

1 March 2012

Mr. Paul Wong
Assistant Secretary for Commerce and Economic Development
(Commerce and Industry) 3A
Commerce, Industry and Tourism Branch
Commerce and Economic Development Bureau
23/F, West Wing, Central Government Offices
2 Tim Mei Avenue
Tamar
Hong Kong

Dear Sirs,

COPYRIGHT PROTECTION IN THE DIGITAL ENVIRONMENT
CODE OF PRACTICE (SECOND DRAFT)

The Hong Kong General Chamber of Commerce is pleased to submit its views on the second draft of the Code of Practice for Online Service Providers (“Code”) as outlined below.

1. Balancing interests of OSPs

1.1 The Code should aim to strike an appropriate balance between the needs of copyright owners and the concerns and responsibilities placed upon online service providers (“OSP”). OSPs provide physical facilities and/or conveyance services to subscribers and ordinarily have no active control over the contents or recipients of the messages. Accordingly, OSPs should be presumed innocent unless proved to have authorized an infringement. Whilst the Code is intended to provide a safe harbour and make the legal position clearer, OSPs are made to bear the burden operationally. In order to encourage OSPs to participate in the Code, we consider that there has to be a balance and OSPs should not be unduly burdened and should be afforded a more reasonable and flexible approach on a case by case basis. We have concerns that the Code may place too much burden on OSPs.

2. Issue of Repeat End-User Infringers

2.1 Where OSPs comply with the Code, subject to compliance with section 88B(2) of the Copyright Ordinance (“Cap. 528”), OSPs will not be held liable for copyright infringement. However, the Code does not require OSPs to put in place a policy that addresses the issue of repeat end-user infringers.

2.2 As stated in our submission on the Draft Code of Practice for Internet/Online Service Providers dated 8 September, 2011, we are disappointed that there are no requirements for OSPs to implement a policy to deal with repeat end-user infringers. This is of concern as research shows that the majority of copyright infringement on the Internet is perpetrated by repeat end-user infringers. If OSPs are exempted from liability without being required to deal with repeat end-user infringers, the deterrent effect of the Code on such repeat offenders will be minimal. Moreover, the introduction of the option for subscribers to opt out of disclosing their personal data to complainants leaves copyright owners without a long-term solution to deal with infringers who repeatedly host infringing materials on the Internet.

1.3 In particular, in relation to Part III of the Code (Notice and Notice System), we believe that the system being put forward will not be effective in combating online copyright infringement, without a mechanism that can impact subscribers’ ability to continue transmit infringing materials. Although OSPs are required to forward notices of alleged infringement to their subscribers, subscribers face no

consequences if they fail to act on those notices. Copyright owners are therefore unable to stop the cycle of continuous infringement by repeat offenders. Likewise, the absence of any provision dealing with repeat infringers in Parts IV and V of the Code (Notice and Takedown System) is likely to lead to subscribers repeatedly re-hosting infringing materials that have previously been taken down.

2.4 We humbly suggest that as a condition to exemption from liability, OSPs should put in place a legally binding policy or contractual arrangement with their subscribers, which allows them to terminate, suspend or limit the services they provide to subscribers, in the event of repeated copyright infringement. Such arrangement would be similar to the framework adopted by the United States' Digital Millennium Copyright Act.

3. Time Frame for Response to Notice of Alleged Infringement

3.1 We note that the second draft of the Code eliminates the specific time frame within which OSPs must respond to notices of alleged infringement. We welcome this approach.

4. Opting Out of Disclosure of Personal Data

4.1 We note that under the second draft of the Code, a subscriber is able to opt out of disclosing its personal data to the complainant when the OSP obtains a copy of the subscriber's counter notice.

4.2 Part IV of the Code states that upon receiving the respondent's counter notice, copyright holders have 20 working days to commence legal proceedings. If the copyright holder does not commence proceedings within this time frame, the OSP will be obligated to reinstate the material or cease disabling access to the material or activity.

4.3 We believe that this proposed procedure would negatively affect copyright owners' ability to tackle online copyright infringement. Where a subscriber opts out of disclosing its personal data (which will occur in the vast majority of cases), copyright owners would need to initiate pre-action discovery proceedings against the OSP, in order to obtain the necessary personal data to commence legal proceedings against the infringer. As such, the Code does not overcome the difficulty faced by copyright owners of having to apply to a court for a *Norwich Pharmacal* order to authorize OSPs to disclose the identity of suspected infringers. Taking into account the difficulty and time needed to obtain pre-action discovery proceedings, it is hard to see how copyright holders would be able to comply with the time frame of 20 working days. The legal costs of engaging solicitors and barristers are high in Hong Kong and only a limited number of copyright owners will have sufficient resources to fund such pre-action discovery proceedings. We therefore suggest the Government to review the proposed framework, taking into account the above issues raised.

5. Other comments

5.1 *Substantial part.* Copyright infringement is defined as the unauthorized reproduction of the whole or any substantial part of a copyright work. The concept of "substantial part" is a term of art. It is hard to define if the notice and takedown procedure will be utilized properly by complainants based on their interpretation of the concept of "substantial part". Given that the notice and takedown procedure is a highly intrusive remedy, consideration should be given to setting the threshold under the Code in respect of the alleged reproduction at a relatively high, uncontroversial level in order to avoid potential misuse of the procedure.

5.2 *Overseas complainants.* As noted in our previous submission, the Code ignores the danger of abuse by overseas complainants, against whom the offence of false statement and liability to damages may not have much weight if they reside outside the Hong Kong jurisdiction.

5.3 *Notice and Counter Notice timing.* The notice and takedown procedure is undoubtedly one-sided in giving complainants an avenue to request content takedown without notice to the subscriber. A subscriber has to wait one month after takedown to have content restored, as the complainant is given 20 working days from receipt of the counter notice forwarded by the OSP to notify if it is initiating legal action, and the OSP may only reinstate content after such time period has expired and no notification of action by the complainant has been received. If a complaint notice is wrongfully issued, this may lead to a wrongful takedown of content for an innocent subscriber and prolonged delay to have content restored, which may cause significant harm.

Yours sincerely,

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