

Online Copyright Infringement Liability Limitation Act by Ditesh Kumar (c) CC-BY, 6th April, 2006

Introduction

The Online Copyright Infringement Liability Limitation Act is a United States (US) federal law that allows for copyright holders to ask an Internet Service Provider (ISP) to remove infringing copyrighted works if that work is available through the ISP. An ISP offers users access to Internet and related services, generally for a monthly fee. ISP's also provide content hosting services on their infrastructure.

The act was introduced due to repeated reports of Internet related copyright infringement activities by users of ISP services. The harm was categorized into the broad areas of:

- Infringement on content hosting services provided by ISP's
- Infringement by the provision of information location tools
- The provision of transitory communication facilities for infringing works

To the extent of allowing for ISP's to assist in enforcing copyright, US trade representatives and copyright holders have sought the same provisions in current US copyright statutes to be implemented in free trade agreements with other countries to ensure “effective action against any act of infringement” by copyright holders.

The ISP provisions have been implemented in Australia, Bahrain, Chile, Central American-Dominican Republic, Moroccan, Oman Free Trade Agreements with the US. Malaysia currently has no provisions involving the limitation of liability for ISP's and it is expected that these provisions will be introduced into the Free Trade Agreement and subsequently Malaysian law. In the Japan-Malaysia Economic Partnership, two general provisions are outlined that would limit the liability of ISP's¹. These provisions, however, are not detailed and do not outline the specifics to the extent of the US provisions.

In Malaysia, the Communications and Multimedia Act 1998 outlines guidelines for voluntary self-regulation of ISP's. The legislation is balanced as far as the rights of users and copyright holders are concerned and provides due recourse for any alleged copyright infringement.

Provisions

The US provisions, known as safe harbors, provide:

- a limited immunity from copyright liability for ISP's that meet procedural requirements
- a requirement for ISP's to disclose the identity of their subscribers upon receipt of a subpoena alleging copyright infringement

¹Japan-Malaysia Economic Partnership Agreement, Chapter 9, Article 122(2).

The US provisions were introduced to remove legal uncertainty and limit the liability of ISP's. There were two cases in the US involving possible ISP liability in copyright infringement cases involving user activities (*Religious Tech. Center v. Netcom On-Line Communication Services Inc.* and *Playboy Enterprise Inc v. Frena*). The decisions in these cases involved secondary and vicarious copyright liabilities on the part of the ISP. The provisions were also intended to protect ISP's from liability of temporary reproduction of copyrighted works in computer memory. This was due to a US government task force report that stated such temporary reproductions are actionable copyright infringement for which ISP's would be strictly liable.

Section 512 of the US Copyright statute provides limited immunity to ISP's in the following circumstances:

- Transitory network communications provided in 512(a). Section (a) excludes an ISP from liability for Internet traffic that passes through their network as long as they do not control the traffic.
- System caching provided in 512(b). Section (b) excludes an ISP from liability in caching activities that do not interfere with copyright protection systems. There is no agreement whether this applies to website content providers that provide caching services². If the cache is publicly available, notice and takedown procedures are applicable.
- Information Residing on Systems or Networks At Direction of Users provided in 512(c). Section (c) applies to websites and other services that an ISP hosts that contains allegedly infringing copyrighted material. Notice and takedown procedures are applicable to such sites.
- Information Location Tools provided in 512(d). Section (d) is particularly targeted to search engine operators and applies the scope of notice and takedown procedures to such operators.
- Limitation on Liability of Nonprofit Educational Institutions provided in 512(e). Section (e) provides protection for nonprofit educational institutions from liability from actions of the faculty members and graduate student employees.

It is important to note that non-compliance by ISP's do not imply liability in any form. To prove liability, copyright holders have to pursue filing a lawsuit alleging copyright infringement under existing provisions.

Takedown Notice and Procedures

A copyright holder issues a takedown notice to the ISP if the copyright holder has a "good faith notice" that the work is infringing. The takedown notice takes the form of a statement with sufficient information to locate the alleged infringing copyrighted work as well as a statement under the penalty of perjury that the complainant is the owner of the copyright. The takedown notice does not require evidence that the infringing act occurred at all.

The ISP is required to remove the allegedly infringing material after receiving the notice. There is a provision for the customer to issue a counter-notice with a statement under the

² Google.com[3] and The Internet Archive[4] provide such services.

penalty of perjury that the subscriber has a good faith belief that the takedown notice for removal was issued as a result of a mistake or misidentification.

