

## Removing Infringing Content on ISPs Hosted in Thailand and the European Union

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Online copyright infringement is a widespread problem. Infringing content that is uploaded to the Internet in one jurisdiction can be easily accessed from around the world. Internet service providers (ISPs) host and transmit vast amounts of data, and the sheer amount makes it impossible for ISPs to monitor all of the content that is uploaded. Consequently, it would be very difficult or almost impossible for ISPs to prevent copyright infringement completely.

In this article, we discuss the recourse available to copyright owners facing infringement online with content hosted in both Thailand and the European Union.

### The Thai Copyright Act and the E-Commerce Directive

Last year, Thailand amended its Copyright Act B.E. 2537 (1994). The amendments introduce a number of provisions that modernize the law for the digital age. Importantly, the amended Copyright Act regulates the potential liability of ISPs for copyright infringement, and it helps copyright holders uphold their rights online.

In the European Union, Directive 2000/31/EC—also known as the E-Commerce Directive—governs copyright infringement and ISP liability. Both the amended Thai Copyright Act and the E-Commerce Directive allow copyright owners to request and force ISPs to act against infringing content on their services. There are, however, a number of differences between the laws.

### Definitions, Liabilities, and Duties of ISPs

The amended Thai Copyright Act provides a broad definition of “ISP” that functions as a catch-all provision. Under Section 32/3, a “service provider” means:

- ❖ a person who provides services to others regarding the provision of access to the Internet, or any other connectivity through a computer system, whether such services are provided in their own name, or in the name or for the benefit of other persons; and
- ❖ a person who provides computer data storage services for the benefit of other persons.

This encompasses most, if not all forms of ISPs. The Thai Copyright Act attributes the same liabilities to all service providers, it does not impose a general obligation on ISPs to monitor and investigate content on their services, and it does not explicitly require ISPs to act upon knowledge of infringing content.

In contrast to Thailand's broad, catch-all definition, the European Union's E-Commerce Directive categorizes ISPs into three distinct types, based on the kind of service they provide. These types include:

- (i) "mere conduit" ISPs, which only act as transmission channels;
- (ii) "caching" ISPs, which provide transmission and temporary storage, without modification, of files and data; and
- (iii) "hosting" ISPs, which allow individuals and organizations to make their websites accessible via the Internet.

It is important to determine the type of ISP because each kind has different liabilities under the E-Commerce Directive, unlike the Thai Copyright Act which attributes the same liabilities to all service providers. Determining the type of ISP is challenging, however, because ISPs usually offer a variety of services.

Similar to the Thai Copyright Act, the E-Commerce Directive does not impose general monitoring and investigation obligations on ISPs. Liability is limited to knowledge of infringing content on their services, and the type of ISP influences when the knowledge requirement is satisfied, especially when hosting data and not merely transmitting data.

### **Taking Action as a Copyright Owner**

To take down infringing content hosted in Thailand under the amended Thai Copyright Act, copyright owners may petition the Court for preliminary injunctive relief before bringing a lawsuit against an infringer. Section 32/3 of the Thai Copyright Act describes the procedure of a preliminary injunction to remove infringing content from the Internet.

To request an injunction, the copyright owner must provide details of the alleged infringement, including the name and address of the service provider, the copyright works at issue, the allegedly infringing works, any other investigative work, and the potential damages resulting from the infringement. Providing evidence of copyright ownership is very important.

In addition, the copyright owner is required by the Court to show a preliminary injunction is necessary. In practice, to demonstrate necessity, the copyright owner must prove to the Court that other remedies are not available. For example, the copyright owner may demonstrate it has previously requested the ISP to take action, but the ISP did not cooperate. The latest amendment of the Thai Copyright Act, however, did not include the notice-and-takedown system in the law.

The Thai Court's decision on whether or not to grant preliminary injunctive relief depends on the extent of damages incurred by each party if the injunction is granted, and the difficulty of enforcing the judgment against the alleged infringer.

For copyright owners to take down infringing content hosted in the European Union under the E-Commerce Directive, a notice-and-takedown procedure is available. Once an ISP is notified, it has knowledge of the infringement and must take action to remove or disable access to the infringing content. ISPs are required to act upon notice from a Court or when properly notified by the copyright owner.

As an example, in Italy, interim measures are used by the Court to issue a takedown notice. A copyright owner who wishes to obtain an interim measure must demonstrate a prima facie case

of infringement. The copyright owner must then prove the claim is urgent. The Court will briefly examine the case, hear both parties, and decide on the interim measure.

## **Outlook**

Thailand's amended Copyright Act and the European Union's E-Commerce Directive provide copyright owners with similar tools to take action against online copyright infringement. They may request the Courts to order ISPs to remove infringing content from their services. The E-Commerce Directive, however, allows copyright owners to notify ISPs of infringement directly without going through the Courts.

Appropriate measures to tackle online copyright infringement instill confidence in investors that their works will be protected. The amended Thai Copyright Act is a positive step forward. Over time, it may offer the same flexibility as the E-Commerce Directive, but whether circumventing the Courts offers more or less protection remains to be seen.

This summary is designed to provide general information only and is not offered as specific advice on any particular matter.

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