



4 May 2011

Hon. Albert Raymond Garcia
Chairman
3/F Annex Building, House of Representatives
Quezon City
Philippines

Comments on Draft Amendments to the Philippines Copyright Law

Introduction

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 Law is timely. Rapid changes in technology have resulted in people communicating, transacting and interacting in new and different ways. As an industry association representing global Internet players, the AIC hopes to be a relevant partner as the House Committee reviews the Copyright Law. It is from this perspective that the AIC offers its comments.

Specific Comments

Five legislative versions have been proposed for consideration by the House: SB 2628/ 2431 proposed by Senators Legarda and Angara; SB 2487 proposed by Senator Villar; SB 962 proposed by Senator Lapid; SB 707 proposed by Senator Estrada; and SB 301 proposed by Senator Trillanes.

SB 2487 has the most comprehensive amendments to the Copyright Law, and is fairly aligned to existing Acts and language. We would be pleased to work with the government on any version the government wishes to propose, but for present purposes, our comments are limited to those in SB 2487.

- *RE: Amendment to Section 171.9 on "Reproduction"* – We propose amending the definition to ""Reproduction" is the making of one or more copies ~~temporary or permanent, in whole or in part~~ of a work or sound recording in any manner or form, without prejudice to the provisions of Section 185 of this Act. "Reproduction" shall not include the temporary or transitory copying necessitated by technological requirements."

Search engines and online service providers need to make cached copies of websites and web content in order to deliver answers to requests typed in by users even after access to a website is disabled. Additionally, in order to ensure that those who are watching a video or musical composition or other audio stream online do not have gaps due to transmission interruptions, all streaming services must engage in copying in the form of buffering. All of these copies are temporary and transitory in nature. Such caching and buffering are technologically required and do not interfere with the legitimate market interests of copyright owners.

- *RE: Amendment to Section 185.1 on Fair Use of a Copyrighted Work* - We propose that the following line be amended as follows,

"The fair use of a copyrighted work for criticism, comment, news reporting, teaching including multiple copies for classroom use, scholarship, research, for the ordinary operation of search engines including copying, indexing, and the retrieval of portions of a work as necessary to respond to search queries, and similar purposes ..."

We propose including this not to give search engines favoured treatment, but because the activities listed in the proposal are integral processes that enable search engines to respond to users' search queries. In order to respond to users' queries, search engines must first make copies of individual websites, and then index them. 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. The proposed language recognizes technological reality.

We also propose including the following exemption on user-generated content:

“Non-commercial User-generated Content

1) It is not an infringement of copyright for an individual to use an existing work or other subject-matter or copy of one, which has been published or otherwise made available to the public, in the creation of a new work or other subject-matter in which copyright subsists and for the individual — or, with the individual’s authorization, a member of their household — to use the new work or other subject-matter or to authorize an intermediary to disseminate it, if

(a) the use of, or the authorization to disseminate, the new work or other subject-matter is done solely for non-commercial purposes;

(b) the source — and, if given in the source, the name of the author, performer, maker or broadcaster — of the existing work or other subject-matter or copy of it are mentioned, if it is reasonable in the circumstances to do so;

(c) the individual had reasonable grounds to believe that the existing work or other subject-matter or copy of it, as the case may be, was not infringing copyright; and

(d) the use of, or the authorization to disseminate, the new work or other subject-matter does not have a substantial adverse effect, financial or otherwise, on the exploitation or potential exploitation of the existing work or other subject-matter — or copy of it — or on an existing or potential market for it, including that the new work or other subject-matter is not a substitute for the existing one.

Definitions

(2) The following definitions apply in subsection (1).

“intermediary” means a person or entity who regularly provides space or means for works or other subject-matter to be enjoyed by the public.

“use” means to do anything that by this Act the owner of the copyright has the sole right to do, other than the right to authorize anything.

Explanation: This provision is taken verbatim from Canada’s Bill C32, and reflects the wise judgment that creativity on the Internet is social. Since the exemption is limited to non-commercial uses, it does not conflict with the legitimate market of copyright owners.

- *RE: Amendment to Section 198 Term of Moral Rights* - We are puzzled as to why the bill proposes that the moral rights of an author be extended from fifty years to perpetuity. Forever is not only a really long time, but it imposes an impossible burden on those who seek to make valuable use of works that are centuries old, and without any corresponding benefit to even distant relatives of the author. We recommend that the term of moral rights remain at fifty years.
- *RE: Amendment to Section 216 on Infringement* - We appreciate the effort to define what constitutes “infringement”. However, we note that the definitions provided are slightly circular and still do not explain when “infringement” occurs (e.g. “A person infringes a right protected under this act when he directly commits an infringement”). In this regard, we would propose that the House Committee consider using language from the Anti-Counterfeiting Trade Agreement (ACTA) instead, which refers to “unauthorised circumvention of technological measures”. The paragraph can therefore read as follows:

“A. ~~Directly~~ Knowingly commits an ~~infringement~~ unauthorized circumvention of an effective technological measure;

B. Benefits financially from the ~~infringing activity~~ unauthorized circumvention of technological measures by ~~of~~ another person if the person benefiting has been given notice of the infringing activity and has the right and ability to control the activities of the other person; or

C. Purposely and with the intent to enable or induce unauthorised circumvention of technological measures ~~infringement~~ by another person, and materially contributes to it.

