

# Notice - Takedown

*The Enforceability of Thai legislation*

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# Company Profile

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*Client focused, Results Driven*

# Company Overview

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## WHO WE ARE

R.W.T. is an International Law firm with an exclusive focus on a wide range of legal and professional services worldwide and throughout the ASEAN Community.

## WHAT WE DO

- Corporate Services
- Immigration
- Dispute Resolution and Litigation
- Banking and Finance
- Commercial Transactions and M&A
- Employment
- Family Law
- Intellectual Property and Enforcement
- Property
- Tax
- Risk Management / Forensic Investigation Services
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# What is a Notice - Takedown?

**A Notice - Takedown** is, in general, a process operated by online hosts in response to court orders or allegations that the content is illegal. The content is then removed by the host following such notice. A takedown notice is widely operated in relation to copyright infringement, as well as for libel and other illegal content.

# The U.S. Notice and Takedown Provision

under

# The Digital Millennium Copyright Act

# DMCA : Definition of ISP (1)

## 17 US Code Section 512 Limitation on Liabilities Relating to Material Online

### Section 512 (k) A Service Provider is defined as

- an entity offering the transmission, routing or providing of connections for digital online communications between or among points specified by a user of material of the user's choosing without modification to the content of the material as sent or received.
- a provider of online services or network access or the operator of facilities therefore includes an entity describes in the above definition.



# DMCA : Notice and Takedown (2)

## Section 512 (c) Information Residing on the System or Networks at the Direction of Users

- The ISP does not (i) have actual knowledge that the material or an activity using the material on the system or network is infringing, (ii) In the absence of such actual knowledge, it is not aware of the facts or circumstances from which the infringing activity is apparent; OR (iii) upon obtaining such knowledge or awareness, the ISP acts expeditiously to remove or disable access to the material;
- The ISP does not receive a financial benefit directly attributable to the infringing activity in such cases where the ISP has the right and ability to control such activity;



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# DMCA : Notice and Takedown (3)

- The ISP expeditiously removes or disables access to the material that is claimed to be infringing or be the subject of infringing activity; **AND**
- The ISP designates an agent to receive notifications of claims by making such available through its service (including on its website in a location accessible to the public and providing substantial information to the Copyright Office (e.g. name, address, phone no and email of the agent).

