

PROVISIONAL PROTECTION MEASURES AGAINST COPYRIGHT INFRINGEMENT ON THE INTERNET *

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Abstract

Prior to the enforcement of the Copyright Act (No.2) B.E. 2558 Thailand did not have the law related to provisional measures of protection for internet copyright piracy. In case the copyright piracy occurs, the Copyright Act B.E.2537 would be applied.

Understanding the social context, at present, has rapidly changed, technology has played much more crucial role in our daily life, especially the internet access. As a result, the copyright piracy through internet network has been increasing. Therefore, to have the enforcement of technology strategy to protect copyright work, Thai government has stipulated the Copyright Act B.E.2537 amended by Copyright Act (No.2) B.E.2558, coming into force on August 4, 2015. The act has applied the ‘safe harbor’ principles of the United States of America and Europe in drafting as the model, with the purposes of protecting the creators and the initiators of the new works that disseminated through the internet and also in accordance with the internet users’ behaviors.

Section 32/3 has mentioned the setting up of liability limitation of Internet Service Provider(ISP) to protect the internet service providers from risk in being sued in case of copyright piracy. The copyright owners can ask the Court to order Internet Service Provider(ISP) to take down pirated files from their websites whereas the copyright owners has to show enough evidences to the Court.

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After, the Internet Service Provider(ISP) has followed the Court's order to take down the pirated file, the Internet Service Provider(ISP) do not have the liability of the pirated action.

In Section 32/3, it was found that the process in suppression of copyright piracy and the protection of copyright of the copyright owners has focused on court procedure which it takes time consume and also has impacts on suppression since technology changed all the time. This leads to overwhelming cases in Court of Justice. In addition, the internet copyright piracy deals with technology where it needs technology expertise and experts to more efficiently solve the problems and provide guidelines than the past.

From the observations mentioned earlier, in the researcher's point of view, it is noted that the Copyright Act (No.2) B.E.2558 is difficult to put into action and cannot solve the problems of intellectual property infringement and internet copyright piracy. As the result, Thailand will remain the country of Priority Watch List (PWL) according to the Special 301 Report of the United States Trade Representatives.

Keywords : Copyright Piracy , Internet, Internet Service Provider(ISP), Liability

บทคัดย่อ

ก่อนมีการบังคับใช้บันทึกยูดีแท่ง พระราชนูญคดิลิขสิทธิ์(ฉบับที่ 2) พ.ศ. 2558 ประเทศไทย ไม่มีกฎหมายเกี่ยวข้องกับเรื่องการละเมิดลิขสิทธิ์ทางอินเตอร์เน็ตโดยตรง แต่หากมีกรณีเกี่ยวกับการละเมิดลิขสิทธิ์ดังกล่าว ก็จะนำเอากฎหมายลิขสิทธิ์ พ.ศ.2537 และ มาปรับใช้

ในปัจจุบันบริบททางสังคมได้มีการเปลี่ยนแปลงไปอย่างรวดเร็ว เทคโนโลยีได้เข้ามานึ่นทบทาทในชีวิตประจำวันของคนมากขึ้น โดยเฉพาะอย่างยิ่งการเข้าถึงในเครือข่ายอินเตอร์เน็ต จึงทำให้เกิดมีการละเมิดลิขสิทธิ์บันทึกยูดีแท่งมากขึ้น ดังนี้เพื่อให้มีมาตรการบังคับใช้กฎหมายทางเทคโนโลยีเพื่อคุ้มครองงานอันมีลิขสิทธิ์ รัฐจึงได้มีการตราพระราชบัญญัติลิขสิทธิ์ (ฉบับที่ 2) พ.ศ.2558 ขึ้น โดยมีผลบังคับใช้ตั้งแต่วันที่ 4 สิงหาคม 2558 เป็นต้นไป ซึ่งกฎหมายดังกล่าวรับเอาหลักการมาจากการหลัก safe harbor ของประเทศสหรัฐอเมริกา และ ยุโรป มาเป็นแม่แบบในการร่างกฎหมาย

พระราชบัญญัติลิขสิทธิ์ฉบับใหม่นี้ โดยมีเป้าหมายเพื่อคุ้มครองผู้สร้างสรรค์ผลงานทุกประเภทที่เผยแพร่ทางอินเตอร์เน็ต พร้อมทั้งยังสอดคล้อง กับกฎหมายผู้ใช้งานอินเตอร์เน็ตอีกด้วย

