

Resolution

Question Q216

**Exceptions to Copyright Protection and the Permitted Uses of Copyright
Works in the Hi-Tech and Digital Sectors**

AIPPI

Observing that :

- a) In the digital environment, copyright works may be reproduced and publicly communicated with extreme ease and with no observable loss in quality. Further, with reference to the Internet, such activities oftentimes transcend national borders.
- b) This has presented various challenges for copyright law, namely:
 - For rights holders, it has become increasingly difficult in the information age to effectively enforce the general principle of copyright law that the owner of copyright and those claiming under him are exclusively entitled to authorise and control the various activities of production, reproduction, communication, performance and other uses in respect of copyright works.
 - In many jurisdictions, existing limitations and exceptions to copyright protection have been applied to the new realities of digital and information technologies. This has created difficulties in terms of maintaining the traditional balance in copyright law between the need to protect creative endeavours and the needs of users to access, use and disseminate copyright works.
 - In the particular context of the Internet, questions surrounding limitations and exceptions to copyright protection, as well as the enforcement of copyright, must very often be assessed under the laws of numerous jurisdictions, with differences in national laws thereby creating unacceptable legal uncertainty for both rights holders and users alike.
- c) For limitations and exceptions to copyright protection, all countries that have acceded to international copyright treaties, such as the Revised Berne Convention, TRIPS and the WIPO Copyright Treaty, are called upon to follow the guiding principle that such limitations and exceptions must (i) be restricted to certain special cases, (ii) not conflict with a normal exploitation of the copyright work and (iii) not unreasonably prejudice the legitimate interests of the author (known as the "Three-Step Test"). National jurisdictions, however, differ considerably as to their recognition and implementation of such limitations and exceptions.

This is not a satisfactory state of affairs, in particular for digital uses of copyright works on the Internet.

- d) Internet service providers and other Internet intermediaries (“ISPs”) have developed new business models for the digital environment to service Internet users. On the one hand, such business models have created new commercial and cultural opportunities properly grounded upon duly authorised uses of copyright works; on the other hand, the same business models have also been used to perpetrate copyright infringement, frequently on a massive scale. It is not possible or feasible in the foregoing instances to identify and pursue the directly infringing party, namely the internet user. In contrast, ISPs are often best-placed to ascertain the sources or destinations of infringing works, and to effectively put an end to or at least impede infringing activity.
- e) Format shifting involves converting material into another, often digital format. The national jurisdictions currently offer varying limitations or exceptions to copyright protection in order to allow for legally permissible format shifting, e.g. for private use or for non-commercial institutions such as libraries, museums, etc. However, few jurisdictions allow format shifting for commercial purposes.
- f) Orphan works may be encountered for different categories of works, e.g. literary, photographic and audiovisual works. The use of orphan works is in particular relevant for non-commercial libraries, museums and similar institutions, but also for commercial entities and uses. Only very few national jurisdictions, however, have a specific regime in place governing the lawful use of orphan works. To make it possible to use orphan works legally on an international scale, in particular on the Internet, national legislation should be harmonised accordingly.

Resolves that:

- a) Effective and enforceable copyright protection should be safeguarded in the digital environment.
- b) The rights holder should be fully recognised under national laws as being exclusively entitled to authorise and control the various activities of production, reproduction, communication, performance and other uses in respect of copyright works in communication networks such as the Internet. Copyright law should therefore provide for an efficient enforcement against infringing activities in such communication networks. These infringing activities should in general not be rendered exempt from liability by way of compulsory licences, mandatory levies or expansive limitations/ exceptions to copyright protection. For the purposes of this paragraph uses in “communication networks” does not include uses in broadcasting.
- c) For limitations and exceptions to copyright protection in the digital environment, the Three-Step Test referred to above sets the generally-accepted standard. In this regard, national laws should be harmonised relying on the Three-Step Test.
- d) For efficient and effective enforcement of copyright in the context of the Internet, the rights holder should be entitled to address all parties that enable, facilitate or contribute to any acts of copyright infringement, including a regime for ISPs to provide the information necessary

for such enforcement with due regard to user's rights. Such parties should include not only those users who are engaged in acts of direct infringement, but in general also ISPs according to the principles set out below.

- e) As ISPs or the Internet traffic they administer often operate on an international level, national rules pertaining to ISP liability should be harmonised. It is preferable that national and international law provide for guiding principles on the matter, including the following:
- In general, there should be no obligation on ISPs to monitor for infringing activity, except as set out below.
 - Host providers storing third party content should in general have a fair and reasonable duty to remove and prevent further uploading of specific infringing content, where such host providers are furnished by the relevant rights holder with prima facie evidence of an infringement.
 - Access providers should in general have a fair and reasonable duty to block access to copyright infringing material, where such access providers are furnished by the relevant rights holder with prima facie evidence of infringement.
 - An ISP willfully facilitating, enabling, cooperating with or contributing to infringing activity should be held accountable for the underlying infringement as if the ISP was the underlying infringer.
 - ISPs may rely on a limitation or exception to copyright protection in the case of transient, temporary or ephemeral reproductions of copyright works, if such activity is an integral and necessary part of the technical means that facilitate the transmission, reception or transiting of traffic on networks (such as the Internet) or is solely supportive of a lawful use, provided that the technical means are content neutral and have no economic significance.
- f) Subject to laws that may govern access to works by the visually impaired or by any other disabled person format shifting should be available for commercial business models by way of licence only. For private and non-commercial uses, limitations or exceptions to copyright protection may be provided in cases where the limitation or exception in question meets the Three-Step Test.
- g) National laws should provide for internationally harmonised and dedicated rules enabling private, non-commercial or commercial users to reproduce and use orphan works, in particular in situations where it is not reasonable to assume that the term of protection for a work has expired. Appropriate rules should be provided for all categories of work. National laws should require a diligent inquiry so as to ascertain the relevant right holder's identity. Further, the right holder should be guaranteed a fair remuneration for the use of the work and retain the option to re-claim the work for his further exclusive exploitation. The user's continued *bona fide* reproduction and use of the copyright work should be reasonably protected.