

Bills Committee on the Copyright (Amendment) Bill 2011

Public Consultation on the Second Draft of the Code of Practice

Purpose

This paper briefs Members on the comments we received from the public on the second draft of the Code of Practice (“the Code”) and the Administration’s response.

Public Consultation

2. To tie in with the introduction of the safe harbour provisions, a non-statutory Code of Practice will be formulated to set out practical guidelines and procedures for online service providers (“OSPs”) to follow when they are notified of infringing activities on their service platforms. The Government issued the first draft of the Code of Practice for public consultation in August 2011. Having carefully considered the comments received, the Government issued the second draft of the Code in January 2012. It contains the following key amendments –

- (a) instead of setting a specific time frame within which OSPs must take action to limit and stop a particular infringement, the second draft requires OSPs to act as soon as practicable. This amendment is to take into account comments received from a wide cross section of stakeholders. Many of them assert that a standard time frame may not be able to accommodate the different circumstances of individual cases and the operational needs of different OSPs;
- (b) in view of the privacy concerns raised by some respondents, we have made changes under which a subscriber may choose to request the OSP not to disclose his personal data when sending a copy of the subscriber’s counter notice to the complainant;
- (c) OSPs will be required to keep records of the notices of alleged infringement and counter notices received for a period of at least 18 months. Such records are required for law enforcement purposes; and

(d) both the complainants and subscribers will be required to provide more information to substantiate their infringement claims and counter claims respectively. This is to facilitate the resolution of disputes in a quicker and more cost-effective manner.

3. For the second draft of the Code, the public consultation period ended on 2 March 2012.

4. A summary of the comments received from the public and the Administration's response is at Annex.

Next Step

5. We shall revise the Code as appropriate with a view to making it more practical and user-friendly. The revised Code will be submitted to the Bills Committee for reference before the end of March 2012.

Commerce and Economic Development Bureau
Intellectual Property Department
March 2012

Summary of comments received from the public on the second draft of the Code of Practice (“the Code”) and the Administration’s Response

	Organisations/Individuals	Views/Concerns	Administration’s Response
1.	Asia Internet Coalition	<p>(i) Suggest that online service providers (“OSPs”) should be required to act “within a reasonable amount of time” instead of “as soon as practicable”.</p> <p>(ii) OSPs should be allowed to design their own forms of notices.</p> <p>(iii) Suggest that the complainants should be required to provide an email address for contact by OSPs and/or subscribers.</p>	<p>(i) Instead of setting a specific timeframe within which OSPs must take action to limit or stop a particular infringement, the second draft of the Code requires OSPs to act “as soon as practicable”. This amendment takes into account comments received from a wide cross section of stakeholders. Many of them assert that a standard timeframe may not be able to accommodate the different circumstances of individual cases and the operational needs of different OSPs. We consider that the wording “as soon as practicable” provides the flexibility that individual OSPs may require and strikes a reasonable balance.</p> <p>(ii) The Bill envisages that OSPs may choose to specify their own forms in so far as they are not inconsistent with the requirements set out therein. We will consider making appropriate revisions to the Code to provide more flexibility to OSPs.</p> <p>(iii) We will consider making appropriate revisions to the Code.</p>

	Organisations/Individuals	Views/Concerns	Administration's Response
		<p>(iv) Paragraph 7 of Form A requires the complainant to confirm that he “believes in good faith” that the material is infringing. On the other hand, the Code refers to the complainant’s belief “on reasonable grounds” that the material is infringing. The Code should make clear that the belief should be “both reasonable and in good faith”.</p> <p>(v) Suggest that the Code should not require OSPs to notify a complainant on receiving a defective notice. OSPs should also be allowed to choose to remove the material in question based on a defective notice without incurring any liability. This will help reduce OSPs’ operational burden.</p> <p>(vi) The requirements for OSPs to forward copies of a notice of alleged infringement and a counter notice to the subscriber and the complainant should be removed. The OSPs should be allowed to notify them in other ways.</p> <p>(vii) A safe harbour should be provided for OSPs’ caching activities.</p>	<p>(iv) Having regard to the requirement set out in the Bill and for the sake of consistency, we will consider using the expression “believes in good faith” throughout the Code in the revised version.</p> <p>(v) In our view, requiring an OSP to notify the complainant on receiving a defective notice is not unreasonable. Compliance with the Code is voluntary. It is our intent that an OSP who removes materials or disables access to materials/activities in good faith will not be liable for any claim in relation to the removal or disabling of access so long as the OSP has followed the relevant steps outlined in the Bill (see the new section 88G).</p> <p>(vi) We note that the proposal is in line with the approach adopted in comparable overseas jurisdictions such as Australia and Singapore. Ultimately, it is for the OSPs to decide whether or not to act in compliance with the Code.</p> <p>(vii) A copyright exception for caching activities subject to fulfillment of prescribed conditions has been provided for under the new section 65A.</p>

