
SUBMISSIONS ON

JOINT IDA-AGC REVIEW OF ELECTRONIC TRANSACTIONS ACT

STAGE III: REMAINING ISSUES

Submitted by :

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1 INTRODUCTION

- 1.1 Yahoo! makes these submissions in response to the invitation by the Infocomm Development Authority of Singapore (“IDA”) and the Attorney-General’s Chambers (“AGC”) to the public, for feedback on Stage III of the ongoing review by those two bodies on the Electronic Transactions Act (“the ETA”).
- 1.2 Before we set out our comments, we would like to take this opportunity to thank the IDA and the AGC for the opportunity to make submissions on the issues canvassed in the consultation paper. In these submissions, we will be commenting on Part 3 of the paper, in relation to the exemption from liability for Internet/network service providers. In this regard, we would like to congratulate the IDA and the AGC for a genuinely well-researched consultation paper, which is one of the best Yahoo! has encountered internationally in the area of exemption of liability for service providers.
- 1.3 We will first address Questions 6 to 9 of the consultation paper, before concluding with some general comments pertaining to the issue of exemption from liability for Internet/network service providers.

2 QUESTION NO. 6

Is it necessary to clarify the meaning of “network service provider”? do you agree with the proposed definition of “network service provider”?

- 2.1 Yahoo! believes that it is necessary to clarify the meaning of “network service provider”. As the IDA and the AGC recognized in paragraph 3.4.1 of the consultation paper, the reference to “network” may lead to an erroneous interpretation of the term. The inconsistency with the Copyright Act, which defines the term, is also undesirable.
- 2.2 In this regard, subject to our comments in paragraph 2.3 below, Yahoo! agrees with the proposed definition of “network service provider” set out in paragraph 3.4.8 of the consultation paper. Our view is that it is crucial for the continued growth of the industry, for all types of online services to be covered by the definition. Accordingly, the defences that apply to network service providers should not be limited by the statutory language used, but should instead be “future-proof”, so as to cover future, presently-unimaginable services as well.
- 2.3 Our only caveat is that the definition for “network service provider” should expressly declare (whether within the definition itself or by way of a subsequent declaratory provision) that, in the context of information location tools, the providers of both automated (such as search engines) and human-compiled (such as directories and archives) information location tools constitute “network service providers”.

- 2.4 We also categorically state that the proposed definition of “network service provider” would not render the scope of Section 10 of the ETA overly-broad.
- 2.5 Our experience as a portal operator is that there is no meaningful basis for differentiating between different types of online services. The providers of services such as information location tools, hyperlinks, content aggregation, message boards, chat, instant messaging and Internet auctions are similar to the providers of traditional access and hosting services, in that the former would similarly have no way of knowing whether the material available through their services is unlawful or otherwise.
- 2.6 It is simply impractical from both a technical (in terms of sheer volume of material) and financial (in terms of the costs of creating and maintaining monitoring systems and retaining adequate in-house legal expertise) perspective to actively monitor such material, rendering a defence imperative. Accordingly, we think that the IDA and the AGC have adopted a progressive position in their proposed definition of “network service provider”.

3 QUESTION NO. 7

Do you agree with the proposed deletion of the words “to which he merely provides access” in section 10(1) of the ETA?

- 3.1 Yahoo! agrees with the proposed deletion of the words “to which he merely provides access” in Section 10(1) of the ETA, as proposed in paragraph 3.4.14 of the consultation paper.
- 3.2 As we have already indicated, it is important that the limitations on liability apply equally to all entities who qualify as “network service providers”. After all, technical and technological neutrality assures longevity of the legislation.
- 3.3 We also believe that the proposed deletion of the words “to which he merely provides access” in Section 10(1) of the ETA would not render the scope of Section 10 of the ETA overly-broad.
- 3.4 On the contrary, the words “to which he merely provides access” tend to create ambiguity and confusion. In relation to the discussion in paragraphs 3.4.10 to 3.4.14 of the consultation paper, Yahoo! believes that it is equally arguable that Section 10 of the ETA protects permanent storage or hosting, notwithstanding the words “to which he merely provides access”.
- 3.5 In this regard, we note that footnote 75 of the consultation paper relies on a statement in the WIPO paper “Online Intermediaries and Liability for Copyright Infringement” to support its conclusion that Section 10 does not apply to permanent storage or hosting services. The consultation paper does not cite any legislative materials or case law to support that conclusion, and to the best of Yahoo!’s knowledge, there are no legislative materials or case law addressing this issue. On a plain reading of the provision, it is certainly possible to argue that “providing access”

to material includes providing the necessary online storage space for other persons to access such material.

4 QUESTION NO. 8

If section 10 of the ETA is amended as proposed in paragraphs 3.4.8 and 3.4.14, do you think any further safeguards are necessary? In particular, would the protection given under section 10 be too wide? If yes, please elaborate with specific reference to the kinds of liability from which network service providers should not be exempted.

