in relation to storing media and technical copying devices. Those who produce or import all kinds of storage media such as CDs, DVDs, video tapes, audio tapes, computer disks and all technical devices used for reproduction of works of art for commercial purposes must pay a levy to the Ministry of Culture.

According to the wording of the above provision, the levy should apply to commercial use only. On the other hand, although this levy is imposed on producers or importers, it is eventually reflected in the prices paid by the consumer. The Turkish Group is therefore of the opinion that it can be considered as a hidden levy that applies for private use.

4. *Under what conditions do the hyperlinking or location tool services provided by search engines infringe copyright? Are there any exceptions or permitted uses relevant to this activity?*

First of all, it must be mentioned that there is no specific regulation or article in any legislation regarding the exceptions or permitted uses relevant to hyperlinking or location service tools by search engines in Turkey.

As stated in Q216A, exceptions and the permitted uses of a copyrighted work mentioned in the Law No. 5846 are prescribed so generally that any activity takes place either in real life or on the Internet including but not limited to hyperlinking, can fall within the scope of these exceptions or permitted uses as long as the criteria are fulfilled. Again, as stated in Question 1 above, Law No. 5651 regulates content provider's responsibility with regards to hyperlinking activities and according to this law, content providers are not responsible from hyperlinking unless, the way this hyperlinked content is presented shows that the hyperlinking content provider is also aiming to display this content. Although it is arguable in our practice, this regulation may can be interpreted as being applicable to copyright matters.

Therefore, it is more up to Jurisprudence to determine the conditions case by case when a hyperlinking shall be considered as copyright infringement and when falls within the scope of exceptions or permitted uses. Unfortunately there is not much case law publicly available regarding these issues and consequently it was not possible for the Turkish Group to refer to any.

When the copyright infringing activities are considered, hyperlinking can be considered as legal at the first glance because the copyright-protected content is stored on a server other than that of the linking party. Accordingly there is no infringing "reproduction/copy" made by the linking party, on which to base liability. On the other hand, according to Law No. 5846 Article 25 communicating a copyrighted work to public by means used for transmitting signs, sounds and/or images exclusively belongs to the author of the work therefore communicating other's copyrighted work without authorization through hyperlinking can be considered as copyright infringement. However to decide on the issue not only the activity but also the content must be taken into consideration since hyperlinking depending on the type of content,

might fall within the scope of freedom of quotation or borrowing, news or even personal use as long as the use does not unreasonably prejudice the legitimate interests of right holders or conflict with normal exploitation of a work or aim to gain profit or refrain from indicating the name of the author and the hyperlinked web site for his case.

5. *Are there any other exceptions or permitted uses which you consider particularly relevant to the digital environment (not previously studied in Q216 A)?*

No. There is not any other exception or permitted use explicitly relevant to the digital environment.

## **II. Proposals for harmonization**

The Groups are invited to put forward proposals for the adoption of harmonised rules. More specifically, the Groups are invited to answer the following questions without regard to their national laws:

6. *In your opinion, are the exceptions to copyright protection for (i) user-generated content, (ii) transient/temporary copies, (iii) private copying (taking into account any copyright levies) and (iv) hyperlinking 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 sectors?*

In view of digital environment, Turkish Copyright Law System is composed of general provisions with reference to articles and definitions of rights (with some inserts of new definitions and/or sections if needed). The main aim is to keep up to date the legal system along with the development and diversity of technological infrastructure. On this perspective, jurisprudence and precedents hold the balance between right holders and the public at large by the interpretation of the definitions by virtue of the spirit of law upon taking into consideration the recent technologic developments in suitable bases mostly.

7. *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?*

The Turkish Group considers that these exceptions and permitted uses are appropriate to the technology, understandable and realistic in the hi-tech and digital sector. However, those exceptions or permitted uses shall not be extended except in very limited circumstances. For the procurement of a true balance between the legitimate interests of all parties involved, the authors should be confident for their work that the existing exceptions are adequate and will not be increased unless it is indispensable to incorporate a new exception or permitted use to protect the needs of users to have access to and to use the copyright works in the hi-tech and digital sectors.

Whereby all exceptions and permitted uses are subject to limitations as explained in the above paragraphs (i.e. use may not unreasonably prejudice the legitimate interests of right holders or conflict with normal exploitation of a work or aim to gain profit or refrain from indicating the name of the author), the Turkish Group considers that they contribute to a situation where copyright is still enforceable in practice.

Nevertheless, the Turkish Group emphasizes that the balance between the legitimate interests of the public and copyright owners should be considered objectively while the aforesaid exceptions and permitted uses are substantiated.

