



Transpacific Partnership Agreement and Future of Internet Policing of Copyright Infringement in Malaysia

Abd Ghani, I. M.*, Ismail, S. F. and Daud, M.

*Ahmad Ibrahim Kuliah of Law, International Islamic University Malaysia (IIUM),
53100 Kuala Lumpur, Malaysia*

ABSTRACT

Internet Service Providers (ISPs) are the gate keepers of internet and free flow of information and expression. The ISPs can also play a strategic role in policing the Internet from copyright infringing materials. As gatekeepers, they can block access and force others to identify the origin of the materials making them the best organisation to take action on the internet materials. The abandoned Trans-Pacific Partnership Agreement (TPPA) between Malaysia, United States of America (US) and another 10 countries in Asia and Pacific Region contains obligations that mandates ISPs to expeditiously remove or disable access to alleged infringing material upon acquiring actual or even with constructive knowledge of the infringement. Although TPPA is theoretically dead after the withdrawal of the US, it is still pertinent to consider its provision as it is the first global standards on ISP liabilities though negotiated under a free trade agreement. This paper examines the obligations under Malaysian Copyright Act 1987 and compare them with TPPA provisions on ISPs. It concludes that unless there is latent defect with the Malaysian notice and take down procedure, there is no compelling urgency for Malaysia to revise her procedure.

Keywords: Copyright infringement, Internet Service Providers (IPS), Internet policing, Trans-Pacific Partnership Agreement (TPPA)

INTRODUCTION

Internet Service Providers (ISPs) stand between users and online content. As a gatekeeper to the Internet, ISPs are poised to be the ideal body to take action against copyright infringing material either by blocking access or taking them down altogether. As the controller of Internet traffic, ISPs can track the traffic of infringing

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E-mail addresses:

imadieha@iium.edu.my (Abd Ghani, I. M.)

suzi@iium.edu.my (Ismail, S. F.)

mahyuddin@iium.edu.my (Daud, M.)

* Corresponding author

copyright content and notify the copyright owners of crucial information pertaining to it. As a result, a system of notice and take down procedures has been introduced in many countries as a legitimate measure to combat copyright infringement. In Malaysia, such procedure was introduced in 2012 vide the Copyright Amendment Act 2012. This procedure complements an earlier notice and take down procedures already in practice under the Communications and Multimedia Act 1998.

This paper begins with a description of the notice and take down procedure under the Malaysian Copyright Act 1987 and the Communication and Multimedia Act 1998. The second part of the paper delves into the TPP provisions on ISP's liabilities. The paper ends with a brief comparison of notice and take down procedures practised in other countries before concluding with some suggestions on the way forward.

OVERVIEW OF LEGISLATION AND SOME RECENT DEVELOPMENTS

In Malaysia, the communications and multimedia industry is regulated by the Communications and Multimedia Act 1998. The Act was enacted to promote national policy objectives and to establish a licensing and regulatory framework for the communications and multimedia industry. The Act is significant in the sense that it enables the establishment of the Malaysian Communications and Multimedia Commission (MCMC) to play the role of a regulator after the merging of communications and multimedia industry

including telecommunications, broadcasting and on-line activities. The establishment of MCMC could be traced back to the government's effort to move the nation towards becoming an information society. Despite the great challenges, the basic question remains as to whether the country is progressing or regressing in realising its goal of becoming an information and knowledge society (Ramasamy, 2010). Legislative approach is one of the methods to encounter the challenges, in particular, to deal with illegal and unlawful content available on the internet (Nawang, 2014).

In March 2001, the MCMC designated the Communications and Multimedia Content Forum of Malaysia (CMCF) as the Content Forum. The CMCF governs content by self-regulation by setting up a Content Code (Code) that is applicable to all industries. The Code is a set of industry guidelines on the usage and/or dissemination of content for public consumption. As far as ISP liabilities are concerned, the Code has set out the guidelines to be followed by an Internet Access Service Provider in Part 5 of the Code, i.e. they are expected to block access to or remove 'prohibited Content' if there has been a complaint against such content. The definition of 'prohibited content' is broad enough to cover all infringing content including content which infringes other parties' intellectual property or contains element of fraud. As such, the Notice and Take down procedure applies equally to copyright infringing material. In fact, in Malaysia, all take down procedures on copyright infringement to date are

undertaken by MCMC.

