



ExCo Hyderabad 2011
Final draft resolution
October 18, 2011

Resolution

Question Q216B

Exceptions to Copyright Protection and the Permitted Uses of Copyright Works in the Hi-tech and Digital sectors

AIPPI

Noting that:

- 1) During the ExCo held in Paris in 2010, Question 216A studied the various challenges to copyright law created by the digital environment.
- 2) The Q216A Resolution (copy attached) provided as a basic principle that the digital environment should provide for effective and enforceable copyright protection. In particular, national laws should fully recognize that rights holders have the exclusive entitlement to authorise and control the various activities of production, reproduction, communication, performance and other uses of their copyright works in communication networks such as the Internet.
- 3) The Q216A Resolution concluded that the "Three-Step-Test", as known from the revised Berne Convention, the TRIPS Agreement and the WIPO Copyright Treaties, is to set the generally-accepted standard for formulating limitations and exceptions to copyright protection in the digital environment.
- 4) Q216A specifically studied the exceptions and limitations to, and the permitted uses of, copyright protection as applied to Internet Services Providers (ISPs), format shifting/digitisation/time shifting and the treatment of orphan works.
- 5) Q216B intends to cover further legal questions, which were not dealt with in the Q216A Resolution, namely:
 - a) the international harmonisation of limitations and exceptions to copyright protection;
 - b) the liability of providers of facilities and services for User Generated Content ("UGC") on the Internet;
 - c) liability for linking activities on the Internet and, in particular, liability as it relates to the activities of Internet search engines;
 - d) liability for the making of transient or temporary copies of copyright works;
 - e) limitations and exceptions pertaining to private copying and copyright levies.

Considering that:

- 1) National jurisdictions differ considerably in respect of the recognition and implementation of limitations and exceptions to copyright protection and the separate issue of liability defences for the benefit of certain types of intermediaries. This is not a satisfactory state of affairs, in particular with respect to the Internet.
- 2) In recent years, there has been an increasing rise in demand by Internet users for the services of UGC providers. The term "UGC providers" is commonly understood to mean those who furnish a structured platform for UGC, which enables users to upload content to this platform and provide tools to search for UGC. These activities do not include services provided by mere conduits permitting access to UGC. They also do not include facilitating third party contributions, for example by way of blogs, forums etc. where a structured platform is not provided for UGC. Examples of UGC providers include social network platforms such as YouTube, Facebook and Ebay. A broad interpretation of the term UGC includes clear cut infringements, but the term also extends to include modified content with genuine creative input. Such creative input can make UGC sites particularly attractive, often containing desirable commentary or artistic expression. If such commentary or artistic expression makes use of third party works protected by copyright law, difficult questions may arise with respect to the boundary between lawful and unlawful use.
- 3) Linking to and from websites is an essential feature of the Internet. User-activated hyperlinking is the most common way to make one's own content or third party content available to a wide number of Internet users. It is not always clear whether the provision of a user-activated hyperlink is actionable under the copyright laws of the various jurisdictions.
- 4) Internet search engines were created to help internet users find content of interest. Search engine results are typically presented as a list of links that direct the user to specific content. The information in the list may consist of web pages, images, information and other types of files. Some search engines also mine data available in databases or open directories. It is possible for a rights holder to prohibit the access of search engines to such content.
- 5) The Q216A Resolution concluded that ISPs may rely on a limitation or exception to copyright protection in the case of transient or temporary copies. This applies if such activity is an integral and necessary part of the technical means that facilitate the transmission, reception or transiting of traffic on networks. In addition, the activity must be solely supportive of a lawful use, with the further requirements that the technical means be content neutral and have no economic significance. In particular, transient or temporary copying may be necessary to enable communications in a network between two parties through an intermediary, or to support some other lawful use. Transient or temporary copying however, goes beyond the interests of ISPs. For example, such copies may be made in relation to works held temporarily in a private computer's RAM. Specifically, transient or temporary copying in the course of the viewing of streamed copyright works, where the works are not authorised to be made available to the public on the Internet, may be problematic in this context.
- 6) Private copying in the digital age can have a significant economic impact on rights holders. Digital private copies can be made with extreme ease, with no observable loss in quality. In addition, digital private copies can be easily distributed via many different forms of electronic media. In some jurisdictions, private copying is not regulated at all, whereas other jurisdictions provide for an exception from copyright infringement without compensating the right holder. Other jurisdictions provide for limitations to copyright infringement, linked to a levy system.

