

SECOND DRAFT

COPYRIGHT PROTECTION IN THE DIGITAL ENVIRONMENT

CODE OF PRACTICE

published pursuant to Section 88I of the Copyright Ordinance (Cap. 528)

Please send your comments on or before 2 March 2012 to

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

Fax: 2147 3065

Email: co_consultation@cedb.gov.hk

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I. Introduction

- 1.1 THIS CODE OF PRACTICE (“the Code”) is published by the Secretary for Commerce and Economic Development pursuant to section 88I of the Copyright Ordinance (Cap. 528) (“the Ordinance”). It provides practical guidance to service providers, complainants¹ and subscribers in the context of Division IIIA of the Ordinance, which particularly includes the relevant practices and procedures to be adopted by service providers to limit or stop copyright infringement on their service platforms.
- 1.2 Where a service provider, in taking steps to limit or stop an alleged infringement, duly complies with this Code, it will be treated by virtue of section 88B(3) of the Ordinance as having taken reasonable steps to limit or stop the infringement in question. Subject to compliance with the other three qualifying conditions in section 88B(2), the service provider will not be held liable for damages or other pecuniary remedy for copyright infringement in a work that occurs on its service platform merely because it has provided or operated facilities for online services (see section 88B(1) of the Ordinance). The other three qualifying conditions are:-
- (a) the service provider has not received and is not receiving any financial benefit directly attributable to the infringement;
 - (b) the service provider accommodates and does not interfere with standard technical measures that are used by copyright owners to identify or protect their copyright works; and
 - (c) the service provider designates an agent to receive notices of alleged infringement, by supplying through the service provider’s service, including on the service provider’s website in a location accessible to the public, the name and contact details of the agent.

¹ For the avoidance of doubt, a complainant, in accordance with section 88C(3)(g)(ii) of the Ordinance, must confirm that he is the copyright owner of the copyright work concerned, or is authorized to act on behalf of the copyright owner. A complainant commits an offence if he makes any false statement in a notice of alleged infringement, and he is also civilly liable to pay damages as a result of the false statement.

- 1.3 For the avoidance of doubt, when electing to implement any procedure and practice to stop or limit any alleged infringement on its service platform (including the removal of any material, or the disabling of access to any material or activity), a service provider should ensure due compliance with all applicable laws, notably the *Telecommunications Ordinance* (Cap. 106) and the *Personal Data (Privacy) Ordinance* (Cap. 486).
- 1.4 The service provider should also ensure that its contracts with subscribers do enable it to take appropriate actions in accordance with the Code, including the forwarding of a notice of alleged infringement to a subscriber, and the removal of or disabling of access to any material on its service platform.
- 1.5 The service provider should take reasonable steps to notify any prospective complainants or subscribers (who are a living individual) of the following:-
 - (a) that sections 88C(3) and 88D(5) of the Ordinance require the complainant and the subscriber in question to supply certain specific personal data in a notice of alleged infringement and counter notice respectively;
 - (b) that a notice of alleged infringement or counter notice which does not contain the personal data of the complainant or the subscriber (as the case may be) will be considered as defective and that the service provider is not required to process the same;
 - (c) the purpose for which the personal data is to be used;
 - (d) the intended recipients of the personal data under subsequent notification steps prescribed in the Code, e.g. onward transmission of (a) the notice of alleged infringement to the subscriber, or (b) the counter notice to the complainant, as the case may be (please also refer to paragraph 4.23(a) below); and
 - (e) the complainant's or subscriber's rights to request access to and the correction of the personal data, and how such request may be made.

- 1.6 The service provider should keep records of the following documents for 18 months after the date of receipt or issuance:-
- (a) a true copy of any notice of alleged infringement received by the service provider;
 - (b) if applicable, a true copy of any notice sent by the service provider to its subscriber which should, amongst others, contain the identity of the subscriber to which the notice was sent; and
 - (c) if applicable, a true copy of any counter notice received by the service provider.
- 1.7 The service provider should take all practicable steps to ensure that the personal data collected from the complainants and/or subscribers are protected against unauthorised or accidental access, processing, erasure, loss or other use.
- 1.8 Expressions used in this Code have the same meaning as in Division IIIA of the Ordinance.

