

DRAFT

COPYRIGHT PROTECTION IN THE DIGITAL ENVIRONMENT

CODE OF PRACTICE FOR SERVICE PROVIDERS

Please send your comments on or before 9 September 2011 to

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I. INTRODUCTION

1. THIS CODE OF PRACTICE (“the Code”) is published by the Secretary for Commerce and Economic Development pursuant to section 88I of the Copyright Ordinance (Cap. 528) (“the Ordinance”). It provides practical guidance to service providers, in the context of Division IIIA of the Ordinance, on the relevant practices and procedures to be adopted by service providers to limit or stop copyright infringement on their service platforms.
2. Compliance with the provisions of this Code is voluntary.
3. Where a service provider, in taking steps to limit or stop an alleged infringement, duly complies with this Code, it will be treated by virtue of section 88B(3) of the Ordinance as having taken reasonable steps to limit or stop the infringement in question. Subject to compliance with the other three qualifying conditions in section 88B(2), the service provider will not be held liable for damages or other pecuniary remedy for copyright infringement in a work that occurs on its service platform merely because it has provided or operated facilities for online services (see section 88B(1) of the Ordinance). The other three qualifying conditions are:
 - 3.1 the service provider has not received and is not receiving any financial benefit directly attributable to the infringement;
 - 3.2 the service provider accommodates and does not interfere with standard technical measures that are used by copyright owners to identify or protect their copyright works; and
 - 3.3 the service provider designates an agent to receive notices of alleged infringement, by supplying through the service provider’s service, including on the service provider’s website in a location accessible to the public, the name, address, telephone number and electronic mail address of the agent.

II. DEFINITIONS

Expressions used in this Code have the same meaning as in Division IIIA of the Ordinance.

Unless the context requires otherwise, the following terms have the following meaning:

“newly released copyright work” means a copyright work that is published¹ in Hong Kong or elsewhere for less than [3] months

“pre-release copyright work” means a copyright work that has not been published in Hong Kong or elsewhere

“working day” means any day other than –

- (a) a public holiday within the meaning of section 3 of the Interpretation and General Clauses Ordinance (Cap. 1); or
- (b) a gale warning day or black rainstorm warning day as defined in section 71(2) of the Interpretation and General Clauses Ordinance (Cap. 1)².

¹ The term “published” and related expressions shall have the meaning assigned to them by s. 196 of the Copyright Ordinance (Cap. 528).

² A number of ordinances adopt a similar formulation. See, for instance, s. 2 of the Unsolicited Electronic Messages Ordinance (Cap. 593) and s. 2 of the Mandatory Provident Fund Schemes Ordinance (Cap. 485).

III. UNDERLYING OBJECTIVES

1. The underlying objectives of this Code are:
 - 1.1 to enhance copyright protection in the digital environment, in the interest of providing an environment conducive to the healthy development of the creative and information technology industries in Hong Kong;
 - 1.2 to facilitate a digital economy by promoting the development of advanced technology for creating and disseminating digital content;
 - 1.3 to combat online piracy and free up online resources that would otherwise be taken up by infringing activities; and
 - 1.4 to foster industry cooperation and entrench a culture of respect for intellectual property rights in the community.
2. This Code seeks to provide a mechanism through which the Administration, copyright owners, copyright users and service providers may join forces, within the framework of the applicable laws, rules and regulations, to combat online copyright infringement, and promote respect for intellectual property rights.

IV. NOTICE AND NOTICE SYSTEM

1. Application of the Notice and Notice System

1.1 The Notice and Notice System is applicable to a service provider who:

1.1.1 offers transmission, routing; and/or

1.1.2 provides connections for or access to digital online communications, between or among points specified by a user,

of material of the user's choosing and who has satisfied the conditions set out in paragraph 1.2.

1.2 The conditions referred to in paragraph 1.1 are that the service provider:

1.2.1 does not initiate the transmission;

1.2.2 does not select the recipient of the transmission except as an automatic response to the request of another person; and

1.2.3 does not select or modify the material contained in the transmission.

