

Without Prejudice

Internet Service Providers

ISP Chair's without prejudice draft of 1/31/2015 as as result of small group technical work

Addendum XV

Negotiators note: Parties are still considering this proposal and reserve their position on the entire section

1. The Parties recognize the importance of facilitating the continued development of legitimate online services and, in a manner consistent with Article 41 of the TRIPS Agreement, providing enforcement procedures that permit effective action by rights holders against copyright infringement[289] covered under this Chapter that occurs [US propose; CL oppose: in the online environment] [CL propose; US oppose: on the internet]. Accordingly, each Party shall ensure that legal remedies are available for rights holders to address such infringement and shall establish or maintain appropriate safe harbours for Internet service providers[290] [US propose; AU oppose: when] acting as

[288]Negotiators' note: Some Parties are considering this ad ref.

[289]For the purposes of this Article, "copyright" includes related rights.

[290]For the purposes of this Section, "Internet service provider" means:

- (a) A provider of online services for the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing, undertaking the function in paragraph 2(a);
- (b) A provider of online services undertaking the functions in paragraphs 2(c) or (d).

For greater certainty, "Internet service provider" includes a provider of the services listed above who engages in caching carried out through an automated process.

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[neutral[291]] intermediaries [292]. This framework of legal remedies and safe harbours shall include:

- (a) legal incentives[293] for Internet service providers to cooperate with [VN propose: authorities or] copyright owners to deter the unauthorized storage and transmission of copyrighted materials or, in the alternative, to take other action to deter the unauthorized storage and transmission of copyrighted materials; and
 - (b) limitations in its law that have the effect of precluding monetary relief against Internet service providers for copyright infringements that they do not control, initiate, or direct, and that take place through systems or networks controlled or operated by them or on their behalf.[294] [CA propose[295]
2. The limitations described in paragraph 1(b) shall cover [CA propose: at least] the following functions:
- (a) transmitting, routing, or providing connections for material without modification of its content[296], or the intermediate and transient storage of such material done automatically in the course of such a technical process;
 - (b) caching carried out through an automated process;

[291]Negotiators note: US to confirm whether it can remove “neutral” pending outcome of discussions on chapeau

[292]For greater certainty, the phrase “[US propose; AU oppose: when] acting as intermediaries” shall not be interpreted to {limit or expand the scope of} the definition of “Internet Service Provider” or [NZ/AU propose: to determine whether a particular Internet Service Provider] meets the conditions required to qualify for the limitations described in paragraph 1(b).

[293]For greater certainty, Parties recognize that “legal incentives” can take different forms under each Party’s legal system [AU oppose: and {does/need not} refer to the conditions for Internet service providers to qualify for the limitations {provided in paragraph 1(b),} as set out in paragraph 3].

[294]It is understood that, to the extent that a Party determines, consistent with its international legal obligations, that a particular act does not constitute copyright infringement, there is no obligation to provide for a limitation in relation to that act.

[295][CA propose; US oppose: It is understood that Internet service providers may control, initiate, or direct various acts of reproduction or communication that may involve infringing acts solely for technical reasons in carrying out the functions in paragraph 3 and as part of a technical process or for solely technical reasons such as division into packets,

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- (c) storage[297], at the direction of a user, of material residing on a system or network controlled or operated by or for the service provider[298]; and
 - (d) referring or linking users to an online location by using information location tools, including hyperlinks and directories.
3. To facilitate effective action to address infringement, each Party shall prescribe in its law conditions for Internet service providers to qualify for the limitations described in paragraph 1(b), or alternatively, shall provide for circumstances under which Internet service providers do not qualify for the limitations described in paragraph 1(b)[299] [AU propose: by either][300]:
- (a) With respect to the functions referred to in paragraph 2(c) and 2(d) above, such conditions shall include a requirement for Internet service providers to expeditiously remove or disable to material residing on their networks or systems upon {MX: one or more of the following:}

[297]For greater certainty, Parties may interpret “storage” as “hosting”.

[298]For greater certainty, such storage of material may include e-mails and their attachments stored in the Internet service provider’s server and web pages residing on the Internet service provider’s server.