Resolves that:

- 1) In respect of limitations and exceptions to copyright protection, national laws should be harmonised relying on the Three-Step Test. Due to cultural differences among nation states, a full harmonisation may be very difficult to achieve. Harmonisation should at least be achieved for some of the limitations and exceptions applicable for Internet uses adopting the following guidelines:
 - a) The system of limitations and exceptions should be sufficiently flexible to treat new technologies and emerging business models.
 - b) The system must provide for adequate legal certainty in the application of the limitations or exceptions.
 - c) The system should have minimum standards for compliance, for example a non-exhaustive list of specific Internet-related limitations and exceptions, in particular as set out below.
- 2) Rules concerning the liability of UGC providers have to strike a fair balance between protecting the desired function of UGC providers to easily communicate users' creations to the public and safeguarding the rights holders' interests to exclusively authorise and control use of their copyright works. National and international law should provide for the following principles:
 - a) In general, there should be no obligation on UGC providers to monitor for infringing activity, except as set out below.
 - b) UGC providers storing third party content should at least have a fair and reasonable duty to remove (take down) and prevent further uploading (stay down) of the same infringing content by the same infringer in situations where such UGC providers are furnished by the relevant rights holder with prima facie evidence of the specific infringement. A quick and simple dispute resolution procedure should be available, enabling the user to argue the legality of the content. If the UGC provider does not fulfill its duty to takedown and take reasonable measures to ensure staydown of the specific content, the UGC provider may be liable for copyright infringement as if it was the underlying infringer.
 - c) A UGC provider willfully facilitating, enabling, cooperating with or contributing to infringing activity should be held accountable for the underlying infringement as if the UGC provider was the underlying infringer. The same principle should apply if the UGC provider makes the users' infringing content its own content.
- 3) Providing user-activated hyperlinks to a copyright work, in and of itself, should not be considered a reproduction of the work. Also, providing such hyperlinks to a copyright work that has already been made available to the public on the Internet with the authorisation of the relevant rights holder does not, by itself, constitute a further act of making such a work available to the public. However, providing hyperlinks may attract liability by contributing to acts of copyright infringement in relation to the targeted work.
- 4) Search engines, when helping users to find and access copyright works that have already been made available to the public on the internet with the authorisation of the right holder should be able to rely on exceptions or limitations and, beyond these on implied licenses, if provided by national jurisdictions.
- 5) In respect of transient or temporary copies, there should be specific limitations or exceptions to copyright infringement as follows:

- a) In relation to a computer program, the making of transient or temporary copies should be exempted from copyright protection, where such copies are necessary to perform or secure a lawful use of the said computer program.
 - b) In relation to all other works transiently or temporarily reproduced in an end user's computer memory, the making of such transient or temporary copies should be exempted from liability for copyright infringement, where the copies are supportive of a lawful use, and the technical means employed are content neutral, and the copies have no economic significance.
- 6) Copyright exceptions and limitations should allow for the private copying of electronic works. This exception or limitation should apply to non-commercial use only. Distribution to the public or public communication should not be covered by this exception. National legislation may further restrict the distribution or communication of private copies (for example by restricting private copies to personal use by the owner of the original copy, for as long as ownership of the original copy is retained). In addition, national legislation may provide for a general exemption in relation to certain types of works or certain forms of exploitation captured by the private copying exception.
- 7) It is proposed to have a separate question addressing the specific issue of levies for exceptions or limitations to copyright protection.