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SUBMISSIONS ON COPYRIGHT (AMENDMENT) BILL 2004 ON BEHALF OF MICROSOFT CORPORATION

Microsoft Corporation is pleased to provide comments on the draft Copyright Amendment Bill as part of the public consultation exercise. In particular, Microsoft would like to comment on the changes to the Internet Service Provider regime under the Copyright Act brought about by the amendment of Clause 43 of the Copyright Bill to define “Internet service providers” and the possible ramifications of this amendment.

The Bill introduces a completely new ISP regime by the introduction of Sections 193A –193DE and repealing of the existing Sections 193A to 193D. One of the most important changes to the regime lies in the provision of a definition of “Internet service provider” in Section 193A. The proposed section 193A provides that “Internet service provider means an internet access service provider licensed under section 5 of the Telecommunications Act (Cap 323).”

Comments

The introduction of a definition of “internet service providers” is beneficial for the purpose of certainty. The new definition limits the number of internet service providers under the regime to a small defined group of essentially telecommunications providers who provide access services and who have licenses under the Telecommunications Act for this purpose. This marks a change from the previous position where “network service provider” was not a defined concept and was not limited to telecommunications access providers.

In making this change, it is critical to ensure that companies, other than telecommunications internet access providers, who provide important facilities for users should also be protected from liability

under the Copyright Act for authorising infringement where their acts merely involve allowing a user to access such facilities. For example, as part of its services under MSN, Microsoft provides web-based services to customers including electronic mail, group discussion facilities and the like. Many of these services are accessed and used by users in Singapore. It is important therefore that the mere provision of such services to a person in Singapore will not by itself render a company liable for authorising infringement as they cannot be said to control, direct or initiate the infringement.

It appears that an attempt has been made to address this issue by the adoption of several sections such as 5(6), including a new Section 9(3).

Section 9(3) provides as follows:

“(3) Notwithstanding subsection (2), a person who provides any facility for doing or facilitating the doing of any act comprised in a copyright is not taken to have authorised any infringement of a copyright merely because another person uses such facility to do any act comprised in the copyright.”

1. Need to clearly define “facility”

Whilst Microsoft welcomes the introduction of a provision such as the new section 9(3) as being essential to ensure that the mere provision of services does not expose the provider to liability for authorising infringement, it is important that this provision clearly protect service providers whilst not unwittingly allowing non-service providers such as photocopying operators to rely on this exclusion. This provision does not appear to have been adopted from the United States or the United Kingdom and will be a new concept. For this reason, Microsoft believes that the section must be clearly defined in its scope to give guidance to the court as to what it is intended to cover whilst ensuring that it is not unnecessarily wide.

The word “facility” is not defined anywhere in the Copyright Act or Bill. The concept of “facility” must be defined in a limited way to allow for both flexibility as well as a degree of certainty. It appears that the 9(3) may have been inspired by the provisions in the Australian Copyright Act. An example of a relevant provision of the Australian Copyright Act is set out below:

“39B Communication by use of certain facilities

A person (including a carrier or carriage service provider) who provides facilities for making, or facilitating the making of, a communication is not taken to have authorised any infringement of copyright in a work merely because

another person uses the facilities so provided to do something the right to do which is included in the copyright.”

Unfortunately, under the Australian Copyright Act, the word “facilities” is also not defined, and there appears to be no Australian case law to assist in interpretation of this.

2. Ensure the application of the exclusion to service providers

Further, it may be appropriate to provide for the exclusion in section 9(3) as being specifically applicable to service providers to make clear that provision of services such as web-based electronic mail services would be considered by the Court as a “facility” within the meaning of the new section 9(3). This may be achieved by an amendment such as the following to section 9(3):

“(3) Notwithstanding subsection (2), a network service provider who provides any facility for doing or facilitating the doing of any act comprised in a copyright is not taken to have authorised any infringement of a copyright merely because another person uses such facility to do any act comprised in the copyright

This may also be achieved, alternatively, by moving this exclusion to Sections 193A-DE and making it expressly applicable to a wider group of service providers not covered by the new definition of internet service providers. This would make clear that the Bill contemplates three groups: the ISPs who would be subject to and enjoy the benefits of the ISP regime; other network service providers who provide non-telecommunications based services for users who would not be subject to the ISP provisions but who would be entitled to immunity from authorising infringement; and others not falling within either group.

Summary

Microsoft welcomes the amendments to the Copyright Act but urges the Singapore Government to take these views into consideration in determining the appropriate amendments to be enacted. Microsoft would welcome the opportunity to elaborate on and discuss the views set out in this paper at further discussions.

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