



Conference on Online IPR Infringement and the Responsibility of Intermediary Service Providers

Bob Fox

Role and Responsibilities of Intermediary Service Providers (ISPs) in Combatting Online Infringements.

Chair, Digital Economy/ICT Group EABC and JFCCT

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SOUTH-EAST ASIA



**Conference on Online IPR Infringement
and the Responsibility of Intermediary
Service Providers**

Bob Fox – chair, Digital Economy/ ICT Group EABC and JFCCT

11-12 September 2019

London Room, Level 2, The Athenee Hotel

- 1) The on-line market environment**
- 2) What is an intermediary**
- 3) Intermediaries in focus**
- 4) Modes of Supply**
- 5) Cross border and Jurisdictional issues**

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Trusted Internet



1. An essential business tool
2. A key enabler for an intelligent society

Governance: Multi-stakeholder model (MSM); top down, especially via difficult laws does not work.

Maintain an open internet while respecting privacy and supporting security. Security and Privacy are not opposite extremes

Network / operational security is everyone's job; national security should be via an agency with right Rule of Law governance – will new TH Cybersecurity Act meet this?

Various rights protected – privacy, IP, impacted by security

Cybersecurity - concept



<i>Three Roles of Government</i>	<i>What is should be</i>
Policy Maker, Rule Marker	Some critical infrastructure is in private hands. Needs multi-stakeholder model (MSM) of governance with private sector on board
User	Cybersecurity laws apply to all; Government actors should not be exonerated from complying with Personal Data Protection law or Cybersecurity law.
Operator of a Cybersecurity Command Centre	Direct management needs independence from policy making and independence from infra owners, but co-operation with private sector needed – MSM model.

Similar Rule of Law principles need to apply to IP in the on-line world

The on-line market environment



Many tricks to thwart IPR's; laws have developed to address these

Group / peer mindset of on-line misuse of data and other rights is not the same as applies to motion pictures (the FBI warning of criminal penalties has been used for decades). A different mindset seems to apply to part of the tech industry, where peer pressure about respecting privacy and some IPRs seems weak.

Peer responsibility mindset - evolving

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ISPs – 1 done 2013



Ref	Goods or Service provider	Normal role	Main commercial relationship(s)	Ability to control IPR infringements	Existing or conceivable remedies or actions in context of IPR infringement
1	Manufacturer	Maker of goods & supplier to wholesaler/other distributor – could also be supplier direct to retail	Component / materials providers, wholesalers or retailers	High, this is a primary infringer, infringement is intentional even if as contract manufacturer	Injunctive, damages, criminal penalties
2	Supplier of goods	Usually acts as a wholesaler - supplies goods to retail on line merchants; supplier and manufacturer could be the same person	Manufacturers, retailers	High, in most cases intentional infringement	Injunctive, damages, possible criminal penalties
3	Warehouse manager or logistics services provider; Post office	May arrange end-to-end logistics, JIT or 'as picked' supply, may also provide retail delivery services to end user; ie post sale distribution/delivery.	Manufacturers, distributors (retailers or wholesalers)	Low (eg Post office) to Medium	Injunctive – may depend on knowledge or intent; but query duty of enquiry; may rely on customer declaration about no illegal goods
4	Advertising agencies, copy producers	Provides copy, advertising and promotional services in respect of goods	On line merchant or on line market	Medium – a code of conduct could be effective in this context, but counterfeiters may not engage professionals	Injunctive – may depend on knowledge or intent; but query duty of enquiry; may rely on customer declaration about no illegal goods;

ISP's - 2



6	On line market place sites	Promotional agent for on line merchant / collective buying site – or may be the direct seller of certain goods	Suppliers, on-line merchants	High to medium – the infringement may be intentional or reckless; reliance on supplier warranty	Injunctive (eg take down order or ‘remove from catalogue’ order – better if able to be targeted), damages
7	Debit or Credit card issuing bank or NBFi (could be bank – typically the case with VISA/MC) or branded card NBFi issuer (eg often the case with Amex)	Provides credit or other financial services to consumer. Merchant agreement (ie authorized merchants) often done at brand (eg VISA, MC, Amex) not issuing bank level.	Consumer; card brand owner.	Very low; specific merchants can be de-authorized in the normal course.	Possible blocking order – preventing use of card or de-authorization of merchant.
8	Acquiring bank	Provides POS support	Merchant	Low to medium. It is possible (in respect of known counterfeit goods) POS system could trigger an alert for further checking – this would need an SKU level identification, and predictive or pattern-of-use or price check algorithms.	Possible blocking order – preventing supply of financial services to designated merchants.
9	Payment service provider (PSP)	Typically an NBFi – sits between bank and merchant	Bank, merchant	Low – could possibly be an agent to apply the filters subject to	Possible blocking order

