

## Question Q216B

**National Group:** The Finnish AIPPI group

**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)?**

There is no specific exception or permitted use stipulation regarding user generated content (UGC) in the Finnish Copyright Act (Copyright Act 404/1961 with several amendments). In the Finnish legislation, there is no definition for UGC. The general terms of Copyright Act apply as well as other common rules and principles regarding content.

**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?**

According to Copyright Act, the activities of an ISP or other service providers are regulated in Act on Provision of Information Society Services (458/2002 <http://www.finlex.fi/fi/laki/kaannokset/2002/en20020458.pdf>). The basic rules of exemption from liability regarding activities of an ISP or other service providers are based on Directive on Electronic Commerce (2000/31/EC <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0031:EN:HTML>).

According to this Act service providers, acting as intermediaries, are exempted from liability in certain cases. In exempting from liability there are three different situations:

1. transmitting data in data transmission services and communication network services
2. caching the information and
3. hosting services.

There is also a notice and take down procedure regarding prevention of access to material infringing copyright or neighbouring right. A holder of copyright or his/her representative may request a hosting service provider to prevent access to material infringing copyright. The same applies to a holder of a neighbouring right and his/her representative if it concerns material infringing this right. A request must be presented to the service provider regarding this content whose material the request concerns. If the service provider regarding this content cannot be identified or if it does not remove the material or prevent access to it expeditiously, the request may be submitted to the service provider by notification.

If the service provider has prevented the access to material alleged to be infringing copyright, it must notify the service provider regarding this content immediately about the prevention and supply him/her with a copy of the notification on the basis of which prevention was made. If the service provider regarding this content considers the prevention to be groundless, he/she may get the material returned by delivering to the notifying party a plea. If the plea is delivered within time limit and meet the requirements determined in Act on Provision of Information Society Services, the service provider must not prevent the material from being returned and kept available unless otherwise provided e.g. by a court decision.

There are also provisions regarding the activities of an ISP or other service providers in Act on the Exercise of Freedom of Expression in Mass Media (460/2003 <http://www.finlex.fi/en/laki/kaannokset/2003/en20030460.pdf>). A court may order an ISP or other service providers to disclose the contact information regarding a sender of a message if it is presumable that making a message available to the public is against the law. Also a court may order an ISP or other service providers to discontinue the distribution of a message to the public should it be likely that making a message available to the public is illegal.

The exemption regarding temporary reproduction that applies mainly in relation to the activities of an Internet service provider (ISP) also applies in relation to UGC. According to Section 11a of Copyright Act the right to make copies of a work does not apply to temporary reproduction:

1. which is transient or incidental;
2. which is an integral and essential part of a technological process;
3. the sole purpose of which is to enable a transmission of a work in a network between third parties by an intermediary or a lawful use of a work; and
4. which has no independent economic significance.

The provision above does not apply to a computer program or to a database. For more details see answer to question 2.

This provision is applicable for example to the technical copies of material made as they pass through the ISP's system or are stored in a cache.

**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?**

Regarding the question of which types of service provider may benefit from an exemption regarding temporary reproduction and other regulation described above, this depends on the actual activities and role of the service provider in question. Therefore, whether the legislation in place applies depends on the role of a service provider, be it e.g. UGC sites, such as YouTube, or social networking sites such as Facebook.

There are quite many provisions in Copyright Act regarding the obligations of the ISPs, e.g. regarding prevention of access to material infringing copyright.

In Section 60a by the order of a court an author or his representative is entitled to obtain contact information from an ISP or other intermediaries regarding a subscriber (i.e. customer) who makes copyright protected material available to the public without authorization. The information should be supplied without undue delay. (It should be noted that in the legislation different terms have been used in different laws in order to describe a word „customer“ i.e. a customer has been described as a „user of an internet service“, as a „subscriber“ or even as a „person who makes a copyright protected material available“.)

In Section 60b, in order to prohibit a continued infringement, a right holder has the right to take legal action against a person who makes a copyright protected material available to the public. The court may order that the making available of the protected material to the public must cease.

In Section 60c, the court may also order an ISP or other intermediaries to discontinue the making available to the public of the copyright protected material upon a request of a right holder. An injunction to discontinue may not be unreasonable in the views of the one making the allegedly protected material available to the public, an ISP or other intermediary or an author. These provisions of Copyright Act also apply to the holders of a neighbouring right.

Regarding the case law, the Finnish Supreme Court handed down a judgment (KKO 2010:47) according to which the exemption of liability under Act on Provision of Information Society Services applies to situations where the nature of the service provider's activity is solely technical (paragraph 31 of the decision). A service provider may not benefit of the exemption if he or she participates in the production of illegal material or acts otherwise in collaboration with the producer with a purpose to promote or implement illegal activity.

In the same group of cases, the Appeal Court of Turku (decision no 1409, given on 19.6.2008), decided similarly and also made a more general appreciation that Act on Provision of Information Society Services could be applied to a type of service provider that acts solely in a technical role. However, in this particular case the actions of the service provider were not solely technical and thus the exemption from liability could not be applied.

