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Combat Measures against Online Copyright Infringement in  
Thailand: Past – Present – Future

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ปัญหาการละเมิดลิขสิทธิ์บนอินเทอร์เน็ตเป็นความท้าทายของเจ้าของลิขสิทธิ์มาโดยตลอด แม้ว่าใน พ.ร.บ. ลิขสิทธิ์ พ.ศ. 2537 จะถูกแก้ไขแล้วในปี พ.ศ. 2558 โดยเพิ่มมาตรการในการแก้ปัญหาการละเมิดลิขสิทธิ์ในโลกออนไลน์ อย่างไรก็ตาม ในปัจจุบัน พ.ร.บ. ลิขสิทธิ์ฉบับดังกล่าวกำลังถูกพิจารณาแก้ไขเพิ่มเติมเพื่อให้สามารถแก้ไขปัญหาบางประการเพิ่มเติม บทความนี้จะเริ่มต้นด้วยการกล่าวถึงลักษณะของการละเมิดลิขสิทธิ์ทางออนไลน์และอุปสรรคที่เจ้าของลิขสิทธิ์ที่มักจะต้องเผชิญจากการละเมิดลิขสิทธิ์ในโลกออนไลน์ จากนั้นผู้เขียนจะกล่าวถึงมาตรการการปราบปรามการละเมิดลิขสิทธิ์ออนไลน์ โดยเริ่มต้นจากมาตรการในอดีตที่ผ่านมาของประเทศไทย และเปรียบเทียบกับระบบ “notice-and-takedown” หรือ การแจ้งเตือนและนำข้อมูลที่ละเมิดออกจากระบบภายใต้กฎหมาย Digital Millennium Copyright Act (DMCA) ของสหรัฐอเมริกา หลังจากนั้น ผู้เขียนจะกล่าวถึงมาตรการในปัจจุบันภายใต้มาตรา 32/3 ของพ.ร.บ. ลิขสิทธิ์และการปิดกั้นเว็บไซต์ภายใต้มาตรา 20 (3) ของพ.ร.บ. ว่าด้วยการกระทำความผิดเกี่ยวกับคอมพิวเตอร์ โดยผู้เขียนจะเปรียบเทียบประสิทธิภาพของทั้งสองมาตรการและแสดงสถิติของการดำเนินการทางกฎหมายภายใต้กฎหมายทั้งสองฉบับในทางปฏิบัติ หลังจากนั้นผู้เขียนจะกล่าวถึงมาตรการการปราบปรามการละเมิดในอนาคตภายใต้ร่าง พ.ร.บ. ลิขสิทธิ์ โดยเจาะลึกไปในรายละเอียดของข้อกำหนดตามร่างกฎหมายฉบับดังกล่าว และในหัวข้อสุดท้าย ผู้เขียน

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จะวิเคราะห์มาตรการการปราบปรามการละเมิดลิขสิทธิ์ทางออนไลน์ล่าสุดและสรุปความคิดเห็นเกี่ยวกับสิ่งที่คาดว่าจะเกิดขึ้นในอนาคต

**คำสำคัญ:** การปิดกั้นเว็บไซต์, การแจ้งลบออก, ลิขสิทธิ์, การละเมิดออนไลน์

## Abstract

Enforcement against copyright infringement on the Internet has always been a challenge for copyright owners. Even though the Copyright Act B.E. 2537 (1994) was amended in 2015 in order to provide tools to solve online copyright infringement, the Copyright Act is now under consideration for further amendment, with the aim to address further this same issue. This article will start with a discussion about the nature of online copyright infringement and the obstacles that copyright owners are generally facing to tackle online infringement. We will discuss in detail the enforcement measures against online copyright infringement, starting with the topic of past enforcement measures in Thailand, and then comparing those initial measures with the notice-and-takedown system adopted by the US Digital Millennium Copyright Act (DMCA). After an exploration of the topic of past measures to combat infringement, we will discuss present measures under Section 32/3 of the Copyright Act and the website blocking procedure under Section 20(3) of the Computer Crime Act. We will also compare the effectiveness of both of these measures, setting out the statistics of these legal actions, as initiated under the separate laws. We will also discuss the topic of future enforcement measures under the draft Copyright Act, focusing on the details of the latest requirements based on the draft Act. We will conclude our analysis by examining the latest developments involving enforcement measures against online copyright infringement and will share our opinion on what to expect in the near future.

**Keywords:** Website Blocking, Takedown Notice, Copyright, Online Infringement

## 1. Introduction: Online Copyright Infringement

It is not too difficult for anyone to create copyright-protected content and share it online, as Thai copyright law provides automatic protection to works, once created, which are recognized under the law. However, it is not that easy to enforce an owner's right to their copyrighted works when battling online infringement in the digital era. The advancement of technology, together with easy access to the Internet, allows people all

over the world to easily access, make a copy or adaptation, and disseminate a copyrighted work to others around the world within a second. A person who purchases a book can easily scan a copy of the physical book into a computer, which is then transformed into a digital file, and send the digital file to his or her friends, or even upload it for other people to download for free. These technological developments have thus changed the way an infringer violates a copyright owner's rights. Even though these unauthorized actions are deemed infringement in Thailand under the Copyright Act B.E. 2537 (1994), there are several obstacles for copyright owners seeking to enforce their IP rights in these circumstances.

## 2. Obstacles of Online Infringement

The first obstacle is the difficulty in identifying the actual infringer. Traditionally, the first and foremost step in any legal action is to identify the target and subsequently evaluate options for strategic legal action against an infringer who could eventually be a defendant in a lawsuit. Identification of the defendant is therefore critically required. In the past, we could find physical shops selling pirated works on their premises. However, if the copyrighted works are disseminated through online means, there are no physical stores to enter. The actual identity of an infringer is thus hidden behind the curtain of a created username. The personal information of the owner of a username is kept confidential by website operators. On some websites, especially pirated websites, usernames can be registered using fake personal information. Furthermore, some websites do not require any personal information but only an email address. Even if copyright owners request information about a suspected infringer, website operators may not be able to provide the correct information. Moreover, even if the username is registered with the correct information, the person who actually uploads the information may be someone else. Without direct knowledge of the actual infringer, it is not easy for copyright owners to gather evidence in order to bring a litigation case against the online infringer.