1.3 Paragraphs 2 to 4 below set out the steps to be taken by the service provider to send notices to its subscribers following receipt of a notice of alleged infringement from a complainant.

2. Notice of alleged infringement

Issue of notice of alleged infringement

2.1 A complainant may send a notice of alleged infringement to a service provider if he believes, on reasonable grounds, that a subscriber to the service provider's online service has infringed the owner's copyright by means of the online service.

Form and delivery of notice of alleged infringement

- 2.2 The notice of alleged infringement shall contain the full particulars as required by Form A set out in the Annex, and be signed or otherwise authenticated by the complainant.
- 2.3 The notice of alleged infringement shall be sent to the service provider's designated agent by electronic or other means.

3. Receipt of notice of alleged infringement

Receipt of notice of alleged infringement

- 3.1 On receipt of the notice of alleged infringement, the service provider shall acknowledge receipt. An automated response will suffice.

Notice to complainant

- 3.2 The service provider shall send a written notice to the complainant as soon as practicable if:
- 3.2.1 the notice of alleged infringement does not comply with paragraph 2.2; or
 - 3.2.2 there are other grounds for not processing the notice of alleged infringement, and these grounds include³:
 - (a) the information in the notice of alleged infringement does not relate to one of the service provider's subscribers (e.g. the IP address identified was not allocated to the service provider at the time of the alleged infringement);
 - (b) the notice of alleged infringement refers to an account that is no longer active; or
 - (c) the subscriber using the IP address at the time of the alleged infringement cannot be reliably identified.
- 3.3 The relevant ground(s) for not processing the notice of alleged infringement shall be stated on a notice sent under paragraph 3.2.
- 3.4 For the avoidance of doubt, a service provider is not required to verify the authenticity and content of a notice of alleged infringement as long as the notice has *prima facie* complied with paragraph 2.2.

³ The stakeholders may provide further factors for consideration based on their actual experience.

4. Notice to subscriber

Notice to subscriber

- 4.1 Unless a notice has been sent to the complainant under paragraph 3.2, the service provider shall, within the relevant timeframe set out in paragraph 4.2, send a written notice to the subscriber containing the information set out in paragraph 4.3.
- 4.2 The “relevant timeframe” referred to in paragraph 4.1 means:
- 4.2.1 where the complainant has confirmed in the notice of alleged infringement that the copyright work alleged to have been infringed is a pre-release or newly released copyright work, [1 to 3]⁴ working day(s) after the date of the service provider’s receipt of the notice of alleged infringement; or
- 4.2.2 in other cases, [7 to 10]⁵ working days after the date of the service provider’s receipt of the notice of alleged infringement.

Content of notice to subscriber

- 4.3 A notice sent under paragraph 4.1 shall include/enclose:
- 4.3.1 a statement that the IP address allocated to the subscriber has been identified in connection with an allegation of copyright infringement;
- 4.3.2 a copy of the notice of alleged infringement;
- 4.3.3 information about the legal consequences of copyright infringement in Hong Kong, together with a reminder to the subscriber that he may seek independent legal advice, if in doubt, and/or contact the complainant directly regarding the alleged infringement.

⁴ It is our intent to stipulate a specific number of day(s) as the maximum duration within which the service providers should take action. Stakeholders are invited to comment on the appropriate number of day(s) to be stipulated.

⁵ See footnote 4.

Notice to complainant

- 4.4 The service provider shall inform the complainant by way of written notice that a notice under paragraph 4.1 has been sent to the subscriber as soon as practicable thereafter.

V. NOTICE AND TAKEDOWN SYSTEM (STORAGE)

1. Application of the Notice and Takedown System (Storage)

- 1.1 The Notice and Takedown System (Storage) is applicable to a service provider who has stored, at the direction of a subscriber, material or activity on its service platform.
- 1.2 Paragraphs 2 to 7 below set out the steps to be taken by the service provider for removing material or disabling access to material or activity that are identified as infringing following receipt of a notice of alleged infringement from the complainant.
- 1.3 Paragraphs 8 to 11 below set out the steps to be taken by the service provider for removing material or disabling access to material or activity that are identified as infringing where it becomes aware of infringing material or activity residing on its service platform.