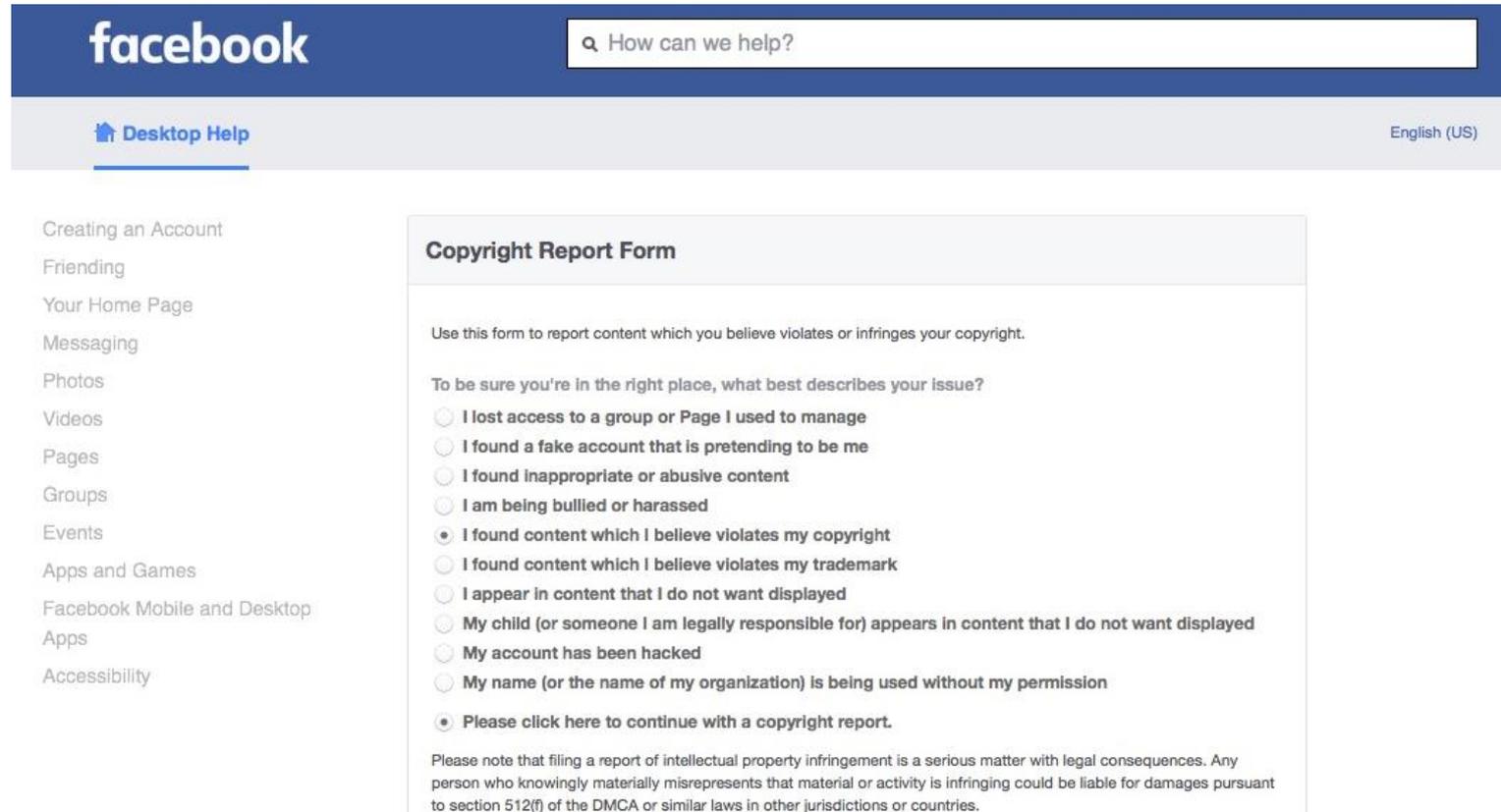
# DMCA : Notice and Takedown (4)

- The **Notification** must be in writing with details as follows (1):
  - A physical or electronic signature of a person authorized to act on behalf of the owner of the exclusive right that is alleged being infringed;
  - The Identification of the copyrighted work claimed to have been infringed. In cases of multiple works being infringed upon, it needs to be clearly listed;
  - The Identification of the material that is claimed to be infringed or be the subject of such infringing activity and as such is to be removed or disabled together with the information which will assist the ISP to locate such material;

# DMCA : Notice and Takedown (5)

- The **Notification** must be in writing with details as follows (2):
  - The Information is reasonably sufficient to permit the ISP to contact the complaining party (e.g. address, telephone no. and email);
  - A statement that the complaining party has a good faith belief that the use of the material in the manner detailed in the complaint is not authorized by the copyright owner, its agent or the law; **AND**
  - 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.

