

GATEKEEPERS LIABILITY FOR INTERNET INTERMEDIARIES IN MALAYSIA: WAY FORWARD

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ABSTRACT

The advent of the Internet has changed how information and content were created, accessed, used, and distributed digitally. The Internet provides diverse opportunities for subscribers, users, private or business operators, and the public at large to enjoy fast and cheap global distribution and sharing of information, knowledge, and entertainment. Internet intermediaries have primarily remained the gateway through which internet users can access and enjoy the vast flow of data, digital information, as well as content in cyberspace. Unfortunately, these internet intermediaries are at the receiving end of many legal disputes involving violations of intellectual property rights, in particular copyright infringements all over the world. Being the 'gatekeeper' to the Internet and web-based services, the internet intermediaries were arguably best placed to block and remove infringed contents. The imposition of liability to internet intermediaries under the 'gatekeeper' rationale is to identify that the intermediaries are capable of detecting the misconduct and sanction the misconduct. The question is, to what extent? In 1998, a safe harbour was created for internet intermediaries by the U.S. Digital Millennium Copyright Act (DMCA), provided that they complied with the obligatory duty to take down the infringing materials once they received the notice of takedown request. This approach has been followed worldwide, including Malaysia, where the internet intermediaries are bound by the Malaysian Copyright Amendment Act 2012 and the Malaysian Content Code to take down or block access to infringing content to avoid liability. Using doctrinal legal research, this paper analyses the applicability of the gatekeepers' liability for internet intermediaries in Malaysia. It examines the arguments placed forward for the liability of such intermediaries for infringing third-party content. The paper ends with a brief comparison of notice and takedown procedures practised in the US and Malaysia before concluding with some suggestions on the way forward.

Keywords: Internet intermediaries, copyright infringement, gatekeeper's liability, notice and takedown, safe harbour.

INTRODUCTION

Today, the rapid growth of the technology and the ever-increasing access to the Internet has made it possible to obtain and share data and information with a mere click of a button and at a minimal cost. However, such technology comes along with its drawbacks in the forms of various violations of intellectual property, including copyright infringement. The ability to transmit, duplicate, and later share via the Internet such data or information has led to infringements of copyright on a more far-reaching scale than anyone could have conceived before (Salow, 2001). As a result, this has caused the loss of billions of dollars in revenue. A study conducted by DTVE Reporter reported that the amount of revenues lost to online piracy alone has increased sharply to nearly USD31.8 in 2016 and expected to hit USD52 billion by the year 2022 (DTVE Reporter, 2018). Internet intermediaries, such as internet access and service providers (ISPs) and web hosting providers, play a significant role here as they provide their subscribers with access as well as a venue to their subscribers to download, upload or transmit such data or information, including infringing copyrighted materials.

It has been widely accepted during the early days of the Internet that internet intermediaries should be free from regulation by the government and be left self-governed. However, holders of copyrighted content started to hold these internet intermediaries to be liable for infringement of their subscribers as an attempt to prevent infringement and to recover their losses. In one of the first cases to decide on the liability of internet intermediaries for online copyright infringement, *Religious Technology Center v. Netcom On-Line Communications Services, Inc.* (907 F. Supp. 1361 (N.D. Cal. 1995)), the court held that although the internet intermediary is not directly liable for copyright infringement committed by its subscribers, it might be contributorily liable if the internet intermediary knew or should have known of the infringement. The reason being, as the gatekeeper to the Internet and web-based services, these intermediaries are best placed to monitor the activities of their subscribers and, as such, are able to prevent copyright infringement by them (Abd Ghani, Ismail, & Daud, 2017; Cooray, 2015). The situation continues until the introduction of a safety net (a 'safe harbour') for the internet intermediaries under s.512 of the United States' Digital Millennium Copyright Act 2000 (hereinafter referred to as 'DMCA') 1998. S.512 DMCA provides for the immunity to the internet intermediaries if they comply with the mandatory obligation to take down the infringing materials once the copyright holders give notice of takedown requests (known as the notice and takedown procedure). The procedure was later adopted in the EU Directive on Electronic Commerce (Directive 2000/31/EC) and other jurisdictions, including Malaysia vide the Malaysian Copyright Amendment Act 2012. Since then, the safe harbour provisions and the notice and takedown procedure have been instrumental in the policing of online copyright infringements. Many studies have been conducted that have appraised the effectiveness of notice and takedown procedures in relation to internet intermediaries' liability for online copyright infringement, yet, there are still uncertainties as to the extent of such liabilities as well as the legal characteristics of allegation for secondary liability (Bhatnagar & Mishra, 2009; Cooray, 2015; Daud, Azmi, & Ismail, 2018; Erickson & Kretschmer, 2019; Mlynar, 2014). There is still no harmonisation over these issues, and many countries still face obstacles in finding a fair balance between the competing rights of copyright owners, internet intermediaries, and users.

