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:

What exceptions or permitted uses apply to a service provider in relation to user-generated content (UGC)? 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? 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?

It is not clear what is meant above by the term ‘service provider.’ For example, the term could refer to mean Internet Service Providers (ISP) such as Telstra, Optus or iiNet, or could more specifically mean host/website proprietors of UGC sites such as:

- Social networking sites such as Facebook, Myspace and Twitter;
- Image/photo/film sharing sites such as YouTube, Flickr and Shutterfly;
- Blog sites inviting comments and responses;
- Information sites such as Wikipedia;
- Virtual reality sites;
- Entrepreneurial sites with UGC components such as travel sites, (collectively referred to as UGC Proprietors).

On this basis, each will be addressed in turn.
**ISPs**

Section 116AA of the Copyright Act 1968 (Cth) (**Copyright Act**) as amended makes specific safe harbour provisions for ISPs. The Copyright Act also provides specific exemptions for ISPs in relation to authorisation of infringement. The purpose is stated as:

> “to limit the remedies that are available against carriage service providers for infringements of copyright that relate to the carrying out of certain online activities by carriage service providers. A carriage service provider must satisfy certain conditions to take advantage of the limitation.”

The safe harbour provisions only apply to a party which is a **Carriage Service Provider (CSP)** as defined under the Telecommunications Act 1997 (Cth) (**Telecommunications Act**). As mentioned in the Australian Group response to Q216A, this in turn brings with it an additional set of complex concepts defined under telecommunications law. However precedent (notably the decision at first instance of the Federal Court in Roadshow Films Pty Ltd v iiNet Limited (No. 3) [2010] FCA 24) (**the iiNet Case**)) established that ISPs and carriers are CSPs.

In order to attract the benefit of the safe harbour provisions, the activities of the CSP must fall within certain categories and meet specific requirements in relation to their activities in each category. These categories are listed in the Australian Group response to Q216A.

The iiNet Case was recently appealed in the Full Federal Court Roadshow Films Pty Limited v iiNet Limited [2011] FCAFC 23, (**the iiNet Case Appeal**) in which the Full Federal Court held that iiNet had not authorised the infringing acts of its users despite failing to take steps to stop the infringing activity. However the Court did not rule out the possibility that an ISP could be found liable for authorising the acts of copyright infringement in some circumstances.

This decision has put CSPs on notice that there may be limitations on those exceptions in circumstances where the CSP is put on notice of unlawful content uploaded by internet users using its service. Specifically, the Full Court agreed that no defence or safe harbour was available to a CSP unless it can be shown that the CSP had no knowledge of the infringing acts occurring on its service/facilities. Further, the safe harbour provisions are for CSPs who adopt and reasonably implement a policy that provides for termination, in reasonable circumstances, of the accounts of repeat infringers. At first instance the trial judge found that iiNet had such a policy sufficient to activate the safe harbour provisions. However the Full Federal Court in the iiNet Case Appeal unanimously found that iiNet did not have such a policy. Whilst the court held in favour of iiNet, (thus granting a reprieve for ISPs) this decision has left the door open on the question of CSP responsibility and has raised the bar for CSPs to put in place appropriate policies to address these issues of the safe harbour provisions will not be available as a defence to infringing acts of users of the CSPs service.

It is anticipated that Village Roadshow will appeal the decision to the High Court of Australia. The tension between users, software developers (like BitTorrent), CSPs
and copyright owners is likely to continue through an increase in litigation and will likely prompt legislative reform. Indeed, following the Full Federal Court decision, the Internet Industry Association (IIA) announced its intention to immediately begin developing an industry code of practice for internet intermediaries.

Whilst the iiNet Case Appeal has provided industry with some guidance regarding where responsibilities should begin and end, the decision falls short in defining reasonable steps intermediaries should take in responding to allegations of infringement by their users. It is the intention of the IIA that the industry code, once developed, will address this gap.

