

Bills Committee on Copyright (Amendment) Bill 2014
The Administration's response to views expressed by deputations

On 25 October 2014, the Legislative Council Bills Committee on the Copyright (Amendment) Bill 2014 (the Bill) (Bills Committee) convened a meeting inviting deputations to give their views on the Bill. The Bills Committee requested the Administration to provide a summary of the views expressed by the deputations and the submissions to the Bills Committee, as well as the Administration's responses.

2. The Administration received a total of 8 419 submissions. In view of the large amount of submissions, we put them into four groups to facilitate readers: (1) users; (2) copyright owners; (3) online service providers (OSPs); and (4) others.

3. There are 8 382 submissions from users (including netizen groups). Amongst all these submissions, 5 754 submissions originated or were generated from a number of online templates. There are 24 submissions from copyright owner organisations and companies, representing a wide spectrum of creative industries, including music, film and video, comics and animation, multimedia services, licensing bodies and publishers. There are two submissions from OSPs. A total of 11 submissions were received from "others", which include professional bodies, political parties and non-government organisations.

4. The Administration provided the summary and Administration's responses on overview, communication right and the corresponding criminal liability, and copyright exceptions on 30 January 2015 (see LC Paper No. CB(4)442/14-15(01)). This paper provides the summary and the Administration's responses on safe harbour (see Annex). The latest version of the Code of Practice, which is related to safe harbour, is also attached at Appendix for reference (see response at D1.6 below). The summary and the Administration's responses on civil liability and others will be submitted separately.

Commerce, Industry and Tourism Branch
Commerce and Economic Development Bureau
20 April 2015

D. Safe harbour		
D1- Limitation on legal responsibilities of OSPs		
Organisations / Individuals	Summary of views	Administration's responses
<p><u>Copyright Owners</u></p> <p>1.1</p>	<ul style="list-style-type: none"> The Government should consider, as a condition for OSPs' obtaining safe harbour protection, stating in this part measures targeted at repeated infringers. 	<ul style="list-style-type: none"> We note that some copyright owners suggested introducing a graduated response system (GRS) to combat repeated infringers. The introduction of the GRS is a controversial issue which needs further assessment on its impact. Some opine that the punishment imposed under the system is too harsh in the sense that a user's right to access the Internet can be denied simply because of allegations from copyright owners. We do not consider that it is the appropriate moment to consider introducing this system to Hong Kong, especially when its implications are yet to be fully tested in overseas jurisdictions. We will continue to keep track of the latest developments in the international community and explore other possible options to strengthen copyright protection in the digital environment.
1.2	<ul style="list-style-type: none"> Should amend section 88B(2) and stipulate that an OSP will be regarded as authorising another to do any of the acts restricted by copyright under section 22(2) if the OSP does not observe this provision. 	<ul style="list-style-type: none"> The introduction of the safe harbour provisions seeks to balance the interests among copyright owners, users and intermediaries, and to provide a mechanism to deal with infringement claims in an efficient and effective manner other than court proceedings. According to our current proposal, if an OSP fails to observe the stipulated conditions under section

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		88B of the Bill, the OSP cannot enjoy the protection under the safe harbour and may be held legally responsible for the infringing activities on its platform.
1.3	<ul style="list-style-type: none"> Consider that one-time set-up fees and flat periodic payments should be treated as financial benefits, and suggest deleting section 88B(4)(b). 	<ul style="list-style-type: none"> Section 88B(4)(b) seeks to prevent OSPs who receive payments from users for providing legitimate services from being regarded as failing to comply with section 88B(2)(b) and losing safe harbour protection merely because their services can be used to access infringing materials. Section 88B(4)(b) differentiates these OSPs from those who receive financial benefits for providing infringing materials.
1.4	<ul style="list-style-type: none"> Concerned whether the safe harbour would be fully effective in combating the piracy problem arising from streaming. Suggest that the Government should review the effectiveness of the safe harbour provisions regularly. 	<ul style="list-style-type: none"> With advances in technology, new modes of electronic transmission such as streaming have emerged. The current scope of statutory protection may not be adequate to cope with such rapid changes and an infringer can evade liability and sanctions on technicality. To enhance copyright protection in the digital environment, we proposed in the Bill to introduce a new exclusive right for copyright owners to communicate their works to the public through any mode of electronic transmission and impose corresponding civil and criminal sanctions. The introduction of the safe harbour provisions seeks to balance the interests among copyright owners, users and intermediaries, and to provide a mechanism to deal with infringement claims in an efficient and effective manner other than court proceedings. According to our current proposal, if an OSP fails to observe the stipulated conditions under section

