



LIABILITIES OF INTERNET SERVICE PROVIDER FOR ONLINE  
COPYRIGHT INFRINGEMENT UNDER  
COPYRIGHT ACT B.E. 2537

BY  
MR. TEETUT MATEEVIRIYAPORN

AN INDEPENDENT STUDY PAPER SUBMITTED IN  
PARTIAL FULFILLMENT OF THE REQUIREMENT  
FOR THE DEGREE OF MASTER OF LAWS  
(BUSINESS LAW)

GRADUATE SCHOOL OF LAW  
ASSUMPTION UNIVERSITY

JUNE 2014

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Independent Study Paper Title : Liabilities of Internet Service Provider for Online  
Copyright Infringement under Copyright Act B.E. 2537  
Author : Mr. Teetut Mateeviriyaporn  
Major : Master of Laws (Business Law)  
Advisor : Mr. Wisit Yanpirat

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Faculty of Law, Assumption University approves this Independent Study Paper as the partial fulfillment of the requirement for the Degree of Master of Laws.

  
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## ABSTRACT

The objective of this research focuses on the liability of Service Provider on Online Copyright Infringement that occurs from their online business operation stated in Thailand's Copyright Act B.E.2537 (1994), as well as other foreign laws such as the United States and the United Kingdom. Likewise, for studying the Safe Harbor and the Notice and Takedown policy in order to provide an exemption for the liabilities of Internet Service Provider arisen from Online Copyright Infringement, this research shall focus only the Internet Service Provider (Hosting Providers) established in Thailand.

It is found that, at present, the Copyright Act B.E.2537 does not specify the duties and liabilities of Online Copyright Infringement. Therefore, Internet Service Providers have certain duties and liabilities because the Copyright Act B.E.2537 does not provide the exemption on liabilities for the Internet Service providers arisen from Online Copyright Infringement. Hence, it is not appropriate for the Internet Service Providers to be liable for Online Copyright Infringement. It is essential to amend the Copyright Act B.E.2537 for providing the duties and exemption on liabilities for the Internet Service Providers arisen from Online Copyright Infringement.

This study provides the comprehensive understanding the copyright laws of foreign countries relating to the liability of Internet Service Provider for online Copyright Infringement, understanding the Notice and Takedown policy in foreign countries and understanding the liability of the Internet Service Provider for Online Copyright Infringement arisen from the business Operation under the Copyright Act B.E.2537.

This study is end up with the proposed recommendations on the amendment of Thai Copyright Act B.E. 2537 and applying the Notice and Takedown practice to use in Thailand as best practice in order to provide an exemption for the liabilities of Internet Service Provider arisen from Online Copyright Infringement in Thailand.



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# Chapter 1

## Introduction

### 1.1 Background and General statement of the problem

As the Internet has been growing to permeate all aspects of the economy and society, therefore, there are the roles of the Internet intermediaries (Service Provider) that enable economic, social and political interactions between third parties on the Internet. They provide access to host, transmit and index content originated by third parties on the Internet; facilitate interactions or transactions between third parties on the Internet; or provide other Internet-based services to third parties.

Problematic content may originate from a party with whom the ISP had a contractual relationship, such as a subscriber, from a third party with no contractual relationship with the ISP, such as a newsgroup posting, or from the ISP itself. The policy issues raised by the different classifications of authorship, responsibility, control and types of content were generally not uniformly dealt with in early jurisprudence. The result was widely differing regimes both across legal systems and under the same legal system, depending on the type of content or the type of “publisher”, “author” or “host”.<sup>1</sup>

Legal issues may arise because of the distribution of content or the provision of services on the Internet. While the vast majority of activities on Internet intermediary platforms are lawful, illegal activities raise questions of liability. A text, image, song or user-generated video might contain illegal images of child pornography, infringe a copyright, incite racial hatred, infringe laws on truthful advertising, give misleading advice, or reveal facts embargoed by laws of confidence or contempt of court rules.

Nevertheless, in foreign countries such as the United States of America, the European Union, and others. There is a “Safe Harbor” policy to limit the liabilities of the Internet Service Provider for the third-party in their own laws. The United States applies the Safe Harbor, Notice and Takedown procedures as the parts of the Digital Millennium

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<sup>1</sup> Daniel Seng, Associate Professor, Faculty of Law, National University of Singapore The role of Internet Intermediaries in Advancing Public Policy Objective, (OECD publishing, 2011), p. 20-25.

Copyright Act of 1998 legislated in Section 512(f)-(g). Those laws are imposing the civil liabilities for the Service Provider. The purpose of the Notice and Takedown procedures is to set forth the limitation of liability for damages of specified telecommunications service providers and the right to demand disclosure of identification information of the senders in case of harmful content, illegal content, or violation of the law through information distribution by specified telecommunications services. In respect of this issue, there can classify the Service Providers based on their functional characters into following types:

1. An access provider, which connects an end user's computer to the Internet, using cables or wireless technology, or also facilitating the equipment to access the Internet;

2. A transit provider, which allows interaction between computer and the access provider, including the hosting provider, and its function is merely the transmission of data (mere conduit);

3. A hosting provider has one or several computers with available space or “servers”, with access to transit providers, which may be used for its own purposes or for use by third parties, who make content available from other computers connected to access and transit providers. A hosting provider will offer technologies to feature content on the web, to send, receive and administer emails, store files, etc. A distinction may be established between caching, where the purpose of hosting is to facilitate the functioning of the network through automatic, intermediate and transient storage of information, and hosting, that is, commercial or other storage that is permanent or more than merely provisional.<sup>2</sup>

In part of the Internet Service Provider, there are the Notice and Takedown procedures to impose the duties and limited liabilities of Service Provider. A Service Provider will be a censorship body by choosing Takedown information from a website upon receipt of a claim to avoid the liabilities. For the Notice and Takedown procedures, whenever an ISP receives a complaint – a notice – about illegal or unlawful content, the ISP has to decide whether the information is indeed illegal or unlawful and if so, it should

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<sup>2</sup> Claudio Ruiz Gallardo and J. Carlos Lara Gálvez, Liability of Internet Service Providers (ISPs) and the exercise of freedom of expression in Latin America, at <http://www.mass.co.cl/acui/leyes-jijena2.html>, (last visited 3 November 2013).



remove the website from its server or block access to it – take down –.<sup>3</sup>

There can see that in foreign countries, they have adopted the Safe Harbor and the Notice and Takedown procedures into the law for making the Service provider to have the procedures in order to prove themselves that they have no actual knowledge of illegal activity or information that occurs in their platforms. Moreover, foreign countries also impose the obligations and liabilities of the Internet Service Provider as civil liabilities.

In Thailand, there is a concern on the Online Copyright Infringement. Nevertheless, Thailand still has no the Safe Harbor and the Notice and Takedown Principle in Thai law. The issues about the liability of the third-party Internet Service Provider for Online Copyright Infringement have been merely mentioned in the Copyright Act B.E.2537 (1994) Section 31(2) stated that Whoever knows or should have known that a work is made by infringing the copyright of another person and commits any of the following acts against the work for profit shall be deemed to infringe the copyright (2) communication to public<sup>4</sup>. This means that the Service Provider will be liable for any offense or infringement that occurs in their platforms even though the Service provider does not know the act of those Copyright infringements. Therefore, it seems unfair for Service Provider and causes increasing obligation to Service Provider. Afterwards, the Internet intermediaries (Internet Service Provider) argued that they are mere conduit, not content providers, and thus that it would be inequitable to hold them liability. They aim to not be treated as a creator or a facilitator of content, but as a conduit like a postal service. They did not want to be classified as a publisher because of risks raised by making the content available for public.

Information on the Internet is distributed, hosted and located by Internet intermediaries, which their roles in the structure of the Internet economy are critical. They provide increasingly significant social and economic benefits through information, e-commerce, communication/social networks, participative networks, or web services. They contribute to economic growth and finance, they including operate and maintain most Internet infrastructures and stimulate employment and entrepreneurship, also enable

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<sup>3</sup> Christian Ahlert, Chris Marsden and Chester Yung, How 'Liberty' Disappeared from Cyberspace: The Mystery Shopper Tests Internet Content Self-Regulation, (Bertelsmann Foundation Publishers, 1999), p. 10-15.

<sup>4</sup> Copyright Act B.E 2537 (1994): Section 31(2).

creativity, collaboration and innovation as well as user empowerment and choice. By enabling individuality and self-expression, they also offer potential improvements in the quality of societies in terms of fundamental values such as freedom and democracy.

For this research, the researcher shall specifically study only Internet Service Provider established in Thailand and when the researcher mentions about Internet intermediaries, this shall mean the Service Provider and the Internet service providers (ISPs), including hosting providers.

## 1.2 Objective of the study

1. To study the Copyright laws of foreign countries relating to the liability of Internet Service Provider on Online Copyright Infringement.
2. To study the Notice and Takedown policy in foreign countries.
3. To study the Liability of the Internet Service Provider on Online Copyright Infringement arisen from the business operation under the Copyright Act B.E.2537 (1994).
4. To study and analyze the problem of the Internet Service Provider arisen from Business Operation in order to liable for Online Copyright Infringement under the Copyright Act B.E.2537 (1994).

## 1.3 Hypothesis of the Research

At present, the Copyright Act B.E.2537 (1994) does not specify the duties and liabilities of Online Copyright Infringement. Therefore, Internet Service Providers have certain duties and liabilities because the Copyright Act B.E.2537 (1994) does not provide the exemption on liabilities for the Internet Service providers arisen from Online Copyright Infringement. Hence, it is not appropriate for the Internet Service Providers to be liable for Online Copyright Infringement. It is essential to amend the Copyright Act B.E.2537 (1994) for providing the duties and exemption on liabilities for the Internet Service Providers arisen from Online Copyright Infringement.



## 1.4 Study Methodology

The methodology of this research is a documentary research. The primary sources are the Copyright Act B.E.2537 (1994), the E-Commerce Directive of European Union and the Digital Millennium Copyright Act of the United States of America. Furthermore, related articles, books, sections in law, journals, and information on Internet are also used in this study.

## 1.5 Scope of the study

This research focuses on the liability of Service Provider on Online Copyright Infringement that occurs from their online business operation stated in Thailand's Copyright Act B.E.2537 (1994), as well as other foreign laws such as the United States and the United Kingdom. Likewise, for studying the Safe Harbor and the Notice and Takedown policy in order to provide an exemption for the liabilities of Internet Service Provider arisen from Online Copyright Infringement, this research shall focus only the Internet Service Provider (Hosting Providers) established in Thailand.

## 1.6 Expectation of the Study

1. To understand the copyright laws of foreign countries relating to the liability of Internet Service Provider for online Copyright Infringement.
2. To understand the Notice and Takedown policy in foreign countries.
3. To understand the liability of the Internet Service Provider for Online Copyright Infringement arisen from the business Operation under the Copyright Act B.E.2537 (1994).
4. To recommend for applying the Notice and Takedown practice to use in Thailand as best practice in order to provide an exemption for the liabilities of Internet Service Provider arisen from Online Copyright Infringement in Thailand.

## **Chapter 2**

### **General Principle, Copyright Protection and Liability of Internet Service Provider under the Copyright Law**

Chapter 2 mentions the General principle of Copyright Protection, Copyright Infringement, Exception of the Copyright Infringement, Type of the Copyright Infringement, the Development of the Copyright Infringement, and Concept of the Notice and Takedown Procedures.

#### **2.1 Development of Copyright Law in Thailand**

Since Thailand joined the World Trade Organization (WTO), it has abided by the enforcement of intellectual property rights under the Trade-Related Aspects of Intellectual Property Rights (TRIPs). One of the laws being enforced is the Copyright Act B.E. 2537 (1994).

At the beginning, this law did not provide much protection to publications in Thailand. Only novel and poem were covered. For meeting international standards, hence, Thailand enacted the Copyright Act B.E.2537 (1994). The first copyright law started in 1892 with the Announcement of the Vajiranana Library which "prohibited the reproduction of novels, poems and articles published in Vajirayarnvises Books, which were published for the Vajiranana Library, without permission from the Board of the Library." Afterwards, in 1901, Thailand made the first step towards protecting all authors and their works with the Ownership of Authors Act B.E.2444 by prohibiting reproduction without authorization of the authors. The Act for Protection of Literary and Artistic Works B.E.2474 was enacted in 1931 and was the first time that the word "copyright" was defined. There was an expansion of copyright's definition to cover artistic, scientific and foreign works. The Copyright Act B.E.2521 (1978) increased penalties for copyrighted material and expanded to what is covered as copyrighted material.

This is the most recent law regarding copyrighted material, and is followed in Thailand today. The first difference from previous laws was the works covered, including databases, computer programs, and literary works. Performers' rights were added to this



version to cover "exclusive rights concerning broadcasting of their performances, the recording of their unrecorded performances and the reproduction of their recorded performances." The next difference is that preliminary injunctions can be directed toward infringers, and any profits made by them can be paid back to the owner. The new intellectual property court is to be run by "two legal experts on intellectual property matters and a judicial assistant who has knowledge in computer software and science." Rental rights allowed the owner exclusive rights to distribute copies of his or her work. Finally, the penalties for infringement are much higher.<sup>5</sup>

In 1992, Thailand established the Department of Intellectual Property (DIP) under the Ministry of Commerce. This enabled Thailand to "administer copyrights, patents and other intellectual property issues, and cooperate with related agencies both domestic and international." Until 1997 the Central Intellectual Property and International Trade Court (IP&IT Court) was established. The IP&IT Court is responsible for overseeing disputes involving intellectual property. These efforts have brought Thailand close to U.S. copyright standards.