**UGC Proprietors**

The IIA has stated its intention to pursue reform to the *Copyright Act* that will expand the current application of the safe harbour provisions beyond ISPs to include a wider range of other intermediaries such as search providers, social media platforms, hosting companies and universities. At present there is no pertinent case law and it is unknown at this juncture whether the definition of ISPs would apply to a UGC Proprietor. Therefore it is doubtful that a UGC Proprietor would meet these safe harbour provisions and would therefore not be entitled to their benefit. Further, as mentioned in the Australian Group response to Q216A, the hosting of a UGC website proprietor of copyright material is not merely transient, it is these site’s *raison d’etre*.

Having said this, *if* the definition of an ISP can be held to apply equally to UGC Proprietors, including social networking sites, then their activities would most likely fall within category C and D and perhaps B activities under sections 116AE, 116 AF and 116AD respectively, of the Copyright Act. It is therefore strongly recommended, *(if not yet established law)* that UGC Proprietors of Australian based UGC and social networking sites attempt to envoke the safe harbour provisions regardless of the uncertainty surrounding being defined as CSP’s. This means that UGC Proprietors should, wherever possible, ensure compliance with the conditions in section 116AH of the Act by:

- adopting and implementing a policy that provides for termination, in appropriate circumstances, of the accounts of repeat infringers;
- complying with any applicable provisions of an industry code relating to accommodating and not interfering with standard technical measures used to protect and identify copyright material;
- not making substantive modifications to copyright material. This does not apply to modifications made as part of a technical process;
- immediately removing or disabling access to copyright material residing on its system or network if the CSP becomes aware that the material is infringing; or
- becomes aware of facts or circumstances that make it apparent that the material is likely to be infringing; or
- if it has been found to be infringing by a Court.

Merely hosting a site to which users post UGC or within which they create UGC does not mean the website proprietor will own copyright in that material. Therefore the usual copyright limitations will apply. Presuming the contributor has created the material, the contributor will usually own the copyright. Issues of liability may arise when the contributor contributes material that they have not created or which is
owned by a third party. Also, in some cases a contributor’s employer may own copyright if it is part of the contributor’s employment to create that material.

In cases where UGC infringes copyright, for example where a contributor has uploaded or posted a photograph or video footage using a third party’s music in the soundtrack, a UGC Proprietor is likely to be liable, inter alia, for authorising the infringement. The safe harbour provisions may not apply in such circumstances. However, it is arguable given the site operator may have no actual knowledge of the content being posted (at least not in advance of it being posted) that this may not be deemed authorisation.

1. 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?

It is not clear to whom the reference of temporary acts of infringement relates. For example, does the question refer to the temporary infringing activities of ISPs, private users, UGC Proprietors?

Limiting the Australian Group’s response to ISPs only, sections 116AD, 116AE and 116 AF of the Copyright Act provide safe harbour defences for an ISP undertaking certain temporary acts of infringement, such as caching temporary copies of electronic works or storing temporary copies of copyright material of its users. These sections are known as category B, Category C and Category D activities and are more particularly described in the Australian Group response to Q216A.

In relation specifically to caching, in most circumstances, this is classed as a category B activity, under section 216AD of the Copyright Act. A Category B activity is an activity where a CSP caches copyright material through an automatic process. Specifically, the section provides that an ISP carries out a Category B activity by caching copyright material through an automatic process however the CSP must not manually select the copyright material for caching.

However, in the recent iiNet case, the Full Federal Court suggested that an ISP would be likely to have direct access to the infringing material on its own servers and might therefore be required to meet a higher standard of conduct in circumstances where allegedly infringing conduct was brought to its attention. Circumstances could therefore arise where an ISP is liable for temporary infringing acts such as caching copyright material. However this issue is untested in Australian case law and may well be raised in the much anticipated appeal (by Village Roadshow Pty Limited) to the High Court.

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?

There are limited and specific private copying exceptions provided for under the Copyright Act. These exceptions relate to format-shifting, time-shifting and uses of copyright material for special purposes.

**Format-shifting generally**
The format-shifting exceptions allow a person to copy certain types of material that he or she owns for private and domestic use into a different ‘format’. Types of format shifting include:

- copying a book, newspaper or periodical to use in a different format
- copying a photograph from hardcopy form into an electronic form (eg by scanning into a computer), or from electronic form into hardcopy form (eg by printing a digital file), and
- copying a video into an electronic form (eg to a DVD).

