

Question Q216

National Group: Finland

Title: **Exceptions to copyright protection and the permitted uses of copyright works in the hi-tech and digital sectors**

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Questions

The purpose of Q216A is to explore exceptions to copyright protection resulting not from issues of eligibility/qualification for protection but from various exceptions, permitted uses or defences. As stated above, this purpose is of itself extremely broad ranging. As such, the work will be limited to a small number of the potential exceptions, permitted uses or defences.

Questions about specific exceptions or permitted uses existing in your country/region

1. *What exceptions or permitted uses apply in relation to the activities of an ISP or other intermediaries? Are there any limitations on those exceptions/uses, for example when the ISP is put on notice of unlawful content? Which types of service provider may benefit from such exceptions: would they, for example, apply to UGC sites such as YouTube or social networking sites such as FaceBook?*

There is an exemption regarding temporary reproduction that applies in relation to the activities of an ISP or other intermediaries in the Finnish Copyright Act (Copyright Act 404/1961 with several amendments). According to Section 11a of the said 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 above provision does not apply to a computer program or to a database.

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. In addition to this

exemption there are no exceptions or permitted uses in Copyright Act that apply in relation to the activities of an ISP or other intermediaries.

Instead, there are provisions in Copyright Act 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 has 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 apply also to the holders of a neighbouring right.

In addition to Copyright Act, the activities of an ISP or other intermediaries 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 intermediaries 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 neighbouring right and his/her representative if it concerns material infringing this right. A request must be presented to the content producer whose material the request concerns. If the content producer 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 a material alleged to be infringing copyright, it must notify the content producer immediately about the prevention and to supply he/she with a copy of the notification on the basis of which prevention was made. If the content producer considers the prevention is 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 meeting 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 intermediaries in the Finnish 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 intermediary 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 intermediary to discontinue the distribution of a message to the public should it be likely that making a message available to the public is illegal.

Regarding to the question of which types of service provider are regulated and exempted from liability, depends on the actual activities and a role of a service provider in question.

2. *Do service or access providers have any obligation (in co-operation with intellectual property right owners or otherwise) to identify, notify or take remedial steps (including termination of access) in relation to their customers who infringe?*

As stated above service and access providers i.e. ISPs or other intermediaries have obligations to identify, notify and to take remedial steps in relation to their customers who infringe. These obligations may be found in Copyright Act, Act on Provision of Information Society Services and Act on the Exercise of Freedom of Expression in Mass Media.

Is the position different depending on whether the customer has only infringed once or has carried out repeated infringing activities?

This question has been taken into account in Copyright Act. In Section 60b it is stated that for the purpose of prohibiting continued infringement, a right holder has a right to take legal action against a person who makes an allegedly copyright-infringing material available to the public. Otherwise, it is up to the court to decide the relevance of the fact whether the infringement has taken place only once or has it been done repeatedly.

Do any such obligations affect the scope of the exceptions or permitted uses that apply to those service or access providers?

As stated above in addition to the exemption of temporary reproduction there are no general exceptions or permitted uses in Copyright Act that apply in relation to the activities of ISPs or other intermediaries.

3. *What exceptions exist for "digitisation" or to allow for format shifting of sound recordings, films, broadcasts or other works?*

As stated above in the answer to question 1 there is an exemption regarding temporary reproduction that applies in relation to the activities of an ISP or other intermediaries in Copyright Act. These temporary reproductions are in digital format.

There are no specific exceptions that would in general allow to make a digital copy or to format shift any copyright protected material from analogue format into digital format in Copyright Act. However, there are certain exceptions that apply also to

works that are in digital format, e.g. the exception in Section 12 regarding copying for private use.

4. *Are there specific exceptions permitting libraries to format shift or to make digital copies for archive or other purposes?*

There are specific exceptions in Copyright Act in Sections 16, 16 a, 16 b, 16 d and 16 e regarding libraries, archives and museums.

According to Section 16 certain archives, libraries and museums may, unless the purpose is to produce financial gain, make copies of a work in its own collections for the purpose of:

1. preserving material and safeguarding its preservation;
2. technically restoring and repairing material;
3. administering and organising collections and for other internal purposes required by the maintenance of the collection;
4. supplementing a deficient item or completing a work published in several parts if the necessary complement is not available through commercial distribution or communication.