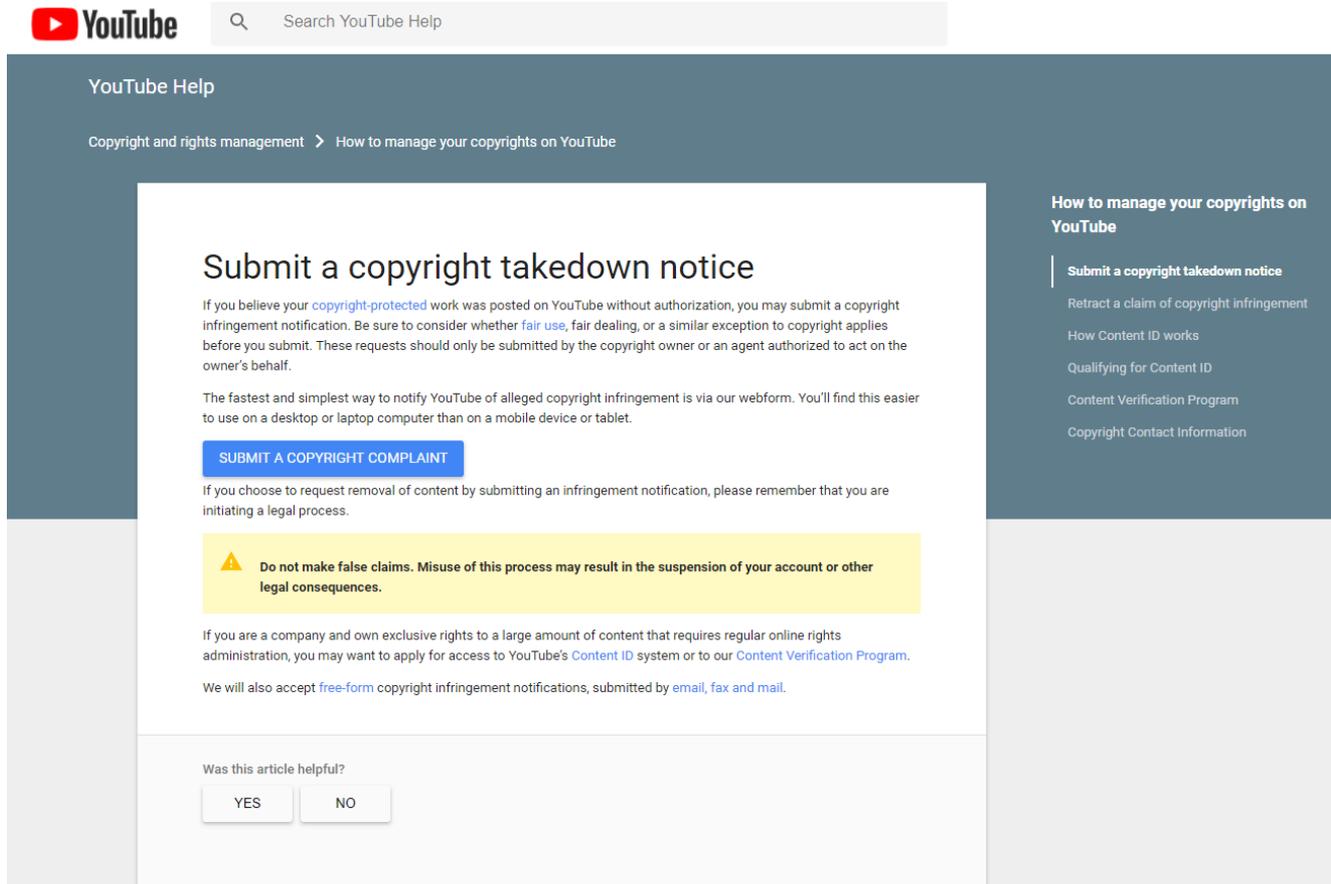
# DMCA : Notice and Takedown (6)



The image shows a screenshot of the Facebook Help Center. At the top, the Facebook logo is on the left, and a search bar contains the text "How can we help?". Below the search bar, there is a navigation bar with "Desktop Help" on the left and "English (US)" on the right. A sidebar on the left lists various help topics: "Creating an Account", "Friending", "Your Home Page", "Messaging", "Photos", "Videos", "Pages", "Groups", "Events", "Apps and Games", "Facebook Mobile and Desktop Apps", and "Accessibility". The main content area is titled "Copyright Report Form". It contains the following text: "Use this form to report content which you believe violates or infringes your copyright." Below this is a question: "To be sure you're in the right place, what best describes your issue?". There are ten radio button options: "I lost access to a group or Page I used to manage", "I found a fake account that is pretending to be me", "I found inappropriate or abusive content", "I am being bullied or harassed", "I found content which I believe violates my copyright" (which is selected), "I found content which I believe violates my trademark", "I appear in content that I do not want displayed", "My child (or someone I am legally responsible for) appears in content that I do not want displayed", "My account has been hacked", and "My name (or the name of my organization) is being used without my permission". At the bottom of the form, there is a link: "Please click here to continue with a copyright report." Below the form, there is a disclaimer: "Please note that filing a report of intellectual property infringement is a serious matter with legal consequences. Any person who knowingly materially misrepresents that material or activity is infringing could be liable for damages pursuant to section 512(f) of the DMCA or similar laws in other jurisdictions or countries."