Secondly, when the copyright infringing work is disseminated in digital form through online platforms, it may be stored on many servers in several countries. For copyright owners, it is difficult to trace the infringed work back to the physical location where the server is located. The server can be located at a place quite distant, or even

in another country. Even if a copyright owner initiates a litigation case against such website, the court judgment may not be enforceable due to jurisdictional issues.

Thirdly, the consideration and discretion of the relevant enforcement authorities and of the Thai Court is quite influential. In criminal cases, there can be an issue about confidence in the authorities' ability to handle online-related cases. In the past, when the copyright owner brought a case before the police, the authorities lacked confidence in letting a case proceed against an online infringer, since normally, actual identification of the infringer or the location of the server could not be fully confirmed. Therefore, the authorities required quite a long time for investigation and interrogation of potential witnesses. The longer it takes, the longer pirated works are available on the Internet and further disseminated. However, in civil cases, copyright owners can request intermediate measures, such as a Preliminary Injunction Order or Anton Piller Order, from the Intellectual Property and International Trade Court (IP&IT Court). However, it is not a simple undertaking to convince the IP&IT Court to consider that there is necessity or urgency to provide such intermediate measures for copyright owners. In some cases, the Court has weighed the possible damage caused to copyright owners against the interests of the accused infringers when deciding whether to order intermediate measures.

Fourthly, in case the IP&IT Court were to grant a Preliminary Injunction Order or Anton Piller Order, execution of such judicial order outside of the jurisdiction can be quite a complex process. This is because servers are usually located outside of Thailand. In addition, some requests for injunctive relief are meant to block access to pirated works or to remove the infringing content from the Internet. If a third-party Internet service operator may be involved, this brings further complexity to the enforcement of a court order.

These obstacles are the main issues facing copyright owners trying to enforce their rights against online infringers in Thailand under the Copyright Act B.E. 2537. However, technological developments have made it necessary to adopt a new tool in order to respond adequately to copyright infringement on the Internet. Since 2015, legislators have gradually made revisions to the Copyright Act B.E. 2537. This article will look back on the limited past measures available and will discuss recent amendments to the Copyright Act B.E. 2537 with respect to measures specifically tailored to combat online copyright infringement. Further, this article will discuss new additions to the Copyright Act B.E. 2537 and the possible effects to copyright owners and other relevant parties.

## 1. Past Combat Measures

### 3.1 Thailand: Copyright Act B.E. 2537

Before 2015, the Copyright Act B.E. 2537 was the only tool to combat copyright infringement, including online infringement. The Copyright Act B.E. 2537 provides legal protection for copyright owners. Under Section 6 of the Copyright Act B.E. 2537, there are nine categories defined as works of authorship that are copyrightable, namely: literary works (including computer programs); dramatic works; artistic works; musical works; audiovisual works; cinematographic works; sound recordings; sound and video broadcasts; and any other works in the literary, scientific or artistic fields.

In addition, a work must meet four requirements, which are (1) expression of an idea, (2) expression in a recognized work, (3) originality, and (4) non-illegality. If these requirements are met, then copyright protection exists in the work automatically once the work has been completed. The copyright owner will then obtain exclusive rights to exclude others from carrying out the same acts to which the copyright owner alone is entitled, namely: (i) reproduction or adaptation; (ii) communication to the public; (iii) allowing dissemination of the original or a copy thereof of a computer program, an audiovisual work, a cinematographic work or a sound recording; (iv) giving benefits accruing from the copyright to other persons; and (v) licensing the rights mentioned in (i), (ii) or (iii), with or without conditions, and if said conditions do not unfairly restrict competition<sup>1</sup>. These rights include moral rights covering the right of paternity and the right of integrity.<sup>2</sup>

The key element to the infringement act is the unauthorized use of a copyrighted work in a manner that violates one of the copyright owner's exclusive rights. Direct infringement consists of copying, modifying, reproducing, adapting, communicating to the public, renting out an original or a copy (audio-visual, cinematographic, sound recording, computer program), or publishing an original or copy of a protected work by a person who is not authorized by the copyright owner.<sup>3</sup> Moreover, indirect infringement also constitutes infringement under the law. If any person is aware or should have been aware

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<sup>1</sup> Copyright Act B.E. 2537 Section 15

<sup>2</sup> Copyright Act B.E. 2537 Section 18

<sup>3</sup> Copyright Act B.E. 2537 Sections 27-30

that a particular work infringes copyright, and that person then engages in certain specified activities for the purpose of seeking profits, this act is deemed to be indirect infringement.<sup>4</sup>

In civil cases, the IP&IT Court has the authority to order a permanent injunction be applied and to order the infringer to compensate the owner of the copyright for damage caused, in an amount the Court considers appropriate, taking into account the seriousness of injury, including the loss of benefits and expenses necessary for the enforcement of the rights of the copyright owner.<sup>5</sup> For criminal actions, the infringer can be fined and/or imprisoned.<sup>6</sup> In a criminal action, one-half of the fine imposed in a Court judgment shall be paid to the owner of the copyright.<sup>7</sup>

To see the effectiveness of enforcement against copyright infringement under the Copyright Act B.E. 2537 before the year 2015, below are the statistics related to copyright infringement cases brought before the IP&IT Court between 2006 and 2018.

