
SUBMISSIONS ON PROPOSED COPYRIGHT (AMENDMENT) BILL 2004

Submitted by :

**John Pok
Legal Counsel, Yahoo! South East Asia
c/o 520 North Bridge Road
#05-01 Wisma Alsaoff
Singapore 188742
jpok@yahoo-inc.com
+65 6477 4500**

SUBMISSIONS ON PROPOSED COPYRIGHT (AMENDMENT) BILL 2004

1 INTRODUCTION

- 1.1 Yahoo! makes these submissions in response to the invitation by the Intellectual Property Office of Singapore (“IPOS”) to the public for feedback on the proposed Copyright (Amendment) Bill 2004 (“the Bill”). We would like to take this opportunity to thank IPOS for the opportunity to make submissions on the Bill.
- 1.2 Our submissions will focus on the following areas:
- (a) The new defences for “Internet service providers” (Clause 43 of the Bill);
 - (b) The provisions relating to online music services, in particular the new exclusive right of owners of sound recording copyrights to make available to the public a sound recording by means of or as part of a digital audio transmission (Clauses 18 and 24 of the Bill);
 - (c) The provisions relating to the presumptions of copyright subsistence and ownership (Clause 33 of the Bill);
 - (d) Possible ambiguities in the proposed statutory language in various provisions (Clauses 5 and 24 of the Bill); and
 - (e) The provisions permitting acts done to achieve interoperability of computer programmes, and incidental acts done in relation to computer programmes and databases (Clauses 13 and 54 of the Bill).

2 NEW DEFENCES FOR “INTERNET SERVICE PROVIDERS”

Clause 43 of the Bill, repeal and re-enactment of sections 193A to 193D and new sections 193DA to 193DE

- 2.1 Clause 43 of the Bill repeals and re-enacts sections 193A to 193D, and also introduces the new sections 193DA to 193DE. We are making submissions on the following five areas in relation to Clause 43 of the Bill:
- (a) the replacement of the existing term “network service provider” (which is undefined) by the term “Internet service provider”, which will be defined in the proposed section 193A(1);
 - (b) provisions required under the United States-Singapore Free Trade Agreement (“USSFTA”) that are not present in the Bill;
 - (c) inconsistencies between the provisions of the USSFTA and the Bill;
 - (d) the proposed “put back” mechanism by way of counter-notices, under the new section 193DA; and

(e) drafting-related issues.

A. Replacement of “network service provider” by “Internet service provider”

- 2.2 The existing sections 193A to 193D of the Copyright Act (“the Act”) provide for certain defences for “network service providers”, a term that is not defined in the Act. Clause 43 of the Bill proposes to replace this term with “Internet service providers”, a term that is defined in the new section 193A(1) to mean “*an internet access service provider licensed under section 5 of the Telecommunications Act (Cap. 323)*”.
- 2.3 Yahoo! understands from the public session conducted by IPOS on 2 August 2004 that the rationale for this change was to ensure that only commercial entities are entitled to the proposed defences introduced by Clause 43 of the Bill, as opposed to private or non-commercial entities such as individuals operating private Local Area Networks.
- 2.4 We respectfully submit that this proposed change would have unintended consequences that go far beyond what is intended and are undesirable. Section 5 of the Telecommunications Act deals with the licensing of telecommunications service providers. In other words, the proposed new term of “Internet service provider” would be limited to Facilities-Based Operators and Services-Based Operators licensed by the Infocomm Development Authority of Singapore (“IDA”) to provide Internet access services.
- 2.5 However, such a change is not required by the USSFTA, and may even be inconsistent with it. Article 16.9.22(b)(xii) of the USSFTA defines “service provider” to mean:
- (a) in relation to the transmission, routing and provision of connections (that is, the defence set out in the proposed section 193C), “*a provider of transmission, routing or connections for digital online communications without modification of their content between or among points specified by the user of material of the user’s choosing*”; and
 - (b) in relation to system caching, storage and referrals (that is, the defences set out in the proposed sections 193B and 193D), “*a provider or operator of facilities for online services or network access*”.
- 2.6 The above definitions in the USSFTA do not explicitly require these defences to be limited to providers of Internet access services. In fact, the definition set out in subparagraph (b) above envisages that “service providers”, as used in the USSFTA, includes service providers who are not Internet access service providers, by referring to providers for “*online services or network access*” (emphasis added).
- 2.7 Yahoo! believes that there is no reason to limit these defences to only Internet access service providers. This is especially so given that Internet access is now commonly viewed as a commodity, and future growth opportunities in the online industry are very likely to be driven by online service providers that do not provide Internet access, in particular providers of online content services of various sorts. At the same time, online content providers are precisely the types of businesses who would require the protection of statutory defences, so that they would have the