II. UNDERLYING OBJECTIVES

2.1 The objectives underlying the formulation of this Code are:-

- (a) to enhance copyright protection in the digital environment, in the interest of providing an environment conducive to the healthy development of the creative and information technology industries in Hong Kong;
- (b) to facilitate a digital economy by promoting the development of advanced technology for creating and disseminating digital content;
- (c) to combat online piracy and free up online resources that would otherwise be taken up by infringing activities; and
- (d) to foster industry cooperation and entrench a culture of respect for intellectual property rights in the community.

2.2 The Code seeks to provide a mechanism through which the Administration, copyright owners, copyright users and service providers may join forces, within the framework of the applicable laws, rules and regulations, to combat online copyright infringement, and promote respect for intellectual property rights.

III. NOTICE AND NOTICE SYSTEM

A. Applicability

3.1 Part III is applicable to a service provider who:-

- (a) offers transmission, routing; and/or
- (b) provides connections for digital online communications, between or among points specified by a user,

of material of the user's choosing and who has satisfied the conditions set out in paragraph 3.2.

3.2 The conditions referred to in paragraph 3.1 are that the service provider:-

- (a) does not initiate the transmission;
- (b) does not select the recipient of the transmission except as an automatic response to the request of another person; and
- (c) does not select or modify the material contained in the transmission.

3.3 Paragraphs 3.4 to 3.14 below set out the steps a service provider may take for forwarding notices to its subscribers following receipt of a notice of alleged infringement from a complainant.

B. Notice of alleged infringement

Issue of notice of alleged infringement

3.4 A complainant may send a notice of alleged infringement to a service provider if he believes, on reasonable grounds, that a subscriber to the service provider's online service has infringed the owner's copyright by means of the online service.

Form and delivery of notice of alleged infringement

- 3.5 The complainant shall send a notice of alleged infringement to the service provider in accordance with the form designated by the service provider, which for the purposes of this Code shall be Form A as set out in the Annex.
- 3.6 The complainant shall provide the full particulars as required by Form A which should be signed or otherwise authenticated by the complainant.
- 3.7 Where a complainant elects to file a notice of alleged infringement, his failure to provide all the required particulars may render the notice defective and the service provider is not required to handle a defective notice.
- 3.8 The notice of alleged infringement shall be sent to the service provider's designated agent by electronic or other means designated by the agent.

C. Receipt of notice of alleged infringement

Receipt of notice of alleged infringement

- 3.9 On receipt of the notice of alleged infringement, the service provider shall acknowledge receipt. An automated response will suffice.

Notice to complainant

- 3.10 The service provider shall send a written notice to the complainant as soon as practicable if there are grounds for not processing the notice of alleged infringement, and these grounds may include the following:-
- (a) the notice of alleged infringement does not comply with paragraph 3.6;
 - (b) the information in the notice of alleged infringement does not relate to one of the service provider's subscribers (e.g. the IP

address identified was not allocated to the service provider at the time of the alleged infringement);

- (c) the notice of alleged infringement refers to an account that is no longer active; or
- (d) the subscriber using the IP address at the time of the alleged infringement cannot be reliably identified.

3.11 The relevant ground(s) for not processing the notice of alleged infringement shall be stated on a notice sent under paragraph 3.10.

3.12 For the avoidance of doubt, a service provider is not required to verify the authenticity of the content entered into a notice of alleged infringement. It will be further processed as long as the notice contains all the particulars required by Form A.

D. Notice to subscriber

Notice to subscriber

3.13 Unless a notice has been sent to the complainant under paragraph 3.10, the service provider shall, as soon as practicable, send a written notice to the subscriber containing the information set out in paragraph 3.14.

Content of notice to subscriber

3.14 A notice sent under paragraph 3.13 shall include/enclose:-

- (a) a statement that the subscriber's account for online services has been identified in connection with an allegation of copyright infringement;
- (b) a copy of the notice of alleged infringement;
- (c) information about the legal consequences of copyright infringement in Hong Kong, together with a reminder to the subscriber that he may seek independent legal advice, if in

III. NOTICE AND NOTICE SYSTEM

doubt, and/or contact the complainant direct regarding the alleged infringement; and

- (d) information about the service provider's policy and/or contractual terms against any use of its online services in breach of copyright, including the consequences of such use.

