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Internet Intermediaries and Copyright Law in Singapore

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This article discusses Practice Direction No 2 of 2010 issued by the Subordinate Courts concerning the "ADR Form". It also reviews other jurisdictions' approaches towards encouraging the use of mediation.

Introduction

At the inception of the Internet era, the term "Internet intermediaries" was mainly synonymous with "Internet Service Providers", referring generally to those telecommunication companies that offered access to the World Wide Web. However, the roles and functions of Internet intermediaries have since evolved and expanded considerably, and the term "Internet intermediaries" today is applicable to a diverse group of entities that are both technically and structurally more different and complex, and which take on more functions, than the traditional network access providers.

In Singapore, there are several legislations that have attempted to define an Internet intermediary, set the legal parameters to its operation and provide some certainty to its legal status. These laws have largely been incorporated into law because of Singapore's effort to become a technology hub as well as its obligations under the free trade deals with the United States, particularly the provisions dealing with intermediary rights and obligations under the copyright regime. They seek to balance the existence of such intermediaries and their functions against the threatened rights of other members of society by their operation.

This article is dedicated to examining the definitions, responsibilities and extent of liability of Internet intermediaries generally and in relation specifically, to copyright law in Singapore. The law on intermediaries in relation to content regulation is excluded.

Types of Intermediaries

In layman's parlance, an "intermediary" is understood as any person or entity that provides a connection between two other parties, such as by opening up a channel of communication or by mediating disputes or facilitating interaction. Applied to the Internet context, it can describe a wide array of agents defined and determined by function, which can involve several parties in a chain of intermediaries or one player performing one or more go-between function.

Network Access Providers

The most basic but fundamental services are rendered by Network Access Providers. They provide infrastructure or data transmission capacity ie, bandwidth. This can be offered through the traditional telephony or cable and have gone from wired LAN connection to wireless connection through electromagnetic waves. They also provide the means for data transfer, which are the protocols necessary to establish connection of a computer to a communications network. In the case of the Internet and connection to the World Wide Web, this refers to the IP-address, Name-Service, Routing, etc.

Online Service Providers and Internet Content Hosts

Whereas access providers perform the core and more specific function of providing the wherewithal for integration, connectivity and channel of communication, Online Service Providers and Internet Content Hosts are intermediaries that perform a whole spectrum of functions. They include information location tools, online advertising platforms and news aggregators (Google and Yahoo!), online businesses like games and application suppliers or goods and services suppliers (iTunes, Amazon and eBay), electronic mail and chat or messaging services (gmail, MSN hotmail and messenger), social networking sites (Facebook and MySpace), electronic archives and educational or referencing sites like encyclopedias and dictionaries (Wikipedia, Citizendium and Dictionary.com) as well as multi-media hosting and file storage and transfer sites (Youtube and Mediafire) amongst others. It may even be appropriate to include P2P technology as an intermediary as long as it serves to link two or more parties for any purpose. Thus, this list of entity is not exhaustive and is likely to expand as information technology develops. It is this large middle group of intermediaries that the law needs to address in terms of the legality and legitimacy of their functions, vis-à-vis criminal and civil responsibility and liability (or otherwise), including the content management (relating to the type of information) and creative works (mainly copyright and trademark) regimes respectively.

Internet Content Providers

Internet Content Providers such as bloggers and user-creators are those who offer their own content on the World Wide Web and other similar platforms. These are unproblematic as far as liability is concerned, as Content Providers are obviously liable for their own content. Primary content providers are not intermediaries and are in fact one of the serviced parties.

Intermediaries and Singapore Copyright Law

Overview

Under Singapore law, Network Service Providers ("NSPs") enjoy a blanket immunity conferred by s 10 of the Electronic Transactions Act ("ETA") (Cap 88), protecting them from any civil or criminal responsibility for third party content. However, this immunity does not apply to the copyright regime. Section 10(2)(d) of the ETA provides that NSPs are subject to the provisions of the Copyright Act ("CA") (Cap 63).

Under the CA, NSPs are granted immunity from copyright infringement for activities that are integral to its functions such as transmission, routing and provision of connections, system caching and storage and information location. From the definition under s 193A, the meaning clearly applies, insofar as the latter functions are concerned, beyond mere access providers and includes other intermediaries like information location tools, which provides and operates facilities online services or network access. They also have to satisfy specific requirements to be eligible for immunity from copyright infringement claims. Copyright holders are now entitled to some form of recourse by issuing notices to request NSPs to either disable access to a website that contains purportedly infringing materials or remove such content from its network.

Definition of NSPs under the CA

The definition of NSPs under the Act can be potentially confusing and thus requires elucidation. Section 193A(1)(a) of the CA defines a NSP as a person who (in relation to s 193B) "provides services relating to, or provides connections for, the transmission or routing of data", while s 193A(1)(b) defines a NSP (in relation to the rest of the Act) as a person who "provides, or operates facilities for, online services or network access."

