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
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?

The three questions posed here shall be answered separately below:

What exceptions or permitted uses apply in relation to the activities of an Internet Services Provider (ISP) or other intermediaries?

Chapter II of the consolidated wording of the Spanish Copyright Act, approved by Royal Legislative Decree 1/1996 of 12 April (SCA), lays down the various exceptions or permitted uses that override the author’s exclusive rights under the heading “Limitations”.


Before describing the content of this provision, it is necessary to refer to the concept of “temporary reproduction” established in the SCA. In that regard, Article 18 SCA defines what is understood by “reproduction” as the incorporation of the work in a medium that enables it to be communicated and copies of all or part of it to be made.

Returning to Article 31.1 SCA, in order to carry out these temporary acts of reproduction, it is not necessary to obtain the author’s consent beforehand, provided that besides having no independent economic significance, the acts are transient or incidental and form an integral and essential part of a technological process whose sole purpose is to enable a transmission in a network between third parties by an intermediary or a lawful use by the author or within the legal boundaries.

Article 40bis SCA provides that such limitations may not be so interpreted that they could be applied in a manner capable of unreasonably prejudicing the
legitimate interests of the author or adversely affecting the normal exploitation of
the works to which they refer.

Reference must also be made to the Information Society and E-Commerce
2000/31/EC of the European Parliament and of the Council of 8 June on certain
legal aspects of information society services.

The ISESA is governed by the principle of the free rendering of services without
the need for prior consent, except for cases in which there is an authorisation
system in place, the specific and exclusive object of which is not the rendering of
services by electronic means (Article 6 ISESA).

On the other hand, based on this principle of the free rendering of services, ISPs
established in an EU or EEA Member State shall not be subject to any kind of
restriction, except for the limitations deriving from the rules on copyright
protection laid down in the SCA or in respect of acts which attack principles such
as the safeguarding of public order, the protection of children and public health,
respect for the human dignity and non-discrimination by reason of sex, race,
religion, creed or any other personal or social circumstances (Article 8 ISESA).

ISPs established in non-EEA States shall abide by the provisions of the
applicable international treaties.

The ISESA and SCA apply to ISPs established in another European Union (EU)
or European Economic Area (EEA) Member State when the user is located in
Spain and the services affect, inter alia, intellectual or industrial property rights
(Article 3.1 a) and 3) ISESA. The ISESA shall apply to ISPs established in a
non-EU or EEA country where this does not contravene the provisions of
international treaties or conventions (Article 4 ISESA).

**Are there any limitations on those exceptions/uses, for example when the
ISP is put on notice of unlawful content?**

ISPs are under the obligation to cooperate when a competent body demands
that content be removed or that the rendering of a service be discontinued
(Article 11 ISESA). This point will be elaborated upon further in the response to
question 2.
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 are no specific rules for UGC sites. The general principle governing the ISESA is that they shall not be liable for content which may infringe IP rights or any other rights provided that they are not involved in the creation of the content, they do not manipulate that content and they are not aware that it is illegal. They are therefore under no obligation to check beforehand that the content that they are providing is lawful; rather, they must remove or block access to that content when ordered to do so by the competent body.

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? 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?

Prior remarks

Pursuing online copyright infringement in Spain through both criminal and civil action has been seriously obstructed. In criminal action, this obstruction is due to excessive stringency in how Spanish courts handle the category of offence. On the one hand, they apply the so-called “principle of minimum intervention” (whereby criminal relief must be restricted to more serious cases of infringement and only to the extent necessary). On the other hand, they apply a restrictive interpretation of the profit-making requirement as per Circular 1/2006 issued by the Chief State Prosecutor’s Office (“this conduct (…), without prejudice to its potentially constituting a civil offence, (…) does not, in principle, meet the requirements that would enable it to be classed as a criminal offence if it is not aimed at making profit”).

However, civil action has also been obstructed by problems in identifying the infringers, i.e., the individuals behind IP addresses. Identifying these individuals inevitably calls for the cooperation of network operators and access providers,
who possess the pertinent data. The law has not done much to assist rightholders in this task to date for the following reasons:

(a) The protection afforded to IP addresses by the personal data protection laws (please see Report 327/2003 issued by the Spanish Data Protection Agency). In that regard, I would draw your attention to the judgment handed down by the Court of Justice of the European Union (ECJ) on 29 January 2008 (case C-275/06 PROMUSICA – TELEFONICA), which declared that Community Directives 2000/31/EC, 2001/29/EC, 2004/48/EC and 2002/58/EC do not require the Member States to lay down an obligation to communicate personal data in order to ensure effective protection of copyright in the context of civil proceedings.

