

新聞稿

2011年8月25日

## 互聯網服務供應商協會 對「版權（修訂）條例 2011」的回應

1. 互聯網服務供應商協會（“HKISPA”）研究了版權（修訂）條例 2011（下稱“條例草案”）的文件，同時收到了商務及經濟發展局的第一稿「服務提供者《實務守則》」（“CoP”），諮詢會員後，有以下之回應。
2. HKISPA 及其成員支持適當保護版權，也理解互聯網已成為部份侵犯版權的媒體。一直以來，互聯網服務供應商（“ISP”）依法與執法機關及版權擁有人合作暢順。
3. 對於政府即將推出的版權（修訂）條例 2011（下稱“條例草案”），我們支持「安全港」的建議，同時對豁免 ISP 暫時複製版權作品以方便網絡緩存營運表示支持。
4. 但是，HKISPA 建議對條例草案作出以下“微調”，令條例草案更切合實際的營運情況及快速的科技發展。
  - A. 於法例條文清晰澄清，ISP 根據 CoP 將涉嫌侵權物品移除時，括勉該 ISP 移除不相關物品或影響其他網絡連線的任何責任。
  - B. 為 ISP 提供一個回饋機制，向商務及經濟發展局秘書長反映及解釋未能執行或不切實際的 CoP 條文，而通過此機制，ISP 不執行移除仍然可以享有「安全港」保護。
  - C. 提供機制允許 ISP 向版權擁有人收回「通知，移除，反通知」的成本，以防服務被濫用。同時明確澄清 ISP 可以因過往版權擁有人的濫用而拒絕該版權擁有人的要求。

詳情及理據，煩請閱讀以下英文版本。

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## Hong Kong Internet Service Providers Association

Responses and suggestions to

Copyright (Amendment) 2011

22 August 2011

Version 1.0

### **Service Interruptions to unrelated services in the course of takedown**

The HKISPA is concerned that the Bill does not sufficiently clarify that the Safe Harbor limits service provider liability even where disabling content or activity may have a deleterious effect on the business of a service provider's customers business or network.

Consider the following situation common to ISPs:

An ISP receives a notice that a web server on its network is serving infringing material. The ISP's only course, under the Safe Harbor, would be to disable access to that relevant IP address. The ISP would not know what other services might be associated with that IP address, including services that could include hosting of multiple web sites, name servers, etc. The ISP's sole option is to disable the IP address, which may include switching on or off all services associated with that IP address.

Thus, the ISP, even though acting in good faith, may impact unrelated services that are not alleged to be infringing. Although we believe that there would be no liability as the Bill is currently drafted, to ensure clarity, the Bill should be amended to ensure that no liability attaches to a service provider even in cases where non-infringing activities are inadvertently curtailed.

### **Proposal of HKISPA**

Section 88G of the Bill currently provides:

88G (1) "if a service provider has, in good faith, removed any material, or disabled access to any material or activity, pursuant to a notice of alleged infringement, the service provider is not liable to any person for any claim made in respect of the removal or disabling, whether or not the material or activity is ultimately determined to be infringing."

The HKISPA proposes the following amendment:

88G (1) “if a service provider has, in good faith, removed any material, or disabled access to any material or activity, pursuant to a notice of alleged infringement, the service provider is not liable to any person for any claim made in respect of the removal or disabling, whether or not the material or activity is ultimately determined to be infringing, **or whether or not the material or activity is directly related to the claimed infringement in question and even if, as a result, the removal of such material or disablement of such access affects the operations or networks of the alleged infringer or any third persons.**”

### **Feedback Mechanism to the Code of Practice**

Regarding Proposal 88B, the HKISPA considers the enactment of a Safe Harbor mechanism to be an appropriate balance to ensure growth of online commerce while at the same time protecting the interests of copyright owners. The HKISPA, however, is concerned that the Code of Practice as published by the Secretary of Commerce and Economic Development may quickly grow out of touch with business realities or that compliance may become impractical given the fast evolution of technology.

For example, in the near future, online content storage will likely be almost entirely cloud based, where disabling or disconnecting online content may not be as straightforward or technically viable as it is today. In such circumstances, if an ISP is unable to stop or limit the alleged infringement because of infrastructure reasons or large scale impact, the ISP might find itself without protections of the safe harbor.

### **Proposal of HKISPA**

To avoid this scenario, the HKISPA proposes that the Bill incorporate a mechanism that can be utilized when a provider considers that compliance with the CoP is technologically impractical or impossible.

Section 88B(3) currently provides:

88B (3) For the purpose of subsection (2)(a), a service provider is to be treated as having taken reasonable steps to limit or stop the infringement in question if the service provider complies with all the provisions in the code of practice respecting the course of action that a service provider may adopt in limiting or stopping an alleged infringement.

HKISPA proposes the following amendment:

88B (3) For the purpose of subsection (2)(a), a service provider is to be treated as having taken reasonable steps to limit or stop the infringement in question if **(i)** the service provider complies with all the provisions in the code of practice respecting the course of action that a service provider may adopt in limiting or

stopping an alleged infringement, or **(ii) if some provisions in the code of practice cannot be complied with, submit to Secretary of Commerce and Economic Development the detail reasons of inability to comply, and communicate this act to the complainant concerned.**

### Cost Recovery

In the previous tripartite negotiations, representatives of the copyright owners agreed generally that it would be fair for service providers to be compensated for the cost of complying with the notice-and-notice and notice-and-takedown procedures. The Bill, however, neglects to provide a mechanism for service providers to recover their costs.

Without a mechanism for service providers to recover their costs, the Bill would impose on the service providers a risk that they will suffer abuse at the hands of alleged copyright owners whose numbers are countless and who may reside in other countries. Therefore, cost recovery is necessary.

### Proposal of HKISPA

HKISPA proposes the follow four amendments.

(1) Amend

88B (2) (a) (i) received a notice of alleged infringement in relation to the infringement;

To

88B (2) (a) (i) received a notice of alleged infringement in relation to the infringement **and it acting reasonably does not firmly believe that it is an abuse, taking into account any failure to pay the service provider billed costs on previous notices (if billed costs are ultimately permitted), or if more than a certain number of notices over a set period of time that were not acted on in response to counter-notices, or if more than a certain number of non-compliant notices within a certain time frame, or if objective indicia that the complainant is not legitimate (such as proof that the claimant is not acting on behalf of the owner);**

(2) Amend

88B (5) (b) the failure of a service provider to qualify for the limitations on liability established by this section has no adverse bearing on the consideration of any defense that may be available to the service provider in proceedings for infringement of copyright.

To

88B (5) (b) the failure of a service provider to qualify for the limitations on liability established by this section has no adverse bearing on the consideration of any defense that may be available to the service provider in proceedings for infringement of copyright, **where such defense may include repetitive non-payment of the copyright owner to the service provider for actual cost recovery of notice, takedowns, or reinstatements.**

(3) Proposed new Section 88C(5):

A service provider may impose a service or processing charge on any complainant in connection with any notice of infringement, which charge shall be limited to 120% of the actual anticipated cost of the service provider in stopping or limiting the alleged infringement. Failure to submit such service charge, if any, within 3 business days after submitting a notice of alleged infringement shall render the notice of no effect for the purposes of section 88B(2)(a).

(4) Amend the Code of Practice

Amend the Code of Practice to clarify that service providers may choose to bill copyright owners for the actual cost of the notice, takedown and reinstatements, and prescribe the cost calculation format.

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