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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 SERVICES PROVIDER MAY BENEFIT FROM SUCH EXCEPTIONS: WOULD THEY, FOR EXAMPLE, APPLY TO UGC SITES SUCH AS YOUTUBE OR SOCIAL NETWORKING SITES SUCH AS FACEBOOK?

The Copyright of Mexico does not provide exceptions or limitations to copyright or neighboring rights in connection with the activities of ISPs or other intermediaries, like OSPs. The reason is that intermediaries in charge of connecting Internet sites operated by infringers of copyright or neighboring rights, are not clearly liable of infringement, namely indirect infringement, by providing means to the site operators –connecting their sites to an indeterminate number of users, but also providing software that users can employ for file sharing or other purposes- who then perpetrate infringement of rights in a direct fashion. No exception or limitation system can exist in the absence or rights or actions to enforce the same.

Direct infringement has been explored, with success, in connection with works disseminated over the Internet, based on the economic right of access that derives from WIPO Treaties. The access right has been tested in a number of cases related to the film and music industries. MPAA v SigloX.com is a landmark criminal case in the field. There is no doubt that, under the Copyright Law, site operators, including service providers who render online services –some of them in addition to connecting activities-, are subject of criminal, administrative and civil damages sanctions since their services imply direct infringement of copyright or neighboring rights, by: i) uploading or in general copying works or subject-matter of neighboring rights, without the consent of the rights holders; ii) giving access to the users the non-authorized copies of works or subject-matter of neighboring rights; or iii) making transmissions thereof or other forms of public communication utilizing Internet as the medium.

Secondary liability of intermediaries has been debated at a government level, with the participation of groups or association like the Business Software

Alliance (BSA), the Motion Picture Association of America (MPAA), a number of collecting societies, as well as the largest ISPs in the country, that include Telmex and Telefonica. However, they have not convinced that ISPs can be liable for secondary copyright infringement, because the Copyright Law or international treaties do not deal with the issue. The reaction has been as follows: i) Associations have stated that HADOPI 2 should be adopted as a model; and ii) Collective societies have announced litigation against ISPs. The ground they rely on is the theory of subjective liability of civil law. However, being civil in nature, it has been questionable whether it can apply to infringement matters deriving from the Copyright Law or the Penal Code. Likewise, the civil theory is narrow in scope, and would not easily accommodate to non-common situations dealing with special rights. Lastly, assistance or inducement is additional factors that can complicate the application of civil liability doctrines.

2. DO SERVICE OR ACCESS PROVIDERS HAVE ANY OBLIGATION (IN CO-OPERATION WITH INTELLECTUAL PROPERTY RIGHT OWNERS OF OTHERWISE) TO IDENTIFY, NOTIFY OR TAKE REMEDIAL STEPS (INCLUDING TERMINATION OF ACCESS) IN RELATION TO THEIR CUSTOMERS WHO INFRINGE? IS THE POSITION DIFFERENT DEPENDING ON WHETHER THE CUSTOMER HAS ONLY INFRINGED ONCE OR HAS CARRIED OUT REPEATED INFRINGING ACTIVITIES? DO ANY SUCH OBLIGATIONS AFFECT THE SCOPE OF THE EXCEPTIONS OR PERMITTED USES THAT APPLY TO THOSE SERVICE OR ACCESS PROVIDERS?

IPSs are free –there is still a debate in this respect- to connect infringers to the Internet, beyond acting as mere conduit, making caching or hosting or performing as a search engine. They are not under an obligation to monitor, identify and much less to notify, warn or disconnect the site, irrespective of the number of notifications made, the knowledge that the intermediary has of the infringing activities or even their deliberate acting.

3. WHAT EXCEPTIONS EXIST FOR "DIGITISATION" OR TO ALLOW FOR FORMAT SHIFTING OF SOUND RECORDINGS, FILMS, BROADCASTS OR OTHER WORKS?