(b) The ISESA does not include IP rights among the safeguarded principles that merit the adoption of whatever measures are deemed necessary to put an end to the infringement thereof (Article 8 ISESA).

Analysis of the issue

Although IP rights are not included among the safeguarded principles, Article 11 ISESA refers to the intermediary service providers’ obligation to cooperate with competent bodies (defined in the ISESA as “all jurisdictional or administrative bodies (...) which exercise legally attributed powers”) in order to have the service discontinued or content removed whilst at the same time respecting the rules and guarantees relating to personal and family privacy, personal data protection, freedom of expression and freedom of information. In order for this provision to be put into practice, a cessation order must be issued by a competent body. As regards IP rights, this obligation to cooperate particularly transcends Articles 138, 139.1.h) and 141.6 SCA, which enable rightholders to request certain cessation measures against intermediaries whose services are used by infringers, “even if the conduct of those intermediaries does not in itself constitute infringement”.

In parallel with the obligation to cooperate, Articles 13 to 17 ISESA establishes the system of provider liability, set out as an instrument aimed at forcing the cooperation of providers in the task of putting a halt to unlawful conduct. Following a general statement on providers’ being subject to the civil, criminal and administrative liability established by law, the following situations in which providers may be declared liable are set forth:
(a) Where the operators themselves are either directly or indirectly involved in the unlawful content, either as network operators and access providers (Article 14 ISESA), service providers who make a temporary copy of the data requested by users (Article 15 ISESA), providers of hosting or data storage services (Article 16 ISESA) or providers that offer links to content or search instruments (Article 17 ISESA).

(b) Where operators are “effectively aware” that the activity or information is unlawful but do not act diligently in order to remove said information or block access thereto (Articles 15.e, 16.1 and 17.1 ISESA).

The Law considers there to be “effective awareness” when a court or competent administrative body declares the data and information unlawful and orders that it be removed, that access to it be blocked or that it be put out of use, and the provider has knowledge of that decision. This is a rather restrictive definition which is not found in the Directive on Electronic Commerce. Thus, the Spanish Supreme Court, in its ruling of 9 December 2009, interpreted Spanish law pursuant to the Directive, attributing “equal value to effective awareness as to the knowledge obtained by the service provider based on the facts or circumstances apt to enable, either indirectly or due to logical inference within the power of any person, an effective understanding of the situation in question”.

To summarise, it can be said that Spanish legislation currently

- does not include IP rights among the safeguarded principles;

- lays down an obligation for providers to cooperate with the competent bodies with a view to discontinuing the rendering of a service or removing content;

- establishes a provider liability system whereby providers, under certain premises, may take measures to remove unlawful data, information or content;

- but does not establish an obligation to communicate personal data in order to ensure effective protection of copyright in the context of civil proceedings.

The situation is the same regardless of whether or not the infringer is a repeat offender.
Draft legislative amendment

It is thus interesting to note that the Draft Bill for Sustainable Economy recently proposed by the Spanish Government included three fundamental amendments:

(a) The explicit inclusion of IP rights among the safeguarded principles, i.e., in Article 8. a) ISESA along with public order, public security and national defence;

(b) The addition of a new paragraph 2 to Article 8 ISESA enabling the identification of infringers. The proposed paragraph reads as follows: “The competent bodies for adopting the measures referred to in the previous paragraph, with the purpose of identifying the party responsible for the information society service involved in the allegedly infringing conduct, may order information society service providers to communicate data that shall permit identification so that an appearance may be entered in the proceedings. Providers shall be obliged to furnish whatever data lies in their possession.”

(c) Amendment of the SCA with the aim of creating a specific system for safeguarding IP rights against infringers in the information society.

The fate of this proposal is nevertheless unclear. There has been opposition which has cast doubt on the fact that IP protection should be placed on the same level as other protected legal assets. According to other legal opinion, the constitutionality of the specific protection system is unclear, particularly the procedure for curbing activities which infringe IP rights. It will be necessary to wait until the Bill has been passed through Parliament before we will know what has finally been approved.

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

In order to reply to this question, we should first of all examine whether the “digitisation” and/or format shifting of a work entail an act of reproduction or transformation of said work, given that each act may have different legal consequences, as we will go on to look at below.

