

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

Reply of the Finnish ALAI Group

January 17, 2011

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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?

Reply:

There is no exclusive definition of a literary work in the Copyright Act of Finland. According to section 1(1) a literary work is "a fictional or descriptive representation in writing or in speech". Section 1(2) includes a partial definition: "Maps and other descriptive drawings or graphically or three-dimensionally executed works and computer programs shall also be considered literary works."

The general conditions for protection – originality, being a result of a creative expression by the author – are applicable also in case of speeches, including ex tempore speeches.

Decision 1988:52 of the Supreme Court, commentary of a football match on television was considered a protected work due to its originality.

- 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].

Reply:

The above-mentioned short works (book titles, phrases) are, in principle, covered by copyright if they fulfil the general requirements for protection.

There are two special provisions in the Copyright Act concerning the protection of a title and the mentioning of the author.

Section 51

A literary or artistic work may not be made available to the public under such a title, pseudonym or pen name that the work or its author may easily be confused with a work previously made public or its author.

Section 52

- (1) The name or signature of the author may be inscribed on a copy of a work of art by another person only when so instructed by the author.
(2) The name or signature of the author shall not be inscribed on a copy of a work of art in such a manner that the copy could be confused with the original work.

(3) Whoever makes or distributes to the public a copy of a work of art shall mark the copy in such a manner that the copy cannot be confused with the original work.

There is no case-law available on this matter. However, questions related to copyright protection of slogans and short expressions as well as book titles have many times been dealt with by the Copyright Council¹.

In the practice of the Council opinions, the threshold for copyright protection of slogans and short expressions has been regarded relatively high.

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

Reply:

Other works than literary works are considered artistic works. The list of categories of works in section 1(1) of the Copyright Act mentions the following categories: "a musical or dramatic work, a cinematographic work, a photographic work or other work of fine art, a product of architecture, artistic handicraft, industrial art, or expressed in some other manner". The list is open ("or expressed in some other manner").

- 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

Reply:

No, there are no such court rulings available.

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

¹ The Copyright Council is appointed by the Government, and one of its duties is to issue opinions on the application of the Copyright Act. The Council is composed of representatives of the most relevant right holder groups and users of protected works. The chair, vice-chair and at least one member are impartial.

Anyone can request an opinion from the Copyright Council – private persons, business enterprises, organisations, the police, authorities and courts of law, whether or not they have personal interests at stake. Since its establishment in 1985, the Council has issued over 380 expert opinions pertaining to the interpretation of the Act.

The opinion of the Council is not binding, and a court of justice may also ignore it. In practice, the opinions of the Council are of a high level and usually followed by the courts.

Reply:

In Finland, neither judicial decisions have been reached, nor such academic opinions have been expressed as far as the copyright protection is concerned.

- 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?)

Reply:

No, there is no such case-law. A sport event is not considered a work as such. However, there may be many kinds of elements included in sport events which may be protected as individual works by copyright (music, decoration, choreography etc.).

2. **Creativity – the Originality Standard**

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

Reply:

The originality standard is based on a long legal tradition and the legislative history (in 1950's). There are no explicit provisions on this in the Copyright Act.

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

Reply:

It is basically the same principles and the same standard that apply. However, in practice, the description of the threshold for originality may sound substantially very different from one category of works to another.

- 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?]

Reply:

Compilations and collections may be protected by copyright if they fulfil the general requirements for protection as works. In addition to that, a compilation or collection may be protected by a neighbouring right in section 49, based on the *sui generis* right in Article 11 of the Directive 96/9/EC on the Legal Protection of Databases.

Section 49 includes both the *sui generis* database right and the so-called catalogue protection which is a national form of protection in Nordic Countries.

The object of protection is defined in section 49 as follows:

1. a catalogue, a table, a program or any other product in which a large number of information items are compiled, or
2. a database the obtaining, verification or presentation of which has required substantial investment.

