

## **Bills Committee on the Copyright (Amendment) Bill 2011**

### **The Safe Harbour Provision**

#### **Purpose**

At the meeting held on 12 January 2012, the Bills Committee requested the Administration to provide further information, if any, for comparing the proposed safe harbour provision under the Copyright (Amendment) Bill 2011 (“the Bill”) with copyright laws in overseas jurisdictions, in respect of the frequency and instances of invoking the notice and takedown mechanism, and whether there were instances where added measures had to be invoked to prevent abuse of the mechanism for political censorship.

#### **The Safe Harbour Provision**

2. To provide incentives for online service providers (OSPs) to cooperate with copyright owners in combating online piracy, we propose to introduce the safe harbour provision. In brief, OSPs’ liability for copyright infringement will be limited, provided that they meet certain prescribed conditions, including the taking of reasonable steps to limit or stop an infringement occurring on their service platforms when being notified.<sup>1</sup> A table comparing our proposal with similar mechanisms in several overseas common law jurisdictions could be found in LC Paper No. CB(1) 3061/10-11(02).

3. The proposed safe harbour provision is underpinned by a voluntary Code of Practice which sets out suggested practical guidelines and procedures for OSPs to follow when being notified of infringing activities on their service platforms. OSPs who comply with the Code of Practice will be treated as having taken reasonable steps to limit or stop the infringement in question. To facilitate the implementation of the safe harbour provision, we have recently issued the second draft of the proposed Code of Practice for public consultation.

4. The Code of Practice sets out two main mechanisms, namely the “Notice and Notice” and the “Notice and Takedown” systems. Under the “Notice and Notice” system, OSPs are required to forward to subscribers notices of alleged infringement that they have received from copyright owners.

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<sup>1</sup> The qualifying conditions for limitation of liability are prescribed under the new section 88B in the Bill.

5. Under the “Notice and Takedown” system, upon receipt of a notice of alleged infringement from a copyright owner, an OSP is required to (a) remove or disable access to material or activity identified to be infringing; and (b) notify the subscriber who has been identified in connection with the alleged infringement. The subscriber may then elect to file a counter notice to dispute or deny the alleged infringement and request for reinstatement or restoration of access. Upon receipt of the counter notice, the OSP is required to reinstate or restore access to the material unless the OSP is notified by the copyright owner or his authorised representative that legal proceedings with a view to restraining the subscriber from engaging in infringing activity relating to the material have been commenced.

### **Prevention of Abuses**

6. Similar provisions were prescribed in the US Digital Millennium Copyright Act (DMCA) in 1998 and the respective Copyright Act of Australia and Singapore in 2005. In our research, we did not come across any comprehensive survey on the frequency and instances of invoking the notice and takedown mechanism in these jurisdictions. We however note that Mr Kent Walker, Senior Vice President and General Counsel of Google Inc. informed the House of Representatives of the US in April 2011 that access to “far less than 1% of all the materials hosted and indexed by Google” globally were disabled in 2010 under the DMCA system.<sup>2</sup> He has also made the following remarks –

“...the DMCA’s notice-and-takedown process strikes the right balance among the interests of rights holders, Internet users, and intermediaries like search engines, social networks and the vast other ways in which people find and link to information online. The DMCA has a proven 12-year track record as a fast, efficient tool for notifying online services that contain links that lead to infringing material, and it works.”<sup>3</sup>

7. There is no available evidence to suggest that in jurisdictions that practise the notice and takedown system, the relevant authorities had deemed it necessary in the light of experience to bring in measures specifically for preventing abuses of the system for the purpose of political censorship.

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<sup>2</sup> See <http://judiciary.house.gov/hearings/pdf/Walker04062011.pdf>.

<sup>3</sup> Ibid.

8. Under our proposed safe harbour provision, there are following measures to prevent possible abuses –

- (a) only the copyright owner (or his authorised representative) is entitled to initiate a complaint by filing a notice of alleged infringement. The Bill further requires the copyright owner to substantiate his claim by providing specific information in the notice of alleged infringement, such as a description of his copyright work, an identification of the infringing material and its location, and a description of how copyright has been infringed, etc. The copyright owner (or his authorised representative) must confirm his identity and the truth and accuracy of the statements made in the notice of alleged infringement;
- (b) a person commits an offence (the maximum penalty of which is a fine of \$5,000 and an imprisonment term of two years) and is liable to pay compensation by way of damages to any person who suffers loss or damage as a result of a false statement made by him in a notice of alleged infringement; and
- (c) there is a mechanism under which the affected subscriber may elect to file a counter notice to dispute or deny the alleged infringement and request for reinstatement or restoration of access. When filing a counter notice, an individual subscriber is entitled to direct the OSP to withhold disclosure of his personal data in a copy of the counter notice sent to the complainant. OSPs are required to reinstate or restore access upon receipt of a counter notice (unless the copyright owner has commenced legal proceedings with a view to restraining the subscriber from engaging in infringing activity relating to the material).

9. With regard to similar notice and takedown mechanisms in other countries, a study conducted for the Organisation for Economic Co-operation and Development has pointed out that “because there are legal risks associated with knowingly filing wrongful notices or counter-notices and because the burden upon alleged infringers who file counter-notices is substantial, it is likely that these notices and counter-notices will be filed only when the complainants are reasonably

confident of their legal position and have some financial wherewithal”.<sup>4</sup> In the US, there is a decided case that a copyright owner who materially misrepresented that the user had infringed his copyright in a work when making a notice under the DMCA mechanism was found liable for paying damages and legal costs to the user.<sup>5</sup>

## **Conclusion**

10. 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 the safe harbour provision and Code of Practice. We believe that the above built-in safeguards (paragraph 8 above) and suitable public education will go a long way towards minimising possible abuse of the safe harbour provision.

Commerce and Economic Development Bureau  
Intellectual Property Department  
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<sup>4</sup> “The role of internet intermediaries in advancing public policy objectives: Forging partnerships for advancing policy objectives for the Internet economy, Part II” (available at: <http://ssrn.com/abstract=1875708>).

<sup>5</sup> As a safeguard against abuse of the notice and takedown system, the DMCA prescribes that any person who knowingly makes material misrepresentation in the notice of alleged infringement or counter notice shall be liable for damages. Please see the decision in *Online Policy Group v Diebold, Inc.*, 337 F. Supp. 2d. 1195 (N.D. Cal. 2004).