



April 25, 2014

Ministry of Law
The Treasury
100 High Street
#08-02, Singapore 179434

Dear Sir,

Comments on the Proposed Copyright (Amendment) Bill 2014

The Asia Internet Coalition ("AIC") welcomes the opportunity to provide our feedback to the proposed Copyright Amendment Bill 2014. The AIC is an industry association formed by eBay, Facebook, Google, LinkedIn, Salesforce and Yahoo! that aims to promote the understanding and resolution of Internet policy issues in the Asia Pacific region.

The unauthorised distribution of digital copies of sound recordings, audiovisual works and literary works remains a serious problem, but responses to that problem must be balanced and considered. The proposed amendments, however, a form of site blocking measures, does not meet those balanced objectives. For example, as detailed below, site blocking is ineffective and likely to result in collateral damage.

The AIC commends the Ministry for tackling piracy and this submission identifies alternative measures along with specific comments on the proposed amendments.

A. The Internet is a Boon to Creativity

Today, more creative content - be it music, movies, video or books - are being created and published than ever before by people and companies around the world ([The Sky Is Rising Report](#)). Artists are using new online platforms as launchpads for their careers and to reach entirely new markets. Digital tools and online distribution methods are helping to reduce barriers of entry for content creators and introduce new opportunities for every kind of creative creation, both amateur and professional.

Just a few years ago, it was not clear there was a business model that could compete with free. Services like YouTube, Spotify and iTunes did not exist then. Today, the creative industries are growing around the world largely due to the innovation in content creation and distribution. For instance, the global recording industry saw its digital revenue grow by over 4% to USD \$5.9 billion dollars in 2013 (IFPI 2014); in that same year, the number of music streams in the U.S. shot up to over a hundred billion, representing an increase of 32% from 2012 (Nielsen 2014). A similar trend could be seen in Europe, where Booz & Co. found that digital media was driving growth in the European creative sector (Booz & Co 2013). "Digital media" is defined not just as sales of digital copies, but also as revenue from streaming: the clear trend is away from possessing copies of works and towards access.

The Internet helps users discover and enjoy new content everyday, and at the same time, allow content creators to make money, through both sales of copies and through streaming. Platforms such as YouTube and Spotify facilitate millions of content owners and creators to earn revenue directly from their work online, while digital stores enable the purchase of compelling content by users on the go or in the comfort of their homes.

One of the AIC member, Yahoo, is reported to be in talks to spend hundreds of millions of dollars to buy News Distribution Network, a video news streamer. Companies like Amazon, Netflix, Hulu, are also investing into the development of original content to be distributed on their platforms. Clearly, emerging technologies are disrupting content distributions, and in a positive way. AIC members are therefore hoping to engage in this public consultation not with a US-AGAINST-THEM perspective but to help shape public policies which will promote economic growth and social well-being through technology innovation.

B. Dealing with Online Piracy

AIC member companies consider the protection of all intellectual property rights (IPR) to be a priority. All AIC members provide dedicated tools and resources to help our users and rights holders protect their IPR online. We take our responsibilities under the law seriously, and evolve our practices as technology changes. For instance, when we receive a valid copyright takedown notice concerning an infringing material found on our platform or services, we remove the material quickly.

Site blocking measures are not effective

It is widely recognised that site blocking is not an effective measure to prevent Internet users from accessing prohibited contents and services. In fact, site blocking is an extremely blunt instrument which has several significant weaknesses. Studies have shown that a relatively small number of individuals are responsible for the largest number of unauthorised copies. A broad-based solution that targets everyone fails to address the actual source of threats to the copyright industries. Today, any average Internet user with a basic knowledge of technology can easily¹ get around technical efforts to block access to specific websites. Moreover, as technology evolves quickly, it is very likely that site blocking measures would become obsolete in the near future in face of new technologies. For example, even today it is possible to present a static URL to users behind which resides a fast-paced, dynamic series of actual URLs. It is therefore not surprising to learn that the UK Government, after considering in-depth analysis reports on the effectiveness of site blocking measures, has decided not to bring forward its earlier proposed site blocking regulations².

In addition, the technical means by which site blocking is implemented can cause unintended negative outcomes, and in some cases jeopardise the security and integrity of the Internet. Such risks should be taken into account when assessing the appropriateness of site blocking as a tool to combat piracy.³

Another drawback of site blocking is that it can cause very serious collateral damages. Site blocking measures inherently carry a high risk of over-blocking, as legitimate content are very likely to be blocked alongside with infringing content if they are hosted on the same domain name or IP address. For example, if streamingmusic.blogspot.com is found to host infringing content, filtering at the domain level will result in every other blogspot account being blocked. This scenario could easily be applied to a Singapore startup looking to develop a new platform or service hosting legitimate content (e.g. Viki.com) or to a local SME that has gone online to

1 There are several ways users can bypass site blocking measures, e.g. using a Virtual Private Network to conceal traffic, using a proxy server to conceal the destination's IP and using third party DNS servers that are not blocking the site.

