
Intellectual Property

Amendment to Copyright Act

Introduction

Amendments to the Copyright Act will take effect on 23 August 2022 after key changes were enacted in Copyright Act No. 5 B.E. 2565 (2022), which was published in the Government Gazette on 24 February 2022. In brief, the aim of the amendments is to standardise Thai copyright laws so that they are consistent with the WIPO Copyright Treaty 1996 and to support the emergence of many new media such as digital content, gaming, and animation. The Thai Department of Intellectual Property ("DIP") expressed confidence that the new copyright law will enhance the opportunity for Thailand to promote Thai "Soft Power" globally.

The major changes made to copyright law by the amendments focus on three areas described further below: Notice & Take Down Procedures; the Technology Protection Measure; and Extension of the Protection Period for Copyright Work.

1. Notice & Take Down Procedures

Notice & Take Down has proven to be one of the most efficient procedures to combat against online infringement in various jurisdictions, and Thailand adopted this concept for the first time in Copyright Act No. 2 B.E. 2558 (2015). There were many requests to lawmakers at that time, especially from the private sector and owners of copyright, to duplicate the same concept of Notice & Take Down found in the Digital Millennium Copyright Act of the USA into Thai law; however, Thai lawmakers chose only partial implementation at the time. That is, illegal content must only be removed by the online host or internet service provider ("ISP") following a Court Order. Other forms of notice, such as direct allegations from the copyright owner to the online host or ISP are not recognised by the laws and the online host or ISP does not have an obligation under the law to remove it until receiving a notice from the Court.

In order to obtain the Court Notice, the copyright owner must follow every single step stated in Section 32/3 of the current Copyright Act. In summary, the said steps can be very costly and time-consuming, especially when the servers are located outside of Thailand. Therefore, after almost seven years of implementation, it has been proven that Section 32/3 is impractical. Many copyright owners opted to use other procedures to take down the online illegal content, including direct negotiation with the online host or ISP. Based on our experience, most online hosts and ISPs have been very cooperative and already adopted an informal Notice & Take Down procedure that complies with an international standard to handle this situation despite there being no provisions under Thai law.

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To be more practical and closer to the international standard, Section 32/3 of the current Copyright Act will be cancelled entirely by the new Copyright Act No. 5 B.E. 2565 (2022). The new model of Notice & Take Down is described under the new Section 43/6, which states that:

*"Where the copyright owner has reasonable evidence that copyright infringement is believed to have occurred on the system or the computer network of the service provider under Section 43/4 or Section 43/5, the copyright owner may notify the service provider to remove the computer information claiming to have been made infringing their copyright or references or connection point of the computer data from the service provider's computer network or suspend the accessibility to computer information or references or access points of such computer data."*¹

To meet the legal requirement, the notice from the copyright owner must include basic information about the copyright owner, copyrighted work, and the infringing computer information. When the service provider is notified, the new law requires the service provider to:

- (1) Remove computer information claiming to have been made in infringement of the copyright or reference or access point of the computer data from the system, or suspend access to computer data or references or access points of such computer data without delay; and
- (2) Notify users of the service accused of copyright infringement and give them opportunities for opposition.

Section 43/8 of the new law also provides a sanction for the copyright owner and the user who gives a false statement to the service provider, which causes the inappropriate removal or bringing back the removed computer information into the system, to be liable for all damages caused.

2. Technology Protection Measure (TPM)

The Technology Protection Measure or TPM is an encryption technology, which is used by copyright owners as a tool to control and prevent the unlawful exploitation of copyrighted work and has been recognised as one of the principles under the WIPO Copyright Treaty 1996. Although Thailand is not yet a party to the said Treaty, Thailand has recognized the importance of TPM and added it to the Thai Copyright Act in 2015 under the Copyright Act No. 2 B.E. 2558 (2015) and the Copyright Act No. 3 B.E. 2558 (2015). However, after many years of use, it has been criticised for lack of clarity and practical difficulties in enforcement, especially regarding the definition of TPM and the lack of legal sanction for those who manufacture or distribute devices intended to evade TPM.

The new Copyright Act No. 5 B.E. 2565 (2022) aims to overcome the said problems. Under Section 4 of the new Act, TPM is re-defined as "*Technology that effectively protects the rights of copyright owners*

¹ Unofficial translation by R&T Asia (Thailand)

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*or actors' rights under this Act, or technologies used to effectively control access to copyrighted work or performance records."*² As for the circumvention of TPM under Section 53/4, it has been re-defined as *"Any action that results in the inefficiency of technological measures used to control access control is deemed to be a violation of technological measures."*³

Based on these new regulations, it can be understood that the circumvention of TPM, which will be subject to a criminal sentence, is focused on the circumvention of the TPM on "access control" only, while the circumvention of other types of TPM, such as "copy control", does not violate the new law. Therefore, if the copyright owner uses a code to prevent duplication or copy of their works, the violation of the code by someone with an objection to duplicate or copy such work without permission shall not be considered a violation of TPM under the new Section 53/4. However, it is important to note that the duplication or copying of copyrighted work without permission is, among other things, considered a violation of the "exclusive right" of the copyright owner and that it is considered a direct infringement under 27 and Section 69 of the Copyright Act, which is subject to a higher sentence.

