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14<sup>th</sup> January, 2011

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Dear Smantha,

On behalf of the Israeli Alai Group I have pleasure in attaching the questionnaire answers for the Dublin Congress. Please be so kind as to confirm receipt.

### **ALAI 2011 – Dublin Congress (16-17 June 2011)**

#### **Questionnaire – Boundaries and Interfaces**

##### **1. The subject Matter of Protection – Works**

- 1.1 How do your legislators or caselaw define a literary work? In particular, how is speech protected? Is ex tempore speech a literary work and what are the conditions for protection?

*The Law defines a literary work, like other works, under an open-ended definition, as “including works expressed in writing, lectures, tables, compilations, and also computer programs”. Courts have recognized prose, poetry, articles, instructional pamphlets and guides as literary works.*

*Under Israeli law a work must be fixed in some form to be protected. Therefore extemporaneous speech that is not fixed is, a-priori, not protected. However, the fixation requirement is minimal, and some commentators regard it as an evidentiary, rather than a substantive rule. Thus, a later fixation may well suffice to prove the existence of an early extemporaneous speech. In one case, under the former copyright Act, a court recognized copyright in an oral lecture, based on the notes taken by the students hearing the lecture, and on the “powerpoint” presentation which accompanied the lecture. This, even though neither were fixations of the full lecture.*

- 1.2 For short works – headlines in a newspaper, phrases (including slogans), book titles, for example; are these covered by statute? Does case-law provide guidance on protection? Is this issue dealt with by de minimis rules? [In the EU discuss Infopaq and how the case is accommodated in national law].

*As a rule, most short phrases will lack the creativity required for protection. Nonetheless, courts have recognized copyright in short phrases in which they found such creativity, such as “There are no Hebrew speaking horses” and “the cider does not fall far from the tree”.*

- 1.3 How does your legislation define an artistic work? A closed and defined list of works? Open-ended definitions for greater flexibility?

*Artistic works are also defined under an open-ended definition as follows: "Artistic work" – including, drawings, paintings, works of sculpture, engravings, lithography, maps, charts, architectural works, photographic works and works of applied art;*

- 1.4 Have court decisions provided any rulings on the availability of copyright protection for contemporary forms or types of artistic expression e.g.

- surveillance art, installations, collage.
- performance art.
- Conceptual art

*None of the above have been the subjects of specific case law. However the definition of “artistic work” is flexible enough to include them. It has been suggested in the literature that installation or concept art could be protected if fixed (for instance, by filming).*

- 1.5 Are there any judicial decisions/ academic opinions on other forms of expression, whether protected or not (e.g. Perfumes)?

*Case law has recognized copyright in fictional characters.*

- 1.6 Is there case-law related to the protection of sporting events (soccer game, marathon race, ice skating competition, etc)? What is the basis of the protection? (dramatic or choreographic work, other?)

*Case law has clarified that while live broadcasts of sporting events may be protected, the underlying event itself is not.*

## 2. Creativity – the Originality Standard

- 2.1 How does your legislation set out the requisite originality standard?

*The law only uses the word “original”, but does not define it. Case law has defined it as requiring (1) that the work is not copied and (2) that its creation is the result of a (a) minimal investment of labour and (b) the input of minimal creativity on the part of its creator. Since the “investment” threshold is easier to cross (and probably means little more than that work is not copied), the creativity requirement is thus the more important of the two*

- 2.2 Does the legislation or case-law suggest a different test of originality is imposed for different kinds of work?

*In general – no. However, as pertaining to compilations and databases, the law requires that their originality must lie in the selection or arrangement of the contents (the law used the word “and”, but the Supreme Court has held that it should be interpreted as meaning “or” in line with TRIPS).*

- 2.3 For compilations / collections is the standard identical to that provided for in relation to works? [For common law jurisdictions there are significant differences on the standard e.g. IceTV (Aust) CCH (Canada). How has “sweat of the brow” been treated in recent case-law?]

*Please see answers to 2.1 and 2.2. “Sweat of the brow” was ruled out as an exclusive option for conferring copyright in the “Interlego” case in the 1990’s, which held that creativity is always required. The recent “Premier League” decision indicates that it may be an additional requirement to the creativity standard. It is submitted by the undersigned that this is somewhat of a misnomer and that minimal creativity on its own will always suffice, whereas “sweat of the brow” on its own will never suffice.*

*In the above Premier League case, the Supreme Court held that football fixture lists did not meet the creativity standard. It also held that “sweat of the brow” (investment) in arranging the fixtures was irrelevant to the question of what investment had been made in arranging the lists as claimed literary works. The latter investment was so minimal as to be insufficient.*

- 2.4 Does your legislation/case law recognise copyright protection for collections such as television listings, yellow pages/white pages telephone directories? If yes, what is protected (headings, content, or both?) If not, why is protection denied (e.g. spin-off theory, competition law considerations).