## **2.2 Concept of Copyright Protection**

### **2.2.1 Works Protected by the Copyright Act B.E.2537**

According to Section 6 under the Copyright Act B.E.2537 of Thailand there are 9 works that are protected by the Copyright Act B.E.2537 as follows:

1. "Literary Work" means any kind of literary work such as books, pamphlets, writings, printed matters, lectures, sermons, addresses, speeches, including computer programs.

- 1) "Computer program" means instructions, set of instructions or anything, which are used with a computer so as to make the computer work or to generate a result no matter what the computer language is.

2. "Dramatic Work" means a work with respect to choreography, dancing, acting or performance in dramatic arrangement, including a pantomime.

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<sup>5</sup> World Intellectual Properties Organization, Development of Copyright Law in Thailand, at <http://www.wipo.int/wipolex/en/details.jsp?id=3801>, (last visited 3 November 2013).



3. "Artistic work" means a work of any one or more of the following characters:

1) Work of painting and drawing which means a creation of configuration consisting of lines, lights, colors or any other things or the composition thereof upon one or more materials.

2) Work of sculpture, which means a creation of configuration with tangible volume.

3) Work of lithography, which means a creation of picture by printing process and includes a printing block or plate used in the printing.

4) Work of architecture, which means a design of building or construction, a design of interior or exterior decoration as well as a landscape design or a creation of a model of building or construction.

5) Photographic work which means a creation of picture with the use of image- recording apparatus which allows the light to pass through a lens to a film or glass and developed with liquid chemical of specific formula or with any process that creates a picture or an image-recording with any other apparatus or method.

6) Work of illustration, map, structure, sketch or three-dimensional work with respect to geography, topography or science.

7) Work of applied art which means a work which takes each or a composition of the works mentioned in (1) to (6) for utility apart from the appreciation in the merit of the work such as for practical use of such work, decorating materials or appliances or using for commercial benefit. Provided that, whether or not the work in (1) to (7) has an artistic merit and it shall include photographs and plans of such work.

4. "Musical work" means a work with respect to a song which is composed for playing or singing whether with rhythm and lyrics or only rhythm, including arranged and transcribed musical note or musical diagram.

5. "Audio visual work" means a work, which consists of a sequence of visual images, recorded on any kind of material and which is capable of being replayed with equipment necessary for such material, including the sound track of such work, if any.

6. "Cinematographic work" means an audiovisual work which consists of a sequence of visual images which can be continuously shown as moving pictures or can be recorded upon another material so as to be continuously shown as moving pictures,

including the sound track of such cinematographic work, if any.

7. “Sound recording work” means a work which consists of sequence of music, sound of a performance or any other sound recorded on any kind of material and capable of being replayed with an equipment necessary for such material but not including the sound track of a cinematographic work or another audiovisual work.

8. “Broadcasting work” means a work which is communicated to public by means of radio broadcasting, sound or video broadcasting on television or by any other similar means.

9. Other works that are related to literary, scientific or artistic domain whatever may be the mode or form of its expression.

### **2.2.2 Exclusive Right**

In copyright law, the exclusive rights are rights that are reserved for the copyright owner. The copyright owner is the sole person who can exercise those rights or grant them to others through a license. In the event that a copyright owner grants an exclusive right, it is possible to terminate that transfer at a later date. This is designed to protect copyright holders for the duration of their copyrights.<sup>6</sup>

There are six exclusive rights, sometimes referred to as the “pillars of copyright.” They are all protected under the law. The first and perhaps the most important is the right to reproduce a work. While people can reproduce excerpts of a work in fair use, they cannot substantively copy a work. For example, quoting several sentences from a book in a review with appropriate attribution is fair use. Reprinting an entire book is not, because only the copyright holder has the right to reproduce the work.

Copyright holder also reserves the right to make derivative works, including works that transform the original work. The law, however, allows for derivative works that are clearly parodies. Thus, someone cannot take a book, change a few elements in the story, and reprint it for profit. Someone can, however, make a parody of the original work, which, while clearly referencing the work it is based on, is also, an original work.

Other exclusive rights include the right to publicly perform, display, and transmit copyrighted works. Performance includes things like plays and musical

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<sup>6</sup> Faculty of law Cornell University, Meaning of Exclusive right, at <http://www.law.cornell.edu/uscode/text/17/106>, (last visited 3 November 2013).



compositions, while the right to display works applies to things like sculpture, photography, and other works of visual art, including stills from films. Transmission applies to radio and television broadcasts and other means of transmission. Limitations on who is allowed to present work are designed to present situations in which people profit or benefit from performing, transmitting, or displaying work that is not theirs.

Finally, the copyright holder holds the exclusive right of distribution. Copyright holder determines how and when his work is distributed and by whom. Controlling avenues of distribution allows people to decide not only who uses their work, but how it is used. In all cases, the exclusive rights provide people with the means of controlling their creative work.

Exclusive rights are not unlimited. The approach to copyright is also commonly in a state of flux. For example, some people might argue that sampling of songs for remixes, as is done in clubs, is copyright infringement. Others do not agree, including some artists who actively encourage people to sample their work.<sup>7</sup>

In Thailand under the Copyright Act B.E.2537, the exclusive rights for the Copyright Owner are imposed in Section 15 as follows:

#### **Section 15**

Subject to Section 9, Section 10 and Section 14, the owner of copyright has the exclusive rights of:

- (1) reproduction or adaptation;
- (2) communication to public;
- (3) letting of the original or the copies of a computer program, an audiovisual work, a cinematographic work and sound recordings;
- (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.

Whether the conditions as mentioned in sub-section (5) of the paragraph one are unfair restrictions of the competition or not shall be considered in accordance with the rules, methods and conditions set forth in the Ministerial Regulation.<sup>8</sup>

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<sup>7</sup> IT Law, Exclusive right, at [http://itlaw.wikia.com/wiki/Exclusive\\_rights](http://itlaw.wikia.com/wiki/Exclusive_rights), (last visited 3 November 2013).

<sup>8</sup> Copyright Act B.E. 2537: Section 15.



### 2.2.3 Copyright Infringement

Copyright Infringement is the use of copyrighted works, infringing the copyright holder's exclusive rights; such as the right to reproduce, distribute, display or perform the copyrighted work, or to make derivative works, without permission of the copyright holder, which is typically a publisher or other businesses representing or assigned by the work's creator.

In general, the copyright law in each country regulates the Exclusive Rights of the Copyright owner, which means other persons are prohibited to act anything with the copyrighted works without the permission of the copyright owner. If they use the copyrighted works without the permission of the copyright owner, such act is called as "Copyright Infringement". Under the Copyright Act B.E.2537 (1994) of Thailand, the works of authorship under Section 6, which includes literary, dramatic, artistic, musical, audio visual, cinematographic, sound recording, sound and video broadcasting work or any other works in the literary, scientific or artistic domain, are protected under this law. The Copyright Owner will have the exclusive rights provided by Section 15 of the Copyright Act B.E.2537 (1994) over their works; for example the right to reproduce, perform and display publicly.

In Thailand, the Copyright Infringement is prescribed in the Copyright Act B.E. 2537 (1994) and can be divided into 2 main categories as follows:

#### 1. Primary Infringement (Direct Infringement)

For occurring primary infringement, there must have been a direct infringement of exclusive rights by person/organization. To determine whether there was in fact a direct infringement, you must determine whether the defendant himself, reproduced, performed, displayed, etc., the copyright holder's work and without permission. If the answer is yes, then it is a direct or primary infringement. The copyright holder will most likely use circumstantial evidence to prove that the exclusive right is violated regardless of confession of the defendant. The copyright holder is needed to show that the defendant has violated the copyright holder's work, and then must prove the similarity between the works to sustain a conclusion that the defendant has actually infringed. Both these requirements are factual determination, and the fact finder will use all available evidences to reach a conclusion. Then, the final requirement of infringement

is that the defendant took enough of the copyright holder's material as to warrant a finding of infringement. This is generally accomplished by comparing the similarities between the works.<sup>9</sup>

According to the Copyright Act B.E.2537, the general rule of the primary infringement is prescribed in four sections as follows:

Section 27 stated that "Any of the following acts against a copyright work by virtue of this Act without the permission in accordance with Section 15(5) shall be deemed an infringement of copyright:

- (1) reproduction or adaptation,
- (2) communication to public"

Section 28 stated that "Any of the following acts against an audiovisual work, a cinematographic work or a sound recording copyrightable by virtue of this Act without the permission in accordance with Section 15(5) whether against the sound or image shall be deemed an infringement of copyright:

- (1) reproduction or adaptation,
- (2) communication to public,
- (3) letting of the original or copies of the work"

Section 29 stated that "Any of the following acts against a sound and video broadcasting copyrightable by virtue of this Act without the permission in accordance with Section 15(5) shall be deemed an infringement of copyright:

- (1) making an audiovisual work, a cinematographic work, a sound recording or a sound and video broadcasting work whether of the whole or in part,
- (2) rebroadcasting whether of the whole or in part,
- (3) making a sound and video broadcasting work to be heard or seen in public by charging money or another commercial benefit"

Section 30 stated that "Any of the following acts against a computer program copyrightable by virtue of this Act without the permission in accordance with Section 15(5) shall be deemed an infringement of copyright:

- (1) reproduction or adaptation,

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<sup>9</sup> Department of Intellectual Property, Primary Infringement, at <http://www.ipthailand.org>, (last visited 4 December 2013).



- (2) communication to public,
- (3) letting the original or copy of the work”

## **2. Secondary Infringement (Indirect Infringement)**

Secondary Infringement or Indirect Infringement is the infringement that occurs after the primary infringement and somehow supports the distribution of illegal copies of work. The secondary infringement concerns or focuses on the knowledge of an infringer. If an infringer “knows” or “should know” that the work is made by infringing the copyright and then carries on such infringement by selling or performing to public, etc. Any person who carries out the copyright infringement shall be deemed as infringer in the Secondary Infringement. Therefore, Thailand prescribes the Secondary Infringement in Section 31 under the Copyright Act B.E.2537 as follows:

Section 31 stated that “Whoever knows or should have known that a work is made by infringing the copyright of another person and commits any of the following acts against the work for profit shall be deemed to infringe the copyright:

- (1) selling, occupying for sale, offering for sale, letting, offering for lease, selling by hire purchase or offering for hire purchase,
- (2) communication to public,
- (3) distribution in the manner which may cause damage to the owner of copyright,
- (4) self-importation or importation by order into the Kingdom”

From the above Section, a person, who shall be considered as infringing the copyright and shall be liable under this Section even he does not directly commit the copyright infringement, is the person who commits any of the acts, provided in (1)-(4) of Section 31 against the copyrighted work for profit by knowing or having a reason to believe that such work is an infringed copyright work

### **2.2.4 Exception of Copyright Infringement**

In general, the exception of Copyright Infringement is “Fair use”. Fair use is a limitation and exception to the exclusive rights granted by copyright law to the author of a creative work. In the copyright law of the United States, fair use is a doctrine that permits limited use of copyrighted material without acquiring permission from the rights’ holder. The examples of fair use include commentary, search engines, criticism, news



reporting, research, teaching, library archiving and scholarship. It provides for the legal, unlicensed citation or incorporation of copyrighted material in another author's work under a four-factor balancing test.<sup>10</sup>

According to the Copyright Act B.E.2537, there are the exceptions of the copyright infringement prescribed in Section 32 - Section 43. However, there is no exception of online copyright infringement for the Service Provider. In this research, the researcher will discuss on some exceptions as example. Under the Copyright Act B.E. 2537 (1994), any act against the copyrighted works, which shall not be deemed an infringement of copyright, are as follows:

1. For research, study of work which non-profit.<sup>11</sup>
2. Use for personal benefit or the benefit of himself and other family member.
3. Comment, criticism or introduction of work with an acknowledgement of the ownership of copyright in such work.
4. Reporting of news through mass media with an acknowledgement of the ownership of such work.
5. Reproduction of the copyright works by the librarian in the library and the purpose of such reproduction are not for profit.<sup>12</sup>
6. Reproduction, adaption, exhibition or display by teacher for the benefit of the teaching and not for profit.
7. Use of work as part of questions and answers in an examination.<sup>13</sup>

## 2.3 Copyright Infringement

For the meaning of Copyright Infringement, the researcher discusses in the part of 2.2.3; but for this part, the researcher will discuss about the types of the Copyright Infringement because the world has been developing very fast. Many things have been

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<sup>10</sup> Department of Intellectual Property, The Fair Use Manual, at <http://www.ipthailand.org>, (last visited 4 December 2013).

<sup>11</sup> Copyright Act B.E. 2537: Section 32-35

<sup>12</sup> Copyright Act B.E. 2537: Section 34.

<sup>13</sup> Copyright Act B.E. 2537: Section 32(8).

changed; such as the way of communication, which in the past, people used paper for sending letter or mail to someone, but at present, people send an electronic mail (E-mail) through internet to someone. Therefore, the way of Copyright Infringement has been changing from past to present. Currently, the Copyright Infringement can be classified into 2 types as follows:

### **2.3.1 General Copyright Infringement**

General copyright infringement is the copyright infringement under general copyright law. If an original is copyrighted, the owner of such work has the exclusive rights to use, publish, disseminate, and change that work for a certain amount of time. Other persons or entities cannot use or distribute such work without the copyright owner's permission. If any person attempts to use or distribute such work without authorization, such person may be found guilty of copyright infringement.