- 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).

Reply:

The above-mentioned collections may be protected by the catalogue protection of section 49 (a catalogue, a table, a program or any other product in which a large number of information items are compiled), or as a database (a database the obtaining, verification or presentation of which has required substantial investment).

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?

Reply:

The provisions of section 17 of the Copyright Act include three cases concerning the making of copies of works and the communication to the public of them to persons with disabilities, as follows:

- (1) **Reproduction for reading or perceiving**, by touching or hearing, by means other than recording of sound or moving images.
- (2) **Making of talking books** of published literary works, for visually impaired and others who cannot use the works in the ordinary manner, owing to a disability or illness.
- (3) **Making copies** of published works **interpreted in sign language**, for the deaf and persons with auditory impairments who cannot use the works in the ordinary manner.

Each case mentioned above is dealt with in separate subsections of section 17. There are, however, certain common elements which are applicable to all three cases:

- Making copies (reproduction) or communicating to the public of these reproductions may not take place for commercial purposes.
- Section 11(2) of the Copyright Act allows the alteration of works to a necessary extent.
- Copies of the works may be distributed (covers lending and selling), and reproductions may be used for communication (making available on-demand or sending by e-mail) to the beneficiaries. The communication to the public does not cover radio or television transmission.
- The authors have a right to remuneration when the recipients of talking books or works interpreted in sign language may maintain permanently a

copy of the work in their possession. In all other cases the use may take place without authorisation of the right holders and without an obligation to pay any remuneration.

The categories of disabled persons:

- 1) Reproduction for reading or perceiving: for visually impaired and others who cannot use the works in the ordinary manner, owing to a disability or illness.
- 2) Making of talking books: for visually impaired and others who cannot use the works in the ordinary manner, owing to a disability or illness.
- 3) Making copies of published works interpreted in sign language: for the deaf and persons with auditory impairments who cannot use the works in the ordinary manner.

- 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?

Reply:

1) Reproduction of published literary works, musical works, and works of fine art. Reproductions are allowed for reading or perceiving, by touching or hearing, by means other than recording of sound or moving images. Anyone may make use of this limitation.

2) Copies of a published literary work may be made by recording of sound (talking books). Institutions entitled to make use of the limitation are institutions determined in a Government Decree. The prerequisite is that the institution does not seek commercial or economic gain, that the mission of the institution includes services to persons with disabilities and that the institution has the financial and operational facilities to pursue such activity.

3) Copies of a published literary work may be made in sign language. Institutions entitled to make use of the limitation are institutions determined in a Government Decree. The prerequisites are the same as described above in 2).

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

Reply:

The following applies to all three cases above:

- Copies of the works may be distributed (covers lending and selling), and reproductions may be used for communication (making available on-demand or sending by e-mail) to the beneficiaries. The communication to the public does not cover radio or television transmission.
- The authors have a right to remuneration when the recipients of talking books or works interpreted in sign language may maintain permanently a copy of the work in

their possession. In all other cases the use may take place without authorisation of the right holders and without an obligation to pay any remuneration.

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

Reply:

The advanced legislation enacted for the benefit of the disabled persons may be well interpreted as a positive attitude, also towards well-founded international solutions in this field.

How these matters should be solved internationally is a subject for a discussion in international fora and in the EU. Finland as a Member of the European Union is participating these discussions.

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

Reply:

The national libraries for visually impaired persons in Nordic Countries have reached a co-operation agreement in 2009 to advance the cross-border exchange of talking books as wells as electronic and braille versions of the books. The parties of the agreement have declared that the distribution of the works shall take place according to the provisions of the national legislation.

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?

Reply:

In the Finnish legislation, access to the Internet is not defined as a specific right. However, in the Decree of the Ministry of Transport and Communications on the minimum rate of a functional Internet access as a universal service (732/2009) 1 Mbit Internet connection is defined as a universal service as of 1 July 2010. This means that telecom operators defined as universal service providers must be able to provide every permanent residence and business office with access to a reasonably priced and high-quality connection with a downstream rate of at least 1 Mbit/s.

