

Telecommunications - Taiwan

Common carrier defence to be further examined

Contributed by **Shay & Partners**

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The National Communications Commission (NCC) has been under fire for its proposed compulsory measures in the draft amendment of the Telecommunications Act to assist further content owners whose rights may be infringed by file sharing or other activities.

The 'common carrier' or 'mere conduit' defence was long established in the Telecommunications Act, until 1998 when sex services took advantage of telecommunications services to obtain easy exposure to the public. Article 8 of the act was then amended to limit the common carrier defence by stating the common carriers' obligations to assist on control of public order to be as follows:

"A telecommunications enterprise may terminate the use of telecommunications by a user, whose business is providing telecommunications contents to the detriment of public order and good morals..."

In case of any unsightly advertisement set up, posted or painted at will, which contains, for the purposes of advertising and propaganda, one or the other's telephone number or any other identification signs or numbers of telecommunications services, the competent authority governing such advertisement may inform the telecommunications enterprise to terminate the provision of the telecommunications service indicated in that advertisement."

In its newly drafted amendment to the act, the NCC demands that all telecommunications service providers which have received their licences from the NCC must cease transmission of immoral content and anything illegal - including blocking access to certain sites or content on notice of any relevant agencies without delay - according to decisions given by relevant government agencies under appropriate laws. It could be a matter of national security or a minor's welfare or, as most of the public comments criticise, an enhancement of anti-piracy measures in regard to IP rights.

Despite the strong criticism among the press and civil organisations, the NCC says that the draft amendment aids clarification and does not cross the line of constitutional review. The NCC insists that it has no intention of intervening in content surveillance, but yields to the rulings of relevant government agencies with which the telecommunication operators must comply whenever a blockade is technically available. The NCC refers to specific provisions in the other existing laws.

The safe harbour mechanism embedded in Chapter 6 of the Copyright Act became effective in May 2009 and exempts internet service providers (ISPs) from indirect liability occurring through customers which have engaged in illegal file-sharing or other activities. 'Notice and take down' is one of the compliances that ISPs must adhere to for protection under safe harbour provisions.

In November 2011 the Minor's Welfare and Rights Protection Law was amended. Article 46 covered ISPs and their direct responsibility for assisting the relevant authorities on internet content surveillance. ISPs must take all necessary measures to restrict minors from accessing certain sites or content, or must remove the content on receiving notice from a competent authority that the identified content or links are determined to be harmful to the physical and mental health of minors.

The draft amendment is pending review of the Executive Yuan.

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