- 4.1 Yahoo! agrees with the view expressed in paragraph 3.4.22 of the consultation paper, that the limitation to “third party material” and the preservation of controls under the Class Licensing Scheme administered by the Media Development Authority of Singapore and of the obligations to comply with orders to remove, block or disable access to material, would provide an adequate balance. Accordingly, we do not think that any further safeguards are necessary or that the protection given under the amended Section 10 would be too wide.
- 4.2 However, we believe that the scope of protection for network service providers under the amended defence can and should be clarified. Specifically, we think that the provisions on information location tools require further clarification, so as to make it clear that the defence in Section 10 of the ETA extends to all forms of linking (such as both simple and deep linking).
- 4.3 It is presently unclear whether hyperlinking without express authorisation should result in liability. There is conflicting case law internationally on this issue, and the position under Singapore law is unclear as well. It would be extremely beneficial if this issue could be addressed in the ETA, so as to provide service providers in Singapore the requisite environment of legal certainty for successful commercial operations.

5 QUESTION NO. 9

Should the immunity regime for service providers under section 10 of the ETA be changed (other than the changes mentioned in Q.6, 7 and 8)?

- 5.1 Yahoo!’s position is that, if the proposed changes mentioned above are implemented and subject to our general comments below, then there would appear to be no necessity or reason at present to change the immunity regime for network service providers under Section 10 of the ETA, for instance by introducing a “Notice and Take Down” regime.

6 GENERAL COMMENTS

- 6.1 Yahoo! would like to make some general comments pertaining to the issue of immunity for network service providers, for consideration by the IDA and the AGC.
- 6.2 Firstly, we believe that the Copyright Act provisions applicable to network service providers need to be carefully considered when amending the Electronic Transactions Act, so as to avoid any unnecessary inconsistency or differences between the two statutory regimes. Specifically, it is necessary to ensure that both the Copyright Act provisions and the ETA provisions cover the same service providers.
- 6.3 In other words, if a network service provider is entitled to protection under Section 10 of the ETA, then it should also be entitled to protection under the relevant provisions of the Copyright Act. Our view is that there is nothing special about copyright compared to, for instance, defamation or child pornography, and the statutory provisions need to be carefully calibrated to reflect this.
- 6.4 Secondly, Yahoo! notes that there are ongoing processes in other countries that could contain helpful lessons for Singapore. In Canada, there is an ongoing debate on the proposed C-60 bill to amend the Canadian Copyright Act, with some of the amendments addressing the issue of immunity for Internet service providers.
- 6.5 One of the key innovations in the Canadian bill is a provision empowering service providers (of caching and hosting services) to charge a gazetted administrative fee to take down allegedly infringing material. Yahoo! feels that this is an interesting idea that should merit closer examination by the IDA and the AGC, in that such fees would help to defray the potentially substantial costs to a network service provider of complying with all applicable regulations and maintaining an effective compliance system, and they would also serve to deter unmeritorious notices under the Copyright Act's "Notice and Take Down" regime.
- 6.6 Furthermore, Canada is considering a "Notice and Notice" system (as opposed to "Notice and Take Down"), whereby the service provider, upon receipt of a notice, sends a notice to the owner of the allegedly infringing material and then is obligated to maintain the relevant user data for six months (or one year, if the copyright owner commences proceedings). Failure by the service provider to do so exposes the service provider to liability for prescribed statutory damages. This mechanism operates in parallel with a defence for Internet service providers (qualified on lack of knowledge for hosting service providers, and absolute for others) in respect of the transmission of electronic data and other acts to render such transmission more efficient (e.g. caching).
- 6.7 Yahoo! believes that the "Notice and Notice" system proposed in Canada is a creative solution that may well represent a viable balance between the interests of service providers, Internet users and aggrieved persons such as rights owners. However, the proposal to require service providers to routinely retain, for up to one year, all data connected with a user served with a notice is not proportionate and

inappropriate, and may impose an onerous burden on service providers in view of the potentially massive volumes of data involved. Yahoo!'s view and experience is that the existing system in Singapore, whereby data preservation obligations are imposed on service providers on an ad hoc basis arising out of the appropriate court orders, represents an appropriate balance on the issue of data preservation.

- 6.8 A better alternative may be to require the service provider to disclose the relevant information on the owner of the allegedly infringing material to the person giving the notice to the service provider, subject to the latter's undertakings not to misuse or disclose (other than for purposes of commencing proceedings) this information and to indemnify the service provider and the owner of the allegedly infringing material for any losses that they may suffer from any such misuse or disclosure (which undertakings should be prescribed ingredients for such notices). This alternative focuses the dispute squarely on the parties who are directly involved, and neatly resolves the problem of innocent service providers being caught in a crossfire between the competing interests of aggrieved persons and users.
- 6.9 At the same time, the UK Department of Trade and Industry is currently conducting a public consultation on the desirability of extending the liability provisions of the E-Commerce Regulations, from the present limited scope of conduit, caching and hosting services to include other services such as hyperlinking, information location tools and content aggregation services as well. This consultation exercise will close on 9 September 2005, and the responses may well be relevant for the IDA's and the AGC's purposes. Yahoo! is presently in the process of preparing its submission to the UK Department of Trade and Industry, and would be pleased to provide the IDA and the AGC with a copy of its finalised submission if that would be helpful.
- 6.10 Finally, Austria, Spain, Portugal, Hungary and Liechtenstein have already implemented provisions to limit the liability of providers of hyperlinks, information location tools and/or content aggregation services. Our European counterparts have confirmed that these provisions appear to be working well.

7 CONCLUSION

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