

The New Approach to Enforce Intellectual Property Right on Internet

แนวทางใหม่ในการบังคับใช้สิทธิในทรัพย์สินทางปัญญาบนอินเทอร์เน็ต

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ABSTRACT

Recently there has been a cyber-strike globally by various website owners by turning their pages into black and some froze its website for a day. The cause of this was the US government who tried to pass the 2 Bills which contain the right to force website owners to responsible for damages (e.g. by freezing its bank account) although such website is not the one damaging copyright owner directly and although the website locates outside the USA.

In fact, this is not only happening in the US but also to other parts of the world through the push of organization representing the Intellectual Property owners (e.g. Copyright and Trademark owners) in order to create stronger enforcement approach internationally to lower the damages they're experiencing. In addition to freezing down bank account of website owner, it also adds in the clause to disconnect Internet connection of users. This approach has been done through international cooperation to make the enforcement assistance become easier.

The question is whether this approach is appropriate as it may affect people's basic rights as well as human rights (e.g. right to expression, right to communication) and whether or not applying criminal penalty is necessary. These are the points which would need further study to find the right balance for everyone.

This article is to discuss related information to readers about current situation.

Keywords: Intellectual Property, Copyright, Human Rights

บทคัดย่อ

ไม่นานมานี้เจ้าของเว็บไซต์หลายแห่งได้แปลงหน้าเว็บไซต์ของตนให้เป็นสีดำและบางแห่งถึงกับไม่ให้มีการเข้าถึงเว็บไซต์ของตนได้เลย มีต้นเหตุจากการที่ประเทศไทยได้มีความพยายามจะออกกฎหมาย เพื่อบังคับให้ผู้เป็นเจ้าของเว็บไซต์ที่มีการกระทำที่ละเมิดลิขสิทธิ์ จะต้องร่วมรับผิดชอบการกระทำการที่ทำอันละเมิดลิขสิทธิ์นั้น (เช่น ให้เกิดการระงับธุกรรมทางการเงิน เป็นต้น) แม้เจ้าของเว็บไซต์นั้นไม่ได้เป็นผู้ดำเนินการกระทำการที่ทำอันละเมิดลิขสิทธิ์เอง และแม้ว่าเว็บไซต์นั้นจะอยู่นอกอาณาเขตของประเทศไทยก็ตาม

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ในความเป็นจริงแล้ว สิ่งที่เกิดขึ้นนี้ไม่ได้เกิดขึ้นในประเทศไทยเท่านั้น หากแต่กำลังเกิดขึ้นทั่วโลกโดยองค์กรที่เกิดจากการรวมตัวของเจ้าของสิทธิ (เช่น ลิขสิทธิ และเครื่องหมายการค้า) ได้ใช้ความพยายามอย่างยิ่งเพื่อให้มีการผลักดันกฎหมายที่เข้มงวดขึ้น เพื่อลดความเสียหายที่เกิดขึ้นกับเจ้าของสิทธิ โดยพยายามผลักดันให้มีการระงับธุกรรมทางการเงินรวมถึงการตัดสัญญาณอินเทอร์เน็ตอีกด้วย การผลักดันเหล่านี้มักอยู่ในรูปของข้อตกลงระหว่างประเทศทั้งนี้เพื่อให้การบังคับใช้ได้ทั่วไปและง่ายขึ้น อย่างไรก็ตามมีปัญหาว่าการออกกฎหมายในลักษณะดังกล่าวบัน្តสุมควรแล้วหรือไม่และจะกระทบกระเทือนถึงสิทธิมนุษยชน (เช่น สิทธิในการแสดงความคิดเห็น สิทธิในการสื่อสาร เป็นต้น) อย่างไร เพียงใดหรือไม่ รวมทั้งการนำเอาความผิดทางอาชญาภาพรับใช้ในกฎหมายเหล่านี้จะเหมาะสมเพียงใด สิ่งเหล่านี้เป็นสิ่งที่ควรจะต้องมีการศึกษาเพิ่มเติมต่อไปเพื่อหาจุดสมดุลที่เหมาะสม บทความฉบับนี้จึงมีเพื่อเสนอรายละเอียดของสิ่งที่กำลังเกิดขึ้นในปัจจุบัน

คำสำคัญ: ทรัพย์สินทางปัญญา ลิขสิทธิ สิทธิมนุษยชน

Introduction

This article attempts to discuss the new enforcement approaches of intellectual property right holder which might impact not only to the infringers but also the basic right of the public.

