

Question Q216 B

National Group: Switzerland

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

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 no codified definition of UGC. Also there has been no mention of UGC in the case law of the Federal Supreme Court or the cantonal courts to date. Practitioners have attempted to define it as any content, such as a text (blogs, chat rooms), films (YouTube), or any combination of those (Facebook), uploaded on to the internet by users using the services of an internet service provider.

Under current Swiss law there is no codified legal definition of the different types of service providers.

With regard to the liability of ISP for UGC, it seems that mainly the access and the host provider types may be relevant. For this reason, this answer will focus on the liability of these two types of providers. The **access provider** provides the technical infrastructure, with which the user can gain access to the internet, and transfers content between two third parties. The **host provider** hosts a platform, on which its users may post any kind of UGC. Both types of providers can make UGC accessible to third parties.

In contrast to European and American law, Swiss law does not provide safe harbour provisions for ISPs.¹ Therefore, the ISPs fall under the general terms and rules of the Swiss Copyright Act ("CA"). UGC must, as a general rule, not infringe the copyright of third parties. If copyright has been infringed, the injured party may address its claims against either the

¹ However, there are some privileges under Swiss law which can also apply to ISPs (in particular: Art. 28 of the Swiss Penal Code (SPC), Art. 24a of the Swiss Copyright Act (CA)). Art. 24a CA is an exemption for the liability for ISP for UGC from a civil law point of view. This provision holds that the temporary reproduction under certain circumstances does not constitute an infringing act. The importance of this provision, however, seems to be very limited as it would protect the **access provider** only from claims which are based on Art. 10 para. 2 lit. a CA, but not from other claims having their origin in a different legal basis.

ISP as the indirect damager or against any direct infringer, such as the person who actually infringed its copyright by posting infringing content.

A. Liability under Civil Law

- Provider's Responsibility for Disclosing the Identity of the Infringer

Art. 62, para. 1, lit. c CA allows the party whose copyright is infringed to obtain information from the defendant regarding the origin and quantity of the items in its possession that have been illegally manufactured or put into circulation and to pass on information related to the addressees and the extent of forwarding to commercial customers. However, this provision is regarded as not sufficient for obtaining this kind of information from an **access** or from a **host provider**.

Art. 2 para. 1 of the Swiss Civil Code (CC) is also not applicable. Therefore, there is no legal ground for the injured person to obtain data related to the infringer from the provider. In fact, the data protection laws actually prevent the ISP from disclosing such data unless the infringer has been made aware that his or her details will be passed on to third parties who are claiming copyright infringement.

- Removal and Claim to Cease and Desist Against the Provider

Whether or not an injured party can assert a claim against an ISP for removal or to cease and desist under the general provision of Art. 41 of the Swiss Code of Obligations (CO) is not debated. However, there may be a legal basis under Art. 62 para. 1 lit. a and b CA for these kinds of claims. In contrast to Art. 62 CA, Art. 28 CC, contains a clause to determine the capacity to be named a defendant. As such, any person who has participated in the infringement can be named a defendant, regardless of whether or not the person has committed a fault. If these principles are applied without restriction, an ISP can always be held liable for infringement of its customers and users. The fact that the control of their customers' actions by the ISP is nearly impossible, or not always possible, would be irrelevant because of the principle of strict liability which is not based on a fault of the ISP. Therefore, if an ISP hosts UGC, which infringes copyrights, the infringing content will generally have to be removed. Considering the difficulty in enforcing cease and desist orders, however, ISPs should only be obligated to do whatever is technically feasible and reasonable to prevent future copyright infringement.

- Damage Claims Against the Internet Service Provider

Infringement of copyright can be either direct or indirect. A claim based on **direct infringement** by an ISP would have its legal basis in the respective law protecting the specific intellectual property right. Art. 62 para. 2 CA refers to the possible tort claims under the Swiss Code of Obligations for damages (Art. 41 CO), compensation for personal suffering (Art. 49 CO), claims resulting from undue enrichment (Art. 62 CO) or even by specific reference (Art. 423 CO) a claim based on conduct of business without mandate which is not in the principle's interest. This enumeration is not exhaustive. This, combined with Art. 50 CO (joint liability of several perpetrators), can lead to the liability of the ISP. Art. 50 CO, which is not by itself a basis for a damage claim, provides that, besides the direct infringer, the abettor or the instigator can both be held liable for contributory infringement. While other laws relating to intellectual property (Patent Act and Design Act) contain explicit provisions regarding the liability of the indirect infringer, the Copyright Act does not.

