



October 17, 2014

By email ([bc\\_106\\_13@legco.gov.hk](mailto:bc_106_13@legco.gov.hk))

Clerk to Bills Committee on Copyright (Amendment) Bill 2014

Legislative Council Secretariat

Legislative Council Complex

1 Legislative Council Road

Central

Hong Kong

### **The Copyright (Amendment) Bill 2014**

Thank you for your invitation to provide a written submission detailing our views on the Copyright (Amendment) Bill 2014 ("Bill"). The Entertainment Software Association ("ESA") is the U.S. association exclusively dedicated to serving the business and public affairs needs of companies that publish computer and video games for video game consoles, personal computers, and the Internet. ESA members represent some of the world's leading entertainment software publishers whose releases account for a majority of the game console and software products sold around the world. Given the importance of the Hong Kong market to the video game industry, ESA has been closely engaged in Hong Kong's efforts to update the Copyright Ordinance since 2006. We applaud the transparent manner in which the Legislative Council has conducted consultations on these matters and appreciate the opportunity to once again provide views on the Bill. We offer the following suggestions, which are aimed at ensuring the Bill achieves the underlying objective of updating the Copyright Ordinance in a manner that accounts for rapid technological developments.

### ***Communication to the Public Right***

We are supportive of the effort to "future proof" the Copyright Ordinance by introducing a technologically neutral "communication to the public" right. Indeed, ensuring that creators are compensated for economically significant uses of their works is among the key goals of any copyright system. At the same time, it is critical that the introduction of the new communication right not disrupt established licensing practices that content creators and online platform providers have relied upon in lawfully disseminating copyrighted works. In the context of the commercial distribution of copyrighted works, it is essential to ensure that the introduction of the communication to the public right does not have unintended effects. To that end, we urge the Bills Committee to consider adding language to Clause 13 of the Bill (Section 28A), or otherwise to clarify through the legislative history, that the implementation of the communication to the public right is not intended to alter or override established practices in the marketplace for the clearance of rights, such as triggering an obligation to pay additional compensation for rights which have already been cleared. We have observed, for example, that in

certain jurisdictions where the right of communication has been implemented, public performance collection societies have sought to claim royalties for the downloading of works, despite the prior clearance of such reproduction rights by the party making use of such works. Such a clarification may be necessary to avoid scenarios in which users of works are, in effect, being asked to pay twice for the same right of exploitation.

### ***Safe Harbours***

As an industry of both content creators and platform operators, and one in which game products and services increasingly empower users to interact with one another to build virtual worlds and share user-generated content, ESA members are very supportive of appropriately calibrated safe harbour frameworks. On the one hand, our members rely on flexibilities provided by safe harbour frameworks to develop and bring their games, game platforms, and innovative consumer experiences to market. On the other, our members' games, like other desirable digital content, are subject to extraordinarily high levels of online piracy and other forms of copyright infringement that is facilitated by service providers who fail to take meaningful action in response to notices of infringement. Thus, as both recipients and high volume senders of takedown notices, ESA members support safe harbours that provide appropriate incentives for online service providers to cooperate with copyright owners in combatting online piracy. On the whole, we believe the safe harbour framework reflected in Clause 50 of the Bill (Part II, Division IIIA) is both reasonable and workable. However, based upon our experience working with safe harbour systems in other countries, we offer the following suggested revisions:

- ***Requirement to Maintain a Repeat Infringer Program:*** To ensure the notice and takedown requirement has a meaningful impact on piracy, we recommend that the Legislative Council consider adding as a condition for safe harbor eligibility a requirement that service providers implement a policy reasonably designed to deter users from engaging in repeat infringements. If service providers do not implement a policy to deter repeat infringement, the sending of such notices and a service provider's removal of infringing material would have little practical effect in deterring online infringement as users will face no disincentive to re-upload (at little time and cost) infringing material removed in response to a takedown notice. To that end, we recommend the addition of the following proposed subsection (e) to Section 88B(2):

(e) that the service provider has adopted and reasonably implemented, and informed subscribers of the service provider's system or network of, a policy that provides for the termination in appropriate circumstances of the services provided to subscribers who have repeatedly received notices under Sections 88C and/or 88D.

- ***Counter Notice Requirements:*** We remain concerned that the counter notice procedures in Section 88E may contain an imbalance with the potential to undermine the effectiveness of the safe harbour framework. Section 88E(3)(e) specifies that a user who submits a counter notice must state whether she "opts for or against the service provider's disclosure of the subscriber's personal data contained in the counter notice to the complainant." This provision seems inconsistent with the rationale for a counter notice mechanism, which is generally intended to allow an individual responsible for the posting of material taken down by a service provider in response to a rights holder submitted notice of infringement to have the material restored in exchange for assuming any resulting liability. In other words, the counter notice serves as a form of indemnification, allowing the service provider to step out of the dispute, restore the *status quo ante*, and enable the right holder to proceed directly against the subscriber in an

infringement action. This balance is disrupted, however, if the individual is permitted to remain anonymous. Given the procedural difficulty and expense involved in obtaining a court order to reveal the identity of an anonymous user, this provision may embolden users to submit counter notices for content they know to be infringing.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'C. Genetski', with a long horizontal flourish extending to the right.

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