There is no human ingenuity in the digitisation of a work, given that it merely involves making a mechanised copy of an analogical or paper work on digital format. We would therefore be dealing with a mere reproduction of the work, and the digitised copy would have no legal status of its own. Otherwise, we
would be dealing with an act of transformation of the work, and the derivative work would enjoy its own legal status and protection.

Format shifting would need to be considered on a case-by-case basis, since the type of work involved and how its format is to be changed would have to be taken into account.

For example, legal opinion is not unanimous on the issue of format shifting of works of fine art – one camp argues that it is impossible to change the format of a work of fine art without transforming it, for example, when a photographic work is changed to a pictorial work, or sculpture to painting; whilst the other camp argues that if the format shift has not involved any human ingenuity that would lend a certain degree of originality to the work, then we would be dealing with an act of reproduction.

On the other hand, if we were to consider the mere shifting of an audiovisual work from analogical to digital format, we would be dealing with an act of reproduction.

It would be another matter altogether if the format of a work were shifted for compression and subsequent decompression purposes, given that in that case, we could be talking about an act of transformation.

Lastly, where the format of a sound recording is changed, it will depend on whether we are dealing with an act of reproduction or transformation and whether the change is on polyphonic format, true to the original, or on monophonic format.

Our legislation establishes different legal consequences depending on which act is involved, and provides for the following exceptions to copyright protection:

a) Temporary reproduction and private copying on any medium;

b) The reproduction, distribution and public communication of a work for the purposes of public security, official procedures or to benefit people with a disability; use of a work for the purposes of illustration in teaching or scientific research; use of works in the reporting of current events; use of works located on public thoroughfares.

c) The use of databases and/or computer programs by legitimate users.
d) Dissemination of a work by cable, satellite and/or technical recordings.

e) The transformation of a work to be parodied.

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

There are no specific exceptions allowing libraries to format shift or to make digital copies, particularly following the amendment of Article 37.2 SCA:

Under Spanish law, all libraries were freed from the obligation of remunerating authors for the public lending of works covered by copyright until the ECJ entered judgment against Spain on 26 October 2006 for incorrectly implementing Directive 92/100/EC. As a result, Spanish lawmakers were particularly cautious when implementing Directive 2001/29 and established a system of limitations to copyright protection that was even more restrictive than that provided under said Directive.

Although Articles 5.2.c) and 5.3.n) of Directive 2001/29 and Article 37 SCA provide for the corresponding exception to the rights of reproduction and communication to the public in respect of the acts carried out by libraries, teaching institutions, museums or archives for the purposes of preservation and research, this does not include personal digitisation of bibliographic works, for which it is necessary to obtain the authorisation of rightholders.

Thus, when identifying the limitations which must be reviewed due to their special relevance as regards the digital dissemination of knowledge, the Green Paper on copyright in the knowledge economy expressly cites the exception to the benefit of libraries, teaching institutions, museums and archives for the purposes of preservation and research.

Likewise, ahead of the lawmakers, a number of National Libraries have embarked on collaboration projects with the sectors involved by promoting protected works on digital format, as well as seeking an extension to the exception laid down in Article 5.3.n) of Directive 2001/29/EC to enable restricted public communication on protected websites that may only be accessed by research license holders, etc.

5. Are there exceptions or permitted uses allowing the use of orphan works? If so, what is their scope?
Spanish copyright legislation, comprised of domestic law, international treaties ratified by Spain, and EU legislation, does not include exceptions that are specific or that differ from those relating to other works covered by valid copyright and owned by parties that can easily be located or identified, in order to deal with the problem of orphan works.

We can specifically say that orphan works are not even mentioned in the SCA.

The only provisions that would indirectly affect orphan works, or that are specifically included in order to prevent certain works from being able to be classed as such when they become digitised, would be those laid down in:

1) Article 162 SCA which, on establishing protective measures for rights-management, considers the removal of any electronic rights-management information, including identification of the author or rightholder, as infringement.

2) Council Directive 2001/29 EC, Article 5 of which sets out a closed list of possible exceptions and legislative limitations thereon. Article 7 lays down the obligation of the Member States to provide for adequate legal protection as regards information for the management of the rights in the digitised works, rendering it necessary to prohibit the removal or alteration of information aimed at preventing the holders or managers of the rights from being located, which could lead to those works’ being orphaned.

3) Article 12 of the WIPO Copyright Treaty and Article 19 of the WIPO Performances and Phonograms Treaty, of which Spain is a contracting party, the content of which is similar to Article 7 of Directive 2001/29.