Year	Criminal	Civil	Total
2018	665	38	703
2017	643	46	689
2016	832	49	881
2015	869	51	920
2014	861	42	903
2013	1,000	46	1,046
2012	1,154	28	1,182
2011	1,210	25	1,235
2010	1,708	16	1,724
2009	1,525	18	1,543
2008	2,402	24	2,426
2007	2,776	27	2,803
2006	3,412	23	3,435

Source: The Central Intellectual Property and International Trade Court

<sup>4</sup> Copyright Act B.E. 2537 Section 31

<sup>5</sup> Copyright Act B.E. 2537 Section 64

<sup>6</sup> Copyright Act B.E. 2537 Sections 69-70

<sup>7</sup> Copyright Act B.E. 2537 Section 76

As shown above, copyright owners tend to enforce their rights by taking criminal action, rather than civil action. This is because criminal enforcement actions under the Copyright Act B.E. 2537 are quite effective, since they indirectly cease the infringing act by imposing criminal penalties against infringers and those infringers do not typically repeat the same offenses. Criminal enforcement can therefore be initiated without costing much in the way of expenses and time. On the other hand, civil suits require lengthy court proceedings. As such, it can be seen that the timing of an enforcement action is one of the most important factor when deciding whether and how to enforce one's rights against infringers.

Another point worth noting from the above statistics is that the number of cases have gradually decreased over the past years. During the year 2006, the number of total cases brought before the IP&IT Court numbered more than 3,000, while the number of total cases during the years 2007–2008 were in the range of 2,000. However, since 2009, the number of cases has dropped drastically. Even though the number of copyright infringement cases is decreasing, it cannot be concluded that people have stopped their infringing acts.

During the years 2014–2018, more and more people in Thailand increased their use of the Internet. According to the statistics of the number of Internet users in Thailand from 2014–2018, the below statistics<sup>8</sup> show this steady increase.

Year	Internet Users
2018	56.8%
2017	52.9%
2016	47.5%
2015	39.3%
2014	34.9%

According to the above statistics, the percentage of the population who use the Internet has increased gradually. People tend to use digital forms of work, rather than physical forms. For example, people shifted from buying CDs to downloading songs. On

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<sup>8</sup> National Statistical Office of Thailand, “Report: Survey on the Use of Information Technology and Household Communication B.E. 2561,” <https://bit.ly/3cJGx1h>, (last visited 9 March 2020).

the other hand, people who buy pirated CDs changed to downloading pirated songs on the Internet. We may conclude that infringement still exists, but the venue has shifted from physical venues to online platforms. Considering that the identification of an infringer is the main obstacle to bringing a case before the IP&IT Court, it is convincing that the cause of decreasing copyright infringement cases is because of the shift from physical infringement to online infringement.

When an infringing copyright work is available on the Internet, time is of the essence. If the copyright owners cannot remove or block the infringing works quickly, additional copies can be made and spread all over the world. While waiting for an injunction order from the IP&IT Court may prove difficult and time-costly, bringing a litigation case before the IP&IT Court for a permanent order may take even longer. Further, when an infringing work exists on a server located in foreign jurisdiction, the enforcement of a Thai court judgment can be too complex. Due to the aforementioned obstacles, copyright owners may opt to request cooperation from third-party service providers, such as website operators, web board operators or online marketplace operators, to disclose information about the actual infringers, or even to remove the infringing content from the website. This approach involves the cooperation of Internet Service Providers (ISPs). However, many ISPs are reluctant to cooperate without any guarantee of exemption from liability. Since the Copyright Act B.E. 2537 is silent on the liability of ISPs and the necessity to cooperate with copyright owners, copyright owners were unable to effectively combat online infringers in the past.

### **3.2 US: DMCA Notice-and-Takedown system**

The notice-and-takedown system is an important measure to combat online infringement and one of the first countries to provide an effective notice-and-takedown system was the United States under the Digital Millennium Copyright Act 1998 (DMCA). The notice-and-takedown system helps copyright owners ensure rapid removal of allegedly infringing material from the Internet while giving Internet Service Providers (ISPs) a safe harbor regarding their indirect liability from Internet users' acts of copyright infringement.

In order to understand the concept of the notice-and-takedown system, three questions need to be clarified:



### 1) Who are the ISPs?

ISPs or Internet Service Providers refer to a broad range of online service providers. This term is defined under Section 512(k)(1) as follows:

*“(A) As used in subsection (a), the term “service provider” means an entity offering the transmission, routing, or providing connections for digital online communications, between or among points specified by a user, of a material of the user’s choosing, without modification to the content of the material as sent or received.*

*“(B) As used in this section, other than subsection (a), the term “service provider” means a provider of online services or network access, or the operator of facilities therefore, and includes an entity described in subparagraph (A).”<sup>9</sup>*

### 2) In what circumstances are ISPs liable for copyright infringement?

There are three types of indirect liability recognized: contributory infringement liability, vicarious infringement liability, and inducement liability.

(a) Contributory infringement liability is found in the case where a person with knowledge of direct infringement directly contributes to another's infringement. Contributory infringement liability is especially relevant to social networking sites, when the ISPs receive notifications from copyright owners alleging that their works are being infringed. Such notifications could establish knowledge on the part of the ISPs, thereby subjecting them to potential contributory infringement liability. They risk potential secondary copyright liability based on the reasoning that they are facilitators of the direct infringement.<sup>10</sup>

(b) Vicarious infringement liability is based on the reasoning that the ISPs, who have control over another's infringement, should be liable if the ISPs have a direct financial interest in the infringed copyrighted work. For example, if a video hosting website has a direct financial interest in putting an advertisement on a page where an infringing video exists, then such hosting websites may be found liable.

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<sup>9</sup> US DMCA, Section 512(k)(1).

<sup>10</sup> Darrow, Jonathan J. and Ferrera, Gerald R., “Social Networking Web Sites and the DMCA: A Safe-Harbor from Copyright Infringement Liability or the Perfect Storm?” [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1698918](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1698918), (last visited 23 January 2020).