Concerning damages claims, it would have to be proven that the ISP acted with intent or negligently when hosting copyright infringing UGC. As a matter of principle, negligence requires that the person acting or committing tort knows or should know of the potential infringement of third party rights. The ISP will have knowledge, for instance, if it is notified by a third party that certain specific UGC infringes copyright. It is, however, much more difficult

to decide - and highly disputed - under which circumstances the hosting provider should have knowledge of the potential copyright infringement under Swiss law. Some legal scholars argue that hosting providers should know of potential infringements already because they provide a technical infrastructure that – at least theoretically – allows for copyright infringements. Some scholars maintain that hosting providers may be seen as acting negligently if they fail to adopt organizational and/or technical measures aiming at preventing or at least mitigating the risks of copyright infringements. Other scholars argue that hosting providers should not be obliged to take any pre-emptive measures to prevent copyright infringements and should be deemed to act negligently only if they fail to take the necessary measures despite having received clear indications of a potential infringement. In summary, there is no consensus in the legal literature as to when a hosting provider must be deemed as acting negligently.

Based on the very low number of cases decided by Swiss courts regarding the liability of ISP, it is very difficult to make a prediction as to which rules of conduct would apply to exclude or limit liability of an ISP.

B. Criminal liability of the provider

- Proposed legislation

To determine the responsibilities for criminal liability with regard to cyber crime, the Swiss Federal Council entrusted an expert committee with drafting an amendment to the Swiss Penal Code. This amendment was sent into consultation in December 2004. Under the first draft, the **access provider** would not have been liable for the actions of its users, if the access provider does nothing else than provide access to the internet.

Regarding the liability of the **host provider**, a more differentiated solution was proposed: The host provider would be exempt from liability unless the host provider failed to take actions to block or lock-out information (UGC) after obtaining knowledge that such information was illegal or infringed third party copyright.

However, in 2008, the Federal Council abandoned the project, as it viewed the general rules of the Swiss Penal Code to be sufficient to combat cyber crime by placing liability on the ISP.

- Current legislation

Regarding the criminal liability of ISP, there have been a number of decisions handed down in particular with regard to the criminal aspect of infringement of copyright laws. If an **access provider** is warned of a potential criminal content of certain internet addresses and if it does not react, the ISP will be considered as an abettor and become criminally liable. This is even more so for **host providers**, as they enable the appropriate hosting and provide an opportunity for infringement. In a very recent decision handed down on February 7, 2011², regarding the responsibility of a web master for a copyright infringement, the Swiss Federal Supreme Court has held that the operator of a website may be criminally liable as aider and abettor to a copyright infringement, if such a person is responsible for a website, on which users are provided hash links to peer-to-peer networks such as eDonkey, etc., and can search them in a systematic way (including the search of copyright protected content), by actively supporting and facilitating access to the files protected by copyright.

- Possible Media Exemption

The rules in the Swiss Penal Code applicable to media could also be viewed as an exemption for ISPs. Under Art. 28 of the Swiss Penal Code (PC), the author is solely

² Decision 6B_757/2010 of 7 February 2011. Available at : http://jumpcgi.bger.ch/cgi-bin/JumpCGI?id=07.02.2011_6B_757/2010

responsible and liable for the content of any publication in media. Only if the author cannot be determined or if the publication was done without the author's knowledge or consent, then in accordance with Art. 322bis PC the publisher or, in the event the publisher cannot be identified, the person responsible for the publication will be held criminally liable. The latter could also be an ISP, particularly if the author of UGC cannot be identified or has not consented to publication.

