

## Question Q216

**National Group:** Turkish National Group

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

**Contributors:** Esra Ter  
Esra Dunder Loiseau  
Evrin Kaslioglu  
Korcan Dericoglu  
Onder Ozden

**Representative within Working Committee:** Onder Ozden

**Date:** 02.03.2010

### 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?

There is neither specific provision nor division under the Turkish Law including the Law on Intellectual and Artistic Works numbered 5846 (hereinafter referred to as "Law No. 5846") regarding the exceptions or permitted uses apply in relation to activities of an ISP or other intermediaries namely, Content Provider, Access Provider, Usenet Operators. The exceptions of copyright protection and the permitted uses of copyright works mentioned in the Law No. 5846 are applicable to all types of works including copyright works in the hi-tech and digital sectors. These exceptions are divided into 3 groups and can be summarized with their limitations as;

## **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 proceeding. 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. Where the nature of the event or of the situation does not so require, the names of the speakers need not be given. For purposes other than those mentioned in the first paragraph, the right to reproduce or publish speeches and addresses shall belong to their authors.

### **- 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. All photographic works (whether or not being of an aesthetic nature) and paintings may solely be quoted for illustrating contents of the selected or collected work. However, this possibility may not be used in a way that would unreasonably prejudice the legitimate interests of the right holder or would conflict with normal exploitation of the work. These limitations shall also be applied to (school-radio) broadcasts exclusively prepared for schools and approved by the Ministry of Education. Reproducing selected and collected work from published musical, scientific and literary works and from publicly exhibited works of art for a purpose other than education and instruction is only permissible with the permission of the author and in all such cases, the title of the work and the name of the author shall be cited in the usual manner.

### **- 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. However, the issue and the date of the newspaper, of the periodical, of the agency and of any other source from which the quotations have been made has to be mentioned together with the name, the pseudonym or the mark of the author of the articles.

#### - 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. However, this freedom shall not be exercised in a manner of prejudicing the legitimate interests or in a contrary manner to the usual exploitation of the work.

### **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. In the absence of specific contractual provisions, the reproduction and adaptation of a computer program by the lawful acquirer shall be permissible where necessary for the use of the computer program in accordance with its intended purpose, including for error correction. The loading, running and error correction of a computer program by a person who has lawfully acquired the program may not be prohibited by contract. The making of a backup copy by a person having the right to use the computer program may not be prevented by contract insofar as it is necessary to ensure such use. It is permissible for a person who has acquired the right to use a computer program to observe, analyze or test the functioning of the program in order to determine the ideas and principles underlying any element of the program if he does so while performing any of the acts of loading, displaying, running, transmitting or storing the program of which he is entitled to do. Where reproduction of the code and translation of its form within the meaning of reproduction and adaptation of the computer program are indispensable to obtain the information necessary to achieve the interoperability of an independently created computer program with other programs, the performing of such acts shall be permissible, provided that the following conditions are met:

1. These acts are performed by the licensee or by another person having the right to use a copy of the program or on their behalf by a person authorized to do so;
2. The information necessary to achieve interoperability shall not be made available to the persons specified above;
3. These acts are confined to the parts of the program which are necessary to achieve interoperability.

The provisions of the above paragraph shall not permit information:

1. to be used for purposes other than to achieve the interoperability of the independently created program;
2. to be given to others, except where necessary for the interoperability of the independently created program;
3. to be used for the development, production or marketing of a computer program substantially similar in its expression or for any other act which infringes copyright.

#### - 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. In the case of works of architecture, permission shall extend to their exterior form only. Artistic works may be publicly exhibited by their owners or with their consent, unless the author has expressly prohibited such exhibition. Works to be sold by auction may be exhibited to the public. It shall be permissible to reproduce and publish in catalogues, guides and similar printed works exhibited on public premises or to be sold by auction by the organizers of the exhibition or auction. The name of the author may be omitted in such cases unless it is customary to include the name.

All the above explained limitations and permitted uses are applicable to all types of ISPs.

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?

According to Law No.5846 service or access providers do not have any obligation to identify and notify the infringing activities of their customers.

Nevertheless, the service and content providers are obliged to take remedial steps such as the removal of the unlawful material from the content in question upon the application lodged by the right owner pursuant to Supplementary Article 4 of the Law No.5846. In such a case, the right owner shall apply to the content provider for the cessation of the violation within 3 days and if the violation persists, upon the application filed before the Public Prosecutor, the cessation of the service rendered to the content provider by the service provider shall be ordered. In the event that the violation is ceased, the content provider is provided with the service again.