STEPS TO BE TAKEN FOLLOWING NOTICE OF ALLEGED INFRINGEMENT

2. Notice of alleged infringement

Issue of notice of alleged infringement

- 2.1 A complainant may send a notice of alleged infringement to a service provider, in relation to material or activity residing on its service platform, if he:
 - 2.1.1 believes, on reasonable grounds, that the material or activity infringes the copyright owner's work; and
 - 2.1.2 wishes the service provider to remove the material or disable access to the material or activity in question.

Form and delivery of notice of alleged infringement

- 2.2 The notice of alleged infringement shall contain the full particulars as required by Form A set out in the Annex, and be signed or otherwise authenticated by the complainant.
- 2.3 The notice of alleged infringement shall be sent to the service provider's designated agent by electronic or other means.

3. Receipt of notice of alleged infringement

Receipt of notice of alleged infringement

- 3.1 On receipt of the notice of alleged infringement, the service provider shall acknowledge receipt. An automated response will suffice.

4. Takedown and notice to subscriber

Takedown

- 4.1 Upon receipt of a notice of alleged infringement that complies with paragraph 2.2, the service provider shall, within the relevant timeframe set out in paragraph 4.2, remove the material or disable access to the material or activity to which the alleged infringement relates.

- 4.2 The “relevant timeframe” referred to in paragraph 4.1 means:

4.2.1 where the complainant has confirmed in the notice of alleged infringement that the copyright work alleged to have been infringed is a pre-release or newly released copyright work, [1 to 3]⁶ working day(s) after the date of the service provider’s receipt of the notice of alleged infringement; or

4.2.2 in other cases, [7 to 10]⁷ working days after the date of the service provider’s receipt of the notice of alleged infringement.

- 4.3 The service provider is well advised to adopt appropriate and reasonably practicable measures to ensure that material or activities that are not subject to the alleged infringement remain intact and unaffected by the removal of the material or disabling of access to the material or activity to which the alleged infringement relates.

- 4.4 For the avoidance of doubt, a service provider is not required to verify the authenticity and content of a notice of alleged infringement as long as the notice has *prima facie* complied with paragraph 2.2.

⁶ See footnote 4.

⁷ See footnote 4.

Notice to subscriber

4.5 Where the service provider has removed material or disabled access to material or activity residing on its service platform, the service provider shall promptly take reasonable steps to send a written notice to the subscriber containing the information set out in paragraph 4.6.

Content of notice to subscriber

4.6 A notice sent under paragraph 4.5 shall include/enclose:

4.6.1 a statement that material or activity stored at the direction of the subscriber has been identified in connection with an allegation of copyright infringement and that the service provider has removed the material or disabled access to the material or activity accordingly;

4.6.2 a copy of the notice of alleged infringement;

4.6.3 a statement that if the subscriber wishes to dispute or deny the alleged infringement and/or the removal or disabling, he may send a counter notice to the service provider within [20] working days after the date of the service provider's notice;

4.6.4 information about the legal consequences of copyright infringement in Hong Kong, together with a reminder to the subscriber that he may seek independent legal advice, if in doubt, and/or contact the complainant directly regarding the alleged infringement.

4.7 The service provider shall be treated as having complied with paragraph 4.5 if it sends the documents to the subscriber as required.

Notice to complainant

4.8 The service provider shall send a written notice to the complainant to inform the latter of the removal or disabling of access and that a notice under paragraph 4.5 has been sent to the subscriber as soon as practicable thereafter.

5. Counter notice

Issue of counter notice

5.1 A subscriber who wishes to dispute or deny the alleged infringement and/or the removal or disabling may send a counter notice to the service provider within [20] working days after the date of the service provider's notice.

Form and delivery of counter notice

5.2 The counter notice shall contain the full particulars as required by Form B set out in the Annex, and be signed or otherwise authenticated by the subscriber.

5.3 The counter notice shall be sent to the service provider's designated agent by electronic or other means.

6. Receipt of counter notice

6.1 On receipt of the counter notice, the service provider shall acknowledge receipt. An automated response will suffice.