(c) Inducement liability may be found in the case where an ISP's business has "purposeful, culpable expression and conduct, and does nothing to compromise legitimate commerce or discourage innovation having a lawful purpose.

Based on the above, ISPs may face copyright infringement liability by the acts of their users or subscribers. Therefore, the ISPs may not want to risk their liability and may choose to cooperate with copyright owners' requests in order to be exempted from possible copyright infringement liability.

### **3) How does the notice-and-takedown system work?**

The procedures of a notice-and-takedown system begin when a copyright owner sends a notice to an ISP. The ISP then has the discretion to take-down such material if they think such material infringes the copyright of the owner. If the ISP does not think that such material infringes, as alleged, it may refuse compliance with the notice. Not taking down alleged material, however, does not mean ISPs are liable. Copyright owners have to bring a case before the court against the ISP, and the court has to decide whether the ISP is liable. On the other hand, if the ISP considers that the material is infringement, they have to comply with the notice in order to be exempted from liability under the "safe harbor" provisions of the Copyright law.

## **4. Present Measures to Combat Infringement**

Pursuing traditional enforcement techniques has proved to be ineffective against online infringers, particularly when the identity of the infringer is unknown. Since ISPs play an important role in the digital era, Thai law seeks to encourage ISPs to get involved in combating online infringement. There are two main laws, which are the Copyright Act B.E. 2537, as amended by the Copyright Act (No. 2) B.E. 2558, and the Computer Crime Act B.E. 2550, as amended by the Computer Crime Act (No. 2) B.E. 2560. Details are elaborated below.

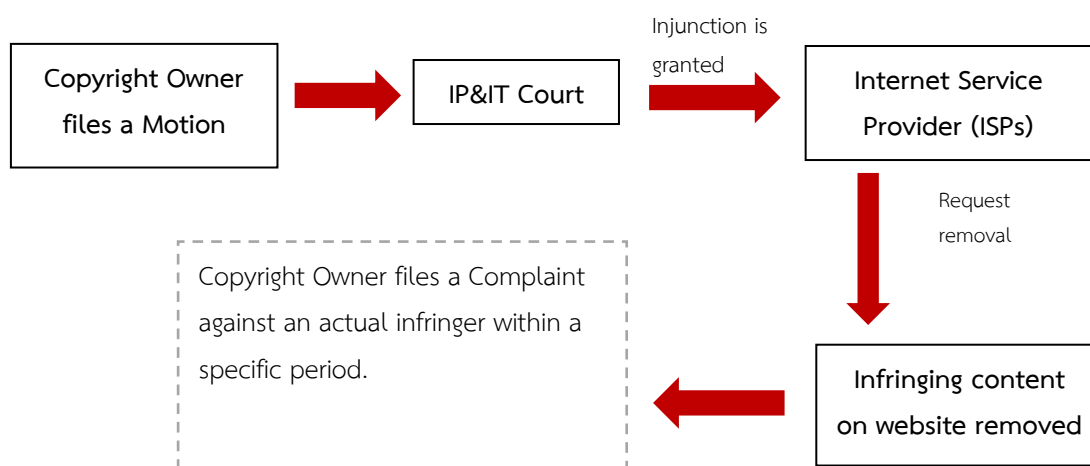
### **4.1 Section 32/3 of the Copyright Act**

The Copyright Act B.E. 2537 was amended by the Copyright Act (No. 2) B.E. 2558, mainly in order to provide tools to solve online copyright infringement. Section 32/3 of the amended Copyright Act allows for preliminary injunctions that remove copyright-

infringing works from the Internet, while at the same time providing an exemption from liability for ISPs.

Under Section 32/3 of the amended Copyright Act, in the event a copyright owner has reasonable grounds to believe that a copyrighted work has been the subject of infringement on a computer system,<sup>11</sup> the rights holder concerned can file a motion with the competent court requesting an injunction order against the ISP to remove the alleged infringing content from its computer system. In the motion, it must expressly state information regarding the ISP, infringement claims, and details of the investigation process that will lead to the finding of infringement and evidence thereof, including potential damages and other relevant factors.

If all the required information is provided and the court sees the necessity, the court may order the ISP to cease the infringement or to remove the alleged infringing work from the computer system of the ISP for a period of time prescribed by the court. Afterwards, the copyright owner must initiate legal action against the actual infringer within a specified time period.



Importantly, if an ISP, who is not controlling, initiating or ordering the alleged infringement, complies with the court order, then the ISP will be exempted from liability. In addition, the ISP will not be liable for any damage arising from implementing the court

<sup>11</sup> Kowit Somwaiya. “DRAFT AMENDMENT TO THE COPYRIGHT ACT OF THAILAND”. <https://www.lawplusltd.com/2018/02/draft-amendment-copyright-act-thailand/>, (last visited 23 January 2020).

order. This provisional measure seems to be appropriate against copyright infringement on the Internet, while providing exemption from liability to those ISPs who cooperate, so that the copyright owner does not have to wait until the court renders its final judgment before removing the infringing content.

However, it should be noted that Section 32/3 of the amended Copyright Act is different from the US DMCA provision. The most important difference is that Section 32/3 brings the involvement of the court into play. Even though in theory the court may be able to render a credible judgment within the process, it creates hurdles for copyright owners since the ultimate goal is to remove the copyright-infringing works.

Since the effective date of the amended Copyright Act on August 4, 2015 and until March 2018, there were only six petitions filed with the IP&IT Court.<sup>12</sup>

Year	Number of Petitions
2016	4
2017	2

Based on the above statistics, not only were there a small amount of petitions filed, it appears that none of these petitions were successful based on different reasons.