Despite the lack of any complete or clear regulation in this regard, we should echo the growing concern from certain doctrinal and institutional sectors over the problem of orphan works:

a) The Parliamentary Group Entesa Catalana de Progrès (GEPCP) proposed that Article 40bis.2 of the consolidated wording of Copyright Act 23/2006 be drafted as follows:

“Works considered as orphan works, for which it is impossible to locate the holders of the exploitation rights following a legitimate search, may be used without prior authorisation in accordance with the conditions established by law”
However, this amendment was not ultimately approved. The reason for the final rejection of same could perhaps lie in the comprehensive list of limitations laid down in Directive 2001/29/EC and the precaution of not going against any limitations regulated by Community lawmakers.

b) The General Director of the National Library of Spain raised this issue at the International Seminar on Intellectual Property and Digital Cultural Assets held in Madrid on 29 and 30 October 2009 when he referred to the need for asset holders and Libraries themselves to evolve within the context of legal certainty by supporting the ARROW project and regulating the legal digitisation of orphan works by adding an opt-out clause in favour of Libraries.

c) The position of CEDRO (Spanish Reprographic Rights Institution) on orphan works, having recently put forward an application to handle the management of orphan works in Spain after having signed the IFRRO declaration on works of this kind on 15 March 2007.

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?

The Spanish Copyright Act regulates the limitations on copyright protection in Article 31 and subsequent Articles thereof. This legal system arises from Directive 2001/29 and is likewise set out as a comprehensive and closed list of limitations. Nevertheless, the limitations adopted by Spanish Law do not include all of those provided for under the Directive. Moreover, their scope of application is generally narrower. Due to their increased relationship with new technology, we would draw your attention to the following limitations provided under Spanish law:

a) Temporary acts of reproduction and the making of private copies (Article 31 SCA). Please note that the limitation regarding temporary acts of reproduction which are an integral and essential part of Internet functioning (laid down in Article 5.1 of the Directive) is a mere transcription of its Community counterpart.

b) Security, official proceedings and people with disabilities (Article 31bis SCA)
c) Quotations and summaries for teaching purposes (Article 32 SCA). Article 32 is a good example of the restrictive interpretation of the limitations in Spanish Law. Our legislation exclusively restricts the limitation regarding quotations to cases where the use is for “teaching or research purposes”. This requirement is set out in more detail in Article 5.3 d) of the Community text. This exception should be of an imperative nature in Directive 2001/29 if it truly seeks to put into practice the free movement of knowledge and information. Paragraph 2 of Article 32.1, according to which “periodical compilations made in the form of press summaries or reviews shall be treated as quotations”, subjects this form of quotation to payment of a royalty when it is used for commercial purposes, and enables rightholders to challenge this exception in such cases.

d) Articles on topical subjects and use of works for reporting current events and works located on public thoroughfares (Articles 33 and 35 SCA). As in the case of Article 32.1.2, the motivating factor behind the limitations laid down in Articles 33 and 35 regarding the reporting of current events is the freedom of information, and these limitations are essential for stimulating the knowledge economy in the European Union.

e) Use of databases by the lawful user and limitations on the exploitation rights of the owner of a database (Article 34 SCA).

f) The scope of broadcasting by cable, satellite and technical recordings (Article 36 SCA).

g) Performance of works at official acts and religious ceremonies (Article 38 SCA).

h) Parodies (Article 39 SCA).

Spanish Law has also restrictively implemented the exception provided in Article 5.3 k) of the Directive referring to use “for the purpose of caricature, parody or pastiche”.

Spanish Law does not provide for pastiche as a limitation on derived or composite works (Articles 9 and 11 SCA). This exception could have served to cover certain cases of transformation or creation of works based on a mix or combination of elements of pre-existing works (this creative technique being known by its English term “mash-up” or “remix”). This concept has made a grand entrance into the digital arena thanks to the technological possibilities
opened up by Web 2.0. This interpretation of the exception laid down in Article 5.3 k) of the Directive is endorsed in the Green Paper, according to which:

“Under the Directive, certain exceptions potentially provide some measure of flexibility in relation to free uses of works […]. Another exception allowing some measure of flexibility is Article 5.3 k) of the Directive, which exempts uses “for the purposes of caricature, parody or pastiche”. Although these uses are not defined, they allow users to reuse elements of previous works for their own creative or transformative purpose”.

The following question can be split into three:

**Does the Spanish Copyright Act contain a *fair use* or *fair dealing* clause?**

The system of limitations to copyright protection provided under the SCA (in accordance with the Directive) lacks an open clause similar to the *fair use* or *fair dealing* clause in countries with common law systems. Nevertheless, Article 40bis SCA has been interpreted broadly by the courts in certain cases, which has led to the introduction of new exceptions to copyright in our Law.

