



March 9, 2018

Mr. Thosapone Dansuputra
Director-General
The Department of Intellectual Property
63 Nonthaburi 1 Rd., Bangkrasor, Muang,
Nonthaburi 11000
Thailand

Dear Mr. Dansuputra,

BSA COMMENTS ON THAILAND COPYRIGHT AMENDMENT BILL

BSA | The Software Alliance (BSA)¹ welcomes the opportunity to respond to the request by the Department of Intellectual Property (**DIP**) for public comments on the Copyright Amendment Bill (**Bill**). BSA understands that the purpose of the Bill is to update Thailand's existing Copyright Act to bring it into consistency with the World Intellectual Property Organization (**WIPO**) Copyright Treaty (**WCT**).

The Bill appears to satisfy many of the WCT requirements by providing effective legal remedies against the circumvention of effective technological protection measures. Additionally, BSA appreciates DIP's recognition of the importance of providing safe harbors to the liability of service providers that implement effective notice and takedown mechanisms for allegedly copyright infringing content, striking the appropriate balance of rights and responsibilities of copyright holders and service providers.

BSA members rely heavily on copyright and other forms of intellectual property protection to make their innovations broadly available to consumers, while preserving their ability to fund and promote ongoing innovations and protect the commercial value of those innovations. Therefore, our members rely on notice-and-takedown mechanisms to prevent online infringement and the unlicensed use of their products.

Additionally, many BSA members offer online services such as remote storage, data processing and analytics, security solutions, and other forms of cloud computing. In this capacity, our members frequently act as online intermediaries and rely on procedures and protections in addressing claims of third-party infringement, including limitations on their legal liability. Given

¹ BSA is the leading advocate for the global software industry before governments and in the international marketplace. BSA members are among the world's most innovative companies, creating software solutions that spark the economy and improve modern life. With headquarters in Washington, DC, and operations in more than 60 countries, we pioneer compliance programs that promote legal software use and advocates for public policies that foster technology innovation and drive growth in the digital economy.

BSA's members include: Adobe, Amazon Web Services, ANSYS, Apple, Autodesk, AVEVA, Bentley Systems, Box, CA Technologies, Cisco, CNC/Mastercam, DataStax, DocuSign, IBM, Informatica, Intel, Microsoft, Okta, Oracle, salesforce.com, SAS Institute, Siemens PLM Software, Splunk, Symantec, The MathWorks, Trend Micro, Trimble Solutions Corporation, and Workday.

these dual roles as both copyright holders and online service providers, BSA members are well positioned to bring a balanced perspective to the Bill and have a unique appreciation of interests of content developers, technology companies, online intermediaries, and the public in maximizing the potential of the Internet.

While we are generally supportive of the proposed amendments to Thailand's Copyright Act, we are eager to take this opportunity for public input to make several recommendations as described in more detail below.

Detailed Comments and Suggested Amendments

1. Injunctive Relief (Sections 43/11 and 43/12)

The imposition of injunctive relief against service providers that otherwise qualify for the safe harbors may be appropriate in some circumstances. However, we are concerned that the current proposed legislation provides little guidance to the judiciary when considering applications for injunctions to block access to infringing content.

Any policy developed to curb online infringement should strike a careful balance between the interest of copyright owners, online intermediaries, and consumers. To guard against the risk that injunctions could inadvertently implicate legitimate, non-infringing content, it is critical that they be narrowly tailored and subject to important due process safeguards. For example, injunctions against “*online storage services that are used to store infringing material*” could affect substantial volumes of non-infringing material used by customers for non-infringing purposes, such as storage of personal family photographs or back-ups of personal files.

Given the inherent risk of collateral damage, injunctive relief should be reserved as a remedy of last resort, available only when a rights holder has exhausted conventional means for addressing online infringement.

Therefore, we urge the DIP to amend Sections 43/11 and 43/12 as follows:

“Section 43/11 *In case a service provider may claim any limitation on the liability under Section 43/3, a court may issue any of the following orders:*

- (1) termination of the account of subscriber as identified in the court's order because of being the infringer; and*
- (2) blocking access **by necessary steps as specified in the court's order to a specific, identified, online location** ~~sources~~ where computer data is located outside the Kingdom of Thailand as identified in the court's order.”*

“Section 43/12 *In case a service provider may claim the limitations on the liability according to Section 43/4, Section 43/5 or Section 43/6, a court may issue any of the following orders:*

- (1) termination of the account of subscriber as identified in the court's order because of being the infringer;*
- (2) blocking access **by necessary steps as specified in the court's order** to the infringing computer data **located at a specific, identified, online location** on the service provider's system or network; and*
- (3) other orders as deemed necessary and causing as less burden as possible to prevent or interfere with infringement of copyright **at specific, identified, online** Internet locations as identified in the court's order.”*

In addition, we urge the DIP to incorporate additional procedural safeguards that a court should consider in assessing whether to issue an injunction under Sections 43/11 and 43/12:

- a) As a threshold matter, DIP should clarify that injunctions under Sections 43/11 and 43/12 are available “*only after notice to the service provider and an opportunity for the service provider to appear are provided.*”
- b) In addition, in determining whether to issue an injunction against a service provider, courts should be directed to consider:
 - (i) whether an injunction, either alone or in combination with other injunctions issued against the service provider, would significantly burden either the service provider or the operation of the service provider’s system or networks;
 - (ii) the magnitude of the harm likely to be suffered by the copyright owner in the digital network environment if steps are not taken to prevent or restrain the infringement;
 - (iii) whether implementation of such an injunction would be technically feasible and effective, and would not interfere with access to noninfringing material at other locations; and
 - (iv) whether other less burdensome and comparably effective means of preventing or restraining access to the infringing material are available.

2. Limitations on Liability for Removal of Allegedly Infringing Content

Eligibility for the limitations on liability afforded by Section 43/5 (hosting providers) and Section 43/6 (information location services) is conditioned on removing, or otherwise blocking access to, allegedly infringing content. As a practical matter, this “takedown” obligation will arise upon the receipt of a notice of claimed infringement (**Takedown Notification**) submitted by a rights holder under Section 43/7. Such a framework thus places service providers in the position of having to remove, or otherwise block access to, content that was originally made available by a third party. Accordingly, it is critical that service providers are not held liable for claims that might arise from third parties whose content is removed or access-blocked based on a Takedown Notification.

Section 43/7 also requires the service provider to reinstate or remove the block to the third-party content (which was removed or access-blocked by the service provider based on a Takedown Notification) within 15 days of the service provider’s receipt of a counter notification by the third party. It is similarly critical that service providers complying with this statutory requirement remain entitled to the limitations of liability under Sections 43/5 and 43/6 vis-à-vis the rights holder that had submitted the Takedown Notification.

We therefore urge DIP to amend Section 43/5 and 43/6, and include a new provision, as follows:

“Section 43/5 *Under Section 43/2, the service provider under Section 43/1 (3) shall not be liable for financial damages in copyright infringement incurred when engaging with its services under the following conditions:*

...

- (4) *the service provider:*
 - (a) removes the allegedly infringing computer data from its system or blocks access to such computer data without delay upon notification of claimed infringement; or**
 - (b) puts the allegedly infringing computer data back up to its system or deactivates access blocking to such computer data,***according to Section 43/7.”*

“Section 43/6 Under Section 43/2, the service provider under Section 43/1 (4) shall not be liable for financial damages in copyright infringement incurred when engaging with its services under the following conditions:

...

(4) the service provider:

(a) removes sources of information referring or linking to the allegedly infringing computer data from its system or block access to such sources of information referring or linking to such computer data without delay upon notification of claimed infringement; or

(b) puts the sources of information referring or linking to the allegedly infringing computer data back up to its system or deactivates access blocking to such sources of information,

according to Section 43/7.”

“Section 43/XX A service provider shall not be liable to any person for any claim based on the service provider’s good faith disabling of access to, or 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.”

3. Legal Remedies for Deleting or Altering Rights Management Information (RMI) and Circumventing Technological Protection Measures (TPMs) (Section 70/1)

While the WCT explicitly calls for effective legal remedies to deter deleting or altering rights management information (RMI) and circumventing technological protection measures (TPMs), the proposed fines in Section 70/1 (from Baht 10,000 to Baht 100,000) are unlikely to deter violations regarding RMI and TPMs.

We therefore urge DIP to consider amending Section 70/1 to read as:

“Section 70/1 Any person who, **for purposes of commercial advantage or private financial gain**, commits **willful** violations ~~regarding of~~ rights management information under Section 53/1 or Section 53/2 or **willful** violations regarding circumvention of technological measures under Section 53/4 or Section 53/6, shall be ~~liable for a fined~~ **not less than Baht 10,000 or more than Baht 100,000 for each such violation.**”


Also, we urge DIP to consider creating other criminal penalties and civil remedies that are on par with those available for copyright infringement.

Conclusion

BSA congratulates the DIP for the decision to adhere to the WCT and appreciates the DIP’s efforts to amend the existing Copyright Act to update and modernize the protection of copyrighted works on the Internet, as well as to preserve incentives for copyright holders and service providers to cooperate to detect and deal with copyright infringements in the digital networked environment. To achieve such purposes, BSA humbly requests that serious consideration be given to the above comments.

We remain open to further discussion with you at any time. Please do not hesitate to contact Ms. Varunee Ratchatattanakul, BSA’s Thailand Country Manager, at varunee@bsa.org or +668-1840-0591 with any questions or comments you might have. Thank you.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Jared Ragland'.

Jared Ragland, Ph.D.
Senior Director, Policy - APAC

CC: The Director of the Legal Office of the Department of Intellectual Property