**Format-shifting of music**

A person who owns a legitimate copy of a sound recording, such as a CD, can make a copy of that recording solely for their private and domestic use. The exception allows a person to use an earlier copy to make later copies for all the playing devices that person owns regardless of the format (eg copying a CD to two MP3 players) and can make sequential copies (eg copying a CD to a personal computer and copying the content again to an iPod).

Limits on format-shifting of music include:

- the original copy must not be a pirate copy;
- the later copy must be solely for private and domestic use;
- the later copy must be made for use with a playing device that the person making the copy owns;
- a copy must not be made from a ‘podcast’ of a radio broadcast or similar program (unless the podcast is licensed for private use);
- the copy cannot be sold, swapped, lent or given away to someone else (however, a person can loan it to a member of their family or household);
- where a person disposes of, gives away, sells or swaps the original copy of a sound recording, they must not keep any copy made from the original;
- a business cannot use this exception to make a copy of a sound recording for a person unless it has permission to do so from the relevant copyright owners;
- uploading a copy of a song to the Internet is not allowed; and
- the new exception does not authorise the removal of any technological access control measures applied to the sound recording (many CDs and all vinyl records do not have access controls).

**Time-shifting**

The time-shifting exception allows a person to record a television or radio broadcast and watch or listen to it later. This exception does not apply to copying material from a DVD or from an Internet download or webcast. There is no fixed time for keeping the copy. However, the recording cannot be kept indefinitely or repeatedly used.

Further limits to the time-shifting exception include:

- the recording must be made solely for personal and domestic use
- time-shift recordings cannot be sold, swapped, lent or given away (however, the maker can loan it to a member of their family or household)
- the recording cannot be used to make a further copy of the material broadcast, and
- uploading a recording to the Internet to share with others is not permitted.
2. **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?**

As businesses increasingly use the internet as a means to provide information and access to customers, a range of diverse legal issues arise that businesses need to consider. The use of hyperlinks is one such issue.

Hyperlinks are active images, symbols or text that internet users can “click” on to be immediately transferred to another web page. The widespread use and ease of linking means that the legal consequences can often be overlooked. However, placing hyperlinks on a website as may give rise to claims of copyright and trademark infringement or even defamation.

In general, including a hyperlink to a website containing a copyright work that is published on the internet is unlikely to amount to copyright infringement, as there is no actual copying involved. By clicking on a link, a user is simply transferred to the web page of the original author and no reproduction is involved. The copy is already present on that website.

Although the law in this area is still largely unresolved, linking could amount to copyright infringement in certain circumstances, such as:

- linking to a work that is published to a restricted audience. This could occur where the contributor, website proprietor, UGC Proprietor, makes subscriber-only content available to non-subscribers by circumventing a pay wall, or where the link is to a consolidated version of a work, such as a film, that would otherwise only be accessible through many different files that would be difficult or time-consuming for an internet user to locate, access and consolidate.
- Linking could infringe copyright in a work where it amounts to a linker authorising acts of copyright infringement by internet users. This might occur where hyperlinks authorise, allow or make it easier for internet users to copy an infringing or pirated copy of a work, or commercially exploit a work where this is prohibited in the linked website’s terms of use.

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

There are no other exceptions or permitted uses under the Copyright Act, relevant to the digital environment, not previous studied in Q216A.

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:

4. **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 answer to this question and question 6 below are intrinsically linked.

These exceptions provide a degree of balance but the issue is a global concern and should be dealt with, as far as possible, at a global level.

5. 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 current exceptions outlined above are for the most part, appropriate to current technology (ie the format and time shifting exceptions) however technology is evolving at a rate impossible for the law in Australia (and arguably the rest of the world) to keep pace.

It is clear that the future of copyright law includes the digital environment and at an international level there is currently a vast disparity between existing copyright laws and the copyright laws necessary to protect the dissemination of original work in the digital environment.