### **2.3.2 Online Copyright Infringement**

In the rapidly changing world of internet, a big factor which must be considered is an online copyright infringement. Traditionally, online copyright infringement would constitute hosting, distributing, or downloading of copyrighted work without the consent of the copyright owner. There are multiple aspects determining the details of the online copyright infringement.

The online copyright infringement occurs when a person or entity uses or circulates information over the Internet without authorization from the entity or person who has the exclusive and legal rights to do with such information.

Moreover, the online copyright infringement is one form of intellectual property theft which can lead to significant legal penalties and security issues. Common online copyright violations include illegally downloading music files and movies, as well as pirating certain types of software applications. Posting online a copyrighted work, such as a drawing or writing without permission of the owner, may also constitute online copyright infringement.

Additionally, the online copyright infringement can result in a range of legal problems for unauthorized user. Normally, the penalties for Internet copyright infringement vary based on the severity of the crime. If people have found guilty of lesser types of infringement, such as illegally downloading couple of music files, may simply be fined; however, greater violations can lead to jail.



Furthermore, people who participate in illegal Internet downloading can inadvertently put their computer security systems at risk. Computer hackers often capitalize on web sites that provide user with the ability to illegally download music, videos, and software. Some hackers purposely infect the files on these sites with harmful codes that can be difficult to uncover and eliminate. An internet user's computer may be infected when one of these contaminated files is downloaded on it.<sup>14</sup>

## **2.4 Liability of Internet Service Provider for online Copyright Infringement**

### **2.4.1 Definition of "Internet Service Provider"**

An Internet service provider (ISP and also called Internet access provider) is a business or organization that offers user for accessing to the Internet and related services. Many but not all ISPs are telephone companies or other telecommunication providers which provide services such as Internet access, Internet transit, domain name registration and hosting, dial-up access, leased line access and collocation. Internet service providers may be organized in various forms, such as commercial, community-owned, non-profit, or otherwise privately owned.

### **2.4.2 Types of Internet Service Provider**

An Internet service provider (ISP and also called Internet access provider) is a business or organization that offers user for accessing to the Internet and related services. Many but not all ISPs are telephone companies or other telecommunication providers. Providing services such as Internet access, Internet transit, domain name registration and hosting, dial-up access, leased line access and collocation. Internet service providers may be organized in various forms, such as commercial, community-owned, non-profit, or otherwise privately owned.<sup>15</sup> Hence, this Research will classify the Internet Service Provider into 3 types as follows:

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<sup>14</sup>Online Copyright Infringement, at <http://faculty.ist.psu.edu/bagby/432Spring12/T15/definition.html>, (last visited 11 December 2013).

<sup>15</sup>CAT Telecom Public company, Definition of Internet Service Provider, at <http://www.cat.net.th/isp/>, (last visited 30 November 2013).



## 1. Access Provider

Access Providers employ a range of technologies to enable consumer to connect to their networks. The available technologies have ranged from acoustic couplers to telephone lines, to cable, Wi-Fi, and fiber optics.

For user and small business traditional options include copper wires to provide dial-up, DSL (typically asymmetric digital subscriber line, ADSL), cable modem or Integrated Services Digital Network (ISDN) (typically basic rate interface). Using fiber optics to end-users is called Fiber to the Home or other similar names.

For customer with more demanding requirements, such as medium-to-large businesses, or other ISPs, higher-speed DSL (such as single-pair high-speed digital subscriber line ), Ethernet, metropolitan Ethernet, gigabit Ethernet, Frame Relay, ISDN Primary Rate Interface, ATM (Asynchronous Transfer Mode) and synchronous optical networking (SONET) can be used. Wireless access is another option, including satellite Internet access. Many access providers also provide hosting and email services.<sup>16</sup>

## 2. Transit ISPs

As customer pay ISPs for Internet access, ISPs themselves pay upstream ISPs for Internet access. An upstream ISP usually has a larger network than the contracting ISP and/or is able to provide the contracting ISP with access to parts of the Internet. The contracting ISP by itself has no access to.

In the simplest case, a single connection is established to an upstream ISP and is used to transmit data to or from areas of the Internet beyond the home network; this mode of interconnection is often cascaded multiple times until reaching a Tier 1 carrier. In reality, the situation is often more complex. ISPs with more than one point of presence (PoP) may have separate connections to an upstream ISP at multiple PoPs, or they may be customers of multiple upstream ISPs and may have connections to each one of them at one or more point of presence. Transit ISPs provide large amounts of bandwidth for connecting hosting ISPs and access ISPs.<sup>17</sup>

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<sup>16</sup> Cisco, Access Provider, at <http://www.cisco.com/en/US/solutions/collateral>, (last visited 30 November 2013).

<sup>17</sup> NTT Communication, Transit ISPs, at <http://www.ntt.net/english/service/modelcase/isp.html>, (last visited 30 November 2013).

### 3. Hosting ISPs

Hosting ISPs is the service that makes your website available to be viewed by others on the Internet. A web host provides space on its server, so that other computers around the world can access your website by means of a network or modem. There are literally thousands of web hosting services available today, ranging from free services with limited options to expensive, specialized business web hosting services. Which option you choose depends primarily on how you plan to use your website and how much you want to spend.<sup>18</sup>

#### 2.4.3 Characteristic of ISP's Liability for Online Copyright Infringement

An infringer for Internet case may not only be the copyright owner, somehow the Internet Service Provider (ISP) might also be involved because reproduction of document, sound recording, art work, or other copyrightable works are arisen whenever the works are uploaded or downloaded. The ISP may make numerous additional reproductions of the works as they are transmitted from computer to computer through internet. Furthermore, in the absence of express or implied consent from the copyright owner, each of these reproductions may infringe the copyright. Additionally, many unauthorized transmissions of works are likely to be deemed infringing distribution rights to the public or public displays, particularly since the doctrine of first sale is unlikely to be deemed applicable to protect the transmissions<sup>19</sup>

In 1998, the United States Congress codified the Online Copyright Infringement Liability Limitation Act prescribed in Section 512 of the Digital Millennium Copyright Act. The purpose behind the Safe Harbor is to provide those entities qualified as network systems providers with the federal immunization from claim brought against them by copyright owner.

The ISPs, such as access providers, search engines, and bulletin board services (Digital Millennium Copyright Act Section 512(k)(1) (A-B), routinely reproduce

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<sup>18</sup>Free server, Hosting ISPs, at <http://www.freeservers.com/WebHosting101>, (last visited 30 November 2013).

<sup>19</sup> Barrett, Magareht, Intellectual Property- Patents, Trademarks, & Copyrights, the Professor Series (2000), (New York: Aspen), p.21.



works, as well as transmit them, in the course of their day-to-day operations. Thus, if user infringes copyrighted works on the Internet, the ISPs who provide the user with the means to transmit, distribute, post, or locate the infringing works may themselves be deemed liable either as direct infringement or as vicarious or contributory infringers. (ISP may be found liable for indirect infringement by permitting another to use one facility for illicit purposes. In *Randall Stoner v. eBay Inc.*, eBay was sued under California state law for permitting the sale of copyrighted and bootleg musical recordings by persons using its auction facilities. The California state court held that the Communications Decency Act gives eBay immunity in that it is an interactive service provider, it is not a content provider as to the unlawful activity, and the information originated from outside, third-party sources.) So long as the ISPs are in compliance with the DMCA by using proper notification of its policy regarding the alleged copyright infringement and establishing a company agent to be notified in the event of such infringement, the ISPs are exempt from such liability and only the direct infringer shall be held liable for copyright damages.<sup>20</sup>

In Thailand, the Internet Piracy has been growing steadily. Several infringing works were found for downloading and sending on many websites. The Business Software Alliance (BSA) noted a huge increase in the number of software infringements in Thailand, from 358 per month in 2006, to 949 per month in 2007. Additionally, recent statistics suggest that mobile Internet penetration in Thailand is extremely high at well over 50% (International Intellectual Property Alliance, 2008).

Nowadays, there is no legislation in Thailand on ISP liability similarly to the United States. However, there is the Act on Organizations Allocating Frequency Waves and Supervising Radio/Television Broadcasting and Telecommunication Business B.E.2543 (2000) enacted for controlling the grant of licenses. Pursuant to the Notification regarding the Licensing for the ISP, ISPs must comply with the condition provided in the mentioned Notification, requiring the ISPs to control, verify, or warn customer to not use their services in ways that contradict any laws. Otherwise, such ISPs will be fined or withdrawn the ISPs' license.

Moreover, the majority of ISPs in Thailand generally cooperate in blocking illegal websites. It does not appear that ISPs are presently obligated to immediately

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<sup>20</sup> Ferrera Gerald R, *Cyberlaw Text and Cases* Cincinnati, (Cengage Learning), p.58.

remove or take down an infringing website, but police and copyright owner may request ISPs to remove such infringing website from its system when there is the evidence of infringement. The police may also request ISPs to provide information regarding the identity of person operating website when such information is required for investigation or when there is the evidence of infringement.

Whether an ISP will be regarded as a direct infringer, contributory, or vicarious infringer, there will be considered based on a case-by-case basis since there is currently no rule or judgment for ISP liability in Thailand.

#### **2.4.4 Copyright Act B.E.2537 (1994)**

For the liability of the Internet Service Provider in Thailand under the Copyright Act B.E.2537 (1994) enacted in Section 31, it is the Secondary Liability or Indirect Liability. It is the liability occurred by the third party (client), who uses the ISPs' service for committing online copyright infringement. Actually, the Internet Service Provider should have some measures to protect their liabilities, such as providing the procedure to notice and block the contents infringing the copyright law.

Section 31 stated that Whoever knows or should have known that a work is made by infringing the copyright of another person and commits any of the following acts against the work for profit shall be deemed to infringe the copyright:

1. Selling, occupying for sale, offering for sale, letting, offering for lease, selling by hire purchase or offering for hire purchase,
2. Communication to public,
3. distribution in the manner which may cause damage to the owner of copyright,
- (4) Self-importation or importation by order into the Kingdom.<sup>21</sup>

#### **1. Elements of Online Copyright Infringement.**

From Section 31 of the Copyright Act B.E.2537, it can be divided into three elements concerning the liabilities of Internet Service Provider.

For the first element, it is the knowing of the Internet Service Provider that such ISP "knows" or "should have known". In this part, the researcher discusses on

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<sup>21</sup> Copyright Act B.E 2537: Section 31.



knowing and supporting material in infringement of the defendant (Internet Service Provider). Vicarious liability, an outgrowth of the respondent superior doctrine, requires the right and ability of the defendant to control the actions of the infringer; and direct financial benefit from the infringement to the defendant. To discourage the facilitation of proscribed conduct, courts hold individual who aids the infringing activities of others accountable under these doctrines.<sup>22</sup> However, in judgement of the ISP's action, whether Internet Service Provider knows or communicates about the copyright infringement or not, it is the duty of the Court to make final decision.

The Second element of the Online Copyright Infringement under Section 31 of the Copyright Act B.E.2537 is the defendant directly infringes the copyrighted work of copyright's owner, such as unauthorized communication the copyrighted song to Public.

The Third element of the Online Copyright Infringement under Section 31 of the Copyright Act B.E.2537 is the defendant (Internet Service Provider) must have an intention to do the infringement for profit. In general, the Online Copyright Infringement is often done for trade or business.<sup>23</sup>

For this research, the researcher discusses Section 31(2) which relates to the liability of the Internet Service Provider. Section 31(2) of the Copyright Act B.E. 2537 (1994) enacted that "Communication to public".

The definition of the "Communication to public" under the Copyright Act B.E.2537 (1994) is provided in Section 4 stated that "Communication to public" is described as making the work available to the public by means of performing, lecturing, preaching, playing of music, causing perception by sound or image, constructing, distributing or by any other means;<sup>24</sup>

Under Section 31 of the Copyright Act B.E.2537, the Service Provider shall be deemed as infringer that infringes the copyright in their business operation services. Especially under Section 31(2), the Service Provider would be sued from the

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<sup>22</sup> Mark Bartholomew, The Secret Life of Legal Doctrine: The Divergent Evolution of Secondary Liability in Trademark and Copyright Law. (Berkeley Tech.L.J. 1363), p.10.

<sup>23</sup> Chaiyos Hermaratchata, Characteristics of Intellectual property Law, (Bangkok: Nititam Printing, 2551), p.103.

<sup>24</sup> Copyright Act B.E. 2537: Section 4.

copyright's owner as person who made communication the infringement to public. It is the Secondary Liability (Indirect Liability) of Service Provider because of their business operations providing Internet service. Such Internet Service Provider does not have an intention to do any infringement. Hence, it is not appropriate to deem that Internet Service Provider is an infringer.

Example: Mr. A is the owner of website (Service Provider), then Mr. B posts the infringing copyright (such as selling the counterfeit goods) on the website of Mr. A. For this case, Mr. A shall be deemed as infringer by communication to public according to Section 31(2). In this case, Mr. A will take liability arisen from third party (Mr. B). In fact, however, Mr. A may not have knowledge or does not know about such posting copyright infringement of Mr. B., Mr. A is only the intermediaries. Mr. A can argue that he only provides the Internet service which acts as a conduit; Mr. A has not participated with those infringements. Therefore, Mr. A should not be liable for any compensation or fine to the copyright's owner. The copyright's owner should sue the infringer. These are the main problems for Service Provider in doing online business operation in Thailand.

