



**Question Q216B**

**National Group:** United States

**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**

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?**

Although it is not considered to be an exception under copyright law, content generated by a user of software is generally considered to be owned by the user unless the output is a derivative work of the software itself.

Section 512 of the U.S. Copyright Act, as amended by the Digital Millennium Copyright Act (the "DMCA"), is entitled "Limitations on liability relating to material online." It provides limitations on liability for service providers under certain defined conditions and circumstances. The courts have interpreted the statutory definition of "service provider" very

broadly, to include operators of UGC (user generated content) sites such as YouTube and social networking sites such as FaceBook:

A “service provider” is broadly defined under the DMCA as a “provider of online services or network access, or the operator of facilities therefor....” 17 U.S.C. § 512(k)(1)(B). “This definition encompasses a broad variety of Internet activities.” Corbis, 351 F.Supp.2d at 1100; *see also In re Aimster Copyright Litigation*, 252 F.Supp.2d 634, 658 (N.D.Ill.2002) (“ ‘service provider’ is defined so broadly that [the court would] have trouble imagining the existence of an online service that would not fall under the definition ...”). Where courts have dealt with services similar to Photobucket, namely Youtube.com, they have found those companies to be “service providers” under the statute. *See Viacom International, Inc. v. Youtube, Inc.*, 718 F.Supp.2d 514, 518 (S.D.N.Y.2010).

*Wolk v. Kodak Imaging Network, Inc.*, No. 10 CIV. 4135, 2011 WL 940056 (S.D.N.Y. March 17, 2011), at \*2.

The U.S. Copyright Office has provided the following (non-binding) summary of the legal requirements that service providers must meet to be protected from liability:

- The provider must not have the requisite level of knowledge of the infringing activity, i.e., actual knowledge of the infringement or knowledge of facts or circumstances from which infringing activity is apparent.
- If the provider has the right and ability to control the infringing activity, it must not receive a financial benefit directly attributable to the infringing activity.
- Upon receiving proper notification of claimed infringement, the provider must expeditiously take down or block access to the material.

*The Digital Millennium Copyright Act of 1998, U.S. Copyright Office Summary*, <http://copyright.gov/legislation/dmca.pdf>, at pp. 11-12.

Liability protection also requires that the service provider has filed with the Copyright Office a designation of an agent to receive notifications of claimed infringement. The Copyright Office provides a suggested form and maintains a list of such agents. In addition, the service provider must adopt and reasonably implement a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider’s system or network who are repeat infringers, and inform its subscribers and account holders of such policy.

**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?**

The U.S. Copyright Act uses the term “copying” broadly. Even the simple act of transferring a computer program from its permanent storage device to a computer’s RAM is considered to be copying in the copyright sense. The leading case on this matter is *MAI Systems Corp. v Peak Computer, Inc.*, 991 F.2d 511 (9<sup>th</sup> Cir. 1993). In *MAI*, Peak was accused of copying MAI software into the RAM of a computer system in violation of the software license while Peak conducted maintenance and repair of customer’s MAI computer systems. The Ninth

Circuit Court of Appeals affirmed summary judgment, stating: “After reviewing the record, we find no specific facts (and Peak points to none) which indicate that the copy created in the RAM is not fixed.” The Court based its conclusion thusly: “We have found no case which specifically holds that the copying of software into RAM creates a “copy” under the Copyrights Act. However, it is generally accepted that the loading of software into a computer constitutes the creation of a copy under the Copyright Act. *See e.g. Vault Corp. v. Quaid Software Ltd.*, 847 F.2d 255, 260 (5th Cir.1988) (“the act of loading a program from a medium of storage into a computer's memory creates a copy of the program”); 2 *Nimmer on Copyright*, § 8.08 at 8-105 (1983) (“Inputting a computer program entails the preparation of a copy.”); *Final Report of the National Commission on the New Technological Uses of Copyrighted Works*, at 13 (1978) (“the placement of a work into a computer is the preparation of a copy”). We recognize that these authorities are somewhat troubling since they do not specify that a copy is created regardless of whether the software is loaded into the RAM, the hard disk or the read only memory (“ROM”). However, since we find that the copy created in the RAM can be “perceived, reproduced, or otherwise communicated,” we hold that the loading of software into the RAM creates a copy under the Copyright Act. 17 U.S.C. § 101.”

Transient/temporary copies: Congress, however, intended to exclude transient copies from copyright violation in the Copyrights Act, e.g. data captured momentarily in the memory of a computer. (H.R. Rep. No. 94-1476, at 53). The question of whether data momentarily stored in a buffer (1.2 seconds) and automatically rewritten over was fixed in the copyright sense was answered in the negative in *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121. In Cartoon, the court held that such brief storage in a buffer was not sufficient to satisfy the definition of “fixed,” even though plaintiff argued that the data persisted long enough to make reproductions of the data (though, in this case, no reproductions were actually being made). Specifically regarding “temporary” copies, the Court in the *MAI* case referred to the RAM copy as temporary but also as a copy in the copyright sense, even though the copy disappears when the computer is turned off. However, so called “temporary” data storage in the buffer in Cartoon was not a copy in the copyright sense. In short, the exact time limit for temporary copies is not yet determined. Note that the cache exception for service providers, 17 U.S.C.A. § 512(b) is designed to create a safe harbor for service providers who cache user-generated content.