7. Notice to complainant and reinstatement

Notice to complainant

7.1 Except in the case of a counter notice which does not comply with paragraphs 5.1 and 5.2, the service provider shall promptly send a written notice to the complainant containing the information set out in paragraph 7.3 upon receipt of the counter notice.

7.2 For the avoidance of doubt, a service provider is not required to verify the authenticity and content of a counter notice as long as the notice has *prima facie* complied with paragraph 5.2.

Content of notice to complainant

7.3 A notice sent under paragraph 7.1 shall include/enclose:

7.3.1 a copy of the counter notice;

7.3.2 a statement that if the complainant does not, within [10] working days after the date of the service provider's notice, inform the service provider by way of written notice to its designated agent, that the copyright owner or its authorized representative has commenced proceedings in Hong Kong seeking a court order to restrain the subscriber from engaging in infringing activity relating to the material or activity on the service provider's service platform, the service provider will reinstate the material or cease disabling access to the material or activity to which the alleged infringement relates.

Reinstatement

7.4 Unless the service provider receives a notice from the complainant pursuant to paragraph 7.3.2, the service provider shall, within [10 to 14] working days after the date of the notice sent under paragraph 7.1, take reasonable steps to reinstate the material or cease disabling access to the material or activity.

STEPS TO BE TAKEN OTHER THAN FOLLOWING NOTICE OF ALLEGED INFRINGEMENT

8. Takedown and notice to subscriber

Takedown

8.1 The service provider shall, upon becoming aware of infringing material or activity residing on its service platform, remove the material or disable access to the material or activity to which the alleged infringement relates as soon as practicable.

- 8.2 The service provider is well advised to adopt appropriate and reasonably practicable measures to ensure that material or activities that are not subject to the alleged infringement remain intact and unaffected by the removal of the material or disabling of access to the material or activity to which the alleged infringement relates.

Notice to subscriber

- 8.3 Where the service provider has removed material or disabled access to material or activity residing on its service platform, the service provider shall promptly take reasonable steps to send a written notice to the subscriber containing the information set out in paragraph 8.4.

Content of notice to subscriber

- 8.4 A notice sent under paragraph 8.3 shall include/enclose:
- 8.4.1 a statement that material or activity stored at the direction of the subscriber has been identified in connection with suspected copyright infringement and the service provider has removed the material or disabled access to the material or activity accordingly;
 - 8.4.2 information reasonably sufficient to enable the subscriber to identify the material or activity in question;
 - 8.4.3 a statement that if the subscriber wishes to dispute or deny the alleged infringement and/or the removal or disabling, he may send a counter notice to the service provider within [20] working days after the date of the service provider's notice; and
 - 8.4.4 information about the legal consequences of copyright infringement in Hong Kong, together with a reminder to the subscriber that he may seek independent legal advice, if in doubt.
- 8.5 The service provider shall be treated as having complied with paragraph 8.3 if it sends the documents to the subscriber as required.

9. Counter notice

Issue of counter notice

- 9.1 A subscriber who does not agree with the alleged infringement and/or the removal or disabling may send a counter notice to the service provider within [20] working days after the date of the service provider's notice.

Form and delivery of counter notice

- 9.2 The counter notice shall contain the particulars as required by Form B set out in the Annex, and be signed or otherwise authenticated by the subscriber.
- 9.3 The counter notice shall be sent to the service provider's designated agent by electronic or other means.

10. Receipt of counter notice

- 10.1 On receipt of the counter notice, the service provider shall acknowledge receipt. An automated response will suffice.

11. Reinstatement

- 11.1 Unless:

- 11.1.1 the counter notice does not comply with paragraphs 9.1 and 9.2; or
- 11.1.2 the relevant copyright owner or its authorized representative has informed the service provider by way of written notice to its designated agent, that it has commenced proceedings in Hong Kong seeking a court order to restrain the subscriber from engaging in infringing activity relating to the material or activity on the service provider's service platform,

the service provider shall, within [10 to 14] working days after the date it has received the counter notice, take reasonable steps to reinstate the material or cease disabling access to the material or activity.