certainty necessary to build a meaningful and sustainable business. Any limitation of these defences to Internet access service providers would therefore be contrary to one of the stated aims of the Bill as mentioned in the introduction to the Bill, namely, to “*strengthen Singapore’s position as an attractive location for copyright-based activities*”, as such a limitation is likely to deter online service providers who are not licensed access service providers from offering their services in Singapore for fear of copyright infringement claims.

- 2.8 Furthermore, we note that the proposed provisions do not limit the operation of the defences to services that are licensed under section 5 of the Telecommunications Act. The proposed provisions would therefore unreasonably discriminate against online service providers who are not licensed access service providers, in favour of their competitors who also happen to be licensed to provide Internet access services.
- 2.9 In this regard, we note that the corresponding legislation in the United States pertaining to defences for online service providers does not limit such defences to providers of Internet access services (see the definitions of “service provider” in 17 U.S.C. §512(k)(1)).
- 2.10 Yahoo!’s view is that the term “network service provider” as used in the existing Act provides the flexibility that is so necessary to “future proof” the legislation. Any attempt to define the term, especially a definition as restrictive as that proposed for “Internet service provider”, could inadvertently result in future technologies and services being deprived of the defences. There has also been no suggestion that the Electronic Transactions Act, which also employs the term “network service provider”, should be amended, in which case it would be desirable to retain the term “network service provider” in the Act in the interest of maintaining consistency in the law.
- 2.11 Accordingly, Yahoo!’s submission is that the new defences under the amended Act should still employ the term “network service provider”, and that this term should not be defined in the legislation so as to preserve the flexibility necessary to the effective operation of the defences. In the event that IPOS determines it necessary to restrict the scope and operation of the defences, Yahoo! respectfully submits that it is not desirable to do so by relying on a narrow definition of “Internet service provider” that is tied to any specific business or type of service, as that would bar many legitimate online businesses who do not engage in such businesses or provide such services at the threshold level.
- 2.12 Instead, a more appropriate approach might be to introduce limitations by way of conditions that must be satisfied by a service provider before it is eligible to rely on the defences, as has been done in the new sections 193B(4), 193C(4), 193D(4) and 193D(5). Alternatively, a wider definition of “Internet service provider” could be adopted. If the objective is to ensure that only commercial entities can rely on the defences, this can be done by defining “Internet service providers” as being any provider of online or network services that does so on a commercial basis, with an additional provision setting out examples of relevant factors in determining whether the services are provided on a commercial basis.

B. Provisions required under the USSFTA that are not present in the Bill

- 2.13 There appear to be two provisions that are required under the USSFTA, that are not present in the Bill.

- 2.14 Firstly, Article 16.9.22(b)(vii) of the USSFTA provides that a service provider's eligibility for the defences "*may not be conditioned on the service provider monitoring its service, or affirmatively seeking facts indicating infringing activity ...*". This is an important statement of principle that is crucial, as any such condition would impose a crushing burden on online businesses. Yet, it is not present in the Bill. Yahoo! therefore respectfully submits that a new section should be added to the legislation to clarify this and to codify this position in the law.
- 2.15 Secondly, Article 16.9.22(b)(viii) of the USSFTA provides that no *ex parte* orders should be made against service providers, except for "*orders ensuring the preservation of evidence, or other orders having no material adverse effect on the operation of the service provider's communications network*". This is not provided for in the Bill. A new section should therefore be inserted, to expressly provide for this.

C. Inconsistencies between the provisions of the USSFTA and the Bill

- 2.16 One of the stated aims of the Bill as mentioned in the introduction to the Bill is to implement Singapore's obligations on copyright law under the USSFTA. Our submission is that a few provisions of the Bill implement the requirements of the USSFTA in relation to online service providers in a manner that is inconsistent with the USSFTA, and that these provisions should accordingly be revised to resolve such inconsistencies. We consider these provisions below.