	Organisations/Individuals	Views/Concerns	Administration's Response
		<p>(viii) The safe harbour for information location tools should also cover the creation of directories or indices.</p> <p>(ix) The Code should clarify that the notice and notice system is applicable to network access service providers only, as the expression “providing connections for or access to digital online communications” might be interpreted to include incidental services provided by OSPs for messaging tools.</p> <p>(x) Suggest that the meaning of “that can be accessed by a user through the Internet” under paragraph 4.1 of the Code should be clarified.</p> <p>(xi) Suggest that the Code should specify that compliance is voluntary, and that the failure of an OSP to qualify for the safe harbour shall not adversely affect its defence.</p> <p>(xii) Suggest that the complainant should be liable for indemnifying and reimbursing the OSPs for any costs, legal fees and damages incurred by the OSPs where the material is ultimately considered as non-infringing.</p>	<p>(viii) We believe that the protection for information location tools is wide enough to cover these activities. We will consider making appropriate amendments to the revised Code to clarify our intention.</p> <p>(ix) We will consider making appropriate amendments to the revised Code to clarify our intention.</p> <p>(x) We intend to introduce Committee Stage Amendments to revise the definition of “online service” to clarify our intention, and the relevant provisions in the Code will also be revised as appropriate.</p> <p>(xi) This is indeed our policy intention as has been set out in the Bill (please see section 88B(5)(b)). We will consider repeating this point in the revised Code.</p> <p>(xii) Currently, an OSP may seek compensation from a complainant in relation to a false statement made in the notice (if any) pursuant to section 88F. This is consistent with the approach adopted under the corresponding statutory mechanisms in Australia, Singapore and the United States.</p>

	Organisations/Individuals	Views/Concerns	Administration's Response
		<p>(xiii) The Code should include exemptions for all statutory liabilities (in particular, those under the Personal Data (Privacy) Ordinance) and contractual liability of OSPs for the takedown.</p> <p>(xiv) The safe harbour provisions should also limit injunctive relief against OSPs.</p>	<p>(xiii) It is our intent that an OSP who removes materials or disables access to materials/activities in good faith will not be liable for any claim in relation to the removal or disabling of access so long as the OSP has followed the relevant steps outlined in the Bill (please see the new section 88G). Separately, they remain responsible for complying with all relevant laws in respect of their activities. This is consistent with the approach adopted under the corresponding statutory mechanisms in Australia, Singapore and the US.</p> <p>(xiv) The limitation of liability in terms of monetary relief serves as an incentive for enlisting OSPs' cooperation in combating online piracy. We do not see sufficient justification to deprive copyright owners of their right from seeking redress from the court totally. The court will take into account the specific circumstances of each case before granting injunctive relief in appropriate cases.</p>

	Organisations/Individuals	Views/Concerns	Administration's Response
2.	Business Software Alliance	<p>(i) Support not setting a specific timeframe for OSPs to act, but suggest the wording should be changed from “as soon as practicable” to “expeditiously”.</p> <p>(ii) Welcome abolishing the different response timeframes proposed for pre-release/newly-release copyright works and other copyright works.</p> <p>(iii) Suggest that the 20-day timeframe for copyright owners to initiate legal proceedings against the subscriber is unworkable, as the option provided to subscribers to not disclose their personal data would make it difficult for copyright owners to complete the discovery process within the 20-day timeframe.</p> <p>(iv) Disappointed that OSPs are not required to implement a legally binding policy or contractual arrangements with their end-users that entitle them to terminate, suspend or limit their service who repeatedly deal with infringing materials.</p>	<p>(i) Noted. We consider that the expression “as soon as practicable” provides the flexibility that individual OSPs may require and strikes a reasonable balance.</p> <p>(ii) Noted.</p> <p>(iii) The Bill and the Code will be further revised to clarify that the commencement of proceedings seeking a court order in connection with the infringing material or activity in question will already be sufficient to suspend reinstatement. In this regard, we will make it clear that the commencement (as opposed to completion) of the relevant discovery proceedings will suffice.</p> <p>(iv) The safe harbour aims to provide incentives for OSPs to work with copyright owners to build an online environment that provides strong protection for copyright. We note for instance that some copyright owners and OSPs in the US have recently come to a voluntary agreement on enhanced co-operation in combating online infringement, including measures against repeat infringers. We will continue to monitor overseas developments on this front. We have recently engaged a consultant to study</p>

	Organisations/Individuals	Views/Concerns	Administration's Response
			different technical solutions which may help strengthen copyright protection in the digital environment.
3.	Cable and Satellite Broadcasting Association of Asia (CASBAA)	<p>(i) Welcome the requirement for OSPs to take action "as soon as practicable" instead of within a specified timeframe.</p> <p>(ii) Consider that the notice and notice system is inadequate in deterring streaming piracy; request the Administration to consider adopting at least one of the following further actions:</p> <ul style="list-style-type: none"> • introducing a more effective system to deal with repeat infringers • requiring search engines to de-list or lower results for known infringing sites • recommending service providers to block access to the small number of streaming sites which are the most flagrant infringers • requiring advertising servers and payment processors to cease serving the infringing sites 	<p>(i) Noted.</p> <p>(ii) Please see our response to item 2(iv) above.</p>
4.	Chun Ngai Kong and others	<p>(i) Oppose the Code since it is biased towards the copyright owners.</p>	<p>(i) The safe harbour seeks to enlist OSPs' assistance in combating online piracy occurring on their platforms. It is largely consistent with the corresponding statutory mechanisms adopted in comparable overseas jurisdictions for a number of years, such as Australia, Singapore and the US. The safe harbour provisions contain a built-in mechanism for deterring abuse. Under our proposal, a person commits an offence and is</p>

