



Conference on Online IPR Infringement and the Responsibility of Intermediary Service Providers

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Speaker's bio

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- Franck is Managing Partner and Founder of Ananda Intellectual Property, one of Thailand's leading IP law firms. His practice includes patent and trademark prosecution, anti-counterfeiting and IP litigation (notably trademark and copyright infringement) in Thailand and throughout Asia.
- Franck is recognized as one of Thailand's leading IP professional and won in 2013 the ILO client choice award for best patent practitioner. He has authored numerous articles, expert studies and guides such as the EABC Guidebook on Intellectual Property in 2013. He is a former President of the Franco-Thai Chamber of Commerce and a current Foreign Trade Advisor for the French Government and WIPO expert.

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- 1) Online Enforcement in Thailand: Main Challenges
- 2) Legal Environment: Recent Developments
- 3) Recommendations

Online enforcement in Thailand: main challenges

- Thailand ranked among top 10 countries in the world for time spent on the Internet
- High activity especially on social media
- Internet speed (4G to 5G)
- Change in consumer behavior (e-commerce, Netflix, HBO number of different subscriptions=an incentive for pirated contents...)

Online enforcement in Thailand: main challenges

- Difficulty to identify individuals behind online sales of infringing products
- Difficulty to catch imports/sales of infringement products when purchased online (individual parcels rather than containers) and to collect evidences (no receipt/billing history)

Online enforcement in Thailand: main challenges

- From warehouse to customer= no more shops.



February 13, 2019 raid: 700,000 fake cosmetics items seized- millions unseized

https://www.thaich8.com/news_detail/78490/ตรวจค้นโกดังสินค้านำเข้าจำหน่ายเครื่องสำอาง



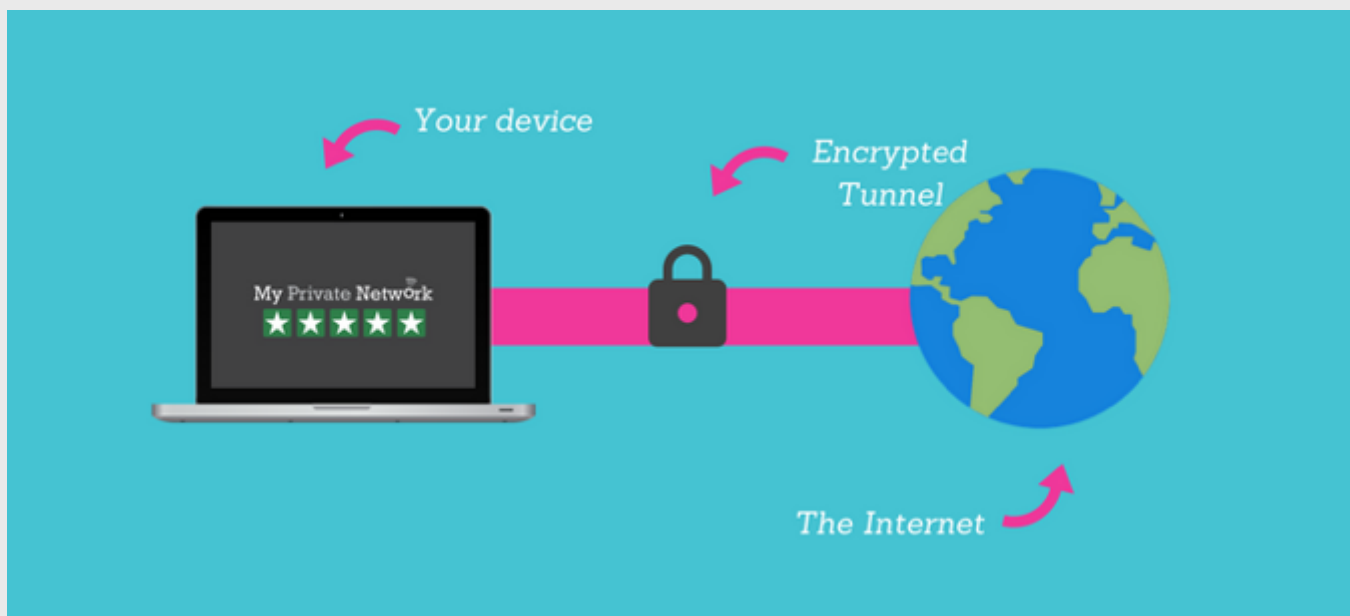
February 13, 2019 raid: 700,000 fake cosmetics items seized- millions unseized