Spanish lawmakers decided to implement the three-step test in domestic law as an additional criterion for the court interpretation of the limitations laid down in the SCA. According to Article 40bis:

“The Articles of this Chapter may not be so interpreted that they could be applied in a manner capable of unreasonably prejudicing the legitimate interests of the author or adversely affecting the normal exploitation of the works to which they refer.”

Given the literal nature of this provision and its systematic positioning, it seems clear that its function is to avoid extensive or excessively broad interpretations of the limitations set out in the preceding paragraphs. At a glance, Article 40bis does not enable the system of limitations to go beyond the interpretation and application of the specific exceptions laid down in Articles 31 to 39. Interpretation of Article 40bis has been subject to a vast amount of diverging legal opinion. As far as Spain is concerned, the dominant interpretation is that it is a closing clause to the limitations system regulated in Article 31 and subsequent Articles of the SCA, designed to prevent it from being read in an excessively broad manner.
Nevertheless, the implementation of this provision in the SCA has, on some occasions, provided the courts with a basis for making broad interpretations of the limitations.

(i) Judgments handed down by Barcelona Court of Appeal on 31 October 2002 (VEGAP vs Barcanova) and Madrid Court of Appeal on 23 December 2003 (VEGAP vs SM)

The abovementioned judgments resolve two very similar cases, in which the entity that manages the rights of painters and sculptors (VEGAP) sued the publishing houses Barcanova and SM before the Barcelona and Madrid courts, respectively, for including fine arts on their text books for purely ornamental or illustrative purposes. The defendants covered their actions by the exception regarding quotations laid down in Article 32.1.

According to VEGAP, given that the use of the works in the text books was not for the purposes of analysis, comment or critical assessment, the defendants had infringed the author’s copyright. This was therefore a very restrictive interpretation of the concept of quotations.

Both Barcelona and Madrid Courts of Appeal invoked Article 40bis SCA in their respective judgments to give a broad interpretation of the limitation on quotations and include the illustration of text books as “a form of quotation”.

“The reproduction of a work of fine art may be lawful even if it is not subject to analysis, comment or critical assessment. On the other hand, the lawfulness of the quotation is justified by the purpose of the inclusion thereof: teaching or research. Consequently, the inclusion of illustrations of fine arts belonging to others in works (such as text books) are lawful provided that the requirements that justify said inclusion are met, i.e., they are for teaching or research purposes, and as long as the use is made to the extent justified by the inclusion as per Article 32 in relation to Article 40bis of the consolidated wording of the Copyright Act.

In light of the above, the exclusive rights of the author could only be considered to have been encroached upon if there was no justification, for example, where the quotation did not fulfil any function or where its functions differed from those set out in the aforementioned Article 32, such as where the work of art was only used for commercial purposes (for example, the sale of a pictorial work in “poster” format), where unjustified damage is caused or where the use is
(ii) Judgment handed down by Barcelona Court of Appeal on 17 September 2008 (Google Spain)

In its judgment of 17 December 2008 (referenced in the article “Of Oceans, Islands and Inland Water – How Much Room for Exceptions and Limitations Under the Three-Step Test?” by the Max Planck Institute professor Annette Kur due its relevance and exceptional nature within a European context), Barcelona Court of Appeal performs an extensive and unusual reading of Article 40 bis SCA.

In that case, the owner of a website accused Google of infringing his copyright by reproducing extracts of the text of his website on its search results page and making copies in order to offer a cached version. After acknowledging that Google’s activities did not fall under any of the limitations on copyright protection provided under the SCA, the Court of Appeal referred to Article 40 bis and held that Google’s intention had been to ease the Internet user’s task of searching and selecting from among the results obtained. The court classified the conduct as tolerated social use of the works, adding that it was moreover compatible with the end pursued by the author and did not harm the copyright holder, but rather benefited him, since it contributed to the achievement of one of the ends implicitly pursued by authors, namely, dissemination of their work and the provision of access thereto by Internet users.

In its interpretation of Article 40bis SCA, the Court of Appeal declared:

“What is termed in the common law system as fair use should guide our interpretation of the scope of copyright protection (which under no circumstances may be deemed to constitute absolute rights) and the limitations thereto. Ultimately, it involves bringing to the sphere of copyright what ius usus inoqui brought to moveable property and real estate, namely, a natural limitation to the right of ownership, which mainly works by interpreting the scope of protection of same in order to avoid absurd and excessive limitations.