มาตรา 32/3 ซึ่งวางหลักเกี่ยวกับการกำหนดข้อจำกัดความรับผิดชอบผู้ให้บริการอินเตอร์เน็ต เพื่อให้ผู้ให้บริการอินเตอร์เน็ต ไม่ต้องเสียต่อการถูกฟ้องร้องละเมิดลิขสิทธิ์ โดยให้เจ้าของลิขสิทธิ์ สามารถร้องขอให้ศาลสั่งให้ผู้ให้บริการอินเตอร์เน็ตนำไฟล์ละเมิดลิขสิทธิ์ออกจากเว็บไซต์ ซึ่งเจ้าของลิขสิทธิ์จะต้องแสดงหลักฐานด้วยๆ ต่อศาลอย่างเพียงพอ และเมื่อศาลมีคำสั่งให้ออกไฟล์ละเมิดออกจากเว็บไซต์แล้ว และเจ้าของเว็บไซต์ดำเนินการตามคำสั่งศาล เจ้าของเว็บไซต์ไม่ต้องรับผิดเกี่ยวกับ การกระทำที่อาจว่าเป็นการละเมิดลิขสิทธิ์ดังกล่าว

จากบทบัญญัติในมาตรา 32/3 นั้น พบว่ากระบวนการในการปราบปรามการละเมิดลิขสิทธิ์และ การคุ้มครองงานอันมีลิขสิทธิ์ของเจ้าของลิขสิทธิ์นั้น เป็นกระบวนการที่เน้นขั้นตอนทางศาลเป็นหลัก ซึ่งทำให้เกิดความล่าช้า ล่าสุดกับการปราบปรามทางเทคโนโลยีซึ่งมีการปรับเปลี่ยนรูปแบบอยู่ตลอดเวลาและ นิยามาที่ ตามมาอย่างหลีกเลี่ยงไม่ได้คือมีคดีขึ้นสู่ศาลเพิ่มมากขึ้น อีกทั้งในเรื่องการละเมิดลิขสิทธิ์ทาง อินเตอร์เน็ตนั้นมีกระบวนการซึ่งเกี่ยวข้องกับเทคโนโลยีซึ่งต้องอาศัยความรู้ความสามารถ ของผู้ใช้ช่วยเหลือ ทางด้านเทคโนโลยี เนื่องจากมีความซับซ้อนเพื่อให้เข้าถึงปัญหาและหาแนวทางแก้ไข ด้วยตัวเองเป็นจำนวนมาก กว่าในอดีต

ข้อสังเกตที่ได้กล่าวในข้างต้น อาจทำให้มีการตั้งข้อสังเกต ได้ว่ากฎหมายฉบับนี้ยกต่อการ บังคับใช้ และไม่สามารถนำมาใช้เพื่อแก้ไขปัญหาการละเมิดทรัพย์สินทางปัญญาได้ จนทำให้กฎหมาย ลิขสิทธิ์ฉบับนี้กลับเป็นกฎหมายที่ไม่ถูกนำมาใช้ในการแก้ปัญหาการละเมิดลิขสิทธิ์ทางอินเตอร์เน็ต และ อาจส่งผลกระทบต่อเนื่องให้ประเทศไทยต้องเป็นประเทศที่ต้องเสียเวลาเป็นพิเศษ **PRIORITY WATCH LIST (PWL)** ต่อเนื่องเป็นปีที่ 10 ได้

คำสำคัญ: การละเมิดลิขสิทธิ์, อินเตอร์เน็ต, ผู้ให้บริการ, ความรับผิด

1. Introduction

The problem of copyright infringement in the computer system in Thailand has been more developed to response the customer's needs. It now becomes a crucial problems which the organizations, both public and private sectors, have to collaborate each other in order reduce the infringed action. In the past, the violation action conducted by copying CDs and MP3 but now it has been developed in the form of downloading the infringed file through internet system where it is difficult to control and suppress. Understanding that the copyright piracy dealing with technology

lasted for a very short time. Accordingly, it leads to copyright owners' damages themselves and at the same time, it also results to the economy of the country.

2. Copyright Act B.E.2537 amended by Copyright Act B.E.2558 (NO.2)

Since technology rapidly changed. Many procedures have been used to protect and infringement

1. Contract Procedure

The copyright limited the right of user through form of contact

2. Technological Protection Measures (TPMs)¹

The technological measure is the method for the copyright owners to control the usage of their works. While the copyright owners use the technological measure to protect their works, there are many computer technology experts find the measure to avoid the technology measure (circumvention of technological measure) to access and gain the benefit from others' works.

The Copyright Act B.E.2537 is silent on the technological measure. Technological measure is stated in the drafted of new Copyright Act came from the agreement of free trade area between the United States and other countries, for example, the agreement between the United States and Singapore Free Trade Area (FTA) in Article 16.4.7(b)² "...effective technological measure means any technology, device, or component that, in the normal course of its operation, controls access to protected work, performance, phonogram, or other subject matter, or protects any copyright or any rights related to copyright" which enacted in Copyright Act B.E.2537 amended by Copyright Act B.E.2558, No.2,.