IV. NOTICE AND TAKEDOWN SYSTEM (STORAGE)

A. Applicability

- 4.1 Part IV is applicable to a service provider who has stored, at the direction of a subscriber, material or activity on its service platform that can be accessed by a user through the Internet.
- 4.2 Paragraphs 4.3 to 4.24 below set out the steps a service provider may take for removing material or disabling access to material or activity that are identified as infringing following receipt of a notice of alleged infringement from the complainant.

B. Notice of alleged infringement

Issue of notice of alleged infringement

- 4.3 A complainant may send a notice of alleged infringement to a service provider, in relation to a material or an activity residing on its service platform, if he:-
- (a) believes, on reasonable grounds, that the material or activity infringes the copyright of the copyright owner's work; and
 - (b) wishes the service provider to remove the material or disable access to the material or activity in question.

Form and delivery of notice of alleged infringement

- 4.4 The complainant shall send a notice of alleged infringement to the service provider in accordance with the form designated by the service provider, which for the purposes of this Code shall be Form A as set out in the Annex.
- 4.5 The complainant shall provide the full particulars as required by Form A which should be signed or otherwise authenticated by the complainant.

IV. NOTICE AND TAKEDOWN SYSTEM (STORAGE)

4.6 Where a complainant elects to file a notice of alleged infringement, his failure to provide all the required particulars may render the notice defective and the service provider is not required to handle a defective notice.

4.7 The notice of alleged infringement shall be sent to the service provider's designated agent by electronic or other means designated by the agent.

C. Receipt of notice of alleged infringement

4.8 On receipt of the notice of alleged infringement, the service provider shall acknowledge receipt. An automated response will suffice.

D. Takedown and notice to subscriber

Takedown

4.9 Upon receipt of a notice of alleged infringement that complies with paragraph 4.5, the service provider shall, as soon as practicable, remove the material or disable access to the material or activity to which the alleged infringement relates.

4.10 For the avoidance of doubt, a service provider is not required to verify the authenticity of the content entered into a notice of alleged infringement. It will be further processed as long as the notice contains all the particulars required by Form A.

Notice to subscriber

4.11 Where the service provider has removed material or disabled access to material or activity residing on its service platform, the service provider shall promptly take reasonable steps to send a written notice to the subscriber containing the information set out in paragraph 4.12.

Content of notice to subscriber

4.12 A notice sent under paragraph 4.11 shall include/enclose:-

- (a) a statement that a material or an activity stored at the direction of the subscriber has been identified in connection with an allegation of copyright infringement and that the service provider has removed the material or disabled access to the material or activity accordingly;
- (b) a copy of the notice of alleged infringement;
- (c) a statement that if the subscriber wishes to dispute or deny the alleged infringement and/or dispute the removal or disabling, he may send a counter notice to the service provider within [20] working days² after the date of the service provider's notice;
- (d) information about the legal consequences of copyright infringement in Hong Kong, together with a reminder to the subscriber that he may seek independent legal advice, if in doubt, and/or contact the complainant direct regarding the alleged infringement; and
- (e) information about the service provider's policy and/or contractual terms against any use of its online services in breach of copyright, including the consequences of such use.

4.13 The service provider shall be treated as having complied with paragraph 4.11 if it sends the documents to the subscriber as required.

² In this Code, "**working day**" means any day other than:-

- (a) a public holiday within the meaning of section 3 of the Interpretation and General Clauses Ordinance (Cap. 1); or
- (b) a gale warning day or black rainstorm warning day as defined in section 71(2) of the Interpretation and General Clauses Ordinance (Cap. 1).

Notice to complainant

4.14 The service provider shall send a written notice to the complainant as soon as practicable if the notice of alleged infringement does not comply with paragraph 4.5.

E. Counter notice

Issue of counter notice

4.15 A subscriber who wishes to dispute or deny the alleged infringement and/or dispute the removal or disabling may send a counter notice to the service provider within [20] working days after the date of the service provider's notice.

Form and delivery of counter notice

4.16 The subscriber shall send a counter notice to the service provider in accordance with the form designated by the service provider, which for the purposes of this Code shall be Form B as set out in the Annex. In any event, the counter notice must allow the subscriber (as long as he is a living individual) to opt for either disclosure or non-disclosure of his personal data in a copy of the counter notice sent to the complainant pursuant to paragraph 4.21.

4.17 The subscriber shall provide the full particulars as required by Form B which should be signed or otherwise authenticated by the subscriber.