In many of the unsuccessful cases, the copyright owner unfortunately returned with empty hands as the court rejected the granting of an injunctive remedy because the copyright owner had, in the court's view, failed to furnish sufficient information, such as details and evidence of the investigation process.<sup>13</sup>

On the other hand, in some cases the IP&IT Court granted a take-down order. Notwithstanding such success, the order granted was still unenforceable in practice. There are several reasons for this failure. One example is an ISP's claim of not being able to take-down copyright-infringing material from the system since the infringing material is stored on servers outside of Thailand. ISPs have struggled with complying with court

<sup>12</sup> Watcharapol Suntarasantic. "Regulations Concerning Website Blocking in Thailand," in International Seminar on Laws Relating to Intellectual Property and International Trade B.E. 2561: Roles of Foreign and Thai Courts in Enforcing the Antitrust Law, Site Blocking Law and Oil Pollution Law (Thailand: June 6, 2018), p. 3.

<sup>13</sup> Ploynapa Julagasigorn and Suebsiri Taweepon, "Thailand's New Law for Combating Online IP Infringement". Informed Counsel (2017).

orders because such orders do not explicitly provide guidance on the measures for website blocking.<sup>14</sup>

Moreover, copyright owners have struggled with complying with court orders. As the law requires a copyright owner to take further action against infringers within a specified timeframe, in practice, it is nearly impossible to locate the actual infringer(s), especially when the vast majority of infringing websites are hosted on foreign servers.

Due to such unsuccessful results of the initial test cases, the number of cases filed in 2017 dropped by half. Furthermore, in May 2017, a new law combating online infringement was enacted, i.e. the Computer Crime Act. As such, there is no record of any petitions being filed under Section 32/3 of the amended Copyright Act after the year 2017.

#### 4.2 Section 20(3) of the Computer Crime Act

Due to the impracticable nature of Section 32/3 of the amended Copyright Act, the government is aware of the flaws and thus enacted the Computer Crime Act B.E. 2560 (CCA) in order to broaden and strengthen the law. The CCA added new enforcement measures to tackle online IP infringement, i.e. website blocking. Section 20(3) of the CCA allows the Ministry of Digital Economy and Society (MDES) and its officials to have primary authority to block permanently all types of IP infringement available on the Internet that can be identified as criminal offenses.<sup>15</sup>

Under the CCA, the MDES and its officials have primary authority related to these provisions. In practice, it is usually the IP owner who finds the alleged infringement on a website. The IP owner is then required to either file a complaint with the police or file a petition to the Department of Intellectual Property, Ministry of Commerce (DIP). Even though this requirement is not stipulated by the CCA, it is required in practice, as the MDES officers do not have the expertise to judge whether an IP owner's claim of infringement is accurate. On the other hand, the police, especially the Economic Crime Suppression Division, the Royal Thai Police (ECD Police) and the DIP officers, are more

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<sup>14</sup> Suebsiri Taweepon and Alec Wheatley, "Copyright Act Amendments: Combating Online Infringement – Obstacles and Prospects". *Informed Counsel*, (2016).

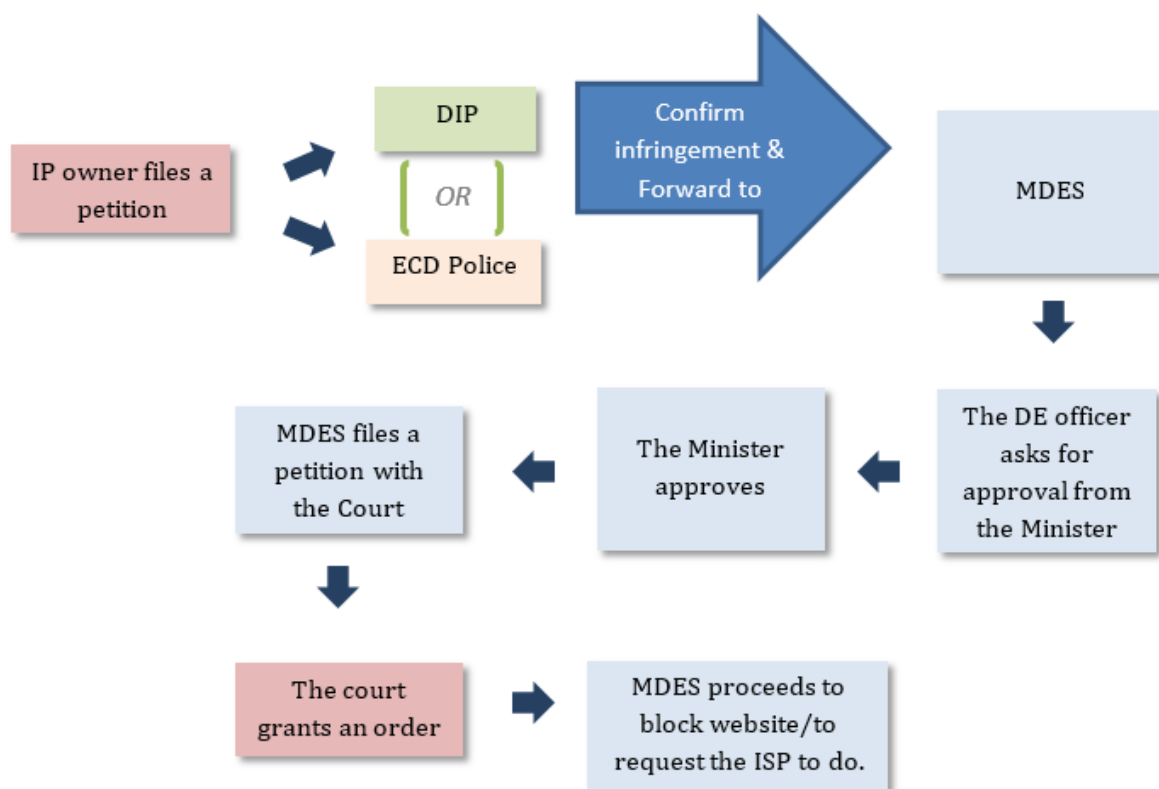
<sup>15</sup> Ploynapa Julagasigorn and Suebsiri Taweepon, "Thailand's New Law for Combating Online IP Infringement". *Informed Counsel*, (2017).

familiar and specialized in IP. As such, if the police or the DIP officers review and confirm that an IP owner's claim is accurate, they will forward the matter to the MDES for further action. An officer of the MDES will be assigned to investigate and collect evidence for further consideration by the Minister.