The exceptions permitting libraries to make digital copies are strictly limited to the internal use for preservation and administration purposes. A library is not allowed to make digital copies and distribute them to its customers. For example in Section 16a it is stated that a library may communicate a work made public that belongs to a library's collection to its customer only on a device reserved for communication to the public on the premises of this library for purposes of research or private study.

5. *Are there exceptions or permitted uses allowing the use of orphan works? If so, what is their scope?*

There is no particular provision in Copyright Act regarding the use of orphan works, but the provisions of extended collective licence in Section 26 of Copyright Act apply also to orphan works. Through extended collective licence a licensee is entitled, under the terms determined in the licence, to use also orphan works.

The provisions on extended collective licence provide a legal system, in which the licensing agreement is made between the user and the organisation representing right holders in Finland. The term "user" is specified among other things in a particular licensing agreement and may be e.g. a school or a municipality. The organisation is approved beforehand by the Finnish Ministry of Education. Thus the organization is authorized by law to make a licensing agreement on behalf of its member right holders as well as of non-represented authors.

There are extended collective licences for the following fields of use in Finland: photocopying, recording in educational activities, original transmissions in radio and TV and retransmitting of radio or TV broadcasts. Copyright Act also provides extended collective licences for the following fields of uses: digital press reviews, digital uses in educational activities and scientific research, certain uses in libraries, archives and museums, use of the artworks belonging to collections, temporary technical recording and resending of archived TV programs.

6. *What, if any, fair dealing/fair use provisions apply? Are there any examples of fair dealing/use provisions having a particular application to Library/search facilities such as Google Book Search?*

As stated above in the answer to question 3 there are no general fair dealing/fair use provisions regarding digital format in Copyright Act but there are some specific fair dealing exceptions that allow the use of copyright protected work in certain situations also in digital format.

According to Section 17 there is an exception for the benefit of persons with disabilities, according to which a production of a work in a different format can be made by any other technique with the exception of recording sound or moving picture. The exception covers literary, musical and artistic works.

According to Section 22 regarding quotation a disseminated work may be quoted in accordance with proper usage to the extent necessary for the purpose.

According to Section 23 articles in newspapers or periodicals on current religious, political, or economic topics may be included in other newspapers or periodicals, unless reproduction is expressly prohibited. This exception is also applicable to the digital versions of the newspapers and periodicals. Nevertheless, a source must always be clearly indicated.

There are no fair dealing provisions in Copyright Act with a particular application to Library/search facilities such as Google Book Search. The creation of Library/search facilities require that agreements are made with the right holders.

7. *How does the law in your country/region understand the requirement of international treaties that exceptions to copyright must not conflict with a normal exploitation of the work and must not unreasonably prejudice the legitimate interests of the author?*

According to the legislative history of Copyright Act, the requirement of a three step test in the international treaties is satisfied by interpreting the exceptions to copyright narrowly.

8. *Are there any other exceptions or permitted uses which you consider particularly relevant to the hi-tech and digital sectors with regard to ISPs, digitisation and format shifting or orphan works?*

No, all the relevant exceptions or permitted uses of Copyright Act are described above.

Your views

- (a) *In your opinion, are the exceptions to copyright protection for (i) the activities of an ISP (ii) digitisation or format shifting; and (iii) orphan works, and the fair dealing/fair use provisions that apply to Library/search facility applications 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 sector?*

The Finnish Copyright Act provides a strong protection for the original author. As stated above there are no general exceptions to copyright protection for the activities of an ISP, digitisation or format shifting and orphan works. In addition, there are no fair dealing/fair use provisions that apply to Library/search facility applications. In the Finnish legislation various solutions have been created e.g. regarding obligations of ISPs and extended collective licences. The Finnish AIPPI Group is of the opinion that the interests of the public and the copyright owners at large are unbalanced in the hi-tech and digital sector according to the current legislation.

- (b) *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 legislation does not correspond to technology that is available to the public especially in the hi-tech and digital sector. In consequence, it is often very easy to access the copyright protected material, especially music and films, through unauthorised channels.

For the time being copyright is still highly respected in Finland and the enforcement of copyright is possible in general. However, if the legislation does not follow the development of technology and if there are no easily accessible legal offers of copyright protected material available, it is possible that the attitudes of the public at large might change.

- (c) *What, if any, additional exceptions would you wish to see relevant to these areas?*

In general, the availability of limitless 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. This could be done by rewriting the copyright legislation, and especially exceptions, using clearer terminology so that it would be easier to understand by an end-user of the copyright protected material.