	Organisations/Individuals	Views/Concerns	Administration's Response
			liable to pay compensation by way of damages to any person who suffers loss or damage as a result of any false statement made by him in a notice of alleged infringement. The proposed criminal and civil sanctions deter false claims of copyright infringement. In addition, a subscriber is entitled to file a counter notice. This provides the subscriber with an opportunity to seek reinstatement of materials that are considered to have been wrongfully removed.
5.	Consumer Council	<ul style="list-style-type: none">(i) Support giving the subscriber an option not to disclose his personal data to copyright owners.(ii) Concerned that OSPs are required to take down the alleged infringing materials solely based on copyright owners' complaints.(iii) Concerned whether the takedown system will be abused and used for purposes other than copyright protection; an OSP should only be required to remove the material/disable access within a reasonable time after the OSP has sent a written notice to the subscriber.	<ul style="list-style-type: none">(i) Noted.(ii) Please see our response to item 4(i) above.(iii) Please see our response to item 4(i) above.

	Organisations/Individuals	Views/Concerns	Administration's Response
6.	Entertainment Software Association	<p>(i) Welcome that OSPs are required to keep a record of notices sent and received for 18 months.</p> <p>(ii) Request the Administration to reconsider its decision to allow the subscriber to opt for non-disclosure of his personal data to the complainant, as this would disrupt the balance in the original proposal.</p> <p>(iii) Suggest that OSPs should indicate the number of notices that a subscriber has received in the notice sent to the subscriber.</p> <p>(iv) OSPs should be required to take action upon becoming aware of an infringing activity, even when no notice from the copyright owner is received.</p> <p>(v) OSPs should be required to implement a policy to deal with repeat infringers.</p>	<p>(i) Noted.</p> <p>(ii) In view of the privacy concerns raised by the public, we propose allowing the subscriber to opt for non-disclosure of his personal data to the copyright owner. We believe that our proposal strikes a reasonable balance between the interests of all parties concerned. Please also see our response to item 2(iii) above.</p> <p>(iii) Please see our response to item 2(iv) above.</p> <p>(iv) This is indeed our policy intention as has been set out in the Bill (please see section 88B(2)(a)). We believe that the majority of cases initiated under the safe harbour provisions will involve notices from copyright owners. Thus, the present Code focuses on the steps to be taken when an OSP receives a complaint from a copyright owner.</p> <p>(v) Please see our response to item 2(iv) above.</p>

	Organisations/Individuals	Views/Concerns	Administration's Response
7.	Hong Kong and International Publisher's Alliance	<p>(i) Welcome abolishing the different response timeframes proposed for pre-release/newly-release copyright works and other copyright works.</p> <p>(ii) Agree that copyright owners should provide information to substantiate their claims. On the other hand, the requirement for the provision of the date of creation/first publication of the work is unnecessary and irrelevant.</p> <p>(iii) Suggest that OSPs should act "as soon as practicable and in any event within 1-2 days".</p> <p>(iv) The OSPs should also be required to maintain records of subscribers' IP addresses for at least 6 months.</p> <p>(v) Disappointed that subscribers can choose not to disclose their personal data which would affect the effectiveness of the system.</p> <p>(vi) Disappointed that OSPs are not required to identify repeat infringers.</p>	<p>(i) Noted.</p> <p>(ii) Noted. We will consider if appropriate revisions to the Code should be made to address the concerns.</p> <p>(iii) Please see our response to item 1(i) above.</p> <p>(iv) Please see our response to item 2(iv) above.</p> <p>(v) Please see our response to item 6(ii) above.</p> <p>(vi) Please see our response to item 2(iv) above.</p>