Once the Minister approves, the officer will then file a motion with the court requesting that the website be blocked or its content deleted. However, in an urgent case, an officer may file a motion with the Court before obtaining approval from the Ministry. If this is the case, the officer must report the matter to the Minister as soon as possible after the motion has been filed.

Finally, if the court grants such a petition, then officials may independently take steps to enforce the block while also requesting that ISPs assist in the effort. The rules, timeline, and methods for enforcing a Court order are regulated by the Minister's Notifications.

A diagram of the process for blocking computer data that infringes IP rights under the amended CCA is shown below.



### 4.3 Comparison between Section 32/3 of the Copyright Act and Section 20(3) of the CCA

With the same aim of combating online infringement, two different laws are applied though each uses a different approach. If we compare Section 32/3 of the Copyright Act and Section 20(3) of the CCA, we see some differences with respect to the scopes of infringement, types of orders, available actions, and responsible persons.

Issue	Section 32/3 of Copyright Act	Section 20(3) of CCA
Subject Matter of Infringement	Copyright	IP Rights
Type of Order	Preliminary Injunction	Permanent Injunction
Available Actions	Remove/Other Methods	Remove/Block
Responsible Person	Copyright Owner	Government Officers

When the case does not involve copyright infringement, the only applicable approach is Section 20(3) of the CCA. However, for a copyright infringement case, rights owners may choose between these two approaches based on their preferred outcome—that is, whether they wish to remove the content or block the website.

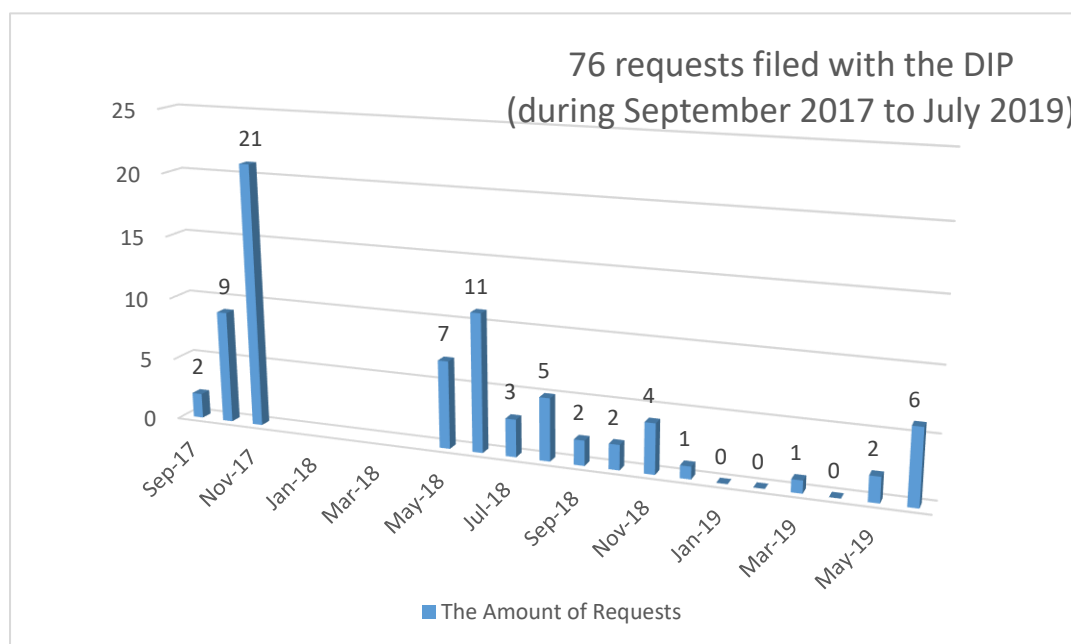
In addition, the burden on IP owners to investigate and collect evidence under Section 32/3 of the Copyright Act is heavier than under the CCA. This is because under the CCA, government officials, or MDES officers, are responsible for prosecuting offenses; however, in practice, MDES officers rely on the assistance of IP owners for collecting sufficient evidence.

Moreover, the Copyright Act provides preliminary injunctive relief, which requires the copyright owner to initiate legal action after the material has been taken down, while the CCA provides permanent injunctive relief that does not require further legal action.

### Statistics

As of the effective date of this law (May 24, 2017), there have been several petitions filed, as shown in the statistics below.

Petitions submitted to the Department of Intellectual Property (DIP) for blocking infringing websites (September 2017 – July 2019)<sup>16</sup>