Expedited Subpoenas

Section 512(h) provides copyright holders the ability to subpoena ISP's to identify alleged copyright infringer's. The subpoena request requires a takedown notice to be submitted.

Provisions in the Japan-Malaysia Economic Partnership Agreement

The agreement requires for each country to “*provide for appropriate measures concerning limitations on liability for service providers*“. Liability is limited to the following scenarios:

- where the ISP provides necessary deterrents to the transmission of infringing copyrighted works through its communications system
- where the ISP is unable to provide such deterrents due to technical limitations

Malaysian Self Regulatory Internet Provisions and Content Code

The Communications and Multimedia Act 1998 spells out the clear aim in allowing Malaysian ISP's to be self regulated. In line with self regulation, the Communication and Multimedia Content Forum of Malaysia has set out guidelines and procedures that ISP's voluntary subscribe to. The Content Forum is also obliged to set up a Complaints Bureau impose sanctions on any member who is considered to have breached the Content Code. It is important to note that web hosting services are specifically excluded from requiring a license to operate.

The Content Code^[7] introduces the concept of an innocent carrier as one that provides access to any content but does not have control or knowledge of the content. An innocent carrier is not responsible for the content provided. From this perspective, it is noted that if an Internet subscriber contravenes any Malaysian law (including copyright law), the ISP has the right to remove access of the subscriber as well as remove the prohibited content as long as the removal is in accordance with the complaints procedure.

The complaints procedure requires that an ISP notified by the Complaints Bureau of prohibited content, has to inform its subscriber to remove the content within two working days, and has the right to remove the content if the subscriber doesn't do so.

Criticisms and Policy Issues

Presumption of Liability

Adoption of provisions that limit ISP liability creates a legal presumption of liability where none exists. There has been no international agreement on secondary copyright liability and the National Information Infrastructure Task Force Working Group's claim on temporary reproduction being infringing on copyright was extremely controversial and was rejected in the diplomatic conference leading up to the 1996 WIPO Copyright Treaty.

The safe harbor provisions have been used as a de facto liability standard and has resulted in increased cost to ISP's. Copyright holders in the US have filed briefs in lawsuits asking the Court to treat non-compliance by an ISP as evidence of copyright liability. Conference Report of the US House of Representatives and Senate indicated that an ISP is not liable for conduct or lack of conduct that qualifies as limitation of liability.

The practical result of these provisions seek to create a presumption of liability of ISP's to copyright holder, instead of providing them immunity against such liability.

Takedown Notice and Procedures Susceptible to Abuse

The problem with the takedown notice and procedures is that it does not require for substantiation of copyright infringement allegations. This allows for abuse in several ways that result in misuse by parties in the past as effective methods to execute private censorship, anticompetitive measures and introduce privacy concerns.

An excellent example of private censorship is the issuance of copyright takedown notices by Diebold Inc., manufacturer of electronic voting machines, to ISP's that hosted websites containing email messages from Diebold employees. These email messages disclosed flaws in the company's voting machines that were used in the November 2004 US elections.

A further example of suppression of free speech would be the takedown notices that the Church of Scientology sent to Google to remove links to websites critical of the Church's teachings. This chills free speech and reduces access of citizens to discussion forums.

These examples are among many cases where there has been no clear evidence of copyright infringement. It has become common practice in the US to use automated scanning tools to generate a large number of takedown notices. These tools have generated takedown notices for works in the public domain as well as works that misidentified as infringing copyrighted material. Furthermore, the owners of such material face substantial difficulties in restoring their work, as counter notices do not require ISP's to restore the work.

Misuse of takedown notices can be reduced by requiring that any such notice be reviewed by a judge. The Copyright Reform Process in Canada suggested[6] that upon an ISP receiving a takedown notice, the ISP be required to forward the notice to the subscriber in question and that blocking the alleged copyrighted work in question would only take effect when ordered by a court of law. Furthermore, it was proposed that the ISP be required to keep a record of relevant information for a specified amount of time and that the government can set fees that may be required to be paid to ISP's by copyright holders for processing the notices.