Remedies that a court may grant against a service provider that is entitled to the defences in the proposed sections 193B to 193D

- 2.17 The proposed sections 193B(3), 193C(3) and 193D(3) set out the remedies that a court may grant against a service provider that is entitled to the defences in those provisions. Yahoo! respectfully submits that these provisions should be amended, to address a number of flaws in them.
- 2.18 Firstly, they should be amended to clarify that the remedies that a court may grant should be limited only to the act of infringement in each case. Yahoo!'s concern is that if these provisions are not amended in this manner, then they could be interpreted as permitting a court to make an order against a service provider in overly general terms that may make compliance impracticable. For instance, as the provisions are presently phrased, they could arguably permit a court to order a service provider to "disable access to XYZ work". But such a broad order would require the service provider to prohibit all future accesses to the stipulated work as well, regardless of whether the copies of that work being accessed in future had been in existence or had been available at the time the order was made.
- 2.19 In other words, such an order would require a service provider to actively and continuously police its service to ensure that a specific work is not being accessed, regardless of the location of that work on the Internet and regardless of whether it is a new copy of the work being made available on the Internet after the date of the order. Otherwise, the service provider could be in technical contempt of court for breaching the order against it.
- 2.20 Such a situation would be inconsistent with the spirit of the USSFTA as set out in Article 16.9.22(b)(vii) (mentioned in paragraph 2.14 above), which states that a

service provider's eligibility for the various defences for service providers should not be conditioned on the service provider "*monitoring its service, or affirmatively seeking facts indicating infringing activity*". Clearly, the intent of the USSFTA is that service providers should not be subject to such onerous duties of monitoring. Yahoo! agrees with this position, otherwise the risk of litigation and the resultant costs of compliance could render many online services commercially unfeasible.

- 2.21 Secondly, the proposed section 193B(3)(a) should be amended to bring it in line with the USSFTA. That section provides that a court may order a service provider who is entitled to the defence in that section, "*to remove or disable access to an infringing copy of the material, or to a reference to an infringing copy of the material*". Yahoo! respectfully submits that the phrase "*or to a reference to an infringing copy of the material*" should be deleted from the proposed section 193B(3)(a).
- 2.22 Article 16.9.22(b)(viii) of the USSFTA requires only the former remedy (that is, the removal or disabling of access to an infringing copy), but not the latter (that is, the removal or disabling of access to a "*reference to an infringing copy of the material*"). Furthermore, the phrase "*reference to an infringing copy*" is ambiguous, because the proposed definition of "referring" in section 193A(1) (which we touch on in paragraph 2.33 below) does not lend itself neatly to being adapted to "reference". For instance, where an order is made against a service provider directing it to remove a "*reference to an infringing copy*", that order could potentially cover a hyperlink in a directory maintained by that same service provider, which, under Article 16.9.22(b)(viii) of the USSFTA, is not an order that a court may make against a service provider entitled to the defence in Section 193B.
- 2.23 Thirdly, the language used in the proposed sections 193B(3)(c) and 193D(3)(c) also requires amendment to render them consistent with the USSFTA. These two provisions provide that a court may make, against a service provider entitled to the defence in each section, "*such other less burdensome but comparatively effective non-monetary order as may be necessary*" (emphasis added).
- 2.24 This language is inconsistent with Article 16.9.22(b)(viii) of the USSFTA, which states that such "other remedies" must be "*the least burdensome to the service provider among comparably effective forms of relief*" (emphasis added). While the new section 193DB does state that the court shall, in making an order, have regard to "*whether some other comparatively effective order would be less burdensome*", the proposed provisions still do not explicitly require the court to order the least burdensome form of relief that is comparably effective, as required under the USSFTA.
- 2.25 The proposed sections 193B(3)(c) and 193D(3)(c) should therefore be revised to read as follows: "*such other comparatively effective non-monetary order as may be necessary, provided such order is the least burdensome amongst all comparatively effective orders*".

Conditions for the application of the defences in the proposed sections 193B to 193D

- 2.26 The proposed sections 193B(4), 193C(4), 193D(4) and 193D(5) set out various conditions that a service provider must satisfy, before it can rely on the defences in each of those sections. In each of these provisions, there is a sub-paragraph (c) that sets out a "catch-all" provision of "*such other conditions as may be prescribed*". This

would permit the Government to prescribe additional conditions for the application of the defences in those sections by way of Gazette notifications.