## **2. Duties and Liabilities of General Intermediary on Copyright Infringement**

Under Section 31(2) of the Copyright Act B.E.2537 regarding general intermediary such as television, radio broadcasting, newspaper or magazine, they may commit the indirect copyright infringement in term of communication the work which was infringed by the third party to public. In practice, when general intermediary is sued by the copyright's owner, such general intermediary has the burden of proof in proving to the court that general intermediary does not have any knowledge about those infringements. Such general intermediary only communicates the content to public. Therefore, they should not be liable for any compensation. From mentioned case, the general intermediary has to protect themselves from liabilities that shall be occurred from indirect copyright infringement by acting as a censorship to check and prove those communicated contents to public. If which content is illegal or infringing copyright, the general intermediary shall take it down or remove such content.



## 2.5 Duties of Internet Service Provider on Online Copyright Infringement in the Notice and Takedown Procedure

The first country providing the Notice and Takedown Procedure into the Copyright Law to limit liabilities of the Internet Service Provider for Online Copyright Infringement is the United States of America. Everyone has heard about “DMCA takedown notice”, however, it is not everyone understands what the “DMCA takedown notice” is. In this research, the researcher tries to explain the basic and gives some ideas about how to use the tool to protect rights and how the Notice and Takedown Policy are working.

Notice and Take down schemes – whereby intermediaries set-up procedures to handle reports about Internet intermediaries hosting illegal, infringing or undesirable content – are in widespread use. They provide a safe harbor if intermediaries remove content when receiving notification of e.g. a privacy breach or copyright infringement. Some participants expressed concern about over-notification by private complainants and lack of judicial review.<sup>25</sup>

Notice and takedown (NTD) Policy, as noted above, is a peculiar kind of Internet content self-regulatory measure. In theory it consists of a scheme, which sets forth that the parties hosting content agree to remove content in case of a legitimate notice by the consumer, without having to prove the legality of the content before a court of law. However, it seems that this is exactly the potential shortcoming: ISPs have to determine whether or not a complaint is legitimate.

At the same time the major advantage of the NTD procedure is that they reduce the high costs of litigation by providing a quick way to address consumers’ complaints. Also, the procedure in principle promotes self-regulation, which relies on constant cooperation between all actors. The drawback of NTD is that the procedure puts a new burden on the content host—the ISP who deals with this burden in the self-regulatory scheme. The quandary for the ISP is whether to strictly investigate all claims of legal infringement, which is higher cost to itself in legal and forensic resources, or to adopt a more self-serving, cheaper and easier regime. To save costs and liabilities, the ISP may

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<sup>25</sup> Organization for Economic Co-operation and Development (OECD), DMCA takedown notice, at <http://www.oecd.org/sti/ieconomy>, (last visited 9 October 2013).

remove content immediately upon notice in order to protect itself against liability or to satisfy content consumers. The ISP is encouraged to become a censorship body, to avoid liability when they choose to take down the information from a website upon receipt of a claim.<sup>26</sup>

### 2.5.1 Definition of “Notice and Takedown”

Notice and take down is a process operated by online hosts in response to court orders or allegations that content is illegal. Content is removed by the host following notice. Notice and take down is widely operated in relation to copyright infringement, as well as for libel and other illegal content. In US and European Union law, notice and takedown is mandated as part of limited liability, or safe harbor, provisions for online hosts (see the Digital Millennium Copyright Act 1998 and the Electronic Commerce Directive 2000). As a condition for limited liability online hosts must expeditiously remove or disable access to content they host when they are notified of the alleged illegality.<sup>27</sup>

In the meaning from DMCA “Notice and take down” is the process for the Internet service provider in order to have an allegedly infringing web site removed from a service provider's network, or to have access to an allegedly infringing website disabled; the copyright's owner must provide notice to the service provider with the following information:

1. The name, address, and electronic signature of the complaining party [512(c)(3)(A)(i)]
2. The infringing materials and their Internet location [512(c)(3)(A)(ii-iii)], or if the service provider is an "information location tool" such as a search engine, the reference or link to the infringing materials [512(d)(3)].
3. Sufficient information to identify the copyrighted works [512(c)(3)(A)(iv)].

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<sup>26</sup> Root secure, Notice and takedown procedure, at [http://www.rootsecure.net/content/downloads/pdf/liberty\\_disappeared\\_from\\_cyberspace.pdf](http://www.rootsecure.net/content/downloads/pdf/liberty_disappeared_from_cyberspace.pdf), (last visited 10 November 2013).

<sup>27</sup> Daniel Seng, Associate Professor, Faculty of Law, National University of Singapore The role of Internet Intermediaries in Advancing Public Policy Objective, (OECD publishing, 2011), p. 2.



4. A statement by the owner that it has a good faith belief that there is no legal basis for the use of the materials complained of [512(c)(3)(A)(v)].

5. A statement of the accuracy of the notice and, under penalty of perjury, that the complaining party is authorized to act on the behalf of the owner [512(c)(3)(A)(vi)].<sup>28</sup>

### **2.5.2 Initial Eligibility Requirements**

All service providers wishing to benefit from the safe harbors must meet three initial eligibility requirements set forth in Section 512(i) as following details:

First, the service provider must have “adopted and reasonably implemented ... a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider’s system or network who are repeat infringers.”

Second, the service provider must have informed “subscribers and account holders of the service provider’s system or network” of such policy.

Third, such policy must accommodate and not interfere with “standard technical measures.” Once these initial eligibility requirements are fulfilled, service providers must then look to the subsections applicable to their particular functions for additional requirements.

### **2.5.3 Additional Requirement for “Information Location Tools”**

Service providers offering “information location tools” must fulfill three additional requirements set forth in Section 512(d) in order to claim protection from liability for copyright infringement by third parties as following details:

First, the service provider must “not have actual knowledge that the material or activity is infringing” or, “in the absence of such actual knowledge,” must not be “aware of facts or circumstances from which infringing activity is apparent” or, “upon obtaining such knowledge or awareness,” must act “expeditiously to remove, or disable access to, the material.

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<sup>28</sup> Chilling Effect, Definition of Notice and Takedown, at <http://www.chillingeffects.org/dmca512c/faq.cgi#QID125>, (last visited 11 November 2013).

Second, the service provider must “not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity. The requirement essentially means that service providers are still subject to vicarious liability.

Finally, the service provider, “upon notification of claimed infringement,”<sup>29</sup> must respond “expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity. This final requirement establishes the “notice and takedown” procedures that copyright owners are using against Internet service providers.

#### **2.5.4 Counter-Notification Procedures.**

The DMCA safe harbor provisions also contain a detailed set of counter-notification procedures. Section 512(g)(1) provides service providers with a limitation on liability to any party based on the service providers’ “good faith” removal of “material or activity claimed to be infringing or based on facts or circumstances from which infringing activity is apparent, regardless of whether the material or activity is ultimately determined to be infringing.” Section 512(g)(2) provides an exception to this general limitation by requiring service providers to follow counter-notification procedures in order to benefit from the limitation on liability resulting from removal of materials. This section provides that a service provider can still be held liable for removal of “material residing at the direction of a subscriber of the service provider on a system or network controlled or operated by or for the service provider” unless the service provider fulfills three requirements. First, the service provider must take “reasonable steps promptly to notify the subscriber that it has removed or disabled access to the material.” Second, upon receipt of a counter-notification from the subscriber, the service provider must provide the original complainant with a copy of the counter-notification and a warning that it will replace the material in ten business days. Finally, the service provider must replace the material within ten to fourteen days after receipt of the counter-notification, unless the original complainant notifies the service provider that it has filed “an action seeking a

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<sup>29</sup> Cornell University, Additional Requirement” information location tool”, at <http://www.law.cornell.edu/uscode/text/17/512>, (last visited 4 December 2013).



court order to restrain the subscriber from engaging in infringing activity relating to the material on the service provider's system or network.”<sup>30</sup>

### **2.5.5 The elements to Takedown Notice**

As mentioned above, the researcher discussed about the Notice and Takedown Policy under the DMCA of the United States of America. It can conclude that Under the DMCA, the copyright holder and his agent can ask for removal of allegedly infringing content by providing complete takedown notice. Under the law, this notice must contain the following elements:

1. A physical or electronic signature of a person authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.
2. Identification of the copyrighted work claimed to have been infringed, or, if multiple copyrighted works at a single online site are covered by a single notification, a representative list of such works at that site.
3. Identification of the material that is claimed to be infringing or to be the subject of infringing activity and that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate the material.
4. Information reasonably sufficient to permit the service provider to contact the complaining party, such as an address, telephone number, and, if available, an electronic mail address at which the complaining party may be contacted.
5. A statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law.
6. A statement that the information in the notification is accurate, and under penalty of perjury, that the complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.<sup>31</sup>

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<sup>30</sup> Link and Law, Counter-Notification Procedures, at <http://www.linkandlaw.com>, (last visited 3 December 2013).

<sup>31</sup> Science Fiction and Fantasy Writers of America, Inc. (SFWA), The elements to Takedown Notice, at <http://www.sfwawriters.org/2013/03/the-dmca-takedown-notice-demystified/>, (last visited 29 November 2013).

This notice, which must be filed by the copyright holder or an agent working for them, is sent to the service provider's DMCA agent, which all service providers must appoint and register with the U.S. Copyright Office. Most DMCA filers, use some form of stock letter to help speed the process along.

Once the notice has been received, the host has to first make sure it is a complete notice and then they are to either remove or disable access to the infringing work. This can be done many ways but is usually handled by simply backing up and deleting the allegedly infringing material.

With that done, the host then usually contacts the client involved, who in turn has the opportunity to respond.

**Example: Procedure to file a Takedown Notice.**

If you discover that work you hold the copyright in is being infringed and wish to file a DMCA notice. You can take the following steps to do so.

1. Determine if the work is infringing, consult an attorney if necessary.
2. Take screenshots or otherwise preserve the infringing site, useful if a dispute should arise later.
3. Obtain a stock DMCA notice template and fill it in with the required information.
4. Use a service such as Yahoo.com or Domain Tools, locate the host of the site where the work is located.
5. Look on the host's site and attempt to locate the contact information for their DMCA agent.
6. Failing that, see if the host has registered with the U.S. Copyright Office and provided the needed information there.
7. If that fails, send the notice to the host's abuse team.
8. Wait at least 72 hours and ensure that the work has been removed.
9. If unable to secure removal of work (IE: Not a U.S.-based host or otherwise uncooperative), consider filing a notice with each of the major search engines.<sup>32</sup>

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<sup>32</sup> Brainz, Procedure to file a Takedown Notice, at <http://brainz.org/dmca-takedown-101/>, (last visited 20 November 2013).



If everything goes according to plan, the work should be removed in a couple of business days. Some hosts respond very quickly, even within the hour, where others make take a little more time. During in patience with your notices and on the lookout for the work to be removed or not, all hosts will send confirmations via email.

**Example: Procedure to Respond to a Notice.**

If you are on the other end of a DMCA notice, you need to take certain steps to ensure that your rights are not trampled on or that the process is not abused.

1. Request a fully copy of the notice if it isn't provided so that you can understand who filed the notice, what works they are claiming to be infringing and the works they say are the originals.

2. Determine if the notice is valid or was sent in mistake. Consult an attorney if necessary.

3. If the notice was in error or malicious, file a counter-notice as promptly as possible, even if you do not wish to have the work restored. Instructions for doing so should be included with the notification of the takedown. If required, you can use a template for responding.<sup>33</sup>

It is important to file a counter-notice if the takedown was sent in error, even if you view the takedown as not being a big deal because hosts are required to ban and delete accounts of repeat infringers. If you receive too many DMCA notices, you may find your entire account disabled, even if the takedown notices were invalid. As such, it is important to file counter-notices to prevent such an action from happening.

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<sup>33</sup> Brainz, Procedure to Respond to a Notice, at <http://brainz.org/dmca-takedown-101/>, (last visited 20 November 2013).

## **Chapter 3**

### **Copyright Infringement, Notice and Takedown Policy in Foreign Countries and International Copyright Treaties**

Besides occurred in Thailand, the problems of Internet Service Provider on Online Copyright Infringement under the Copyright law also occur in foreign countries such as in the United States of America, the European Union, and the United Kingdom. Many cases are brought to the court. Despite Internet Service Provider in those countries may be the infringer of the copyright work, there are some laws, including Conventions and Treaties that relate to the problems of Internet Service Provider on Online Copyright Infringement such as WIPO Copyright Treaty (WCT), the Berne Convention, etc.

#### **3.1 International Copyright Treaties**

##### **3.1.1 World Intellectual Properties Organization**

The roots of the World Intellectual Property Organization go back to 1883, when Johannes Brahms was composing his third Symphony, Robert Louis Stevenson was writing *Treasure Island*, and John and Emily Roebling were completing construction of New York's Brooklyn Bridge.

The need for international protection of intellectual property became evident when foreign exhibitors refused to attend the International Exhibition of Inventions in Vienna in 1873 because they were afraid their ideas would be stolen and exploited commercially in other countries.

Year 1883 marked the birth of the Paris Convention for the Protection of Industrial Property, the first major international treaty designed to help the people of one country obtain protection in other countries for their intellectual creations in the form of industrial property rights, known as:

1. Inventions (patents)
2. Trademarks
3. industrial designs

The Paris Convention entered into force in 1884 with 14 member states,



which set up an International Bureau to carry out administrative tasks, such as organizing meetings of the member States.

