

## Question Q216

**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

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?*

The Swiss Copyright Act (URG) provides that the holder of copyright in a work has the exclusive right *inter alia* to copy the work (Art. 10, para. 2, lit. a URG), to disseminate the work (Art. 10, para. 2, lit. b URG) and to make the work available (Art. 10, para. 2, lit. c URG). By providing services such as website hosting, internet access, search or Web 2.0 services to customers or users who infringe these rights, ISPs may also infringe these rights, at least indirectly.<sup>1</sup>

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<sup>1</sup> In the responses, a distinction is made only between access and hosting providers. We would consider FaceBook, YouTube and other Web 2.0 providers as hosting providers, as they store and make available content on the internet, in addition to the other services they provide to their users. As they are more closely identified with the sites that they host than more “traditional” hosting providers, they are perhaps more likely to be confronted with claims by copyright owners. However, we are not aware of any case having been brought against a Web 2.0 provider before the Swiss courts to date.

## a) Statutory exceptions

The only statutory exception to the exclusive rights in Art. 10, para. 2 lit. a-c URG that is specific to ISPs is found in Art. 24a URG, which excludes the making of temporary copies from the exclusive rights of the copyright holder. This exception, which is intended to exempt caching and browsing from copyright infringement, is only an exception to the exclusive right to copy a work (Art. 10, para. 2, lit. a URG). As regards the rights to disseminate and make works available (Art. 10, para. 2 lit. b and lit. c URG), there are no statutory exceptions or permitted uses that protect ISPs. The Swiss Federal Council considered whether to propose legislation in this field in 2004 but, contrary to the advice of an Expert Commission, decided that the position under Swiss law was already sufficiently clear. It did propose legislation to clarify the position of ISPs under criminal law in 2004, but has since recommended the Swiss Parliament not to pursue the issue of provider liability under criminal law either.

## b) Exceptions in case law

In relation to **criminal liability** for breaches of copyright (imposed by Art. 67 URG), the Criminal Court of the Canton of Basel-Stadt (sic! 2003, 960) was called on to consider whether an ISP (in this case an access provider) had a duty to prevent use of its services for dissemination of copyright infringing content. In analogy with earlier decisions on the provision of telephone services, the conclusion was that there was no criminal act of omission in these circumstances. The Court held that providing internet services could in no way be considered a special danger to copyright, and therefore there could be no criminal liability for failure to stop copyright infringements. The Court did not make clear whether its findings would also apply to hosting providers. Nor did it examine whether the access provider's failure to stop the copyright infringer could give rise to contributory criminal liability.

In an earlier criminal case (BGE 121 IV 109), the Federal Supreme Court had decided that the general director of a telecoms service provider did bear contributory criminal liability for assisting in the crime of offering pornographic materials to under-16s. The court placed weight on the fact that the general director had failed to ensure customers offering services via the telecoms provider's "Telekiosk" service, many of whom were known to be offering pornographic content, had no mechanism in place to ensure that users were at least 16 years of age. If this reasoning were applied to ISPs, there could be a duty on ISPs to take action once they become aware that their services are being used to offer illegal content.

As regards **civil liability** (Arts. 61ff. URG), there have been no published cases dealing directly with this point and so the legal position of ISPs is not clear. The most helpful analogy can be drawn from the area of infringement of personality rights (protected under Art. 28 of the Civil Code) and in particular from a case brought before the Federal Supreme Court against a printing company in respect of an article that infringed personality rights (Case BGE 126 III 161). The Federal Supreme Court decided that if a serious newspaper was being printed, the printing company could not be required to carry out preventative controls. Only if exceptional circumstances came to the printing company's attention would it be required to examine more closely the material to be printed. For tabloid newspapers or for publications where infringing articles have repeatedly appeared, or where the publication's editors have the reputation of ignoring the law, such circumstances cannot be ignored and the printing company is required to take more care. It should postpone publication in order to carry out controls or refuse publication altogether.