- 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]?

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?

Reply:

There are two categories of provisions in the Copyright Act which both cover also the use of orphan works without distinction.

1) Traditional limitations to copyright (e.g. private use, certain activities of libraries, archives and museums, public performance in educational activities and religious ceremonies).

2) The system of extended collective licence (e.g. photocopying, use in educational activities, activities of libraries, archives and museums, original radio and television broadcasts, retransmission of radio and television broadcasts).

- 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?

Reply:

In the system of extended collective licence, when a contract is established concerning a use within the sphere of application of these provisions, a licensee may, by virtue of these provisions, under the terms determined in the contract, use a work in the same field whose author the organisation does not represent.

If there are orphan works in the licensed repertoire, their use is authorised on the basis of the licence, and the remuneration for the use of these works is included in the remuneration paid to the collective management organisation for the licence. It is up to the organisation to distribute the remunerations to the rightholders they represent, as well as to the rightholders they do not represent, and reserve a share for unknown and/or non-detectable authors.

The status of an extended collective licensing organisation may be obtained only by the approval of the Ministry of Education and Culture.

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

Reply:

No, there are not.

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.?

Reply:

A Government Bill dealing with this matter was introduced to the Parliament in October 2010 (Bill Nr. 235/2010).

The proposed regime consists of a possibility to send notices to those participating in unlawful file-sharing. The Government will monitor the effects of the proposed legislation and consider later whether further measures are needed.

The main part of the Government Bill includes amendments to the Act on the Protection of Privacy in Electronic Communications. The proposed amendments make it possible for a tele-operator (provider of telecommunications services) to convey a notice from a copyright organisation (based on information on IP number at a certain moment) to a tele-subscriber if the organisation has observed that unlawful file-sharing has occurred.

The tele-operator is obliged to convey the notice. The content of the notice is strictly defined in the law. The organisation or organisations sending the notices are obliged to cover the expenses.

In this process the contact information of the subscriber won't be revealed to the organisation. There will be no registration of personal data or surveillance whether the person actually stops the unlawful activities or not.

The Parliament's response is expected in February 2011.

- 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?

Reply:

The active role of the Ministry of Education and Culture in providing information on copyright and possible consequences of the breach of copyright in its website constitutes an important part of the proposed bill.

In addition to the Government Bill, an awareness campaign was already initiated in spring 2010 as a cooperation project among the main players in the branch (internet service providers, holders of rights to content, content business companies). This campaign – and other corresponding future activities – result from the branch talks initiated by the Minister of Culture in Autumn 2008.

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

Reply:

The interruption of internet access may take only by the order of the court.

According to section 60a, in trying a case referred to in section 60b (i.e. a legal action against a person who makes allegedly copyright-infringing material available to the public), the court of justice may, upon the request of the author or his representative,

order the internet service provider to discontinue the making of the allegedly copyright-infringing material available to the public (*injunction to discontinue*), unless this can be regarded as unreasonable in view of the rights of the person making the material available to the public, the intermediary and the author.

- 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 ?

Reply:

The proposed legislation (see reply to 6.1) has already been criticised as being "toothless" because it does not include any legal sanctions. The legislation already in force (see reply to 6.3) was a necessary but not a sufficient step in combating piracy.

- 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)?

Reply:

No, there is not.

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

Reply:

No, there are not. For the time being the internet service providers have not been eager to co-operate with the rightholders in these matters.

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?

Reply:

There is no information available on such agreements.

- 7.2 How is the filtering to be accomplished?

- 7.3 Have there been any cases concerning such agreements or "best practices"?

Reply:

No, there have not been.

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

Reply:

There is no such information available.

Please send your replies by email to Samantha Holman at sam@icla.ie by **15 January 2011**