8. *What, if any, additional exceptions would you wish to see relevant to these areas?*

The Turkish Group does not believe that there should be any other exceptions in these areas, as the general provisions are sufficient as long as they are fairly applied on a case by case basis. On the other hand, provisions of Law No. 5651 mentioned above with regard to limits of the responsibilities of service provider, host provider and content provider can be added to exceptions regulated with Law No. 5846 in order to clarify the issue since leaving it to interpretation may have negative consequences.

9. *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?*

The simple answer to this question is NO due to the territorial characteristics of copyright laws and different enforcement processes. Moreover as stated in Q216A it is not requisite to add new exceptions as hi-tech and digital sectors are very fast developing sectors. However the international treaties can prescribe the exceptions and permitted uses as a joint recommendation concerning the issue (such as WIPO's Joint Recommendation Concerning Provisions on the Protection of Well-Known Marks). Through this way, countries, where there is no specific regulation or not much case law regarding the issue, will be able to enhance their legal awareness.

**Note:** It will be helpful and appreciated if the Groups follow the order of the questions in their Reports and use the questions and numbers for each answer. If possible type your answers in a different colour. Thank you for your assistance.

## **SUMMARY**

The exceptions with regards to copyright issues are governed in a general sense in the relevant Turkish legislation. Therefore it is not possible to state that there is a specific exception for using a copyrighted material in UGC sites. The specific provisions regulating the responsibilities and the exceptions of the responsibilities of service, host and content providers are applicable to limited number of crimes but may be applied through interpretation to copyright cases.

Generally, private use and ability to monitor contents of the UGC sites constitutes main defensive arguments in most of the cases.

Specifically, transient/temporary copies of works or hyperlinking may constitute infringement if they do not fall within the scope of exceptions or permitted uses when evaluated on a case by case basis.

Finally, although there are no copyright levies that apply directly for private use, there is a levy on technical devices and other media used for reproduction, which is eventually reflected to consumer as an indirect levy.

## **RESUME**

Les exceptions relatives à la question de droit d'auteur sont réglementées d'une manière générale. C'est pourquoi il n'est pas possible de dire qu'il existe une exception spéciale concernant l'usage d'un matériel protégé par un droit d'auteur, uniquement dans les sites d'UGC. Les provisions spécifiques réglementant les responsabilités et les exceptions aux responsabilités des fournisseurs d'accès, d'hébergement et du contenu sont applicables à un nombre limité de crimes/délits mais à travers l'interprétation elles peuvent être appliquées aux cas des droits d'auteurs.

Généralement, dans la plupart des cas, l'usage privé et la capacité de surveiller les contenus des sites d'UGC constituent les défenses principales.

En particulier, les copies transitoires/temporaires des œuvres ou des hyperliens peuvent constituer des contrefaçons s'ils ne tombent pas dans les champs des exceptions ou des usages permis lorsqu'ils sont évalués de cas par cas.

Finalement, même s'il n'existe pas d'impôts directs sur les droits d'auteur qui sont imposables en cas d'usage privé, il existe un impôt sur les outils techniques et les autres médias utilisés pour la reproduction, lequel est éventuellement reflété sur le consommateur comme un impôt indirect.

## **ZUSAMMENFASSUNG**

Die Ausnahmeregelungen in Hinblick auf urheberrechtliche Sachverhalte sind im türkischen Recht allgemein geregelt. Daher ist es nicht möglich zu sagen, dass es für die Verwendung urheberrechtlich geschützter Materialien in UGC-Seiten eine besondere Ausnahmeregelung gibt.

Die besonderen Bestimmungen, die die Haftungen und die Ausnahmen der Haftungen von Service, Host- und Content- Anbietern regeln sind für eine begrenzte Anzahl von Verbrechen anwendbar, diese können jedoch durch Auslegung auf Urheberrechtsfälle angewendet werden.

Im Allgemeinen ist der private Gebrauch und die Fähigkeit Inhalte der UGC-Seiten zu überwachen in den meisten Fällen die wichtigste Verteidigung.

Besonders vorübergehende/vorläufige Kopien von Arbeiten oder Hyper-Verbindungen begründen Rechtsverletzungen, wenn sie bei der Fall zu Fall Beurteilung nicht in den Rahmen der Ausnahmen oder des erlaubten Gebrauchs fallen.

Schließlich gibt es zwar keine direkten Urheberrechtsabgaben, die für den privaten Gebrauch gelten, jedoch gibt es eine Abgabe auf technische Geräte und Reproduktion von anderen Medien, die schließlich als indirekte Abgabe beim Verbraucher einfließen.