It is a fundamental premise of copyright protection that the creator/owner has the exclusive right to control the publication, replication and dissemination of their work, so as to provide the author/creator with a financial incentive to continue to produce and create. The online/digital environment provides copyright owners with the ability to produce and replicate their creative endeavours an infinite number of times to reach as many people around the world as can access the internet. Whilst the internet is a low cost medium for distribution of creative works such as books, films and music, the very benefits of the internet are also the challenges faced in the digital environment. The iiNet case Appeal has produced, in Australia, an increased regulatory focus on the legal obligations of ISPs. It is likely that these obligations will only increase with time. However in Australia and elsewhere, it is apparent that government and regulatory bodies are struggling to modernize out of date laws and internet regulatory legislation.

The internet is a global communication medium and an inherent problem is that interpretation of content differs from country to country making global regulation nigh on impossible. One solution favoured by the Australian Group is a treaty addressing this complex issue.

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

Format shifting exceptions for the visually and aurally impaired.

7. 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 principle, addressing this issue on a country by country basis is likely to be ineffective, and a multilateral approach is necessary. A non exhaustive list is to be preferred so as to enable legislative change to keep up with the changing technology. A prescribed or exhaustive list would likely be, in practice, too restrictive in the digital and online environment.

Summary

Q216B concerns specific exceptions to copyright material and the permitted uses of copyright works in the high-tech and digital sectors.

In Australia, section 116AA of the Copyright Act 1968 (Cth) (Copyright Act) as amended, makes specific safe harbour provisions for Carriage Service Providers (CSPs).

The aim of Australia's safe harbour scheme is to ensure that CSPs who take reasonable measures to limit and deter copyright infringement are able to attract the benefit of reduced liability for copyright infringement if they introduce certain policies and procedures. This means that the remedies available against CSPs may well be limited if the CSP concerned has complied with the conditions contained in Division 2AA of the Copyright Act.

Following the recent iiNet case, this area of Australian law is undergoing significant scrutiny. Among other things, the definition of what is a CSP and whether it includes User Generated Proprietors is unsettled. Therefore it is uncertain whether the safe harbour provisions apply to User Generated Proprietors as well as CSPs.

Australian law provides exceptions relating to format shifting, time-shifting and uses of copyright material for special purposes. These exceptions are strictly limited to private copying only and do not apply to commercial situations.

The law in Australia with respect to hyper linking and copyright infringement is largely unresolved. In general, including a hyperlink to a website containing a copyright work that is published on the internet is unlikely to amount to copyright infringement as there is no actual copying of a copyright work involved. However, linking could amount to copyright infringement in certain circumstances such as:

- linking to a work that is published to a restricted audience;
- where providing the link amounts to authorising acts of copyright infringement by internet users.

The Australian Group considers that given the international nature of the high-tech and digital sectors, addressing the issues considered by this Q216B on a country by country basis is likely to be ineffective and a multilateral approach is necessary. The Australian group is in favour of establishing a multi-lateral treaty to address this complex issue.
Résumé

Q216B concerne les exceptions spécifiques au matériel soumis à copyright et les utilisations permises d’ouvrages soumis à copyright dans les secteurs numériques et de la haute technologie.

En Australie, l’article 116AA modifié de la Loi de 1968 sur le Copyright (Cth) (Copyright Act), prévoit des dispositions spécifiques de sphère de sécurité pour les Fournisseurs de Service de Télécommunication.

L’objectif du programme australien de sphère de sécurité est de s’assurer que les Fournisseurs de Service de Télécommunication qui prennent des mesures raisonnables pour limiter et décourager les violations de copyright peuvent bénéficier de l’avantage d’une responsabilité limitée pour violation de copyright s’ils mettent en place certaines pratiques et procédures. Ceci veut dire que les recours disponibles contre les Fournisseurs de Service de Télécommunication peuvent effectivement être restreints si le Fournisseur de Service de Télécommunication concerné a respecté les conditions prévues par la Section 2AA de la Loi sur le Copyright.