Electronic publications, including those published on the internet, would probably be covered by the term "media". UGC posted on electronic media on a website that can be accessed by anyone via the internet, is also considered as a publication. This privilege for ISP is however limited to so called media content offences (*Medieninhaltsdelikte*). It is thus controversial whether Art. 28 PC is applicable to violations of the CA, which provide a criminal sanction in case of unauthorised publication of copyrighted works (irrespective of their content).

In the event that Art. 28 PC is not applicable, or if the author cannot be determined, the ISP can become criminally liable if it does not take appropriate action to prevent infringement of third party copyrights or other criminal acts. Where information is automatically processed, it also becomes very difficult to find a responsible person.

However, **host providers** who accept unpublished information without reviewing the content of the individual users (such as Youtube), would probably not be regarded as conventional media. Unlike conventional media, the contributions by the authors are multiplied or stored without any redaction by these ISP and there is no influence on the publication. Thus these ISPs would not benefit from the media exemption under the Penal Code, but would also most likely not be liable as aider and abettor for the fact of allowing a user to publish on the platform offered by the host provider alone.

There is however some debate about whether the legal framework requires undertakings of this kind to ensure a certain measure of filtering of content. The solutions seem to be feasible and in place for host providers, who have a set of tested mechanisms in place (filters, flag-down procedures etc.). It is more critical for access providers who only provide their customers with technical access to UGC which can also be accessed through other means. Their only option to avoid becoming liable is to interrupt the flow of data from and to a particular user once they have been put on notice that there is UGC infringing third party copyrights being distributed from such user is of criminal content. However, this is disputed in the legal literature and there is no case law to date.

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?

Article 10 para. 2 letter a CA provides that the author shall have in particular the right to produce work reproductions of the copyrighted work, such as printed materials, phonograms, videograms and data carriers.

This exclusive right to produce work reproductions of the copyrighted work basically includes all types of reproductions, including provisional reproductions. However, with respect to the electronic use of a work, such exclusive right does not always lead to a satisfying result.³

Chapter 5 CA (articles 19 and following) provides several limitations⁴ of copyright. In particular, in accordance with article 24 CA a reproduction of a work may be made in order to ensure the preservation of the work. In such case, a reproduction must be stored in an archive not accessible to the general public and marked as an archive copy. Furthermore

³ Barrelet / Eggloff, *Le nouveau droit d'auteur*, 3^e éd, Berne 2008, N 1 ad Art. 24a.

⁴ We prefer the expression "limitation" over "exception" in order to avoid the discussion whether they would have to be narrowly construed, what is normally said to be the case for exceptions.

according to paragraph 2 of said provision, any person entitled to use a computer program may make a security copy thereof and this right may not contractually be waived.

In addition, the recently introduced article 24a CA provides that a temporary reproduction ("*Vorübergehende Vervielfältigungen / Reproductions provisoires*") of a work is authorized subject to the following conditions:

- a. The reproduction is transitory and accessory;
- b. The reproduction is an integral and essential part of a technical process;
- c. The only purpose of the reproduction is to enable a transmission in a network between third parties by an intermediary or a lawful use of the work;
- d. The reproduction does not have an independent economical signification.

This provision on temporary reproductions as a limitation of copyright has entered into force on 1st July 2008 within the framework of a revision of the CA approved in October 2007 by the Parliament in order to implement the WIPO Copyright Treaty. The wording of article 24a CA is based on the wording of article 4 paragraph 1 of the Directive 2001/29/EC of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society (the "Information Society Directive").

The conditions set out in article 24a CA must be met cumulatively.⁵ As a rule, only digital reproductions can be considered as temporary copies.⁶ A reproduction is transitory or accessory if the copy is deleted at the end of a process or when electricity is interrupted for instance when the data is hosted by a proxy server.⁷ A copy is accessory if it does only simplify another process of use, such as on-line browsing or caching⁸ which allows accelerating the data down-load.⁹

The reproduction must be a part of a technical process and thus, the copies have to be made and deleted automatically when carrying out the process.¹⁰

Based on the above, copies of electronic works held in a computer's working memory (RAM) are not infringing copies (provided of course that all conditions of art. 24a CA are met) as the RAM¹¹ is a volatile memory which is automatically deleted when the computer is turned off. On the contrary, a ROM memory is not volatile (by way of example, a copy automatically saved by a word processing software product, on the computer's hard disk, for instance at the intervals of every 10 minutes when using the software, does not fall under the scope of article 24a CA).