Technological measures means any technology, device, or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works, performances, or phonograms, which are not authorized by authors, performers or producers of phonograms, as provided for by a Party’s law. Without prejudice to the scope of copyright or related rights contained in a Party’s law, technological measures shall be deemed effective where the use of protected works, performances, or phonograms is controlled by authors, performers or producers of phonograms through the application of a relevant access control or protection process, such as encryption or scrambling, or a copy control mechanism, which achieves the objective of protection.”

- *RE: Section 216.1.a and 216.1.e Remedies for Infringement* – We think that the clauses to double damages against any person who circumvents technological

measures, or tries to conceal or facilitate such an act is too punitive. Whilst these acts should not be condoned, the principle underlying these penalties should be based on proportionality rather than a blanket multiplier. In this regard, we suggest that the Committee remove the entire amendment that was proposed, i.e:

“provided, that, in cases of the following, the amount of damages to be awarded shall be doubled against any person who:

i. Circumvents effective technological measures; or

ii. Having reasonable grounds to know that it will induce, enable, facilitate or conceal the infringement, remove or alter any electronic rights management information from a copy of a work, sound recording, or fixation of a performance, or distribute, import for distribution, broadcast, or communicate to the public works or copies of works without authority, knowing that electronic rights management information has been removed or altered without authority.”

Instead, these could be replaced with “The court shall take into account the need for proportionality between the seriousness of the infringement, the interests of third parties, and the applicable measures, remedies and penalties”.

Other Comments

We note that the amendments to the Copyright Law do not contain any details on a safe harbour regime. A safe harbour is a provision that reduces a party's liability on the condition that the party performed its actions in good faith. Safe harbours are important for search engines and online platforms as it is virtually impossible for us to keep track of the amount of content that is uploaded onto our websites or that is automatically copied and indexed by our servers¹. Whilst the proposed text in Section 216.B refers to “notice” being given to the person that benefits from an infringing activity, the period with which the person has to comply, and the format of this notification are not spelled out.

We understand that under one proposal, these details will appear in the Implementing Guidelines to this Act. However, given that the Bill proposes a secondary liability regime, we believe that both secondary liability and safe harbours should be addressed at the same time. So, either the secondary liability and safe harbours should both be treated in the Bill, or both should be treated in the

¹ For example, 35 hours of video are uploaded onto YouTube each minute. This is equivalent to 233,000 movies per week.

Implementing Guidelines. In an effort to provide guidance we detail a number of principles we believe critical to any safe harbour regime.

1. Protections should apply broadly to Internet (including mobile) intermediaries who act as conduits for or hosts of third party content. Because technological change can render legal language obsolete, safe harbours should not be limited to enumerated lists of services or technologies -- although language should clearly cover the basic services currently provided by ISPs, search engines, hosting platforms, and others. In order to encompass hosting services, which have been an essential part of the democratisation of culture, language including “material residing on or made available through an intermediary’s system” should be included.
2. To provide intermediaries with legal certainty and to maintain efficient processes for removals and dispute resolution, safe harbours should comprehensively address all legal claims that would result in the removal or suppression of publicly available content.
3. Safe harbour regimes should ensure that rights holders can easily identify and follow processes to report infringement. For example, by requiring intermediaries to publicize basic information about where and how to submit complaints.
4. A clearly defined form for effective legal notice of infringement, coupled with clear follow-on steps and obligations for the affected parties, is essential for a streamlined and effective safe harbours regime. At a minimum, 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 elements such as
 - 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.
5. There should be set and effective consequences for false notices.
 6. An obligation to monitor or actively look for infringing content would undermine the purpose of the safe harbour regime.

The Internet, like new technologies in the past, has created challenges for traditional business models, including those of many media companies, but market-based solutions are generating new ways to drive sales and make money, and a new generation of creators is finding their fans through social media and other evolving online services. Thanks to platforms like YouTube, there are more artists and media companies creating more content on more platforms than ever before, and more ways for them to make money online.

In conclusion, we thank you for taking the time to review our comments, and look forward to further engaging you on this. Should you have any further queries, please do not hesitate to contact director@asiainternetcoalition.org should you require further information on the contents of this submission.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'J. Ure', with a long horizontal stroke extending to the right.

John Ure
Executive Director
Asia Internet Coalition