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		<p>88B of the Bill, the OSP cannot enjoy the protection under the safe harbour and may be held legally responsible for the infringing activities on its platform.</p> <ul style="list-style-type: none"> Following usual practice, after the passage of the Bill, we will continue to monitor closely social, economic and technological developments and review the relevant provisions to ensure the Copyright Ordinance (CO) is updated to meet our needs.
<p><u>Users</u> 1.5</p>	<ul style="list-style-type: none"> Concerned about the definition of online service providers. 	<ul style="list-style-type: none"> Section 88A of the Bill stipulates the statutory definition of “service providers”, i.e. “a person who, by means of electronic equipment or a network, or both, provides, or operates facilities for, any online services”. Online service includes the services as defined under section 65A(2)¹ but does not include intranet services.
1.6	<ul style="list-style-type: none"> The safe harbour provisions should give the court more freedom in exercising its interpretation right so as to ease the concern about the threat of white terror. 	<ul style="list-style-type: none"> The introduction of the safe harbour seeks to balance the interests among copyright owners, users and intermediaries, and to provide a mechanism to deal with infringement claims in an efficient and effective manner other than court proceedings. For subscribers, the safe harbour will also provide a fair and transparent mechanism for them to file counter notices in cases of alleged infringement. They may provide reasons as to why their works should not be taken

¹ That is, “(a) the transmission, routing, or provision of connections for digital online communications, between or among points specified by a user, of material of the user’s choosing; (b) the hosting of information or material that can be accessed by a user; (c) the storing of information or material on a system or network that can be accessed by a user; (d) the linking or referral of users to an online location by the use of information location tools; and (e) the provision of online social networking services to users.”

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		<p>down. It will help protect their freedom of expression.</p> <ul style="list-style-type: none"> • The Bill proposes safe harbour provisions with various safeguards to address the concerns of different stakeholders. For example- <ul style="list-style-type: none"> (a) OSPs are not required to actively monitor their service platforms for infringing activities. As long as the relevant conditions are met, they are qualified for safe harbour protection; (b) Both the complainant and subscriber are required to provide adequate and specific information to substantiate their allegation of copyright infringement and claims in the counter notice. A complainant or a subscriber who submits a false statement may incur civil and criminal liabilities (a fine at level 2 and imprisonment for 2 years); (c) A subscriber may request the OSP not to disclose his or her personal data when it sends a copy of his or her counter notice to the complainant (a request for disclosure of personal information is subject to court scrutiny); (d) On receipt of a counter notice, an OSP shall take reasonable steps to reinstate the material it has taken down unless the complainant has informed it in writing that legal proceedings have been commenced in Hong Kong seeking a court order in connection with any infringing activity that relates to the material in question; and

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		<p>(e) OSPs may follow the detailed guidelines in the Code of Practice to be issued in the future.² The latest draft Code released in March 2012 took into account comments received during the two rounds of consultation in August 2011 and January 2012 and was reviewed by the previous Bills Committee on the Copyright (Amendment) Bill 2011 (the 2011 Bill).</p>
1.7	<ul style="list-style-type: none"> • “[D]irect financial benefit” under section 88B(2)(b) would render all OSPs as having knowledge of the infringement and thereby impose on them the responsibility to remove infringements. The limitation on liability by active censorship under section 88B(5)(a) would lead to white terror, resulting in OSPs actively censoring users on a large scale. 	<ul style="list-style-type: none"> • Section 88B(2)(b) of the Bill stipulates that an OSP will not be protected by the safe harbour provisions if it has received any financial benefit directly attributable to the infringement. This provision seeks to prevent an OSP whose financial benefit is directly attributable to the infringement from relying on the safe harbour provisions to evade legal responsibility. • We understand that some users are concerned about the definition of “direct financial benefit”. Therefore, section 88B(4)(a) stipulates that in determining whether a service provider has received a financial benefit directly attributable to the infringement in question, the court may take into account all the circumstances of the case, including the industry practice and whether the fee imposed is for providing access to infringing material. Section 88B(4)(b) also stipulates that financial benefits directly attributable to the infringement do not include one-off set up fees or flat periodic payments

² The latest version of the Code of Practice can be found at Appendix.