Art. 24a let. c CA further provides that the only purpose of the reproduction must be to enable a transmission in a network between third parties or a lawful use of work. The enabling of a transmission in a network between third parties is thereby focusing on access providers, service providers and host providers¹² and thus, shall also limit the responsibilities of such service provider (as well as those of the user starting the process).¹³

As regards the enabling of a lawful use, the right to make a lawful copy (be it on the basis of a legal license or a contractual license) and the right to make a temporary reproduction within

⁵ Barrelet / Eggloff, *Le nouveau droit d'auteur*, 3^e éd, Berne 2008, N 3 ad Art. 24a.

⁶ Barrelet / Eggloff, *Le nouveau droit d'auteur*, 3^e éd, Berne 2008, N 3 ad Art. 24a.

⁷ FF 2006 3303, Barrelet / Eggloff, *Le nouveau droit d'auteur*, 3^e éd, Berne 2008, N 4 ad Art. 24a. ; Erläuternder Bericht IGE 2 zum VE 2004, S. 16.

⁸ According to Wikipedia.org, a cache is a component that transparently stores data so that future requests for that data can be served faster. Hardware implements cache as a block of memory for temporary storage of data likely to be used again.

⁹ Barrelet / Eggloff, *Le nouveau droit d'auteur*, 3^e éd, Berne 2008, N 4 ad Art. 24a.

¹⁰ Barrelet / Eggloff, *Le nouveau droit d'auteur*, 3^e éd, Berne 2008, N 5 ad Art. 24a.

¹¹ The expression RAM memory is characterized by the volatility of the data.

¹² Barrelet / Eggloff, *Le nouveau droit d'auteur*, 3^e éd, Berne 2008, N 6 ad Art. 24a.

¹³ Erläuternder Bericht IGE EB 2. VE 2004, S. 16 f.

the meaning of Art. 24a CA is also covered by the permission (if the reproduction complies with all other conditions of Art. 24a CA).¹⁴

Finally, the condition that the reproduction must not have an independent economical signification means of course that any reproduction which is made accessible against compensation does not fall into the scope of Art. 24a CA.¹⁵

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?

Swiss copyright law grants the limitation of private use (art. 19 CA).

Three types of use are considered private according to the law:

- Private use *stricto sensu* (para. 1 lit. a) is any use made for private purposes. The provision aims at all kinds of works of art. It is a general limitation of copyright, that allows anyone to use a copyrighted work of art for himself or within a circle of persons closely connected to each other, such as relatives or friends.

This provision is mandatory and cannot be waived by contract. The prohibition to circumvent technical measures can be seen as preventing private use. Nevertheless, this prohibition is not applicable in case of legally authorized use such as private use (39 IV CA). In addition, an independent office for monitoring how technological measures are affecting the lawful use of a work has been established with the legislative revision of the CA. The use cannot be for commercial purposes (whereby a fee covering costs does not prevent the character of private use).

- The use by educational institutions covers : “*any use of a work by a teacher and his students for educational purposes*” (para. 1 lit. b). Only the use by or by instruction of a teacher within the class is covered.
- The copying of a work within enterprises, public administrations, institutions, commissions and the like, for internal information or for documentation purposes is lawful under the same restrictions as previously exposed (para. 1 lit. c).

Outside the private use *stricto sensu*, only the copying of extracts of a work, such as books, newspapers, films, DVD, available on the market, is lawful, but not the copying of a complete work (para. 3). The disposition aims at avoiding copies that would compete with the work's sale. Full and substantial copying is therefore forbidden.

The law imposes royalties for a copy made for private purpose except for the private use *stricto sensu* (art. 20 CA). It is a fair compensation for the author that cannot consent or refuse a copy of his work being made under a private copy limitation.

