

Defamation and Internet Service Providers In Thailand

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I. Introduction

Defamation is one of the most controversial issues in Thailand. Today people can express their ideas, opinion and information via the Internet. Defamation cases have increased considerably. Although direct offenders or defendants are prosecuted or sued in criminal and civil matters, the risk for Internet service providers has increased. Because ISPs acquire benefits from Internet users, they have to control user's behaviors to be in accordance with laws and regulations, as well as to prevent any damage arising from defamation.

In Thailand, provisions on defamation are found in both criminal and civil laws. Still, there are other types of laws relating to defamation and Internet service providers, such as the Computer Crime Act. For this reason, Internet service providers may find it difficult to avoid criminal liability and civil damages. This article explores liability of Internet service providers in relation to defamation in Thailand. It focuses on laws, especially the Criminal Code, Civil and Commercial Code, and the Computer Crime Act, explaining the extent Internet service providers are liable and how they can protect themselves from criminal offenses or lawsuits. The article begins with the introduction of Internet service providers and defamation in Thailand. It then discusses defamation law relating to the use of the Internet and the role and responsibility of Internet service providers. Next, it explains damages and remedies in defamation cases before turning to defenses, exemptions and mitigations. The last section concerns some strategies for Internet service providers to prevent themselves from criminal offenses and damages.

II. Internet Service Providers and Defamation Law in Thailand

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According to Section 3 of the Computer Crime Act of 2007, Internet service providers are classified in two ways: (1) a person who provides accessibility to the Internet network through the computer system and; (2) a person who keeps computer data for others. The first classification can be further classified into four categories:

- (1) *telecommunication and broadcast carriers*, such as fixed line service providers, mobile service providers, leased circuit service providers and satellite service providers;
- (2) *access service providers*, such as public network service providers;
- (3) *hosting service providers*, such as web hosting service providers, file server service providers, mail server service providers and Internet data centers; and
- (4) *Internet cafes or cyber cafes*.

The second category refers to content and applications service providers such as web board service providers, Internet banking service providers, electronic payment service providers.²

Although Internet service providers do not commit defamatory acts directly, they might be indirectly related to defamation through their customers as Internet users. So, Internet service providers are expected to have monitoring systems in order to prevent harm and damage from such illegal acts. However, no law directly prescribes ISPs to conduct such monitoring.

Applying the Criminal Code to the issue of defamation is limited because the Code does not specifically institute liability for Internet service providers in defamation cases. The Code provides that an ISP can only be criminally liable when it has a duty to prevent the harm or it supports the person causing the harm. The Computer Crime Act also does not specifically create liability for ISPs. It can only be applied implicitly through Sections 14 and 15 of the Computer Crime Act jointly with some Criminal Code provisions on an act by omission. Furthermore, there is no law that directly imposes civil liability on ISPs in cases of defamation. Legal scholars need

² Paiboon Amornkietpinyo, Textbook on the Computer Crime Act B.E. 2550 (Bangkok: Provision, 2010), at 23-26.

to interpret whether Internet service providers fall within the scope of Sections 420 and 423 of the Civil and Commercial Code.

Through 2011, 26 defamation cases were prosecuted according to Sections 14 and 15 of the Computer Crime Act.³ Due to the ISPS's confessions, the Courts found the ISPs but the impositions of the punishment were suspended.⁴ ISPs, as intermediary persons, are now afraid of lawsuits because they are not certain about what the law requires them to do when faced with defamatory content. Entrepreneurs are now in trouble due to the uncertainty of the existing laws and are discouraged from continuing services to their customers.⁵

The objective of Section 14 (1) is not to impose punishment on defamation, but to punish phishing. However, Thai lawyers have applied this section to defamation cases and the courts have agreed that it can also apply to defamation. Recently, legislators have considered revising Section 14 (1) to impose punishment solely for phishing.⁶ Legislators have also considered adding a sentence to Section 15 that excuses Internet service providers from liability if they can prove that they warned the offender or suspended the circulation of defamatory statement, or removed statements from their system.⁷

III. Laws on Defamation and Liabilities of Internet Service Providers

In Thailand, defamation on the Internet is prescribed by criminal laws and can lead to tort liability. The Thai Criminal Code and the Computer Crime Act of 2007 provide some criminal offenses meanwhile the Thai Civil and Commercial Code call for remedies in the form of compensation.

(1) Criminal Law Offenses

³ Sawatree Sooksri et al, *Computer Crimes?* (Bangkok: iLaw Project, 2012), at 88.

⁴ *Id.* at 88-9.