ISPs - 3



10	Electricity; UPS providers	Provide electricity to banks, on line merchants, data centres, ISPs, IP owners, manufacturers etc	Any user or electricity (ie just about every person in the value chain); gencos	Low to none	Possible blocking order to cease supply to an on-line merchant unless it ceases and desists from supplying infringing goods. Draconian step.
11	Data Centre Service Providers / other web service providers (may also include ISP function)	Hosting, co-location, web se	Merchant	Low	Injunctive (take down) – must be focused on the on-line merchant & subject to legal process
12	Internet access provider (ISP) (‘Intermediary Service Provider’ is a more recent term)	Provides access to www (the internet) via fixed wireline, fixed wireless or mobile wireless. Increasingly done by mobile operators (eg in Thailand DTC, AIS, True, TOT, TT&T,)	Consumer of internet access services; typically no relationship with www. Relies on standards (eg TCP/IP; 3GPP) to provide access.	Very low to none. Can only block access to an entire site (subject to legal process) or	Blocking order (ie to the on-line site) subject to legal process
13	Browser and search services providers	Provides management internet access tools, provide search tools, Google (eg) as a search engine flags sites on a security basis.	Advertisers, end users	Medium – certain sites can be identified (with safeguards) and tagged to alert or exclude from search results	Open to abuse – caution. Possible access denial subject to a process.

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Instrument	Copyright Act amended to 2015 Current draft Amendments	Computer Crimes Act amended to 2017 With 2017 Notification
Subject matter	Copyright	All IP rights, various proscribed actions
Categories	Draft Amendment to Copyright Act s.4 (definitions) – ‘service provider’ – four categories. New s. 43/1; <ul style="list-style-type: none"> (1) Mere conduit (2) Temporary storage – caching (3) Hosting (4) Search engine 	Notification 2017 clause 4 <ul style="list-style-type: none"> (1) mere conduit (2) System caching – temporary storage (3) Hosting (4) Search engine (5) (Other – general access/ communication means)
Action	Direct take-down request or effect blocking without delay, process for challenge	Request Court to remove infringing content from the Internet, or website blocking.

What about finance-related ISPs?

Conditions for exemption from liability



CA amendments briefer than CCA Notification explanations; may anticipate CA secondary legislation.

CA examples:

Conduit - 'automatic technical process', 'does not amend'

Caching – 'not intervening' etc

Hosting – 'didn't know/have constructive knowledge of IP violation'

Search engine - didn't know/have constructive knowledge of IP violation; will remove without delay once knows

ISPs – MNOs/MNVO/s, DCs



Involve in the dialogue up front – these groups of ISPs tend to be left out

Rules based approach – need to be able to execute – must be reasonable

Orders must be proportionate, often a question of fact; overreach (aggressive blocking) can cause economic harm.

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Modes of Supply - services

4 Modes of Supply of Services

Enterprise
Singapore

Modes	Forms of Service Provided
<p>Mode 1: Cross-Border Supply Consumer and Service Supplier remain in different countries -Only the service crosses the border (E.g. An EU resident uses online services offered by a Singapore-based company)</p>	
<p>Mode 2: Consumption Abroad -Consumers making use of a service in another country (E.g. Tourism services; Customer from the EU travelling to Singapore to consume services from a company based here) -Also covered is the movement of consumer's property (E.g. Sending a ship or other equipment abroad for repair)</p>	
<p>Mode 3: Commercial Presence -Foreign companies setting up subsidiaries or branches to provide services in another country (E.g. Foreign firm from Singapore setting up a branch in the EU to provide wholesale trade services)</p>	
<p>Mode 4: Presence of Natural Persons -Individuals travelling from their own country to supply services in another country on a temporary basis (E.g. Salesperson from Singapore practices in EU)</p>	

Source: Enterprise Singapore, explaining the EU-Singapore FTA

eCommerce – what is sold



intrinsically digital – streaming video, eBooks, computing services, Software-as-a-Service, social media, games, various intelligent uses of Data to create value,

substitutes for established equipment and services – virtual private communications networks, security services, virtualised PBXs, Platform-as-a-Service and services delivered on-line (e.g. accounting / other business processes, graphic design, software development, data analytics, banking and financial services, on-line payments, telemedicine; industry and home automation),

marketing, sale, logistics, etc. of physical goods – (e.g. Amazon, eBay, Alibaba, Tarad.com, Lazada, Shopee),

marketing and sale of services which are not delivered on line (eg air services, taxi services, hotel bookings).