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		<p>charged on a non-discriminatory basis. Based on section 88B(4)(a) and (b), OSPs who receive payments for providing legitimate services to users will not be regarded as failing to comply with section 88B(2)(b) and lose safe harbour protection merely because their services can be used to access infringing materials. We consider that OSPs will not proactively censor users on a large scale under the provisions of section 88B(2)(b).</p> <ul style="list-style-type: none"> • Section 88(5)(a) does not require OSPs to censor proactively. On the contrary, the provision stipulates that OSPs are not required to actively monitor their platforms for infringing activities. As long as the relevant conditions are met, they are qualified for the limitation on liability under the safe harbour.
1.8	<ul style="list-style-type: none"> • Some support the Government’s proposal. 	<ul style="list-style-type: none"> • Views noted.
<u>Others</u> 1.9	<ul style="list-style-type: none"> • Support the introduction of the safe harbour which could offer protection to OSPs. 	<ul style="list-style-type: none"> • Views noted.
1.10	<ul style="list-style-type: none"> • Suggest that the Code of Practice should be made subsidiary legislation as it can facilitate the Legislative Council’s supervision. 	<ul style="list-style-type: none"> • To tie in with the introduction of the safe harbour, we will formulate a voluntary Code of Practice which sets out practical guidelines for OSPs to follow, in particular the guidelines on the practices and procedures that OSPs could adopt to limit or stop infringing activities on their platforms after receiving a

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		<p>notice of alleged infringement. OSPs who follow the provisions of the Code of Practice will be regarded as having met one of the prescribed conditions to be eligible for protection under the safe harbour provisions.</p> <ul style="list-style-type: none"> • Even if an OSP has not followed the Code of Practice, the OSP can still be qualified for protection under the safe harbour provisions if it can prove to the court's satisfaction that it has taken reasonable steps to limit or stop the infringement and has complied with other conditions of the proposed section 88B(2). Compliance with the Code of Practice on the part of the OSPs is voluntary. • The proposal of a non-statutory Code of Practice is meant to provide flexibility in the implementation of the statutory provisions. To accommodate changes in the business environment as well as rapid advances in technology, the Government may need to revise and update the guidelines and procedures set out in the Code of Practice in consultation with stakeholders from time and time. As opposed to prescribing the guidelines by way of subsidiary legislation, a non-statutory Code of Practice allows the Government to introduce revisions in a more timely fashion. • To ensure efficiency and transparency, section 88J stipulates that the Secretary for Commerce and Economic Development may publish in the Gazette the Code of Practice and amend it in a manner consistent with his power to publish the Code.

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D2- Notice of infringement		
Organisations / Individuals	Summary of Views	Administration's responses
<p><u>Copyright owners</u></p> <p>2.1</p>	<ul style="list-style-type: none"> Section 88C(3)(b) of the Bill should make reference to the same section in the 2011 Bill which provides that a notice of infringement remains effective even if it fails to identify every work in which copyright is infringed, provided that the notice stipulates that “multiple copyright works have been infringed on one online website” and such a notice can identify “a representative number of such works”. The provisions will then be able to combat online mass infringement more effectively. 	<ul style="list-style-type: none"> According to our proposal, both the complainant and subscriber should provide adequate and specific information to substantiate their allegation of copyright infringement and counter notice respectively, so as to facilitate a more expedient and cost-effective way in solving the conflicts. Moreover, this requirement can allay public concern about possible abuse of the mechanism. Therefore, the relevant provisions require a notice of alleged infringement to substantially identify the copyright work that is alleged to have been infringed.
<p>2.2</p>	<ul style="list-style-type: none"> Under the proposed section 88C(6), although the acknowledged means of submission to OSPs “may include electronic means”, nothing in the provision rules out the possibility that such a means can be excluded. Therefore, under this provision, OSPs can require that all notices be delivered by post or courier and refuse to act on those delivered electronically (on the grounds that under the proposed section 88C(4), a notice that does not comply with sections 88C(2) and (3) is of no effect– 	<ul style="list-style-type: none"> Views noted. Given the modes of operation of different service platforms on the Internet are different, it may not be appropriate to impose a requirement that all notices of infringement must be transmitted by electronic means. On the other hand, if OSPs choose to follow the Code of Practice, they are required to specify at least one electronic means that the complainant and subscriber may use.