Ref : <https://www.facebook.com/help/contact/1758255661104383>

# DMCA : Notice and Takedown (7)



The image is a screenshot of the YouTube Help page for submitting a copyright takedown notice. At the top, there is a search bar with the text "Search YouTube Help". Below the search bar, the page title "YouTube Help" is displayed, followed by a breadcrumb trail: "Copyright and rights management > How to manage your copyrights on YouTube". The main content area features the heading "Submit a copyright takedown notice". The text explains that users can submit a copyright infringement notification if they believe their "copyright-protected" work was posted on YouTube without authorization. It advises users to consider "fair use, fair dealing, or a similar exception to copyright" before submitting. A blue button labeled "SUBMIT A COPYRIGHT COMPLAINT" is prominently displayed. Below the button, a yellow warning box contains the text: "Do not make false claims. Misuse of this process may result in the suspension of your account or other legal consequences." Further text mentions that the fastest way to notify YouTube is via the webform and that users can apply for access to YouTube's Content ID system or Content Verification Program. At the bottom of the main content area, there is a feedback section asking "Was this article helpful?" with "YES" and "NO" buttons. On the right side of the page, a sidebar titled "How to manage your copyrights on YouTube" lists several options, with "Submit a copyright takedown notice" being the selected item.

YouTube Help

Copyright and rights management > How to manage your copyrights on YouTube

## Submit a copyright takedown notice

If you believe your [copyright-protected](#) work was posted on YouTube without authorization, you may submit a copyright infringement notification. Be sure to consider whether [fair use](#), fair dealing, or a similar exception to copyright applies before you submit. These requests should only be submitted by the copyright owner or an agent authorized to act on the owner's behalf.

The fastest and simplest way to notify YouTube of alleged copyright infringement is via our webform. You'll find this easier to use on a desktop or laptop computer than on a mobile device or tablet.

[SUBMIT A COPYRIGHT COMPLAINT](#)

If you choose to request removal of content by submitting an infringement notification, please remember that you are initiating a legal process.

**⚠ Do not make false claims. Misuse of this process may result in the suspension of your account or other legal consequences.**

If you are a company and own exclusive rights to a large amount of content that requires regular online rights administration, you may want to apply for access to YouTube's [Content ID](#) system or to our [Content Verification Program](#).

We will also accept [free-form](#) copyright infringement notifications, submitted by [email](#), [fax](#) and [mail](#).

Was this article helpful?

