

Amendments to the Copyright Act 2014: A Block-buster In The Making?

Introduction

Parliament has passed amendments to the Copyright Act (the “**Amendments**”) to introduce new measures aimed at tackling online copyright infringement. The Amendments are likely to come into effect by the end of next month. The most significant of these new measures aim to enable content rights holders to apply directly to the courts for an injunction to block sites which “*clearly and flagrantly*” infringe copyright. The Amendments are intended to counter the high level of consumption of online copyright infringing content in Singapore, which is reportedly one of the highest in the region. According to Senior Minister of State for Law and Education Indranee Rajah, in 2012, Singapore was ranked 4th amongst 18 Asian countries and 12th out of 38 countries globally, in terms of the highest number of illegal downloads per Internet user. The prevalence of online piracy in Singapore has undermined any endeavours by Singapore to build its reputation as an economy which respects the protection of intellectual property rights.

Summary of the New Measures

The present legal mechanism available to rights holders to protect their copyrighted material from being made available online without their authority or consent is the “take down” notice. This is a notice which is issued to an Internet Service Provider (“**ISP**”) to request that it disables access to or removes copyright infringing material from its network. The Government considers that this mechanism has not been effective because ISPs have only tended to comply with the notices if they wish to avail themselves of the “safe harbor” provisions which indemnify them from certain copyright infringement liabilities. If ISPs do not respond positively to take-down notices, rights holders would then need to sue the ISP for copyright infringement and seek an injunction against the ISP to disable access or remove the infringing material. It appears that rights holders have not pursued this avenue due to the uncertainty of proving liability at trial and the potential costs involved in litigation.

The Amendments allow rights holders to apply directly to the Courts for injunctions to block access to egregious websites – i.e. sites that clearly and blatantly infringe copyright,

without having to sue ISPs. This would be an alternative remedy to the current “take-down” mechanism, and will avoid having to involve the ISPs in copyright lawsuits unnecessarily. In addition, the Amendments provide for a non-exhaustive list of factors to help define what constitutes such egregious websites. One such factor would be whether the website’s primary function is to commit or facilitate copyright infringement, or whether the owner of the website demonstrates a disregard for copyright.

Issues for Consideration

The measures contained in the Amendments provide a new avenue for copyright owners and exclusive licensees to block access to copyrighted content by applying under the new section 193DDA (read with sections 193DDB and 193 DDC) for an “Order to disable access to a flagrantly infringing online location” (“**Order**”). The key features of these new measures, and some potential issues which they raise, are summarised below.

What is “flagrantly infringing”?

The Amendments contain a list of factors which the court may have regard to when considering whether a website has been used to “flagrantly infringe” the copyright in any material. These are as follows:

- (a) whether the primary purpose of the online location is to commit or facilitate copyright infringement;
- (b) whether the online location makes available or contains directories, indexes or categories of the means to commit or facilitate copyright infringement;
- (c) whether the owner or operator of the online location demonstrates a disregard for copyright generally;
- (d) whether access to the online location has been disabled by orders from any court of another country or territory on the ground of or related to copyright infringement;
- (e) whether the online location contains guides or instructions to circumvent measures, or any order of any court, that disables access to the online location on the ground of or related to copyright infringement;
- (f) the volume of traffic at or frequency of access to the online location.

Despite the inclusion of these factors, there remains uncertainty as to how they may be applied to determine liability, as there is with the determination of end-user criminal

liability under section 136(3A) of the Act (which provides that a person may be guilty of a criminal offence if the infringement is wilful, and its extent “significant”), and the availability of the general defence of fair dealing under section 35(2) of the Act – both of which also feature similar lists of factors for the court to take into account in determining applicability.

So, it remains to be seen if a forum website containing postings of peer-to-peer file sharing links but which also contains other non-infringing content can be said to have as its primary purpose the commission or facilitation of copyright infringement. Questions also remain as to the extent a website may be able to avoid being deemed “egregious” simply by carrying out various non-infringing activity as its co-purposes, and just how many peer-to-peer file sharing links need to appear on a forum or bulletin board before it can be considered to be “flagrantly infringing”. There are similar questions as to how the court will be able to ascertain if the website owner/operator is demonstrating a disregard for copyright generally. Concerns have also been raised that the Amendments impose overly onerous obligations on the website owners or operators to police user-generated content hosted on their sites over which they may have little control.