The Law does not contemplate express exceptions for digitalization.
WIPO Treaties set some rules concerning exceptions and limitations. In essence the treaties enhance the three-step-test analysis of the Berne Convention. In agreed statements it has been provided that member States can decide whether adapting exceptions and limitations to the digital environment or creating new ones that are more adequate. Countries have applied differently the WIPO Treaty provisions. Regarding the three-step-test, most jurisdictions have viewed it as a supplemental rule, applicable when no specific exception or limitation exists or when courts need to find out balanced solution. Likewise, some countries have not found distinctions between digital and analogue uses of works, in order to impose exceptions or limitations. They have remained "technology-neutral". Some other countries have admitted a technology neutral approach, but still have required an explicit extension in certain fields that are specific to digital rights when referred to private copying or orphan works.
The situation is quite unique in Mexico, where exceptions and limitations restrict to what listed in the law. The three-step-test does not work as a source of principal or subsidiary law, but as just as a general reference. The Copyright Law does not recognize special exceptions or limitations regarding electronic or digital reproduction, making available or transmission using digital networks or works or subject matter protected by neighboring rights. Existing exception or limitation norms apply to digital rights when compatible by the nature of the work or right. In 2009 Congress discussed a bill dealing with certain exceptions to economic rights, such as the right to make transitional copies of works obtained from Internet into the random access memories of computers, a right to copy video or sound recordings in the memory of computers, including the digitalization of analogue recordings, and a right of private copying of photographic and literary works. By rejecting the bill, Congress found that it did not improve the existing system.
The Copyright Law mostly deals with copyright limitations to the economic right of reproduction in literary works, including: i) text quotation, when reproduction is non-substantial and not a mere "simulation", ii) copy of articles,

photographs, illustrations or commentary, regarding news, previously disclosed by the press or media, and that right holders have not reserved for their own exercise; iii) copies of parts of a work for scientific, literary or artistic critique and investigation; iv) private copying on just one occasion by an individual, academic, investigative or non-profit institution; v) copy made by libraries or archives for the purpose of preserving or security, provided that copies of the work are out of stock, no longer catalogued or at risk of disappearing. Regarding neighboring rights of book publishers, phonogram producers, performing artists and video producers, limitations trigger when use (whatever the form, which includes reproduction of the subject matter of neighboring rights) is not made for the purpose of indirect gain; secondly when users employ for news reporting short fragments of performances – as fixed or reproduced – phonograms, broadcast signals, books or video recordings, under the same conditions that limit the reproduction of works. Digitalization of works or subject matter of neighboring rights is valid, by invoking exception rules of the Copyright Law, in connection with any of the activities described above.

4. ARE THERE SPECIFIC EXCEPTIONS PERMITTING LIBRARIES TO FORMAT SHIFT OR TO MAKE DIGITAL COPIES FOR ARCHIVE OR OTHER PURPOSES?

Exceptions exist, as stated above, but not specific for digital copies of works or subject matter of neighboring rights. The exception provision is narrow though, since it refers to copies made but libraries or archives for preservation or security reasons only.

5. ARE THERE EXCEPTIONS OR PERMITTED USES ALLOWING THE USE OF ORPHAN WORKS? IF SO, WHAT IS THEIR SCOPE?

No. Orphan works has just been recently addressed and discussed and since there are alternative solutions to exception or limitation, such as licensing or creating registries or databases with catalogue of works, the government has not taken a position.

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?

Fair dealing or fair use provisions do not apply in Mexico and even less in connection with library/search facilities.
It is clear that Google libraries settlement has attracted interest around the globe. It can certainly be regarded a challenging test to the copyright fair use system. Google allows its customers to search books from an index that includes a display of text snippets. For that purpose, Google scans the literary works in the books, makes online indexing, and elaborates the snippets of the texts. Before the court, Google has invoked case law allowing free use of works under the argument that the "use" of the work has been "transformed" and thereby, the copy "serves a different function that the original work". Google would not be successful before Mexican courts by invoking the exemption or limitation rules of the Copyright Law, since they are much more restrictive and inflexible that those of the US fair use system.

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 INTEREST OF THE AUTHOR?

The Copyright Law contemplates the three-step-test but in a rather unique fashion. It does not apply as such, weather as a principal or subsidiary law. It rather works as a headline referencing what listed in the law. In the end the three-step-test cannot be invoked directly. Some commentators have criticized

how the three-step-test has been inserted in the Copyright Law.

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, DIGITIZATION AND FORMAT SHIFTING OR ORPHAN WORKS?

No.