The new Copyright Act No. 5 B.E. 2565 (2022) also provides penalties for those who manufacture or distribute devices intended to evade TPM under Section 53/6. The necessity of this legal sanction is because the violation of TPM is typically complicated. Individuals who have no knowledge of technology cannot do so easily, but must rely on the equipment or devices produced by knowledgeable people. The fact that the existing law imposes penalties only on violators of TPM, but without penalties for manufacturers or distributors of the tools needed to cause such violation, is a gap in law enforcement.

The re-definition of TPM and the circumvention of TPM under the new Act as stated above, as well as the addition of the penalties for manufacturers or distributors of devices intended to evade TPM, is a significant step towards ramping up legislation regarding TPM in Thailand and it will be interesting to see the increment of law enforcement on TPM in the near future.

3. Extension of Protection Period for Photographic Work

As Thailand is preparing to join the WIPO Copyright Treaty 1996 together with 112 other member countries, it is necessary to ensure that local laws comply with the key treaty provisions on copyright protection. Amongst other things, the protection period for photographic work has been extended from the original protection of 50 years from the date of creation to the whole life of the author (i.e., photographer) plus 50 years after the death of the author.

Although this extension does not apply to any photographic work where the copyright protection has already expired before 23 August 2022, this extension would apply to all photographic works where copyright protection still exists, even if it has been created before the effective date of the new laws.

² Unofficial translation by R&T Asia (Thailand)

³ Unofficial translation by R&T Asia (Thailand)

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Concluding Words

As the new Copyright Act No. 5 B.E. 2565 (2022) is soon to become effective, with many changes in technology-related law enforcement, such as Notice & Take Down Procedures and Technology Protection Measure (TPM), it is important for local and international businesses who operate in Thailand to run a gap analysis to ensure compliance in advance.

For the new Notice & Take Down Procedures, it is necessary for the ISP to make a channel for notification available on their website or platform in an easily accessible location. The said channel must include the name, address, telephone number, and email address of the service provider or person assigned to receive the notification. An internal protocol to handle Notice & Take Down Procedures must be set up and tested in advance to ensure a smooth process.

As for the copyright owner and content creator, especially digital content, musical works, cinematic works, TV series, gaming, and animation, which frequently see their content illegally made available to the public on various platforms, the new Notice & Take Down Procedures and changes to the TPM under Thai laws makes the system more "user friendly" in terms of the time and cost needed to enforce their rights.

With regard to the extension of protection period for photographic work, this would definitely encourage the creativity of both local and foreign photographers as they can enjoy the longer protection period and even pass on the right to receive royalties in works to their heirs. On the other hand, this extension would impact some business activities, such as photo stock websites, advertising agencies, filming industries, or those involved with sourcing and using the photographic work for commercialisation in Thailand as they may need to update the expiration dates of all photographic works currently being used or planned to be used. Financial forecasting of the additional cost of the royalties for the longer protection and copyright clearance search or freedom to operate analysis must also be undertaken to ensure the proper and legal use of photographic work under the new Act.

Due to rapidly changing technology, the law must therefore be flexible and adapt to technology. An implementation of the new Copyright Act No. 5 B.E. 2565 (2022) and the intention to join the WIPO Copyright Treaty 1996 could be a positive sign to show that Thailand is now waking up and ready to play in the digital world.

Contact



Nuttaphol Arammuang
Partner & Head
Intellectual Property

D (66) 2656 1991
F (66) 2656 0833
nuttaphol.a@rajahtann.com

Contribution Note

This Client Update is contributed by the Contact Partner listed above with the assistance of **Jomjai Jintasuwan** (Senior Associate) and **Suvijak Sriphavatsarakom** (Associate) of the Intellectual Property Group of R&T Asia (Thailand) Limited.

* * *

Our Regional Contacts

RAJAH & TANN | *Singapore*

Rajah & Tann Singapore LLP

T +65 6535 3600
sg.rajahtannasia.com

R&T SOK & HENG | *Cambodia*

R&T Sok & Heng Law Office

T +855 23 963 112 / 113
F +855 23 963 116
kh.rajahtannasia.com

RAJAH & TANN 立杰上海

SHANGHAI REPRESENTATIVE OFFICE | *China*

**Rajah & Tann Singapore LLP
Shanghai Representative Office**

T +86 21 6120 8818
F +86 21 6120 8820
cn.rajahtannasia.com

ASSEGAF HAMZAH & PARTNERS | *Indonesia*

Assegaf Hamzah & Partners

Jakarta Office

T +62 21 2555 7800
F +62 21 2555 7899

Surabaya Office

T +62 31 5116 4550
F +62 31 5116 4560
www.ahp.co.id

RAJAH & TANN | *Lao PDR*

Rajah & Tann (Laos) Co., Ltd.