	Organisations/Individuals	Views/Concerns	Administration's Response
8.	Hong Kong General Chamber of Commerce	<p>(i) Welcome that OSPs are not required to act within a specified timeframe.</p> <p>(ii) Request the Administration to reconsider its decision to allow the subscriber to opt for non-disclosure of his personal data to the complainant, as it would affect the effectiveness of the proposal.</p> <p>(iii) Opine that the notice and takedown procedure may not be used properly given that complainants may have different interpretations of the concept of "substantiality". The minimum threshold for invoking the notice and takedown procedure should be increased.</p> <p>(iv) Concerned that the system may be abused by overseas complainants.</p> <p>(v) Suggest that OSPs should be required to implement a legally binding policy or contractual arrangements with their end-users that enable them to terminate, suspend or limit their service to those who repeatedly deal with infringing materials.</p> <p>(vi) The notice and takedown system is one-sided and gives complainants an avenue to request content takedown without a notice to the subscriber.</p>	<p>(i) Noted.</p> <p>(ii) Please see our response to item 6(ii) above.</p> <p>(iii) The Code adopts the same principle as that prevailing under the Copyright Ordinance for determining if an unauthorized copy infringes the rights in a copyright work, namely that the copy must constitute a whole or substantial copy of the copyright work. This approach is consistent with the basic principles of copyright laws in Hong Kong and other common law jurisdictions.</p> <p>(iv) Overseas complainants will be required to provide an address for service in Hong Kong.</p> <p>(v) Please see our response to item 2(iv) above.</p> <p>(vi) Please see our response to item 4(i) above.</p>

	Organisations/Individuals	Views/Concerns	Administration's Response
		(vii) Concerned that OSPs are unreasonably burdened with too much responsibilities under the proposed safe harbour provisions.	(vii) The safe harbour aims to provide incentives for OSPs to work with copyright owners to build an online environment that provides strong protection for copyright. Compliance with the Code is voluntary, and there is no sanction as such against those OSPs who choose not to follow the Code. In any case, an OSP may still qualify for protection under the safe harbour if it is able to show to the court's satisfaction that it has, among other things, taken reasonable steps to limit or stop the infringement as soon as practicable as required under the new section 88B(2)(a).
9.	Hong Kong Internet Service Providers Association	<p>(i) Support not setting a specific timeframe for OSPs to act.</p> <p>(ii) Support allowing subscribers to choose not to disclose their personal data in the notices forwarded to the complainants.</p> <p>(iii) Support requiring both the complainant and the subscriber to provide more information to substantiate their claims.</p> <p>(iv) Support requiring OSPs to retain the records of notices sent and received, but consider that 12 months is enough.</p>	<p>(i) Noted.</p> <p>(ii) Noted.</p> <p>(iii) Noted.</p> <p>(iv) Under our proposal, a person commits an offence and is liable to pay compensation by way of damages to any person who suffers loss or damage as a result of any false statement made by him in a notice of alleged infringement. Prosecution of an offence under the Copyright Ordinance may</p>

	Organisations/Individuals	Views/Concerns	Administration's Response
			<p>commence within three years from the date of commission of the offence. Having regard to local circumstances including the prevailing scale of OSP operations in Hong Kong and to avoid overburdening them, we consider that instead of three years, a 18-month retention period would strike a reasonable balance. Further reduction in the period may create difficulties in evidence collection and investigation for law enforcement purposes.</p>
10.	The American Chamber of Commerce in Hong Kong	<p>(i) An OSP should also be required to act when it gains actual knowledge of an infringing activity on its service platform.</p> <p>(ii) Suggest that OSPs should be required to mark all notices sent, and keep a register of infringement notices so as to facilitate the identification of repeat infringers.</p> <p>(iii) Suggests that OSPs should be required to implement a reasonable policy to terminate, suspend or limit their services to repeat infringers under appropriate circumstances.</p>	<p>(i) Please see our response to item 6(iv) above.</p> <p>(ii) Please see our response to item 2(iv) above.</p> <p>(iii) Please see our response to item 2(iv) above.</p>

	Organisations/Individuals	Views/Concerns	Administration's Response
11.	IFPI Asian Regional Office	<p>(i) Suggested that substantial compliance with the Form A should be sufficient.</p> <p>(ii) Point out that some information required in Form A such as the date of creation/first publication date of the copyright work concerned may not be available, e.g. for pre-release works. Provision of the name or description of the work should be sufficient for identification purpose.</p> <p>(iii) "Subscribers" should not only mean end-users of the Internet, but the person or entity who subscribes the Internet service.</p> <p>(iv) OSPs should be required to retain information that would enable them to identify repeat infringers for at least 12 months.</p> <p>(v) There should be a summary procedure in place to determine the validity of counter-notices.</p> <p>(vi) Suggest that the Government should introduce a graduated response system ("GRS") to deal with repeat infringers.</p>	<p>(i) While we will make it clear in the Bill that the form used by OSPs must comply with requirements set out therein, we will consider other ways to provide more flexibility to OSPs in the revised Code.</p> <p>(ii) Please see our response to item 7(ii) above.</p> <p>(iii) We will consider making appropriate revisions to the Code to clarify this point.</p> <p>(iv) Please see our response to item 2(iv) above.</p> <p>(v) Please see our response to item 2(iv) above.</p> <p>(vi) Many consider it disproportionate to deprive users' Internet connection based on claims of copyright infringement. Noting the controversies surrounding GRS, we do not think it is opportune to consider introducing this measure in Hong Kong. We will continue to monitor overseas developments on this front. Please also see our response to item 2(iv) above.</p>