The 2 preliminary concerns relating to copyright enforcement will be discussed. First, what are the reasons for the right owner to extend the scope of copyright protection beyond what has already been existed in intellectual property law? Second, what are the justifications for arguing whether the right and enforcement should or should not be extended?

The two matters will be discussed based on the view of 3 different sources as follows:

1. The comments of the Motion Picture Association of America, Inc. in response to the workshop on the role of content in the broadband ecosystem ;

2. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue (and)

3. IFPI Digital Music Report 2012 - Key Facts and Figures.

The author of the first two documents have expressed different interesting opinions on new approaches which the intellectual property right holders are trying to pursue through domestic laws as well as international laws (the “approach”). The third document is the annual report showing result after the Three-Strike approach is implemented in some countries.

The first source, Motion Picture Association of America, Inc. (“MPAA”) has sent out its comment before the Federal Communications Commission providing that National Broadband Plan should apply the policy to encourage ISP to take part in combating online infringement. To support this, MPAA provided the statistic of global export for motion picture and television industries which carry large impact on US jobs, taxes and income. In addition, MPAA also provided its analysis of best practice from few countries including South Korea, France and

Sweden. What MPAA call “best practice” includes termination of individual users’ Internet access, shutting down websites that transmit infringing content (although without receipt of complaint from a copyright holder), forming an investigation body to combat online infringement and ordering ISP to disclose users’ information and IP Address. These activities focus on copyright infringement prevention and discontinuation. In doing so, the monitoring system has to be implemented.

The second source, the Special Rapporteur has submitted its report called “Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression” to the Human Rights Council of United Nations concerning the right to freedom of opinion and expression. It stated the general principles on the right to freedom of opinion and expression and the Internet which everyone’s entitled to as well as outlined the restriction and plans which it thinks might violate human rights including arbitrary blocking or filtering of content, criminalization of legitimate expression, imposition of intermediary liability, disconnecting users from Internet access, cyber-attacks and inadequate protection of the right to privacy and data protection. It concluded that the Internet restriction should be minimal except for a very exceptional case.

The last source, it provides reports showing the impact in year 2012 after implementation of the Three-Strike measures and new monitoring system.

This article will discuss the proposed procedure and reasoning of all sides as well

as providing the author’s own view about the approach. However, in order to analyze different thoughts to reach final conclusion additional data and research might be needed.

The Background

In the past few decades, it is undeniable that Internet has been the main channel for most people to access information including different type of medias, documents, audio-visuals and many more. According to the nature of Internet system, its link among countries around the world through submarine cables, satellites, etc. have made the information flow through different destination very easily.

According to the Envisional Technical Report an Estimate of Infringing Use of the Internet – Summary showed that nearly two-thirds of all content shared on bittorrent is copyrighted and shared illegitimately.

Moreover, the two-week Internet study² by iPoque showed that more than 50% of Internet traffic was used for Peer to Peer (P2P)³ activity. Due to large number (and still increasing) of transferring of copyrighted files, the copyright holders has been claiming that such transfer

2 From 11 monitoring locations; eight ISPs and three universities from eight regions: Africa, South America, Middle East, Eastern, Southern, and Southwestern Europe, Germany. No locations in the United States.

3 Abbreviation of “Peer to Peer” which, according to Webster dictionary, means “The kind of communication found in a system using layered protocols. Each software or hardware component can be considered to communicate only with its peer in the same layer via the connection provided by the lower layers”.

cause great revenue loss and shall damage not only the owner of copyrighted works but also the economy of the country and creativity industry as a whole. Therefore, the current copyright law alone is not enough to be the tool to stop piracy. There has been a large debate to strengthen the law outside copyright in order to accommodate and protect the works as much as possible.