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	<p>including the means of notice specified by the OSPs). Given that online infringements can happen very fast today, responses to them should be equally speedy. As such, the statutory framework must ensure that valid notices of infringement may be sent by electronic means. This may be achieved by amending the relevant part in the proposed section 88C(6) to “(which must include electronic means)”.</p>	
<p><u>Users</u> 2.3</p>	<ul style="list-style-type: none"> • Although a complainant who submits false statements is liable to criminal sanctions, in practice there is no supervision and checks and balances. The subscriber who is complained against cannot obtain the personal particulars of the complainant and it is not necessary for the complainant to provide very substantial information to prove his case. The abuse of this system may lead to take-downs of large amounts of secondary creations. 	<ul style="list-style-type: none"> • To allay public concerns regarding possible abuse of the mechanism, both the complainants and subscribers are required to provide their names together with adequate and specific information to substantiate their allegations of copyright infringement and claims in counter notices respectively. For instance, a complainant must substantially identify the copyright work alleged to have been infringed and the material and activity alleged to be infringing, confirm that he is either the copyright owner of the relevant copyright work or has been authorised to act on the owner’s behalf, and confirm the truthfulness and accuracy of all the statements he makes. A complainant who submits a false statement may incur civil and criminal liabilities.
2.4	<ul style="list-style-type: none"> • Should add a provision requiring the complainant to provide clear identity proof or authorisation from copyright owners when lodging a complaint to prevent the system from being abused. 	

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D3- Removal of infringing material		
Organisations / Individuals	Summary of Views	Administration's responses
<u>Copyright owners</u> 3.1	<ul style="list-style-type: none"> The proposed section 88E(3)(d) requires the subscriber to confirm that he believes in good faith that the material was removed or access to it was disabled as a result of a mistake or misidentification on the part of the OSP and further state the grounds for such belief. If this requirement is enforced effectively, it can minimise those counter notices which are frivolous or being used as a delaying tactic. 	<ul style="list-style-type: none"> Views noted.
<u>Users</u> 3.2	<ul style="list-style-type: none"> Under this provision, OSPs are forced to remove a work within a short period of time, even before the court determines whether the work is infringing or not. OSPs may even need to provide the identity and personal particulars of the creator, uploader or distributor to the complainant. Otherwise, the OSPs may be subject to legal proceedings in court. This provision will affect freedom of speech and creation and is unfair to creators. 	<ul style="list-style-type: none"> The introduction of the safe harbour provisions seeks to balance the interests among copyright owners, users and intermediaries, and to provide a mechanism to deal with infringement claims in an efficient and effective manner other than court proceedings. OSPs may follow the Code of Practice on a voluntary basis. Non-compliance of the Code of Practice will not attract any sanctions. According to our proposal, OSPs are not required to monitor and actively seek facts that indicate infringing activities, nor are they responsible for determining whether the content in question is infringing under the CO or not. There are also mechanisms under the safe harbour provisions to minimise
3.3	<ul style="list-style-type: none"> Consider that OSPs should not remove a work before the court determines whether it is 	

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	infringing.	possible abuse. See the response at D2.3 and 2.4 for details.
3.4	<ul style="list-style-type: none"> Concerned that OSPs will remove suspected infringing works relying on unverified complaints, which is harmful to the circulation of doujin and secondary creation culture. 	<ul style="list-style-type: none"> Moreover, the safe harbour also provides a fair and transparent mechanism for subscribers to file counter notices in cases of alleged infringements. This mechanism provides subscribers a channel to request the reinstatement of materials mistakenly taken down and protect their freedom of expression. To address public concern about privacy, the Bill proposed that a subscriber may choose to request the OSP not to disclose his or her personal data when it sends a copy of his or her counter notice to the complainant (a request for disclosure of personal information is subject to court scrutiny). On receipt of a counter notice, an OSP shall take reasonable steps to reinstate the material it has taken down unless the complainant has informed it in writing that proceedings have been commenced in Hong Kong seeking a court order in connection with any infringing activity that relates to the material in question. Besides, according to our proposal, if an OSP has not acted in good faith or followed the procedures in the Bill to remove the material or disable access to the material, the OSP will not be exempted from the legal liability as prescribed in section 88H. The Bill proposes safe harbour provisions with various safeguards to address the concerns of users on freedom of