Traditionally, an ISP has been equated with that of the traditional telecommunications carrier. It is a conduit that passively allows the transmission of data and is therefore not responsible for the nature, or character of that data. The argument is based on the reasoning that it would be unjust, unreasonable and impractical to expect an ISP to monitor all of the services that it may give access to. In reality, ISPs usually host a myriad of web-based services which provide access to a worldwide audience. From this angle, the imposition of a heavy burden of internet policing or monitoring would adversely affect the free flow of information on the internet. Nevertheless, from another angle, the ISP is seen as the best avenue to block and remove offensive materials. Thus, by insisting that ISPs respond to abuses of the internet, this can ensure that the internet remains as a safe super information highway and does not become a haven for illegitimate and illegal activities. Some of the main issues encountered by the ISPs revolves around content liability, intellectual property rights as well as crime detection and surveillance (Cooray, 2015).

Australia, New Zealand, Japan and Canada, and USA have taken efforts to regulate Internet access. The role of ISP as a mere conduit was also debated. There was a myriad of discussions and debates over the efficacy and feasibility of such a system. The governmental and legislative support is seen as a positive effect to curtail online distribution of illegal and illicit content

including copyright infringing materials. Many are of the view that the ISPs operation should be regulated in some way to ensure that they play a proactive role in stemming the traffic of copyright infringing materials. Australia for instance, has been very active in regulating the Internet as early as 1995 with the creation of ISP Code of Practice (Goode, 2005).

The most commonly used means of enforcement are takedown notices — demands sent from content owners to ISPs or website hosts to remove infringing content hosted on websites under their control. Depending on the circumstances, an ISP may be compelled upon receiving a takedown notice to remove infringing content from a hosted website, or in some cases, an entire website, for a temporary or for an extended period (Michels, 2013). In the US, the Digital Millennium Copyright Act (DMCA) was adopted by the Congress and enforced since 1998 in attempts to curb infringing online activity by a private notice system. It has been argued that the broad scope of the take down procedure disrupts the balance between the copyright holders and ISPs. Besides, it can lead to misuse of the system and increases the risk of wrongful take down (Tehrani, 2012). It has also been reported that several industry stakeholders were sometimes hesitant and doubtful when they were obliged to take proactive steps in handling online copyright infringing materials, for inter alia, fears related to possible breach of contractual liability with subscribers. More so, copyright infringement is a contentious allegation

and something that is best established by a court of law (Byron, 2008). All in all, internet use and policy development, as well as measures to tackle challenges posed by the rapid growth of internet, may vary between countries and from one jurisdiction to another, so legislation for one state or country may not work for another (Hornle, 2011).

The paper continues with a discussion on the provisions of the Copyright Act 1987 that deals with notice and take down procedure for copyright infringement.

ISP'S LIABILITIES – THE MALAYSIAN POSITION

Provisions on ISP's liabilities were introduced in Malaysia vide the Copyright Amendment Act 2012. As these provisions are rather new, they have not been tested in the court of law. According to the provisions, ISPs are subjected to private notice and take down procedure and what type of exemptions from liabilities they enjoy once they undertake the procedure. The ISP provisions have been hailed by the US as one of the reason why Malaysia was taken out from the United States Trade Representative (USTR) watch list in 2012 (United States Trade Representative [USTR], 2012). In the course of revising the law, Malaysia took into consideration legislative provisions in the UK, US, Australia and EU (Azmi, 2013). The provisions are detailed, as a new part, Part VIB, was devoted solely for ISP's liability. The following sections will discuss in detail the provisions under the Copyright Act 1987 on ISP's liability.