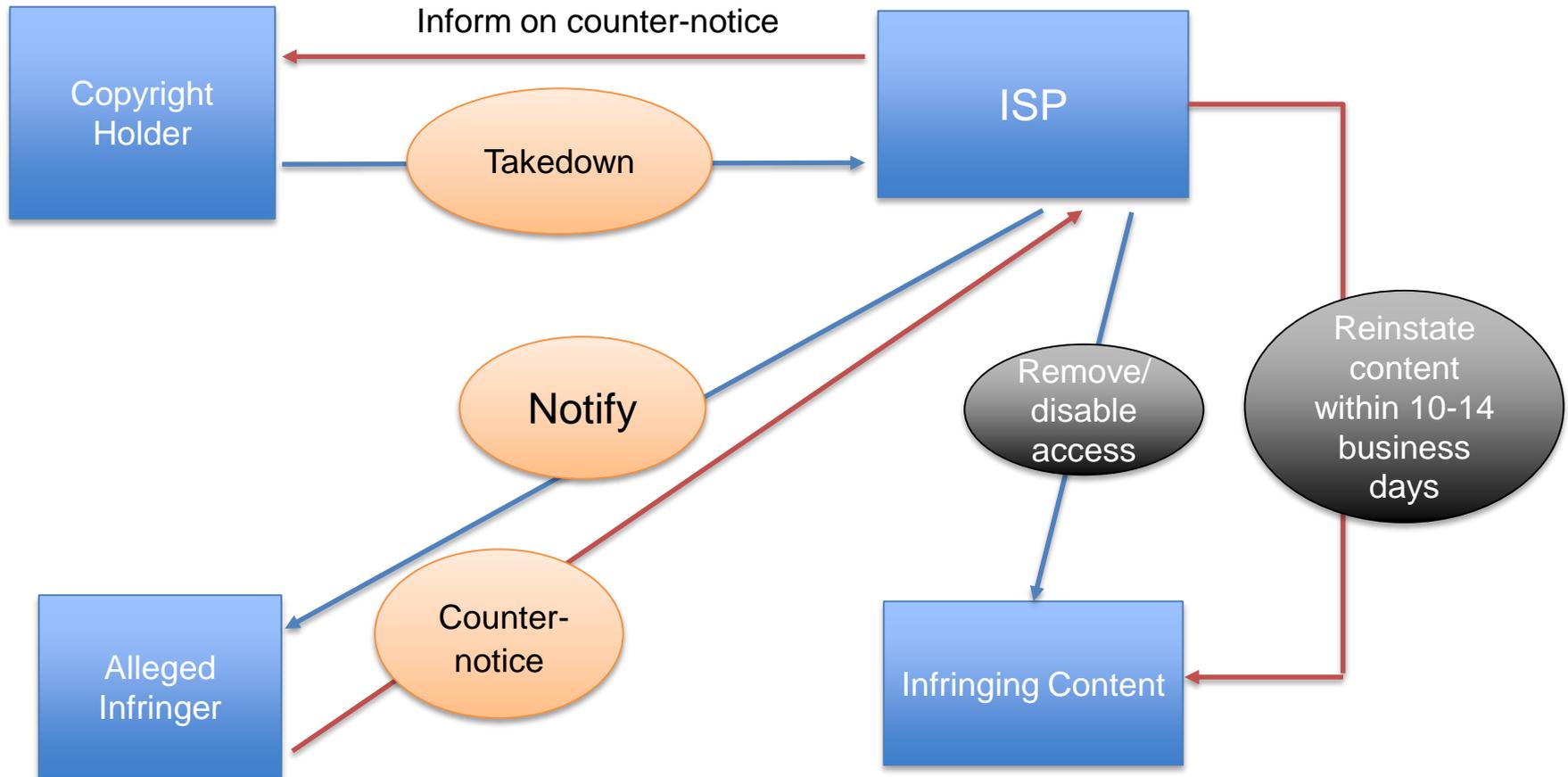
YES NO

**How to manage your copyrights on YouTube**

- Submit a copyright takedown notice**
- [Retract a claim of copyright infringement](#)
- [How Content ID works](#)
- [Qualifying for Content ID](#)
- [Content Verification Program](#)
- [Copyright Contact Information](#)

Ref: <https://support.google.com/youtube/answer/2807622?hl=en>

# Example of Notice and Takedown (8)



# DMCA : Misrepresentations and Replacement (9)

## Section 512 (f)

- Any person who knowingly and materially misrepresents that (i) the material or activity is infringed **OR** (ii) the material or activity was removed or disabled by mistake or misidentification shall be liable for any damages occurred to any person in relation to such misrepresentations.