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		<p>expression.</p> <ul style="list-style-type: none"> • Our proposal is substantially similar to the mechanisms in Australia, Singapore and the United States.
<p><u>OSPs</u> 3.5</p>	<ul style="list-style-type: none"> • The safe harbour imposes too much pressure on small service providers and unreasonably requires them to remove content and notify the subscriber within a prescribed time limit, which will be easily abused by copyright owners. 	<ul style="list-style-type: none"> • The Code of Practice does not set a prescribed timeframe for OSPs to remove the material and notify the subscriber of the allegation of infringement. Instead, the OSPs are required to remove the relevant material as soon as practicable and promptly take reasonable steps to notify the subscriber of the allegation. In practice, having consolidated the divergent views of different stakeholders, setting a prescribed timeframe may not be able to cater for the different circumstances of each case and the operational needs of OSPs. We consider that the requirements of the Code of Practice can provide flexibility to individual OSPs, which is a reasonable balance between different interests.
<p><u>Others</u> 3.6</p>	<ul style="list-style-type: none"> • In view of the risk of litigation, OSPs are prone to over-censoring possible infringing content. The Bill should provide that OSPs should only remove confirmed infringing content after receiving court orders. 	<ul style="list-style-type: none"> • Section 88B(5)(a)(i) of the Bill provides that OSPs are not required to monitor and actively seek facts that indicate infringing activities. As long as the relevant conditions are met, they are qualified for safe harbour protection. • In addition, according to our proposal, if an OSP has not acted in good faith or followed the procedures in the Bill to remove or disable access to the material, the OSP will not be able to rely on the exemption from legal liability as prescribed in section 88H.

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3.7	<ul style="list-style-type: none"> Works with their sources quoted should be exempted from being removed. 	<ul style="list-style-type: none"> Quoting the source is only one of the conditions to be fulfilled under certain copyright exceptions. To rely on such copyright exceptions, one must also comply with all other relevant conditions.
D4- Counter notice		
Organisations / Individuals	Summary of Views	Administration's responses
<u>Copyright owners</u> 4.1	<ul style="list-style-type: none"> If a subscriber who submits a counter notice can opt against the service provider's disclosure of his or her personal data to the complainant, the affected copyright owner will not be able to determine if it is a repeated infringement, which will undermine the effectiveness of the safe harbour. 	<ul style="list-style-type: none"> Regarding repeated infringement, see response at D1.1. To address public concerns about privacy, the Bill proposes that a subscriber may choose to request the OSP to refrain from disclosing his or her personal data when it sends a copy of his or her counter notice to the complainant (a request for disclosure of personal information is subject to court scrutiny). We believe that this proposal provides a reasonable balance between different interests. We will continue to monitor closely the latest overseas developments and explore other viable means. We will make reference to overseas experience in order to strengthen copyright protection in the digital environment.
<u>Users</u> 4.2	<ul style="list-style-type: none"> Before the court determines whether a work is infringing, the complainant should not be provided with the personal data of the alleged 	<ul style="list-style-type: none"> See response at D3.2. There is no provision in the Bill that requires OSPs to disclose

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	infringer for privacy reasons.	the personal data of subscribers. On the contrary, the relevant provisions clearly provide that a subscriber can opt against disclosure of his or her personal data.
4.3	<ul style="list-style-type: none"> Suggest removing the proposed provision that OSPs have to disclose the personal data of subscribers in order to be protected under the safe harbour. 	
4.4	<ul style="list-style-type: none"> A subscriber may attract criminal liability if he makes a careless mistake on the form which may be regarded as a false statement. 	<ul style="list-style-type: none"> The proposed sections 88F(1) and 88G(1) stipulate that a person may incur legal liability if he knowingly or recklessly makes a false statement/makes any statement that he or she does not believe to be true in a notice of alleged infringement or counter notice.
D5- Others		
Organisations / Individuals	Summary of Views	Administration's responses
<u>Users</u> 5.1	<ul style="list-style-type: none"> Since OSPs receive financial benefits from users who use their services, they should not make use of netizens to evade payment of royalties or reasonable income to copyright owners. 	<ul style="list-style-type: none"> Views noted.