T +856 21 454 239
F +856 21 285 261
la.rajahtannasia.com

CHRISTOPHER & LEE ONG | *Malaysia*

Christopher & Lee Ong

T +60 3 2273 1919
F +60 3 2273 8310
www.christopherleeong.com

RAJAH & TANN | *Myanmar*

Rajah & Tann Myanmar Company Limited

T +95 1 9345 343 / +95 1 9345 346
F +95 1 9345 348
mm.rajahtannasia.com

GATMAYTAN YAP PATACSIL

GUTIERREZ & PROTACIO (C&G LAW) | *Philippines*

Gatmaytan Yap Patacsil Gutierrez & Protacio (C&G Law)

T +632 8894 0377 to 79 / +632 8894 4931 to 32
F +632 8552 1977 to 78
www.cagatlaw.com

RAJAH & TANN | *Thailand*

R&T Asia (Thailand) Limited

T +66 2 656 1991
F +66 2 656 0833
th.rajahtannasia.com

RAJAH & TANN LCT LAWYERS | *Vietnam*

Rajah & Tann LCT Lawyers

Ho Chi Minh City Office

T +84 28 3821 2382 / +84 28 3821 2673
F +84 28 3520 8206

Hanoi Office

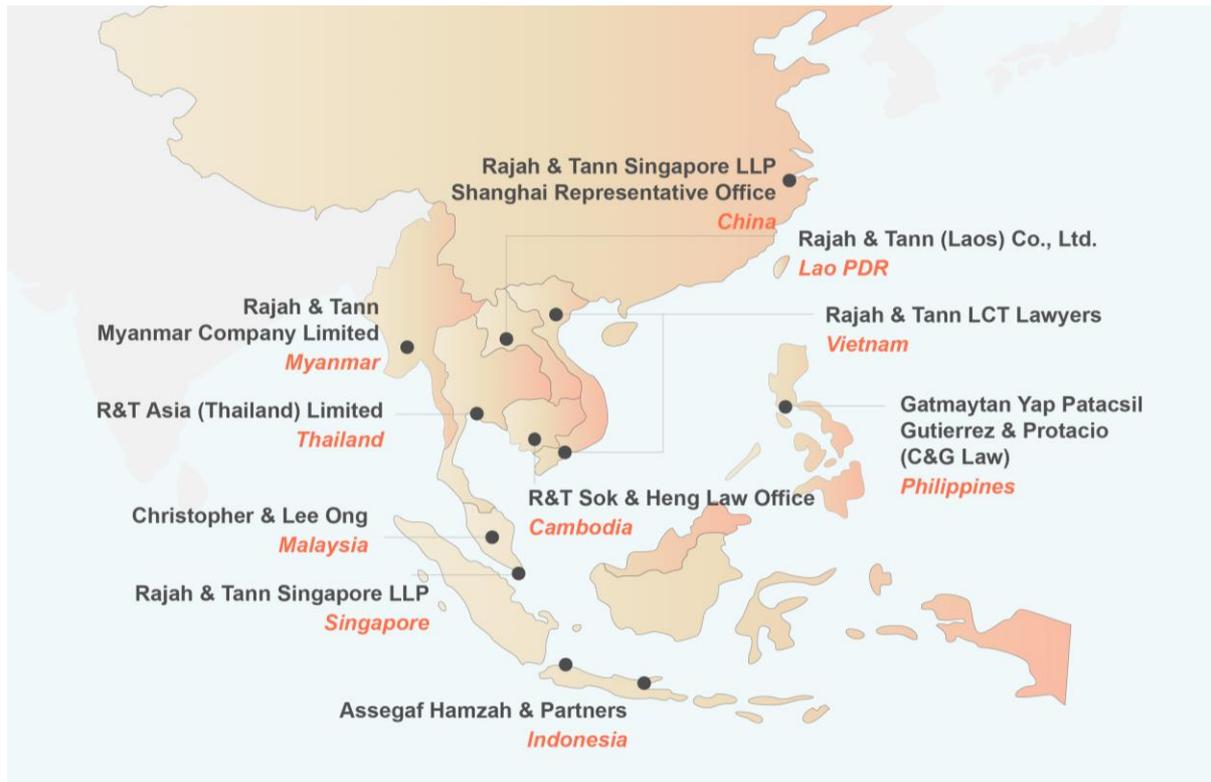
T +84 24 3267 6127
F +84 24 3267 6128
www.rajahtannlct.com

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