## Section 512 (g)

- The ISP informs the subscriber of the removal or disablement of access to the material;
- Upon receipt of the counter notification, ISP promptly informs the right holder(s) on such counter notification that it will replace the removed material or cease disabling access to it in 10 business days; **AND**
- The ISP replaces such removed material and ceases disabling access to it not less than 10 nor more than 14 business days upon receipt of the counter notice.

# DMCA : Advantages of Notice and Takedown (10)

While the DMCA requirements might seem complicated and intimidating, they do create a set of safeguards that deter abuse.

- **First**, the system **prohibits third-party abuse complaints**. Only the copyright owner or someone authorized by them can file a complaint.
- **Second**, it offers a punishment, under penalty of perjury, while filing a DMCA notice.
- **Third**, it ensures that the **infringing works are properly identified** and that the necessary evidence is provided to identify the infringement.
- **Finally**, it offers a **put back procedure** that enables webmasters who are hit with obviously false DMCA notices to get their sites put back up within 10 business days (not more than 14 business days). While this is not a perfect solution, it does do a great deal to deter fraud.

# The Canada Notice and Notice Provision

under

# The Copyright Modernization Act

# Copyright Modernization Act: Notice and Notice (1)

## Sections 41.25 and 41.26

The **Notice and Notice** regime is defined in the Copyright Modernization Act. The system of Notice and Notice works as follows:

- The copyright holder sends notice of infringement to ISP;
- The ISP must forward the notice to the alleged infringer as soon as feasible;
- The ISP must inform the copyright holder that it was forwarded or why it is not possible;
- The ISP must retain record of the notice at least six months or upto a year (if the copyright holder files a legal claim).

The right holder, if any, may file the case against the alleged infringer.

# Copyright Modernization Act: Notice and Notice (2)

The **Notice** must contain information as follows:

- The claimant's name and address;
- The copyright material that is alleged to have been infringed and the claimant's interest or right with respect to that material;
- The location data (e.g. the web address or internet address associated with the alleged infringement);
- The infringement that is alleged; **AND**
- The date and time of the alleged infringement.

# Copyright Modernization Act: Notice and Notice (3)

- The ISP is not required to remove or disable infringing contents (only pass it on to the alleged infringer), although they may do so voluntarily.
- The copyright owner will still be required to invoke other legal remedies (e.g. commencing a copyright infringing case) against the infringer.
- This regime is intended to discourage online copyright infringement by providing copyright owners with a tool to enforce its rights, while also respecting the interest and freedom of the user.

# USA VS CANADA

- **The US system:** the alleged infringer is deemed guilty upon notice, unless they file the counter-notice in its defense and the ISP is required to do a takedown upon notification.
- **The Canadian system:** The ISP simply notifies the alleged infringer and only reports the said notification to the rights owner whether it is able to do so or not as well as the reason for the result of the action.

# The Notice -Takedown Provisions in Thai Legislation:

- The Amendment to The Copyright Act (No.2) B.E. 2558
- The Amendment to The Computer Crime Act (No.2) B.E.2560
- The Announcement of Ministry of Digital Economy and Society Re: Process for Notice, Suppression of Transmission of Computer Data and Removal of Computer Data from the Computer System B.E. 2560



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## The Amendment to The Copyright Act (No.2) B.E. 2558 (1)

**Section 32/3** deals with online copyright infringement by:

- Giving copyright owners a way to protect their copyrighted material from being infringed online.
- Providing a safe harbor to internet service providers (ISP) [Internet system e.g. TOT or True and platform owners e.g. Facebook or Youtube] by giving them protection/exemption from liability for breach of copyright if they comply with the court's order within the timeframe as specified within the court's order.



## Advantages of Section 32/3

- **The Copyright owner** protection provision is prescribed in **paragraph 1**.