Definitional Issues

Under the Act, the type of obligations and the immunity enjoyed depends on what type of 'service provider' you are. This is reflected in Section 43B of the Copyright Act 1983 which defines 'service provider':

- (a) for the purpose of section 43C, means a person who provides services relating to, or provides connections for, the access, transmission or routing of data; and
- (b) for the purpose of this Part other than section 43C, means a person who provides; or operates facilities for, online services or network access and includes a person referred to in paragraph (a).

The above definition seems broad enough to encompass ISPs such as TMNet, P1, and Maxis as well as any person who provides or operates facilities for online services or network access. Therefore, it seems possible for the operators of websites, such as Facebook and YouTube for instance, to fall within the definition of "service provider" for the purposes of the aforementioned provisions.

The reason why the distinction is made is that for those falling under category (a), their obligation is relatively minor as they are only considered as mere conduit. Their connection to the internet content is only technical, i.e. for the transmission, routing and provision of connections. They are nowhere involved in the creation of the content and therefore should not be

responsible for the content.

The second category of service provider has more stringent obligation in relation to notice and take down procedure. These are services that operate online facilities and include system caching under 43D and storage and information location tools under section 43E. In relation to copyright infringing materials, even though system caching and information location tools are not involved in the creation of the content, they have the power to stem the further distribution of such content. Their role in policing copyright infringement is therefore very important.

Notice and Take Down Procedure

As far as the ISP liabilities are concerned, Sections 43B to 43I set out the responsibilities of ISPs vis a vis online content.

Section 43H confers the right on the owner of a copyright which has been infringed to notify a service provider to remove or disable access to the electronic copy on the service provider's network. A service provider who has received such notification is required to take action within 48 hours from the time of receipt of the notification, otherwise, the former may be equally implicated for the infringing activity, most probably as contributory infringer for enabling the infringing act to take place.

As at times, defining infringement is not an easy task. The Act provides for mechanism for the disputed online content to be put back online through a counter notification procedure. The person whose

electronic copy of the work was removed or to which access has been disabled may issue a counter-notification to the service provider, requiring the latter to restore the electronic copy or access to it. The service provider must promptly provide a copy of the counter-notification to the issuer of the notification and inform him that the removed material or access to such material will be restored in 10 business days. At this juncture, it is still possible for the copyright owner to delay the restoration of the online materials by seeking a court order to restrain the issuer of the counter-notification from engaging in any infringing activity in relation to the material on the service provider's network.

Exemption of Liabilities

What is the incentive for ISPs in playing their role in the notice and take down procedure? This is important as the ISPs may run the risk of forsaking their contractual duties with their subscribers in taking action against the complained content.

Sections 43C to 43E exempt a service provider from liability for copyright infringement by reason of the following activities; (i) transmitting, routing or providing connections of an electronic copy of the work through its primary network or any transient storage of the electronic copy of the work in the course of the aforesaid activities (Section 43C); (ii) making any electronic copy (system caching) of the work from an electronic copy of the work made available on an originating network, or through an automatic process, or in response to an action by a user of the service

provider's primary network, or to facilitate efficient access to the work by a user (Section 43D); and (iii) storing an electronic copy of the work at the direction of a user of the service provider's primary network or linking a user to an online location on an originating network at which an electronic copy of the work is made available by the use of an information tool such as a hyperlink or directory, or an information location service such as a search engine (Section 43E). A service provider must satisfy the various conditions set out in Sections 43C to 43E in order to obtain the benefit of the exemptions under the respective provisions.

All the various section provides the ISPs immunity from any liability if they take action within the stipulated time. Speedy action from the ISPs assist in preventing the distribution of copyright infringing materials. Section 43H further requires the owner of the copyright to compensate the service provider or any other person against any damages, loss or liability arising from the service provider's compliance with the notification.

It is also clear that under the current law, take down procedure only arises upon notification from copyright owners. Section 43E of the Act does not require the ISPs to remove or disable access to the infringing material even if they may have slightest information about possible infringement from events taking place elsewhere. The ISPs are only obliged to do so upon receipt of a notification from the copyright owners. In this way, the ISPs are not expected to conduct any form of independent internet

policing except to investigate complaints from copyright owners. That give the ISPs some freedom in operating their business and not be unduly hampered with excessive policing.