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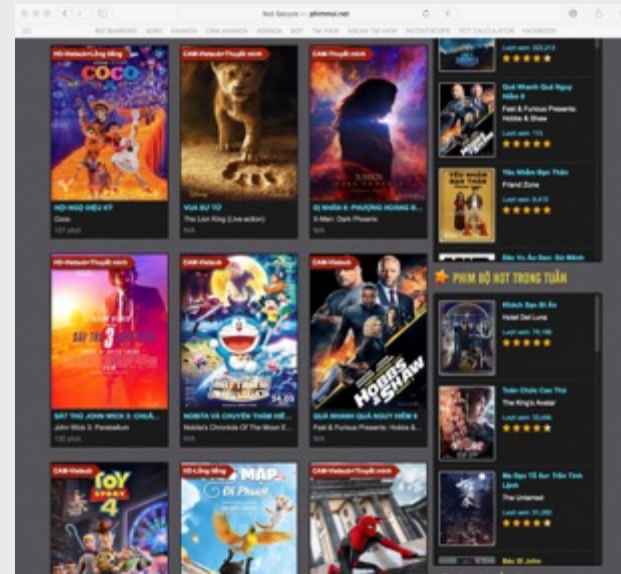
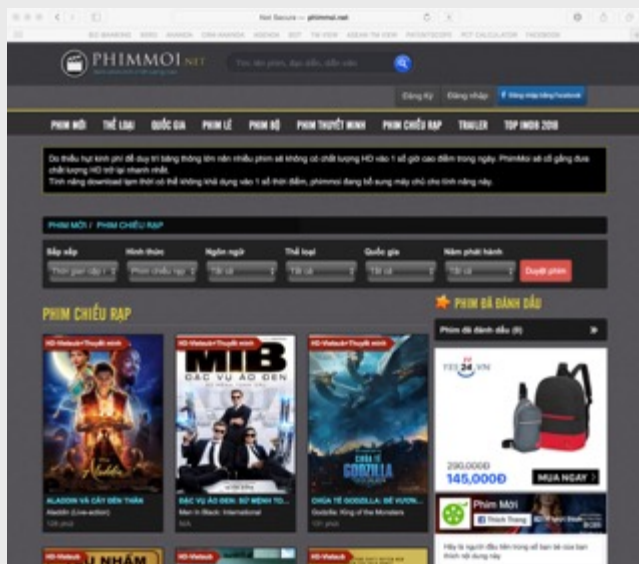
Online enforcement in Thailand: main challenges

- Easy access to infringing contents (local/international) and tools to access forbidden contents (VPNs)



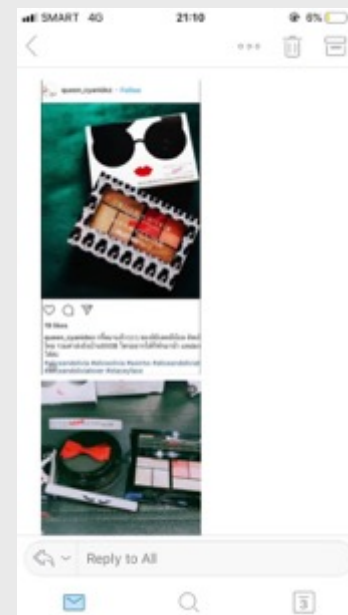
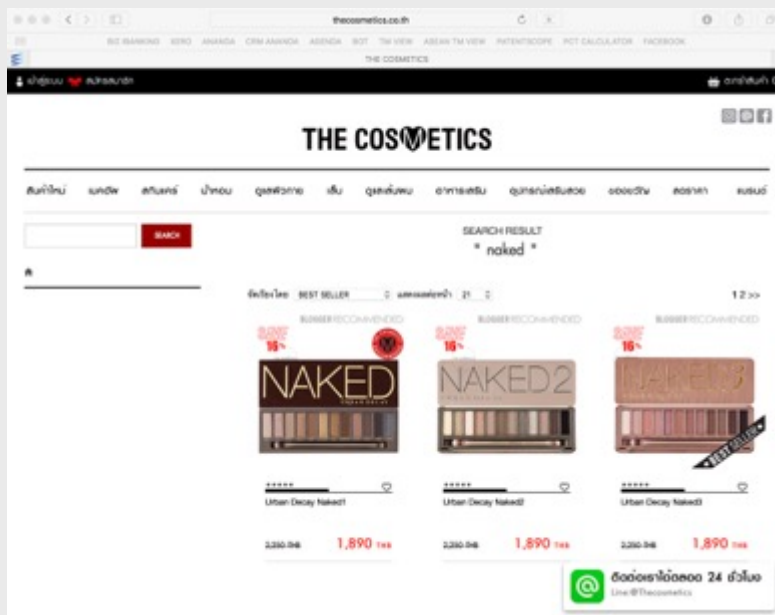
Online enforcement in Thailand: main challenges

- Focus of authorities on restricting access to containing pornographic content and lese-majeste, less on IP infringing websites.