- 2.27 Such a possibility is inconsistent with the USSFTA, which appears to comprehensively list out all the conditions that a service provider must meet for each of the defences to apply. For instance, the conditions for the defence in the proposed section 193B to apply are set out in Articles 16.9.22(b)(ii), (iv) and (vi) of the USSFTA. The conditions for the application of the defence in the proposed section 193C are set out in Articles 16.9.22(b)(ii) and (vi). Similarly, the conditions in relation to the proposed section 193D can be found in Articles 16.9.22(b)(ii), (v) and (vi).
- 2.28 Yahoo!'s view is that the language used in the USSFTA shows that the intent was for the conditions set out in the USSFTA to be a closed, conclusive list, in which event there should no room or scope for the Government to prescribe additional conditions for the operation of those defences. In that case, the "catch-all" provision in the form of sub-paragraph (c) of each of those provisions becomes unnecessary, and it should be removed from the legislation.

D. Proposed "put back" mechanism by way of counter-notices, under the new section 193DA

- 2.29 The new section 193DA sets out a "put back" mechanism, where the owner of content that is subject to a "take down" notice can serve a counter-notice on a service provider requiring it to "put back" the content that was "taken down". A service provider must comply with any such "put back" notice, for it to be entitled to the defences in the proposed sections 193B to 193D.
- 2.30 It appears from the new section 193DA(4), which sets out the requirements for a counter-notice, that a service provider is obliged to comply with a counter-notice only if the owner of the content alleges that the "take down" of the content was *"done as a result of a mistake or misidentification"*.
- 2.31 However, in practice, it is likely, if not probable, that any counter-notice served on a service provider by a legitimate content owner would deny any infringement at all. While "mistake" as used in the proposed section 193DA(4) could arguably include a mistake by the maker of the "take down" notice that the content in question infringed, Yahoo!'s position is that it would be helpful if the present proposed language is expanded to expressly include a counter-notice disputing that the content is infringing.

E. Drafting-related issues

- 2.32 There are a few drafting-related issues with certain provisions of the Bill, that Yahoo! respectfully submits should be addressed by way of amendments to the Bill.
- 2.33 Firstly, the proposed section 193A(1) defines "referring" to include *"referring or linking by use of an information location tool such as a hyperlink or directory"*. We suggest that this definition should be amended to read as follows:

“referring or linking by use of an information location tool or service such as a hyperlink or directory or search engine (whether such directory or search engine is generated or compiled manually or automatically)”. (insertions underlined)

- 2.34 This amendment would be beneficial, as it clarifies that search engines operators and online directory services are entitled to the defences in the proposed section 193D as well.
- 2.35 Secondly, the proposed section 193A(1) contains a definition for “electronic copy”. However, there is already a definition for the term “electronic copy” in the proposed section 7(1) (see Clause 2(e) of the Bill). Although the proposed section 193A(1) states that the definitions in that provision are “*for this Part*”, having two definitions of the same term in the same statute creates an unnecessary risk of confusion. We would therefore suggest that there should only be one definition for the term “electronic copy”, especially since the two definitions appear to be *in pari material* in any event.
- 2.36 Thirdly, there is a reference to “*a user of the network*” in the proposed section 193B(1)(c). This would appear to be a reference to a user of the “primary network” (as defined in section 193A(1)), but should be clarified, for instance, by inserting the word “primary” between “the” and “network”.
- 2.37 Finally, the term “storage” as used in the proposed section 193D(1)(a) is not defined. Yahoo! respectfully submits that this term should be defined, and that the definition used should explicitly include a reference to “hosting”, as that is the common term applied to the “storage” of online content.

3 NEW EXCLUSIVE RIGHT TO MAKE AVAILABLE TO THE PUBLIC A SOUND RECORDING BY MEANS OF OR AS PART OF A DIGITAL AUDIO TRANSMISSION

Clause 18 of the Bill, amendment of section 82; Clause 24 of the Bill, new section 107B

- 3.1 One of the new exclusive rights accorded to the owners of the copyright in sound recordings is the right to make available to the public the sound recording, by means of or as part of a digital audio transmission (“the New Exclusive Right”). Yahoo! respectfully submits that, for the reasons set out below, the provisions relating to the New Exclusive Right are extremely complex and possibly internally self-contradictory, and hence should be amended and rationalised.
- 3.2 To begin with, it seems that the right of “making available to the public” is narrower right than the right of “communication to the public”, which is part of the copyright in literary, dramatic and musical works and cinematograph films. This is apparent from Clause 2(b) of the Bill, which defines “communicate” to include:

“(a) *the broadcasting of a work or other subject-matter;*

(b) the inclusion of the work or other subject-matter in a cable program; and

(c) *the making available of the work or other subject-matter (on a network or otherwise) in such a way that members of the public (whether in or outside Singapore) may access the work or subject-matter from a place and at a time individually chosen by them*".