	Organisations/Individuals	Views/Concerns	Administration's Response
12.	International Federation Against Copyright Theft – Greater China	<ul style="list-style-type: none"> (i) Welcome that OSPs are required to take action “as soon as practicable” and to keep a record of notices sent and received for 18 months. (ii) Request the Code to have a termination policy for dealing with repeat infringers as well as site-redirection measures for tackling streaming sites and cyberlockers. (iii) Endorse the views of Motion Picture Association. (iv) There should be a simple and effective system for copyright owners to obtain the identity of infringers from OSPs. 	<ul style="list-style-type: none"> (i) Noted. (ii) Please see our response to item 2(iv) above. (iii) Please see our responses to item 16 below. (iv) Please see our responses to items 6(ii) and 11(v) above.
13.	International Federation of Creativity and Technology Ltd	<ul style="list-style-type: none"> (i) Opine that the “opt-out option” for subscribers to prevent disclosure of their personal information undercuts the entire purpose of the counter notice and should be deleted. (ii) There is a lack of an effective system to prevent infringing activities emanating from overseas cyberlockers; the Administration should study the site-blocking experience of Korea, Malaysia and Spain. (iii) Consider the notice and notice as well as the notice and takedown system ineffective in deterring repeated infringers. There should be a system that mandates reduction in bandwidth and termination of services for repeated infringers. 	<ul style="list-style-type: none"> (i) Please see our response to items 6(ii) and 11(v) above. (ii) Please see our response to item 2(iv) above. (iii) Please see our response to item 2(iv) above.

	Organisations/Individuals	Views/Concerns	Administration's Response
14.	International Federation of the Phonographic Industry (Hong Kong Group) Ltd.	(i) Opine that if a subscriber opts for non-disclosure of his identity to a complainant, the complainant will have to resort to a very costly legal procedure to defend his rights through discovering the identity of the subscriber first. The complainant should be entitled to the identity of the alleged infringer if he undertakes to take legal actions against the subscriber within a specified timeframe, say 5 or 7 days.	(i) Please see our responses to items 6(ii) and 11(v) above.
15.	Internet Society Hong Kong	<p>(i) Support not setting a specific timeframe for OSPs and only ask OSPs to act "as soon as practicable".</p> <p>(ii) Support providing an option for subscribers to choose not to disclose their personal data in the notices forwarded to the complainants.</p> <p>(iii) Support requiring OSPs to retain the records of notices sent and received for 18 months.</p> <p>(iv) Requiring both the complainant and subscriber to provide more information to substantiate their claims may, to a certain extent, help deter unnecessary and ungrounded claims.</p> <p>(v) Disappointed that an exception for political parody is not provided.</p>	<p>(i) Noted.</p> <p>(ii) Noted.</p> <p>(iii) Noted.</p> <p>(iv) Noted.</p> <p>(v) The proposed introduction of a new exception for parody is liable to substantially change the existing balance of interests between copyright owners and users. Therefore, it requires thorough consideration and extensive public consultation beforehand. The Administration is prepared to study this issue after the passage of the Bill.</p>

	Organisations/Individuals	Views/Concerns	Administration's Response
16.	Motion Picture Association	<p>(i) Welcome that OSPs are required to act as soon as possible, but this should, in no event, be later than 1 working day after the receipt of the notice. Also, counter notices should be sent within 5 working days.</p> <p>(ii) Welcome the requirement for OSPs to keep a record of notices sent and received for 18 months.</p> <p>(iii) Welcome that copyright owners are not required to share the cost of implementing the safe harbour provisions.</p> <p>(iv) Suggest removing the requirement of providing the date of creation or first publication of copyright work from Form A.</p> <p>(v) The Code fails to require OSPs to identify or take action against repeat infringers; a GRS against repeat infringers should be imposed.</p> <p>(vi) An OSP should also be required to act when it gains actual knowledge of infringing activity, or of facts/circumstances leading inevitably to that conclusion.</p>	<p>(i) Please see our response to item 1(i) above. Separately, in relation to the timeframe for filing counter notices, we consider it imperative to allow adequate time for subscribers to consider their individual case, seek legal advice as necessary and prepare a response (if any).</p> <p>(ii) Noted.</p> <p>(iii) Noted.</p> <p>(iv) Please see our response to item 7(ii) above.</p> <p>(v) Please see our response to item 11(vi) above.</p> <p>(vi) Please see our response to item 6(iv) above.</p>

	Organisations/Individuals	Views/Concerns	Administration's Response
		<p>(vii) Suggest using site-redirection (denial of access to infringing content through technical measures) and technologies to prevent infringing sites from appearing in search results, so as to tackle the problems of streaming sites and cyber-lockers.</p> <p>(viii) Suggest that the notification procedures can and should be electronically automated, e.g. through the Automated Copyright Notice System.</p> <p>(ix) OSPs should be required to adopt terms of service that expressly prohibit the use of the service for copyright infringement; permit collection and disclosure of subscriber information for legal actions; and implement polices against repeat infringers.</p> <p>(x) Suggest that the opt-out provision under paragraph 4.16 should not be included since it undermines the purpose of counter-notification.</p> <p>(xi) OSPs should refrain from reinstatement if the complainant informs the former that it objects to the subscriber's counter notice.</p>	<p>(vii) Please see our response to item 2(iv) above.</p> <p>(viii) Please see our response to item 2(iv) above.</p> <p>(ix) Please see our response to items 2(iv) and 11(v) above.</p> <p>(x) Please see our response to item 6(ii) above.</p> <p>(xi) Please see our response to item 12(iv) above.</p>