The remuneration is as follow:

- Copying for private purposes, *stricto sensu* (art. 19 para. 1 lit. a CA), is royalty free. There is, however, a copyright levy for copies made on a third party copy machine or on blank media. This constitutes an indirect form of remuneration. The purpose of this type of levy system is to avoid that the collecting rights societies would have to invade people's privacy. The levy on blank media is therefore due directly from the manufacturer or the importer (if the manufacturer is not located in Switzerland). The

¹⁴ Barrelet / Eggloff, *Le nouveau droit d'auteur*, 3^e éd, Berne 2008, N 6 ad Art. 24a referring to ATF 127 III 26 and 128 IV 201; Oertli, in Müller/Oertli (ed.) N 11 ad Art. 24a.

¹⁵ Barrelet / Eggloff, *Le nouveau droit d'auteur*, 3^e éd, Berne 2008, N 7 ad Art. 24a.

notion of blank media/tapes covers all kind of content in digital or analogue format (but not hard disks in personal computers or online storage capacities).

- Furthermore, remuneration is due by educational institutions for copies made for educational purposes or by students. Enterprises, public administrations, institutions, commissions and the like, must also pay for copies. The educational institutes as well as enterprises, public administrations, institutions, commissions and the like, will be charged a levy by ProLitteris, the Swiss reproduction rights management organization. In addition, the levy will be paid by the third party who is entrusted with making the reproduction.

The mechanism of remuneration

The remuneration provided for in compensation for the limitations can be divided into two categories:

1. ProLitteris is the collecting rights society that has the authority to collect and distribute royalties for works of literature and art (Tariff 8). ProLitteris usually levies on copies made through a copy machine (but not only).
2. SUISA is the collecting right society that has the authority to collect and distribute royalties for copies made on blank tapes, CD-ROM's and any other kind of digital or analogue data carriers (Tariffs 4a-4e).

In order to avoid an excessive and complicated administration, for every kind of tariff one collecting society has been designated to bill. Then, each collecting society will distribute among its sister companies the funds received for the field for which they are in charge.

The tariffs (hereinafter TC 4a-4e) cover blank media that are able to record protected works and the spectrum of the tariffs is large enough to include any kind of blank medium no matter the technology used. The levy is made on the potential of copying copyright protected works, therefore it will be levied on these media even if they are used in fact to record unprotected content.

Based on market surveys, the remuneration on blank tapes and media used for professional purposes has been reduced over time due to the fact that they are often used outside the scope of copyright and that costs of data storage media have come down. The tariffs aim at establishing a situation that reflects the reality, but may not do justice in individual instances. The existing blank media levy in Switzerland is now subject to political discussions. Indeed, it is difficult to determine an adequate levy that takes into account the sales price and the high capacity for storing protected works.

Pursuant to art. 60 para. 2 CA, "*compensation shall normally amount to a maximum of 10 percent of the proceeds from a cost of utilization for author's rights and a maximum of 3 percent for neighboring rights; however, it shall be determined in such a way that, subject to economic administration, the entitled persons receive equitable remuneration*".

Taking into consideration the development of the technology, the Swiss copyright levy on blank tapes and CD ROM's, was a good way to levy at the time of tape recorders. Today, we may have to think of ways to improve it by taking into consideration the evolution of technology (increasing hard disc capacity in personal computers, online storage facilities etc.). Alternative solutions may need to be explored such as a levy on storage capacity in personal computers, a flat-rate remuneration for access to protected works on the internet (model Spotify) or similar.

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?

Generally, hyperlinking to a site will not infringe copyright in that site¹⁶. In order to constitute a copyright infringement under Swiss law, one or more of the exclusive rights of the copyright holder would have to be infringed. Of most relevance here, the link would have to result in a “making available” of the copyright work (Art. 10 para 2 lit. c, d and e CA). However, a hyperlink is only a reference to the content on the linked site. It is not a “making available” of that content; the content is still made available on the original site¹⁷. The link does nothing more than point to its location. So the act of providing a link as such does not infringe copyright in the content of the linked site under Swiss law.

It may be different where a website offers a catalogue of content offered on other websites that can be accessed through direct links through such other sites directly onto the content¹⁸. The text of the link itself is “made available” directly on the site providing the link. However, in most cases the link text does not meet the requirements for copyright protection, namely a work of intellectual creation and of a certain individuality (Art. 2 para. 1 CA). Even if a small part of the content is included with the link, it is likely that the limitation for citation (Art. 25 CA) will apply¹⁹. This limitation permits works to be cited without infringing copyright, provided the citation serves the purpose of providing an explanation, reference or illustration and as long as the extent of the citation is justified by this purpose.