**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?**

Yes, there is a private copying exception which is applicable in limited circumstances. Under 17 U.S.C.A. § 117, a person or his agent is authorized to make a copy of a computer program if the copy is necessary to use the software or if a copy is made for archival purposes if the person making the copy is the legal owner, and if, when the original copy is transferred, the archival copy is also transferred or destroyed. Also, according to 17 U.S.C. § 1008, there is a private copying exception to allow non-commercial copying by consumers of digital and analog music. Levies may be applied for private use. 17 U.S.C. § 1004 establishes a 3% royalty rate for blank CDs labeled and sold for music use. There is also a levy for stand-alone CD recorders. The levies do not apply to generic blank CDs meant for multiple uses and to computer CD burners.

**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?**

HREF hyperlinking does not itself constitute direct or contributory copyright infringement of the linked site by the operator of the linking site. When a hyperlink is executed, the user's web browser ceases communicating with the linking site and initiates a request to the linked site for transmission of the linked page to the user so none of the content of the linked page is stored on the linking site. Therefore, HREF hyperlinking does not involve "copying" in the copyright sense. The DMCA also addresses "information location tools" in Section 512(d) of the Act. The DCMA provides that a service provider shall not be liable for copyright infringement for linking users to an online location containing infringing material or infringing activity if (1) the service provider does not have actual knowledge and is not aware of facts or circumstances from which infringing activity is apparent; or upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, such infringing material and if (2) the service provider does not receive a financial benefit directly attributable to the infringing activity in a case in which the service provider has the right and ability to control such activity.

Hyperlinks fall into two types for addressing legal concerns: hypertext (HREF), and inline links/framing. Hypertext is a retrieval means that enables a user to access particular locations by clicking on links embedded within web pages or documents. Inline links refer to graphics viewable within the main body of a web document which are supplied from a different source than the web document being viewed. Framing allows web documents to contain multiple windows which may operate independently of each other. For example, a developer can use a frame to select a website or portion of a website belonging to another and surround it with their own material, while only displaying the framing site URL (and not the site being framed).

Hypertext linking: Courts have declined to find copyright infringement in a hypertext link, since a hyperlink points to a URL, a location address without expressive or original content protectable by copyright. (*Ticketmaster Corp. v. Tickets.com Inc.*, 2000 WL 525390 (C.D. Cal. March 27, 2000); *Bernstein v. J.C. Penney, Inc.*, 1998 WL 906644 (C.D. Cal. Sept. 29, 1998); *Feist Publications, Inc. v. Rural Telephone Services Co.*, 499 U.S. 340(1991).

Inline links/framing: A search engine's display of "thumbnail" versions of copyrighted images and search results has been held to be fair use by the Ninth Circuit (*Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003) at 822), but whether linking or framing full size versions of the same images violates the copyright owner's right of public display remains uncertain. In *Perfect 10, Inc., v. Amazon.com, Inc.*, 487 F.3d 701 (9th Cir. 2007), amended opinion at 508 F.3d 1146 (9th Cir.), the appeals court rejected the argument that the search engine publicly displayed copyrighted images when it created the impression that the search engine was showing the image within a single Google Web page. The decision left room for the idea that framing another's content outside of the search engine context could yield infringement.

**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 first-sale doctrine (17 U.S.C. § 109) is another exception to copyright laws. The first-sale doctrine allows a purchaser to transfer copyrighted materials that have been sold or transferred under the authority of the copyright holder to another without the permission of the copyright holder. It is currently unclear as to whether the first-sale doctrine applies to software that is licensed.

## 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?

For user-generated content policy, yes, the exception is generally appropriate. For transient copies, yes, the exception is generally appropriate. For private copying for archival use, yes, the exceptions are appropriate. For hyperlinking: the established portions of the law are appropriate; however this area continues to evolve as other US federal court circuits have yet to demonstrate whether they will be following the 9<sup>th</sup> Circuit.

Because transient copies are permitted and copying into RAM is within scope of this exception in ordinary use, copyright in this area is enforceable in practice.

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

Proposing additional exceptions to expand the list of exceptions may not be advisable at this time. The current technology trend favors the "apps" model over the "open" model. The apps model is a self-contained app that controls content, linking, and other factors through a specific interface, mobile phone, iPad, portals such as [Salesforce.com](http://Salesforce.com), Netflix, Opentable, etc. The app model in the hi-tech and digital sectors addresses exceptions and use for copyrighted Works contractually, and prior to adoption and launch, in a manner respecting copyright issues discussed herein. The "open" model of search, location and having the ability to manipulate content in ways contrary to copyright principles now appears to be replaced by a user directly accessing Wikipedia pages, pages operating under known exceptions. Moreover, recently large content owners are introducing market models utilizing technology schemes that respect copyright principles.

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?

No. We would propose a flexible pragmatic approach. An active, exhaustive list that is maintained at WIPO or other governing body would be helpful to the community at large for future developments, much like a Wiki page. Using international treaties to promulgate and

adopt the exhaustive list as additional protected subject matter is historically problematic. For example, the problem of a particular country not signing the particular treaty text continues. There is a group of countries that have not signed newer Berne Convention texts thereby preserving a jurisdictional exception to copyright subject matter in those countries.

Harmonization should focus on bringing all countries together to operate from the same set of copyright-able subject matter and recognized exceptions.