Who can claim relief?

Based on the Amendments, relief is only available to rights owners and their exclusive licensees. In *Odex Pte Ltd v Pacific Internet* [2008] 3 SLR(R) 18 (a case in which we had represented the Plaintiff), the High Court held that a sub-licensee has no civil right of action under the Copyright Act, including the right to apply to Court for pre-action discovery to obtain the identities of potential copyright infringers. Such rights and remedies are only available to the copyright owners and their exclusive licensees which obtain their licenses direct from the rights owners. This may not necessarily accord with the reality in rights licensing arrangements in the film and music industry, where often the party who bears the responsibility of policing and enforcing against infringing activity is the territorial sub-licensee, which often derives its licence from a Master licensee for the region as opposed to directly from the rights owner. In many cases, the Master licensee may not even be an exclusive licensee, and even if it is, may not want to be responsible for or may not be motivated into taking action in the territory where the infringement takes place. In such situations, the party that suffers loss as a result of the online infringing activity is the sub-licensee. The Amendments do not provide for non-exclusive licensees to make applications under the new regime, and sub licensees will therefore still have to rely on the support of the exclusive licensee or owner to make the application for an Order, which may not always be readily available.

Effectiveness against infringing end-users

Just as it takes two hands to clap, there would have to be a source of infringing content as well as an end user who accesses and downloads such content in order to give rise to infringing activity. The Amendments are geared towards the mechanism of site blocking in order to prevent access. For many end users, if one site is blocked, they will simply search for alternative sites which have not yet been blocked. More sophisticated users are able to create Virtual Private Networks which allow them to circumvent national restrictions and access websites regardless of whether they have been blocked by a local ISP. Blocking is only one remedy which may not have the desired effect.

The Government made clear during the consultation process that it wishes to avoid remedies that are too intrusive on internet users. While individual end users may already incur liability under the Copyright Act for illegal downloading, it is generally difficult and not cost-effective for copyright owners to obtain details of the infringers. Ongoing efforts at education too appear to be having little impact on consumers. The result is that the measures introduced by the Amendments will fall short of addressing a root cause of the problem by omitting to include measures aimed at the end user.

Measures adopted in other countries

In France, the government introduced a law in 2009 which became known as the “three-strikes policy”. Under this scheme, a government agency identified individuals who were illegally copying content and sent those individuals warning emails and letters. If the first two messages were ignored, the agency would summon the suspected offender for an interview and could refer him or her to a judge. The courts had the power to suspend internet activity for up to a month. In July 2013, the law was amended to withdraw the suspension as a remedy, and the penalty infringers now face is a fine ranging from 60 to 1500 Euros (approximately S\$100 to S\$2500).

The UK is seeking to introduce measures which would require the ISPs to send letters to customers informing them when their account is suspected of being used for online copyright infringing activity. If a customer receives three letters within a 12-month period, the ISP may provide anonymous information on request to copyright owners informing them that an unidentified customer’s account has been used to commit infringing acts. The copyright owner may then seek a court order requiring the ISP to reveal the identity of the customer in order that the copyright owner may then institute legal action against that customer for copyright infringement.

A non-statutory scheme has been in operation in the US which is operated by the ISPs themselves on a voluntary basis (although strongly supported by the US Government). Under this scheme, after providing 6 warnings to a customer, the ISP may implement measures such as reducing the customer's bandwidth. All of these measures recognise that a graduated approach - which first alerts the suspected infringer that his activity is illegal before imposing restrictions or fines upon them - may deter copyright infringing activity online without being overly draconian. Without any likelihood of a similar scheme being adopted in Singapore, the remedies of copyright holders remains limited to blocking the means by which end users can infringe copyright without targeting the end user. The effectiveness of targeting only those behind the infringing websites and not the end users can only be seen over time once these new measures have been put to the test.

Conclusion

The new measures being introduced by the Amendments will be welcomed by copyright owners as a potentially more effective means of protecting their work from flagrant infringement on the internet. As with all new efforts aimed at preventing online copyright infringement however, those who are intent on infringing copyright will keep finding ways to evade such measures. The effectiveness of these new measures and the extent they will be relied upon by rights owners in combating the high levels of infringing activity in Singapore will remain to be seen.

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