In 1886, copyright entered the international arena with the Berne Convention for the Protection of Literary and Artistic Works. The aim of this Convention was to help nationals of its member States obtain international protection of their right to control, and receive payment for, the use of their creative works such as:

1. novels, short stories, poems, plays;
2. songs, operas, musicals, sonatas;
3. and drawings, paintings, sculptures, architectural works.

Like the Paris Convention, the Berne Convention set up an International Bureau to carry out administrative tasks. In 1893, these two small bureaux united to form an international organization called the United International Bureaux for the Protection of Intellectual Property (best known by its French acronym BIRPI). Based in Berne, Switzerland, with a staff of seven, this small organization was the predecessor of the World Intellectual Property Organization of today - a dynamic entity with 186 member states, a staff that now numbers some 1238, from 116 countries around the world, and with a mission and a mandate that are constantly growing.

As the importance of intellectual property grew, the structure and form of the Organization changed as well. In 1960, BIRPI moved from Berne to Geneva to be closer to the United Nations and other international organizations in that city. A decade later, following the entry into force of the Convention establishing the World Intellectual Property Organization, BIRPI became WIPO, undergoing structural and administrative reforms and acquiring a secretariat answerable to the member States.

In 1974, WIPO became a specialized agency of the United Nations system of organizations, with a mandate to administer intellectual property matters recognized by the member States of the UN.

In 1978, the WIPO Secretariat moved into the headquarters building that has now become a Geneva landmark, with spectacular views of the surrounding Swiss and French countryside.

WIPO expanded its role and further demonstrated the importance of intellectual property rights in the management of globalized trade in 1996 by entering into a cooperation agreement with the World Trade Organization (WTO).

The impetus that led to the Paris and Berne Conventions - the desire to

promote creativity by protecting the works of the mind - has continued to power the work of the Organization, and its predecessor, for some 120 years. But the scope of the protection and the services provided have developed and expanded radically during that time. In 1898, BIRPI administered only four international treaties. Today its successor, WIPO, administers 26 treaties (three of those jointly with other international organizations) and carries out a rich and varied program of work, through its member States and secretariat, which seeks to:

1. harmonize national intellectual property legislation and procedures,
2. provide services for international applications for industrial property rights,
3. exchange intellectual property information,
4. provide legal and technical assistance to developing and other countries,
5. facilitate the resolution of private intellectual property disputes, and marshal information technology as a tool for storing, accessing, and using valuable intellectual property information.<sup>34</sup>

### 3.1.2 WIPO Copyright Treaty WCT (1996)

The WCT is a special agreement under the Berne Convention. Any Contracting Party (even if it is not bound by the Berne Convention) must comply with the substantive provisions of the 1971 (Paris) Act of the Berne Convention for the Protection of Literary and Artistic Works (1886). Furthermore, the Treaty mentions two subject matters to be protected by copyright as follows:

1. computer programs, whatever may be the mode or form of their expression, and
2. Compilations of data or other material ("databases"), in any form, which by reason of the selection or arrangement of their contents constitute intellectual creations. (Where a database does not constitute such a creation, it is outside the scope of this Treaty.)

For the rights of authors, the Treaty deals with three rights which are:

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<sup>34</sup> World Intellectual Properties Organization, History of WIPO, at <http://www.wipo.int/about-wipo/en/>, (last visited 28 November 2013).



1. The right of distribution,
2. The right of rental, and
3. The right of communication to the public.

Each of them is an exclusive right, subject to certain limitations and exceptions.

Not all of the limitations or exceptions are mentioned in the following details:

1. The right of distribution is the right to authorize the making available to the public of the original and copies of a work through sale or other transfer of ownership,

2. The right of rental is the right to authorize commercial rental to the public of the original and copies of three kinds of works:

1) Computer programs (except where the computer program itself is not the essential object of the rental),

2) Cinematographic works (but only in cases where commercial rental has led to widespread copying of such works materially impairing the exclusive right of reproduction), and

3) Works embodied in phonograms as determined in the national law of the Contracting Parties (except for countries that since April 15, 1994, have in force a system of equitable remuneration for such rental),

3. The right of communication to the public is the right to authorize any communication to the public, by wire or wireless means, including “the making available to the public of works in a way that the members of the public may access the work from a place and at a time individually chosen by them.” The quoted expression covers in particular on-demand, interactive communication through the Internet.

The Treaty obliges the Contracting Parties to provide legal remedies against the circumvention of technological measures (e.g., encryption) used by authors in connection with the exercise of their rights and against the removal or altering of information, such as certain data that identify works or their authors, necessary for the management (e.g., licensing, collecting and distribution of royalties) of their rights (“rights management information”).

The Treaty obliges each Contracting Party to adopt, in accordance with its legal system, the measures necessary to ensure the application of the Treaty. In particular, the Contracting Party must ensure that enforcement procedures are available under its law so as to permit effective action against any act of infringement of rights covered by the

Treaty. Such action must include expeditious remedies to prevent infringement and remedies, which constitute a deterrent to further infringements.

The Treaty establishes an Assembly of the Contracting Parties whose main task is to deal with matters concerning the maintenance and development of the Treaty, and it entrusts to the Secretariat of WIPO the administrative tasks concerning the Treaty.

The Treaty entered into force on March 6, 2002. The Director General of WIPO is the depositary of the Treaty.

This Treaty is open to States members of WIPO and to the European Community. The Assembly constituted by the Treaty may decide to admit other intergovernmental organizations to become party to the Treaty.<sup>35</sup>

The area of copyright and related rights has expanded enormously with the technological progress of the last several decades, which has brought new ways of spreading creations by such forms of worldwide communication as satellite broadcast and compact discs. Dissemination of works via the Internet is but the latest development, which raises new questions concerning copyright.

WIPO is deeply involved in the ongoing international debate to shape new standards for copyright protection in cyberspace. The organization administers the WIPO Copyright Treaty and the WIPO Performances and Phonogram Treaty (known together as the "Internet Treaties"), which set down international norms aimed at preventing unauthorized access to and use of creative works on the Internet or other digital networks.

The WCT deals with protection for authors of literary and artistic works, such as writings and computer programs; original databases; musical works; audiovisual works; works of fine art and photographs; whereas the WPPT deals with protection for authors rights of performers and producers of phonograms.

The purpose of the two treaties is to update and supplement the major existing WIPO treaties on copyright and related rights, primarily in order to respond to developments in technology and in the marketplace. Since the Berne Convention and the Rome Convention were adopted or lastly revised more than a quarter century ago, new types of works, new markets, and new methods of use and dissemination have evolved.

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<sup>35</sup> World Intellectual Properties Organization, Summary of the WIPO Copyright Treaty 1996, at [http://www.wipo.int/treaties/en/ip/wct/summary\\_wct.html](http://www.wipo.int/treaties/en/ip/wct/summary_wct.html), (last visited 28 November 2013).



Among other things, both the WCT and the WPPT address the challenges posed by today's digital technologies, in particular the dissemination of protected material over digital networks such as the Internet. For this reason, they are often referred to as the "Internet treaties."

Both treaties require countries to provide a framework of basic rights, allowing creators to control and/or be compensated for the various ways in which their creations are used and enjoyed by others. Most importantly, the treaties ensure that the owners of those rights will continue to be adequately and effectively protected when their works are disseminated through new technologies and communications systems such as the Internet. The treaties thus clarify that existing rights continue to apply in the digital environment. They also create new online rights. To maintain a fair balance of interests between the owners of rights and the general public, the treaties further clarify that countries have reasonable flexibility in establishing exceptions or limitations to rights in the digital environment. Countries may, in appropriate circumstances, grant exceptions for uses deemed to be in the public interest, such as for non-profit educational and research purposes.

The treaties also require countries to provide not only the rights themselves, but also two types of technological adjuncts to the rights. These are intended to ensure that right holders can effectively use technology to protect their rights and to license their works online. The first, known as the "anti-circumvention" provision, tackles the problem of "hacking": it requires countries to provide adequate legal protection and effective remedies against the circumvention of technological measures (such as encryption) used by right holders to protect their rights. The second type of technological adjunct safeguards the reliability and integrity of the online marketplace by requiring countries to prohibit the deliberate alteration or deletion of electronic "rights management information": that is, information which accompanies any protected material, and which identifies the work, its creators, performer, or owner, and the terms and conditions for its use.<sup>36</sup>

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<sup>36</sup> World Intellectual Properties Organization, WIPO Copyright Treaty, at [http://www.wipo.int/copyright/en/activities/internet\\_treaties.html](http://www.wipo.int/copyright/en/activities/internet_treaties.html), (last visited 20 November 2013).

### **3.1.3 Berne Convention in the Protection of Literary and Artistic Works (as amended on September 28, 1979)**

The Convention rests on three basic principles and contains series of provisions determining the minimum protection to be granted, as well as special provisions available to developing countries, which want to make use of them.

#### **1. The three basic principles are the following details:**

1) Works originating in one of the contracting States (that is, works the author of which is a national of such a State or works which were first published in such a State) must be given the same protection in each of the other contracting States as the latter grants to the works of its own nationals (principle of “national treatment”).

2) Such protection must not be conditional upon compliance with any formality (principle of “automatic” protection).

3) Such protection is independent of the existence of protection in the country of origin of the work (principle of the “independence” of protection). If, however, a contracting State provides for a longer term than the minimum prescribed by the Convention and the work ceases to be protected in the country of origin, protection may be denied once protection in the country of origin ceases.

#### **2. The minimum standards of protection relate to the works and rights to be protected, and the duration of the protection which are as follows:<sup>37</sup>**

1) As to works, the protection must include “every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression” (Article 2(1) of the Convention).

2) Subject to certain permitted reservations, limitations or exceptions, the following are among the rights, which must be recognized as exclusive rights of authorization:

- (1) The right to translate,
- (2) The right to make adaptations and arrangements of the work,
- (3) The right to perform in public dramatic, dramatico-musical and

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<sup>37</sup> World Intellectual Properties Organization, Protection of Copyright, at <http://www.wipo.int/treaties/en/ip/berne/>, (last visited 29 November 2013).



musical works,

(4) The right to recite in public literary works,

(5) The right to communicate to the public the performance of such works,

(6) The right to broadcast (with the possibility of a contracting State to provide for a mere right to equitable remuneration instead of a right of authorization),

(7) The right to make reproductions in any manner or form (with the possibility of a contracting State to permit, in certain special cases, reproduction without authorization provided that the reproduction does not conflict with the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author, and with the possibility of a contracting State to provide, in the case of sound recordings of musical works, for a right to equitable remuneration),

(8) The right to use the work as a basis for an audiovisual work, and the right to reproduce, distribute, perform in public or communicate to the public that audiovisual work.

The Convention also provides for “moral rights,” that is, the right to claim authorship of the work and the right to object to any mutilation or deformation or other modification of, or other derogatory action in relation to, the work, which would be prejudicial to the author’s honor or reputation.

3) As to the duration of protection, the general rule is that protection must be granted until the expiration of the 50th year after the author’s death. There are, however, exceptions to this general rule. In the case of anonymous or pseudonymous works, the term of protection expires 50 years after the work has been lawfully made available to the public, except if the pseudonym leaves no doubt as to the author’s identity or if the author discloses his identity during that period; in the latter case, the general rule applies. In the case of audiovisual (cinematographic) works, the minimum term of protection is 50 years after the making available of the work to the public (“release”) or—failing such an event—from the creation of the work. In the case of works of applied art and photographic works, the minimum term is 25 years from the creation of such work.

**3. Countries regarded as developing countries in conformity with the established practice of the General Assembly of the United Nations may, for certain works and under certain conditions, depart from these minimum standards of protection with regard to the right of translation and the right of reproduction.**

The Berne Union has an Assembly and an Executive Committee. Every country member of the Berne Union, which has adhered to at least the administrative and final provisions of the Stockholm Act, is a member of the Assembly. The members of the Executive Committee are elected from among the members of the Union, except for Switzerland, which is a member *ex officio*.

The establishment of the biennial program and budget of the WIPO Secretariat—as far as the Berne Union is concerned—is the task of its Assembly.

The Berne Convention, concluded in 1886, was revised at Paris in 1896 and at Berlin in 1908, completed at Berne in 1914, revised at Rome in 1928, at Brussels in 1948, at Stockholm in 1967 and at Paris in 1971, and was amended in 1979.<sup>38</sup>

## **3.2 Foreign Copyright Infringement Provisions and Notice and Takedown Policies**

### **3.2.1 The Copyright Act 1976 of the United States of America**

The Copyright Act 1976 is the copyright law of the United States of America and remains the primary basis of copyright law in the United States, as amended by several later enacted copyright provisions. The Act spells out the basic rights of copyright holder, codified the doctrine of "fair use" and for most new copyrights adopted a unitary term based on the date of the author's death rather than the prior scheme of fixed initial and renewal terms.<sup>39</sup>

The Copyright Act 1976 was enacted on October 19, 1976 and went into force on July 1, 1978.

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<sup>38</sup> World Intellectual Properties Organization, Summary of Bern Convention for the protection of Copyright, at [http://www.wipo.int/treaties/en/ip/berne/summary\\_berne.html](http://www.wipo.int/treaties/en/ip/berne/summary_berne.html), (last visited 29 November 2013).

<sup>39</sup> Faculty of law Cornell University, The Copyright Act of 1976, at <http://www.law.cornell.edu/uscode/text/17>, (last visited 28 November 2013).