If this Federal Supreme Court case against a printing company can be applied to ISPs (as opposed to a printing company) and to infringements of copyright law (as opposed to rights of personality), it would mean that there would be an exception to copyright infringement available for ISPs. Moreover, there would be no automatic control duty on the ISPs. However, there would be a duty to investigate and take action after a first infringement or in the case of users that have repeatedly infringed or have a reputation for ignoring the law.

It is unclear whether the non-statutory exceptions or permitted uses for ISPs (if any) under Swiss law will apply differently to different types of service provider. The cases decided under criminal law concern access providers. The printing company in the civil law case BGE 126 III 161 probably had a function closer to that of a hosting provider than an access provider. As hosting providers may have more technical possibilities to block or remove content than access providers, it could be that a hosting provider would be expected to do more to prevent or put a stop to copyright infringements than an access provider. However, Swiss courts have not yet been called upon to consider this point.

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?*

#### **a) Obligation to identify**

ISPs that are access providers have a duty to store information on the identity of users of their services, on communication traffic and on invoicing (Art. 15, para. 3 of the Federal Act on Supervision of Postal and Remote Communications, BÜPF). These identification duties apply to access providers, but not to hosting providers. There is no statutory duty on any type of ISP to keep data on the content of exchanged information, nor to monitor and identify users that infringe copyright.

#### **b) Obligation to notify**

Does the ISP have a duty?

Access providers have no duty to notify copyright holders of the identity of infringers of their copyright. On the contrary, they are prohibited from disclosing identity data to private entities (Art. 43 of the Telecommunications Act). Such information may only be provided to a specific body, the Office for Special Tasks of the Federal Department of the Environment, Transport, Energy and Communications, which will pass details on only to those official authorities that appear on a closed list of permitted recipients.

Hosting providers on the other hand are not covered by the Telecommunications Act. So long as they comply with the provisions of the Swiss Data Protection Act (DSG), particularly the duty to notify customers or users that their identity may be disclosed to third parties claiming copyright infringement (Art. 4, para. 3 DSG), hosting providers would be entitled to disclose identity information.

Art. 62, para. 1, lit. c URG contains an obligation on defendants to provide information on the origin of objects in their possession that have been unlawfully produced or put on the market. Access providers do not have infringing works in their possession; they only make available the technical infrastructure to access the works. Therefore,

even in the absence of the prohibition on disclosure of identity information, this Article could not be used by copyright owners to obtain information on an infringer's identity from an access provider. As regards hosting providers, it may be possible to argue that the content on a provider's server or (for Web 2.0 providers) on its website is in the ISP's possession. To date, the ability to use Art. 62, para. 1, lit. c URG to obtain information from a hosting provider regarding the identity of a copyright infringer does not appear to have been tested.

Alternatively a copyright holder whose rights have been infringed might initiate criminal proceedings against an ISP and request sight of files in connection with those proceedings in order to obtain information on the identity of the infringer. The Federal Data Protection Authority has indicated that it would consider this an abuse of the DSG if it is used to circumvent the data protection laws that would otherwise prohibit disclosure of the information, it being specified that this issue has been litigated before the Federal Administrative Tribunal which found that this did not violate the DSG (decision A-3144/2008 of May 27, 2009) and that the dispute will ultimately be decided by the Swiss Federal Tribunal.

### **c) Obligation to take remedial steps**

In the absence of legislation and published court decisions in this field, the scope of the obligation to take remedial steps is a matter of speculation. If the findings in the Federal Supreme Court case BGE 126 III 161 (discussed in the answer to Q1 above) were to be applied to ISPs, there would be no automatic duty to take remedial steps where users infringe copyright. However, there may be a duty to take action in some circumstances. In particular, BGE 126 III 161 would seem to require ISPs to take remedial measures, including termination of access, where users are known to have repeatedly infringed copyright in the past or to have a reputation for ignoring the law. This conclusion would also apply if the result of the criminal case BGE 121 IV 109 against the general director of a telecoms service provider were to be applied analogously to ISPs.