2 OFCOM's (the UK communications regulator) report concluded that *"the provisions as they stand would not be effective"*. Actual report here: <http://stakeholders.ofcom.org.uk/binaries/internet/site-blocking.pdf>

3 Prominent security researchers have [demonstrated](#) that DNS blocking would undermine the Internet's security & integrity.

sell its goods or merchandises. The potential negative spillovers to the economy are clear and should not be taken lightly.

We therefore encourage the Ministry to consider implementing other more effective measures as set forth below in lieu of site blocking to combat piracy. Should the measure be adopted, it is critically important for the law and measures to be clear such that only websites that are clearly and flagrantly and totally infringing copyright be targeted. Care should be taken to minimise the economic and technical risks as described in the paragraphs above.

More effective solutions to piracy

The AIC views that an effective way to tackle piracy online is for rights owners, Internet companies and law enforcement agencies to work closely to combat piracy. AIC member companies involved are committed to work with other industry leaders in rooting out rogue sites from their services. Having more companies in Singapore and around the world contribute to this effort would generate a longer lasting impact on the combat against online piracy as compared to measures like site blocking.

Another effective approach the Ministry could consider to combat rogue sites that specialise in online piracy is to encourage rights holders to offer better and more convenient legitimate services. One of the main causes for the consumption of illegal contents online is the absence of legitimate content and/or services in a market. As piracy often arises when consumer demand goes unmet by legitimate supply, viable marketplace alternatives with the right combination of price, convenience, and inventory will do far more to reduce piracy than enforcement. Studies have shown that music piracy decreases significantly when legitimate services (such as Spotify and Netflix) enter a market.⁴

The IFPI (International Federation of Phonographic industry) recently published a report on the state of the digital music industry in 2013. The report findings were very encouraging for the music industry and underscores that users are willing to pay for legitimate content:

- Global digital revenue grew by 4.3% to USD\$5.9B. Digital now accounts for 39% of the total industry revenue.
- Revenue from streaming services exploded, growing by over 50% to more than USD\$1B. This was achieved with only 28M subscribers to

⁴ NPD Group, "Music File-sharing declined Significantly in 2012," February 2012 <<http://goo.gl/apJVo>> and Spotify, "New Spotify study sees encouraging downwards trend in music piracy in the Netherlands," July 2013 <<http://goo.gl/lmsYbB>>

music streaming services, which means that the opportunities for growth are immense.

Other examples that illustrate the role legitimate services have in driving down piracy include:

- In Sweden, it was reported that the number of people who pirate music has dropped by 25 percent since 2009. This sharp decrease coincided with a massive interest for the music streaming service Spotify when it was launched around the same time. This trend was similarly observed in the Netherlands.⁵
- In Italy, the president of the Italian Music Industry Association (FIMI) recently declared that the music industry is booming online due to digital services and platforms such as YouTube and Vevo. He also stated that these services have created tools, which have proven to be effective at addressing piracy.

At the same time, the existing notice and takedown system - one that has been well established in jurisdictions such as the United States and Europe, has proven to be very effective. Through this system, intermediaries were able to, with the cooperation of rights holders and upon receipt of valid notices, remove identified infringing materials from their platforms and services. This cooperation between the various stakeholders provides rights holders an effective way to report infringing materials they have identified, while providing legal certainty for online intermediaries who similarly believe it is important to protect copyright. This fine balance achieved by this system is now an important foundation of the Internet today, facilitating the growth of creativity and driving billions of dollars to the creative sector every year. At the same time, it has encouraged investments into Internet technologies, supporting the development of innovative Internet services and platforms like Amazon, eBay, Facebook and YouTube.

As we have seen extensive use of this system in other jurisdictions to remove copyright infringing material online, it is unclear to us why the Ministry of Law has indicated that this system “has not been effective” in Singapore. In this regard, we would like to seek the Ministry’s further clarification on whether this is an issue that is unique or specific to Singapore, as it appears to be one of the key reason for the introduction of the proposed amendments.

⁵ Swedish example [here](#) and the Netherlands example [here](#)

Given the positive role that the Internet can play in growing the creative sector, it is important that new laws do not unintentionally limit the growth of new innovative services that may bring about even more positive impact for content creators.