A Brief Overview of the Copyright Law

Copyright is a right that composers, artists, music arrangers and other kind of authors acquire in connection with their original creation of work. These rights give the power to the authors to monopolize and prevent others for a limited time from using, duplicating and/or distributing the protected work without prior permission. It also gives the authors the right to set conditions for someone who wishes to use the works.

The establishment of copyright law is to ensure stability of economic development while encourage the creation and distribution of original works whereby the authors could exploit the economic value of their works. Without the law, the authors would have no guarantee to receive the economic return after the first copy of the original work's sold and is likely decrease his/her inspiration to create new work to the world. Because of that, the governments had come to the point that there is a need to secure right of authorship worldwide thus the creation of international treaties has begun.

From International Agreements to the current Thai Copyright Law

There are few international agreements with regard to copyright. However, the author will only focus on the ones that influence Thai copyright law. The international agreements in force are inevitably the Berne Convention and the TRIPS Agreement.

The Berne Convention (1971) and Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement) are the key treaties governing copyright law of Thailand. Both ensure that the members shall protect literary and artistic works as appeared in Article 2 (1) of the Berne Convention (1971) that reads

“The expression “literary and artistic works” shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.”

The TRIPs Agreement endorses the substantive provisions of the Berne Convention and added the provision to include computer program into copyright protection.

As party and member of the above agreements, Thailand has applied these principles into its Copyright Act B.E. 2537.

The Protection – the view from Thai copyright law

Under Section 15 of Thai Copyright Act B.E. 2537, the owner of the copyrighted work has exclusive right to use the work as follows:

“...

- (1) reproduction or adaptation;
- (2) communication to public;
- (3) letting for hire of the original or the copies of a computer program, an audiovisual work, a cinematographic work and a sound recording;
- (4) giving benefits accruing from the copyright to other persons;
- (5) licensing the rights mentioned in (1), (2) or (3) with or without conditions, provided that the said conditions shall not unfairly restrict the competition...”

Therefore, in principle, the right holder is eligible to take legal action against any activities appeared above.

The Fair Use

While copyright law has given the right owner the enforcement right, it has provided exceptions which, in some circumstances, the users can use the work without permission from

right holders. Those exceptions are commonly known and called “Fair Use” concept. The concept appears in copyright law of most countries. In Thailand, it's stated in Section 32-43 of the Copyright Act B.E. 2537 where the main scope is in Section 32 as follows:

“An act against a copyright work by virtue of this Act of another person which does not conflict with a normal exploitation of the copyright work by the owner of copyright and does not unreasonably prejudice the legitimate right of the owner of copyright is not deemed an infringement of copyright.

Subject to paragraph one, any act against the copyright work in paragraph one is not deemed an infringement of copyright; provided that the act is each of the followings:

- (1) research or study of the work which is not for profit;
- (2) use for personal benefit or for self benefit together with the benefit of other family members or close relatives;
- (3) comment, criticism or introduction of the work with an acknowledgement of the ownership of copyright in such work;
- (4) news reporting through mass media with an acknowledgement of the ownership of copyright in such work;
- (5) reproduction, adaptation, exhibition or display for the benefit of judicial proceedings or administrative proceedings by authorized officials or reporting such proceedings;
- (6) reproduction, adaptation, exhibition or display by an instructor for the benefit of instruction provided that the act is not for profit;

(7) reproduction, adaptation in part of a work or abridgement or making a summary by an instructor or an educational institution so as to distribute or sell to students in a class or in an educational institution provided that the act is not for profit;

(8) use of the work as part of questions and answers in an examination.

In summary, this is the immunity for users of copyrighted work should their usage falls under one of the reasons above. Even without the copyright holders' permission, the users will be able to use the work where permitted by law under this "fair use" doctrine.