One important safeguard introduced in the Act is the imposition of penalty for those who issue a false notice.¹ For this purpose, a person who makes a statement outside Malaysia may be dealt with as if the offence was committed in Malaysia.²

The discussion now moves to the notice and take down obligations underlined under the TPPA. Although TPPA is now abandoned, the comparison is necessary as TPPA is a major regional framework that deals with standards on ISP duties for the first time. There were never any free trade agreements that dealt with ISP obligation before TPPA. As a result, TPPA remains an important regional initiative that should be considered as a 'benchmark' for future negotiations.

TPPA's Provisions on ISP

Transpacific Partnership Agreement (TPPA) has been hailed as the 21st century trade rules that has rewritten the rules for global trade. By creating a single set of trade and investment rules on trade areas, TPPA promises to provide greater certainty and predictability for business by creating harmonisation of standards enabling parties to compete on a more level playing field. It is comprehensive in its coverage, extending traditional trade issues such as market access,

¹ Section 43I of the Copyright Act 1987.

² Section 43I (2) of the Copyright Act 1987.

technical barriers to trade, sanitary and phytosanitary measures to non-traditional trade issues such as labour standards and capacity building. The harmonisation of intellectual property rules is established through the intellectual property chapter, one of the biggest chapters in the TPP.

The ISPs liabilities are part of the binding commitments under the TPP. These provisions are far from being non-contentious as they integrate US style safe harbour provisions as a platform for regional integration. This paper outlines the ISP's obligations under the IP chapter with the aim of analysing whether the 'red flag' obligations underlined under TPPA is really essential in improving the internet policing of copyright infringing materials.

Definitional issues. Under the Agreement, the term ISP has a broad meaning. Article 18.81 of the said Agreement, defines 'Internet Service Provider' to mean:

- (a) a provider of online services for the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing, undertaking the function in Article 18.82.2(a) (Legal Remedies and Safe Harbours); or
- (b) a provider of online services undertaking the functions in Article 18.82.2(c) or Article 18.82.2(d) (Legal Remedies and Safe Harbours).

For greater certainty, Internet Service Provider includes a provider of the services listed above that engages in caching carried out through an automated process.

From the above definition, it is clear that the term ISP will not only cover the companies that provide telecommunication services but also content services, data storage, domain hosting, cache and other related services related to the Internet.

The binding commitments on ISPs, however, do not extend to those who serve only as conduits in the whole process. The categories of services which are considered as mere conduits are routing, mere transmission and connections, intermediate and transient storage, cache, storage, linking and directories. Footnote 153 further clarifies that the storage of material may include e-mails and their attachments stored in the Internet Service Provider's server and web pages residing on the Internet Service Provider's server.

The definition is explicit in the sense that categorisation of services captured under the notice and take down procedure is the same as in the Malaysia. Both targets not only companies that provide technical access that offer all kinds of services on the internet including as mentioned as content services, but also data storage, domain hosting, cache and other related services related to the Internet. As mentioned earlier, the second category of services may have closer connection to content and therefore, would have stronger obligations regarding infringing copyright materials.

‘Incentives’. The TPPA creates a form of legal incentives for ISPs to participate in controlling the traffic of copyright infringing materials in return for some form of security against possible adverse action by internet users known as safe harbour. As the provision explicitly uses words such as legal incentives, it presupposes that other forms of incentives besides safe harbour can also be introduced to encourage cooperation from the ISPs. Further, the action taken can go beyond notice and take down procedure as TPPA allows ISPs to take other action as long as they are targeted at unauthorised storage and transmission of copyrighted materials³. To that effect, it has been questioned whether the termination of licence or service could be considered as a valid action for purposes of TPPA. It is further made clear in footnote 152 that storage can include the act of hosting content such as blogs, web page, portals and the like.

In return, the ISPs get exemption from monetary relief for their actions. The reason for this immunity is that they are not involved in the infringing action. These activities are beyond their control, not initiated and originated from them even though they take place through the systems that they control.