The decision of the Supreme Court has since been followed by several lower courts in Finland.

**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?**

As stated above there is an exemption regarding temporary reproduction in Copyright Act which applies mainly in relation to the activities of an ISP but also in relation to UGC.

According to Copyright Act transient/temporary copies of computer programs and databases do not amount to infringing copies provided that the source of the copies is legal. According to Section 25j of the said Act is as follows:

(1) Whoever has legally acquired a computer program may make such copies of the program and make such alterations to the program as are necessary for the use of the program for the intended purpose. This shall also apply to the correction of errors.

(2) Whoever has a right to use a computer program may make a back-up copy of the program, if necessary for the use of the program.

(3) Whoever has a right to use a computer program shall be entitled to observe, study or test the functioning of the computer program in order to determine the ideas and principles which underlie any element of the program if he does so while performing the acts of loading, displaying, running, transmitting or storing the program.

(4) Whoever has a right to use a database may make copies of it and perform all other acts necessary for accessing the database and for normal use of its contents.

(5) Any contractual provision limiting use in accordance with subsections 2–4 shall be without effect.

It should be noted that the in contractual practice of software industry, the subsection 1 mentioned above is not usually applied.

**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 in Copyright Act Section 12 according to which anyone may make single copies for his private use of a work that has been made public. The copies thus made may not be used for other purposes.

It should be noted that the exception regarding reproduction for private use does not permit reproduction of a work that is not legal according to Copyright Act.

Copyright levies apply for private use in Finland. According to Section 26a of the said Act, a compensation for the reproduction of a work for private use should be paid whenever an audio or video tape, or any other device on which sound or image can be recorded and which to a substantial extent is used for the reproduction of a work for private use, is produced or imported for distribution to the public. The manufacturer or the importer has to pay the levy, determined on the basis of the playing time or the recording capacity of the device.

According to Section 26b of the same Act, a levy shall be paid to an organization, representing numerous authors of works used in Finland, which has been approved for this task by the Ministry of Education and Culture for a maximum of five years. The organization will annually submit an account of the measures it has taken pursuant to

the approval decision. The administrative costs of collecting societies shall be deducted from the levy proceeds.

According to a government decree on the scope and level of private copying there is a list of platforms and devices for which levies should be paid. The list is as follows:

- Analog recording platforms (analog audio tapes, analog video tapes), digital recording platforms (recordable CDs, DVDs, Blu-ray discs and MiniDiscs and other comparable platforms), digital recording devices (recordable TVs, video players, mp3 players and comparable audio players, digital boxes), external hard drives.
  
- Levies are not paid e.g. for navigation devices, mobile telephones, computers, PDAs or game consoles.

The collected levies are to be used as direct compensation to the authors and as indirect compensation for author's common purposes (cultural support). The levies are distributed to the authors through an organization representing numerous authors of works in accordance with a plan for the use of the levies annually approved by the Ministry of Education and Culture.

The levy system is under investigation by an independent officer appointed by the Finnish Ministry of Education and Culture. The independent officer will give its proposal regarding the alternative compensation mechanisms, possible developments or other proposals of the present system already this spring.

**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?**

With regards to hyperlinking, there is neither legislation in place nor relevant legal praxis in Finland. Yet some pondering regarding the legal phenomenon of hyperlinking can be found in the preparatory works of Copyright Act, i.e. in the Committee Report of Copyright Commission (KOM 2002:5).

When a copy of a work is produced within the activity of a search engine there might be a copyright problem in place, but as said earlier there is no legal praxis regarding this issue. The legal situation is uncertain.

**5. Are there any other exceptions or permitted uses which you consider particularly relevant to the digital environment (not previously studied in Q216 A)?**

Regarding other exceptions or permitted uses, the right of quotations in Section 22 is relevant also in the digital environment. A disseminated work may be quoted in accordance with proper usage to the extent necessary for the purpose.

Also a so called must carry obligation to retransmit TV programs is relevant in the digital world. According to Section 25i a telecommunications company which provides service in a cable TV network may retransmit by wire a work included in the TV or radio broadcast simultaneously with the original transmission provided that the original transmission is not altered.

In addition, one should also take into consideration Copyright Act Section 4 according to which if a person, in free connection with a work, has created a new and independent

work, his copyright shall not be subject to the right in the original work. This basic rule which includes parody and caricatures is also relevant in the digital environment.

## **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?**

The exemption regarding temporary production is needed to hold the balance between the interest of the public at large and of copyright owners in the hi-tech and digital sectors.

As stated above there are no general exceptions to copyright protection for user-generated content and hyperlinking.

Regarding the levy system which was established in the 1980s there are some problems with the system in place. Changes in the hi-tech and digital environment challenge the present levy system. In the digital environment in comparison with analog world it is possible to apply copy protection systems (e.g. DRM) with which it is possible to de facto limit totally the exceptions to copyright protection. In addition, in the digital world it is more practical to make agreements with consumers about use of the content.