A cassation appeal was lodged before the Supreme Court against this judgment.

(iii) Judgment handed down by Madrid Court of Appeal on 6 July 2007 (El Mundo vs Periodista Digital)
The publishers of the newspaper *El Mundo* and the website www.elmundo.es, sued *Periodista Digital* for its use of *El Mundo* content on its website. According to the plaintiffs, *Periodista Digital* had been making a daily, systematic copy (for dissemination on the Internet free of charge) of a large proportion of the news, editorials, cartoons, opinion columns and even photographs and graphic content published daily in *El Mundo*. In its Judgment of 12 June 2006, Madrid Mercantile Court no. 2 considered that *Periodista Digital’s* conduct could be deemed to fall under the exception regarding press summaries or reviews laid down in Article 32 SCA.

The Court of Appeal revoked the first instance ruling, arguing that *Periodista Digital* “was feeding, to a considerable degree, off the other newspapers with which it competed”, surpassing the specialisation and degree of dissemination that should characterise press reviews and going beyond what is permitted under Article 40bis SCA. As regards the scope of Article 40bis, the Court of Appeal declared that:

“the provisions of the aforementioned Article 40bis SCA make this court inclined not to interpret the scope of the limitation as per Article 32.2 SCA, which might leave the copyright holder unprotected as happened with the decision under appeal, which ruled that certain conduct was acceptable when, in light of the circumstances surrounding it, it actually proved detrimental to the interests of the plaintiffs and clearly contrary to any possibility that they might exploit their works in a normal manner”.

The Court of Appeal likewise made reference to the “commercial purposes” requirement referred to in Article 32.2, indicating that “the purpose of said conduct could not be described as non-commercial, since such modus operandi was enabling the defendant to enter the media sector of the marketplace and obtain income from advertising or sponsorship, as is clearly revealed by the inclusion of advertisements in its digital newspaper”.

In conclusion, case-law has, on certain occasions, availed itself of Article 40bis SCA in order to interpret the limitations on copyright in a broad manner.

¿Does the Spanish Copyright Act include an exception for Libraries / search facilities? Do these apply to library / search facilities such as Google Books?
Articles 5.2 c) and 5.3 n) of the Directive and Article 37 SCA provide for an exception to the rights of reproduction and communication to the public in respect of the acts carried out by libraries, teaching institutions, museums or archives for the purposes of preservation and research, as mentioned in the response to question 4.

However, this exception does not include projects aimed at carrying out mass digitisation of bibliographical works without the need for prior consent from rightholders, such as the project conceived by Google.

Currently, one of the objectives shared by libraries, art galleries and public archives throughout the world is the digitisation of their collections for the purposes of preservation, research and facilitating access to their respective catalogues. Given the enormous costs deriving from digitisation, it could be appropriate to expand upon this exception in the Directive so that it also includes private entities that collaborate with public institutions such as libraries, museums or archives for the purposes of digitisation, preservation and research.

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?

Council Directive 2001/29/EC of 22 May 2001 established a comprehensive list of exceptions, taking in the provisions of the Berne Convention and WIPO Treaties of 1996. Most of those exceptions could be found in the legislation of different States, as in the case of Spain, which had already established a list of exceptions to exclusive rights in the Copyright Act of 1987.


In light of this legislative approach in Spain, these exceptions clearly comply with the provisions of Article 9 of the Berne Convention, Article 5.5 of the Council Directive of 22 May 2001 and Article 10 of the WIPO Copyright Treaty of 20 December 1996.
The exceptions in question are clarified in section 6 above. Spanish law does not include any other exceptions or limitations on exclusive rights that comply with the requirements of the three-step test.

The Directive of 22 May 2001 focuses on regulating the legal protection of technological measures for controlling access and use of works thanks to encryption and control of access information. Protection in Spain is obtained by rightholders through Article 270 of the Criminal Code. Rightholders may therefore impose their will by means of technology and obtain absolute control over their work.

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?

We would have to say no. The exceptions or permitted uses relevant to the hi-tech and digital sectors with regard to the issues mentioned above have been sufficiently described in the preceding paragraphs.

Therefore, besides what has been mentioned *ad supra*, and without prejudice to future progress in the subject matter, there are currently no additional exceptions or limitations that might be of interest here.

Nevertheless, as regards orphan works, please note that despite there being no specific exceptions differing from those referred to from a general standpoint, this situation might change in the medium term.