⁵ *Id.* at 156-160.

⁶ <http://ilaw.or.th/node/3393>.

⁷ *Id.*

(1.1) *The Criminal Code*

If one imputes anything about another person to a third person in a manner likely to impair the reputation of that person or to subject that person to contempt or hatred, he is an offender of a defamatory offense and will be liable to imprisonment for not exceeding one year or a fine not exceeding twenty thousand baht, or both.⁸ The offense can be aggravated if the offender commits this offense by means of publication (such as a document, drawing, and letters), broadcasting or dissemination of pictures, or by propagation by any other means.⁹ The offender will be liable to imprisonment for not exceeding two years and a fine not exceeding two hundred thousand baht.¹⁰

Under the criminal defamation laws, the defamatory statement needs not be false. It is said that “the greater the truth, the greater the libel.”¹¹ The statement must be sufficient for the third person to realize who is defamed.¹² The imputation may include victim’s criminal behavior, personal financial statements and improper sexual behavior.¹³ The wrongdoer might let the third person know the imputation in person, by phone,¹⁴ letter,¹⁵ pictures or other means of communication. The defamatory offense does not depend on whether the third person believes such statement. It depends on whether the statement can cause the victim damage in the eyes of ordinary persons.¹⁶

In relation to Internet service providers’ responsibility under the Thai Criminal Code, it may refer to these two legal questions: (1) whether Internet service providers can be

⁸ Section 326 of the Criminal Code

⁹ Section 328 of the Criminal Code

¹⁰ Section 328 of the Criminal Code

¹¹ Kanaphon Chanhom, *Criminal Law: Specific Offenses vol. 1* (Bangkok: Winyuchon, 2015), at 274-275.

¹² *Id.*, at 277.

¹³ *Id.*, at 278-281.

¹⁴ Supreme Court Decision No. 2635/2529 (1986).

¹⁵ Supreme Court Decision No. 2822/2515 (1972).

¹⁶ Chanhom, *Criminal Law: Specific Offenses vol. 1*, at 286.

regarded as offenders when they do nothing to stop the defamation and; (2) whether Internet service providers can be supporters of defamatory offenses which are done by Internet users.

(1) Whether ISPs can be regarded as offenders when they do not take any action

According to Thai criminal law, there is no vicarious liability for a person with no direct action. In a case that content providers who imputes another person through the Internet, Internet service providers have no criminal responsibility for the content provider's action of defamation. This includes access providers, host service provider and telecommunication carriers.¹⁷ While Thai criminal law provides that liability can be found when a party fails to act, a criminal statute must create a duty to act for a party to be liable.¹⁸ In the current Thai law, there is no such imposed duty for Internet service providers to prevent criminal defamation from another person. For this reason, Internet service providers cannot act by omission on defamatory offenses.

(2) Whether ISPs can be supporters of defamatory offenses perpetrated by Internet users

Generally, a criminal supporter can be punished if he assists or facilitates before or at the time of the criminal commission of another person, according to Section 86.¹⁹ The punishment for the supporter is two thirds of the punishment provided for such offense.²⁰ Internet service providers who assist or facilitate the commission of defamation by another person can be liable as supporters of the defamatory offenses even if the actor does not realize such they are assisting or

¹⁷ Sawatree Sooksri, *The Duties and Criminal Liability of Internet-Provider: Special Study on Pornography and Libel on the Internet*, (Master of Laws Thesis, Faculty of Law, Thammasat University, 2004), at 139.

¹⁸ Section 59 Paragraph 5 of the Criminal Code.

¹⁹ Section 86 of the Criminal Code.

²⁰ Section 86 of the Criminal Code.

facilitating. There might be a case when Internet service providers have recognized defamatory an offense through their service, but keep silent or ignore it. As the criminal defamation is a continuing offense, as long as the statement is shown, the commission has not been finished.²¹ Internet service providers can be regarded as supporters in the form of “assistance” or “facilitation” of the defamatory commission when providers desire or could have foreseen the effect of such an existence of the defamatory statement under Sections 326 and 328 of the Thai Criminal Code.

(1.2) The Computer Crime Act of 2007

In addition to the defamatory offenses under the Thai Criminal Code, the Computer Act of 2007 imposes punishment on a person who disseminates the defamatory statement through the computer system. According to Section 14 (1), a person who involved in importing forged computer data to a computer system, either in whole or in part, or false computer data, in a manner that is likely to cause damage to a third party or the public, he shall be subject to imprisonment for not more than five years or a fine of not more than one hundred thousand baht or both.²² From this section, only false statements of defamation that cause damage to another person in the computer system can be punished. Another offense is prescribed in Section 16, where any person, who imports to a computer system that is publicly accessible, computer data where a third party's picture appears either created, edited, added or adapted by electronic means or otherwise in a manner that is likely to impair that third party's reputation or cause that

²¹ Supreme Court Decision No. 2272/2527 (1984).