This paper begins by providing some background and context on the current framework in imposing liability to internet intermediaries, the definition of internet intermediaries, and followed by the discussion on the applicability of the gatekeepers' liability to internet intermediaries for copyright infringement by third parties (the subscribers). It then continues to provide an in- depth and comprehensive analysis of the safe harbours as outlined by the DMCA and Malaysian Copyright Amendment Act 2012 as well as the Content Code. The paper ends with a brief comparison of notice and takedown procedures practised in the US and Malaysia before concluding with some suggestions on the way forward.

METHODOLOGY

The methodology adopted by this paper was a doctrinal legal methodology. The methods of doctrinal research are characterised by the study of legal texts, and for this reason, it is often described colloquially as 'black-letter law' (McConville & Wing, 2007). The doctrinal methodology, being rigorous, evaluative and critical, is capable of achieving the objectives of this paper to investigate the applicability of the gatekeepers' liability for internet intermediaries as well as to analyse the legal procedure on notice and takedown imposed on the internet intermediaries as practised in the U.S. and Malaysia. Primary data from relevant statutes as well as case laws from the United States and Malaysia are examined and analysed, such as the U.S. Digital Millennium Copyright Act 1998 (DMCA) and the Malaysian Copyright Act 1987, the Copyright (Amendment) Act 2012, the Communication and Multimedia Act 1998 (MCMA), the Communications and Multimedia Content Code (the Content Code). Secondary sources, including textbooks, academic journals, and law reports and newspaper reports, are also used throughout the discussions.

CURRENT FRAMEWORK IN IMPOSING LIABILITY TO INTERNET INTERMEDIARIES

Before proceeding with the discussion on the liability of internet intermediaries, this paper attempts to define who are internet intermediaries. It is crucial to provide a definition (as well as a categorisation of the roles) of the internet intermediaries so as to determine the types of infringement and the immunity available to the internet intermediaries for liabilities that may be alleged for them. However, it is noted that the internet intermediaries may also play more than one role, and as such, the categories may not be clear cut as hoped.

Defining Internet Intermediaries

Internet intermediaries play a vital role in Internet transactions. In general, internet intermediaries perform various functions in facilitating the use of the Internet and offer a variety of services such as access to the Internet, hosting of information on the Internet, network services, etc. In 2010, an OECD report prepared by Karine Perset, offered a definition of internet intermediaries and attempted to identify the categories of internet intermediaries. According to the report, internet intermediaries "bring together or facilitate transactions between third parties on the Internet. They give access to, host, transmit and index content, products, and services originated by third parties on the Internet or provide Internet-based services to third parties". The report then listed the following as fitting this definition:

	Category of Internet Intermediaries	Examples
1	Internet access and service providers (ISPs) (Main internet intermediaries)	Verizon, Comcast, NTT, Internet Initiative Japan, BT, Free.fr and mobile operators offering Internet access such as Vodafone, Orange, T-mobile, MNT
2	Web hosting, data processing, and content delivery providers, including domain name registrars	Navisite, Akamai, OVN, Easyspace, Packspace, Register.com, Go Daddy, GMO Internet Inc.
3	Internet search engines and portals	Google, Yahoo, Baidu, Naver, MSN
4	E-commerce intermediaries, where these platforms do not take title to the goods being sold	Amazon, eBay, Ali Baba, Priceline.com
5	Internet payment systems	Visa, Paypal, MasterCard
6	Participative networking platforms, which include Internet publishing and broadcasting that do not themselves create or own the content being published or broadcast	Facebook, LinkedIn, YouTube, Ohmynews

[Source: Perset, K. (2010). *The Economic and Social Role of Intermediaries*. OECD]

In a study conducted on the role played by internet intermediaries in online regulation, internet intermediaries have been classified into several different categories depending on the role that they play in the online communication or transaction chain. The varying roles played by the internet intermediaries have frequently impact on the level of their involvement in the primary activity – ranging from being entirely passive intermediaries, which simply provide the setting for the interactions (e.g., providing access or connectivity to the Internet, caching or hosting), to those that take an active facilitatory role, which in turn is likely to have consequences for liability (Rowland, Kohl, & Charlesworth, 2016). Indeed, the role played by the internet intermediaries have evolved as a result of the Internet's phenomenal development, and this may lead to the debate regarding their liability to online copyright infringement by their subscribers. In two WIPO studies on the changing role of internet intermediaries and the liability of internet intermediaries, the definition of internet intermediaries includes not only those

intermediaries who are considered as 'mere conduits', but also those who are involved in the intermediation activities in the broad sense, namely that of Internet search engines which locate and facilitate access to online content via hyperlinks as well as those activities generally referred to as the "Web 2.0 intermediation activities" (Fernández-Díez, 2010; Seng, 2010).

