



18 March 2010

To:

Y. Bhg Datuk Mohd. Zain Mohd. Dom
Secretary General, Secretary General's Office
Ministry of Domestic Trade, Cooperatives and Consumerism
Level 11 (Tower), No. 13, Persiaran Perdana
Presint 2, 62623 Putrajaya
Malaysia

Comments on Draft Amendments to the Malaysian Copyright Act

Introduction

The Asia Internet Coalition welcomes the decision by the authorities to review the Copyright Act.

The Asia Internet Coalition (AIC) is an industry association founded by eBay, Google, Nokia, Skype and Yahoo!. Incorporated in Hong Kong, the AIC seeks to promote the understanding of Internet policy issues in the Asia-Pacific Region.

The AIC believes that the review of the Copyright Act is timely. Given the rapid changes in technology, people communicate, transact and interact in new and different ways. As an industry association representing global Internet players, the AIC hopes to be a relevant partner as the authorities review the Copyright Act. It is from this perspective that the AIC offers its comments on the Copyright Act.

Specific Comments

- *Re Article 43(C)(2)* – With respect to this provision, we encourage the Ministry to give guidance to the courts that can effectively balance the interests at stake. To do so, it could articulate further what is meant by “reasonable steps” in section (1). More specifically, the court should consider whether such relief is issued in due regard for the relative burden to the service provider and harm to the copyright owner, the technical feasibility and effectiveness of the remedy and whether less burdensome, comparably effective enforcement methods are available.
- The proposed sections 43D(2) and 43E(3) both state “A service provider shall not be held liable under this section if the copyright owner or his agent has not given any notification under section 43H.” We are of the view that the exclusion of liability should not be limited to these sections, but apply to the Act, as a whole.



- For greater clarity on the conditions required for service providers to “not be held liable”, we propose that section 43E(1)(b)(i)(bb) be amended to read “in the absence of such actual knowledge, acquires knowledge of such facts or circumstances which would lead inevitably to the conclusion that the copyright in the material has been infringed in”.
- *Re 43E(1)(a)* – We are of the view that this provision should include situations where the electronic copy of the work stored by the user is shared with or made available by the user to other users or other users have access to such works stored by the user on the service provider’s online service.
- *Re Article 43G(1)(b)*, we would be grateful for clarity on what is meant by “details and particulars” of the “agent”. If this refers to contact information, we would be grateful if this is explicitly reflected in the said article.
- Article 43H(1) suggests that the Minister (represented by the Ministry) will develop a standardized notification form which all notifying parties will have to use when issuing a take-down notice to a service provider. We encourage the Ministry to develop a notification process that facilitates both a streamlined and effective safe harbor regime. This should entail a clearly defined form for effective legal notice of infringement, coupled with clear follow-on steps and obligations for the affected parties. At a minimum, a legally effective notice from a rights holder should include concrete identification of the work infringed, the legal basis of the infringement claim, and the exact location of the allegedly infringing content on the service provider’s network (for example, by providing a URL). In addition, the notification should also include similar elements that are already required for counter notices (43(H)(5)) – specifically¹:
 - A physical or electronic signature of a person authorized to act on behalf of the owner of an exclusive right that is allegedly infringe;
 - Information reasonably sufficient to permit the service provider to contact the complaining party, such as an address, telephone number, and, if available, an electronic mail address at which the complaining party may be contacted;
 - A statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law;
 - A statement that the information in the notification is accurate, and under penalty of perjury, that the complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.
- *Re Article 43H(2)*: We are of the view that mandating service providers who have received notification to “remove or disable any access to the infringing electronic copy on its network” not later than forty-eight hours would be technically impossible. Our collective experience with takedown notices has shown that

¹ These factors are also found in the U.S. Digital Millennium Copyright Act



many notices are incomplete, imprecise, and overboard. Sorting out the exact claim usually requires multiple contact with the claimant, a process that can take quite a number of days in some cases. We acknowledge that timely removal or disabling of infringing content is necessary to protect the legitimate rights of copyright-owners, but recommend more flexibility for service providers to respond constructively and according to the information that is given by claimants. Scanning the regulatory landscape in other jurisdictions, we note that the US's Digital Millennium Copyright Act uses the term "expeditious" removal to describe a similar expectation of service providers. "Expeditious" must be understood not only with the acts of service providers, but also in conjunction with the quality of the information given to service providers by claimants.