More problematic are situations where the linking site makes use of hyperlinked content. This may occur by means of **deep links**, *i.e.*, links that bypass the home page, including adverts and/or conditions of use of the linked website, or **framing**, where the party linking to third party content presents that content as if it were part of the linking party’s own website. Although a website owner may have very good reasons to object to deep linking, there will likely only be a copyright infringement if the user is left with the impression that the linked site is still a part of the linking site. Otherwise, such deep links do not generally infringe on any of the exclusive rights of the copyright owner under the Copyright Act²⁰. The more useful tool available to the website owner here would be an action based on unfair competition. With framing on the other hand, by presenting the linked content as its own, the linking site owner may be liable for copyright infringement²¹.

In circumstances **where the user of a site infringes copyright**, providing a hyperlink to that site may constitute a contribution to copyright infringement²².

In its decision of 7 February 2011²³, the Swiss Federal Supreme Court found a website operator guilty of being an **accessory to the crime of copyright infringement** committed by users accessing linked content²⁴. The website in question provided hash links to films and computer games posted on the internet without the consent of the copyright holders.

¹⁶ See e.g. Rolf H. Weber, E-Commerce und Recht, Zurich 2001 (cited below as “Weber, E-Commerce”), 247 f; Rolf H. Weber, Rechtsfragen rund um Suchmaschinen, Zurich/Basel/Geneva 2003 (cited below as “Weber, Suchmaschinen”), III 2.1.2., 65; David Rosenthal, Projekt Internet: Was Unternehmen über Internet und Recht wissen müssen (cited below as “Rosenthal, Projekt Internet”), Zurich 1997, 184; Michael Kikinis, Immaterialgüterrechte und elektronischer Geschäftsverkehr, in: Internet-Recht und Electronic Commerce Law (F. Jörg/O. Arter eds), 2. Tagungsband, Bern 2003, 124.

¹⁷ Weber, E-Commerce, 248.

¹⁸ See the Swiss Supreme Court Decision referred to in footnote 2 above.

¹⁹ Rosenthal, Projekt Internet, 184.

²⁰ Weber, Suchmaschinen, III 2.1.2 65 is of the same view.

²¹ Weber, E-Commerce, 251; Weber, Suchmaschinen, III 2.1.2 66.

²² For legal and illegal downloads, see the Decision of the Grisons Cantonal Court, „swissmule.com”, reported in sic! 2008, 205-208 with comments from Marcel Küchler.

²³ See the answer to question 1 and footnote 2 above.

²⁴ Decision 6B_757/2010 of 7 February 2011. Available at : http://jumpcgi.bger.ch/cgi-bin/JumpCGI?id=07.02.2011_6B_757/2010.

Provided the user had downloaded the necessary peer-to-peer software from the internet, he or she was able to directly access the infringing content by clicking on the hash link. Downloading content (other than software) for private use is not a copyright infringement (Art. 19 CA). However, any further distribution of the downloaded content that is not for private purposes and any upload of that content will likely amount to a copyright infringement. As peer-to-peer software generally includes an automatic upload function to enable the network to operate efficiently, downloads are accompanied by uploads unless the user has disabled the upload function. In this particular case, the probability of such upload having taken place by a user in Switzerland, even though no individual instance was actually proven, was enough for the court to find there had been a copyright infringement. It was this infringement through upload that then constituted the basis for holding the website operator guilty of being a criminal accessory.

Criminal liability requires intent, which in turn needs knowledge on the part of the accused. It is not sufficient that a website offers links to copyright-protected content if the website operator does not know whether the copyright holder has given its permission. In the hash links case, the website operator was found to have known that the users of his website would be committing a copyright infringement by accessing the links he provided. In the case of most search engines, there will likely be no intent, at least not until the search engine is informed of the copyright infringement being committed by users of a particular link.

