

To:  
Commerce and Economic Development Bureau  
Intellectual Property Department

26 Sep 2022

Dear Sir/Madam,

**Preliminary Comments from HKISPA on Draft Code of Practice**  
**(Re: Section 88I of the Copyright Ordinance (Cap. 528))**

1. I am writing in response to the Draft Code of Practice, to be published pursuant to Section 88I of the Copyright Ordinance (Cap. 528), as communicated to us on 31 Aug 2022 by IPD, where the Draft is also going to be tabled for discussion on 27 Sep 2022 between IPD and stakeholders.
2. This is a writing in response to the Draft, tabulating our preliminary comments to facilitate more efficient discussion on 27 Sep 2022. Opinions expressed on this letter however are not final, and will be subject to further deliberations and fine tuning upon receiving further comments from our members.
3. We fully acknowledge that compliance to the Code of Practice will be fully voluntary. Non-compliance of any ISPs to the Code has no adverse bearing on the consideration of any defense that may be available to the service provider in relevant proceedings.
4. ISPs consider that compliance to the Code, on their own operating expenses, are CSR contributions rendered to the community, where ISPs reasonably expect that such contributions shall be positively acknowledged by copyright holders and the society in large.
5. The Internet is ever changing in technology. This draft code was prepared in 2012, and technology has changed so much in the decade, with immeasurable advances in cloud computing, content distribution, and encryption. It has now become more often than not that an ISP will not be technically able to identify or stop the distribution of a particular piece of content without affecting other connected services on the cloud. Also, content tracking and take-down becomes a complicated and resources intensive process and in all cases require investigations by experienced engineers because contents reside on distributed clouds. In contrast, the advance of automation technology and AI makes it much easier to identify potentially infringing material. Therefore, the cost to track and remove the material which must be done by humans, far outweighs the cost of identification which can be done by robots.
6. Therefore, given the diverging cost imbalances, there will very likely be circumstance in the future that the cost to implement compliance to the Code becomes impossible to be self-contained by ISPs: The copyright community should be prepared to see that individual ISP(s) may elect not to provide service according to the Code, or cease to provide service according to the Code in the future, or elect to demand payments as a condition to providing any service as described in the Code. Such should be read as a normal phenomenon of the enlarging cost imbalances.

7. With these leading paragraphs as background preamble, we recommend the following amendments to the Draft for the current stage of legislation. The suggested changes are underlined for your easier perusal.

-- BEGINNING OF RECOMMENDED CHANGES --

3.6 The notice of alleged infringement should be signed or otherwise authenticated by the complainant, shall only be sent after human vetting, and shall not be sent from automated robots.

3.10 add the following after 3.10 (d)

(e) if the complainant had previous occurrences of erroneous notices which resulted in misused resources of the service provider concerned; where such occurrences include, but not limited to, refuted allegations of infringement, non-existence of alleged infringing material, referral to the wrong service provider.

3.11 The service provider shall provide the relevant ground(s) for not processing the notice of alleged infringement when notifying the complainant pursuant to paragraph 3.10, and, if the ground for not processing the notice was based on 3.10 (e), the service provider may reject the request or demand payments for compensation of resources for any further processing of requests from the same complainant.

3.12 For the avoidance of doubt, a service provider is not required to verify the authenticity of the content entered into a notice of alleged infringement. However, if the allegation is subsequently proven to be untrue, the complainant concerned shall be considered misusing the resources of the service provider and will be subject to 3.11 at the service provider's discretion.

4.5 The notice of alleged infringement should be signed or otherwise authenticated by the complainant, shall only be sent after human vetting, and shall not be sent from automated robots.

4.7 Failure by the complainant to comply with paragraphs 4.4, 4.5 and/or 4.6 shall render the notice of alleged infringement defective. The service provider is not required to process the same. If the complainant of the request had occurrences of incorrect or erroneous requests in the past, the service provider may consider the request from the same complainant as defective, or demand payments from the complainant to compensate for any resources spent before further processing the request.

4.9 Upon receipt of a notice of alleged infringement that complies with paragraphs 4.4, 4.5 and 4.6, the service provider shall, as soon as practicable and provided that the material is technically possible to be removed or disabled access without possibly affecting any other Internet services, remove the material or disable access to the material or activity as specified in the notice of alleged infringement.

4.10 For the avoidance of doubt, a service provider is not required to verify the authenticity of the content entered into a notice of alleged infringement. However, if the allegation is subsequently refuted, or the content proven to be non-existent or not residing on the network of the service provider concerned, the complainant concerned

shall be considered misusing the resources of the service provider and will be subject to 4.7 at the service provider's discretion for subsequent requests from the same complainant.

4.14 The service provider shall notify the complainant as soon as practicable if it was rejected due to conditions stated in 4.7.

4.25 Unless the service provider receives a notice from the complainant pursuant to paragraph 4.24(b), the service provider shall, within 25 working days after the date of the notice sent under paragraph 4.22, take reasonable steps to reinstate the material or cease disabling access to the material or activity, if the material concerned was disabled according to 4.9.

5.5 The notice of alleged infringement should be signed or otherwise authenticated by the complainant, shall only be sent after human vetting, and shall not be sent from automated robots.

5.7 Failure by the complainant to comply with paragraphs 5.4, 5.5 and/or 5.6 shall render the notice of alleged infringement defective. The service provider is not required to process the same. If the complainant of the request had occurrences of incorrect or erroneous requests, the service provider may consider the request from the same complainant as defective, or demand payments to compensate for any resources spent before further processing the request.

5.9 Upon receipt of a notice of alleged infringement that complies with paragraphs 5.4, 5.5 and 5.6, and provided that the service provider is capable of technically disabling the access to the material without affecting any other normal Internet services on the same or connected platform, the service provider shall, as soon as practicable:-

5.10 For the avoidance of doubt, a service provider is not required to verify the authenticity of the content entered into a notice of alleged infringement. However, if the allegation is subsequently refuted, or the content proven to be non-existent or not residing on the network of the service provider concerned, the complainant concerned shall be considered misusing the resources of the service provider and will be subject to 5.7 at the service provider's discretion for subsequent requests from the same complainant.

-- END OF RECOMMENDED CHANGES --

8. Further, some of our members expressed deep concern on the clause "4.3 - A complainant may send a notice of alleged infringement to a service provider, in relation to material or activity residing on the latter's service platform". This implicitly imposes certain law enforcement duties (crime reporting, crime investigation and verdict) on service providers.
9. It has been considered that it is more appropriate to send the infringement notices to a statutory body, for example the Customs and Excise Department, for processing. Service providers will support the statutory body in the course of investigation and implementation of remedial actions in accordance to the COP.

10. We will consolidate the opinions of our members for the above approach, and may submit our suggestions for further improvement of the implementation of the CoP.

Thank you for your kind attention.

Lento Yip

Chairman

Hong Kong Internet Service Providers Association

- ENDS -