- 3.3 From this definition of "communicate", it appears that "making available" a work to the public is narrower than "communicating" the work to the public. It also appears that "making available" excludes communication to the public by way of broadcasting and/or inclusion in a cable programme. In addition, the new section 82(3) specifically excludes, *inter alia*, broadcasting and inclusion in a cable programme from the definition of "make available", for the purposes of that part of the Act.
- 3.4 The foregoing shows that "make available" is intended to be conceptually distinct from broadcasting and inclusion in a cable programme.
- 3.5 We note that the terms "broadcast", "cable programme" and "cable programme service" are defined in the existing Act, and are not amended in the Bill. The present definitions are concerned with the mode of transmission of a signal, and are not concerned with whether that signal is analogue or digital in nature. In other words, under the existing definitions of those three terms in the Act, a broadcast, a cable programme and a cable programme service could all be either analogue or digital in nature.
- 3.6 With respect to "broadcast", this conclusion is consistent with the new definition of "simulcasting" set out in Clause 2(i) of the Bill, namely "*simultaneously broadcasting a broadcasting service in both analog and digital form*", which envisages a broadcast of a digital signal. It is also consistent with the Broadcasting Act, which similarly focuses on the transmission of a signal, regardless of whether such signal is analogue or digital in nature.
- 3.7 Therefore, on a straightforward reading of the new sections 82(1)(d) and 82(3), it would seem that a digital broadcast of a work or other subject-matter and the inclusion of the same in a digital cable programme service, both without the licence of the relevant copyright owner, would not infringe the New Exclusive Right.
- 3.8 However, the new section 107B casts doubt on whether this is in fact the position. The new section 107B sets out a defence against infringement, in relation to the making available to the public of a sound recording by means of or as part of a digital audio transmission that is not part of an interactive service and is part of a "*non-subscription sound broadcast*".
- 3.9 This reference to a "*non-subscription sound broadcast*" implies that, notwithstanding the new section 82(3), a digital transmission of a sound recording that is part of either a subscription sound broadcast (whether or not it is interactive), or an interactive, non-subscription sound broadcast, could infringe the New Exclusive Right.
- 3.10 Furthermore, the new section 107D provides that non-interactive services do not infringe the New Exclusive Right, provided such services pay equitable remuneration to the copyright owner (whether by agreement between the parties or as determined by the Copyright Tribunal). This raises the possibility of a non-interactive broadcast having to pay equitable remuneration to the copyright owner, to avoid infringement.

3.11 It appears that the following may be the only way to reconcile all of the provisions mentioned above as they presently stand:

Broadcast

- (a) a digital broadcast of a sound recording that is non-subscription and non-interactive is exempted and will not infringe the New Exclusive Right, and equitable remuneration does not have to be paid (by virtue of the new section 107B);
- (b) a digital broadcast of a sound recording that is subscription and non-interactive will not infringe the New Exclusive Right, provided equitable remuneration is paid (by virtue of the new section 107D);
- (c) a digital broadcast of a sound recording that is interactive (whether subscription or non-subscription) will infringe the New Exclusive Right, unless licensed by the copyright owner;

Inclusion in a cable programme

- (d) an inclusion of a sound recording in a cable programme on a digital cable programme service that is non-interactive (whether subscription or non-subscription) will not infringe the New Exclusive Right, provided equitable remuneration is paid (by virtue of the new section 107D);
- (e) an inclusion of a sound recording in a cable programme on a digital cable programme service that is interactive (whether subscription or non-subscription) will infringe the New Exclusive Right, unless licensed by the copyright owner;

Other types of services

- (f) a non-interactive digital service (whether subscription or non-subscription) that transmits a sound recording, but is not a broadcast or cable programme service, will not infringe the New Exclusive Right, provided equitable remuneration is paid (by virtue of the new section 107D); and
- (g) all other digital transmissions of sound recordings (including interactive services) will infringe the New Exclusive Right, unless licensed by the copyright owner.