Section 193A(1)(a) CA

Based upon a literal reading of this definition, it is possible to see how widely it might be interpreted – an intermediary could presumably qualify as a NSP as long as it can show that it provides services relating to the transmission of data. However, in the recent case of *RecordTv v MediaCorpo TV Singapore*,1 the court adopted a narrow interpretation of the definition. In deciding on the definition of a NSP under the section, Justice Ang noted that:

In common parlance, a network service provider is a business or organization that sells bandwidth or network access by providing direct access to the Internet. In other words, a network service provider provides the service of enabling a person to connect to a network.2

It will thus appear that the definition of NSPs under s 193A(1)(a) (in relation to s 193B) would only refer to those intermediaries that provide very basic and fundamental services such as providing bandwidth or infrastructure for users to connect to the Internet, a good example of which would be Singtel or Starhub. This distinction of being a mere conduit is important because of the differences in responsibilities that a NSP under this definition has as compared to those that fall under the definition in s 193A(1)(b).

Section 193A(1)(b) CA

Similar to the above definition, a literal reading of s 193A(1)(b) can result in a potentially wide coverage, with intermediaries being able to qualify as long as they can show that at the very least, they provide online services. There has been no judicial clarification on the scope and extent of this definition. This probably means that almost any online intermediary can qualify as a NSP.

Responsibilities of NSPs and the Safe Harbour Provisions

The Safe Harbour provisions are encapsulated within ss 193B to 193D and ss 252A to 252C of the CA. In short, the Safe Harbour provisions are the various requirements that the NSPs have to meet in order to enjoy immunity under the CA. It is important to note that the fact that a NSP elects not to meet the requirements to come under the Safe Harbour provisions does not automatically make it liable to copyright holders for any copyright infringements. Instead, the general provisions of the CA will govern the NSP's liability in relation to copyright infringement and the complainant will still have to prove primary or secondary infringement on the NSP's part in a court of law.

Section 193B CA

This provision deals with the NSP's "transmission, routing and provisions of connections." Briefly, in order to obtain immunity, the NSP must only act as a conduit, where the transmission is via automated electronic processes without any substantive modifications (other than necessary technical ones) made to the content of the electronic copy.

Section 193C CA

This provision deals with system caching. Briefly, the NSP obtains immunity if the material that is cached is not substantively modified, and the NSP observes the technical rules under the section. Similar to s 193B, the NSP's treatment of the data or copyright material must be confined to the bare minimum without any alterations (save for ones that technical processes require). However, the difference between both provisions lie in s 193C(2)(b), which provide that the NSP must either remove or disable access to any infringing material if a take down notice has been lodged by a complainant.

Section 193D(1)(a) & (b) CA

These two provisions pertain to the storage of information and referring or linking of a website respectively. The NSP obtains immunity if it does not receive any direct financial benefits arising from the infringing activity and if it does not have knowledge of the activity. Similar to section 193C, the NSP must either remove or disable access to any infringing material if a take down notice is lodged.

The responsibilities that a NSP has, that is, whether or not they are subjected to the notice-and-take-down regime and to other eligibility requirements for immunity, is clearly dependent on its function as well as its practices and purpose of operation. A NSP that acts as a mere conduit need not comply with the take down notice regime as compared to the instance whereby the infringing data is stored or located on the NSP's systems. This is based on the principle that a service provider should not be liable over what is beyond its control and should not be responsible for more than what it can perform to minimise infringement while remaining an efficient and effective Internet intermediary.

Liability of NSPs and section 193DB CA

The various relief that the courts may grant to aggrieved copyright holders differ according to the role that a NSP plays. Basically, the relief ranges from an order requiring a NSP to disable access to or terminate a specified account to ordering a NSP to remove an infringing copyrighted material or any other orders that are least burdensome to the NSP among "comparatively effective non-monetary orders." The section also lists various considerations such as questions of foreseeability, burden of the order on the NSP, feasibility of compliance, effectiveness, adverse effects on NSPs and whether there are other less burdensome solutions that the courts will take into consideration when deciding the appropriate forms of relief.

It is interesting to note how the law tries to balance the responsibility of NSPs with regards to copyright infringements such that this responsibility is not too onerous for NSPs – for example, the application of a least burdensome approach to the NSP and taking into consideration the possible adverse ramifications on the NSP's business before making such orders. This is also perhaps reflective of the Government's pro-business and pro-IT stance in order to develop Singapore as an IT hub and not to stifle or make it onerous for NSPs, or those that require their services, to conduct their business.