New Enforcement Approach

As discussed earlier, the copyright enforcement appears to be uncontrollable Over the Internet, the right holders are seriously searching for new approach to help them lessen the transferring / duplicating their copyrighted works in international level. At the same time, using the Fair Use as the reason to use those works without making any compensation. The sample of new approach from the right holders and governments appeared as international approach is in The Anti-Counterfeiting Trade Agreement (ACTA) proposal which goes beyond existing IP law by including 3 new components which are:

1. International cooperation;
2. Enforcement practices; and
3. Legal framework for enforcement of IPRs

There are widely debate whether or not ACTA is necessary as many of its provisions could affect fundamental rights of public and

individual.

The ACTA requires that the member countries must take action against online copyright infringement, provide information of the users (through IP Address), monitoring user's Internet usage and so on, to the requester (sometimes without knowing whether that person is a true copyright holder or he/she only appears to think he/she is). The ACTA has created chaos in many European countries as people disagree with the approach. However, many governments had accepted and pass similar laws in those countries such as France. Although European Parliament does rejected ACTA later on, however the countries that agreed to this ACTA were not only those in EU but also in different part of the world. Therefore, the future of ACTA as well as other similar laws must still be followed closely.

Apart from the international approach through ACTA, the USA has also tried to implement a few regulations (still pending) into its domestic laws which are The Stop Online Piracy Act (SOPA) and The Protect IP Act (PIPA). Both SOPA and PIPA (as well as ACTA) consist of one same thing which is Internet monitoring process that someone (most likely to be ISPs as well as the websites) must make sure that there's no infringing activities on their network or they could be liable for the infringement together with the infringer(s). Although these 2 Bills are possible to offer stricter enforcement on Intellectual Property with higher coordination with ISPs and website owners to track the infringers but in order to track, the information

of the users might leak out to third parties without any way to ensure that the users will be protected if found not guilty. In addition, these laws could put the ISPs and the website owners into a financially hard time as their money transaction could be suspended if alleged infringement is occurring within their network.

Should the monitoring system successfully paves its way into effective law, the information of users, names, locations, detail of visited websites, etc. would be collected and could be sent out to some other countries which the right holders located at and requested for these information.

The opinion

On 30 October 2009, Motion Picture Association of America, Inc. (“MPAA”) has sent out its comment before the Federal Communications Commission providing that National Broadband Plan should come out with the policy to encourage ISP to take part in combating online infringement. To support the ideas, it provided that most current Internet usage environment (uploading and downloading files on the Internet) which related to copyright infringement substantially take amounts of traffic thus clog Internet and degrades Internet service. Discouraging the illegitimate upload and download such files will help decrease Internet cost for users and increase Internet speed⁴.

MPAA proposed that National Broadband Plan should:

“(1) encourage ISPs and the creative community to work on a variety of measures to deter unlawful online conduct and free up broadband capacity for legitimate activity;

(2) recommend that government policies support these multiple efforts and not foreclose any particular anti-theft approach;

(3) recommend that Congress encourage ISPs to work with the creative community to implement the best available, commercially practicable policies and technological solutions to diminish the theft and unauthorized distribution of copyrighted materials online;

(4) recognize that flexibility is needed to encourage continuous advances in such technological solutions and their subsequent adoption; and

(5) acknowledge, as the Commission proposed to do in its network neutrality notice of proposed rulemaking, that using technological solutions to combat the transmission of unlawful content online constitutes a reasonable network management practice.”

MPAA noted that National Broadband is the main tool to use for discouraging copyright infringement. It appears that there are a lot of threats to entertainment industry when Internet users can work their way around Internet system and get movies or music file without paying royalty to right holders. It gave example of Star Trek movie which was available on the Internet almost immediately after the release in theater. Claiming as such, it added that movie industry

⁴ However, it appears that this is only their claim without prove that it will be as such in reality.

is the channel to promote cultural and economic for the US. as well as create jobs for the people and increase tax revenue for government. With increased number of online entertainment, the industry's exploring new business models to assist subscribed consumers to view the content legally. The sample of the models were talked about such as Netflix, iTunes and Hulu.com. Recent report shows that Netflix is having financial problem as well as losing subscribers.