### 1. Exclusive Right Provision

According to Section 106 of the Copyright Act 1976, the copyright's owner under this title has the exclusive rights to do and to authorize any of the following actions:

- 1) To reproduce the copyrighted work in copies or phonorecords;
- 2) To prepare derivative works based upon the copyrighted work;
- 3) To distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- 4) In the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
- 5) In the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
- 6) In the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.<sup>40</sup>

### 2. Copyright Infringement Provision

The Copyright Infringement of the United States are imposed in Section 501 of the Copyright Act 1976 as follows:

- 1) Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 122 or of the author as provided in section 106A (a), or who imports copies or phonorecords into the United States in violation of section 602, is an infringer of the copyright or right of the author, as the case may be. For purposes of this chapter (other than section 506), any reference to copyright shall be deemed to include the rights conferred by section 106A(a). As used in this subsection, the term "anyone" includes any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his or her official capacity. Any

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<sup>40</sup> Copyright Act of 1976: Section 106.

State, and any such instrumentality, officer, or employee, shall be subject to the provisions of this title in the same manner and to the same extent as any nongovernmental entity.

2) The legal or beneficial owner of an exclusive right under a copyright is entitled, subject to the requirements of section 411, to institute an action for any infringement of that particular right committed while he or she is the owner of it. The court may require such owner to serve written notice of the action with a copy of the complaint upon any person shown, by the records of the Copyright Office or otherwise, to have or claim an interest in the copyright, and shall require that such notice be served upon any person whose interest is likely to be affected by a decision in the case. The court may require the joinder, and shall permit the intervention, of any person having or claiming an interest in the copyright.

3) For any secondary transmission by a cable system that embodies a performance or a display of a work which is actionable as an act of infringement under subsection (c) of section 111, a television broadcast station holding a copyright or other license to transmit or perform the same version of that work shall, for purposes of subsection (b) of this section, be treated as a legal or beneficial owner if such secondary transmission occurs within the local service area of that television station.

4) For any secondary transmission by a cable system that is actionable as an act of infringement pursuant to section 111(c)(3), the following shall also have standing to sue: (i) the primary transmitter whose transmission has been altered by the cable system; and (ii) any broadcast station within whose local service area the secondary transmission occurs.

5) With respect to any secondary transmission that is made by a satellite carrier of a performance or display of a work embodied in a primary transmission and is actionable as an act of infringement under section 119(a)(5), a network station holding a copyright or other license to transmit or perform the same version of that work shall, for purposes of subsection (b) of this section, be treated as a legal or beneficial owner if such secondary transmission occurs within the local service area of that station. (f)(1) With respect to any secondary transmission that is made by a satellite carrier of a performance or display of a work embodied in a primary transmission and is actionable as an act of infringement under section 122, a television broadcast station holding a copyright or other license to transmit or perform the same version of that work shall, for purposes of subsection (b) of this section, be treated as a legal or beneficial owner if such secondary



transmission occurs within the local market of that station. (2) A television broadcast station may file a civil action against any satellite carrier that has refused to carry television broadcast signals, as required under section 122(a)(2), to enforce that television broadcast station's rights under section 338(a) of the Communications Act of 1934.

### **3. Notice and Takedown in the Digital Millennium Copyright Act 1998 (DMCA)**

The Notice and Takedown (NTD) procedure under paragraph 512 of the DMCA starts with the notification of the infringed copyright holder. The ISP must act immediately by removing the content or blocking access to it. Paragraph 512 (c) (3) lists a number of elements the notification should contain: it must be a written notification to the designated agent including an electronic signature from the right holder or a representative of the right holder whose right is infringed. The copyrighted work that was infringed and the actual material need to be identified and the notifier has to provide sufficient information for the ISP to locate the content. The complaining party should also give the ISP enough information on how to contact him, such as an address, a telephone number and an e-mail address at which he can be contacted. The notification should contain a statement by the complainant that he has a 'good faith belief' that the use of the material was not authorized by the copyright owner, its agent or the law. The complaining party also has to add a statement that the notification is accurate and that he is authorized to act on behalf of the right holder. The complaining party has to make these statements under the penalty of perjury. The ISP should have a designated agent to whom the notification should be sent, a notification sent to someone else than the designated agent is a non-conforming notice. However, even a non-conforming notification will usually be taken care of, because the ISP will lead the complainant to the designated agent if the first complaint was sent to the wrong address. According to paragraph 512 (g) of the DMCA, the ISP cannot be held liable for removing content, even though the material was in fact not infringing.

The ISP can only waive the above mentioned liability if it also notifies his client that material was blocked or removed. If the client sends the ISP a counter-notice, the latter is obligated to restore the material within ten days and the ISP should send the complainant a copy of the counter notice and inform him that the material will be restored. The ISP does not have to restore the material if it receives a notice from the

complainant that he has issued a law suit. Then access to the allegedly infringing material will continue to be disabled until the court has ordered otherwise. After a counter-notice from the alleged infringer, the complainant cannot send another counter-notice. Thus the ISP does not have to continue blocking and de-blocking access to the material, the parties should go to court.

The most positive point of this procedure is that the ISP does not have to decide whether or not the content complained about is infringing or not. There is no qualitative decision required; the ISP merely acts upon notifications. This contributes to a faster process of removing and replacing materials, saving the ISP time and money. Another positive aspect of this framework is that the ISP is not liable for removing content that was not infringing. Not having to choose between the possibility of being held liable for copyright infringing materials and the possibility of facing liability for unjustly removing materials will take some of the burden off the ISPs, both financially and physically. In case of an untrue complaint, the complaining party will be held liable for the damages instead of the ISP.

A negative aspect of this regime is that for a substantial decision, parties have to go to court. This puts an extra burden on the judicial system, which is undesirable. Another downside of the DMCA's NTD procedure is that both parties can be acting in good faith, this could especially occur when the allegedly infringing party is relying on the fair use of materials. The fact that the complainant who made an untrue statement will be held liable for the damages may in that case also turn out unfair. Finally, the DMCA only covers the subject of copyrighted materials. For other topics such as child sexual abuse images or defamation there is no such procedure available. As I will show in section 6 some elements of the U.S. system can function as an example for the Dutch system, both in a positive and a negative way.

The Communications Decency Act of 1996 provides a framework for ISPs in case of offensive material. ISPs removing or blocking access to content that falls under this act will not be held liable for defamation or other causes of action. This leaves the victims of so-called cyber bullying without a proper action, because approaching the wrongdoer is often almost impossible and the ISPs enjoy full immunity under the CDA. If the U.S. government were to implement a NTD regime similar to that of the DMCA, these victims can start a legal procedure in order to get their damages paid for.



The Digital Millennium Copyright Act or “DMCA,” passed by Congress in 1998, is a far-reaching law that controls the public’s ability to access and copy materials in digital form. Section 512 of the law provides a “safe harbor” from possible copyright liability for Internet service providers (ISPs) – including search engines – that “expeditiously” remove any material on their servers that a copyright owner tells them in “good faith” is infringing. No legal proceedings are needed.

Although §512 does allow an ISP “subscriber” to send a counter-notice contesting the allegation of infringement, the requirements of the counter-notice are detailed and technical, and not every Web speaker is a “subscriber” who can make use of the, for example, may not even be aware that their words, images, or links have been removed.

Section 512 is misguided because ISPs should not be liable for copyright infringement in the first place, simply because someone is using their servers to infringe. ISPs are akin to telephone companies or highways: they provide a means of transport. Wrongs committed by users of telephones or drivers on highways are not attributed to those providing the conduits. Section 512 ignores this principle in the interests of helping copyright owners protect their rights, but it provides an insufficient check on overreaching, and creates an unacceptable shortcut around the procedures that are needed to decide whether speech is actually infringing.

Just as with cease and desist letters, so with §512 take down notices, some of the targeted material has a strong or at least reasonable likelihood of being fair use. Yet copyright holders can churn out take-down letters with little effort, and cause the suppression of speech they don’t like without ever going to court. In one egregious example, Diebold, Inc., a manufacturer of voting machines, sent take-down letters to Swarthmore University and other ISPs demanding the removal of student Web postings containing internal emails of Diebold employees that discussed defects in the company’s machines. The students sued; the company backed off; and the court ruled that the postings were fair use, noting: “It is hard to imagine a subject the discussion of which could be more in the public interest.”<sup>41</sup>

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<sup>41</sup> Science Fiction and Fantasy Writers of America, Inc. (SFWA), Notice and Takedown in DMCA, at <http://www.sfwaworld.org/2013/03/the-dmca-takedown-notice-demystified/>, (last visited 20 November 2013).

### 3.2.2 The Copyright Directive in the European Union.

The copyright law of the European Union has arisen in an attempt to harmonize the differing copyright laws of European Union member states. It consists of a number of directives, which the member states are obliged to enact into their national laws, and by the judgments of the Court of Justice of the European Union, that is the European Court of Justice and the General Court.

The attempts to harmonize copyright law in Europe (and beyond) can be dated to the signature of the Berne Convention for the Protection of Literary and Artistic Works on 9 September 1886: all European Union Member States are signatories of the Berne Convention, and compliance with its dispositions is now obligatory before accession. The first major step taken by the European Economic Community to harmonize copyright laws came with the decision to apply common standard for the copyright protection of computer programs, enacted in the Computer Programs Directive in 1991. A common term of copyright protection, 70 years from the death of the author was established in 1993 as the Copyright Duration Directive.

The implementation of directives on copyright has been rather more controversial than for many other subjects, as can be seen by the six judgments for non-transposition of the Copyright Directive. Traditionally, copyright laws vary considerably between member states, particularly between common law jurisdictions (Cyprus, Ireland, Malta and the United Kingdom) and civil law countries. Changes in copyright law have also become linked to protests against the World Trade Organization and globalization in general.<sup>42</sup>

For the Copyright Directive, it had enacted the exclusive rights of the Copyright owner in Articles 2–4 containing definitions of the exclusive rights granted to under copyright and related rights. They distinguish the "reproduction right" (Article 2) from the right of "communication to the public" or "making available to the public" (Article 3): the latter is specifically intended to cover publication and transmission on the Internet. The two names for the right derive from the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty (Arts. 8 & 10 respectively). The related

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<sup>42</sup>Wikipedia, Copyright Law in European Union, at [http://en.wikipedia.org/wiki/Copyright\\_law\\_of\\_the\\_European\\_Union](http://en.wikipedia.org/wiki/Copyright_law_of_the_European_Union), (last visited 20 November 2013).



right for authors to authorize or prohibit any form of distribution to the public by sale or otherwise is provided for in Article 4. (Officially the Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, also known as the Information Society Directive or the InfoSec Directive)<sup>43</sup>

This research also discusses the Copyright law in the United Kingdom because the United Kingdom (UK) is the one country that applies the Copyright Directive to its law.

The Copyright Law in the UK is mentioned under the Copyright, Design and Patents Act 1988 (CDPA). In the UK, copyright is an automatic right afforded to creators of literary, dramatic, musical and artistic works meaning you do not have to register the work for it to be protected. Copyright gives the creators exclusive rights over the exploitation of their work. This can include control of copying, adaptation, issuance of copies to the public, performance and broadcasting of their work by others. In giving permission for the use of their copyright work creators can be entitled to receive royalty payments and this permission is given through a license agreement. In the UK, copyright is only created if the work is tangible or fixed in some kind of material form. Ideas cannot be given copyright protection, but the material expression of that idea can be protected. For example, the idea for a website cannot be copyright protected but the website itself can be.<sup>44</sup>

### 1. Exclusive Right Provision

The Exclusive rights under the Copyright, Design and Patents Act 1988 (CDPA) is imposed in Section 16 as follows:

Section 16 stated that

The acts restricted by copyright in a work

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<sup>43</sup> Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society

<sup>44</sup> JISC digital media, Copyright Law in UK, at <http://www.jiscdigitalmedia.ac.uk/guide/copyright-an-overview>, (last visited 1 December 2013).

1) The owner of the copyright in a work has, in accordance with the following provisions of this Chapter, the exclusive right to do the following acts in the United Kingdom

- (1) To copy the work;
- (2) To issue copies of the work to the public;
- (3) To rent or lend the work to the public;
- (4) To perform, show or play the work in public;
- (5) To communicate the work to the public;
- (6) To make an adaptation of the work or do any of the above in relation to an adaptation;

And those acts are referred to in this Part as the "acts restricted by the copyright".

2) Copyright in a work is infringed by a person who without the license of the copyright owner does, or authorizes another to do, any of the acts restricted by the copyright.<sup>45</sup>

## 2. Copyright Infringement Provision

Under the Copyright, Design and Patents Act 1988 (CDPA), the Copyright Infringement is divided into Primary Infringement and Secondary Infringement.

### Primary Infringement<sup>46</sup>

- 1) Infringement of copyright by copying
- 2) Infringement by issue of copies to the public
- 3) Infringement by rental or lending of work to the public
- 4) Infringement by performance, showing or playing of work in public
- 5) Infringement by communication to the public
- 6) Infringement by making adaptation or act done in relation to adaptation

<sup>45</sup> Copyright, Design and Patents Act 1988 (CDPA): Section 16.

<sup>46</sup> Copyright, Design and Patents Act: Section 17-21, Primary Infringement 1988 (CDPA).



