March 2, 2012

AIC's Response to the Hong Kong Copyright (Amendment) Bill 2011
Code of Practice for Service Providers Second Draft

Thank you for the opportunity to contribute our views to the second draft of the Code of Practice for Service Providers to be published pursuant to Section 88I of the Copyright Ordinance ("**Draft Code**").

Our comments are as follows:

1. Provide full exemption from various liabilities:

1.1 The draft Code makes it clear that its compliance only exempts the service providers from "liability for damages or other pecuniary remedy for copyright infringement in a work that occurs on its service platform" and that it does not exempt service providers from liability under other laws, such as the Personal Data (Privacy) Ordinance and the Telecommunications Ordinance nor under the contracts with users. Instead, the burden is placed on the service providers to avoid all possible legal or contractual liabilities arising out of compliance with the Code, by providing the exemption in the terms of service.

1.2 The problem with this approach is that instead of having a statutory exemption, the service providers' protection is entirely contractual, meaning that if sued by a user, the service provider will need to ask the court to enforce the relevant contractual term on to exempt the liability, which the court may or may not do. As discussed below in 1.3, this approach does not accurately reflect the different role played by service providers than by others, such as data users.

1.3 Similarly, in order to avoid liability under the Personal Data (Privacy) Ordinance, the service providers will need to do all the things set forth in Paragraphs 1.5 – 1.7 of the Code. While the Personal Data (Privacy) Ordinance typically puts all the burden on the data user, this is fair because the assumption is that the data is collected and used by the data user for its own commercial reasons and benefits. However, in the case of compliance with the Code, the role of the service providers as a data collector and user is completely passive, the Code is stipulating all the details in which personal information is provided and to be used or forwarded and the main purpose of such collection and use is for the better protection of the interests of the rights holders.

1.4 In the true spirit of providing meaningful safe harbor protection to the service providers and making the protection proportional to the rather burdensome requirements of the Code, we strongly believe that the Code

should include exemptions for all statutory liabilities (in particular, the Personal Data (Privacy) Ordinance) and contractual liabilities for takedowns. For example, the language in 17 USC 512(g)(1) as an ideal sample of the language that should be included in the Code:

"A service provider shall not be liable to any person for any claim based on the service provider's good faith disabling of access to, or removal of, material or activity claimed to be infringing or based on facts or circumstances from which infringing activity is apparent, regardless of whether the material or activity is ultimately determined to be infringing."

1.5 In addition to the exemption above, we would also suggest adding to the Copyright Amendment Bill that a complainant is liable to indemnify and reimburse the service provider for any costs, legal fees and damages incurred by the service provider (if any) where the material is ultimately considered non-infringing. Finally, there is no safe harbor for injunctive relief. In reality, injunction is often used by copyright owners as a legal remedy. The availability of such remedy could completely defeat the purpose of the Code. For example, if material is re-instated by the service provider under Paragraph 4.24 (after the failure of the complainant to respond within 20 working days to the counter notice), the complainant can still sue the service provider for an injunctive order, despite the fact that the service provider has fully complied with the Code. A broad injunction going well beyond the narrow facts of a particular case could imperil the availability of a lawful service for millions of consumers. We therefore request that if injunctive relief is available, such relief be limited to the particular works or account at issue.

1.6 A safe harbor should be added for a service provider's intermediate and temporary storage of material on a system, service platform, or network controlled or operated by the service provider; i.e., so-called "system caching." This type of safe harbor is different from that for providing connections and for more permanent storage contained in the existing draft. The safe harbor is necessary due to the way in which service providers legitimately attempt to ensure that, for example, the public's viewing of audiovisual works is not interrupted by connectivity problems. Such a safe harbor does not adversely impact on copyright owners' interest.

1.7 The safe harbor for information location tools should also include the creation of directories or indices since such directories and indices are a necessary technological step and an integral part of information local tools.

2. Make it clear that compliance is voluntary:

2.1 The phrase "compliance with the provisions of this code is voluntary" has been removed. Although we do not understand the reason for such

removal, we would suggest that this phrase be added back in to make it clear that "there are other reasonable steps (ie, steps other than the Code) that can be taken to limit or stop the infringement in question".

2.2 In addition, we would also suggest adding to the Copyright Amendment Bill that "the failure of a service provider's conduct to qualify for limitation of liability under the Code shall not bear adversely upon a defense asserted by the service provider's conduct is not infringing or any other defense".

