Submission for meeting of Bills Committee on Copyright (Amendment) Bill 2011 by Online Service Providers Alliance

I. Part I (Online Service Providers Comments)

(a) Communication right

We are welcome for the clarification on when a person does not initiate communication of a work to the public if he does not "determine the content" of the communication, such as merely (a) gaining access to what is made available by someone else in the communication or (b) receiving the electronic transmission of which the communication consists. (For instance, a person is not initiating a communication by posting a hyperlink to an infringing music file made available by someone else, as he has no control over the content of that file.). Therefore, if a person who just post a hyperlink and even it is linked to infringement item. That will not be considered as copyright infringing. Hyperlink itself is not cause any infringement, in Internet world, it just a path to somewhere or something. However those things can be change by time and time by the owner and it is not determined by the person who just posts the hyperlink.

(b) Online Service Providers (OSP) Liability

We are welcome to hear that the use of Code of Practice can limit the liability of OSP.

However we have concern on below issues:

- The Cost to handle the complaint notice and counter notice
  - i. Copyright can involve a lot of things, not only music and movie, but also text, picture, etc. Everybody can be a copyright owner. Therefore, we can foresee that the volume of copyright complaint notice, counter notice will substantially increase after we announce such changes on Copyright Law.
  - ii. In order to handle the above notices. OSPs may need to have designated staffs. Almost all of Hong Kong OSPs are providing free service to more than 4.7 millions Hong Kong Internet user. However, most of OSP's company scale is very small, some of them are less than 4 full time staffs and some of them are even running in part time mode. The new designated staffs to handle above notices definitely make a heavy cost burden to most of OSPs operation.
  - iii. Since, OSPs are helping and assisting the copyright owner to protect their right and asset. Also, almost all of OSPs are just a platform to provide free service to their members; they are not gaining revenue from such infringement activity. So, we suggest a reasonable cost should be charge for each complaint notice and counter notice.
- The abuse of complaint notice

i. We agree that the true identity of the complainant should be provided and the complainant has civil liability on his declaration and misrepresentation in a notification of claimed infringement.

ii. However, we still afraid that if the complainant did not bear any cost, they may abuse the complaint notice. So, we suggest to charges a reasonable cost on the complainant to avoid the abuse of use.

iii. If the publisher issues the counter notice to insist his content did not cause any copyright infringement. The OSP should provide the publisher's information to High Court for further legal action if necessary, rather than complainant directly. It can avoid people use complaint notice to acquire someone's personal data.

- The reasonable time to handle the complaint notice and counter notice

i. In order to have limit liability, OSPs need takes reasonable steps to handle the complaint notice and counter notice. However, we need clearly define the definition of "reasonable time". Because all OSPs web sites are running 7 x 24 base. However, OSPs staffs have normal business hours. Therefore, too tight response time will cause extra costs on OSPs business operation burden.

- **The Code of Practice :**

Based on following section on the Note submitted to us by CEDB :

"If an OSP complies with all the provisions in the code of practice to be issued by the Secretary for Commerce and Economic Development applicable to OSPs and the notification of alleged infringement, it will be deemed to have taken reasonable steps to combat the infringement"

We have strong concerns about the establishment and life-time management of the so-called "Code of Practice" :

ii. There is no any details about the "Code of Practice" for industry and public to comment

iii. There is no any information or proposal about the mechanism and principles of the operation of "Code of Practice"

iv. We strongly suggest that the draft "Code of Practice" should be available for industry or public discussion at the same time as the draft copyright legal framework.

v. We also strongly proposed that the upcoming "Code of Practice" should have the mechanism which will allow the industry OSP players and public consent before it is agreed.

II. Part II (Internet User Comments)

在香港高登討論區有關版權(修訂)的貼文有 67 篇共有 2776 個回應，當中包含 992 位網民。以下是一些摘要：

1. 非商業使用的侵權行爲不應訂立爲刑事法例

118(1)(g)：

(1) 任何人如未獲版權作品(“該作品”)的版權擁有人的特許而作出以下作爲，即屬犯罪—

(g) 分發該作品的侵犯版權複製品(但並非爲任何包含經銷版權作品的侵犯版權複製品的貿易或業務的目的，亦並非在任何該等貿易或業務的過程中分發)，**達到損害版權擁有人的權利的程度**。

知識產權署的立法會參考摘要：

爲有效保護這項新增的專有傳播權利， 我們建議訂定相應的刑事罰則，懲處在下列情況下未獲授權而向公眾傳播版權作品的人：有關作爲在牟利的業務過程中作出；或**傳播版權作品的程度足以損害版權擁有人的權利**。條例現時已有其他罰則，包括有關售賣侵權複製品或分發侵權複製品達到損害版權擁有人權利程度的罰則。建議的刑事罰則與現有罰則相近。

何謂「損害版權擁有人的權利的程度」，可以涵蓋金錢以外的「損害」。此含糊的定義未免令人擔心執法機關權力過大，擔心執法機關可以以無形的「損害」爲理由作出刑事檢控。

提議：

i. 商業使用的侵權行爲訂立刑事法例，但若是非商業使用的範疇，刑化會扼殺有關的使用或表達空間。

ii. 版權者唔追究政府作爲第三方絕對唔應該出手干預, 恐怕將來政府司法機構會選擇性地引用是項條例,打壓反對政府人士的言論空間

2. 「貶損處理」的規管，扼殺創作和言論自由

第 92(2)及 92(3)