The provisions on internet intermediary are also provided in the EU Directive on Electronic Commerce (Directive 2000/31/EC). However, the EU Directive does not explicitly define who is an internet intermediary but instead, provides a combinational explanation of "service provider" and "information society service". Article 2 of the EU Directive defines a 'service provider' as any natural or legal person providing an 'information society service', and provides that an 'information society services' as services within the meaning of Article 1(2) of Directive 98/34/EC as amended by Directive 98/48/EC. Article 1(2) of Directive 98/34/EC then explains that 'any service normally provided for remuneration, at a distance, by electronic means (i.e., using electronic equipment for the processing (including digital compression)), and at the individual request of a recipient of services'. The EU Directive provides exemptions to the liability of 'intermediary service provider' for "mere conduit", "caching" and "hosting" activities (see recital 43, 44, 45 and 46 of EU Directive).

In the U.S., the Digital Millennium Copyright Act (DMCA) does not define the term 'internet intermediary'. On the other hand, s.512 of the DMCA provides the definition of a 'service provider' in two-folds by incorporating it in two subsections, namely s.512(k)(1)(A) and (B). Under s.512(k)(1)(A), for the purpose of section 512(a), that is transitory digital network communication, the term 'service provider' refers to 'an entity offering the transmission, routing or providing of connections for digital online communications, between or among points specified by a user, of the material of the user's choosing, without modification to the content of the material as sent or received'. On the other hand, s.512(k)(1)(B), for the purpose of section 512(b), (c) and (d), provides that the term 'service provider' refers to 'a provider of online services or network access or the operator of facilities, therefore, and includes an entity described in subparagraph (A)'. The second definition, however, seems much broader compared to the first one as it extends to a provider of online internet services such as system caching, hosting, and information location, in addition to access to the Internet. It has been observed that the DMCA's definition of a service provider includes any entity providing Internet to their customers, and broad enough to include not only all existing internet intermediaries but also to embrace technically new providers in the future (Mishra & Dutta, 2009).

In Malaysia, s.43B of the Copyright (Amendment) Act 2012, just like its counterpart in the U.S., defines the term of a 'service provider' as 'a person who provides services relating to, or provides connections for, the access, transmission or routing of data; and a person who provides, or operates facilities for, online services or network access. Here, based on the definition given, it is clear that a service provider is an important category of intermediaries without which internet users cannot gain access to online content. The Communications and Multimedia Act 1998, on the other hand, provides a classification of a services provider into four categories, namely, network service providers ('NSP'); network facilities providers ('NFP'); applications service providers ('ASP'); and content applications service providers ('CASP'). The Content Code, on the other hand, refers to following internet intermediaries, namely, internet access service providers ('IASP'), internet content hosting providers ('IChP'), online content developers ('OCD'), online content aggregators ('OCA') and link provider ('LP').

As mentioned earlier, the definition and the categorisation for the internet intermediaries is vital so as to determine the various types of infringement accrues to the internet intermediaries. Hence, the internet intermediaries may be potentially liable for online copyright infringement depending on the different roles or services provided by them, whether such liability is primary or secondary, direct or indirect, or vicarious or contributory, as well as the immunity that might be available to them. This paper, however, focuses on internet intermediaries providing Internet access and services as well as data processing and web-hosting service and limits its scope to liability to copyright infringements by the third party.

Gatekeepers Liability for Internet Intermediaries

Although in the early stage of the development of the Internet, the internet intermediaries have been regarded merely as a conduit that passively allowed for the transmission of data and, therefore, not responsible for the nature of such transmission, this 'conduit immunity' has been increasingly eroded. The main reason for liability is imposed on such internet intermediaries lies in the fact that these intermediaries can be considered to be the gatekeeper to the Internet and web-based services. According to Cambridge Advanced Learner's Dictionary & Thesaurus (2020), the term 'gatekeeper' refers to 'a person whose job is to open and close a gate and to prevent people from entering without permission; or someone who has the power to decide who gets particular resources and opportunities, and who does not'. As the gatekeepers, the internet intermediaries can block or stop access and identify the origin of the infringing materials, or otherwise, enforce others to do the same. These intermediaries are presumed to have the capability to determine whether the infringing materials, including copyright-infringing materials, are being transmitted over their networks and stored in their servers. They are also considered as the middlemen and, to some extent, responsible for infringing activities conducted by their subscribers. Here, the liability of internet intermediaries could be a direct liability, strict liability, contributory liability, or vicarious liability for copyright infringement performed by their subscribers. As such, the intermediaries are argued as the ideal body to monitor the Internet and to take legal measures against the infringers, and should they fail to do so, they have to be liable somewhat for the infringement (Cooray, 2015; Hua, 2014; Kumar, 2014).