IPRs of goods and services are relevant in most cases. There are also IPRs in the platform

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Content & Jurisdiction

How can we manage globally-available content in light of the diversity of local laws and norms applicable on the internet?

CONTENT & JURISDICTION PROGRAM:

CROSS-BORDER CONTENT TAKEDOWN

Problem Framing
May 2017

Mainly about offensive content; less about IPRs, possibly due to relative homogeneity of IP laws (substantive) but less so for procedural laws and rules

But there are jurisdictional issues

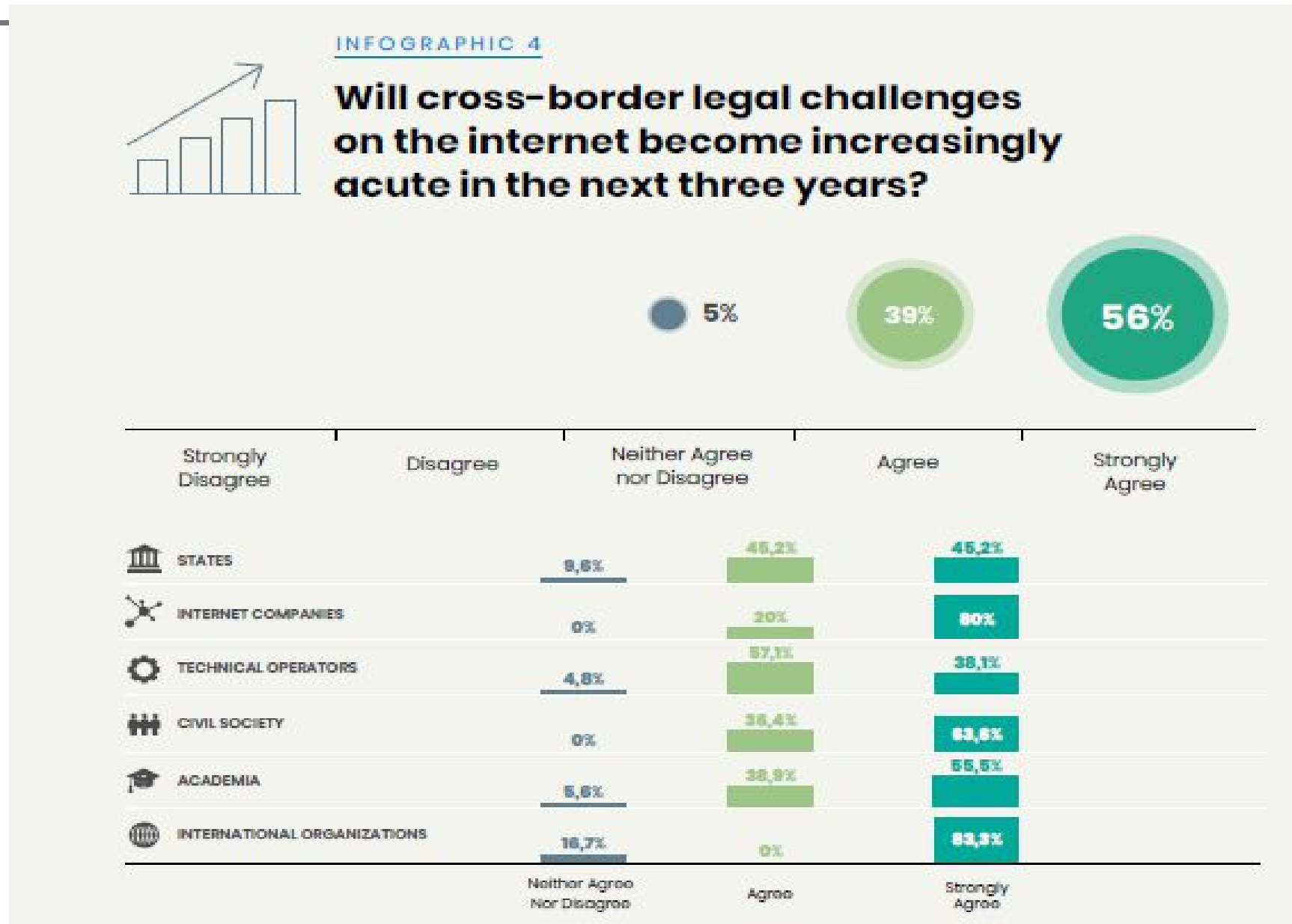


Need resolving.