Facilitating access to copyright protected content without permission of the rightholder may also be found to be a **damaging act in tort**²⁵. However, wilful misconduct or negligence are then required. For search engines, probably the only instance where this would occur is where the search engine is aware that accessing the content will constitute a copyright infringement²⁶. Swiss law does not impose a duty on search engines to monitor copyright infringements, but if specifically informed of the infringing content, the search engine would need to take action to stop allowing access to it (flat-down process).

Other than the limitation for citations mentioned above (Art. 25 CA), and indirectly the limitation for private use (Art. 19 CA), there are **no statutory limitations** or permitted uses in Switzerland that are relevant for hyperlinking or location tool services provided by search engines.

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

Yes. The following cases are of relevant in the digital environment, have not previously been studied in Q 216, and are not reflected in the CA (extra-statutory limitations):

- a) Right to analyse and decompile a computer program to detect bugs if the rightholder does not provide for sufficient support and maintenance at fair terms (in analogy to Art. .21 CA);
- b) Citation right for pictures (removing a controversy around Art. 25 CA);
- c) uses of copyrighted works in any format for the benefit of people with a disability in the format required by the specific disability (extending the limitation of Art. 24c CA);
- d) Use (and incidental copying) of copyright protected works for scientific purposes and research (general „*Forschungsprivileg*“, cf. Art. 9 para. 1 lit. b PatG und Art. 5 para. 3 lit. a) Information Society Directive).

²⁵ Weber, Suchmaschinen, III 2.1.2 66.

²⁶ Weber, Suchmaschinen, III 2.1.1 61.

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?

(i) user-generated content

Under Swiss law, there is no general limitation for UGC; the general rules of law (Civil Code, Copyright Act and Criminal Code) apply. The law is neutral with regard to technology (Internet, traditional media) and source of content, and indeed we do not see any reason for striking a different balance of interests for the internet than for traditional media. To our knowledge no one has ever brought a lawsuit on such grounds which could be viewed as a sign of adequacy of the status quo. However, the issue arises whether the lack of a clear limitation or safe harbour for ISP negatively affects the balance between the interests of the public at large and the copyright owners in the hi-tech and digital sectors. It could be conceived to introduce a general limitation for access providers and a clearly defined standard that exempts host providers from liability.

(ii) transient/temporary copies

The limitation for transient/temporary copies (art. 24a CA) is clear, appropriate and a good compromise that can be internationally generalized and that is aligned with article 2 of the Information Society Directive.

(iii) private copy

The limitations provided for in the Swiss CA represent a relatively exhaustive list of types of cases in which the use is lawful, generally holding the balance between the interest of the public at large and of copyright owners and authors also in the hi-tech and digital sector. There is only a limited need for additional limitations in order to reflect the needs of the hi-tech and digital environment (see above to 5).

As regards the Swiss copyright levy on blank tapes and CD ROM's, the present system was a good way to levy in the analogue world. Today, the evolution of technology in the hi-tech and digital sector should also be taken into consideration. Alternative solutions should be explored such as flat-rate remuneration for access to protected works on the internet.

(iv) hyperlinking

In Switzerland there is no specific limitation for hyperlinking and the general rules of liability (infringement of reproduction and broadcast) are applicable in this kind of case. However, the scope of liability on providers of hyperlinks can be considered relatively clear under existing law. A provider of hyperlinks will only be found to have infringed copyright if he is aware that those accessing the linked content will be committing a copyright infringement or if he makes the linked content his own. Limiting the liability of hyperlink providers to these specific situations would seem to strike a fair balance between the various competing interests involved.

The Swiss system balances the interests of the public in general and of the copyright holders in the field at stake. It is a good compromise for all the parties involved. As previously

explained for the UGC, the need for a specific rule of law on that precise kind of issue never appeared in forefront of Swiss Courts.

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?

(i) There is no exemption for the liability for ISP for UGC from a civil law point of view with the limitation of Art. 24a CA for temporary copies. There is the limited possibility of relying on the media exemption in the Penal Code. However, given that there is no explicit legal basis for an exemption, this has to be deduced from the legal framework. The lack of a clear exemption from liability of ISP with regard to UGC in Swiss copyright law is not appropriate for digital technology.