According to Cooray (2015), the method in which the internet intermediaries acquire such liability has been connected with the Kraakman's 'gatekeeper liability'. Here, the term 'gatekeeper liability' is defined as the liability imposed on private parties who are able to disrupt misconduct by withholding their support or assistance from the wrongdoers. Such support or assistance might include a specialised service or form of certification, which is the prerequisite for the wrongdoer to succeed and is the 'gate' that

the gatekeeper keeps. Kraakman (1986) in Zittrain (2006) and Cooray (2015), has proposed four evaluative criteria for successful gatekeeping, namely (a) serious misconduct that possible penalties cannot deter; (b) missing or inadequate private gatekeeping incentives; (c) gatekeepers who can and will prevent misconduct reliably; and (d) gatekeepers whom legal rules can induce to detect misconduct at a reasonable cost. Thus, the imposition of the gatekeeper liability upon the internet intermediaries is to associate that these internet intermediaries are capable of identifying the misconduct and stop the misconduct. Kraakman's argument that such gatekeeper liability is based on the tort doctrines of vicarious liability which provides 'incentives for the one held liable for the actions of another to serve as a de facto 'cop-on-the beat', a metaphor that can be traced back to Jeremy Bentham's conception of *respondeat superior* (Zittrain, 2006). However, detecting and preventing the misconduct is not the only ground for such imposition of liability to the intermediaries as Kraakman has implied that the imposition of liability under the gatekeeper rationale is based entirely on balance between the misconduct's social cost and how effectively the intermediary can punish the misconduct. However, it is noted that while Kraakman's own work was directed at financial and other types of wrongdoings or infringements that can be curtailed through the gatekeeping functions of lawyers and accountants, many Internet and cyberlaw disputes are agreeable to precisely this sort of framework. The regulators have often been to see if gatekeeping can successfully be applied to achieve a regulatory end on the Internet by imposing close monitoring over the internet intermediaries to detect and prevent infringement on the Internet.

Despite the rational and motivation in the imposition of gatekeepers' liability on the internet intermediaries discussed earlier, this approach is not without negative implications. Concerns have been raised with regard to the innovation costs both of rendering the intermediaries liable for third party infringement and of direct state or government intervention in defining the future of the Internet as a generative platform. Zittrain (2006), for example, suggested approaching intermediary liability for wrongdoing as a matter of corporate responsibility, instead of as a good Samaritan defence through which internet intermediaries are welcome but not duty-bound to make calls on the legality or illegality of online content. Netanel (2003) also argued that the intermediaries would tend to overreact by removing or blocking all related content in an attempt to avoid any possible suggestion of liability or by removing content simply because copyright owners claim that it infringes their copyright.

Safe harbour for Internet intermediaries – Position in the U.S.

The role of internet intermediaries as mere conduits and the issue of the efficacy and feasibility of such regulation over the internet intermediaries to curtail illegal and infringing contents on the Internet have been debated in many discussions. Although some disapprove of liability to be imposed on the internet intermediaries, many are of the view that these intermediaries should be regulated in some way to ensure that they involve actively in combating illegal and infringing contents, including copyright-infringing materials. One of the most common methods of online copyright enforcement used in this regard is the notice and takedown procedure, where a copyright owner may issue a notice to an internet intermediary or a website host to take down or remove copyright-infringing materials hosted on its websites. Depending on the circumstances, the internet intermediary may be compelled upon receiving the takedown notice to remove the infringing content from a hosted website or an entire website, for a temporary or extended period of time (Michels, 2013). In return, the internet intermediary will be granted an immunity (safe harbour) from liability. This notice and takedown procedure was first introduced in 1998 in the United States by virtue of the Digital Millennium Copyright Act (DMCA). The DMCA was signed into law on October 28, 1998. It addressed a number of significant copyright-related issues, including online copyright infringement liability under Title II, which add a new section 512.

Section 512 of the DMCA introduced a limitation on liability (a safe harbour) for an internet intermediary against liability for third-party's copyright infringement where the internet intermediary complies with the notice and takedown procedure. The term 'notice' here refers to information received by an internet intermediary that indicates infringement is occurring on one of its systems. The term 'takedown', on the other hand, refers to the process whereby an internet intermediary removes or disables access to material stored in or travelling through its networks (Bhatnagar & Mishra, 2009). Here, the safe harbour envisaged in s.512 DMCA limits the liability of the internet intermediary in four general categories of internet intermediary activities, namely: 1) transitory digital network communications, 2) system caching, 3) storage of information systems or networks at direction of users, and 4) information location tools (s.512(d)). Each limitation entails complete protection from monetary damages and restricts the availability of injunctive relief in various respects (see s.512(j)). The failure of the internet intermediary to qualify for any of the limitations in s.512, however, does not necessarily make it liable for copyright infringement. Here, the copyright owner must establish that the online intermediary has infringed. On the other hand, the internet intermediary may still avail itself of any of the defences available to copyright defendants generally, such as fair use.