Online enforcement in Thailand: main challenges

- Grey zone: parallel imports ?/ fake items? / improper FDA registration/no receipt and no label.



Online enforcement in Thailand: main challenges

- Lack of regional/international coordination
- Thailand not yet a signatory to Internet Treaties
- Need to strike a balance between liability (of ISPs, freedom of speech/expression, IP owners and consumers)

Online enforcement in Thailand: main challenges

- Current procedures and tools for take-down not always satisfactory from an IP owner perspective even for DCMA compliant ISPs...

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Alibaba Group - Intellectual Property Protection Platform (IPP platform)

Alibaba Group | IP Protection Platform
阿里巴巴集团 | ipp.alibabagroup.com

中文 | English

Create a New IP Protection Platform Account

* Country/Region: Mainland China

* Identity category: ☒ Individual ☐ Enterprise

* Registrant category: ☒ Right holder ☐ Authorized agent

* Email: Email will be used as Login ID

* Password: Please set login password

* Confirm password: Please enter your login password again

* Phone number: Please enter phone number

* Verification: >> Please slide to verify

☐ Upon creating my account : I agree to the [IPP User Agreement](#) and [IPP Privacy Policy](#).

Agree and register

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Online enforcement in Thailand: main challenges

- Current procedures for take-down in Thailand not satisfactory from IP owner perspective

Online enforcement in Thailand: legal environment

LAWS	Copyright Act B.E. 2537 (as amended in 2015)	Computer Crime Act BE 2560 (2017)
Article	Section 32/3: "In the case where there is reliable evidence showing that there is a <u>copyright infringement</u> in the computer system of a service provider , a copyright owner may <u>submit a petition requesting the court to order the service provider to cease such copyright infringement</u> ".	Section 20/3: "When there is an action to disseminate computer data, the competent official [from Ministry of Economy and Society-MDES], with approval from the Minister, may file a <u>petition with supporting evidence, to the court of jurisdiction, for a court order to suppress the dissemination or to remove such computer data from a computer system</u> ".
Type of infringement	Copyright only	Completed by Ministerial regulation All intellectual property rights
Type of order	Temporary injunction	Permanent injunction
Available actions	Request to the Court for removal of infringing content from the Internet. <u>Must be followed by a lawsuit against the infringer</u>	Request to the Court for removal of infringing content from the Internet or website blocking. <u>No further legal action needed</u>

Online enforcement in Thailand: legal environment

- Under current Copyright Act there are many obstacles for IP owners:
 - ✓ High burden of proof (name and adress of ISP, copyright work, alleged infringing work, detecting process, time, date, damage and request to service provider to remove infringing work).
 - ✓ Preliminary injunction only
 - ✓ Broad definition of « service provider » leading to enforceability issue: some service providers may not be able to remove alleged copyright work from their computer system (data hosts vs. Access providers). Often the server is hosted in a foreign country.
 - ✓ Some copyright owner cannot initiate the law suit within the time prescribed because they cannot find the real identity of the infringer
 - ✓ Safe harbor for ISPs when they comply with Court order, means they have no interest in assisting the copyright owner in collecting evidences
 - ✓ Costs and length of procedure (6-8 months)

Online enforcement in Thailand: legal environment

- New draft Copyright Act approved by Thai Cabinet on October 16, 2018 and Council of State on August 16, 2019 are expected to be approved soon.
- ✓ Revokes the Section 32/3 and introduces a new scheme under a Chapter 7 “Limitations to Service Provider Liability” similar to Digital Millennium Copyright ACT (DMCA) and also some part of EU Directive 2000/31/EC
- ✓ Distinguishes among 4 types of service providers (unofficial translation):
 - **Section 43/1** For this section, there shall be four types of service providers as follows:
 - (1) A service provider that provides an **intermediary service** between computers, the direction of computer data, or the service of connecting computer systems or networks, so as to affect the sending of data, including the automatic temporarily retention of the data while providing such services [**mere conduit**]
 - (2) A service provider that temporarily retains computer data in a computer system or network through an automatic system [**caching ISP**]
 - (3) A service provider that provides storage services for computer data on the service provider’s system or network according to a service user’s directions [**Hosting**]
 - (4) A service provider that provides search services for searching the online location of data by referring or linking the service user to online locations through the use of information location tools [**search engine**].

