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Copyright Act Amendments: Combating Online Infringement – Obstacles and Prospects

Last year's amendments to the Thai Copyright Act gave copyright owners broader and more advanced tools to tackle copyright infringement in the digital age. Among these amendments, the one which has garnered the most attention is Section 32/3, which provides preliminary injunctive relief for copyright infringement on computer systems. This feature has been of particular interest to IP practitioners and scholars, who have attempted to determine how best to utilize this section in order to enforce against copyright infringement on the Internet.

While Section 32/3 was designed to address the removal of infringing copyright works online, thus far, it has resulted in a number of unsuccessful enforcement actions by content owners. This article discusses the utility of Section 32/3 to date and offers suggestions for possible improvements which could benefit all stakeholders.

Background to Section 32/3

Section 32/3 was intended to simultaneously limit the liability of Internet service providers (ISPs) and provide a procedure for content owners to have infringing content removed from the Internet, similar to the safe harbor and notice-and-takedown procedures being used in some countries. However, while these jurisdictions do not require court intervention for their notice-and-takedown processes, Section 32/3 does.

During the drafting process of Section 32/3, due to concerns about the possible risk of abuse by exploitative copyright owners or other illegitimate actors, the Office of the Council of State inserted the court as an impartial gatekeeper to review all takedown requests for compliance with the requirements of the statute. This step was designed to prevent copyright owners from excessively enforcing their rights against non-infringing content.

Such misuse of notice-and-takedown procedures has occurred in other countries through use of automated notice programs, which scan Internet platforms without human oversight and often request the removal of clearly non-infringing content. At the same time, critics have claimed that involving the court unnecessarily slows down and complicates the process, and makes ISPs less likely to voluntarily take down infringing content, absent a court order.

How Does Online Infringement Occur?

There are three main categories of platforms that infringers use to reproduce and distribute infringing works online, namely online marketplaces, social media sites, and private websites.

Each category of platform presents unique enforcement issues for content owners whose rights are infringed. A private website run by a professional counterfeiting organization is going to react very differently to a request for cooperation compared to a legitimate social media platform. Rights owners require dependable procedures to block or remove infringing content, regardless of the type of platform used by an infringer.

Methods of Removal

When an ISP is in control of content and is willing to cooperate with content owners, infringing content online may be handled through takedown requests. Due to their international presence, many of the largest online platforms, such as eBay and YouTube, have instituted their own internal brand registry and takedown procedures. These policies are found in the platforms' Terms of Use, and they operate without any involvement by the courts or other government agencies. Such cooperation between platforms and content owners is a good example of a collaborative solution to online infringement accomplished by ISPs and content owners working together.

While this is promising, it does not address how to combat the worst infringers: private websites that conduct their illegal businesses anonymously on hidden servers which may be located anywhere in the world. When infringing content is hosted by an ISP with servers in a foreign jurisdiction, blocking users from accessing the infringing content may be the only available remedy. While not itself immune from criticism, website blocking may be accomplished in a focused manner by only targeting the specific URL where the infringing content is located.

Obstacles to Enforcement Using Section 32/3

Courts have struggled with implementing Section 32/3 because it does not explicitly provide for website blocking. Takedown orders are effective with compliant ISPs under the jurisdiction of the Thai court. However, takedown orders targeting foreign ISPs with servers hosted outside of Thailand are often unenforceable and are likely to be ignored. As such, the Thai courts have been unable to provide remedies to content owners for the vast majority of infringing websites hosted on foreign servers.

Another result of Section 32/3 is that some Thai ISPs now expect to receive a court order before they will voluntarily comply with a takedown request, based on the unfounded fear that they may lose their liability exemption provided by the statute if they do otherwise. This concern has no basis in the text of the Copyright Act, but it continues nevertheless.

In addition, Section 32/3 requires plaintiffs to follow up a request for a preliminary injunction with a lawsuit, but it does not specify the type of action to be taken, whether civil, private, criminal, or by filing a charge with the police. This creates uncertainty for courts and plaintiffs over how to pursue a claim under Section 32/3. Additionally, after the content has been removed, copyright owners may think that there is no need for a lawsuit, or it may be very difficult to bring one—in a civil action, the damages may be too low to justify a suit against an anonymous defendant, and in a criminal action, the three-month prescription period is easily exceeded.

In either case, the plaintiff may require the assistance of the court to subpoena the identity of an anonymous infringer from the hosting ISP. The statute, however, does not provide for such a remedy.

Finally, although Section 32/3 appears in Part 6 of the Copyright Act—which lists exceptions to infringement of copyright—it reads like a litigation procedure. If Section 32/3 is intended to demonstrate that ISPs are not liable for unknowingly hosting infringing content on their services, then combining it with a litigation requirement does not further those ends.

The DIP's Efforts

In an encouraging move, the Department of Intellectual Property (DIP) recently proposed a draft guideline for best practices in notice-and-takedown procedures in the hope that copyright owners and ISPs will be able to work together to stop

Continued on page 4

Copyright Act Amendments (from page 3)

the dissemination of infringing content on the Internet. Thus far, however, this draft guideline has only been shared with a focus group of major copyright owners as a pilot project and has not yet been distributed publicly or become official.

The DIP also recently circulated a letter stating that it is teaming up with the National Broadcasting and Telecommunication Commission (NBTC) to increase its enforcement efforts against online infringement. To that end, the NBTC will begin working with copyright owners to block access to infringing sites before the end of the year. While the letter does not disclose the method that will be used to block access to sites, this should be seen as a positive step in the fight against online infringement.

The DIP is also exploring the opportunity to collaborate with the Ministry of Digital Economy and Society (formerly the Ministry of Information and Communication Technology) by changing the draft amendment of the Computer Crime Act to provide for blocking infringing content on the Internet. It should be noted that the draft amendment of the Computer Crime Act is not expected to be finalized until

sometime next year, so copyright owners may have awhile to wait before this cause of action is available in Thailand.

While the DIP's recent efforts are not yet close to actual implementation, they demonstrate that the DIP is listening to copyright owners and is intent on addressing online infringement.

Outlook

Section 32/3 of the Copyright Act has created a safe harbor for ISPs by limiting their liability for infringing content which is posted to their services by third parties. However, in these situations, injunctive relief has eluded content owners. Until this matter is resolved, to obtain reliable results content owners should broaden the scope of their enforcement strategies and not limit themselves to Section 32/3 alone.

In addition, the utilization of traditional investigative methods may also be effective in locating and identifying anonymous infringers online. Content owners should actively collaborate with experienced legal counsel in order to create comprehensive enforcement strategies to best protect their digital content. ⚖️