- i. The first safe harbour provided under s.512(a), provides that an internet intermediary will not be liable for infringement of copyright 'by reason of the provider's transmitting, routing, or providing connections for, material through a system or network' controlled or operated by or for the internet intermediary, or by reason of intermediate and transient storage of that material in the course of transmitting, routing or providing connections'. It further provides that the following conditions are met, namely, that the transmission of the material was initiated not by the internet intermediary, the transmission or routing is carried out through an automatic technical process without involvement by the internet intermediary, the selection of the recipients of the material is not made by the internet intermediary, no copy is made by the internet intermediary, and that no modification is made of the content of the material transmitted through the system or network (see s.52(a)((1),(2),(3),(4) and (5)). The first type of safe harbour can be characterised as 'passive conduit' activities.
- ii. The second safe harbour, provided under s.512(b), provides that the internet intermediary will not be liable for infringement of copyright 'by reason of the intermediate and temporary storage of material on a system or network' controlled or operated by or for the internet intermediary where the material is made online by another person; the material

- is transmitted from that other person to another person at his direction, and the storage is carried out through an automatic technical process'. Here, the second type of safe harbour concerns 'system caching', that is the process by which the internet intermediary temporarily store material on a system or network as part of managing network performance, to reduce network congestion generally and speed access to popular sites. The internet intermediary will be exempted from liability if the following conditions are met, including that the transmission of the material was made available online by other person and transmitted without modification by the internet intermediary, the storage is carried through an automatic technical process, and that the internet intermediary complies with the rules concerning refreshing, reloading or other updating of the material when specified by the person making the material available online (see s.512(b)(1) and (2)).
- iii. The third safe harbour under s.512(c), provides that the internet intermediary will not be liable for infringement of copyright 'by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the internet intermediary provided that the internet intermediary has no actual knowledge, is not aware that the material or an activity using the material on the system or network is infringing, and that upon obtaining knowledge or awareness, has acted expeditiously to remove or disable access of such material'. The internet intermediary also must not receive any financial benefit directly attributable to the infringing activity (see s.512(c)(1), (2), and (3)). Examples of such storage include providing server space for a user's web site (web hosting) or for a chat room.
 - iv. The fourth safe harbour under s.512(d) provides that the internet intermediary will not be liable for infringement of copyright 'by reason the intermediary referring or linking users to an online location containing infringing material or infringing activity by using information location tools' (such as a directory, index, reference, pointer or hypertext link). Here, the internet intermediary must not know or aware that the material is infringing and that upon obtaining knowledge or awareness, the internet intermediary must act expeditiously in removing or disabling access to such material. Again, the internet intermediary also must not receive any financial benefit directly attributable to the infringing activity (see s.512(d)(1), (2), and (3)).

However, to be eligible for any of these safe harbours, the internet intermediary must fulfill two more conditions; namely, it must adopt, reasonably implement, and inform the subscribers of a policy for terminating in appropriate circumstances the account of subscribers who are repeat infringers. The internet intermediary also must accommodate and not interfere with 'standard technical measures'. These conditions are provided under s.512(i)(1)(A) and (B). The internet intermediary must also satisfy the specific criteria for each of the four safe harbours.

It is clear that the safe harbours under s.512 DMCA provides different types of exemptions depending on the kind of functions or services performed by internet intermediaries. The scope of the exemption is broadest in the case of intermediaries that "are acting as mere conduits" under s.512(a). On the other hand, for internet intermediaries of a type specified in s.512(b), s.512(c), and s.512(d), exemption from copyright liability is contingent on the implementation of the notice and takedown procedure. Here, the process starts, for example, when an internet intermediary hosting the infringing material on its website, receives a notice of the claimed infringement. Upon receipt of such a notice which meets the requirements of s.512(c)(3), the intermediary must 'expeditiously remove or disable access of such material'. Here, the DMCA, by s.512(g)(1), protects an internet intermediary from liability that may arise on account of its removing or disabling access of materials in 'good faith'. However, to be eligible of such protection, the internet intermediary must fulfill the conditions laid down in s.512(g)(2)(A),(B) and (C) namely, to take reasonable steps to promptly notify the subscriber that it has removed or disabled access to the material. Upon receipt of counter-notice, the internet intermediary must promptly provide the person who gives the notice, a copy of the counter-notice, and informs that person that it will replace the removed material or cease disabling access to it in 10 business days. The internet intermediary must then replaces the removed material and ceases disabling access to it not less than 10, nor more than 14 business days following receipt of the counter-notice.

The DMCA, by s.512(f), also provides that a person who knowingly misrepresents that material is infringing or that material was removed or disabled by mistake or misidentification, will be liable for any damages, including costs and legal fees incurred by the alleged infringer, by any copyright owner, or by an internet intermediary who is injured by such misrepresentation, as a result of the intermediary relying upon such misrepresentation in removing or disabling access to the material or activity claimed to be infringing, or in replacing the removed material or ceasing to disable access to it.