¹ Jakrit Kuanpoj and Nandana Indananda, **Right in Digital Era Technological Measure and the option for Thailand**, Thammasat printing : pp.63

² Electronic frontier foundation "Seven lessons from a comparison of the Technological Protection Measure Provisions"
<https://www.eff.org/pages/seven-lessons-comparison-technological-protection-measure-provisions> (Accessed on July 21,2016)

Section 3³ states that “Technological Measure is the technology that is designed to protect the copy, control the access to the copyright works effectively.

One of crucial observations found that the Copyright Act B.E.2537 amended by Copyright Act (No. 2) B.E. 2558 (A.D. 2015) is that it is difficult to enforce and cannot apply to solve the problem of copyright infringement.

2.1 The arising of Copyright Act B.E.2537 amended by Copyright Act B.E.2558 (NO.2)⁴

Earlier, the copyright law of Thailand did not have the provision covered the aspect of internet copyright infringement where its action involved with a lot of people. Therefore, in August 2015, the enforcement of the law regarding the copyright piracy in that case has come into force, by adding the action of internet piracy as a guideline to enforce the copyright law pertaining to the liability of Internet Service Provider (ISP). As it was mentioned in Section 32/3 of the Copyright Act (No. 2) B.E. 2558 (A.D. 2015) that if legitimate evidence has been produced to prove an infringement of copyright in a computer system by a ISP, the copyright owner may file a petition with the Court for the ISP to be restrained from infringing such copyright.

2.2 Section 32/3 Copyright Act B.E.2537 amended by Copyright Act B.E.2558 (No.2)⁵

2.2.1 Service Provider

³ Copyright Act B.E.2537 amended by Copyright Act B.E.2558

⁴ The Department of Intellectual Property, Ministry of Commerce (Thailand) “Copyright Law to compel Digital Economy” Protection of the creator in the internet Penalties 10,000-400,000 or in prison or both”. https://www.ipthailand.go.th/index.php?Option=com_content&view=article&id=1618:digital-econo-my-10-000-400,000&catid=8:news&Itemid=332 (Accessed on July 20,2016)

⁵ Copyright Act B.E.2537 amended by Copyright Act B.E.2558 (No.2) <https://ictlawcenter.etda.or.th/files/law/file/52/9b3da7a8a28d49b9d78fd88171695e8b.pdf> (Accessed on July 20,2016)

For the benefit of this section, “Service Provider”⁶ means:

(1) A Service Provider to others in accessing the internet or enabling others to contact one another by other means through a computer system whether the Service Provider does so under his name, or those of others or in the interests of others.

(2) Service Provider for computer information storage for the Interest of others.

In Thailand, the law did not force the copyright owner to go to the court. The copyright owner can contact Internet Service Provider(ISP) directly or the copyright owner can go to the court asking for the petition to forced the Internet Service Provider(ISP) to take down the piracy contents.

2.2.2 The Petition

The petition to be submitted to the Court must contain specifying the following details⁷:

1. Name and address of the Service Provider.
2. Details of the copyright work which is infringed.
3. Details of the copyright work which has been made by the Infringer.

4. Evidence showing how the infringement of the copyright. Material has been found on the Service Provider’s Computer system i.e. date, time and details of the investigation.

5. Details of the damages that is likely to occur as a result of the above mentioned infringement of the copyrighted work.

6. Execution request for the Service Provider to remove the infringed work from the Service Provider’s computer system or such other action whereby they shall refrain from infringing the copyrighted work by other means.

⁶ Copyright Act B.E.2537 amended by Copyright Act B.E.2558 (No.2) Section 32/3 paragraph2

⁷ *Id*, paragraph 3

2.2.3 Court

When the Court receives the petition⁸, the Court shall conduct inquiries. If the Court finds the petition contains appropriate details and has necessary causes for it to consider issuing the petition, then it shall order the Service Provider to refrain from infringing the copyright or to remove the infringed work from the computer system of the Service Provider within a specified period of time as specified in the court order. The order of the Court is immediately executable and can be notified to the Service

Provider without delay. The owner of the copyright material can take the Court order and serve it on the Service Provider who must comply with such order within the timeframe specified in the Court order.

2.2.4 Liability of the Internet Service Provider⁹

In case the Service Provider is not the one who control, initiate or command the infringement of the copyrighted material in their computer system and such Service Provider complies with the Court order, they will not be liable for those acts relating to the infringement of copyright that occurred prior to the Court order and after the court order is no longer effective. The Service Provider shall not be liable for any damages that arise due to its compliance with the Court's order.

The said Section 32/3 has mentioned the specifying of liability limitation of Internet Service Provider(ISP) to protect them from risk in being sued in case of copyright infringement. The copyright owners can ask the Court to order Internet Service Provider(ISP) to take down infringed files from their websites whereas the copyright owners have to present enough evidences to the Court. After, the ISP has followed the Court's order to take down the infringed file, the ISP do not have the liability of the infringed action.