[299]A Party may comply with the obligations in Paragraphs 3, by maintaining a framework wherein:

- (i) there is a [VN propose: competent authority or authorized organization or] stakeholder organization that includes representatives of both Internet service providers and rights holders, established with government involvement;
- (ii) such [VN propose: competent authority or authorized organization or] stakeholder organization develops and maintains effective, efficient and timely procedures for entities certified by the [VN propose: competent authority or authorized organization or] stakeholder organization to verify without undue delay the validity of each notice of alleged copyright infringement by confirming that the notice is not the result of mistake or misidentification, before forwarding such verified notice to the relevant Internet service provider; and
- (iii) there are appropriate guidelines for Internet service providers to follow in order to: qualify for the limitation described in paragraph 1(b), including requiring that such Internet service provider promptly remove or disable access to the identified materials upon receipt of a verified notice; and be exempted from liability for having done so in good faith in accordance with such guidelines; and
- (iv) there are appropriate measures that provide for liability where an Internet service provider has actual knowledge of the infringement or awareness of facts of circumstances from which the infringement is apparent.

[300]Negotiator’s Note: For AU, they can withdraw their proposal if AU’s concerns about country-specific outcomes are resolved. AU would also need to oppose the JP/MX footnotes and the CA annex if its concerns are not resolved. JP is happy to have its footnote as an alternative standard in the main text and is also open to having a merit based discussion on this footnote.

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- (i) [VN propose: receiving a notification from the authority or person authorized to do so, in accordance to the national legislation of each Party; or][301][302]
- (ii) obtaining actual knowledge of the infringement or becoming aware of facts of circumstances from which the infringement is apparent,[CL propose: including through effective notice of claimed infringement. For these purposes, each party shall establish appropriate procedure through an open and transparent process which is set forth in domestic law, for notices[303] of claimed infringement, and may establish such procedures for counter notices by those whose material is disabled or removed through mistake or misidentification.] [CL oppose: [CL/VN propose:[304] such as through receiving a notice [305][306][CL propose:[307]] of alleged infringement from the rights holder or a person authorized to act on its behalf, and in the absence of a counter-notice from the person whose material is subject to a notice for removal or disabling indicating that the notice was issued by mistake or misidentification.][308]

[301]Negotiator's Note: For MX, the need for this language is dependent on whether their constitutional FN is accepted.

[302]Negotiators' note: VN can drop this proposal if its amendments to JP's footnote above is accepted.

[303][CL propose: For greater certainty, such a notice, as may be set out under a Party's law, by a written communication physically or electronically signed by a person who represents a right holder and must contain information that is reasonably sufficient to enable the online service provider to identify the work, performance or phonogram claimed to be infringed, the alleged infringing material, and the online location of the alleged infringement, and that has a sufficient indicia of reliability with respect to the authority of the person sending the notice.]

[304][CL/VN propose: A Party may require judicial [VN propose: or administrative authority] intervention for purpose of obtaining actual knowledge of the infringement or awareness of facts or circumstances from which the infringement in apparent.]

[305]For greater certainty, such a notice, as may be set out under a Party's law, must contain information that is reasonably sufficient to enable the online service provider to identify the work, performance or phonogram claimed to be infringed, the alleged infringing material, and the online location of the alleged infringement, and that has a sufficient indicia of reliability with respect to the authority of the person sending the notice.

[306]Placeholder to address VN's concerns about the identity of the person sending the notice to be discussed by the US and VN, e.g., {and that person's identity}. VN may consider removal of "legally sufficient" from the paragraph on the outcome of this discussion..

[307][CL propose: For greater certainty, upon receiving a legally sufficient notice or statement, a Party may require judicial intervention for the purpose of removing a disabling access to infringing material.]

[308]Negotiator's note: CL's opposition to this paragraph is meant to reflect that its proposal would replace the problematic issues that it faces in this sub paragraph

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- (b) An Internet service provider that removes or disables access to material in good faith pursuant to and consistent with sub-paragraph (a) shall be exempt from any liability for having done so, provided that it takes reasonable steps in advance or promptly after to notify the person whose material is removed or disabled.[309]

[AU propose: placeholder for alternative requirements for effective action with respect to the functions referred to in paragraph 2 above]

