

HKISPA Responses to matters relating to ISPs in the Copyright Amendment Bill 2014

Hong Kong Internet Service Providers Association (HKISPA) maintains its support in principle to the Bill and acknowledges that it will help Hong Kong better comply with international standards on copyright protections. However, HKISPA believes strongly that there is much room for the Bill to improve and strike a better balance among copyright owners, service providers, Internet users and other concerned parties.

Since 2007, HKISPA has submitted proposals (some are listed below) to the Government specifically on Sections 88A to 88I of the Bill. It is with deep regret that our proposals, which significantly improve the Bill for proper operation of ISPs, were mostly ignored by the Government. We would like to highlight that our concerns are solid and the fast evolution of technology further contributes to the complexity of our industry but the Government has unfortunately overlooked the suggestions raised by us.

Ambiguity of Definition

Regarding Section 88B, HKISPA considers the enactment of a Safe Harbor mechanism to be appropriate to ensure growth of online commerce while at the same time protecting the interests of copyright owners. However, Sections 88B(2b) and 88B(4) of the Bill state that should a service provider has “*any financial benefit directly attributable to the infringement*”, there is a high chance that it will be found ineligible for the Safe Harbor protections even if complete notice-and-notice and notice-and-take-down procedures were followed by the ISP concerned. HKISPA is concerned that the Bill does not, as it may seem, to serve as an adequate protection to service providers as many of them are running a commercial business model which may be categorized as “direct benefit”. For instance, if a service provider runs a social media or online forum platform and profits from advertising business, does it fall into the category of receiving direct financial benefit? We urge the Government to issue more clarification on this part.

Abuse of the Notice Mechanisms

HKISPA and its members also have grave concerns regarding the potential abuse of the notice mechanism. We appreciate that Section 88C of the Bill sets out the elements that must be present in the notices and counter notices to make them valid, and that it is defined an offence to make materially false statements in notices. However, as the relevant ISP would have to process and review all notices that are submitted (even those that do not comply with Section 88C), we are concerned that the system may be abused if huge amount of notices, particularly from those by automatic takedown-notice robots, not in compliance with Section 88C are posted to ISPs and it would impose significant administrative costs to be borne mainly by the ISPs concerned. The HKISPA’s suggestion of making reckless submission of non-compliant notices an offence was also ignored.

To illustrate the technicality, in the modern Internet with high-speed broadband, geographically diverse cloud storages, virtual private network tools and mobility, it is often not a trivial task to identify the location of a piece of content on the Internet, and thus it is not an easy task to perform a notice and takedown action. This is particularly true with dispersed and complex network of larger scale ISPs. The aforementioned is only part of the

operational difficulties service providers face with the scattered, open and cross border nature of the Internet, and with the dynamic and evolving technologies being employed. It is outright unfair for service providers to bear the additional administrative fees alone but without protection against the possible abuse of the notice mechanism.

In the previous tripartite negotiations, representatives of the copyright owners agreed generally that it would be fair for service providers to be compensated for the cost of complying with the notice-and-notice and notice-and-takedown procedures. The Bill, however, neglects to provide a mechanism for service providers to recover their costs. Coupled with that the reckless submission of non-compliant notices has not been made an offence, it makes a perfect incentive scenario for abuse of the notice mechanism.

Lack of Consultation with the Industry for the Code of Practice

HKISPA is concerned that the Code of Practice as published by the Secretary of Commerce and Economic Development may quickly grow out of touch with business realities or that compliance may become impractical given the fast evolution of technology. As one matter of fact, the first draft of the Code of Practice was written by the bureau without extensive consultation with the industry.

Consider the case that in the near future, online content storage will likely be almost entirely cloud based, where disabling or disconnecting online content may not be as straightforward or technically viable as it is today. In such circumstances, if an ISP is unable to stop or limit the alleged infringement because of infrastructure reasons or large scale impact, the ISP might find itself without protections of the Safe Harbor. In this regard, HKISPA has suggested that a service provider should not be found liable if he or she submits to the Secretary of Commerce and Economic Development the detailed reasons of inability to comply, and communicate this act to the complainant concerned.

Service Interruptions to unrelated services in the course of takedown

HKISPA is also concerned that the Bill does not sufficiently clarify that the Safe Harbor limits service provider liability even where disabling content or activity may have a deleterious effect on the business of a service provider's customers business or network.

The ISP, even though acting in good faith, may impact unrelated services that are not alleged to be infringing when it responds to the take down notice and has to disable access to the concerned IP address. This will switch off all services associated with that IP address, some of which the ISP may have no prior knowledge because of the nature of the Internet. Although we tend to believe that there would be no liability to ISPs under this Bill but to ensure clarity, the Bill should be amended to ensure that no liability attaches to a service provider even in cases where non-infringing activities are inadvertently curtailed.

Please consult our previous submissions to the government for further details.

- <http://www.hkispas.org.hk/prelease/HKISPA-RES-COPYRIGHT-20070430.pdf>
- http://www.hkispas.org.hk/prelease/HKISPA_response_to_Copyright_Bill_2011_25Aug2011.pdf
- [http://www.hkispas.org.hk/images/doc/HKISPA-Response-to-Copyright-\(Amendment\)-Bill-2011-on-20131104.pdf](http://www.hkispas.org.hk/images/doc/HKISPA-Response-to-Copyright-(Amendment)-Bill-2011-on-20131104.pdf)