However, this procedure of notice and takedown implemented by internet intermediaries upon request by a copyright holder has been fallen under criticism due to its potential negative impacts on the rights and creative uses of Internet users. Erickson & Kretschmer (2019) pointed out that while the procedure of notice and takedown is an effective measure to stop direct piracy of content, neither the copyright holders nor the internet intermediaries have developed the due process for making a judgment about a fair derivative or transformative use. There were also criticisms on the lack of clarity on the knowledge or awareness requirement ('the red flag test') to determine the safe harbour eligibility for an internet intermediary, as well as inconsistency on the knowledge standard for internet intermediary's secondary liability for copyright infringement (Sadeghi, 2013; Sirichit, 2013). Further, it has been argued that the broad scope of the takedown procedure disrupts the balance between the copyright owners and the internet intermediaries. It also may lead to abuse of the system by the copyright owner and increases the risk of a wrongful takedown. Internet intermediaries may simply choose to comply with a takedown notice, rather than risk safe harbours protection by standing up for a user who may indeed benefit from copyright protection (Bar-Ziv & Elkin-Koren, 2017; Tehrani & Amoozgar, 2012; Urban, Karaganis, & Schofield, 2017)

Safe harbour for Internet intermediaries – Position in Malaysia

The specific provisions on the internet intermediaries' liability, as well as the notice and takedown procedures with regards to copyright infringement in Malaysia, are provided for by the Malaysian Copyright Act 1987 (hereinafter referred to as CA 1987) (vide the Copyright (Amendment) Act 2012). However, the provisions on the internet intermediaries' liability, in general, are covered by the Malaysian Communications and Multimedia Act 1998 (CMA 1998) and the Communications and Multimedia Content Code (the Content Code), respectively.

1) Notice and takedown under the Copyright Act 1987 vide the Copyright (Amendment) Act 2012

The provisions on the liability of internet intermediaries for online copyright infringement, as well as the notice and takedown procedures, were first introduced in Malaysia vide the Malaysian Copyright (Amendment) Act 2012, which added new Part VIB into the Copyright Act 1987 adding new s.43B to s.43I. These new provisions define who are the internet intermediaries to be subjected to the notice and takedown procedure and explain the type of exemptions from liabilities afforded to them once they undertake the notice and takedown procedure (Abd Ghani et al., 2017). These provisions are yet to be tested in the court of law.

Like s.512 DMCA, the type of liabilities and exemptions to be enjoyed by the internet intermediaries in Malaysia under Part VIB of the Copyright Act 1987, depending on the kind of functions performed by these internet intermediaries. The definition given under s.43B states that (a) for the purpose of s.43C, as a person who provides services relating to, or provides connections for, the access, transmission or routing of data; and (b) for the purpose of Part IVB under the Act other than s.43C, a person who provides, or operates facilities for, online services or network access. Abd Ghani et al. (2017) observed that the definition provided under s.43B distinguishes the internet intermediaries into two categories. The first, under category (a), are those internet intermediaries who are considered as a mere conduit. The obligation of those who fall under category (a) is relatively minor since their connection to the internet content is only technical, namely, for providing connection, access, transmission, or routing. The second, under category (b), on the other hand, are those internet intermediaries who have a more active role. Hence, their obligations are more stringent in relation to notice and takedown procedure as they operate online facilities and activities, including system caching, storage, and information location tool, and have the power to stop the further distribution of the infringing materials.

The first safe harbour under is provided under s.43C, where an internet intermediary will not be liable for infringement of copyright in any work if the infringement occurs 'by reason of the transmission, or routing, or the provision of connections, by the service provider of an electronic copy of the work through its primary network; or any transient storage by the service provider of an electronic copy of the work in the course of such transmission, routing or provision of connections'. To be eligible for the exemption under this section, the internet intermediary must satisfy the following conditions, namely, that the transmission of the electronic copy of the work was initiated by another person, the transmission, routing, provision of connections or storage is carried out through automatic technical process without any selection by the internet intermediary, the internet intermediary does not select the recipient of the electronic copy of the work, and that there is no modification on the content of the electronic copy of the work by the internet intermediary other than part of a technical process (see s.43C(1)(a)(b) (A),(B), and (C)). Where the infringing content has been identified to come from an online location outside Malaysia or from a specified account, the court may order the internet intermediary to take reasonable steps to disable access to that online location or terminate the specified account (see s.43C(2)).

The second safe harbour is provided under s.43D, where an internet intermediary will not be liable for infringement of copyright for the making of an electronic copy of the work if it is from an electronic copy made available on an originating network, through an automatic process, in response to an action by a user of its primary network, or to facilitate efficient access to the work by a user. However, to be eligible for the exemption, the internet intermediary must not make any substantive modification other than a modification made as part of a technical process. The internet intermediary must also satisfy such other conditions as the Minister may determine in relation to access to the electronic copy by users of its primary network, the refreshing, reloading or updating of the electronic copy, and the non-interference with the technology used at the originating network consistent with industry standards in Malaysia. Under s.43D(2), the internet intermediary will not be held liable under the said section if the copyright owner or his agent, has not given any notice under s.43H.

The third safe harbour is provided under s.43E, where an internet intermediary will not be liable for infringement of copyright in any work where the infringement occurs 'by reason that the electronic copy of the work is stored at the direction of a user of its primary network, or where the internet intermediary is referring or linking a user to an online location on an originating network at which the electronic copy of the work is made available by the use of an information location tool or service (such as a hyperlink, a directory or a search engine). To be eligible of the exemption, the internet intermediary must not have actual knowledge that the electronic copy of the work is infringing, or is unaware of the facts or circumstances from which the infringing activity is apparent. The internet intermediary must also show that it has not receive any financial benefit directly attributable to the infringement of the copyright in the work; and that it does not have the right and ability to control the infringing activity (see s.43E(a) and (b)). Upon receipt of a notice on any infringement under s.43H, the internet intermediary must respond within the time specified to remove or disable access to the material that is claimed infringing.