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

The general exception for private use applies, i.e. digitisation of content in analog format or re-formatting of content in digital format is generally permitted if done for one's own use and for use within a small circle of friends (Art. 19, para. 1, lit. a URG). Other exceptions apply to use within the classroom and an enterprise against remuneration payable to an authorised collecting society (Art. 19, para. 1, lit. b and c URG), whereby these exceptions do not extend to the digitisation or re-formatting of entire works that are commercially available (Art. 19, para. 3, lit. a URG). This limitation does not apply if the original copy has been made available lawfully (Art. 19, para. 3bis URG).

The above exceptions do not apply to the digitisation or re-formatting of computer programs (Art. 19, para. 4 URG).

As indirect remuneration for the forms of use that fall under the above exceptions, a remuneration has to be paid to the authorised collecting society for the manufacture or import of storage media for sound and sound/image recordings, including MP3 players or video recorders with hard drive (but not ordinary computers)(Art. 20, para. 3 and 4 URG).

Insofar it is permitted to make a copy of a work in order to preserve it (Art. 24, para. 1 URG), such preservation copy may be made in a different format than the original work. No remuneration duty applies, except in the form of an indirect remuneration (as provided under the previous paragraph).

The temporary copying of a work is authorised (Art. 24a URG) provided that:

- a. it is ephemeral or auxiliary;
- b. it constitutes an integral and essential part of a technical procedure;
- c. it serves exclusively for the transmission within a network between third parties via an intermediary, or the legitimate use of a work;
- d. it has no independent economic significance.

Ephemeral or auxiliary copies may be those stored on a proxy server, or intermediary copies necessary for certain (permitted) forms of use, whether these copies are ephemeral or permanent but auxiliary in nature. The four criteria must be fulfilled cumulatively. They do not extend to changes of the copied work, but cover re-formatting that is dictated by the technical process.

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

Art. 24 para. 1bis URG which entered into force on July 1, 2008, provides that publicly accessible libraries, educational institutions, museums and archives may make copies of works necessary for safeguarding and conserving their collections, provided that these copies are not used for any economic or commercial purposes.

This provision was adopted in order to make sure that libraries and other entities are in a position to safeguard their collection in digital format, which was not possible under the preexisting legal framework<sup>2</sup>. This provision consequently offers to its beneficiaries the ability to make copies of the relevant works and to shift format for archiving purposes. This is particularly important because digital media platforms may have a shorter life span by comparison to non-digital media platforms and may evolve over time so that the digital format may need to be adapted over time<sup>3</sup>. This provision however clearly specifies that the copies are not be used for any economic or commercial purpose.

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

Art. 22b para. 1 URG provides that the rights which are required for exploiting phonograms or videograms may only be asserted through the approved collecting societies to the extent that: a. the use relates to elements coming from archives which are accessible to the public and archives of broadcasting organizations, b. that the right owners are unknown or cannot be located, c. the phonograms or videograms which are to be used have been produced or reproduced in Switzerland and at least ten years have lapsed since their production or reproduction.

Art. 22b para. 2 URG provides that the users are requested to notify the collecting societies about the phonograms and videograms which contain orphan works.

On this basis, the scope of the exceptions for the use of orphan works is quite limited.

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<sup>2</sup> See the Message of the Swiss Federal Council, Feuille Fédérale 2006 I para. 1.2.1, p. 3276 (the Message is available at : <http://www.admin.ch/ch/f/ff/2006/3263.pdf>).

<sup>3</sup> Message of the Swiss Federal Council, Feuille Fédérale 2006 I para. 1.2.1, p. 3302.

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?*

There is no fair use / fair dealing exception under Swiss copyright law which has a specific application for library/search facilities such as Google Book Search. The exception to copyright protection for purpose of quotation of works does not apply in these cases. Art. 25 URG provides in this respect that published works may be quoted if the quotation serves as an explanation, a reference or illustration and the extent of the quotation is justified for such purpose. Art. 28 para. 1 URG provides that where necessary for reporting on current events, works perceived in so doing may be recorded, reproduced, presented, broadcast, distributed or otherwise made perceivable. Art. 28 para. 2 URG further provides that for the purposes of information on current affairs, short extracts from press articles or from radio and television reports may be reproduced, distributed and broadcast or rebroadcast, it being specified that the extract and the source must be designated and that where the name of the author is given in the source, that name must also be given.

