

Working Guidelines

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Q216B

Exceptions to Copyright protection and the permitted uses of Copyright works in the hi-tech and digital sectors

Introduction

1) In the digital environment:

- National frontiers have little significance
- Nobody is in charge of the system as a whole and its growth is both unpredictable and uncontrollable
- There is an immense volume of traffic
- Works are repeatedly and often automatically reproduced by being stored in computer memory
- Publication and reproduction of works can be achieved with extreme ease with no observable loss in quality.

2) Many see this fast moving world as testing and challenging copyright's traditional balance between the need to protect creative endeavours and the needs of users to have access to copyright works that have lawfully been made available to the public. Responding to these concerns, Question 216 examines the exceptions to copyright protection and the permitted uses of copyright focusing on the hi-tech and digital sectors. This broad topic has been dealt with in two parts – Q216A was considered in Paris in 2010 and Q216B will be considered in Hyderabad in 2011 – with the aim of obtaining a comprehensive study at the end of the two-year cycle. Q216B raises a number of key questions in relation to user generated content services, transient/temporary copies, private copying and copyright levies and hypertext links. Are existing exceptions appropriate to the technology? Do existing exceptions hinder efficient copyright protection in case of works illegally made available to the public? Are they realistic in the light of users' expectations? Are they readily understandable? And, bearing in mind amongst other things the extreme length of copyright – often life plus 70 years - are they suitable to ensure that, in the words of TRIPS, "measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade"?

- 3) The purpose of Q216B is to explore exceptions to copyright protection in the specific areas set out below resulting not from issues of eligibility/qualification for protection at the time of inception but from various exceptions, permitted uses or defences which are relevant at the moment of use of the work in the digital environment. National and Regional Groups are asked to consider relevant exclusions from or defences to copyright protection.

Previous work of AIPPI

- 4) Q57 studied the protection of computer programs and software.
- 5) Q182 studied the different levels of database protection at national and international level, discussing the various limitations and exceptions to the protection.
- 6) The AIPPI Forum Singapore 2007 in Forum Session III discussed 'Copyright and Digital Rights Management: Moving Beyond Protection?'.
7) Q216A studied exceptions and permitted uses to copyright relating to the activities of Internet Service Providers (ISPs), format shifting/digitisation and orphan works.

Features of the internet: general and technical background and specific issues to be studied

Internet Service Providers, clients and servers

- 8) Typically an individual user is connected to the internet via an Internet Service Provider (ISP). Computers which store data for use on the internet are known as servers and computers to which the data is supplied are known as clients. If a client computer wishes to access data held in the memory of a remote server, it must know the electronic address (URL) of the remote server. This URL is first sent to the server of the local ISP, which then contacts the remote server and requests it to transmit the data in question. The data is transmitted from the remote server to the ISP's server, perhaps through intermediaries, and is then sent from the ISP server to the client. ISPs may further provide e-mail accounts, storage services and other services.

Search engines

- 9) Search engines have been created to aid the internet user to find sites of interest. The search engine operates by searching the web in principle using a fully automated process. "Spiders" (sometimes referred to as robots, crawlers or bots) roam the internet searching for key words in the URLs and metadata behind websites. This information is then gathered and used to create a searchable index of websites and pages. For reasons of speed and efficiency much collecting and indexing of the data is performed in advance of the particular search by the user. This means that large quantities of text are stored. The material supplied to the user on the search results page contains a collection of hyperlinks as words or images (thumbnails). While some search engines focus on in principle neutrally displaying all information available on the Internet (e.g. Google, Bing), others specialize on facilitating access to illegal copies of works (e.g. thepiratebay.org).

User generated content

- 10) In recent years there has also been a phenomenal rise in demand for user generated content (UGC) services by users worldwide. In particular there has been an increase in services provided by social networks (such as YouTube, MySpace and Facebook) which

encourage internet users to upload video and other content onto their sites making the content publically available to others. In practice, not only original content but also many third party works, original or adapted works, including the whole of or extracts from films, books and music are uploaded onto these websites. Auction sites (e.g. Ebay) are another well-known example for UGC sites. Some types of UGC sites considerably attract illegal UGC, such as so-called linking sites, which make available to the public links onto film, music or audiobook files, stored on cyberlockers. Some countries like Australia provide safe harbour provisions which apply for hosts of UGC services in certain circumstances. A person who provides facilities for making a communication is not taken to have authorised any copyright infringement merely because another person uses the facilities to carry out an infringing act. This principle has been endorsed by the Australian courts recently in relation to infringement proceedings brought against an Australian ISP related to third party content being uploaded onto UGC services. However this decision has been appealed and is awaiting judgement. In Germany, the Federal Supreme Court obliges UGC sites after gaining knowledge of an obvious infringement to filter out the specific infringing content, but also to filter for similar obvious infringements of the same type. The case law may be evaluated by the European Court of Justice after a reference by a British court.