3.12 However, the above conclusion would effectively render the exclusions in the new section 82(3) nugatory and of no effect.

3.13 We respectfully submit that these provisions governing the New Exclusive Right should be reconsidered in detail and streamlined, to avoid the ambiguities and potential inconsistencies mentioned above.

- 3.14 Furthermore, a definition for “interactive” or “interactive service” should be added to the legislation. The Bill presently does not contain a definition for the term “interactive service”. This is different from the position under US law, where 17 U.S.C. §114(j)(7) sets out a detailed definition for “interactive service”. The Bill should provide a definition as well, and such definition should set out certain parameters for interactivity that must be satisfied before a service is deemed to be interactive. Otherwise, taken to its extreme, a song request programme on a free-to-air broadcast could potentially be deemed to be “interactive” as well.

4 PRESUMPTIONS OF SUBSISTENCE AND OWNERSHIP OF COPYRIGHT

Clause 33 of the Bill, amendment of section 130

- 4.1 Clause 33 of the Bill amends section 130 of the Act through the addition of new sections 130(1A), 130(1B) and 130(1C). These amendments seek to strengthen the existing presumptions in the Act relating to the subsistence and ownership of copyright. Yahoo! notes, on a preliminary basis, that these amendments are not required under the USSFTA.

The new section 130(1A)

- 4.2 The new section 130(1A) provides that where a plaintiff satisfies the court that a defendant has challenged the subsistence and/or ownership of copyright without good faith, then the presumption of copyright subsistence or ownership in the existing section 130(1) “*shall apply notwithstanding that the defendant puts these matters in issue*”.
- 4.3 The language used suggests that where a defendant puts the issues of copyright subsistence and/or ownership into dispute but is found to have done so in bad faith, then there is an irrebuttable presumption of such copyright subsistence and/or ownership. But this would make the subsistence and/or ownership of copyright (which are relevant issues and crucial elements of a plaintiff’s claim) dependent on the defendant’s good faith or lack thereof in putting those issues into dispute, which is wholly irrelevant to the merits of the case.
- 4.4 We respectfully submit that such a linkage is arbitrary, unnecessary and undesirable. It would also not benefit either the plaintiff or defendant in legal proceedings. The new section 130(1A) simply replaces a relevant issue in dispute (the subsistence or ownership of copyright) with an irrelevant issue that is also in dispute (the good faith or lack thereof of the defendant). Bad faith is frequently as difficult to prove as the subsistence and ownership of copyright, in which case the new section 130(1A) would not result in any cost or time savings to the parties to litigation.

The new section 130(1B)

- 4.5 The new section 130(1B) permits a plaintiff to shift the burden of proof in relation to the subsistence and/or ownership of copyright to a defendant (that is, to disprove such subsistence and/or ownership), simply by filing an affidavit stating that copyright does subsist, that the plaintiff is the owner of such copyright, and that the copy of the work annexed to the affidavit is a true copy thereof.

- 4.6 But these are self-serving statements of fact that, based on the language of the new section 130(1B), do not appear to require particularisation or support by details. Yahoo! respectfully submits that should a plaintiff be permitted to shift the burden of proof by filing an affidavit, then that affidavit should also require the plaintiff to state relevant additional information even if such information technically constitutes hearsay evidence. Examples of such relevant additional information include the circumstances under which the work was created, whether there were any other owners of the copyright, and whether the ownership of the plaintiff arose by reason of his authorship of the work or otherwise (such as by assignment of copyright).
- 4.7 The new section 130(1B) also permits a court to direct a plaintiff to adduce oral evidence to prove the subsistence or ownership of copyright. We respectfully submit that the Bill should be amended, to expressly provide for some parameters governing when the court should direct the plaintiff to adduce such oral evidence, for instance, where the affidavit filed by the plaintiff to shift the burden of proof of the subsistence and/or ownership of copyright to the defendant does not adequately set out all of the information required under the legislation.

5 POSSIBLE AMBIGUITIES IN PROPOSED STATUTORY LANGUAGE

Clause 5 of the Bill, amendment of section 16; Clause 24 of the Bill, new section 107A

- 5.1 In this section, we will refer to two provisions of the Bill that we believe would benefit from amendment to clarify their respective intents and objectives.

The new section 16(6): person who makes a communication

- 5.2 Clause 5 of the Bill introduces a new section 16(6), which provides as follows:

“For the purposes of this Act, a communication other than a broadcast is taken to have been made by the person responsible for determining the content of the communication at the time the communication is made.”