	Organisations/Individuals	Views/Concerns	Administration's Response
17.	New World Telecommunications Ltd.	<p>(i) Since the notice and notice system does not require OSPs to terminate connection or transmission to a subscriber, it is unclear whether this would be regarded as not taking reasonable steps to stop or limit an infringement.</p> <p>(ii) The requirement that OSPs needs to act “as soon as practicable” should be changed to “as soon as reasonably practicable”.</p> <p>(iii) Suggest that “the subject of the alleged infringement cannot be located or identified notwithstanding the infringement notice contains all the necessary particulars” should be included under paragraph 3.10 as a ground for not processing the notice.</p> <p>(iv) Suggest deleting the requirement that OSPs need to include information on “the legal consequences of copyright infringement in Hong Kong” in the notice sent to a subscriber as OSPs may not be equipped to give advice on legal consequences, and it might not be appropriate for OSPs to give such advice.</p> <p>(v) If the complainant is an individual, he should be required to expressly indicate in Form A his consent to disclose his personal data to the subscriber.</p>	<p>(i) According to section 88(B)3 of the Bill, an OSP will be treated as having taken reasonable steps to limit or stop the infringement in question if it complies with the relevant provisions in the Code of Practice.</p> <p>(ii) Please see our response to item 1(i) above.</p> <p>(iii) The suggested ground may not be relevant as OSPs are not required to remove any material under the notice and notice system.</p> <p>(iv) The OSPs are required to provide factual information on the general legal consequences of copyright infringement in Hong Kong rather than specific legal advice to their subscribers on their cases.</p> <p>(v) We believe that the complainants who choose to use the safe harbour provisions to enforce their rights should provide all relevant particulars, including their names and contact details. This approach not only minimises the possibility of abuse by anonymous</p>

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		<p>(vi) Consider the 18-month record retention period too long.</p> <p>(vii) The timeframe for the filing of proceedings to suspend reinstatement (20 days, see paragraph 4.23(b)) and the timeframe for reinstating materials (25 days, see paragraph 4.24) are too long; suggest Saturdays should not be regarded as working days.</p> <p>(viii) The mechanism of informing the complainant of a defective notice under the notice and takedown system should be similar to that under the notice and notice system.</p>	<p>complaints, but also helps subscribers understand the allegation and facilitates contact with the complainants for dispute resolution should the subscribers elect to do so.</p> <p>(vi) Please see our response to item 9(iv) above.</p> <p>(vii) The inclusion of the timeframe provides clarity in respect of each party's rights and obligations. The timeframe also helps the OSPs to ascertain if they should continue to store the removed material/activity on their service platforms. The same definition for working days has been adopted in different pieces of legislation in Hong Kong. We do not see strong justifications to depart from this.</p> <p>(viii) The two mechanisms are slightly different as they have different targets. The notice and notice system requires the OSPs to notify subscribers of allegations that the latter have taken part in infringing activities. Under the notice and takedown system, OSPs are required to remove infringing materials from their sources as soon as practicable and inform subscribers of the same thereafter. Thus, different mechanisms are adopted for the two different systems.</p>

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		<p>(ix) There should also be a mechanism to inform subscribers of their defective counter notice similar to that provided for complainants.</p> <p>(x) The text in paragraph 1.5 (“the service provider should take <i>reasonable steps</i> to notify any <i>prospective</i> complainants or subscribers”) is unclear. For instance, it is not clear as to whether the service provider should put up a notice setting out the relevant matters at the same time it supplies the identity of its agent.</p>	<p>(ix) The proposed mechanism seeks to strike a balance between the rights and responsibilities of stakeholders, without overburdening the relevant parties. Having said that, we will review the operation of the Code regularly after its implementation and update the Code as appropriate.</p> <p>(x) We will consider making appropriate revisions to the Code to provide further clarity.</p>

	Organisations/Individuals	Views/Concerns	Administration's Response
18.	Office of Privacy Commissioner for Personal Data	<p>(i) Suggest a personal information collection statement be explicitly provided in Forms A and B.</p> <p>(ii) Suggest that the type of information required under "additional information" in the forms should be specified for ascertaining if the additional information is necessary and not excessive for the intended purpose of data collection.</p> <p>(iii) Point out that when OSPs use the subscriber's personal data collected during the account opening process for forwarding the notices, they might violate the data protection principle unless the consent of the subscribers are obtained.</p> <p>(iv) Point out that OSPs should take practical measures to safeguard the security of personal data held or transmitted by them.</p> <p>(v) There should be strong justifications to support the retention of notices for 18 months as longer retention of personal data may give rise to higher risks regarding data security, given the relatively short period of time within which the notices are required to be issued.</p>	<p>(i) We will include this reminder in the revised Code.</p> <p>(ii) We will make appropriate revisions to the Code to clarify this requirement.</p> <p>(iii) Paragraph 1.4 of the Code has already drawn OSPs' attention to this issue.</p> <p>(iv) Paragraph 1.7 of the Code has already drawn OSPs' attention to this issue.</p> <p>(v) Please see our response to item 9(iv) above.</p>