²² Section 14 (1) of the Computer Crime Act of 2007.

third party to be isolated, disgusted or embarrassed, shall be subject to imprisonment for not longer than three years or a fine of not more than sixty thousand baht or both.²³

One interesting section under this Act should be addressed because it is directly related to the criminal responsibility of Internet service providers. Section 15 prescribes that “*any service providers intentionally supporting or consenting to an offense under Section 14 within a computer system under their control shall be subject to the same penalty as that imposed upon a person committing an offense under Section 14.*” In this case, when Internet service providers realize that there is a defamatory statement under Section 14 made by content providers, they intentionally support or allow that statement to exist on the Internet.²⁴ A crucial legal problem arising from this section is the limit of the word “consent.” One judicial case before a court of the first instance decided that an Internet service provider who withdraws the posted criminal statement after it has realized such a statement was present for a long period of time, shall be regarded as to have “implicitly consented” to its posting.²⁵

In addition to the liability of Internet service providers in Section 15, the Computer Crime Act imposes preventive duties against abuse of Internet usage by consumers in Sections 26 and 18 and 20. The objective of Section 26²⁶ is to preserve computer traffic data and Internet user data, including name, surname, user name or pin code,²⁷ for at least ninety days. Otherwise, Internet service providers can be liable for a

²³ Section 16 of the Computer Crime Act of 2007.

²⁴ Sirichan Binsirawanich, *Computer Crime: Case Study of Defamation on Network*, (Master of Laws Thesis, Faculty of Law, Chulalongkorn University, 2007), at 64-65.

²⁵ Court of the First Instance Decision No. 2091/2555 (2013).

²⁶ Section 26 of the Computer Crime Act of 2007.

²⁷ Pornpetch Wichitchonlachai, *Textbook on the Computer Crime Act B.E. 2550* (Bangkok: Court of Justice Office, 2007), at 67-68.

fine, according to Paragraph Three.²⁸ Moreover, Internet service providers are bound by Section 18 (2) and (3) to deliver computer traffic or Internet user data to a relevant appropriate official.²⁹ Under Section 20, Internet service providers have a duty to restrain the dissemination of computer data affecting the kingdom's security or runs in contrast to public order or good morals.³⁰

(2) Civil Liability

Thai law also allows victims of defamation to seek civil remedies. Under Section 423 of the Thai Civil and Commercial Code, a person who asserts or circulates an injurious fact that is contrary to the truth and causes damage to the reputation or credit of another person or his earnings or prosperity must compensate the injured person.³¹ A person will not be liable for torts if he asserts or circulates a fact that is true, while he may still be punished if his act meets the requirements of a defamatory offense.

Concerning Internet service providers' tortious liability, Thai legal scholars hold different positions about imposing civil liability when Internet service providers allow people to assert or circulate defamatory facts on the Internet. Some scholars believe Internet service providers can be liable for the wrongful act of another person because they permit that person to commit defamation. It could be said that Internet service providers "circulate" the wrongful fact by their own action. On the contrary, some scholars opine that circulation can occur only through an affirmative act. No one can circulate any fact by merely "omitting."³² For this reason, Internet service providers who remain inactive or do not remove the defamatory statement should have no civil liability. There has not yet been judicial decision in relation to this matter.

²⁸ Section 26 of the Computer Crime Act of 2007.

²⁹ Section 18 of the Computer Crime Act of 2007.

³⁰ Section 20 of the Computer Crime Act of 2007.

³¹ Section 423 of the Civil and Commercial Code.

³² Susom Supaint, *Textbook on Torts*, 7th ed. (Bangkok: Nitibannakarn, 2010), at 89.

However, Internet service providers might be liable by the general provision of torts under Section 420.³³ Under this section, an act by omission can cause damage to another person if that person has a duty to prevent the damage. Scholars suggest that the limit of “duty” in civil law is broader than that in criminal law.³⁴ Thus, although there is no “written” duty to prevent harm prescribed in a statute, it does not mean that a person has no such duty. The injured person can claim that the injury derives from the tortfeasor who did not exercise his duty. Specifically, the duty to inspect whether there is a wrongful act arising from the Internet network that they operate. Internet service providers cannot remain inactive or negligent and allow the defamatory statement to be present on the network.