(2) 就本條而言—

(a) “處理”(treatment) 作品指對作品進行任何增加、刪除、修改或改編，但不包括—

(i) 翻譯文學作品或戲劇作品；或

(ii) 將音樂作品編曲或改作而只涉及轉調或轉音域；及

(b) 如作品**經處理後受歪曲或殘缺不全**，或在其他方面對作者或導演的**榮譽或聲**

譽具損害性，則該項處理屬貶損處理，而在以下條文中，凡提述作品受貶損處理，即須據此解釋。

(3) 就文學作品、戲劇作品或音樂作品而言，任何人如—

(a) 將受貶損處理的作品作商業發表、公開表演、或向公眾傳播；或

(b) 向公眾提供受貶損處理的作品的影片或聲音紀錄，或向公眾提供包括受貶損處理的作品在內的影片或聲音紀錄，或向公眾發放該等影片或聲音紀錄的複製品，該人即屬侵犯該權利。

(4) 就藝術作品而言，任何人如—

(a) 將受貶損處理的作品作商業發表或公開陳列，或將受貶損處理的作品的影像向公眾傳播；

(b) 公開放映包括受貶損處理的作品的影像在內的影片，或向公眾提供該影片或向公眾發放該影片的複製品；或

(c) 向公眾提供表述受貶損處理的下列作品的平面美術作品或照片或向公眾發放該平面美術作品或照片的複製品—

(i) 建築物模型形式的建築作品；

(ii) 雕塑品；或

(iii) 美術工藝作品， 該人即屬侵犯該權利。

第 92 條中，一直沒有清楚界定何謂「受貶損處理的作品」，只將其定義爲「**經處理後受歪曲或殘缺不全**，或在其他方面對作者或導演的榮譽或聲譽具損害性」。以舊曲新詞爲例，如果詞意與原曲並無直接關係（例如改編自《電燈膽》的政治諷刺歌曲《屍症報告慳儉省》），會否被定義爲「受歪曲或殘缺不全」，或「在其他方面對作者的榮譽或聲譽具損害性」？現時「受貶損處理的作品」的定義實在過份含糊。

修訂案中，更賦予政府權力，可以檢控違例人仕。但政府如何得知某人「向公眾傳播作品」的行爲，已「達到損害版權擁有人的權利的程度」？**尤其是對版權擁有人名譽、精神困擾等無形損害，外人（包括政府）根本無從判斷。**若此修訂案獲得通過，則政府可以假借版權擁有人之名，以損害版權擁有人利益而**任意檢控**使用版權物品的網民，實爲本修訂案中極大的漏洞。

此條一旦擴闊適用範圍，一般市民的言論自由將會受損，政府可以隨時越俎代庖，控告自己不喜歡的人。

提議：

i. 政府不應把「名譽」或「心理傷害」這些無形損失與版權法中的「損害版權持有人利益」混爲一談，這不單違反版權法的原意，亦可能使政治諷刺的表達，受到刑事打壓的威脅。

ii. 網站接到侵權投訴不先將貼文影音下架當然要負連帶責任，但上載發貼人如欲抗辯，也不應被逼獻上個人私隱資料予投訴人，最起碼不是在法庭受理案件前。此虛僞的「安全港」制度一旦實施，配合「貶損處理」，任何有勢力人士都可以大行白色恐佈，禁絕一切不利己言論於網上流傳。

iii. 應加強 OSP 非法定實務守則的公眾參與

3. 設立「公平使用」條文，對創作應有空間之保障

在保護使用者方面，美國法例當然有著名的公平使用（fair use），讓使用者在特定合理條件下可以抗辯。但在香港採納的英國版權法體系中，則無類似條文以保障使用者。香港或英國採用是公平處理（fair dealing）條文（香港版權法第 III 部，即第 37 至 88 條。），即是爲各種特定豁免情況逐一編寫條文，沒有廣義條文讓公眾用以抗辯。在公平使用的保障下，雖然可能要花費鉅額律師費與企業抗辯，但它優點在於可以作爲公眾的最後防線；然而，現時香港的公平處理條文，只就個別的特定條件下定立豁免版權授權（例如圖書館館藏複印、教育複印、影片字幕、公共機構使用等），範圍極度不足及狹窄。它既沒有就各種非商業的二次創作定下豁免授權，更令公眾沒有一個最後抗辯防線。

若加上現在這個《條例草案》修訂，即使如上述的二次創作，也可被刑事起訴，而無從抗辯。此舉明顯損害公眾的言論自由。

提議：

i. 我們強烈要求政府在版權法例中，**加入公平處理條文**，並明確把**非商業性質的二次創作**，在一個合理引用原作的範圍下，**列爲豁免範圍**，政府不應扼殺小市民創作自由，應保留市民發表意見的應有空間，以保障有關的創作及其所表達的言論之自由。

About the OSPA: *The Online Service Providers Alliance (OSPA) is a platform to bring together policy makers, professionals from related fields, and stakeholders from the community, to advise on and promote methods for achieving the goal of providing better online services to society. OSPA is also active in setting up mechanism for OSPs to combat Internet problems including defamation, copyright infringement, and inappropriate and illegal content provided by third parties while balancing the need to ensure freedom of expression and the development of Internet services in Hong Kong. OSPA was formed in 2010 by the Internet Professional Association (iProA) and ten web sites, major local websites: Baby-Kingdom.com, FoodEasy.com, HKGolden.com, Qooza.hk, sina.com.hk, TradeDuck.com, Travellife.org, 28hse.com, 28phone.com and the international trading web site eBay.com.hk.*

Date: 20 – July -2011