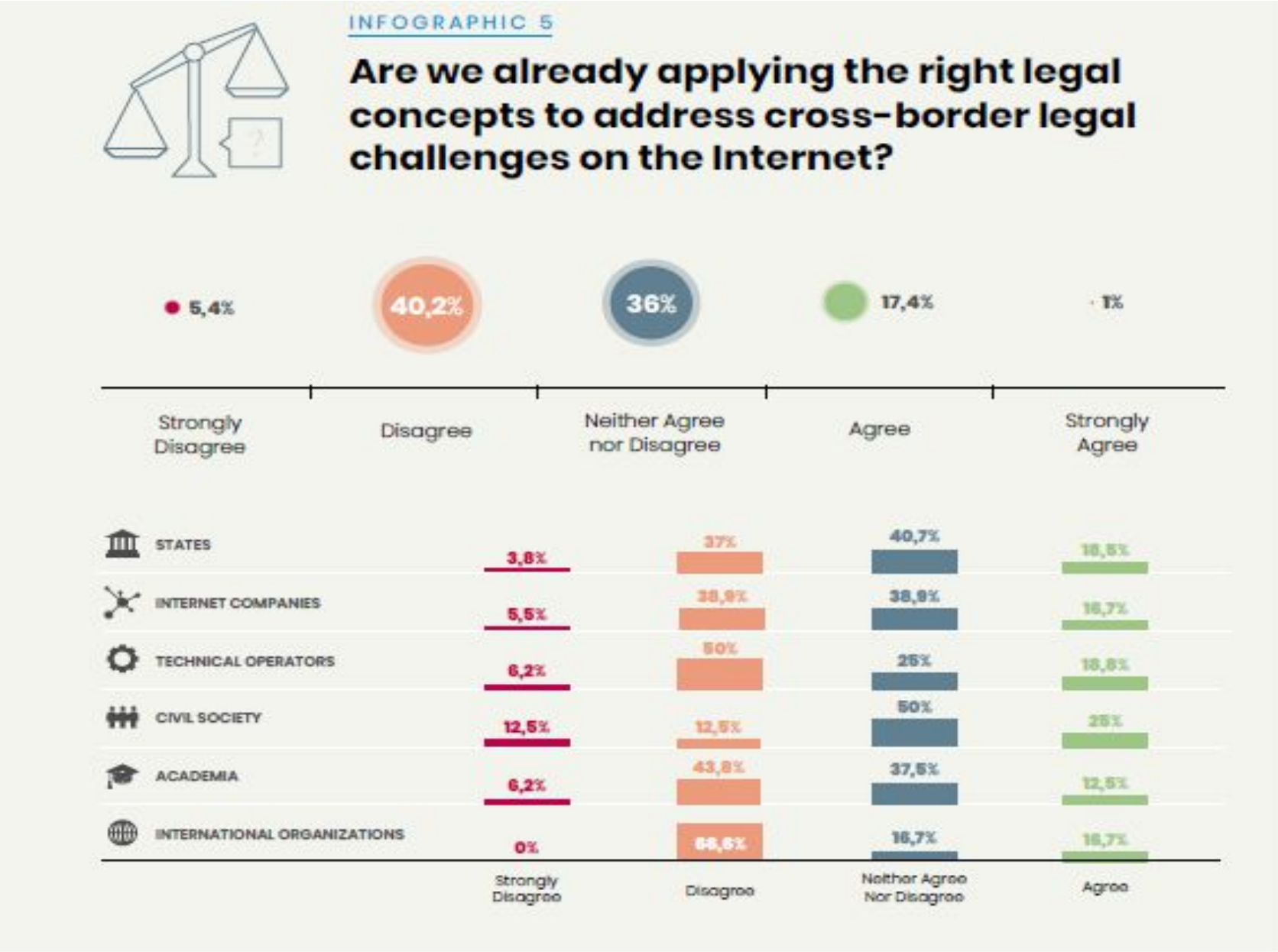
First Global Internet Report published 3 June 2019; further experience input by September, publish at UN early November.

In Thailand – for dispute resolution need to allow arbitration and special skills for on-line disputes; fast track resolution.

Data Issues



Data Issues



SOURCE: Internet & Jurisdiction Policy Network: Internet & Jurisdiction Global Status Report 2019

Digital Competencies (Digital Literacy)



Ability to use, create and share digital content safely and responsibly. It is an overarching concept for a wide range of skills:

technology competency, which is the use of digital technology;

information literacy, which is the ability to locate, identify, retrieve, process and use digital information optimally; and

media literacy, which enables us to comprehend, contextualise and critically evaluate information, as well as to create and communicate content effectively across digital media platforms.

cyber wellness, includes taking personal responsibility to use the internet for the good of the community, and understanding the risks of online dangers and negative online behaviours.

Thank you

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