	Organisations/Individuals	Views/Concerns	Administration's Response
		<p>(vi) It is unclear as to what are the consequences for breach of the Code. The lack of adverse consequences undermines the effectiveness in protecting personal data privacy.</p>	<p>(vi) An OSP who uses the personal data in a manner prohibited by the Personal Data (Privacy) Ordinance will be subject to sanctions thereunder. We do not consider it necessary to impose a different set of sanctions on the same fault.</p>
19.	Online Service Provider Alliance	<p>(i) In Form A, the complainant should be asked to provide the Universal Resource Locator (URL) of the infringing materials (not just the website which is too general).</p> <p>(ii) Concerned that the requirement of keeping record of notices sent and received will become an additional financial burden on OSPs.</p> <p>(iii) While agreeing to remove the infringing materials, do not agree to remove or block access (path) to the materials or activity since the path can be changed anytime.</p> <p>(iv) Request to have a longer consultation period on the Code. OSPs should be allowed to review and amend the Code regularly. Also, the Administration should step up publicity to promote the Code to the public.</p>	<p>(i) A complainant is required to provide sufficient details for an OSP to locate an alleged infringing material. However, we do not consider it necessary to provide an exhaustive list in Form A. The complainant is best placed to ensure that sufficient information is provided in Form A to facilitate action on the part of the OSP to protect his copyright.</p> <p>(ii) Please see our response to item 9(iv) above.</p> <p>(iii) OSPs are not required to track whether certain alleged infringing materials have been moved to other online locations. They only need to disable the access path as specified by a notice of alleged infringement.</p> <p>(iv) Since August 2011, the Government has conducted two rounds of public consultation on the Code. After the passage of the Bill, the Administration will conduct publicity campaigns to educate the public on the rights and responsibilities of different parties under</p>

	Organisations/Individuals	Views/Concerns	Administration's Response
		<p>(v) Suggest C&ED or IPD to handle all complaint notices.</p> <p>(vi) Suggest that copyright owners should bear the extra cost of OSPs for implementing the systems in order to, amongst others, reduce abuses.</p>	<p>the safe harbour provisions and the Code. We will also review the operation of the Code regularly after its implementation and update it as appropriate. We will engage the Panel on Commerce and Industry of the Legislative Council and other stakeholders before bringing any revised Code of Practice into force.</p> <p>(v) The safe harbour provisions create a platform for copyright owners to enlist OSPs' assistance in combating online piracy occurring on their platforms. This is similar to the corresponding statutory arrangements in overseas jurisdictions including Australia, Singapore and the US. Compliance with the Code is voluntary. We do not consider it appropriate for the Government to centrally process referrals/complaints from copyright owners, or for that matter meddle with the contractual relationship between the OSPs and the subscribers of their services.</p> <p>(vi) Under our proposal, individual copyright owners and OSPs will each bear their own costs in implementing the safe harbour provisions. This is similar to the arrangements in Australia, Singapore and the US where there is no statutory cost-sharing mechanism. The proposed safe harbour provisions take into account the special role of the OSPs and provide them, through a</p>

	Organisations/Individuals	Views/Concerns	Administration's Response
			<p>limitation of liability regime, with an incentive to help copyright owners fight online piracy. More and more copyright owners and OSPs (some of them being developers of digital content themselves) recognise that it is in their mutual interest to work together in developing successful business models and building an online environment that provides strong protection for copyright. In working out the safe harbour provisions, we have borne in mind the importance of striking a reasonable balance between the interests of copyright owners and OSPs. We consider it reasonable to ask the parties concerned to bear their own costs in implementing the system.</p>

	Organisations/Individuals	Views/Concerns	Administration's Response
20.	The Hong Kong Copyright Licensing Association	<p>(i) Enquire what action or step the copyright owner can take to obtain the subscriber's personal data for further action.</p> <p>(ii) Suggest that if a subscriber's reason to dispute the infringement is that he has been licensed to use the copyright work, he should provide his personal data to the copyright owner so that the latter can verify the license.</p> <p>(iii) Suggest including two more factors to suspend the OSPs' reinstatement of allegedly infringing materials:</p> <ul style="list-style-type: none"> • Formal complaint lodged with C&ED or other authority against the infringing activity; and • Reporting to the police or other authority for suspicious false statement in the counter notice. 	<p>(i) It remains the case that a copyright owner may seek a Norwich Pharmacal order to discover the identity of an alleged infringer.</p> <p>(ii) Please see our response to item 6(ii) above. We will consider requiring the provision of more information on the licence in question in the revised Code.</p> <p>(iii) Please see our responses to item 2(iv) and 11(v) above.</p>
21.	The Law Society of Hong Kong	<p>(i) Recommend that OSPs should be required to send a notice to subscribers or complainants (if there are grounds for not processing the complaint) as soon as practicable but within a certain period of time (say 21 days).</p>	<p>(i) Please see our response to item 1(i) above.</p>
22.	The Professional Commons	<p>(i) Welcome the adoption of a flexible approach concerning the timeframe to take actions.</p> <p>(ii) Welcome that a subscriber may opt for non-disclosure of personal data in a copy of counter notice sent to a complainant.</p>	<p>(i) Noted.</p> <p>(ii) Noted.</p>