- 11.2 For the avoidance of doubt, a service provider is not required to verify the authenticity and content of a counter notice as long as the notice has *prima facie* complied with paragraph 9.2.

VI. NOTICE AND TAKEDOWN SYSTEM (INFORMATION LOCATION TOOLS)

1. Application of the Notice and Takedown System (Information Location Tools)

- 1.1 The Notice and Takedown System (Information Location Tools) is applicable to a service provider who has linked or referred users to an online location containing infringing material or activity, by the use of information location tools.
- 1.2 Paragraphs 2 to 4 below set out the steps to be taken by the service provider for disabling access to such infringing material or activity.

2. Notice of alleged infringement

Issue of notice of alleged infringement

- 2.1 A complainant may send a notice of alleged infringement to a service provider, in relation to a link or reference to material or activity that is provided by the service provider on its service platform, if he:
 - 2.1.1 believes, on reasonable grounds, that the material or activity infringes the copyright owner's work; and
 - 2.1.2 wishes the service provider to disable access to the material or activity in question.

Form and delivery of notice of alleged infringement

- 2.2 The notice of alleged infringement shall contain the full particulars as required by Form A set out in the Annex, and be signed or otherwise authenticated by the complainant.
- 2.3 The notice of alleged infringement shall be sent to the service provider's designated agent by electronic or other means.

3. Receipt of notice of alleged infringement

- 3.1 On receipt of the notice of alleged infringement, the service provider shall acknowledge receipt. An automated response will suffice.

4. Takedown

- 4.1 Upon receipt of a notice of alleged infringement that complies with paragraph 2.2, the service provider shall, within the relevant timeframe set out in paragraph 4.2:
- 4.1.1 disable access to the material that is alleged to be infringing or the subject of infringing activity, or the activity that is alleged to be infringing; and
 - 4.1.2 remove or disable access to any material alleged to be infringing or the subject of any infringing activity that has been made and stored by the service provider on its service platform.
- 4.2 The “relevant timeframe” referred to in paragraph 4.1 means:
- 4.2.1 where the complainant has confirmed in the notice of alleged infringement that the copyright work alleged to have been infringed is a pre-release or newly released copyright work, [1 to 3]⁸ working day(s) after the date of the service provider’s receipt of the notice of alleged infringement; or
 - 4.2.2 in other cases, [7 to 10]⁹ working days after the date of the service provider’s receipt of the notice of alleged infringement.
- 4.3 For the avoidance of doubt, a service provider is not required to verify the authenticity and content of a notice of alleged infringement as long as the notice has *prima facie* complied with paragraph 2.2.

⁸ See footnote 4.

⁹ See footnote 4.

VII. ANNEX

Form A - Notice of Alleged Infringement

To: [Name of service provider]

1. This notice is furnished pursuant to section 88C of the Copyright Ordinance and the Code of Practice issued by the Secretary for Commerce and Economic Development on [•].
2. The particulars of the person furnishing this notice (the complainant) are as follows:
 - (a) Name:
 - (b) Address:
 - (c) [Address for service in Hong Kong⁽¹⁾:]
 - (d) Other information for contacting the complainant⁽²⁾:
3. [The particulars of the owner of the copyright work referred to in paragraph 4, on whose behalf this notice is furnished, are as follows⁽³⁾:
 - (a) Name:
 - (b) Address:]
4. The particulars of the copyright work in respect of which copyright is alleged to have been infringed are as follows⁽⁴⁾:
5. The complainant confirms that the copyright work alleged to have been infringed is a pre-release or newly released copyright work (if applicable)⁽⁵⁾.
6. The particulars of the alleged infringement in respect of the copyright work referred to in paragraph 4 are as follows⁽⁶⁾:
7. The particulars of the means by which you are alleged to have linked or referred a user to the online location of the alleged infringement referred to in paragraph 6 are as follows⁽⁷⁾:
8. The complainant believes in good faith that use of the material, or conduct of the activity in the manner complained of is not authorized by the law of Hong Kong, the copyright owner or its authorized representative.

