

Commerce and Economic Development Bureau (“CEDB”)’s Consultation Paper
Updating Hong Kong’s Copyright Regime

Response by SmarTone Mobile Communications Limited (“SmarTone”)

1. SmarTone welcomes the opportunity to provide comments on the captioned Consultation Paper issued by CEDB.
2. As a mobile network operator (“MNO”) in Hong Kong, we would like to comment on the issues related to Online Service Providers (“OSPs”), namely the Safe Harbour and the voluntary Code of Practice as stated in paragraph 2.12 of the Consultation Paper.
3. The Consultation Paper states that to provide incentives for OSPs to cooperate with the copyright owners in combating online piracy, and to provide sufficient protection for their acts, safer harbour provisions will be introduced to limit OSPs’ liability for copyright infringements on their service platforms caused by subscribers, provided that they meet certain prescribed conditions, including taking reasonable steps to limit or stop a copyright infringement when being notified. CEDB has issued a draft Code of Practice (“CoP”) which sets out guidelines and procedures for OSPs to follow.
4. The CoP sets out three scenarios in which OSPs may be required to take actions:
 - a. Notice and Notice System, which is applicable to a service provider who transmits, routes, or provides connections for digital online communications, between or among points specified by a user, of material of the user’s choosing¹;
 - b. Notice and Takedown System (Storage), which is applicable to a service provider who has stored, at the direction of a subscriber, material or activity on its service platform²;
 - c. Notice and Takedown System (Information Location Tools), which is applicable to a service provider who has linked or referred users to an online

¹ 3.1 of the CoP

² 4.1 of the CoP

location containing infringing material or activity, by information location tools on its service platform³.

5. We reckon that items b) and c) above would not be applicable to MNO as MNO only provides the transmission path for data communications. It is impossible for MNO to take down content of a website which is not hosted by the MNO. It is also impractical, if not impossible, to disable access to a particular material or link at a website without affecting the access to the whole website. Practically, it is impossible for MNO to block access to a particular content within a particular website on the Internet, as MNO can only block access to the entire website using DNS/IP blacklisting approach. In other words, MNO is unable to take down or block access to a particular content on a website not hosted by the MNO.
6. Regarding item a) - the Notice and Notice system, we would like to point out that it would be impracticable to identify a subscriber based on IP address in most cases because IP address is usually allocated to subscribers on a dynamic and shared basis.
7. Not only that the Notice and Notice system may not be effective in achieving the stated objectives of the CoP in combating online copyright infringing activities, there are also substantial costs and issues in meeting the requirements in the CoP as follows:
 - a) OSPs are required to designate an agent to receive and handle notices of alleged infringement (“Notice”) from copyright owners;
 - b) OSPs are required to handle the notices of alleged infringement even though the subscriber cannot be reliably identified based on the IP address provided in the Notice⁴ ;
 - c) The CoP requires OSPs to ensure that its contracts with subscribers would enable it to take appropriate actions in accordance with the CoP, including the forwarding of the Notice to a subscriber⁵. It would mean that the OSPs would need to amend the terms and conditions of their contracts with existing customers which would require consent from the customers affected.
 - d) Even if the above are satisfied and the Notice is sent to the OSP’s subscriber, given that there is no general requirement for the complainant (i.e., the copyright owner) to check the accuracy of information provided in the Notice nor any consequences to the complainant if the information in the Notice is

³ 5.1 of the CoP

⁴ 3.10 & 3.11 of the CoP

⁵ 1.6 of the CoP

subsequently found to be wrong, there is a high risk that the system might be subject to abuse and customers receiving the Notice may object to it. It is expected that the OSPs would need to spend a lot of resources in handling their customers' disputes or objections to the Notice.

8. In view of the above issues, it is our submission that the Notice would be better sent directly by the complainant. Currently the OSPs would be required to provide information to court or law enforcement agencies ("LEA") for investigation of crimes under respective legislations. The complainant should first supply evidence of the alleged copyright infringement to the court or LEA, which will verify the validity of the allegations of the copyright owners. If the court or LEA considers that there is a case for further action, they would demand the OSPs to provide information of their subscribers under court order or specific provisions under the law. The complainant may then obtain the information from the court or LEA for sending the Notice directly to the individual which is alleged as involving in the copyright infringement act. We believe this is a more practical arrangement which strikes a proper balance between protecting the interest of copyright owners and preventing abusive use of the system.

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