- 5.3 Our view is that this definition is flawed, because the “*person responsible for determining the content of the communication*” could be interpreted as the natural person actually determining the content, such as a DJ on an Internet radio station who programmes his own show and selects his own playlist. This would be inappropriate in a commercial context, where the relevant responsible person should actually be the employer of the natural person.
- 5.4 If the copyright owner decides to commence infringement proceedings, it would have to sue the hypothetical DJ as the primary tortfeasor and the Internet radio service provider as a joint tortfeasor and/or based on a theory of vicarious liability arising out of the hypothetical DJ’s liability. This would unnecessarily complicate litigation, and would also prejudice and inconvenience employees discharging their duties in good faith. Therefore, Yahoo! respectfully submits that Clause 5 of the Bill should be amended to ensure that natural persons (like the hypothetical DJ) are not unnecessarily involved in litigation. In an appropriate case, a service provider would still be able to seek recourse against its employee.

The new section 107A: defence in relation to the making of an incidental copy of a sound recording or cinematograph film in the course of broadcasting the same

- 5.5 Clause 24 of the Bill introduces the new sections 107A to 107E. The new section 107A(a) limits the defence in section 107A to an instance where “*the recording or film from which the copy is made is in analog form*”. This suggests that the defence in the new section 107A is limited to those instances where the sound recording or cinematograph film being used is in an analogue format (for instance, audio cassette or video cassette), as opposed to a digital format (such as CD or DVD). However, our view is that such a position would be unnecessarily restrictive and unrealistic in today’s digital environment. Accordingly, we propose that the new section 107A(a) be deleted.
- 5.6 The new section 107A(b) further limits the defence in the new section 107A to situations where “*the copy is made solely for the purpose of simulcasting the recording or film in digital form*”. This appears to have two possible meanings: either the defence applies only if the simulcasting is “*in digital form*”, or the defence applies only if the copy is made solely for simulcasting, and the copy is made in digital form.
- 5.7 However, the first possible meaning is illogical, since simulcasting is (as stated in paragraph 3.6 above) defined in Clause 2(i) of the Bill to mean “*simultaneously broadcasting a broadcasting service in both analog and digital form*”. That is, by definition, simulcasting must be in both analog and digital forms.
- 5.8 Therefore, the intended meaning of the new section 107A(b) would appear to be the second possible meaning outlined above. If that is so, we would suggest amending the new section 107A(b) to the following:

“the copy is made solely for the purpose of simulcasting the recording or film and is made in digital form.” (insertions underlined)

6 PROVISIONS PERMITTING ACTS DONE TO ACHIEVE INTEROPERABILITY OF COMPUTER PROGRAMMES, AND INCIDENTAL ACTS DONE IN RELATION TO COMPUTER PROGRAMMES AND DATABASES

Clause 13 of the Bill, new sections 39A to 39D; Clause 54 of the Bill, new section 261C(1)(d)

- 6.1 Clauses 13 and 54 of the Bill introduce various provisions relating to acts done to achieve interoperability of computer programmes, namely the new sections 39A, 39B and 261C(1)(d). Yahoo! agrees that it would be helpful to have the Act address the issue of interoperability, which is an important issue in the digital age that is likely to become even more important over time.
- 6.2 In a world of networks and networked software, it is frequently desirable, if not necessary, for software created by different entities to be able to communicate and work with one another. The proposed provisions permitting acts done to achieve interoperability of computer programmes accordingly take on an importance that should not be underestimated.

- 6.3 Yahoo! believes that the new sections 39A, 39B and 261C(1)(d) represent a positive first step by Singapore in the area of interoperability. However, as technology and the business and industry environment are constantly evolving, Yahoo! urges IPOS to remain open to future legislative changes to accommodate the changing needs of legitimate businesses.
- 6.4 Clause 13 of the Bill also introduces the new sections 39C and 39D, which clarify that incidental acts that are necessary to the lawful use of a computer programme, or to the access to and use of a database in the exercise of a right to use such database, do not infringe copyright. Yahoo! believes that, as with the new sections 39A, 39B and 261C(1)(d), these are positive changes to the law.

7 CONCLUSION

- 7.1 We hope that IPOS will consider our various submissions set out above. We would be happy to address IPOS further on any of the points raised, should it be necessary to do so.
- 7.2 Thank you.