Given the Community lawmakers’ silence and the Communication from the European Commission on copyright in the knowledge economy of 19 October 2009, there is legal opinion which reflects a desire to see the European Union taking an interest in regulating this issue. Additionally, as we had mentioned in section 5, different groups are promoting the adoption of various exceptions and measures in respect of such works; on the one hand, rights management entities related to the publishing world are seeking to handle the management of orphan works in Spain whilst, on the other hand, the National Libraries of Europe are interested in having an exception established in their favour. Added to this is the media interest that orphan works have generated in relation to digital library projects such as Google Books and Europeana.
Consequently, the regulation of this field, as well as the ensuing emergence of specific exceptions relating to orphan works, could happen in the not too distant future.

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?

(i) The exceptions referring to the activities of an ISP in principle seem to be balanced. However, some members of the Group might feel that providers of search engine services ought to enjoy broader exceptions.

(ii) We consider the exceptions in relation to digitisation and format shifting to be appropriate. Although the digitisation of works satisfies the public interest since it facilitates access to those works and includes them within the sphere of the knowledge society, the exclusive rights of authors must nevertheless be respected.

(iii) In the case of orphan works, the lack of specific regulation on this matter means that we cannot talk about balance or proportion between public interest and copyright holders. This situation has a legal loophole whereby, despite the fact that there is public interest, it is impossible to obtain the authorisation of the copyright holders since they cannot be identified or located.

These circumstances call for the need for regulation that would guarantee proportionality between the exclusive rights conferred by copyright legislation and access to culture by the general public.

With respect to libraries and the provisions of fair use / fair dealing, we must specify the following: the system of limitations provided under Spanish law does not contain an open clause similar to the fair use / fair dealing provision that exists in countries with a common law tradition. Instead, there is a three-step test laid down in Article 40bis SCA, which applies exclusively to the closed limitations laid down in the law.

We nevertheless believe that the traditional exceptions to copyright in respect of libraries, although generally correct, should be reviewed in order to incorporate the changes deriving from the arrival of the digital era.
(a) 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?

As a result of the legal amendments which have been carried out in our country in order to implement the various Community Directives on the subject matter in question, we can find the exceptions referred to throughout this report.

Although those exceptions were appropriate in their day, the constant evolution of the hi-tech and digital sectors render it necessary to redefine and clarify the requirements laid down in those exceptions. In order to guarantee accuracy and adequacy in the exceptions referring to those sectors, it will be necessary for the Community lawmakers to take the initiative of reviewing and harmonising the existing exceptions and weigh up the need to include new provisions. The Green Paper on copyright in the knowledge economy emphasises the need to review certain limitations due to their special relevance in the digital dissemination of knowledge.

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

The Working Group considers it necessary to adapt the exceptions regarding the use made by Libraries and Cultural Entities to the uses arising from new technology. It would be advantageous to establish, inter alia, an exception in relation to orphan works to the benefit of Libraries.

In light of the lawmakers’ silence, we have seen how our main Libraries are claiming a broader interpretation of Article 5.3.n) of Directive 2001/29, and how they have taken an interest in the ARROW project for the digitisation of orphan works.

As regards orphan works, the problem referring to the lack of regulation should be resolved by creating a new legal exception to exclusive rights and entrusting the management and deposit of rights to a management entity. In that regard, on signing the IFFRO Declaration, the reproduction rights organisation CEDRO seeks to handle the management of such works.

Lastly, given the rigidity of the system of exceptions established by Directive 2001/29 and the contradictory interpretations of same that have arisen, it would be advisable to amend the Directive in order to endow that system with increased flexibility and capacity for adapting to change, the effects of which would be similar to those of fair use.
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?

In light of EU practice (the EU being a supranational entity which, through Directive 2001/29, established a catalogue of exceptions to copyright), we can conclude that the establishment of a comprehensive catalogue does not necessarily imply the harmonisation of the systems linked thereto. Nevertheless, in that regard, the nature of the list will be essential (imperative or optional / open or closed).

We believe that if there really was a will to harmonise this field on a global scale (setting aside the differences between copyright protection systems), it would be appropriate to establish a closed list including an open clause, which would enable the system to be adapted as the hi-tech and digital sectors evolve.

Summary

Q216 Exceptions to copyright protection and the permitted uses of copyright works in the hi-tech and digital sectors

The non-stop changes taking place in the hi-tech and digital sectors call for ongoing realignment of the balance between the exclusive rights of authors and distribution of and access to their works, and this in turn heightens the importance of exceptions to and limitations on copyright.