A la suite de l’affaire récente d’iiNet, ce domaine de la loi australienne est en train de subir un examen minutieux. Entre autres choses, il reste à définir ce qu’est un Fournisseur de Service de Télécommunication et à déterminer si cela inclut les Propriétaires de Contenu Généré par les Utilisateurs. On ne sait donc toujours pas si les dispositions de sphère de sécurité s’appliquent à la fois aux Propriétaires de Contenu Généré par les Utilisateurs et aux Fournisseurs de Service de Télécommunication.

La loi australienne prévoit des exceptions relatives au changement de format, au changement de temps et aux utilisations de matériel soumis à copyright pour des besoins spécifiques. Ces exceptions sont strictement limitées à la seule copie privée et ne s’appliquent pas aux situations commerciales.

En Australie, la loi relative à la création de liens hypertextes et à la violation de copyright reste en grande partie imprécise. En général, le fait d’inclure un lien vers un site web contenant un ouvrage soumis à copyright qui est publié sur internet ne risque pas d’être assimilé à une violation de copyright car cela n’implique pas de copie effective d’un ouvrage soumis à copyright. Cependant, créer un lien pourrait être assimilé à une violation de copyright dans certaines circonstances, telles que:

- créer un lien vers un ouvrage qui est publié à l’attention d’un public restreint;
- lorsque créer le lien revient à autoriser des actes de violation de copyright par les utilisateurs d’internet.

Selon le Groupe Australien, étant donnée la nature internationale des secteurs numériques et de haute technologie, il y a de fortes chances pour que le fait de traiter les problèmes posés par cette Q216B pays par pays soit inefficace et qu’une approche multilatérale soit nécessaire. Le Groupe Australien est en
faveur de l’établissement d’un traité multilatéral pour résoudre ce problème complexe.

Zusammenfassung

Frage 216B bezieht sich auf spezifische Ausnahmen bei urheberrechtlich geschütztem Material und die zulässigen Nutzungsarten von urheberrechtlich geschützten Werken im High Tech- und Digital-Sektor.

In Australien enthält Paragraph 116AA des Urheberrechtsgesetzes von 1968 (Cth) (Urheberrechtsgesetz) in seiner neuesten Fassung spezifische Safe Harbour-Regelungen für Mobilfunkgesellschaften (Carriage Service Providers, CSPs).

Die Zielsetzung des australischen Safe Harbour-Programms besteht darin, zu gewährleisten, dass CSPs, die angemessene Maßnahmen zur Begrenzung und Verhinderung von Urheberrechtsverletzungen ergreifen, in den Genuss einer reduzierten Haftung für Urheberrechtsverletzungen kommen können, wenn sie bestimmte Richtlinien und Verfahren einführen. Dies bedeutet, dass die gegen CSPs zur Verfügung stehenden Rechtsmittel sehr wohl begrenzt sein können, wenn der betreffende CSP die in Abteilung 2AA des Urheberrechtsgesetzes enthaltenen Bestimmungen eingehalten hat.

Im Nachgang zum kürzlich bekannt gewordenen iiNet-Fall befindet sich dieser Bereich des australischen Rechts eindeutig auf dem Prüfstand. Unter anderem ist die Definition des Begriffs CSP ungeklärt wie auch die Frage, ob davon nutzergenerierte eigene Inhalte umfasst sind. Es ist daher nicht sicher, ob die Safe Harbour-Regelungen für nutzergenerierte eigene Inhalte sowie CSPs gelten.


Die Rechtslage in Australien im Hinblick auf Hyperlinking und Verletzung von Urheberrechten ist weitgehend ungeklärt. Allgemein gesagt stellt selbst ein Hyperlink zu einer Website mit einem urheberrechtlich geschützten Werk, das im Internet veröffentlicht ist, eher keine Urheberrechtsverletzung dar, da es sich dabei nicht um tatsächliches Kopieren eines urheberrechtlich geschützten Werks handelt. Allerdings kann die Verlinkung in bestimmten Umständen, die nachstehend beispielsweise aufgeführt sind, zu Urheberrechtsverletzungen führen:

- Verlinkung zu einem Werk, das nur für eine beschränkte Zielgruppe veröffentlicht ist;
- wenn die zur Verfügungstellung des Links zur Autorisierung von Handlungen von Internetnutzern führt, die Urheberrechtsverletzungen darstellen.