Besides, according to Law on the Regulation of the Transmissions Communicated via Internet and Competing with the Felonies Committed by These Transmissions numbered 5651 (hereinafter referred to as "**Law No.5651**"), access and host providers are obliged to prevent the access of the illegal content communicated by any of its user in the event that he is notified as regards the said unlawful content in compliance with the provisions of the Law No.5651 and he is able to prevent it technically.

Respectively, the Turkish National Group would like to stress out that the above explanations shall set an answer to a part of **Question 1** above, cited as "*..., for example when the ISP is put on notice of unlawful content?*", since such an instant is envisaged in our legislation within the scope of infringing acts rather than limitations to the aforesaid exceptions.

The position is not different depending on whether the customer has only infringed once or has carried out repeated infringing activities.

Aforesaid obligation does not affect the scope of the exceptions or permitted uses that apply to those service, content or access providers.

3. What exceptions exist for "digitisation" or to allow for format shifting of sound recordings, films, broadcasts or other works?

There is no specific provision under the Law No.5846 setting out exceptions for digitization or to allow format shifting of sound recording films broadcast or other works.

The general exceptions explained under Question 1 apply to digitization and format shifting as well.

4. Are there specific exceptions permitting libraries to format shift or to make digital copies for archive or other purposes?

There are no specific exceptions permitting libraries to format shift or to make digital copies.

5. Are there exceptions or permitted uses allowing the use of orphan works? If so, what is their scope?

According to Law No.5846, orphan works can be copied, published and reproduced by anyone unless the authorship over the allegedly orphan works is proven.

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?

The general provisions on fair dealing/ fair use that have been explained under Question 1 above apply here. There is no specific fair dealing/fair use application for library/search facilities.

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?

The Law No.5846 in our country adopts the requirement of international treaties (Bern Convention Art.9) with respect to limitation of those exceptions in its provision underlying private use exception in respect of the author's right of reproduction. According to Law No.5846, it is permissible to reproduce intellectual and artistic works for personal use without aiming to gain profit. However, such reproduction cannot unreasonably prejudice the legitimate interests of right holders or conflict with normal exploitation of a work.

In this regard, the said Article is construed as the reproduction made for personal use shall appeal to the private ambient which means that the copies duplicated for the personal need shall be limited with the number of people take part in such private ambient. In the doctrine, it is argued as to whether the level of exploitation of the work shall be limited with one copy which shall be allocated to the person who fairly uses the work or more than one copy provided that the other copies are duplicated finitely with the restrained ambient (i.e. family members) of that user. Actually, the number of copies shall never be more than the personal need which therefore may not unreasonably conflict with the normal exploitation of a work. Besides, the said reproduction shall pursue the goal of private use. Otherwise, it shall amount to commercial use of the work in which the user aims to gain profit or dispose/save cost.

Last but not the least; the use shall not have any detrimental effects over the potential market or the value of the work in question.

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?

The Turkish National Group does not consider any other exceptions or permitted uses 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?

The Turkish National Group considers that the exceptions to copyright protection set out under the general provisions of Law No. 5846 that apply to (i) the activities of an ISP (ii) digitisation or format shifting; and (iii) orphan works, and to Library/search facility are suitable and adequate to hold the balance between the interest of the public at large and of copyright owners in the hi-tech and digital sector. Some proposals that may help develop the current situation will be mentioned under section (c) below.

- (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?

The Turkish National 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 shall be confident with 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 National Group considers that they contribute to a situation where copyright is still enforceable in practice.

Nevertheless, the Turkish National 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.

Notwithstanding the above, the author's name should be indicated and the copyright owner may receive fair compensation in certain cases.

(c) What, if any, additional exceptions would you wish to see relevant to these areas?

The Turkish National Group is of the opinion that it is not requisite to add new exceptions since hi-tech and digital sectors are very fast developing sectors.

On the other hand, the Turkish National Group considers that the legislator has to determine the characteristics, functions and the liabilities of each service, content and access providers in the Internet society clearly in order to eliminate the ambiguity between their roles. Except for the Law No.5651, the liabilities of the service, access and content providers are not well determined in our relevant legislation yet which complicates Courts in the course of rendering their decisions. As a result of that inadequacy, the service, access and/or content providers argue that they shall not be held liable in most of the cases.

With respect to Digital Libraries, it is worth mentioning that there are no provisions under Turkish Law that regulates IP Rights in relation to libraries, either digital or paper based. Considering the fast growth in the digital field and the need for digital libraries, the fair use exception on its own may become insufficient in terms of setting the balance between the interest of the public and of copyright owners in the near future. The Turkish National Group believes that there may be need for specific provisions setting out rights and obligations of libraries (both digital and paper based) and other aspects of library usage in relation to IP Rights.