The introduction of new legislation is but only one way to reduce piracy. The importance of existing mechanisms such as the notice and takedown process should not be underestimated, as they have shown to be effective and powerful at addressing some of the challenges surrounding online piracy. We also urge the Ministry to consider facilitating the emergence of alternative and potentially more effective industry-led solutions to combat piracy.

C. Specific comments to the proposed amendments

Scope of application

Based on the Ministry's public consultation documents, we understand that the proposed amendments are aimed at introducing a new site-blocking mechanism, one where rights holders can apply directly to the Courts for an injunction to block public access to specific websites that "show a blatant disregard for, and clearly infringe, copyrights". This mechanism foreseeably would require the block to take place at the network level and put in effect by the entities who are providing users with access to the Internet; in other words, the conduits which are just mere providers of data transmission, routing, or connection services (referred to in this submission as "Internet access providers")

We suggest that the proposed amendments clarify which category of service provider the injunction, if granted, would be served on. The Copyright Act currently provides two definitions for the term "network service provider":

- Under section 193A(1)(a), which defines network service providers as entities (conduits) which are just mere providers of data transmission, routing, or connection services (i.e. the Internet access providers); and
- Under section 193A(1)(b), which is much wider in scope and covers a range of entities, including for instance search engines, content hosts and cloud storage providers.

Given that the objective is to block public access to "egregious" websites, it would follow that the injunctions granted under the proposed new section

193DDA should apply only to Internet access providers. In addition, there is no practical need for the new mechanism to be applied to other types of network service providers such as search engines, content hosting sites (such as YouTube or cloud storage lockers), eCommerce platforms, social media sites or any Internet companies which may aggregate information on other websites. As we have highlighted above, the notice and takedown mechanism can be utilised for cases concerning infringing materials found on such platforms or services.

It is therefore recommended that the scope of application of the injunctions granted under the proposed new section 193DDA be clarified by amending (amendments in bold) the definition of “network service provider” under section 193A(1):

“network service provider” –

(a) for the purposes of sections 193B, 193DDA, 193DDB and 193DDC, means a person who provides services relating to, or provides connections for, the transmission or routing of data;

In addition, the draft referred to “online location”, presumably adopted from similar provisions in the UK, to capture all manner of sites with infringing materials. The vagueness of this term has been severely criticized as it provides no clarity whether it should refer to URL, IP Address or the DNS domain. Given that the rights owners should have the responsibility to identify the pirate sites clearly for the purpose of an injunction, the Singapore Government should use this opportunity to form a clearer definition for “online location”.

Determination of flagrant copyright infringement

We support the proposed approach to include a non-exhaustive list of factors the Court shall need to consider in determining whether a website is clearly and flagrantly infringing copyright. Doing so will help to ensure that only egregious websites are caught and reduce the risk of “over-blocking”. We also support the list of factors in the proposed Copyright Amendment Bill and would like to suggest a few enhancements in line with the stated objective of capturing only “egregious” websites:

- 193DDA(2)(b): the present wording of this provision may inadvertently capture entities such as search engines or cloud storage providers, whose primary purpose is not to facilitate copyright infringement. We recommend the following amendments (amendments in bold) to be made so that it would be more focused

on identifying websites that are clearly and flagrantly infringing copyright.

- o whether the online location makes available or contains directories, indexes or categories of the means with the primary purpose to facilitate infringement of the copyright in the material or other material; or
 - o whether the online location makes available or contains directories, indexes or categories of the means with the primary purpose of copyright infringement and have no substantial non-infringing uses
- 193DDA(2)(c): the wording of this provision is very broad and it is unclear to us what would be considered as demonstrating a disregard for copyright generally. For instance, if a network service provider were to ignore an improper or erroneous notice that was submitted, would that be considered as having a disregard for copyright? Conversely, if a website has a stated policy and processes in place to protect copyright and remove infringing materials, would that be considered as having a proper regard for copyright? It would be important for the Ministry to provide illustrations so that industry players are clear on how it would be “implemented” and would like to seek the Ministry’s clarifications on this matter.
- 193DDA(2)(e): a website that is merely providing information on how to circumvent measures that disables access to another website does not necessarily mean it is facilitating copyright infringements. There may be other noble intentions that fall outside of the scope of copyright, such as helping citizens in a rogue state get free access to information. We recommend that this provision be tightened to limit its consideration to copyright infringing activities. This could be achieved for instance by inserting “on the ground of or related to copyright infringement” at the end of the provision.
- 193DDA(2)(f): it is too broad to just consider the number of visitors the website receives. For instance, a popular website may receive a large number of visitors due to the innovative services or legitimate compelling content the website is providing, and not because of a very small volume of copyright infringing material it is providing access to or hosting, and of which it has no knowledge of. Rather than consider purely the number of visitors the website receives, it would be more appropriate and realistic to consider the number of

visitors to the specific infringing materials found on the site. For instance (amendments in bold):