	Organisations/Individuals	Views/Concerns	Administration's Response
		<p>(iii) Believe that it is a reasonable requirement for OSPs to keep a record of notices sent and received for 18 months.</p> <p>(iv) Believe that it is reasonable to ask complainants and subscribers to provide more information to substantiate their claims to facilitate quicker dispute resolution.</p> <p>(v) Disappointed that an exception for political parody is not provided.</p>	<p>(iii) Noted.</p> <p>(iv) Noted.</p> <p>(v) Please see our response to item 15(v) above.</p>
23.	<p>二次創作權關注組) These 小郎) responses 同人空港) are 何天浩) submitted 李沛悅) using the 動畫網站) same 詞中物) template. 蘇石) Anna Cheng) Kwok Chun Ting) Pearl Pun) Reki Mak)</p>	<p>(i) Request to give OSPs 30 working days for taking actions. Also, the definition of working days should be revised to include other special occasions such as school tests and examinations taking into consideration that many small OSPs are run by students.</p> <p>(ii) Request to remove the timeframe for filing a counter notice.</p> <p>(iii) Request to delete the requirement of keeping records for 18 months.</p> <p>(iv) Complainants should be required to provide more information (like their business registration numbers, their ID copies, letters of authorization</p>	<p>(i) Please see our response to item 1(i) above. Separately, the same definition for working days has been adopted in different pieces of legislation in Hong Kong. We do not see strong justifications to depart from this.</p> <p>(ii) The inclusion of the timeframe provides clarity in respect of each party's rights and obligations. The timeframe also helps the OSPs to ascertain if they should continue to store the removed material/activity on their service platforms.</p> <p>(iii) Please see our response to item 9(iv) above.</p> <p>(iv) In considering the information required to be included in a notice of alleged infringement and a counter notice, we seek to strike a</p>

	Organisations/Individuals	Views/Concerns	Administration's Response
		<p>etc) when filing a complaint. They should be liable to both civil and criminal sanctions if they make false statements.</p> <p>(v) Form B should explicitly state that the subscriber's personal data will not be disclosed unless he has given consent and that there should be additional penalties for abuse of personal data.</p> <p>(vi) The Code places heavy burden on small-scale OSPs.</p> <p>(vii) It is unjustified to remove the alleged infringing materials solely based on copyright owners' complaints; and the notice and takedown system should not be implemented.</p> <p>(viii) Request to clarify who will be regarded as OSPs.</p>	<p>reasonable balance between the interests of relevant parties without overburdening them. Separately, the Bill provides that a person commits an offence and is liable to pay compensation by way of damages to any person who suffers loss or damage as a result of any false statement made by him in a notice of alleged infringement.</p> <p>(v) Depending on the actual circumstances of each case, if an OSP does not honour the subscriber's preference and chooses to pass the latter's personal data to the complainant, the OSP may not be able to enjoy the exemption of liability envisaged under section 88G. Please also see our response to item 18(vi) above.</p> <p>(vi) Please see our response to item 1(xi) above.</p> <p>(vii) Please see our response to item 4(i) above.</p> <p>(viii) We will propose amendments to the Bill to clarify the definition of OSPs under the safe harbour provisions.</p>

	Organisations/Individuals	Views/Concerns	Administration's Response
24.	萬聯文化有限公司	<p>(i) Consider that it is inappropriate for OSPs to take action without the consent of the copyright owners.</p> <p>(ii) The Administration should put more effort in combating large-scale online privacy activities at their sources.</p>	<p>(i) Under the Notice and Takedown system as set out in the draft Code, OSPs are expected to take actions after receiving a notice of infringement from the copyright owner or his representative. Only under circumstances as those set out in section 88B(2)(a)(ii) and (iii) of the Bill are OSPs expected to take reasonable action to stop an online infringement.</p> <p>(ii) Please see our response to item 2(iv) above.</p>
25.	香港小市民	<p>(i) The Bill will adversely affect mash-up works and stifle creativity.</p>	<p>(i) The legislative proposals do not alter the existing legal principles for determining whether the making of a parody or mash-up work constitutes a copyright infringement. The making of a parody or mash-up work that does not amount to copyright infringement under the existing copyright law will remain so under the Bill. Please also see our response to item 15(v) above.</p>