4. Where a system for counter-notices is provided under a Party's law, [AU propose: and where material has been removed or access has been disabled in accordance with paragraph 3,] that Party shall require that the Internet service provider restore the material subject to a counter-notice [CL propose:[310]], [CI oppose: unless the person giving the original notice seeks judicial relief within a reasonable period of time.] [VN propose; US oppose: or in the alternative, the Internet service provider receives a notification from the authority or person authorized to do so, in accordance to the national legislation of each Party.]
5. Each Party shall ensure that monetary remedies are available in its legal system against any person who makes a knowing material misrepresentation in a notice or counter-notice that causes injury to any interested part[311] as a result of an Internet service provider relying on the misrepresentation.
6. Eligibility for the limitations in paragraph 1 may not be conditioned on the Internet service provider monitoring its service or affirmatively seeking facts indicating infringing activity.
7. Each Party shall provide procedures, whether judicial or administrative, in accordance with that Party's legal system, and consistent with principles of due process and privacy, enabling a copyright owner who has made a legally sufficient claim of copyright infringement to obtain expeditiously from an Internet service provider information in the provider's possession identifying the alleged infringer,

[309]With respect to the function in subparagraph 2(b), a Party may limit the requirements of paragraph 3 related to an Internet service provider removing or disabling access to infringing material to circumstances in which the service provider becomes aware or receives notification that the cached material has been removed or access to it has been disabled at the originating site.

[310][CL propose: A Party may require that the restoration of the material by the Internet service provider is subject to conditions as specified in the Party's law.]

[311]For greater certainty, it is understood "any interested party" may be limited to those with a legal interest recognized under that Party's law.

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where such information is sought for the purpose of protecting or enforcing such copyright.

8. It is understood that the failure of an Internet service provider to qualify for the limitations in paragraph 1 does not itself result in liability. Moreover, this article is without prejudice to the availability of other limitations and exceptions to copyright, or any other defences under a Party's legal system.
9. The Parties recognize the importance, in implementing their obligations under this Article, of taking into account the impacts on rights holders and Internet service providers.

[MX propose: “**constitutional footnote**” - Placement to be determined]

“It is understood that Parties that have yet to implement the obligations set forth in par 3 and 4 will do so in a manner that is both effective and consistent with the Party's existing constitutional provisions. To that end, a Party may establish an appropriate role for the government that does not impair the timeliness of the process set forth under par 3 or 4 or entail advance government review of each individual {legal notice}.”[312]

[US/CA propose; [ANNEX TO IP CHAPTER][313]

In order to facilitate the enforcement of copyright on the Internet {and to avoid unwarranted market disruption in the digital environment}, {paragraph(s) x] shall not apply to a Party, provided that, if upon the date of entry into force of this Agreement, it continues to:

- i) prescribe in its law circumstances under which Internet service providers do not qualify for the limitations described in paragraph 2;
- ii) provide statutory secondary liability for copyright infringement where a person, by means of the Internet or another digital network, provides a service primarily for the purpose of enabling acts of copyrights infringement, in relation to prescribed factors, such as:
 - a. whether the person marketed or promoted the service as one that could be used to enable acts of copyright infringement;

[313]Negotiator's Note: CL/VN/BN/PE are opposed to the concept of an Annex to address only one party's system but can go along with the Annex that is flexible enough to accommodate other parties' system. For CL/MY, this applies to other parts of the text where there are specific references to a particular system.

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- b. whether the person had knowledge that the service was used to enable a significant number of acts of copyright infringement;
 - c. whether the service has significant uses other than to enable acts of copyright infringement;
 - d. the person's ability, as part of providing the service, to limit acts of copyright infringement, and any action taken by the person to do so;
 - e. any benefits the person received as a result of enabling the acts of copyright infringement; and
 - f. the economic viability of the service if it were not used to enable acts of copyright infringement;
- iii) require Internet service providers carrying out the functions referred to in paragraph 2(a) and 2(c) to participate in a system for forwarding notices of alleged infringement, including where material is made available online, and where they fail to do so, subjecting them to pre-established {monetary remedies/sanctions/amounts};
- iv) {induce} Internet service providers offering information location tools to remove within a specified period of time any reproductions of material that they make, and communicate the public, as part of offering the location information tool upon receiving a notice of alleged infringement and after that original material has been removed from the electronic location set out in the notice; and
- v) {induce} Internet service providers carrying out the function referred to in paragraph 2(c) to remove or disable access to material upon becoming aware of a decision of a court to the effect that the person storing the material infringes copyright in the material.]