- o the number of visitors to the specific unique online location(s) where the infringing material(s) is/are sited

As a separate consideration, it is important to recognise that not all pages or content located on a site may be responsible for facilitating or committing copyright infringement. In this regard, an order to block a website in its entirety under section 193DDA may result in an over-blocking of legitimate content. In particular, if the lawful pages or content form a significant portion of the website, it would be inappropriate for access to the entire site to be blocked. We suggest that wider discretion should be provided to the Court when making an order under section 193DDA in order to examine whether the ban is likely to impact potential non-infringing content on the website vs. the option of page specific removals; this should include the ability of the Court to:

- Issue an order to block access to specific infringing content that has been clearly identified by the rights holder, as an alternative to an order to block access to the website in its entirety; and
- Require that other lawful content on the website does not get blocked as part of the order.

At the same time, Court orders should not impose any obligations on websites to monitor and actively look for infringing content going forward. Doing so introduces a general pre-screening regime - an internationally unprecedented step to the best of our knowledge: both the EU and the U.S do not require such an obligation. Given the massive amount of content which is created and uploaded at any time, such an order would be impractical and unrealistic as this would require websites to review every piece of content being created or shared on their platforms.

D. Application Process

Proof of Infringement

The AIC recommends that as part of the application process for an order to be made under section 193DDA, there should be a requirement for the rights holders to prove that they both possess the relevant rights and that copyright infringement has taken place in the first instance. Injunction without the need to prove liability is a drastic measure. This is a crucial step as the alleged egregious websites should have to be liable for copyright

infringement (i.e. content on the site has to be unlawful) before action can be taken. Such a requirement (in addition to those stated under 193DDB) would involve requiring applicants to state clearly:

- they own the relevant rights within Singapore
- the allegedly infringed rights, with a specific indication of the rights and the infringement procedure;
- the infringing material(s) and, if necessary, why it is not a 'fair use'; and
- the location(s) of the infringing material(s) on the website

Safeguards

In light of the impact an injunction / order made under section 193DDA can have on websites and to users in Singapore, it would be important to ensure that there are safeguards in place to prevent unjustified applications. To this end, we recommend that as part of the application process, applicants be required to provide a deposit or bond, which would be forfeited upon an unsuccessful claim. The value of the bond posted should be higher should hearings take place in the absence of, or without hearing, from the owner of the website being targeted. This deposit or bond should not be viewed as a barrier, as it will be returned upon a successful claim. Moreover, since only egregious websites are targeted, the risk of uncertainty would be considerably reduced.

Notices

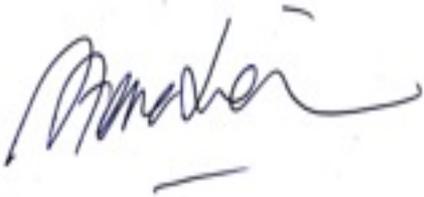
We note that there is a notification process (similar to the current take-down mechanism in the Copyright Act) provided under section 193DDB. We support this notification process, as opportunity must be provided for the targeted website and the network service provider to first take action against the identified infringing material. It is unclear how this notification process would interact with the safe harbour provisions provided for under section 193DA of the current Copyright Act.

We are of the view that the take down notice and takedown process should be the first action of recourse for rights owners. Doing so will uphold the principle of the notice and takedown system and provide encouragement for all parties to pursue its use to resolve challenges around piracy, rather than going to straight to the courts.

E. Conclusion

While there are certain challenges concerning online piracy today, it is also important to recognise that the Internet has brought about significant opportunities and growth to the creative sector. Technology is evolving at a fast pace and it is due to the development of new technologies that we are seeing a boon of creativity, fuelling growth for the artists and creative companies in more ways than before. Interestingly, these opportunities are the best ways to address the challenges. The AIC hopes that the recommendations provided in this submission would help the Ministry identify appropriate and effective measures to combat piracy, and would be most happy to engage in further discussions with the Ministry on the matter.

Yours sincerely,



Executive Director - Asia Internet Coalition
director@asiainternetcoalition.org
+65 9679 3939