Does Not Accommodate P2P Practices, Termination of Internet Access Without Proof

The US provisions does not provide sufficient protection to ISP's when new technological frameworks are used to disseminate allegedly infringing copyrighted works. Peer to peer file sharing is among the most widely used file sharing network on the Internet whereby users are able to share digital copies of music, movies and other content directly from their own machines without resorting to a central index or a central sharing service.

In this case, the ISP only provides Internet connectivity and communication services to the subscriber and falls into the safe harbor for transitory communication. To limit their liability, ISP's have to implement a policy of terminating repeat infringer's³. In the US, however, copyright owners have not exercised this option, but instead have chosen to exercise the web casting option (which applies if the allegedly infringing work is hosted on the ISP's infrastructure) and have sent ISP's thousands of takedown notices. For example, ISP Pacific Bell Internet Services stated that the enforcement agent for the Recording Industry Association of America sent it 16,700 invalid takedown notices in which the enforcement agent claimed that the ISP subscribers had downloaded into the users computers. Complaints from other large ISP's lead to a US Congressman to call for a Congressional investigation into the practice.

The takedown notices sent by copyright holders have been used to pressure ISP's that the alleged infringement is sufficient to trigger the repeat infringer clause, whereby the Internet access of the alleged infringer is terminated. The Vice-President and Associate General Counsel of Verizon Communications Inc. noted that most of the takedown notices were automatically generated by automated scanning tools with an extremely low accuracy rate. For example, a US ISP received 30,000 takedown notices between January and April 2004 of which only 2 were valid (resulting in an accuracy rate of 0.007%). This has directly resulted in the ability of private parties to terminate Internet access on a mere allegation of copyright infringement.

Expedited Subpoena Processes

US legislation has provisions for expedited subpoenas. Court clerks are permitted to issue subpoenas that direct ISP's to disclose the identity of their subscribers, with the copyright holder only stating that the allegation was made in good faith.

This subpoena process has no provision for judicial oversight and has due process deficiencies. The ISP has no legal obligation to notify its subscriber that his or her identity is being sought by a subpoena. Secondly, in the case of a notification, the subscriber has no legal course of action to ask a judge to evaluate the subpoena before the ISP discloses the information. In cases of misidentification, the subscriber does not have rights to taken action against the copyright holder.

Furthermore, unlike discovery procedures in copyright infringement lawsuits, the copyright owner can request for subscriber information without having an intent to file a subsequent

³ The definition of "repeat infringer" is not provided in the US copyright statute.

lawsuit. This leads to potential abuse by those having unscrupulous intentions.

The lack of provisions for judicial oversight allows for copyright holders to automate the subpoena issuance process. From July to December 2003, music copyright holders issued over 3000 subpoenas to ISP's in the US. This raises the operating costs to the ISP as well as liability due to possible errors in the disclosure of the information. ISP Charter Communications stated that the cost of complying with the subpoenas would run into the hundreds of thousands of US dollars.

Court rulings in 2003 in the US indicated that the expedited subpoena processes could not be used to identify alleged copyright infringer's when the allegedly infringing copyrighted works resided in the users computers. The copyright holders then filed over 10,000 lawsuits against individuals using laws that predated the safe harbor provisions. This clearly indicates that additional protection for copyright holders was unnecessary as the existing provisions were sufficient to protect copyright holder interests.

The Moroccan Free Trade Agreement in Article 15.11(28)(xi) allows the possibility of a judicial process to obtain subpoenas. To prevent further abuse, all future subpoenas should have mandatory judicial oversight.

Conclusion

There are strong benefits to limiting the liability of ISP's. However, the current structure of safe harbors in the US lead ISP's to err on the side of restricting users activities and the lack of judicial oversight has lead to copyright owners exerting far too much power against those who are alleged infringing. Amendments to the current safe harbor provisions should be incorporated to remove the ability of unscrupulous copyright owners to abuse the law to their benefit.

As Malaysian Internet content is still severely lacking, it is not in the national interest to put up and enforce legislation that will frighten Malaysian Internet users from creating more content for fear of infringing on copyrights accidentally or unknowingly. This is not to say that we should not respect copyrighted materials, rather an appropriate balance has to be struck such that the ISP is not put into a straitjacket and trigger-happy copyright owners call the shots on content from the local guys.

As a fledgling democracy, more local people should be encouraged to speak out on issues and takedown notices and procedures should not be abused by the people and/or organizations who have batteries of lawyers to protect their interests. Current Malaysian legislation is well suited to achieve these goals and should not be modified.

References

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