It should be noted that the law also punishes users for making false notices with fines and/or imprisonment terms, and this liability accrues whether or not the false statement was made in Singapore. This is no doubt put in place to discourage frivolous and groundless notices from being issued, which might cause a lot of potential trouble for both the opposing parties as well as the NSP itself and also have a chilling or stifling effect on Internet content. There is also recourse for the Internet content provider to challenge the allegation of infringement.

Potential gaps in the law

Since it was amended to incorporate the above provisions, newer forms of intermediaries, functions, operation, purposes and roles have emerged in the recent years, especially with regards to content hosts. Traditionally, hosting services were normally offered by the very same telecommunication companies that were also the ones that offered network access to the users. It was arguably with this notion in mind that the safe harbour provisions were enacted, which excused these hosting companies from caching and the storage of unauthorised material. However, in recent years, we have seen the emergence of an array of content hosting intermediaries distinguishable by one factor or another – for example, websites such as Facebook, YouTube, MySpace and Dailymotion that host "user-created" content. While it cannot be denied that on a literal reading the provisions under the CA may render them equally applicable to these

newer forms of online intermediaries, the fact is that there are significant technical and operational differences between these newer forms of intermediaries and the traditional ones that may require closer examination, with a view to a review of the law applicable to intermediaries. Perhaps a more nuanced and specific approach is also needed to deal with the differences between intermediaries that go beyond their technical or even functional similarities.

Newer forms of online hosting intermediaries have the effect of increasing copyright infringement activities, and that is an issue that is facing courts worldwide. For example, in July 2007, the French court held that Dailymotion, a video-sharing website, had deliberately "enabled mass-scale piracy" because of its inherent structure and technical functioning of the website, such that it "must have been aware of the infringing content", and "induced the infringement" in order to increase traffic flow to their website.3 Similarly, the Parisian courts have held that Google was ineligible to qualify for France's safe harbour clauses because it had not taken sufficient steps necessary to prevent infringing content from being reposted on its site despite the fact Google had complied and taken down the offending material each time it was alerted to do so. More recently, in 2010, the Italian courts have found some YouTube executive criminally liable for certain content posted by its users, and Viacom, a global entertainment content company, is still locked in an ongoing dispute with You Tube over its operational model as a video-sharing website.

Intermediaries Under Foreign Copyright Law

United States Online Copyright Infringement Liability Limitation Act

Section 512 of the Digital Millennium Copyright Act or the Online Copyright Infringement Liability Limitation Act ("OSCILLA") provides more or less the same safe harbour framework for intermediaries under copyright law, and was in fact the template for the equivalent provisions in the Singapore Copyright Act. Briefly, the OCILLA creates a safe harbour for online service providers against copyright liability if they adhere to, and qualify for certain prescribed safe harbour guidelines and promptly block access to allegedly infringing material or remove such material from their systems once they receive a notification claiming infringement from a copyright holder. OCILLA also includes a counter notification provision that offers service providers a safe harbour from liability to their users, if the material upon notice from such users claiming that the material in question is not, in fact, infringing. The safe harbour provisions include the following: Passive conduits (17 USC § 512(a)), system caching (17 USC § 512(b)), online storage (17 USC § 512(c)) and information location tools (17 USC § 512(d)).

European Union E-Commerce Directive

EU states have their own copyright law, many of which has similar provisions. They are guided by the principles and provisions in the E-Commerce Directive. Articles 12 to 14 of the E-Commerce Directive establishes the limitations on the liability of the Internet intermediaries, which are defined as "information society services". Under art 2(a) of the Directive, "information society services" are defined as "any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services."4 Information society services enjoy protection from legal liability if it acts as a "mere conduit" or provides caching or hosting services. These would cover access providers and some functions of service providers and information location tools. The Directive leaves it to the individual member states to put in place measures such as the Notice and Removal process in their domestic laws.

Conclusion

Although these legislative provisions are useful in clarifying the law relating to Internet intermediary liability and responsibility; as their functions, purposes, operation and role on the Internet becomes increasingly complicated, there may be a need in the future to update the laws and regulations to deal with the ambiguities that will arise. Singapore should take the lead in tracking developments and trends in the area of Internet intermediaries; identify issues when they arise or even predict problems before they emerge, and address it expeditiously. Only by providing clear, attractive and progressive laws can we attract intermediaries to establish their business and infrastructure here, contributing to the goal of developing Singapore into a technological hub in the Asia-Pacific region, if not the world.

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Notes

1. *RecordTV Pte Ltd v Mediacorp TV Singapore Pte Ltd and Others* [2009] SGHC 287.

2. *Ibid* at 88.

3. J de Beer & C Clemmer, "Global trends in online copyright enforcement: a non-neutral role for network intermediaries?" (2009) Vol 49 No 4 *Jurimetrics*.

4. The meaning is taken from art 1(2) of Directive 98/34/EC as amended by Directive 98/48/EC.