In keeping with Community legislation, Spain has drawn up a limiting, enumerative general listing of exceptions, though the range of application is narrower than in Community counterparts.

There is a discernible lack of exceptions specifically addressing such aspects as digitisation, orphan works, and use by libraries in connection with the hi-tech and digital sectors. New technologies can alter how works are used, yet in copyright matters works are still subject to application of the general exceptions laid down by Spanish legislation, which can result in divergent interpretations and may not be responsive to real conditions in the sectors considered.
Internet Service Providers (ISPs) are the exception, in that they benefit from a specific limitation on copyright, namely, temporary reproductions.

The Spanish Group believes it necessary to review and harmonize the interpretation and application of existing exceptions and also to make the system more flexible and adaptable to changes taking place in the relevant sectors. The Spanish Group likewise considers new limitations on copyright addressing uses by libraries and research facilities and use of orphan works to be called for.
Résumé

Q216 Les exceptions à la protection du droit d’auteur et les usages autorisés des œuvres protégées dans les secteurs de la haute technologie et du numérique.

L’évolution constante des secteurs de la haute technologie et du numérique exige une adaptation continue de l’équilibre existant entre les droits exclusifs des auteurs d’une part et la diffusion et l’accès à ces œuvres d’autre part, ce qui renouvelle l’importance des exceptions et limitations aux droits d’auteur.

En Espagne, en accord avec la législation communautaire, on a établi une liste générale d’exceptions, exhaustive et fermée, qui présente des marges d’application plus étroites que celles fixées dans le contexte communautaire.

Dans les secteurs de la haute technologie et du numérique, on observe qu’il manque des exceptions spécifiques sur des aspects tels que la numérisation, les œuvres orphelines et les usages réalisés en bibliothèques. Bien que les nouvelles technologies puissent modifier les conditions d’usage des œuvres, dans ce contexte les exceptions établies sous caractère général dans la législation espagnole continuent d’y être applicables, ce qui peut donner lieu à diverses interprétations et ne pas répondre à la réalité des secteurs à l’étude.

Les Fournisseurs de Services Internet (ISP) constituent une exception, car ils bénéficient d’une limitation spécifique aux droits d’auteur, qui consiste en des reproductions provisoires.

Le Groupe Espagnol juge nécessaire de réviser et d’harmoniser l’interprétation et l’application des exceptions existantes, mais aussi d’apporter au système une plus grande flexibilité et capacité d’adaptation aux changements dans les secteurs d’intérêt. Il estime également nécessaire de prévoir de nouvelles hypothèses de limitation des droits d’auteur pour les usages de bibliothèques et centres de recherches, ainsi que les œuvres orphelines.
Zusammenfassung

Q216 Ausnahmen vom Urheberrechtsschutz und erlaubte Benutzungsformen urheberrechtlich geschützter Werke in den Sektoren der Hochtechnologie und Digitaltechnologie (exceptions to copyright protection and the permitted uses of copyright works in the hi-tech and digital sectors)

Die fortwährende Entwicklung in den Sektoren der Hochtechnologie und Digitaltechnologie macht eine kontinuierliche Anpassung des bestehenden Gleichgewichts zwischen den Ausschließlichkeitsrechten der Urheber und der Verbreitung und dem Zugang zu diesen Werken erforderlich, was den Ausnahmen und Beschränkungen der Urheberrechte eine erneuerte Bedeutung verleiht.

In Spanien ist im Einklang mit der Gemeinschaftsgesetzgebung eine erschöpfende und abgeschlossene, allgemeine Liste mit Ausnahmen erstellt worden, die geringere Anwendungspielräume als die entsprechenden Gemeinschaftsbestimmungen aufweist.

Im Zusammenhang mit den Sektoren der Hochtechnologie und Digitaltechnologie ist ein Mangel an spezifischen Ausnahmen zu Aspekten wie der Digitalisierung, den verwaisten Werken und der in Bibliotheken erfolgenden Benutzung festzustellen. Auch wenn die neuen Technologien die Nutzungsbedingungen von Werken verändern können, kommen in diesem Kontext auch weiterhin die innerhalb der spanischen Gesetzgebung existierenden allgemeinen Ausnahmen zur Anwendung, was zu unterschiedlichen Auslegungen führen kann und der Wirklichkeit der analysierten Sektoren nicht entspricht.

Die Provider von Internetdiensten (ISP) stellen eine Ausnahme dar, da sie von einer Beschränkung der spezifischen Urheberrechte profitieren, und zwar in Form der vorläufigen Wiedergaben.