⁸ *Id*, paragraph 4

⁹ *Id*, paragraph 5,6

The majority of copyright laws pertaining to infringed action through internet and liability of Internet Service Provider(ISP) derived from Digital Millennium Copyright Act (DMCA) of the United States, but there have been changes in some details to be suitable for the problematic conditions of each country.

3. Digital Millennium Copyright Act (DMCA) of the United States

3.1 Internet Service Provider (ISP)

The United States Internet Service Providers can be divided into 3 categories as in 17 U.S.C., Section 512 (2006)¹⁰

“the service provider offering the transmission, routing or providing the connections for the digital online communication between or among points specified by a user, material or the user’s choosing without modification to the contents of the material as sent or received or a provider of online service or network access or the operator of facilities therefore.”

There are three terms for Service Provider:

1. Internet Service Provider (ISP): a business or organization that offers a user access to the Internet and related services which allow a subscriber to communicate with others and access information on the internet.
2. Online Service Provider (OSP), including ISP, and IAP: provides Internet access to the subscriber.
3. Internet Access Provider (IAP)

3.2 Safe-Harbor

3.1.1 Notice and Take Down¹¹

The Digital Millennium Copyright Act (DMCA)

¹⁰ Section 512 limits online Service Provider liability for direct liability and indirect liability (contributory and vicarious liability)

¹¹ Notice, Takedown, and the good faith standard: How to protect internet user from bad-faith removal of web content <http://heinonline.org/HOL/LandingPage?handle=hein.journals/stlp129&div=26&id=&page=> (Accessed on July 20,2016)

contains safe-harbor provisions for online service providers from copyright infringement claims made by their customers or users. To take advantage of this provision, the Internet Service Provider needs to receive notice and take down procedures by removing infringed contents. The copyright does not have to be registered with the United States Copyright Office to take advantage of this DMCA provision.

Internet Service Provider in each country will provide services in various categories such as the United States of America which is in the common law system¹², They crucially pays attention to knowledge and benefit of Internet Service Provider (ISP). In case they find the circumstance of the infringed action through internet, copyright owner can inform ISP to take down or limit access¹³ the users to the infringed content.

The ISP is immunity from the damages¹⁴ if removes or block access to the infringing materials in notification.

3.1.2 Counter Notification

To protect erroneous action the law or DMCA law allow the subscriber to send counter notification¹⁵ to show that the material was removed or disabled through a mistake or misidentification and that subscriber has the right to ask their materials to be put back. The DMCA provides safe harbor for the ISP for the exemption from liability¹⁶ of transitory network community, system caching, online storage, or linking of infringing materials if ISP removes infringed content immediately.

¹² Common Law Office of America <http://www.usacommonlaw.com/legal.html> (Accessed on July 18, 2016)

¹³ DMCA Protect your content <http://www.dmcacom/FAQ/Creating-a-Takedown-case-using-DMCAcom> (Accessed on 18 July,2016)

¹⁴ Martin Charles Golumbic “**Fighting Terror Online :The Convergence of Security, Technology, and the law**”, 2008 pp.54

¹⁵ The Digital Millennium Copyright Act (DMCA) Section 512(g)(1)

¹⁶ Legal Protection of the Digital Information, Congress Codifies the Decisions <http://digital-law-online.info/lpdi1.0/treatise33.html> (Accessed on July 20,2016)

4. Finding

Although the Copyright law of Thailand has not set up the promulgation for the right owners who are infringed through internet to use the rights court, but from the study of laws of the countries using taking down and notification measures, found that taking down measure may impact on the personal right in freedom of expression where some countries realized as a fundamental rights.

The promulgation in Section 32/3, although a supplementary law, the study found that the process of suppression the copyright infringement and the protection of copyright work of the right owner is focused on juridical procedure and it takes time consume and has impacts on suppression. That provision leads to overwhelming cases in Court. In addition, the internet copyright piracy deals with technology where it needs technology expertise and experts to more efficiently solve the problems and provide guidelines than the past.

5. Conclusion and Recommendations

The adding of Court provision in punishing Internet Service Provider (ISP) has been recommended by the researcher. For example, in case the copyright owner has informed ISP pertaining to the copyright infringement but ISP did not have any action to the infringed content. Or there has been ISP's duty transform in some countries to monitor and inspect the infringed action in their computer system. This is to alleviate the damages of the copyright owners promptly. Therefore, it is not necessary to bring the case to the Court.

The grant of authority to the ISP to inspect the copyright infringement within their internet system should be mentioned as an effective option. There should also be a focal point organization to control and inspect ISPs since they receive benefits from providing space for the users.

Apart from that, there should be a provision to protect repeat infringement for ISP to delete the users' accounts in case they repeat

sharing the copyrighted work of the others. This is to avoid duplicate prosecution that leads to the increasing numbers of the cases in the Court.

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