Transient/temporary copies

- 11) Many copyright regimes protect against reproduction, temporary or permanent, subject to exceptions or permitted uses, with or without compensation. The working of the internet involves the constant creation of more or less temporary/transient copies held in the computer's working memory (RAM) or cached. A copyright regime which required the copyright owner's consent for all such copies would, arguably, be unworkable.
- 12) This issue is addressed in the European Union by providing that transient or incidental copies shall be exempted from the reproduction right provided that they are an integral and essential part of a technological process, have no "independent economic significance" and enable either the transmission in a network between third parties by an intermediary or the lawful use of the work. The precise meaning of these provisions continues to be developed by the Courts. An alternative or supplementary solution to this sort of exception might be to rely on implied licences.
- 13) In Japan, the courts have held that copying on RAM would not constitute a reproduction under the national Copyright Law. A recent amendment to Japanese Copyright Law has also allowed reproduction of copyrighted works for, inter alia, prevention of transmission problems. In Australia, there are exceptions to copyright infringement for temporary reproductions and copies made in the course of communication or which are part of a technical process.

Private copying and copyright levies

- 14) In many European countries, copying by a natural person for private use and for ends that are neither directly nor indirectly commercial are permitted. Other countries, such as the UK, do not provide a general exception for private copying. In Australia, for example, copyright is not infringed by copying a sound recording for private domestic use or making an electronic copy of a videotape which is not itself infringing.
- 15) The quid pro quo of such private use is usually fair compensation for the right holders. This is often provided through a copyright levy. Copyright levies have come under fire in the last few years because of the expanding number of devices which are subject to levies and the confusing differences which apply between countries. Recent attempts by the European Commission to achieve some sort of harmonisation across Europe do not appear to be progressing speedily.

- 16) On the other hand it has been difficult to find an acceptable alternative method of compensating right holders. Some have advocated the increased use of technological measures to control private copying in order to avoid the need for levies. Such measures have, however, also been criticised in that they may prevent consumers taking advantage of legitimate exceptions to copyright, for example exceptions allowing the blind to make Braille copies.

Hypertext links and search engines

- 17) A hypertext link makes a third party website available to users. Such links may be either to the homepage of the website or they may be "deep" links to other pages, to film or music files, to documents, audiobooks or images etc on the site. In case of a link making content illegally publically available, it is considered that the publishing link is illegal. One relevant example are links displayed on linking sites, illegally publishing movie, music and audiobook files. In case of a link to content legally published on the Internet, deep linking in particular is unwelcome to many web site owners as it may circumvent advertisements and other important material on the home page; in some instances – particularly where the page is "framed" within the original site - the user may not be aware that they have moved to a third party site at all. Does it amount to copyright infringement? In case of a link to content legally published on the Internet, some commentators argue for an implied licence to hyperlink to a website. The question then arises whether this implied licence may be revoked by the website terms and conditions. Others say there is simply no copyright infringement as there is no substantial reproduction, the elements copied - the URL and often a word or short phrase which acts as the pointer to the hyperlink – not generally being protectable by copyright. Others again argue that a hyperlink involves infringement of copyright by "communicating to the public" the content linked to or possibly by authorising infringement if the user then goes on to visit the third party page and copying occurs. In the US a hyperlink has in some circumstance been regarded as infringing the copyright owner's exclusive right to "display copyrighted work publically".
- 18) In some countries – for example Austria – search engine providers are afforded the same privileges as ISPs and are explicitly excluded from liability for copyright infringement in relation to the provision of hyperlinks and location tool services under certain conditions. In other countries there is no specific exemption. Here search engines may argue that they are not liable for their hyperlinking and location tool services, when used for copyright infringement. It seems likely that where a search engine provides, for example, hosting services in addition to its core services it can benefit from the relevant ISP exemptions (see the resolution for Q216A) in relation to that other activity.

Normal exploitation

- 19) International copyright treaties provide that exceptions and limitations to copyright must be confined to special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author. It is important that exceptions and permitted uses relating to copyright do not overstep this mark. We understand that the case law of different countries approaches this proviso in different ways.

Exhaustive list

- 20) Currently the international copyright treaties do not provide for an exhaustive list of possible copyright exceptions. By contrast the European Digital Copyright Directive does provide such a list. Member states are not obliged to implement any of the exceptions and permitted uses in this list (other than the exception in relation to transient copying referred

to above) but they are not permitted to incorporate additional exceptions save in very limited circumstances. The object is to promote harmonisation of copyright across Europe and cross border activity in the context of an increasingly globalised digital sector.

Questions

I. Analysis of current law and case law

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

1. What exceptions or permitted uses apply to a service provider in relation to user-generated content (UGC)? Are there any limitations on those exceptions/uses, for example when the service provider is put on notice of unlawful content uploaded by internet users? Would they also apply to UGC sites which likely attract infringement? Which types of service provider may benefit from such exceptions: What content does your jurisdiction define as UGC? Would exceptions for UGC, for example, apply to UGC sites such as YouTube or social networking sites such as FaceBook?
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?
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?
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?
5. Are there any other exceptions or permitted uses which you consider particularly relevant to the digital environment (not previously studied in Q216 A)?

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

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?

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