4.18 Where a subscriber elects to file a counter notice, his failure to provide all the required particulars may render the counter notice defective and the service provider is not required to handle a defective counter notice.

4.19 The counter notice shall be sent to the service provider's designated agent by electronic or other means designated by the agent.

F. Receipt of counter notice

4.20 On receipt of the counter notice, the service provider shall acknowledge receipt. An automated response will suffice.

G. Notice to complainant and reinstatement

Notice to complainant

4.21 Except in the case of a counter notice which does not comply with paragraphs 4.15 and 4.17, the service provider shall promptly send a written notice to the complainant containing the information set out in paragraph 4.23 upon receipt of the counter notice.

4.22 For the avoidance of doubt, a service provider is not required to verify the authenticity of the content entered into a counter notice. It will be further processed as long as the counter notice contains all the particulars required by Form B.

Content of notice to complainant

4.23 A notice sent under paragraph 4.21 shall include/enclose:-

- (a) a copy of the counter notice (where the subscriber expressly in the counter notice opts for non-disclosure of his personal data to the complainant, such data must be omitted from the copy of the counter notice); and
- (b) a statement that if the complainant does not, within [20] working days after the date of the service provider's notice, inform the service provider by way of written notice to its designated agent, that proceedings have been commenced in Hong Kong for seeking a court order for the purpose of or with a view to restraining the subscriber from engaging in infringing activity relating to the material or activity on the service provider's service platform, the service provider will reinstate the material or cease disabling access to the material or activity to which the alleged infringement relates.

Reinstatement

4.24 Unless the service provider receives a notice from the complainant pursuant to paragraph 4.23(b), the service provider shall, within [25] working days after the date of the notice sent under paragraph 4.21, take reasonable steps to reinstate the material or cease disabling access to the material or activity.

V. NOTICE AND TAKEDOWN SYSTEM (INFORMATION LOCATION TOOLS)

A. Applicability

5.1 Part V is applicable to a service provider who has linked or referred users to a location on the Internet containing infringing material or activity, by information location tools on its service platform.

5.2 Paragraphs 5.3 to 5.11 below set out the steps to be taken by the service provider for disabling access to such infringing material or activity.

B. Notice of alleged infringement

Issue of notice of alleged infringement

5.3 A complainant may send a notice of alleged infringement to a service provider, in relation to a link or reference on its service platform, if he:-

- (a) believes, on reasonable grounds, that the link or reference refers to material or activity that infringes the copyright of the copyright owner's work; and
- (b) wishes the service provider to disable access to the material or activity in question.

Form and delivery of notice of alleged infringement

5.4 The complainant shall send a notice of alleged infringement to the service provider in accordance with the form designated by the service provider, which for the purposes of this Code shall be Form A as set out in the Annex.

5.5 The complainant shall provide the full particulars as required by Form A which should be signed or otherwise authenticated by the complainant.

V. NOTICE AND TAKEDOWN SYSTEM (INFORMATION LOCATION TOOLS)

5.6 Where a complainant elects to file a notice of alleged infringement, his failure to provide all the required particulars may render the notice defective and the service provider is not required to handle a defective notice.

5.7 The notice of alleged infringement shall be sent to the service provider's designated agent by electronic or other means designated by the agent.

C. Receipt of notice of alleged infringement

5.8 On receipt of the notice of alleged infringement, the service provider shall acknowledge receipt. An automated response will suffice.

D. Takedown

5.9 Upon receipt of a notice of alleged infringement that complies with paragraph 5.5, the service provider shall, as soon as practicable:-

- (a) disable access to the material or activity to which the alleged infringement relates; and
- (b) remove or disable access to any material alleged to be infringing or the subject of any infringing activity that has been made and stored by the service provider on its service platform.

5.10 For the avoidance of doubt, a service provider is not required to verify the authenticity of the content entered into a notice of alleged infringement. It will be further processed as long as the notice contains all the particulars required by Form A.

5.11 The service provider shall send a written notice to the complainant as soon as practicable if the notice of alleged infringement does not comply with paragraph 5.5.

VI. ANNEX

Form A – Notice of Alleged Infringement

To: [Name of service provider]

NOTICE OF ALLEGED INFRINGEMENT

This notice is furnished pursuant to section 88C of the Copyright Ordinance, Cap. 528 and the Code of Practice published by the Secretary for Commerce and Economic Development on [date of publication].