3. Amend the relevant timeframe to provide more flexibility:

3.1 Paragraph 3.13 provides that we need to send the notice to the subscriber "as soon as practicable" (instead of 1-3 working days or 7-10 working days in the previous draft). As we mentioned before, it is important to provide flexibility here for service providers, given that technology is constantly evolving and there is a vast multiplicity of online platforms and uses. In our view, the requirement of acting "within a reasonable amount of time" leaves more flexibility for the service providers in handling complaints than the requirement of "as soon as practicable".

4. **Allow service providers to design the forms:**

4.1 Paragraph 3.5 is unclear – it is not clear if the form should be the form as designated by service providers or as per Form A (ditto for Paragraphs 4.4 and 5.4).

4.2 We would suggest that Form A and Form B should be for reference only and service providers are allowed to design their respective forms (similar practice in Singapore). In any case, we submit that complainant must also provide an email address for contact by service providers and/or subscribers. Based on our experience, it is often more efficient to contact complainants by email to clarify their complaints and content of notices.

4.3 In connection with the prescribed forms, we also note that while Form A provides that the "complainant believes in good faith" that the material is infringing, Paragraph 2.1 provides that the complainant may send the notice if he "believes, on reasonable grounds" that the material is infringing. It is our view that the requirement should be that the belief is both reasonable and in good faith.

5. Define application of the notice and notice system more tightly:

5.1 In the Code, the Notice and Notice System is said to apply to a service provider who: - (i) offers transmission, routing; and/or (ii) 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 3.2.

5.2 From our reading of the above, the scope of service providers to which Notice and Notice System appears to be broad. Noting the scope of services different service providers may provide, the notion of "providing connections for or access to digital online communications" can catch incidental services which a online platform provider may offer, e.g. the messaging tools provide on platform for users. We believe that the Notice and Notice System is intended to apply to network access service providers and suggest that this should be more clearly set out to avoid confusion as to which kinds of service providers should follow which system. Otherwise, we also propose considering specifying that the two criteria are conjunctive so 3.1(a) and 3.1(b) should be connected with the word "and" only. The words "/or" should be taken out.

6. Improve the handling of incomplete or defective notices:

6.1 Paragraph 3.7 should be amended to provide that incomplete forms "are" defective, not "may be" defective (ditto for Paragraphs 4.6 and 5.6).

6. 2 Paragraph 3.10(a) provides that if an infringement notice is incomplete, we need to notify the complainant (ditto for Paragraphs and 4.14 and 5.11). From our experience, the majority of the infringement notices that we receive are in some way defective or incomplete, the notification requirement is very burdensome and could create a huge administrative problem for the service providers, especially if someone deliberately sends us lots of incomplete notices. We are of the view that the notification should be completely voluntary on the part of the service providers.

6. 2 In addition to removing the notification requirement, we would also suggest that amending the Code to provide that although the service provider is not required to handle a defective notice (Paragraph 3.7), it may choose to remove based on a defective notice without facing liability.

6.3 In practice, all these changes will mean that, upon receipt of a defective notice, the service providers may choose to, without facing liability, remove the material without notifying the complainant or notify the complainant without removing the material. Without this flexibility, there will be considerable operational burden on the service providers who will have to check formal adequacy of notice on different criteria in different countries.

7. Remove the requirement of forwarding infringement notices and counter notices:

7.1 Paragraphs 3.14(b), 4.12(b) and 4.23 require the service providers to send a copy of the infringement notice to the subscriber and the subscriber's counter notice to the complainant. We would assume that the CEDB thinks that compliance with Paragraph 1.5 and the choice of opting

out under Paragraph 4.16 will resolve all relevant issues under the Personal Data (Privacy) Ordinance. This notwithstanding, we maintain our previous position on leaving it as an option to the service providers and allowing them to notify the subscribers and the complainants in other ways.

7.2 Again, we submit that the requirement is not necessary and will only add to the administrative burden of the service providers. The absence of such stipulation is also in line with the international standard and process already accepted and being put in place in countries outside of Hong Kong.

8. Define application of the notice and takedown system more clearly:

8.1 Paragraph 4.1 provides that the Notice and Takedown System is applicable to a service provider who has stored, at the discretion of a subscriber, material or activity on its service platform that can be accessed by a user through the Internet. The underlined part is added in this second draft and we would like to understand the rationale behind this.

AIC
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