- **Privacy protection and clarity on service providers' obligations.** We also encourage the Ministry to add clarity when it comes to service providers' obligations to monitor their services. In order to protect user privacy and facilitate effectiveness of safe harbors, service providers should have no obligation to monitor their services or affirmatively seek facts indicating infringing activity.

"Fair Use" " & Flexible Fair Dealing

The AIC would also like to take this opportunity to underscore the importance of the concept of a flexible fair dealing regime for the digital age. We are heartened that Malaysia has adopted flexible, purpose-based standards by which new, legitimate uses can be developed over time by the courts, as opposed to simply providing narrow black-and-white exceptions adopted at a fixed point in time. In this review of the Copyright Act, we appreciate that fair dealing would be made more flexible and fit for the digital age, by making the list of possible purposes open-ended (including but not limited to a few examples), subject to a four factor test. This sort of flexible test is generally associated with "fair use" but the label chosen – whether fair use, fair dealing, or something else entirely – is beside the point; what is important is that there be an effective combination of flexibility and guidance to the courts, that allows new legitimate uses and technologies to evolve over time.

Flexible limitations and exceptions are especially important in the digital age. The Internet's core technical function is to make and disseminate copies of information -- it depends on limitations in copyright. Search engines are one example of how appropriate limitations help innovation flourish, for both content owners and users benefit.

In a time when creativity is booming, information location tools are critical to connecting author and audience. Search engines help fill this role in a way that both makes copies and respects copyright holders' legitimate interests. In order to respond to users'



search queries, search engines make copies of individual websites first. These pages are then analyzed and ranked, and links are provided to a user in response to a query. In addition, search engines provide a snippet from relevant websites so that users can decide which sites to access. In many ways, this is quite similar to the function and purpose performed by a library card catalogue. The ability to search across images, video, music, and other content also involves making a copy of that content first, which involves appropriate limitations on copyright.

The benefits of flexible exceptions are demonstrated in countries where such laws already exist; in fact, in the U.S., a recent study found that industries that depend on fair use contribute \$2.2 *trillion* to GDP. They also account for one out of eight U.S. jobs, and \$281 billion in annual exports. In this regard, we propose that the following amendments also be adopted.

- **Clause 26, Anti-circumvention:** In order to ensure flexible limitations, we suggest that there be an exception for conduct that is otherwise permitted under the Copyright Act.
- **Clause 27, “statutory damages”** – If statutory damages are to be included in Malaysia law, we encourage the Ministry to ensure specifically that they are tied to an assessment of harm to the rights holder and are proportional. In general, copyright plaintiffs should be required to prove loss, in order to recover damages, just as any other litigant must do (or appropriately establish remedies such as an account of profits). We suggest that, if statutory damages are allowed, then the law should require that any award bear a reasonable relationship to plaintiffs’ actual losses.

Statutory damages are particularly problematic as applied to third-party liability and digital technologies, such as portable music players or online media hosting platforms. In those instances, the number of copyrighted works involved might be significantly large, and thus the potential damages can reach high sums. With that in mind, the existing caps on damages in the proposal are crucial.

The potential harm of disproportionate statutory damages is clear from experience in the U.S. As a recent scholarly paper on the US statutory damages system explains:

“The United States is an outlier in the global copyright community in giving plaintiffs in copyright cases the ability to elect, at any time before final judgment, to receive an award of statutory damages, which can be granted in any amount between \$750 and \$150,000 per infringed work.... Awards of statutory damages are frequently arbitrary, inconsistent, unprincipled, and sometimes grossly excessive.... In the modern world in which the average person in her day-to-day life interacts with many copyrighted works in a way that may implicate copyright



law, the dangers posed by the lack of meaningful constraints on statutory damage awards are acute.”²

In conclusion, we thank you for taking the time to review our comments, and look forward to further engaging you on this. Specifically, we would like to have an opportunity to further discuss elements within the draft amendments of the Copyright Act. We think that Malaysia is on the right track in upholding flexible fair dealing in its amendments to the Copyright Act, and would be happy to work with the authorities to look at ways to protect this principle. Please do not hesitate to contact director@asiainternetcoalition.org should you require further information on the contents of this submission.

Dr John Ure
Executive Director
Asia Internet Coalition

² Pam Samuelson and Tara Wheatland, “Statutory Damages in Copyright Law: A Remedy in Need of Reform,” William & Mary Law Review, Vol. 51, p. 439, 2009, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1375604