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 three step test has three functions depending on the level on which it is applied:

On an international level the test limits the freedom of national jurisdictions to limit the copyright of authors,

on a national level the three steps apply as loadstar for copyright legislation, and

they are used as guidance in the interpretation of the law.

The three step test has been primarily designed to set boundaries to limitations, and not to strike a just balance between interests of copyright holders and private users and the public. Those interests are taken into account in the application of the three step test as made by courts in Switzerland.

We refer in particular to the decision of the Swiss Federal Supreme Court 4C. 73/2007 of 26 June 2007, 134 III 473, regarding press reviews, where the Court, in delib. 6.3, takes into consideration the interests of the public, particularly of small enterprises, to have easy access to information habitually disseminated in the form of press reviews, the interests of publishers (who would be primarily interested in a prohibition right), and the interests of the authors (mostly journalists) who are interested both in their works being widely accessible and in sharing in the revenues generated thereby, what is at least partially assured by the duty of the collecting societies to take into consideration also the original right holders when distributing their revenues (Art. 49, para.3 URG). The Swiss Federal Supreme Court came to the conclusion that the various interests at stake are best balanced by a limitation of copyright against remuneration. The Court concluded that the interpretation of Art. 19 para. 2 URG (copies for use within businesses made by third parties) as covering also press reviews does not contradict the tree step test.

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?*

In relation to domain name service providers, legislation specifically provides that there is no duty for the service provider to control entitlement to a domain name (Art. 14f, para. 2 of the Regulation on Address Elements in the Telecommunications Field, AEFV).

One copyright exception which is relevant for the high-tech sector (even if not related to ISPs, digitisation and format shifting or orphan works) is Art. 21 URG which provides that any person who has the right to use a computer program may obtain, either personally or through another person, the necessary information on interfaces with independently developed programs by decoding the program code. Art. 21 para. 2 URG further provides that the interface information obtained by decoding the program code may only be used for the development, maintenance and use of interactive computer programs insofar as neither the normal exploitation of the program nor the legitimate interests of the owner of the rights are unreasonably prejudiced.

### 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?*

(i) The exceptions to copyright protection for the activities of an ISP under Swiss law are not at all clear. Accordingly it is uncertain how a court called upon to decide in this field would balance the various competing interests.

(ii) The ability of libraries and other relevant entities to shift format for archiving purposes as provided under Art. 24 para. 1bis URG provide for an appropriate and balanced solution between the interests of the relevant stakeholders.

(iii) The regulation relating to orphan works provides for a specific solution the practical efficiency of which is still difficult to assess (given that it has been adopted quite recently). It could be appropriate to extend the scope of the exception for using orphan works to other categories of works (such as literary works) for which a public cultural and scientific interest in accessing such works may be found prevalent under certain circumstances.

The absence of tailored fair dealing/fair use provisions applying to Library/search facility applications in Switzerland privileges the interests of the copyright owners over those of the general public in accessing the relevant works. The absence of such fair uses provision however does not necessarily privilege copyright owners who are in the high-tech sector, but rather owners of copyrights over traditional works.

(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?*

(i) The uncertainty in Swiss copyright law in relation to the activities of ISPs does not benefit the enforceability of copyright in practice.

(ii) and (iii) The relevant exceptions as presently adopted in the Swiss Copyright Act provide for specific solutions which are appropriate in terms of technology particularly because they are technology-neutral (i.e. they do not depend and rely on a specific

technology), are generally clear and understandable and provide for realistic solutions. Particularly with respect to the use of orphan works, the regulation provide for a solution which makes it possible to enforce copyright in an appropriate manner.