(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?

Unlike the exhaustive list provided by the European Digital Copyright Directive, the Turkish National Group contemplates that there should not be an exhaustive list given the emergent and international nature of hi-tech and digital fields. Nevertheless, this shall not be construed as meaning that the legislator shall be generous to adopt new exceptions which may unreasonably prejudice the legitimate interests of right holders or conflict with normal exploitation of a work. On the contrary, whereas the author is guarded more than the user in the Law No.5846, legislator should first and to the utmost protect creative endeavour and while doing that he should not overlook the growing needs of the user.

Therefore, on the one hand legislator shall be aware of the fact that in case the balance between the legitimate interests of all parties involved is disrupted against the user, he shall seek for a solution that might re-establish the balance by incorporating a new exception or permitted use and on the other hand, legislator should be aware of the fact that he shall not act impetuously on creating new exceptions.

## Summaries

### SUMMARY

There is no specific division in Turkish IP legislation regarding exceptions or permitted uses apply in relation to library/search facility, orphan works, digitization, format shifting or to activities of an ISP. Accordingly, all exceptions and permitted uses mentioned in Law No. 5846 are applicable to all types of works in the hi-tech and digital sectors. Nevertheless, these exceptions are subject to limitations.

The Turkish National Group considers that these exceptions and permitted uses are suitable to hold the balance between the interest of the public and copyright owners in the hi-tech and digital sector and these exceptions and permitted uses shall not be extended except in very limited circumstances.

The Turkish National Group believes that the current hurdles of applying the provisions of IP laws for the protection of copyright works in the hi-tech and digital sectors will be solved as the nature and characteristics of this sector and functions of its intermediaries are more comprehensively resolved and substantiated by the legislator and the practitioners.

### RÉSUMÉ

Il n'existe pas de dispositions spécifiques dans la législation turque relatives à la propriété intellectuelle concernant les exceptions ou les utilisations autorisées qui s'appliquent en matière de bibliothèque / centre de recherche, d'œuvres orphelines, de numérisation, de conversion de formats ou d'activités d'un fournisseur d'accès. En conséquence, toutes les exceptions et les utilisations autorisées sont applicables à tous les types d'œuvres dans le secteur hi-tech et numérique. Néanmoins, ces exceptions sont soumises à certaines limitations.

Le Groupe National turque considère que ces exceptions ainsi que les utilisations autorisées sont de nature à maintenir l'équilibre entre l'intérêt du public et celui des propriétaires de droits d'auteur dans le secteur hi-tech et numérique, et que lesdites exceptions et utilisations autorisées ne doivent pas être étendues, sauf dans des circonstances très limitées.

Le Groupe National turque estime que les difficultés actuelles de l'application des dispositions relatives à la loi sur la propriété intellectuelle pour la protection des œuvres protégées dans le secteur hi-tech et numérique seront résolues à condition que les législateurs et les praticiens aient une meilleure connaissance des caractéristiques de ces secteurs ainsi que des intermédiaires qui y officient.

### ZUSAMMENFASSUNG

Es gibt in den türkischen Immaterialgüterregelungen keine spezielle Aufteilung für die Ausnahmen und zulässigen Nutzungen in Bezug auf Bibliothek/Recherchezentren, anonyme Werke, Digitalisierung, Formatänderung oder Tätigkeiten eines Internetdiensteanbieters. Dementsprechend sind alle, die im Gesetz mit der Nummer 5846 geregelte Ausnahmen und zulässigen Nutzungen, für jede Art von Tätigkeiten im Hochtechnologie- und Digitalsektor anwendbar. Dennoch sind diese Ausnahmen Beschränkungen unterworfen.

Die türkische Nationalgruppe ist der Auffassung, dass diese Ausnahmen und zulässigen Nutzungen geeignet sind, das Gleichgewicht zwischen den Interessen der Öffentlichkeit und den Inhabern von Urheberrechten im Hochtechnologie- und Digitalbereich zu halten und daher sollten diese Ausnahmen und zulässigen Nutzungen nur im begrenztem Umfang erweitert werden.



Die türkische Nationalgruppe ist der Ansicht, dass die derzeitige Hindernisse bei der Anwendung der Immaterialgüterrechtsregelungen bezüglich der Schutz von urheberrechtlich geschützten Werke im Hochtechnologie- und Digitalsektor gelöst werden kann, wenn die Eigen- und Besonderheiten dieses Sektors und die Tätigkeiten der Vermittler vom Gesetzgeber und den Anwendern umfassender bestimmt und fundiert wird.