*Again, they must be the result of minimal creativity in selection or arrangement. White pages will not be able to meet this standard. Yellow pages may, depending on the creativity, but in many cases even they will not meet the standard due to obviousness of the selection or arrangement. Cases have gone both ways. Television listings will probably be treated in the same manner as football fixtures were in the Premier League case – and would thus be denied protection*

### 3. Achieving Access for the visually impaired

- 3.1 Does your national legislation provide exceptions or limitations in favour of the visually impaired? For wider categories of disabled persons? On what condition: is there a remuneration right or right to compensation?

*No specific provisions exist, although certain acts taken to provide access to a work to this category of persons area may be considered fair use, under Israel’s open-ended fair use standard.*

- 3.2 What kind of works are or would be subject to limitations or exceptions? Literary works only? Works and performances fixed in sound recording? Will the visually impaired or other beneficiaries of the exceptions or limitations obtain copies of covered works directly, or only via libraries or other institutions?

*If fair use is applied, it will pertain to works and sound recordings. The fair use exemption in the Performers’ Rights Act is more limited and will be problematic in*

*application, except when dealing with educational uses for the visually impaired of disabled persons.*

- 3.3 Are the exceptions and limitations confined to the reproduction of the work? If making available or adaptation is possible, on what conditions?

*Again, if fair use is applied, it may also cover making available and adaptation.*

- 3.4 Has your Government expressed a view on support for international initiatives (e.g. World Blind Council Treaty)?

*Unfortunately, no.*

- 3.5 On an extra-legal basis, are there any market initiatives, or business practices, that your national *group are aware of?*

*No.*

#### 4. **Access to the Internet as a Human Right**

- 4.1 Does your legislation/constitution/case-law define access to the Internet as a specific [or human] right?

*Not specifically, although case law has given much weight to the right to receive information from the internet, including the right to browse the web and speak on the web anonymously. This has been so in cases involving applications for orders against ISP's, requesting identification of alleged publishers of defamation or alleged IP infringers. The Supreme Court has now held that absent specific legislation on the subject, courts lack authority to grant such order. One of the above cases did consider access to culture to be a human right, the access in such case being obtained via the internet. Therefore in this context, access to the internet could be considered a human right.*

- 4.2 Are there any specific restrictions or limitations on this right [Europe: it is not necessary to refer to ECHR but any national decisions or rulings on ECHR should be mentioned]?

*Not Applicable, see above*

#### 5. **Orphan Works**

- 5.1 Are there extant legislative provisions allowing access/use in relation to orphan works? What kinds of work are involved? Performances?

*At present there are no provisions.*

- 5.2 On what conditions? Is there a remuneration right or right to compensation? Is there a court or administrative procedure to be satisfied prior to use?

*Not Applicable.*

- 5.3 Are there proposals for the introduction of, or changes to, orphan works provisions?

*Not at present. However, commentators have suggested that that the orphan status of a work is a factor that should be taken into consideration in fair use analysis and may weigh in favour of a fair use finding.*

## 6. **Graduated Response Laws or Agreements**

- 6.1 Within the specific context of p2p filesharing of audio-visual works and sound recordings, does your national law contain laws (or proposed laws) providing for a graduated response “solution”? On what conditions? Three strikes, etc.?

*No such provisions exist.*

- 6.2 Do such proposals include an educational aspect – enhancing awareness of intellectual property protection, as well as measures to (1) make Internet access more secure in order to prevent illegal activity; (2) – favour availability of legal services?

*Not Applicable.*

- 6.3 Is there a court procedure and/ or administrative agency that oversees the proceedings or authorises interruption or termination of internet access?

*Not at present.*

- 6.4 Is it possible to assess the effectiveness of the implementation of these measures, both as a matter of stemming piracy, and with respect to the development of legal services?

*Not Applicable.*

- 6.5 Is there any case-law on the possible (own initiative) use of blocking or filtering technology by an ISP, as distinct from situations where an ISP is required by a court or administrative agency to terminate subscribers access (i.e. injunctive relief)?

*No.*

- 6.6 Are there private agreements among copyright owners and internet service providers that function similarly to “3-strikes” laws?

*No.*

## 7. **Private Agreements and UGC**

- 7.1 Are there private agreements among copyright owners and hosts of UGC content sites regarding the filtering of content posted to the sites? Are there inter-industry statements of “best practices” regarding filtering? Have government authorities in your country undertaken initiatives to encourage the adoption of such accords?

*No.*

- 7.2 How is the filtering to be accomplished?

*Not Applicable.*

7.3 Have there been any cases concerning such agreements or “best practices”?

*Not Applicable.*

7.4 Outside the existence of such accords, have courts themselves imposed remedies requiring measures such as "take down, stay down"?

*Some courts have adopted a “Notice and Takedown” approach, whereby the ISP is exempted from liability until it receives notice of the alleged infringement, after which it would retain its exempt status only if it acts to remove the allegedly infringing material within a reasonable time after notice. One other court has held an ISP exempt, as “a mere platform”, even absent any notice/takedown analysis.*

Looking forward to seeing you in Dublin.

Sincerely yours,



Tony Greenman,  
On behalf of ALAI Israel