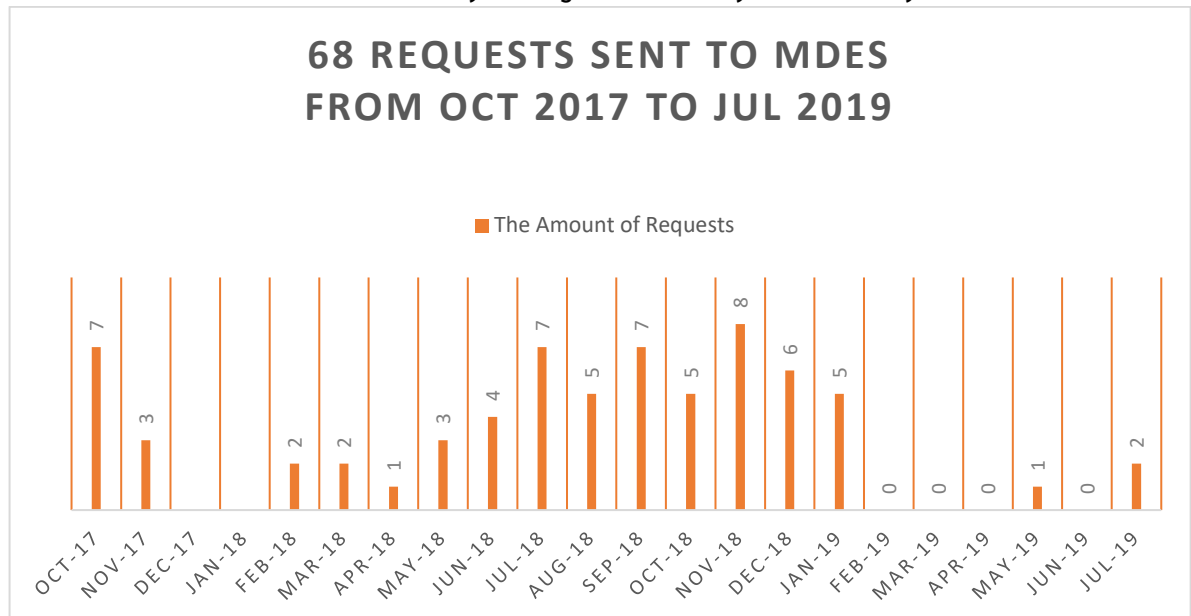
It should be noted that since the effective date of the CCA in May 2017, both the authorities and IP owners still have limited experience as to how to use this measure in practice. After several discussions involving the MDES, the DIP, the police and IP rights owners, the procedure was settled. It was concluded that the petitions under Section 20(3) of the Computer Crime Act must first be submitted either to the police or to the DIP prior to forwarding the same to the MDES. As shown in the statistical data of the DIP, the number of requests from September 2017 through November 2017 sharply increased, and the requests in November 2017 were the highest on record.

After the DIP reviews a petition, the DIP will conclude its opinion and forward the case to the MDES for further action. However, if the petition contains insufficient information or evidence, the DIP will coordinate with the IP owner to rectify or input additional information to fulfil the requirements. Below are the statistics of petitions forwarded to the MDES.

<sup>16</sup> Department of Intellectual Property. “Statistical Report on (July 15, 2019)” 2019.



Petitions forwarded to the Ministry of Digital Economy and Society (MDES)<sup>17</sup>



The reduced number shows that some petitions submitted to the DIP are still pending amendment or additional evidence. Out of 68 cases forwarded to the MDES, half of these cases successfully blocked infringing websites. Details are shown below.

Statistical Data of Court-ordered blocking of URLs<sup>18</sup>

Months	Number of Court Orders	Number of URLs Blocked
January 2018	2	19
March 2018	2	20
April 2018	2	301
May 2018	2	195
June 2018	5	23
July 2018	0	0
August 2018	6	41
September 2018	8	22
October 2018	4	17
November 2018	5	313
December 2018	0	0

<sup>17</sup> Department of Intellectual Property. “Statistical Report on (July 15, 2019)” 2019

<sup>18</sup> Ibid.

January 2019	0	0
February 2019	1	2
March 2019	1	17
April 2019	0	0
May 2019	0	0
June 2019	1	298
<b>Total</b>	<b>39</b>	<b>1,268 URLs</b>

Based on the statistics above, 1,268 URLs containing IP-infringing materials were successfully blocked. However, it should be noted that there have been petitions filed with the MDES through the police as well, although such records are unavailable. As such, this number shows only a part of the successful development of Thailand's online measures against IP infringement.

Nonetheless, the procedure under the CCA takes a significant amount of time as it involves several authorities, e.g., MDES, DIP, IP&IT Court, which takes approximately 2–6 months, depending on the complexity of the case, to complete the process.

## 5. Future Combat Measures

Due to the several obstacles accompanying the application of Section 32/3 of the amended Copyright Act and Section 20(3) of the CCA, there are some official indications that there will be further amendments made to the Copyright Act in order to include the US DMCA's notice-and-takedown system into the Copyright law.

With an aim to enhance the mechanisms of copyright protection in the digital environment, Thailand is further amending the Copyright Act B.E. 2537, which is now under the review of the Council of State.

In the draft amendment of the Copyright Act, the draft identified four types of ISPs, namely (1) intermediary ISPs, (2) caching ISPs, (3) hosting ISPs, and (4) search engine ISPs. These are the four types of ISPs similar to the US DMCA's system.

Importantly, the draft deletes Section 32/3 of the Copyright Act and replaces it with a section called "Exemption of Liability of ISPs". This newly drafted section sets out the requirements for ISPs to be exempted from liability of copyright infringement. There are both general and specific requirements for each type of ISP. Details are summarized below.

## 5.1 General Requirements

The ISPs must have explicitly announced their policies to terminate services to users who are repeat infringers, and the ISPs must have reasonably implemented such policies. Please note that the draft amendment does not require monitoring obligations for ISPs, as it does not want to put further burdens on ISPs when setting up their internal monitoring systems.

## 5.2 Specific Requirements

In addition to the above general requirements, each ISP must comply with the following specific requirements in order to be exempted from liability. The requirements for each ISP can be summarized below.<sup>19</sup>

1) Intermediary ISP:

- Does not initiate the transmission;
- The transmission is automatic;
- Does not keep a copy of the data longer than necessary; and
- Does not alter the data.

2) Caching ISP:

- Does not alter the data;
- Refreshes the data to be up-to-date;
- Does not carry out technological interference to retrieve the data; and
- Removes the data from the system or blocks access to the data when the

original website has removed the data or has blocked access.