1. Particulars of the ** individual / business furnishing this notice (the complainant):-
 - (a) Name:
 - (b) Address for service in Hong Kong:
 - (c) Contact telephone number:
 - (d) Additional information (if any):
2. Particulars of the copyright work alleged to be infringed (the copyright work):-
 - (a) Name or description of the copyright work:
 - (b) Type of work:
 - (c) Name of owner of the copyright work (the copyright owner):
 - (d) Date of creation or first publication of the copyright work:
3. The complainant confirms that he is:-
 - the copyright owner; or
 - the authorized representative of the copyright owner.
4. Identification of the material and/or activity which is the subject of the alleged infringement (the material or activity in question) and its location (please see Guidance Note):
5. (Applicable only to cases in which the complainant issues a notice under Part V of the Code of Practice) ** Identification of the reference or link to the material or activity in question and its location:

6. Description of how the material or activity in question infringes the copyright owner's rights in the copyright work (more than one box may be selected):-
- the material is a whole or substantial copy of the copyright work;
 - the material has been uploaded to a website accessible to the public without the copyright owner's authorization;
 - others: _____
7. The complainant believes in good faith that use of the material, or conduct of the activity in the manner complained of is not authorized by the law of Hong Kong, the copyright owner or its authorized representative.
8. The complainant requests the service provider to send a copy of this notice to its subscriber whose account for online services has been used or involved in the alleged infringement.
9. (Applicable only to cases in which the complainant issues a notice under Parts IV or V of the Code of Practice) ** The complainant requests the service provider to:-
- remove the material;
 - disable access to the material; or
 - disable access to the activity
- referred to in paragraph 4.
10. The complainant declares that the information contained in this notice is true and accurate to the best of his knowledge and belief.
11. The complainant understands that it is an offence to make any false statement in this notice (the maximum penalty of which is a fine of \$5,000 and imprisonment of 2 years), and that he is also liable to pay compensation by way of damages to any person who suffers loss or damage as a result of the false statement.

Signature:

Date:

** Delete if not applicable

Guidance Note

This may, for instance, be provided by way of a reference to one or a combination of the following items:

- the file name, a description of the contents of the file, and the hash code of the infringing material;
- the IP address related to the alleged infringement;
- the port number used to conduct the alleged infringement;
- the website, protocol, via which the alleged infringement occurred.

Form B – Counter Notice

To: [Name of service provider]

Counter Notice

This notice is furnished in accordance with section 88D of the Copyright Ordinance, Cap. 528 and the Code of Practice published by the Secretary for Commerce and Economic Development on [date of publication]. The purpose of this notice is to request a service provider to either (a) reinstate a material that has been removed or (b) restore access to a material or an activity the access to which has been disabled pursuant to a notice of alleged infringement, on grounds that there has been a mistake or misidentification.

1. Particulars of the ** individual / business furnishing this notice (the respondent):-
 - (a) Name:
 - (b) Address for service in Hong Kong:
 - (c) Contact telephone number:

2. Identification of the material or activity in question:-
 - (a) The material or activity in question involves
 - material ** that has been removed / to which access has been disabled; or
 - activity to which access has been disabled.
 - (b) Description of the material or activity in question and its location prior to such removal or disabling of access:

3. The respondent believes, in good faith on the grounds set out in paragraph 4 below, that the removal or disabling of access was the result of a mistake or misidentification.

4. The grounds on which the respondent relies in making the statement in paragraph 3 above are as follows:-
 - no copyright subsists in the copyright work concerned;
 - the respondent has been licensed to use the copyright work;
 - the material in question does not constitute a whole or substantial copy of the copyright work;
 - the respondent is permitted to use the copyright work by virtue of one of the copyright exceptions under the Copyright Ordinance (Please set out the exception: _____).

5. (Applicable only to cases in which the respondent is a living individual) The respondent ** agrees / does not agree to the disclosure of his personal data to the complainant.

6. The respondent declares that the information contained in this notice is true and accurate to the best of his knowledge and belief.
7. The respondent understands that it is an offence to make any false statement in this notice (the maximum penalty of which is a fine of \$5,000 and imprisonment of 2 years), and that he is also liable to pay compensation by way of damages to any person who suffers loss or damage as a result of the false statement.

Signature:

Date:

** Delete if not applicable