The current list of exceptions could be simplified in order to better adjust to the hi-tech and digital fields. Also the use of extended collective licences could be taken into consideration e.g. in searching possible ways to commercially use old materials in newspapers, magazines or TV-programs where the right holders are unknown.

It should be noted that different types of works are created and used differently for historic reasons or due to their contribution to local language or culture; therefore, this should also influence the legal tools that may be considered in order to avoid the interest conflicts between the public and the right holders.

- (d) *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 the international harmonisation 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 be already outdated when an agreement about 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.

Instead, some kind of international guidelines or a list including minimum standards could be a useful tool for harmonizing copyright relating to the hi-tech and digital sector. In our opinion, copyright problems arising in relation to the digital technology could be worked out by finding solutions to a particular issue at a time instead of trying to solve all the problems simultaneously.

Summary

The Finnish Copyright Act does not contain general exceptions to copyright protection for the activities of an ISP, digitisation or format shifting or the use of orphan works in the hi-tech and digital sector. Temporary reproduction is allowed by an exemption of Copyright Act and it is applicable e.g. to the technical copies of material made as they pass through the ISP's system or are stored in a cache. The Finnish copyright legislation does not provide any fair dealing/fair use provisions that apply to Library/search facility applications. Instead, various legal solutions have been created, e.g. regarding obligations of ISPs and extended collective licences..

The Finnish AIPPI Group is of the opinion that according to the current legislation the interests of the public and the copyright owners at large are unbalanced in the hi-tech and digital sector. Therefore, in order to better adjust and harmonize copyright laws, some kind of international guidelines or a list including minimum standards could be created in order to find solutions to copyright related problems arising in the hi-tech and digital sector.

Sommaire

La loi finlandaise sur le droit d'auteur ne contient pas d'exceptions de la protection du droit d'auteur liées avec l'activité de prestataire de services de la société de l'information, la numérisation, la transformation du format ou l'usage des oeuvres orphelines dans le secteur digital et hi-tech. Le fait de copier temporaire est autorisé à cause d'exception de la loi sur le droit d'auteur qui concerne par exemple les copies techniques dans le système d'un prestataire ou les copies de caching. La loi finlandaise sur le droit d'auteur ne contient pas de dispositions spécifiques sur fair dealing/fair use applicable de bibliothèques/ applications pour rechercher les livres. Par contre, il y a nombre de dispositions concernant les responsabilités de prestataires de services de la société de l'information et le système de la licence collective.

Le groupe finlandais d'AIPPI trouve que les intérêts d'auteurs et lesquelles du public ne sont pas en balance selon la présente législation dans le secteur digital et hi-tech. Par conséquent, le groupe finlandais d'AIPPI considère qu'il y aura peut-être un

besoin pour les règles de conduite ou la liste des exceptions minimums inter nationales pour qu'on puisse trouver solutions aux questions compliquées sur le droit d'auteur dans le cadre digital et hi-tech.

Zusammenfassung

Das Finnische Urheberrechtsgesetz enthält keine allgemeine Ausnahmen vom Urheberrechtsschutz für die Aktivitäten eines ISPs, Digitalisierung oder Format Verlagerung oder für die Benutzung der verwaisten Werke in dem Hi-Tech und digitalen Sektor. Vorübergehende Vervielfältigung ist zulässig durch eine Ausnahmebestimmung des Urheberrechtsgesetzes und die Bestimmung ist anwendbar z.B. auf technische Kopien des Materiales wenn sie durch das System des ISPs vorübergehen oder in einem Zwischenspeicher gespeichert werden. Die Finnische Urheberrechtsgesetzgebung stellt keine Fair Dealing / Fair Use Bestimmungen zur Verfügung, die für Bibliothek- / Suchmaschineanwendungen gelten. Stattdessen sind verschiedene rechtliche Lösungen z.B. bezüglich der Pflichten der ISPs und erweiterter kollektiver Lizenzen geschäft geworden.

Die Finnische AIPPI Gruppe ist der Meinung dass die Intressen des Publikums und der Urheberrechtinhaber in der Gesamtheit nach der gültigen Gesetzgebung unausgewogen in dem Hi-Tech und digitalen Sektor sind. Daher, um Urheberrechte besser anzupassen und harmonisieren, könnte man eine Art von Internationalen Leitlinien oder eine List einschließlich Mindeststandarden erstellen, um Lösungen zu den Urheberrechtlichen Problemen zu finden, die im Hi-Tech und digitalen Sektor entstehen.