The diversification and convergence of recording devices, their use for many purposes and the vanishing distinction between devices intended for private and company use complicate the application of the levy system in practice. The fast increase in recording capacity of different devices may lead to an unreasonable compensation for some devices. Also the just distribution of the levies to the authors is difficult to organize in the digital and borderless world.

In general, the Finnish AIPPI Group is of the opinion that there are some problems with the private copying system and that the interests of the public and the copyright owners at large are not balanced especially in the hi-tech and digital sector with the current legislation.

**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?**

The exceptions and permitted uses, when applicable, are not always appropriate to the technology or understandable to the public in general mostly due to the fact that there are not many exceptions that apply to the digital and hi-tech sector and that the copyright legislation is quite complicated. Many of the exceptions in place are very limited in their scope of application and sometimes even outdated.

The enforceability of the exceptions and permitted uses, when applicable, may even be uncertain in practice.

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

In general, the possibility of digital copying and distribution of the copyright protected material has changed the copyright environment so much, that the legislation should be modified to better correspond with the current situation and continuing development of technology. The current list of exceptions could be simplified in order to better adjust to the hi-tech and digital fields. E.g. the altering of a work in sampling or mash ups could perhaps be made easier through legislation.

The legislator should safeguard the primary interests of the author without blocking the normal development of the digital and hi-tech sector through legislation.

**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?**

The Finnish AIPPI Group is of the opinion that in general active international cooperation in the field of copyright is worthwhile; nevertheless, an exhaustive or prescribed list of exceptions and permitted uses by international treaties might not be an efficient way to harmonize copyright since a list would already be outdated when an agreement on the content of the treaty would be completed. Additionally, it would be extremely challenging to reach a mutual understanding regarding exceptions and permitted uses that could be included in this kind of a list.

### Summary

The Finnish Copyright Act does not contain a specific exception or permitted use stipulation regarding user generated content. Temporary reproduction is allowed by an exemption. The activities of service providers are regulated in Act on Provision of Information Society Services. Service providers, acting as intermediaries, are exempted from liability in three different situations: 1) transmitting data in data transmission services and communication network services, 2) caching the information and 3) hosting services. There is also a notice and take down procedure regarding prevention of access to material infringing copyright or neighbouring right.

The Finnish AIPPI Group is of the opinion that according to the current legislation there are some problems with the private copying system and that the interests of the public and the copyright owners at large are unbalanced in the hi-tech and digital sector. In order to better adjust and harmonize copyright laws, active international cooperation in the field of copyright is suggested.

### Résumé

La loi finlandaise sur le droit d'auteur ne contient pas d'exception spécifique ou de disposition concernant l'usage autorisé quant au contenu généré par les utilisateurs (*user-generated content*). La reproduction temporaire est permise par une exception. La loi sur la prestation des services de la société de l'information réglemente les activités des prestataires de services. Les prestataires de services, agissant en qualité

d'intermédiaires, sont exemptés de responsabilité dans trois cas différents: 1) quand ils transmettent de l'information dans des services de transmission d'information et dans des services de réseau de communication, 2) quand ils fournissent une forme de stockage dite « caching » et 3) quand ils hébergent des services. Il existe également une procédure de notification et de retrait (*notice and take down*) relative au blocage de l'accès aux matériels qui violent le droit d'auteur ou un droit voisin.

Le groupe AIPPI finlandais est d'avis que, sous la législation actuelle, certains problèmes existent dans le système de la copie privée et qu'il y a un manque d'équilibre entre les intérêts du public et ceux des propriétaires des droits d'auteur, en général, dans les secteurs du numérique et des technologies avancées. Afin de mieux ajuster et harmoniser la législation sur le droit d'auteur, une collaboration internationale active dans le domaine du droit d'auteur est recommandée.

### **Zusammenfassung**

Das Finnische Urheberrechtsgesetz enthält keine spezielle Ausnahme oder Regelung für zulässige Verwendung betreffend nutzergenerierte Inhalte. Vorübergehende Vervielfältigung ist im Ausnahmefall erlaubt. Die Tätigkeiten der Dienstleister sind im Gesetz über die Bereitstellung der Dienste der Informationsgesellschaft geregelt. Dienstleister, die als Vermittler auftreten, sind von der Haftung in drei verschiedenen Situationen befreit: 1) Übertragung von Daten bei der Datenübertragung Dienstleistungen und Kommunikation Netzwerk-Services; 2) die Zwischenspeicherung der Information (Caching) und 3) Hosting Dienstleistungen. Es gibt auch Verfahren zur Meldung und Entfernung ("notice and take down"-Verfahren) zur Verhinderung des Zugriffs auf Material gegen das Urheberrecht oder das verwandte Schutzrecht.

Die Finnische AIPPI Gruppe ist der Meinung dass es einige Probleme mit dem System der Privatkopien nach der gültigen Gesetzgebung gibt und die Interessen des Publikums und der Urheberrechtinhaber in der Gesamtheit unausgewogen in dem Hi-Tech und digitalen Sektor sind. Daher, um Urheberrechte besser anzupassen und harmonisieren, aktive internationale Zusammenarbeit im Bereich des Urheberrechts wird vorgeschlagen.