*“In the case where **there is reliable evidence** showing that there is a copyright infringement in the computer system of a service provider, a copyright owner **may submit a petition requesting the court to order the service provider to cease such copyright infringement.**”*



## Advantages of Section 32/3

- There is an exemption of the infringement provision for **the intermediary entity** (i.e. The ISP) which appears in **paragraph 4**

*“In the case where the service provider **is not a person controlling, initiating or ordering** alleged infringement in the computer system of the service provider and such service provider **has proceeded with the court’s order** as prescribed under paragraph four, the service provider **shall not be liable for alleged infringement** occurring prior to the issuance of the court order and after the expiry of the court’s order.”*



## Disadvantages of Section 32/3

- **Paragraph 3** states that the rights owner is required to file a petition to the court and the petition must contain these:
  1. *Name and the Address of the ISP;*
  2. *The copyrighted work that is allegedly infringed;*
  3. *The alleged infringing work;*
  4. *The detecting process, date, and time when the act was discovered, as well as the act committed or circumstances, including evidence relating to the copyright infringement;*
  5. *Damage that may occur from the alleged copyright infringement;*

**AND**

  6. *The request to order the service provider to remove the infringing work from the service provider's computer system or to suppress copyright infringement by other means.*



## Disadvantages of Section 32/3

- In practice, it is very difficult to obtain all information required by Section 32/3 especially the name and address of the ISP.
- It increases the numbers of court cases.
- The court procedures are time consuming. It allows for the infringing contents to appear on the system for a longer period of time.
- It is likely that the court will reject the petition as the court will grant that there was insufficient evidence to pursue this matter further unless the rights owner clearly shows to the court all of the required information as specified in Section 32/3.
- Finally, it is likely that this Section 32/3 will not be enforced effectively.

# The Announcement of Ministry of Digital Economy and Society Re: Process for Notice, Suppression of Transmission of Computer Data and Removal of Computer Data from the Computer System B.E. 2560

## Clause 5

- The information on notice (contact details of contact person of ISP and a form of notice).
- Process of notice (a police report and details of infringing activities and material)
- The process of takedown (removal or disable accession and informing the persons who post the contents).
- The process of counter-notice (a police report, details of material which has been removed or disable to access and requesting for reinstate the contents).



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# The Amendment to the Computer Crime Act (No.2) B.E.2560 (1)

## Section 20

- It grants power to the officer of the Ministry of Digital Economy and Society (MDES) under an approval of the Minister of MDES to file a petition to the court requesting for an order to cease dissemination or deletion of infringing online contents.
- The authority of the officer of MDES to file such a petition as prescribed in paragraph 1 (3) covers “**(3) computer data which is a criminal offence according to the laws related to intellectual property** or other laws, where such computer data is a breach to the public order or good moral of the people and the law enforcement officials or the inquiry official according to the Criminal Procedure Code has made a request.”