MPAA still believes that should the contents are available online, it should be protected against online unauthorized distribution / view because of their high investment in producing them. Illegal distribution could cause large damage to industry and the owner could be out of business as it won't be able to compete with infringers in terms of investment cost.

MPAA also provide its strong comment that ISP will be the tool to use combating infringement. Cooperation with ISP will help them detect unlawful activities and stop piracy. Examples are given such as ISP could help blocking Internet access to websites, slow down the speed of some subscribers, detect data traffic. Although MPAA claims that this method could be used with infringers only, this author finds that it is almost impossible to point out the infringer without policing each individual's Internet usage constantly. Additional question is who will bear the cost for monitoring this. MPAA shows need of policy allowing entities

to address online content infringers⁵ but did not provide any further detail about financial barrier that could raise in online industry.

At any rate, to support this particular view, MPAA provides sample of 'best practice' of some countries that has started to adopt the monitoring system. It claims that such policy will help creating good environment for new innovation as investor would trust that they will be protected from online theft.

While MPAA is aggressively encouraging government globally to follow their approach, the Special Rapporteur has submitted its report to the Human Rights Council of United Nations ("Special Rapporteur") concerning the approach that could interfere the right to freedom of opinion and expression. Apparently, the balance of right must be observed especially the right to access the Internet.

Internet is the key technology which permits individual to exercise their right to freedom of opinion and expressions. Under article 19 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Right, it provides that:

"(a) Everyone shall have the right to hold opinions without interference;

"(b) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either

⁵ It is to be noted that should the policy be introduced, it is likely that they will have legitimate right to work their way to find infringers online.

orally, in writing or in print, in the form of art, or through any other media of his choice;

(c) The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(d) for respect of the rights or reputations of others;

(e) for the protection of national security or of public order (ordre public), or of public health or morals."

Thus, it is undeniable that the right to freedom of opinion and expressions is a fundamental right of everyone. Special Rapporteur views that restriction on the Internet by blocking contents, monitoring, identifying active users, criminalizing legitimate expression and adoption of restrictive legislation to justify such measures are unacceptable unless the following tests are conducted:

... (a) It must be provided by law, which is clear and accessible to everyone

(principles of predictability and transparency); and

(b) It must pursue one of the purposes set out in article 19, paragraph 3, of the Covenant, namely (i) to protect the rights or reputations of others, or (ii) to protect national security or of public order, or of public health or morals (principle of legitimacy); and

(c) It must be proven as necessary and the least restrictive means required to achieve the purported aim (principles of necessity and proportionality)...."

It also provided that "...the restriction should also be done only through the body which is independent from any influence. Moreover the content that might be restricted to access should be very limited such as "...child pornography (to protect the rights of children), hate speech (to protect the rights of affected communities), defamation (to protect the rights and reputation of others against unwarranted attacks), direct and public incitement to commit genocide..." only. All restriction must have legal basis otherwise it is unnecessary and/or disproportionate."

The use of blocking and filtering Internet could damage the right to freedom of expression which is the basic right of people thus not justified through established law and article 19, paragraph 3, of the International Covenant on Civil and Political Rights above.

It also viewed that "...the call to criminalized online activities is also another important issue where it should be limited to the expression that clearly shown to be:

(a) the expression is intended to incite imminent violence;

(b) it is likely to incite such violence; and

(c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence...."

This author agrees that criminalization of intellectual property infringer should not be necessary as the nature of infringement only effect civil damage of the right holders. Criminal penalty should be limited only to certain act above.

Many countries such as United Kingdom and the USA. start to use the new approach called “notice and take down” system where it protect intermediaries (ISPs) from IP liability provided that they take down unlawful material when they are made aware of its existence. Users who are notified by the service provider that their content has been flagged as unlawful often have little recourse or few resources to challenge the take down and could be viewed as lack of transparency as all parties determining such infringement are private entities. This approach could also weaken individual's privacy and make online usage vulnerable to cyber-attack.