### Secondary Infringement<sup>47</sup>

- 1) Importing infringing copy
- 2) Possessing or dealing with infringing copy
- 3) Providing means for making infringing copies
- 4) Permitting use of premises for infringing performance
- 5) Provision of apparatus for infringing performance

### 3. Notice and Takedown in E-Commerce Directive of the European

#### Union

The E-Commerce Directive was designed to harmonize European rules on electronic commerce. Four of its Articles, Article 12 through Article 15 are specifically directed to Internet Service Providers and their liability. The directive makes a distinction in three different roles for the ISPs and connects different levels of liability to these roles. The first three Articles that will be explained have been implemented into article 6:196c.

The first article, Article 12<sup>48</sup>, is for the ISP that is involved in so-called 'mere conduit'. Member States shall not hold an ISP liable on the condition that it gives access to information of which the ISP has not initiated the transmission, has not selected the receiver of the transmission and has not selected or modified the information contained in the transmission.

Automatic, transient and intermediate storage of information is also included as long as its sole purpose is to carry out the transmission and provided that the information is not stored longer than reasonably necessary. In this and the next articles it is mentioned that these, shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement'. This even though an ISP has removed or blocked certain information, or when they did not and were not supposed to know that the information was illegal or unlawful, a court or administrative authority can still

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<sup>47</sup> Copyright, Design and Patents Act: Section 22-26, Secondary Infringement 1988 (CDPA).

<sup>48</sup> E-Commerce Directive (Directive 2000/31/EC): Article 12.

require an ISP to stop or prevent an infringement.<sup>49</sup>

The second article on ISP liability, Article 13<sup>50</sup>, addresses ISPs in case of 'caching'. Member States shall not hold an ISP liable for automatic, intermediate and temporary storage of information, performed for the sole purpose of making the onward transmission of the information more efficient on the condition that: a) the provider does not modify the information, b) it complies with conditions on access to the information, c) it complies with rules regarding the updating of information, d) the provider does not interfere with the lawful use of technology to obtain data on the use of the information and e) the provider acts expeditiously to remove or disable access to the information once it obtains actual knowledge that the information has been removed from the network at its initial source, access to it has been disabled or that a court or administrative authority has ordered such removal or disablement. Like in Article 12, the ISPs face only a very 'mild' form of liability. As long as the ISP has not influenced the information in the ways mentioned and acts immediately once they find out information should be removed, they will not be held liable for the content.

Article 14<sup>51</sup> of the directive is the third article to mention ISP liability, addressing the ISP in the role of 'hosting' provider. If a provider stores information provided by the recipient of the service it shall not be held liable by the Member States on certain conditions. These conditions are that the ISP did not have actual knowledge of the illegal activity or information and is not aware of facts or circumstances from which the illegal activity or information is apparent. Or, once it has obtained knowledge about above mentioned activities or information immediately removes or disables the access to the information. According to the second paragraph of the Article, the ISP will be held liable if the recipient of the service was acting under the authority and control of the ISP. In this case, a more stringent liability is applied. However, as long as the ISP removes illegal content as soon as it has noticed the information and the information was not put online under the authority of the provider, it will not be held liable.

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<sup>49</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain Legal aspects of information society services, in particular electronic commerce in the Internal Market, O.J. 2000, L178.

<sup>50</sup> E-Commerce Directive (Directive 2000/31/EC): Article 13.

<sup>51</sup> E-Commerce Directive (Directive 2000/31/EC): Article 14.



Article 15<sup>52</sup>, the last article to address ISP liability, prescribes that Member States cannot oblige ISPs to monitor information which they transmit or store, nor can they be obliged to actively seek facts or circumstances indicating illegal activity. In Section 6.3, where the possibility of techno-regulation will be discussed, I will examine whether in the future this last provision could be removed or adjusted. Article 15 also states that Member States are allowed to establish obligations for ISPs to inform the competent public authorities once they have knowledge of illegal activities or information and they can be obliged to communicate to the competent authorities about information enabling the identification of recipients of their service with whom they have storage agreements. In some of the case law dealt with in the next section, the obligation to provide national authorities with identifying information is expanded to other parties as well.

On first sight, these articles merely describe how the liability of ISPs should be regulated. But, when having a closer look, one can clearly distinguish the basis of a NTD- procedure. Articles 13 (1 b) requires the ISP to remove or disable access to information as soon as they find out that the information has been removed from the network of the initial source of transmission, access has been disabled or a court or administrative authority has ordered removal or disablement. In 14 (1 b) the ISP has the duty to remove or disable access to information expeditiously once it has obtained knowledge of illegal or unlawful activity or content. Because according to Article 15, ISPs do not have an obligation to monitor. Hence, they will usually be notified by a third party about the allegedly illegal or unlawful information. ISPs have to check whether the notification is correct and if so, remove the information from their servers. Thus, a notice and take down procedure comes into existence.<sup>53</sup>

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<sup>52</sup> E-Commerce Directive (Directive 2000/31/EC): Article 15.

<sup>53</sup> Mr. A.P.C Roosendaal and Dr. Mr. C.M.C.K. Cuijpers, faculty of Law, Tilbury University, Notice and Take Down Towards a central system in Netheland (Faculty of Law Department TILT), p.40-42.

### **Case Study**

#### **Viacom V. Youtube<sup>54</sup>**

The Second Circuit recently breathed new life into Viacom International Inc.'s and other video content owners' copyright infringement lawsuit against Google Inc.'s YouTube that alleges over 70,000 instances of infringement on YouTube's site between 2005 and 2008. However, in doing so, it did not severely limit the "safe harbor" protections of the Digital Millennium Copyright Act as Viacom had urged the court to do.

Rather, it held that such protections would only not be available to YouTube if it had actual knowledge or was generally aware of facts and circumstances of specific infringing activity. The fact that YouTube was generally aware of prevalent infringement on its site did not preclude it from the DMCA's safe harbor.

In 2010, the District Court for the Southern District of New York granted summary judgment in YouTube's favor, finding that it was immune from the plaintiffs' claims of copyright infringement as YouTube was eligible for the safe harbor protections available under the DMCA for qualified service providers such as YouTube. The main issue on appeal was whether YouTube could be deprived of the DMCA safe harbor protections if it was generally aware of prevalent infringement on its site, or whether, instead, it would only be deprived of such protections if it had actual knowledge or was generally aware of specific infringing activity.

The Second Circuit agreed with the district court's holding that the DMCA's safe harbor is only unavailable where a service provider has actual knowledge or is generally aware of facts and circumstances of specific infringing activity. However, it did still reverse the district court's granting of summary judgment in favor of YouTube, as it found that a reasonable jury could find that YouTube did in fact have the requisite actual knowledge or general awareness, and remanded the case back to the district court for this determination. It also asked the district court to determine if YouTube should be ineligible for safe harbor protections because it engaged in willful blindness.

#### **Viacom's Complaint**

In Viacom's case before the district court, Viacom alleged that between

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<sup>54</sup> Daniel Schecter and Sarah E. Diamond, Latham & Watkins LLP, case study: *Viacom V. Youtube*, at <http://www.law360.com>, (last visited 22 January 2014).



Year 2005 and 2008, over 60,000 instances of video clips that were posted on YouTube contained unauthorized copies of Viacom's copyrighted shows, such as "SpongeBob SquarePants" and "The Daily Show." It was not disputed that Viacom sent a massive takedown notice to YouTube in 2007 and that YouTube quickly responded by removing all the referenced clips from its site. Viacom argued that YouTube, nonetheless, should not be entitled to the DMCA's safe harbor because it was generally aware of prevalent infringement on its service and thus was not eligible for safe harbor protection. Viacom also argued that its take-down notice required YouTube to take down all infringements of its content referenced in the takedown notice and not just the specific instances of infringement identified in the takedown notice.

### **YouTube's Defense**

YouTube, in opposition to Viacom's appeal, argued that it was entitled to the safe harbor defense as it was not actually or generally aware of the specific infringements claimed by Viacom until it received the DMCA takedown notice from Viacom, and that once it did receive the notice, it acted expeditiously in removing all the referenced clips. YouTube further argued that it did not have an affirmative duty to search for all infringements of Viacom's content, but only those postings it was made aware of by Viacom.

As noted by the Second Circuit in its decision, by the time of the parties' summary judgment briefing, site traffic on YouTube had reached over 1 billion daily views, with more than 24 hours of new video uploaded to the site every minute. YouTube argued that with such volume, it would be prohibitively burdensome to require it to actively monitor every upload on its site for potentially infringing content.

### **Second Circuit's Decision**

In its decision of the appeal, the Second Circuit agreed with the district court's interpretation of the DMCA's safe harbor provision. It held that with respect to "Red Flag Knowledge," awareness of prevalent infringing activity in general is not enough to disqualify a service provider from protection. Rather, to be disqualified from the safe harbor, in the absence of actual knowledge, a service provider must have awareness of facts or circumstances that indicate specific and identifiable instances of infringement. It went on to explain that actual knowledge is a subjective standard, while

general, red- flag knowledge is an objective standard.

However, the Second Circuit did disagree with the district court's determination that the plaintiffs failed to demonstrate a fact issue regarding the extent of YouTube's knowledge. The Second Circuit focused on internal YouTube correspondence in which company founders and other upper-level management acknowledged that certain video clips users had uploaded to the website constituted infringement.

The Second Circuit held that these emails "raised a material issue of fact regarding YouTube's knowledge or awareness of specific instances of infringement." Thus, the court reversed the grant of summary judgment in YouTube's favor and remanded the case to the Southern District of New York for a determination of whether the clips referenced in the emails were clips at issue in the lawsuit, and YouTube was therefore aware of specific instances of infringement.

The Second Circuit further held that the common law doctrine of willful blindness "may be applied, in appropriate circumstances, to demonstrate knowledge or awareness of specific instances of infringement under the DMCA," and instructed the district court to consider on remand whether there were sufficient facts to demonstrate that YouTube made a deliberate effort to avoid knowledge of specific instances of infringement, which would also deprive it of the protections of the safe harbor.

On April 18, 2013, the U.S. District Court for the Southern District of New York granted YouTube's renewed motion for summary judgment in *Viacom v. YouTube*. The court found that YouTube was protected under the safe harbor provisions of the Digital Millennium Copyright Act. This decision, which issued after a remand from the Second Circuit, gives new insight into how federal courts will apply the DMCA's Section 512(c) safe harbor provisions to online service providers (such as YouTube) whose websites contain user-generated content that may infringe upon the copyright of a third party.

The opinion was issued after the Second Circuit remanded several questions to the district court on April 5, 2012, including whether

- (1) YouTube had knowledge or awareness of any specific copyright infringing videos on its website;
- (2) YouTube willfully blinded itself to such specific infringements;
- (3) YouTube had the "right and ability to control" infringing activity within the meaning of Section 512(c)(1)(B); and



(4) for any of the clips “in-suit” which were syndicated to a third party, whether such syndication occurred “by reason of the storage at the direction of the user” within the meaning of Section 512(c)(1), so that YouTube could claim safe harbor protection.

On remand, U.S. District Judge Louis Stanton, who had ruled against Viacom in his initial 2010 summary judgment decision, again granted YouTube’s motion for summary judgment. The court found that Viacom lacked proof that YouTube had item-specific knowledge or awareness of any of the allegedly infringing clips-in-suit; that there was no showing that YouTube was willfully blind to specific infringements of clips-in-suit; that YouTube did not have the right and ability to control its users’ infringing activity within the meaning of Section 512 (c)(1)(B); and that YouTube was protected by the safe harbor provisions where its syndication did not include manual selection or delivery of videos, and served the purpose of Section 512(c) by “providing access to material stored at the direction of users.”

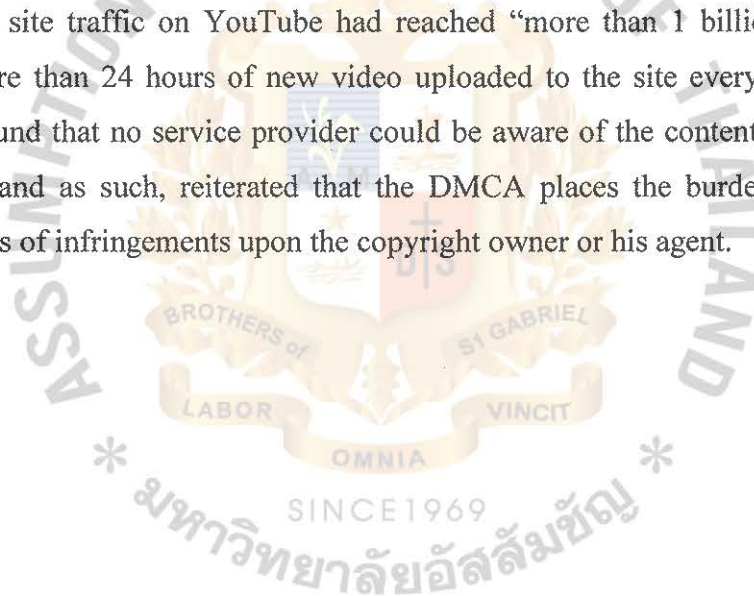
The district court made these findings despite evidence that YouTube executives knew that some specific copyrighted works (e.g., specific movies or TV show episodes) were available on the YouTube website, but without knowing exactly where such clips were located. The district court’s holding suggests that unless an online service provider learns or receives notice of the specific location of an infringing video clip, it is not required to take action in order to retain protection under the DMCA’s safe harbor. Because this approach was rejected by the Second Circuit in the earlier appeal, a subsequent appeal of this most recent decision is likely.