The fourth safe harbour is provided under s.43F, where an internet intermediary acting in compliance with s.43H is provided with an exemption from liability in respect of any action taken in good faith concerning the removal of an electronic copy of a work from the internet intermediary's primary network, or the disabling of access to any electronic copy of a work on the internet intermediary's primary network or another network. The phrase 'any action' will presumably include not only copyright liability

but also includes contractual and other civil liabilities. However, if as a result of a settlement between the copyright owner and the person who made the electronic copy of the work available, where the internet intermediary receives a written notification to restore the electronic copy, the internet intermediary must, as far as practicable, to restore the electronic copy of the work, or restore access to the electronic copy of the work, on its primary network or another network.

The Malaysian internet intermediary's obligations concerning the notice and takedown procedure are covered under s.43H of the CA 1987. Here, s.43H provides that a copyright owner who has been infringed to issue a notice or notification to the internet intermediary of the network to remove or disable access to the electronic copy on its network (s.43H(1)). An internet intermediary who has received such notification as aforesaid is then required to remove or disable access to the infringing electronic copy on its network within 48 hours from the time of receipt of the notification (s.43H(2)). Otherwise, the internet intermediary may be held liable for the infringing activity. Here, the internet intermediary may be liable as a contributory infringer for enabling the infringing activity to take place. However, the person whose electronic copy of the work was removed or to which access has been disabled may issue a counter-notification to the internet intermediary, requiring the latter to restore the electronic copy or access to it. The internet intermediary must promptly provide a copy of the counter-notification to the issuer of the notification and inform the latter that the removed material or access to such material will be restored in ten business days. Unless the internet intermediary receives further notification from the issuer of the notification that he has filed an action seeking a court order to restrain the issuer of the counter-notification from engaging in any infringing activity concerning the material on the internet intermediary's network, the internet intermediary is required to restore the removed material or access to it not less than ten business days after its receipt of the counter-notification (s.43H(4)(a) and (b)). It is clear that the takedown procedure provided under s.43H only arises upon notification from the copyright owners. The relevant provision does not require the internet intermediaries to remove or disable access to the infringing material though they may have received information about the possibility of infringement from events taking place elsewhere. The implication of the above is that the internet intermediaries are only required to take action in taking down or removing infringing materials upon receipt of a notification from the copyright owners.

One crucial safeguard provided under Malaysian law is the imposition of a penalty for those who give a false notice (see s.43I of the 1987 Copyright Act). For this reason, any person making a false notice is guilty of an offence under that section and shall be liable, upon conviction, for a fine not exceeding RM100,000 or imprisonment for a period not exceeding five years or both, and shall be liable to reimburse any person suffering any loss or harm arising from such notification. Furthermore, this section specifies that a person making a comment outside of Malaysia may be viewed as if the crime was committed in Malaysia. This provision will reduce the number of false or unjustified notice and as such, provide a safeguard for both copyright owners as well as the Internet intermediaries.

2) *Notice and takedown under the CMA and the Content Code*

The provisions on the internet intermediaries' liability, in general, are covered by the Malaysian Communications and Multimedia Act 1998 (hereinafter referred to as CMA 1998) and the Communications and Multimedia Content Code ('the Content Code'), respectively. Although there is no specific provision in the CMA 1998 that provides for notice and takedown procedure as a specific measure to counter content risks, the Malaysian Communications and Multimedia Commission ('the MCMC') is taking such initiative under the broad provision of s. 263 of the CMA 1998, which reads that "a licensee shall use his best endeavour to prevent the network facilities that he owns or provides or the network service, applications service or content applications service that he provides from being used in, or in relation to, the commission of any offence under any law of Malaysia". The Content Code, which was enacted in 2001 and established by virtue of s.94 of the CMA 1998, was introduced as a set of industry guidelines on the usage and dissemination of content for public consumption. As far as internet intermediary liabilities are concerned, Part 5 of the Content Code, prohibits the internet intermediaries, namely, the internet access service providers ('IASP'), internet content hosting providers ('ICHP'), online content developers ('OCD'), online content aggregators ('OCA') and link provider ('LP') (herein 'Code subjects') to block access to or remove 'prohibited content' if there has been a complaint against such content. Abd Ghani et al. (2017) pointed out that the definition of 'prohibited content' under Part 5 of the Content Code is broad enough to cover all infringing content including content which infringes other parties' copyright or contains an element of fraud. Hence, the notice and takedown procedure laid down in Part 5 of the Content Code applies equally to copyright-infringing material.