Red flag vs. wilful ignorance. ISPs are required to take action upon obtaining actual knowledge of the copyright infringement or

³ footnote 149 of TPPA. For greater certainty, the Parties understand that implementation of the obligations in paragraph 1(a) on 'legal incentives' may take different forms.

becoming aware of facts or circumstances from which the infringement is apparent. The language of the provision entails that the ISP’s action does not depend on notice given by the copyright owner. If it comes to the ISP’s knowledge that certain suspicious activities are taking place, they are obligate to take action. The red flag obligation originates from the US Digital Millennium Copyright Act 2000. Mablesen (2013) highlights some of the important factors that should be considered in assessing ‘awareness’ here. Factors include whether there are blatant indicators or signs that raises alarm such as the employment of the terms ‘pirate’ or ‘bootleg’ in their URL or header. The standard of awareness has been judicially considered in *Viacom International, Inc. v YouTube, Inc.*⁴, where the Second Circuit explained the standard to be referred here is ‘wilful blindness’ or ‘conscious avoidance’ which implicates deliberate closing of one’s eyes to a blatant infringing activity. This goes further than the system that Malaysia is currently practising which is, ISP can only take action if there is a specific notice by the copyright owner. The rationale is that ISPs must not turn a blind eye to certain red flag activities on the basis that the copyright owner fails to submit the notice required under the law.

Countries that practice the notice and take down procedure will normally outline the requirement of the notice, in order for them to be valid. The TPPA has a much more relaxed requirement for the contents of a takedown notice. The applicant does

⁴ 676 f.3d 19 (2d Cir. 2012)

not need to state his or her good faith belief that the material identified in the notice is being used unlawfully. As long as there is enough information about the identity and the location of the infringing materials, an ISP is obliged to take a necessary action (Bridy, 2015). What TPPA requires in the footnote is that such notice must contain information that:

- (a) is reasonably sufficient to enable the Internet Service Provider to identify the work, performance or phonogram claimed to be infringed, the alleged infringing material, and the online location of the alleged infringement; and
- (b) has a sufficient indicium of reliability with respect to the authority of the person sending the notice.

The TPPA envisages that some member countries have yet to put in place a notice and take down procedure. It accepts an alternative system which is ‘effective and consistent’. The speed of which the take down process take place must not be hampered by processes which do not impair the timeliness of the process and does not entail advance government review of each individual notice⁵. As made clear from the Agreement itself, an alternative way of complying with the obligations is by establishing of a stakeholder organisation responsible in verifying the validity of each notice as practised in Japan. Once the verification process takes place, the ISPs

⁵ footnote 154 of TPPA

must promptly remove or disable access to the copyright infringing materials.⁶

Monetary incentives for abuse of the system.

The main criticism against the private notice system is that it is a powerful tool to act against infringing copyright material. Once notice is given, an ISP would speedily take down or block material without having to conduct any form of investigation or verification process. An important safeguard against possible abuse of the notice and take down procedure is Article 18.82.4 which provides for monetary compensation for knowing material misrepresentation in a notice or counter notice that cause injury to any interested party.⁷ However, the term ‘interested party’ here is be confined to only ‘those with legal interest recognised under the member countries’ law. The provision of such penalty is a testimony that some form of balance has been provided for in the Agreement. In the US for example, monetary remedies for material misrepresentation are available in take down notices (Bridy, 2015). In addition, the DMCA also provides for the recovery of attorney’s fees and costs in order to reduce the prospect of abusive takedowns.

CONCLUSION: POST TPPA AND THE WAY FORWARD

Critics have raised a number of arguments against the private notice system. It has been said that legal incentives for self-regulation might lead to a privately created

⁶ footnote 154 of TPPA

⁷ footnote 158 of TPPA

systems of easy and presumably illegal takedown of content, and rules which violate consumer interests. It was feared that such private notice might lead to surveillance of contents or deep packet inspection, in order to fulfil the intended ‘cooperation’ with copyright holders. As reported, Google for example has received 77 million copyright takedowns in past month. This has led to the fear that the overzealous removal of materials may raise concerns of censorship.