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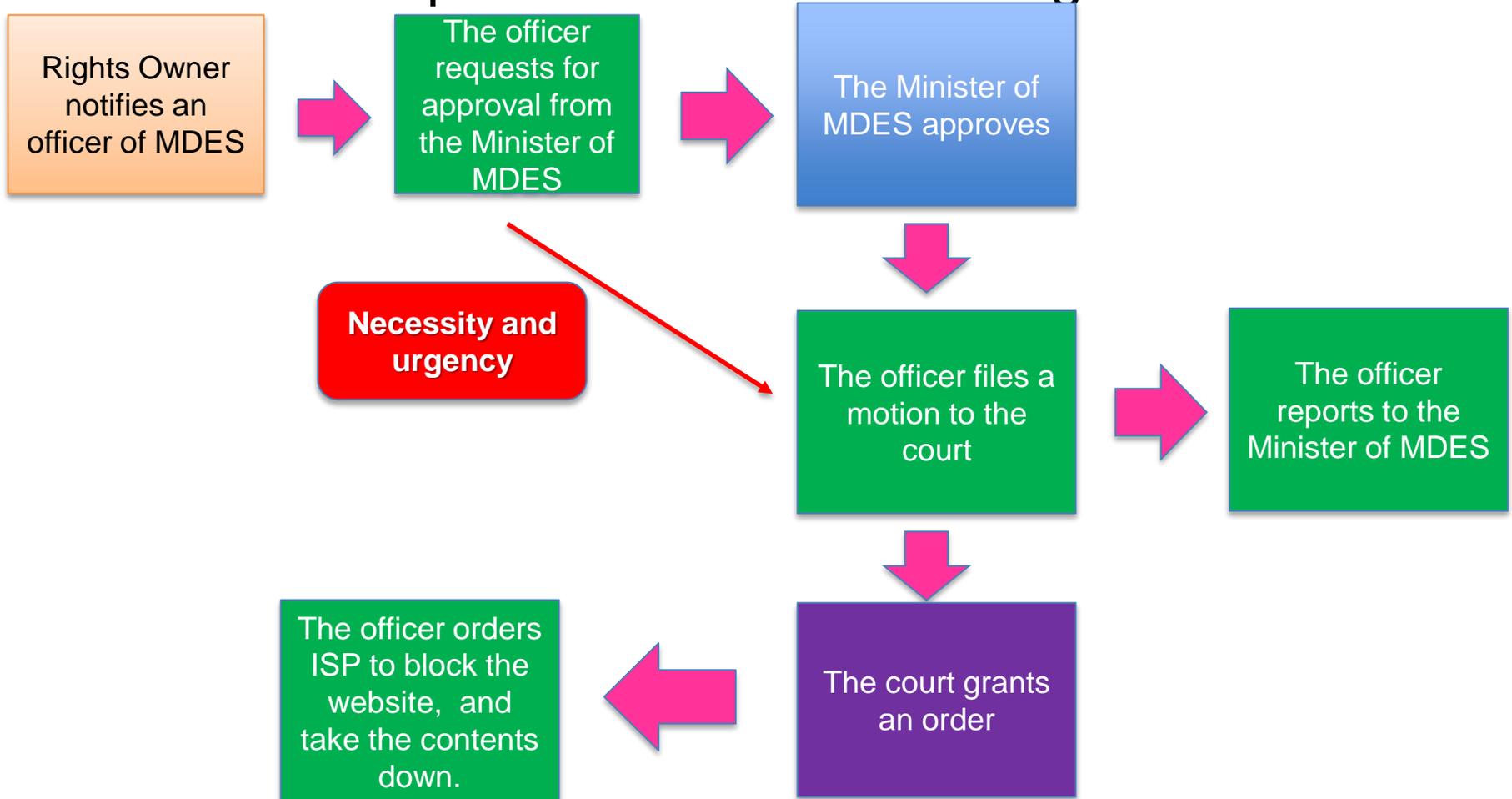
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## The Amendment to Computer Crime Act (No.2) B.E.2560 (2)

- Paragraph 4 prescribes that “*when the court issues an order to suppress the dissemination or to remove such infringing computer data, the officer may suppress the dissemination or remove the computer data itself OR order the service provider to suppress the dissemination or remove the computer data.*”
- Paragraph 5 grants the officer of MDES powers that “*in case of necessity and emergency, the officer may file for the court order under paragraph 1 before obtaining any approval from the Minister of MDES.*”

# The Amendment to the Computer Crime Act (No.2) B.E.2560 (3)

## The Computer Crime Act: Blocking Procedures



## A comparison of Section 32/3 and Section 20

Items	Section 32/3	Section 20
Infringement Subject Matter	Copyright Work	All Intellectual Property Works
Court's Order	Injunctive Relieve	Permanent Relieve
Action	Suppress/Remove	Suppress/Remove
Responsible Party	Right Owner	Officer of MDES
Information requirement(s)	Name and address of ISP; Copyright work; Alleged infringing work; Detecting process, date and time when the act was discovered and damage that may occur, etc.	Not specified (Evidence)

# Recommendations

- Managing your IP assets
- Monitoring possible infringements
- Determining whether it is worthwhile to pursue legal actions
- Collecting evidence
- Consulting with your legal counsel



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# Q&A

# Further Information and Enquiries

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