It should be noted that the Content Code was not enacted as enabling legislation but merely as a guideline. As such, industrial compliance to the Content Code is not mandatory, as provided in s.92 of the CMA 1998. Nevertheless, industrial compliance with the Content Code could serve as a legal defence 'against any prosecution, action or proceeding of any nature, whether in a court or otherwise' (see s.98(2) of the CMA 1998). (Daud & Jalil, 2017). In this regard, although Malaysian internet users are not directly part of the Code's subject, compliance can be achieved through the application of Communications and Multimedia Act 1998 (hereinafter referred to as 'CMA 1998') which inevitably binds all Malaysian citizens. Consequently, internet intermediaries will only be required to filter and monitor online content upon receiving direction from MCMC, and this usually relates to assisting in investigations and prosecutions. Unless required by the law, the internet intermediaries have no active duty to monitor any prohibited content that passes through their domains. This is confirmed by the 'innocent carrier' provisions in Part 5 of the Content Code that does not place liability onto the internet intermediaries for hosting prohibited content since they were merely the content conduit.

The process of notice and takedown starts when the Complaints Bureau of the Communications and Multimedia Content Forum (CMCF) notifies the internet intermediaries, for example, the IASP that its user or subscriber is providing prohibited content on

their respective platforms. After the IASP receives such notification from the Complaints Bureau, it is required to identify the location of the prohibited content and instruct its subscriber to takedown the prohibited content within two working days. Part 5 of the Content Code further provides that subscribers must remove the prohibited content within 1 to 24 hours from the time of notification. In the event where subscribers have failed to remove the prohibited content within the stipulated period, the internet intermediaries are authorised to suspend or terminate the subscribers' access account. However, for link providers, they are required to remove the prohibited content within 24 hours after notification by the Complaints Bureau. It is enlightening to note that the notice and takedown procedure in the Content Code provides a specific period for both service providers and subscribers to respond (Daud et al., 2018).

However, there are some criticisms on the notice and takedown procedure laid down in the Content Code. According to Daud et al. (2018), Part 5 of the Content Code omits to consider the position adopted in the US DMCA where a content provider is given the opportunity to justify why the content complained of should not be removed. Besides, the act of removing material or blocking access is centralised with the MCMC taking action and not the internet intermediaries. Any complaint related to online infringement including copyright infringement will be channelled to the Ministry of Domestic Trade, Cooperatives and Consumerism acting as the regulator, who will then pass the complaint to the MCMC acting as the final authority to remove or block access to infringing sites. Although it is noted that the complaints by copyright owners will be investigated and verified before further action can be taken and thus reducing the possibility of abuse that may arise out of the notice and takedown procedure, the drawback is that such system can be seen as a form of control or top-down blocking system, and the MCMC may be accused of policing the internet (Daud et al., 2018).

ANALYSIS AND CONCLUSION

The implementation of notice and takedown procedure in Malaysia has brought the Malaysian copyright regime to restrict or disable access to copyright-infringing materials in line with that established in the United States as well as other jurisdiction. The safe harbour adopted by Malaysia has acknowledged the limited liability of internet intermediaries in respect of copyright infringement, subject to the functions or activities performed by them, and the full compliance of the internet intermediaries to the mandatory notice and the takedown procedure. Hence, the internet intermediaries must satisfy the various conditions set out in the relevant provisions in the Copyright Act 1987 and the Content Code to be eligible for the exemptions provided under the respective provisions.

A critical distinction between the notice and takedown procedure practiced in Malaysia and the United States is that the notice and takedown procedure in Malaysia occurs only after the internet intermediaries receive notification from the owners of the copyrights. The Malaysian law on notice and takedown does not allow internet intermediaries to remove or disable access to the infringing material even though they might have obtained details about the likelihood of infringement from other sources or events. Unlike their United States counterparts, Malaysian internet intermediaries also are not required to perform any sort of independent surveillance except to investigate complaints from the copyright owner that give them some freedom to operate their business and not unduly burdened with unnecessary policing (the duty of the gatekeepers).

However, there are some drawbacks in the notice and takedown procedure laid down in the Copyright Act 1987 and the Content Code. According to Daud et al. (2018), Part 5 of the Content Code omits to consider the position adopted in the US DMCA where a content provider is given the opportunity to justify why the content complained of should not be removed. In addition, the act of removing material or blocking access is centralised with the MCMC taking action and not the internet intermediaries. Any complaint related to copyright infringement will be channelled to the Ministry of Domestic Trade, Cooperatives and Consumerism acting as the regulator, who will then pass the complaint to the MCMC acting as the final arbiter and has the authority to remove or block access to infringing sites (Daud et al., 2018). There is also the lack of clarity on the knowledge requirement ('the red flag test') to determine the safe harbour eligibility for an internet intermediary, as well as inconsistency on the knowledge standard for internet intermediary's secondary liability for copyright infringement under the present framework.

As a way forward, the current framework for internet intermediaries' liability in copyright infringement is already in place but still needs some rethinking and reshaping. While the distinctive and creative features of the Malaysian approach should be maintained, in the interests of substantive and procedural consistency and clarity, a more organised and streamlined approach to the liability and immunity of internet intermediaries is required.

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