The four types **truly** are based on the American DMCA, 17 US Code § 512 (a), (b), (c), and (d) which are, respectively: Transitory Digital Network Communications, Systems Caching, Information Residing on Systems or Networks at Direction of Users, and Information Location Tools.

Online enforcement in Thailand: legal environment

- New draft Copyright Act approved by Thai Cabinet on October 16, 2018 and Council of State on August 16, 2019 are expected to be approved soon.
- ✓ *Service providers must have a **takedown policy in place** to enable termination in appropriate circumstances of subscriber and account holders identified as infringers*

Section 43/2 *A service provider must have a policy of cancelling the services provided to service users who repeatedly commits infringements, and the means to enforce such policy appropriately. There shall be technical standardized measures that do not incur unreasonable costs upon the service provider that shall be used without intervening with said policy.*

- ✓ *Copyright owners should be **able to send a notice** to the service provider (categories 43/1 (3) and (4) namely service providers hosting the infringed work and search engines and request such service provider to remove the same (namely reference source or accessing point) from its computer system and cease providing access to the related computer data.*

Online enforcement in Thailand: legal environment

- New draft Copyright Act approved by Thai Cabinet on October 16, 2018 and Council of State on August 16, 2019 are expected to be approved soon.
- ✓ *Notification of claimed infringement must be in writing with among other things the following information:*
 - *Name and contact details of copyright owner*
 - *Identification of infringed work*
 - *Identification and location of the infringing content*
 - *Attestation the information is true*
 - *Electronic signature*

*If the notification complies with the above requirement, the online service provider **must** **without delay** remove or disable access to infringing material*

Online enforcement in Thailand: legal environment

- One possible area of concern from IP owner perspective:

If there is a counter notification from the alleged infringer, the online service provider must notify the claiming party and **if the copyright owner does not bring a lawsuit to the Court within 15 days**, the service provider is then required to restore the data to the system.

Online enforcement in Thailand: legal environment

- Other important aspects of the proposed amendments:
 - (Sections 53/1 and 53/2) Introduce a copyright offence for removal or alterations of rights management information ("RMI")
 - (Section 53/4) Circumvention of technology protection measures ("TPM") are also a copyright offence.

Online enforcement in Thailand: legal environment

- The Computer Crime Act (2017) complemented by the Notification of the Ministry of Digital Economy and Society. Re” Process of the notification, Blocking Dissemination and Deletion of Computer data from Computer System B.E. 2560 (2017) - published July 22, 2017.
- Exemption of liability for 5 types of service providers:
 - intermediary service providers (mere conduit)
 - Caching
 - Hosting/storing
 - Search engine
 - Others

Online enforcement in Thailand: legal environment

- ISPs must have a notice/take down policy
- IP owners can either:
 - report to police/file a complaint with police or
 - inform service provider

Online enforcement in Thailand: legal environment

- Recent Developments:

Opening of new Center of Operational Policing of Thailand Against Intellectual Property Violations and Crimes on the Internet Suppression (COPTICS)



Online enforcement in Thailand: legal environment

- Possible limitations of COPTICS/questions to be answered...
 - 1) It was reported that COPTICS can only block on a per url basis, meaning they do not block an entire site just the url that contains the infringing content?
 - 2) It was also reported that COPTICS cannot block secured websites, therefore any site that is https cannot be blocked?
 - 3) Facebook and YouTube urls cannot be blocked, no explanation on this other than perhaps pressure from the industry giants?

Online enforcement in Thailand: legal environment

- Recent Developments:
- Thailand joining Internet Treaties?

Online enforcement in Thailand: recommendations

- Apply for IPR protection and make sure you can prove ownership (in particular for copyright owners, same for distributors)
- Monitor infringements online, set-up a response team
- Regional cooperation/harmonization
- Awareness still needed
- Support Thailand adhesion to WIPO Internet treaties
- Explore ways to improve efficiency.. take down if one thing, stay down another...

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