The choice of a private notice system over other existing system currently practised in the world raises the issue as to what is the optimal form of controlling copyright infringing traffic on the internet. The UK for example, allows the tampering of the Net traffic only if there is a court injunction. The UK Copyright and Related Rights Regulations 2003 allows the grant of an injunction against a service provider only in instances where the service provider has “actual knowledge” of another person using their service to infringe copyright. What amounts to actual knowledge? This refers to a clear notice from the copyright owner containing the specific allegation of infringement.⁸

Canada practises the notice and notice procedures. This requires the copyright owner to file a notice to the ISP who is then duty-bound to notify the alleged infringer. The notice is mandated to be kept for six months in ordinary circumstances. If any legal proceedings are initiated against the owner of the web site, such notice is to be

kept for a longer period, i.e. 12 months. The aim of the notice and notice procedures is to assist copyright owners to build their case against the infringer and not to take down the material. It allows the copyright owner to retain the notice as evidentiary tool or proof of wilful infringement if the web site owner does not to take any action after receiving the notice. It enables the copyright owner to claim additional damages for such wilful infringement.

Chile also practices a notice and take down procedure that is mediated through court proceedings.⁹ The system which was introduced in April 2010, where right holders are required to obtain judicial orders to take down or block access to infringing content. Although the system was introduced after the signing of the US-Chile Free Trade Agreement, it differs from the US Digital Millennium Copyright Act (DCMA) safe harbour system in many critical areas. Chile opted for judicial mediated notice and take down procedure due to overriding concerns over the protection of Internet users’ constitutional rights. Commentators highlighted that such system provides more balance to conflicting interest between the copyright owners for reducing illegal online content and internet users’ want for freedom of expression. By requiring a judicial order, it enables an evaluation of the legitimacy of the copyright owners claim as opposed to a simple private notice. In turn, the likelihood of false and abusive notices would be reduced tremendously. There will also no

⁸ s 97A (2) UK Copyright and Related Rights Regulations 2003.

⁹ <https://cdt.org/files/pdfs/Chile-notice-takedown.pdf>

overzealousness of taking down materials as the claim has to be evaluated through a judicial process first before an action can be taken. More fundamentally, ISPs are only duty bound to take action when they have “actual knowledge” of infringing activity. This could remove the possible discretionary effect of removal of content solely based on red flags.

Another major concern is that TPPA does not give recognition to the whole list of accepted uses and exceptions recognised under the copyright law. Such exceptions play a major role in the context of user-generated content. For example, use for satire and parody and the use of clips for criticism and teaching (with attribution) are well accepted exceptions in many jurisdictions. By not acknowledging such rights, the notice and take down procedure under TPPA is skewed in favour of the copyright owner. In the US, the applicability of fair use defence in notice and take down procedure has been considered in *Lenz v. Universal Music Corp.*¹⁰ The Court in that case decided that copyright holders must determine first whether the use of their materials is somehow not covered under the fair use exceptions for it to be ‘unauthorised’ in the first place. On this, Kathleen O’Donnell was of the opinion that this fair use determination is to ensure that the interests of the users are not unnecessarily impeded by the notice and take down procedure.

Counter notice is only discretionary under the TPP. This underscores the

importance of providing the affected party the avenue to raise their objection against action taken under the notice and take down procedure. Counter notice is mandatory in Malaysia.

The attempt to covertly transpose US style notice and take down procedure through free trade agreements raises the question whether having higher standards on ISP liabilities are necessary in the first place. Now that TPPA has been abandoned, there remains a question as to whether its spirit is going to be revived in another forum. That raises the question as to whether the existing practices on ISP’s liabilities are inadequate in any manner or that the US style is more efficient that it should be the global standard. Until this issue is resolved, there is no reason why the Malaysian notice and take down procedure should be revised.

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¹⁰ 572 F. Supp.2d 1150, 1151 (N.D. Cal. 2008)

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