3) Hosting ISP:

- Does not know but should have known about the infringement, or knows about the infringement but later removes the data from the system or blocks access without delay;
- Does not obtain any financial benefits directly from the infringement;
- Has a system to receive notice letters; and

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<sup>19</sup> Taksaorn Somboonsab, “Laws Concerning Website Blocking in Thailand,” in International Seminar on Laws Relating to Intellectual Property and International Trade B.E. 2561: Roles of Foreign and Thai Courts in Enforcing the Antitrust Law, Site Blocking Law and Oil Pollution Law (Thailand: June 6, 2018), p. 6.

- Removes the data from the system or blocks access without delay once notified.

4) Search engine ISP:

- Does not know but should have known about the infringement, or knows about the infringement but later removes the reference or linkage to the data from the system or blocks access without delay;

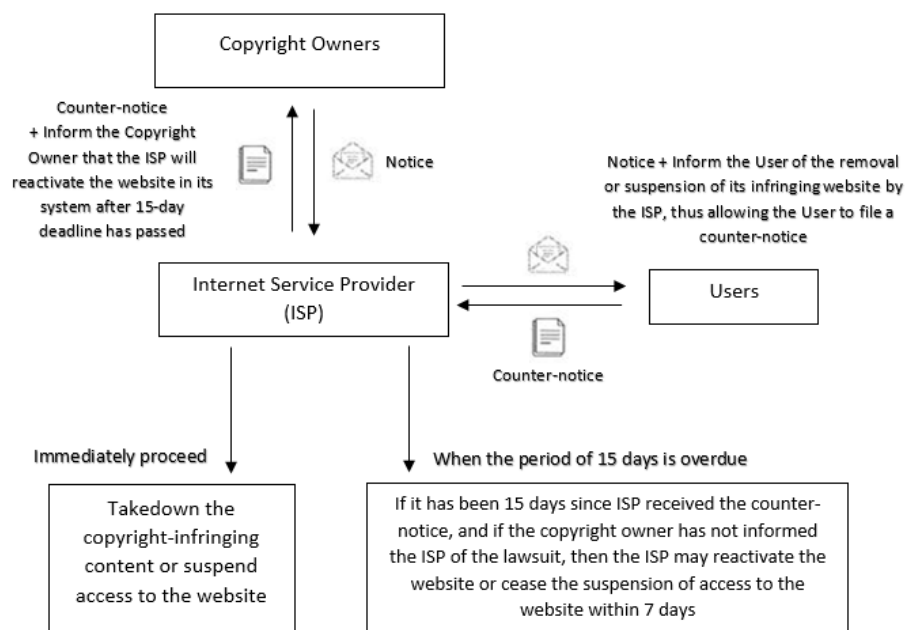
- Does not obtain any financial benefits directly from the infringement;

- Has a system to receive notice letters; and

- Removes the data from the system or blocks access without delay once notified.

Based on the above, it is clear that the obligation to remove data from the system or to block access is only for caching ISPs, hosting ISPs and search engine ISPs. This clarifies that intermediary ISPs are not required to remove data or block access from their systems, as they are mere conduits of the data. If they act passively and neutrally, they may qualify for an exemption of the liability. The Ministry will issue a further regulation on the criteria, rules and conditions for ISPs to be exempt from liability.

For caching ISPs, hosting ISPs and search engine ISPs, they must follow the steps set down by the law.



To elaborate, copyright owners can send a notice of infringement to ISPs of any allegedly infringing data. ISPs who have been notified must take down the data, its references, or access points from their system or block access without delay. Then, the ISPs must notify the user who posted the allegedly infringing material of such removal or blocking. This is to give an opportunity to the user to oppose such removal. If the user has reasonable grounds to oppose, they can send a counter-notice to the ISP. The ISP will then restore the data back onto the system within 15 days from the date of receiving the counter-notice. If the copyright owner later finds that the alleged infringing data has been restored, they must initiate legal action against the user. In such case, the ISP is obliged to takedown the data again, where the copyright owner notifies the ISP that it has filed a lawsuit against the user.

In the countries where the notice-and-takedown system has been adopted, there are some negative opinions that the system supports ISPs in removing data without thoroughly considering whether it is infringing data as claimed. Therefore, the draft amendment prescribes that any person who falsely notifies an ISP or falsely opposes the notice is liable for any damages arising out of his or her false notification or opposition.

## 6. Conclusion

Owing to the fast-paced developments of technology, an exact copy of copyrighted work can be disseminated easily, by any person, from anywhere in the world, and can be accessed by anyone across the globe. Copyright owners around the world are facing the same problems as Thailand, as infringement occurring on the Internet affects every country. Identifying a copyright owner is easy, but identifying an infringer is not. To find the location or storage place of the original source is sometimes insurmountably difficult. This makes enforcement against online infringement quite challenging.

The problems of online infringement are changing, along with the technology and with the behavior of users. If the law provides enforcement measure options, such as blocking measures under the CCA, it will be beneficial for copyright owners to choose the most appropriate measures to tackle the ever-evolving development of technology and changes in user behavior.

However, identifying an infringer has always been a problem and remains a major issue for copyright owners. To block access seems to be the most appropriate measure. It is unique that Thailand has the CCA addressing the IP infringement issue, which also covers all types of IP that are criminal offenses. As for the notice-and-takedown system, it is universally accepted that this procedure provides a viable alternative to a copyright owner seeking the removal of allegedly infringing data through the cooperation of responsive ISPs. Even though the draft Copyright Act has not yet been concluded, business practices have already developed internal systems to incorporate notice-and-takedown systems; therefore, most ISPs are already familiar with this system. If Thailand's Copyright Act adopts the notice-and-takedown system, not only will copyright owners have more tools available to combat online infringement, the ISPs will be assured that they will not be liable to copyright infringement claims. Once the Copyright Act is amended, it will upgrade the standard of copyright protection in Thailand to be at the same high standard as that applied internationally.