### **Knowledge or Awareness of Specific Infringements Including Specific Clips-in-Suit**

The first question before the court was which party had the burden of establishing whether YouTube had actual knowledge, or the lack thereof, of allegedly infringing video clips on its website. Following the April 5, 2012, remand order by the Second Circuit, the district court requested that the parties report the precise information given to, or reasonably apparent to, YouTube for each of the allegedly infringing clips-in-suit. YouTube submitted a list of 63,060 clips-in-suit for which it never received any notices of infringement, and challenged Viacom to specify how it claimed such notice was given.

Viacom responded that the huge volume of material at issue prevented it from proving which clips-in-suit YouTube knew about and which it did not. Viacom argued that it did not carry the burden of proving YouTube's knowledge of specific infringing videos, because YouTube claimed the safe harbor as an "affirmative defense." Therefore, under Viacom's argument, YouTube had the burden of establishing each element of its affirmative defense, including lack of knowledge or awareness of Viacom's clips-in-suit.

The district court rejected this argument as an "anachronistic," pre-DMCA concept, given that the great volume of material placed by users on online service providers' platforms means that the provider could publish copyright infringing materials without knowledge. The court found this problem illustrated by the case record, which established that site traffic on YouTube had reached "more than 1 billion daily video views, with more than 24 hours of new video uploaded to the site every minute." The district court found that no service provider could be aware of the contents of each such specific video, and as such, reiterated that the DMCA places the burden of notifying service providers of infringements upon the copyright owner or his agent.





## **Chapter 4**

### **Problem Analysis on Internet Service Provider**

This Chapter mentions in the analysis on the duty and liability of the Internet Service Provider for action of third party in online business operation under the Copyright Act B.E.2537 (1994).

#### **4.1 Problem on Liability of Internet Service Provider for Online Copyright infringement**

At present, the number of new technologies has been continuously increasing, especially online technology such as internet. For the benefit of internet user, the user normally use the internet for finding information, research and study, online business, playing game, some kinds of media, etc. Additionally, the internet has been gaining widespread acceptance because it is a simple tool to use and search for many information e.g., maps, video, music, address, article, sale products, etc. For getting sources of online information through internet, internet user can seek easily and fast, including save time.

The first reason of the problem regarding the Liability of the Internet Service Provider in Thailand under the Copyright Act B.E.2537 is that this Copyright Act of Thailand was promulgated since B.E.2537 which the researcher has the opinion that this law is very old and out of date. During promulgation of the Copyright Act B.E. 2537, the internet was not important as appearing in current time. People do not have knowledge about Internet. During that time, the Internet was a tool that was far away from daily life of people which ordinarily used paper in sending mail; but at present, internet is very important and gets widespread acceptance. Currently, internet is the first thing that people use in communication and is significant factor in daily life. As mentioned above, the Copyright Act B.E.2537 is now obsolete and there is no any amendment in part of Copyright Infringement and exception of Copyright Infringement relating to the liability of Internet Service Provider.

From the above paragraph, the liability of Internet Service Provider in Thailand under the Copyright Act B.E.2537 was enacted in Section 31(2) stating the Secondary Liability or Indirect Liability which is the liability occurred by third party (client) who

uses service of Internet Service Provider in committing Online Copyright Infringement. The problem on this issue is that Internet Service Provider only provide service to Internet user; but when the client or Internet user uses such Internet system in committing copyright infringement, such Internet Service Provider shall be liable according to Section 31(2) of the Copyright Act B.E.2537 as follows:

Section 31 stated that Whoever knows or should have known that a work is made by infringing the copyright of another person and commits any of the following acts against the work for profit shall be deemed to infringe the copyright:

1. Selling, occupying for sale, offering for sale, letting, offering for lease, selling by hire purchase or offering for hire purchase,
2. Communication to public,
3. Distribution in the manner which may cause damage to the owner of copyright,
4. Self-importation or importation by order into the Kingdom

Internet Service Provider shall be liable for online copyright infringement because of Internet Service Provider is the one who makes communication online copyright infringement to public. The Copyright Act B.E.2537 actually should have some measures to protect Internet Service Provider from online copyright infringement arisen by third party.

Moreover, the liabilities of Internet Service Provider for action of third party are provided in Section 14 and Section 15 of the Computer-Related Crime Act B.E.2550 (2007); but this research only focuses on analyzing the liability of Internet Service Provider (hosting providers) provided in the Copyright Act B.E.2537.

## **4.2 Analysis on Duty of Internet Service Provider for Online Copyright Infringement**

In present global interconnection, the Internet is no longer a tool. Rather, it is a service that helps generate income and employment, provides access to business and information, enables e-learning, and facilitates government activities. It is an essential service that has been integrated into every part of our society. Our experience begins when an Internet Service Provider (ISP) uses fixed telephony (plain old telephone



service), mobile-cellular telephony, or fixed fiber-optic or broadband service to connect us to the global network. From that moment on, the ISP shoulders the responsibility for the instantaneous, reliable, and secure movement of our data over the Internet.

ISPs come in many forms and sizes, and go with many names: the phone company, the cable company, the wireless company, etc. They are the Internet stewards: planning and managing resources, providing reliable connectivity, and ensuring delivery for traffic and service. While the communication infrastructure security is generally believed that it is so robust, recent situations show that networks and platforms on which Internet user rely are becoming increasingly susceptible to operator error and malicious cyber attack.

In part of Online Copyright Infringement, Internet Service Provider has the duty to block or remove (Notice and Takedown Procedure) the Online Copyright Infringement; such as stated in the Copyright Act of 1976 which is the United States Copyright Law and also imposed the duty of Internet Service Provider in the Digital Millennium Copyright Act 1998 (DMCA).

In the United Kingdom, the UK has the Copyright, Design and Patents Act 1988 (CDPA) to protect the exclusive rights of copyright's owner and also imposes the duty of Internet Service Provider for doing Notice and Takedown Procedure in Article 12 - Article 15 of the E-Commerce Directive of the European Union.

In Thailand, under the Copyright Act B.E.2537 there is no provision stating about the duty of Internet Service Provider relating to Online Copyright Infringement. This means Thailand still has not yet determined the duty and measure to protect Internet Service Provider from the liability on Online Copyright Infringement. In practice, there is only the policy of each Internet Service Provider to announce to public as a rule of using their services. Nevertheless, it is not enough to control public for not infringing copyright. The Internet Service Provider does not have the power to control public. The Copyright Law actually should have some protection measures to protect the liability of Internet Service Provider in online copyright infringement; such as providing the Notice and Takedown procedure to control the contents that infringe the copyright.

## **Chapter 5**

### **Conclusion and Recommendation**

#### **5.1 Conclusion**

Rapid change of technology affects the law inevitably. The Copyright Law is one of laws that have been severely affected by change of technology. Internet is a good example of this change. The no boundary internet makes it easier for copying and distributing million contents and works without proper authorization of copyright's owner. While some countries adapt and amend their internal copyright laws to keep pace with technology by the way of ratifying the WIPO Copyright Treaty (WCT) and/or WIPO Performances and Phonograms Treaty (WPPT), or by enacting new laws to chase internet piracy – the ISP's Liability, or instance, or the expansion of the contributory, inducement or vicarious liability to the P2P makers to deter internet piracy, Thailand has been quite step slowly to react to this issue.

The existing Thai Copyright Law does not cover the technology advancement. Nonetheless, Thailand is now underway of amending Thailand Copyright Law to meet the standard of WCT and WPPT. However, duration of enacting new copyright law is still unforeseeable due to unpredictable political factor.

This independent study deeply looks into the possibility in using the Notice and Take Down Policy to solve the problem on liability of Internet Service Provider. For this issue, ISPs would be liable for content hosted on their servers if such ISPs are aware of that action and still does not take action to blocking access to server. The rule of Notice and Take Down forces ISPs to choose between the interest of their clients and their own risks in holding liability for damages caused by contents which their clients have been hosting online.

The main concept of Notice and Takedown Policy would relieve the Internet Service Provider from task they never ask for and would prevent the Internet Service Provider from taking everything which are notified in form of offline to escape from liability. ISPs lack knowledge about subjects such as intellectual property rights or defamation which could lead to unfair decisions. These decisions should be made by those who are specialized in the relevant fields such as the officer of the Ministry of



Information and Communication Technology.

As mentioned above, the researcher would like to recommend the appropriate solutions to deal with problems in Thailand and to prevent such problems that have the occurrence tendency in the future.

## **5.2 Recommendation**

For the reason mentioned in the conclusion part, this is found that Thai Copyright Act B.E.2537 should be amended to cover or solve the problems of Internet Service Provider and to give confidence to Internet Service Provider in order to protect themselves from liabilities in Online Copyright Infringement that may happen in the future. Moreover, the researcher recommends on the regulation or policy for Internet Service Provider to avoid the problem arisen from Online Copyright Infringement of third party.

### **5.2.1 Amendment of Copyright Law**

For supporting the implementation of the Notice and Takedown Procedure in applying to Thai Copyright Law, the researcher recommends that in the Part 5 of the Copyright Act B.E.2537 stated for the Copyright Infringement should add one more Section as below:

“Section... When the Internet Service Provider knew or should have known or been informed by the competent authority about act of piracy or copyright infringement which appears in computer system under their control. Such Internet Service Provider shall immediately amend or suspend the popularization containing such information from the date of knowledge or notification within a reasonable time. In case the Internet Service Provider which fails to suspend, modify or make prevalence of such information shall be punished.

Implementation of rules and procedures shall be as prescribed.”

### **5.2.2 Guideline of Notice and Takedown Procedure in Thailand**

The researcher recommends the guideline of Notice and Takedown Procedure to standardize practice of the Internet Service Provider, to protect and avoid the

problems or misunderstanding of copyright's owner, Internet Service Provider and third party. Each Internet Service Provider should define some regulations i.e. removing or blocking the content infringing the copyright. Therefore, the regulation governing Internet Service Provider should be in scope of Notice and Takedown Procedure. Moreover, as the researcher has previously mentioned that the Notice and Takedown Procedure actually can apply to the Computer –Related Crime Act B.E.2550 (2007); nevertheless, this research only focuses on applying to the Copyright Act B.E.2537.

### **Guideline of the Notice and Takedown Procedure**

#### **1. Definition**

1) “Internet Service Provider” is the service provider on the Internet and hosting providers.

2) “Notifier” is a person or organization that makes a report.

3) “Content Owner” is a person (or organization) that has placed (contested) the content on the Internet.

#### **2. Notice to block or remove the content**

1) Details of the notification shall contain at least as follows:

(1) Name and details of the notifier

(2) Identifying the content in question clearly by specifying URL or specific address and originality of the content

(3) Identifying the reason to show that those contents are illegal or infringing the copyright

(4) Referring related rights and laws

(5) Contact information

2) Notifier must certify that the complaint is made in good faith.

3. Operation of Internet Service Provider to Takedown the content contains the following details:

1) Takedown the content from service

(1) The Internet Service Provider should perform a careful removal or blocking of content.



(2) The Internet Service Provider may takedown the content in the appropriate period for each case. The Internet Service Provider takes action on the basis of each case as below:

a. In the event that the ISPs determines that the content concerned is not unequivocally unlawful, the intermediary informs the notifier accordingly, together with the reasons for this.

b. In the event that the ISPs determines that the content concerned is unequivocally unlawful, the intermediary ensures that the content concerned is immediately removed.

c. In the event that it has not been possible to come to an unequivocal judgment as to whether the content concerned is unlawful, the intermediary informs the content owner about the report with the request to remove, block the content or to contact the notifier. If the notifier and the content provider are unable to reach an agreement, the notifier can choose to make an official report to the police if in his or her opinion it concerns a criminal offence. If it concerns content that is alleged to be unlawful under civil law, it is preferable that the notifier is able to bring his or her dispute with the content provider before the courts. Should the content provider be unwilling to make him or herself known to the notifier, the ISPs can decide to provide the notifier with the content provider's name and contact details or to remove the content concerned.

2) The Internet Service Provider needs to notice the removal or blocked the content to the owner of the content immediately.

#### 4. Counter-Notification Procedures

1) A content's owner that has been notified by the Internet Service Provider may argue to the Internet Service Provider with the description that those contents should not be removed.

2) The Counter-Notification shall contain as follows:

(1) Name and address of the content's owner including - contact information

(2) Identifying the content that was removed by specifying the URL or specific information before removing such content

(3) The explanation showing the good faith of the content's owner in bringing the content into system and showing that it is not illegal action

3) If the Internet Service Provider gets the Counter-Notification from the content's owner, the Internet Service Provider should notice and copy those arguments sending to the notifier immediately.

4) This Section providing Internet Service Provider still is liable for removal of "material residing at the direction of a notifier of the service provider on a system or network controlled or operated by or for the service provider", unless the Internet Service Provider fulfills three requirements as follows:

(1) The service provider must take "reasonable steps promptly to notify the content owner that it has removed or disabled access to the material."

(2) Upon receipt of the Counter-Notification from the content's owner, the service provider must provide the original complainant with a copy of the Counter-Notification and a warning that it will replace the material or content in ten business days.

(3) The service provider must replace the material, within ten business days after receiving the Counter-Notification, unless the original complainant notifies the service provider that it has filed "an action seeking a court order to restrain the content owner from engaging in infringing activity relating to the material on the service provider's system or network."

5. In compliance with this Guideline, the Internet Service Provider must show the intention that the Internet Service Provider does not support or consent to illegal action or copyright infringement occurring on their system.



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