YOUR VIEWS

(A) IN YOUR OPINION, ARE THE EXCEPTIONS TO COPYRIGHT PROTECTION FOR (I) THE ACTIVITIES OF AN ISP (II) DIGITIZATION 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?

In the particular case of ISPs the balance inclines to their side, taking into account that the Copyright Law does not recognize their liability. Copyright holders cannot invoke any sort of legal actions against intermediaries unless they perform direct infringement. However, as in other jurisdictions, the question remains if it can be justified that intermediaries are held liable of indirect copyright infringement for connecting users, regardless if these latter engage in wrong doing.
The copyright Law does not contemplate exception or limitation provisions applicable to orphan works and those referenced to library/search facilities are narrow. As a general comment, incorporating specific exceptions and limitation

rules to digital rights justifies to the extent that they contribute to seek balanced solutions to tension or conflicts. New exceptions or limitations should not be considered as for digital rights when there is a general provision that includes them.
Orphan works would definitively require the admission of a new *ad hoc* exception, perhaps a limitation indeed. In keeping with this, the limitation provision would require that the user of the work follows a clearance process using every resource available at hand, including search or registries, records and catalogue (ie. music publisher catalogue). If nothing found the user may start using the work, giving public notice that it is an orphan work. If the rights holder shows up at a later time, it would no longer be in a position to stop the use of the work, but entitled to remuneration or compensation (no profits though resulting from the exploitation of the work).
Exemption or limitation rules applicable for libraries or archives should probably be modified in order to solve problems arising out form newer library/search facilities issues.

(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?

They are not appropriate in all instances, not because of technology factors, but since the whole system has proved not to be efficient. The Copyright Law should be changed not only to meet conditions imposed by new technologies, as far exceptions and limitations is concerned, but principally to reorganize the system, practically from scratch.

(C) WHAT, IF ANY, ADDITIONAL EXCEPTIONS WOULD YOU WISH TO SEE RELEVANT TO THESE AREAS?

Response for c) in a) and b).

(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 HARMONIZATION OF COPYRIGHT? MIGHT YOU GO FURTHER AND SAY THAT THERE SHOULD BE A PRESCRIBED LIST? IF SO, WHAT WOULD YOU INCLUDE?

No, the system cannot be limited to an exhaustive list, but again, not only for digital fields. The three-step-test rule should be instrumental to achieve a balance between copyrights and use of works, giving courts more ample powers to draw the dividing line. International treaties could bring standards that member countries may insert into domestic law. However, the standards should never be exhaustive.

Note: It will be helpful and appreciated if the Groups follow the order of the questions in their Reports and use the questions and numbers for each answer.

SUMMARY

UNDER MEXICAN LAW, ISPS AND OTHER INTERMEDIARIES ARE NOT CLEARLY LIABLE FOR COPYRIGHT INFRINGEMENT, NAMELY INDIRECT INFRINGEMENT, BY PROVIDING MEANS TO THE SITE OPERATORS – CONNECTING THEIR SITES TO AN INDETERMINATE NUMBER OF USERS, BUT ALSO PROVIDING SOFTWARE THAT USERS CAN EMPLOY FOR FILE SHARING OR OTHER PURPOSES- WHO THEN PERPETRATE INFRINGEMENT OF RIGHTS IN A DIRECT FASHION. ACCORDINGLY, THE LAW DOES NOT CONTEMPLATE ANY EXCEPTION OR LIMITATION REGIME TO MITIGATE UNJUSTIFIED APPLICATION OF RIGHTS.

THE LAW DOES ALSO NOT CONTEMPLATE EXPRESS EXCEPTIONS AND LIMITATIONS FOR DIGITALIZATION OF WORKS. SOME OF THE EXISTING GENERAL EXCEPTIONS OR LIMITATIONS APPLY IN CONNECTION WITH DIGITAL RIGHTS, SINCE MEXICAN SYSTEM IS ESSENTIALLY “TECHNOLOGY-NEUTRAL”. HOWEVER SOMETIMES EXCEPTIONS AND LIMITATIONS ARE UNAPLICABLE TO DIGITAL RIGHTS. THE LAW SHOULD BE AMENDED TO FILL ANY GAPS. ORPHAN WORKS IS AN EXAMPLE OF THE FOREGOING.