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

(i) We suggest that in principle ISPs should be exempted from responsibility for copyright infringements of their customers or users. Instead conditions should be created to ensure that the owner of the infringed copyright may address claims directly to the main infringer, the customer or user. To achieve this, we suggest the introduction of an obligation on hosting providers (not access providers, for whom the situation is already regulated under Swiss law) to provide identity information about their customers or users to copyright holders. However, the right to identity information should not simply be handed over on first demand. As suggested by Philipp Frech in *“Zivilrechtliche Haftung von Internet-Providern bei Rechtsverletzungen durch ihre Kunden”* (Schulthess, 2009), the obligation on the hosting provider should be structured such that it must first inform its customer or user of the request for identity information in connection with an alleged copyright infringement and then only if the customer or user fails to remove the allegedly infringing content can the provider disclose the identity information to the copyright owner.

(iii) It could be appropriate to extend the scope of the exception for using orphan works to other categories of works (such as literary works) for which a public cultural or scientific interest in accessing such works may be found prevalent under certain circumstances, potentially in the format of a compulsory licensing scheme, whereby the beneficiaries of the relevant fees would need to be appropriately defined. It would in this context be appropriate to refrain from imposing a geographic requirement relating to the place of publication of the relevant works (as this is provided under Art. 22 URG) which do not appear fully justified in an age of global electronic communication and distribution of digital content.

(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?*

(i) In the absence of international harmonisation of the liability of ISPs, ISPs face various duties and obligations in different jurisdictions. This may lead copyright owners to forum shopping as they look for a jurisdiction that leaves ISPs exposed to liability. Therefore, a harmonised exception for ISPs would be desirable. We suggest this should take the form of an exemption from liability coupled with a duty (for hosting providers only) to provide identity information, as outlined in the response to question (c) above.

In view of the borderless nature of electronic data flows, it appears critical that global solutions shall be adopted in order to address these copyright challenges. A global exception covering the use of works in the course of electronic search tools could thus be adopted.

## **Summary:**

Focusing on the key proposition made by the Group in its Report, the Group proposes that ISPs should be exempted from responsibility for copyright infringements committed by their customers or users provided that the owner of the infringed copyright may address claims directly to the customer. This shall be implemented by introducing an obligation on hosting providers (not on access providers, for whom the situation is already regulated under Swiss law) to provide identity information about their customers if such customers do not remove the allegedly infringing content after having being notified by their provider. The other issues addressed in this report do not call for an urgent adaptation of Swiss law.

## **Résumé:**

En se concentrant sur la proposition essentielle faite par le Groupe dans ce rapport, le Groupe propose que les fournisseurs de services Internet soient exonérés de responsabilité pour les actes de violation de droit d'auteur commis par leurs clients à la condition que les titulaires de droits d'auteur puissent adresser leur requête directement à ces derniers. Ceci peut être mis en œuvre par une obligation imposée aux fournisseurs de services d'hébergement (pas aux fournisseurs d'accès, pour qui la situation est déjà réglementée en droit suisse) de fournir les informations concernant l'identité de leurs clients si leurs clients n'enlèvent pas le contenu violant le droit d'auteur après en avoir été notifiés par leur fournisseur de service. Les autres questions traitées dans ce rapport n'appellent pas de modification urgente du droit suisse.

## **Zusammenfassung:**

Mit Fokus auf den von der Gruppe in diesem Bericht gemachten Hauptvorschlag, empfiehlt die Gruppe, dass ISPs von der Haftung für die von ihren Kunden begangenen Urheberrechtsverletzungen insoweit befreit werden, als die Inhaber der verletzten Urheberrechte ihre Ansprüche direkt gegen diese Kunden geltend machen können. Dies könnte so umgesetzt werden, dass die Hosting-Provider (nicht die Access-Provider, für welche das Schweizerische Recht bereits eine Regelung vorsieht) verpflichtet würden, die Identität ihrer Kunden preiszugeben, falls es diese trotz Abmahnung durch den ISP unterlassen, die urheberrechtsverletzenden Inhalte zu entfernen. Die anderen in diesem Bericht behandelten Fragen verlangen nicht nach einer dringenden Anpassung des Schweizerischen Rechts.