The Special Rapporteur concluded that the restriction to online usage should be very limited and flow of information should be freely allowed. It also added that “...the full guarantee of the right to freedom of expression must be the norm, and any limitation considered as an exception, and that this principle should never be reversed.”

Claimed result

The IFPI which is the organization representing the recording industry worldwide has provided its Digital Music Report 2012 - Key Facts and Figures (“IFPI Report”), it puts in evidence that there's 8% increase in the digital revenues (US\$ 5.2 billion). On the other hand it underlines a decline in the overall recorded music market, which fell 3% (US\$ 16.2 billion). For a period of time, IFPI has been supporting the model / system of graduated response or

three-strike approach which already implemented by the French legislator with the HADOPI Law.⁶

IFPI notes that search engines are often used as means to find music contents and in this respect suggests a closer cooperation between the music industry and search engines in order to adopt practices and procedures aimed to prevent the infringement and to speed up the responses and the removal of non-legal links.

In addition IFPI remarks that several music sites illegally distribute contents to the users adopting advertising based models generating revenues from the sale of advertising space which allow those websites to build a profitable business. In the Limewire case has been estimated that in 2006 Limewire would have earned US\$ 20 million in advertising revenues. However this case has been settled in 2011 for 105 Million US Dollars.

⁶ This HADOPI Law created an entitle entity to screen Internet connection in order to prevent the exchange of copyrighted material without prior agreement from the copyright holders. In particular it may initiate a procedure based on three strikes:

1. In the event of an infringement, HADOPI sends an email message to the user specifying the time of claim. At this stage the ISP is to monitor the user who. If the infringement is repeated in the next 6 months then the second phase of the procedure applies;
2. HADOPI sends a formal letter of warning. If the user refuse to comply the third step applies;
3. HADOPI requires to restraint the Internet access to the user for a limited period (two months - one year). The user is included in a blacklist and all the ISP are not allowed during that period to provide such user with an Internet connection.

Because of the above, it highlights the request to have stronger collaboration with websites and ISP to help decrease the number of online infringement.

Apparently, the remarkable blackout strike on 18 January 2012 which many websites such as Wikipedia, TwitPic, Reddit, together with other over 7,000 websites around the globe has decided to show their disagreement with Stop Online Piracy Act (SOPA) and the PROTECT IP Act (PIPA) Bills by had its pages go dark, has caught great attention from Internet users, US Congress as the biggest online protest in history. This may be the clear answer to the association like MPAA how the consumer feel with its current approach.

Possible impact to Thailand and the Conclusions

Recently, the developed countries (especially those with higher number of intellectual property ownership) has attempted to tie the intellectual property issue into international trade agreements and trying to build monitoring system to detect the violations that occurred in other countries.

As Thailand continues its business with foreign countries, it would be difficult to avoid becoming a party to those agreements. There are many examples of countries that have faced the same situation for example in the FTA between Korea-USA or Korea-EU, both have given out the higher level of protection in intellectual property which provide stricter enforcement method such as the coordination

between Internet Service Provider (ISP) and the right holders allowing for certain ISP activity and preventing the infringement of copyright, the extension of protection of works sending over satellite signal, etc..

Even though the number of overall recorded music market has been declined, there is no prove whether such decline was the effect of digital infringement. In addition, the total revenue is still increasing in spite of market scale.

Back to the reasons provided by MPAA, one of the main concerns was that online distribution of its work has damages them greatly but with 2012 IFPI report, questions might be raised whether or not such claim is true and whether the current approach of the right holders are appropriate as it'll certainly effect people's basic rights all over the world. In order to put any new legal system into place, the balance between interest of private corporations and fundamental public rights should be carefully taking into account. This author finds that the fundamental right should not be damaged and the restriction should be limited. Further study on this issue must be made to prepare Thailand for possible future negotiations.

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