9. The complainant requests the service provider to:
- (a) send a copy of this notice to its subscriber whose account for online services has been used or involved in the alleged infringement;
 - (b) remove/disable access to^(delete as appropriate) the material or disable access to the activity referred to in paragraph 6 (if applicable).⁽⁸⁾
10. The complainant declares that:
- (a) The information contained in this notice is true and accurate to the best of his knowledge and belief;
 - (b) The complainant is/is authorized to act on behalf of^(delete as appropriate) the owner of the copyright work referred to in paragraph 4; and
 - (c) The complainant understands that he 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 contained herein.

Date:

Signature:

Notes

- ⁽¹⁾ Omit this paragraph if the complainant is a resident in Hong Kong.
- ⁽²⁾ Such as the complainant's telephone number, fax number, e-mail address, designated contact person.
- ⁽³⁾ Omit this paragraph if the complainant is the owner of the copyright work.
- ⁽⁴⁾ Provide sufficient particulars to enable the service provider to identify the copyright work that is alleged to be infringed, or if multiple copyright works are alleged to have been infringed at a single online site, identify a representative number of such copyright works.
- ⁽⁵⁾ Omit this paragraph if the copyright work alleged to have been infringed is not a pre-release or newly released copyright work.
- ⁽⁶⁾ Provide sufficient particulars to enable the service provider to identify and locate the material that is alleged to be infringing or the subject of infringing activity; and/or the activity that is alleged to be infringing, by reference to (as appropriate):-
 - (i) a description and the nature of alleged infringement and the date, time and other details in relation to the commission of the alleged infringement;
 - (ii) the online location of such material or activity, such as:
 - the file name, a description of the contents of the file, and the hash code of the infringing material;
 - the IP address related to the alleged infringement;
 - port number used to conduct the alleged infringement;
 - the website, protocol, via which the alleged infringement occurred.
- ⁽⁷⁾ Provide sufficient particulars to enable the service provider to identify and locate the link or reference on its service platform that links to the material that is alleged to be infringing or the subject of infringing activity, or the activity that is alleged to be infringing, as referred to in paragraph 6. Omit this paragraph if inapplicable.
- ⁽⁸⁾ If sub-paragraph (b) is applicable, delete "remove/disable access^(delete as appropriate) to the material" or "disable access to the activity" as appropriate.

Form B - Counter Notice

To: [Name of service provider]

1. This notice is furnished pursuant to section 88D of the Copyright Ordinance and the Code of Practice issued by the Secretary for Commerce and Economic Development on [•].
2. The particulars of the person furnishing this notice (the respondent) are as follows:
 - (a) Name:
 - (b) Address:
 - (c) Telephone number:
 - (d) [Address for service in Hong Kong⁽¹⁾:]
3. The particulars of:
 - (a) the material that has been removed/to which access has been disabled^(delete as appropriate); or
 - (b) the activity to which access has been disabled, are as follows⁽²⁾:
4. The respondent believes in good faith that:
 - (a) the removal of/disabling of access to^(delete as appropriate) the material; or
 - (b) the disabling of access to the activity⁽³⁾ referred to in paragraph 3 was the result of a mistake or misidentification.
5. The respondent requests the service provider to reinstate/cease disabling access to^(delete as appropriate) the material or cease disabling access to the activity⁽⁴⁾.
6. The respondent declares that:
 - (a) the information contained in this notice is true and accurate to the best of his knowledge and belief; and
 - (b) the respondent understands that he 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 contained herein.

Date:

Signature:

Notes

- ⁽¹⁾ Omit this paragraph if the respondent is a resident in Hong Kong.
- ⁽²⁾ Delete sub-paragraph (a) or (b) as appropriate. Provide sufficient particulars to enable the service provider to identify the material and its online location before it was removed or access to it was disabled; or the activity and its online location before access to it was disabled as appropriate.
- ⁽³⁾ Delete sub-paragraph (a) or (b) as appropriate.
- ⁽⁴⁾ Delete “reinstate/cease disabling access to^(delete as appropriate) the material” or “cease disabling access to the activity” as appropriate.