(ii) The relevant limitations are appropriate to digital technology, understandable and realistic.

(iii) The Swiss private use limitation is generally an appropriate answer to today's concerns, understandable and provides for realistic solutions. It avoids creating barriers to new technologies, while taking into account the legitimate concerns of the authors and rights holders. However, and as explained above, the remuneration system may require an adaptation to the digital technology and the uses of the work on internet. The private copying limitation arguably permits downloading of content for private use even if uploaded illegally, what is not an appropriate solution even if as a matter of principle downloaders are most frequently also acting as uploaders so that their liability can be triggered.

(iv) For hyperlinks, a copyright holder has the ability to enforce its rights by putting the hyperlink provider on notice of infringing content. Once the link provider has knowledge that users will be infringing copyright by accessing the content of a link, it may be found liable for contributing to the infringement. There is a degree of uncertainty around the limits of the required degree of knowledge for civil and criminal liability, however that would likely remain the case even if a specific limitation were introduced for link providers. This solution is appropriate, understandable and realistic.

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

(i) It would be helpful to have clear legislation or more leading cases regarding UGC in order to have a clearer legal situation. We suggest clarifying that service providers are exempt from liability for certain copyright infringements in relation to UGC. Where a service is rendered that consists of the storage of UGC, the service provider shall not be liable for damages or disgorgement of profits by reason of storing UGC at the request of the user on the provider's system, if the provider does not have actual knowledge that the UGC is infringing and is not aware of facts or circumstances from which the illegal UGC is apparent, or the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the UGC. The limitation should obviously not apply where the service provider has the right and ability to control the infringing UGC material or activity.

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?

In the absence of international harmonization of liability for UGC, service providers have to comply with different duties and obligations in different jurisdictions. This disrupts the

business of such service providers and may also lead copyright owners to forum shopping as they look for a jurisdiction that leaves the service providers exposed to liability. Consequently, it would be desirable to have harmonized limitations for providers of these services. Since electronic data flows across borders, global limitations covering UGC and hyperlinking/location tools should be adopted to address these copyright challenges. Theoretically, an international treaty holding an exhaustive list of limitations could be made. However, we doubt that this would be the best suitable solution for two reasons. First, all the national limitations would have to be taken into account and the list would certainly be huge. Additionally, this might lead to misuse by asking for all and any kinds of limitations, in order to reduce copyright in general.

Second, technology is growing fast and a treaty would already be obsolete the very moment it would be adopted. A treaty would lack the required flexibility to include, at the time of its adoption, the new and upcoming technology.

The adoption of an open general limitation („window limitation“ or „mini-fair use provision“), that would allow the use of copyright works even outside a list of narrowly-drafted limitations could be recommended, subject to compliance with the general standards of the Three-Step Test (Art. 9 para. 2 BC, Art. 13 TRIPs and Art. 10 WCT/Art. 16 Abs. 2 WPPT).

Summary:

With the limitation of the liability of Internet Service Providers, the Swiss regulatory framework generally offers clear limitations to copyright which adequately balance the interests of the stakeholders also in the digital and internet environment. The conditions of liability of Internet Service Providers should be clarified by limiting the cases of liability to clearly defined situations of gross negligence or bad intent of the relevant Internet Service Provider.

Résumé:

Sous la réserve de la responsabilité des fournisseurs de services Internet, le cadre réglementaire suisse offre généralement des solutions claires et pondérées de manière adéquate les intérêts divergents des parties concernées également dans l'environnement numérique et de l'Internet. Les conditions de la responsabilité des fournisseurs de services Internet devraient être clarifiées en limitant les cas de responsabilité aux situations bien définies dans lesquelles un comportement gravement fautif peut être reproché aux fournisseurs concernés.

Zusammenfassung:

Mit der Ausnahme der Haftung der Internet Service Providers, enthält das Schweizer Recht eine Reihe von Ausnahmen, welche die Interessen der interessierten Parteien auch im digitalen und Internet Zeitalter angemessen gegen einander abwägen. Die Haftung der ISP sollte auf klar definierte Fälle von grober Fahrlässigkeit oder böser Absicht beschränkt werden.