IV. Damages and Remedies in Defamation Cases

Victims of defamation may also seek civil damages from ISPs in order to compensate them for their injuries. In ordering the defendant to make compensation, the Court determines the manner and the extent of compensation according to circumstances and the gravity of the wrongful act.³⁵ The word “manner” refers to a method of compensation, such as restitution of the deprived property or its value and damages.³⁶ The extent of compensation will be calculated by the Court based on the circumstances of the case, external facts of the wrongful act, the gravity of the offense, and the internal facts of the tortfeasor (such as intent and negligence). However, there is no legal formula for damage compensation in Thai law. Therefore, court has broad discretion in determining the compensation.³⁷

³³ Section 420 of the Civil and Commercial Code.

³⁴ Sawatree Sooksri, *The Duties and Criminal Liability of Internet-Provider: Special Study on Pornography and Libel on the Internet*, at 144.

³⁵ Section 438 Paragraph 1 of the Civil and Commercial Code.

³⁶ Section 438 Paragraph 2 of the Civil and Commercial Code.

³⁷ Paichit Poonyaphan, *Textbook of the Civil and Commercial Code on Torts and Principles of Torts on of Assumption of Legal Wrongfulness, 13th ed.* (Bangkok: Nitibannakarn, 2553), at 158.

Concerning compensation for defamation, Section 447 allows the Court to order proper measures on the tortfeasor for the rehabilitation of reputation, instead of, or together with, compensation for damages.³⁸ The Court also includes compensation for any loss of credit another or earnings or prosperity. Although Thai courts apply punitive damages to some types of case, especially in product liability, they do not apply the doctrine to defamation cases because the Civil and Commercial Code does not allow them to do so. The injured party can only be compensated for the rehabilitation of reputation and actual damages.

In the case of multiple liable parties, the liability, according to Section 432, can be apportioned equally, but the Court can decide otherwise, depending on the circumstances.³⁹ However, the injured party may demand the compensation at his option from any one of the joined actors, in whole or in part

Next, can the Court exercise an injunction to mitigate damage from defamation on the Internet? The Code of Civil procedure allows the Court to order some protective measures. Section 254 states that the Court can exercise a temporary injunction to restrain the defendant from repeating or continuing any wrongful act, or to order minimizing trouble and injury which the plaintiff may thenceforward sustain on account of the defendant's act until the case becomes final or until the Court has otherwise ordered.⁴⁰ In defamation cases, the Court can apply this interlocutory injunction when asked by the plaintiff. The plaintiff must show he has good cause and has sufficient ground for applying the protective measures. Furthermore, the Court must be satisfied that: (1) the defendant intends to repeat or continue the defamation; and (2) the plaintiff will thenceforward sustain trouble and injury because of the defendant's act.⁴¹

³⁸ Section 447 of the Civil and Commercial Code.

³⁹ Section 432 of the Civil and Commercial Code.

⁴⁰ Section 254 (2) of the Code of Civil Procedure.

⁴¹ Section 255 (2) of the Code of Civil Procedure.

V. Defenses, Exemptions and Mitigations

(1) Criminal Law

Sections 328 and 86 of the Criminal Code state that ISPs can be liable as supporters of those who use their services to defame others over the Internet.

(1.1) Defamation

The Criminal Code separates justifications from excuses for defamatory offenses. Justification provisions are in Sections 329 and 331 and Excuse is in Section 330. First, the defendant can allege that, according to Section 329, he expressed opinion or statement in good faith:⁴² (1) by way of justification, self-defense or safeguarding his legitimate interests; (2) by being an official exercising his or her duty; (3) by way of fair comment on any person or anything which shall be deemed common public criticism; or (4) by way of fair report of the open proceedings of any Court or meeting.

In general, a person can raise the defense of good faith. Acting in good faith means the defendant believes that the expressed statement is true even if it is not. Good faith is a defense as a matter of law.⁴³ However, the statement must be reasonably believed to be true. On the other hand, if it can be proved that the defendant acted in bad faith, he cannot avail himself to Section 329.

In addition to acting in good faith, the defendant must fulfill one of four conditions in Section 329:

- (1) The defendant has to express the statement by way of justification. This refers to the right thing to do in the eyes of ordinary persons.⁴⁴ The word “self-defense” means that the defendant protects

⁴² Section 329 of the Criminal Code.

⁴³ Supreme Court Decision No. 770/2526 (1983).

⁴⁴ Jitti Tingsapat, *Criminal Law Part II Sections II and III* (Bangkok: Thai Bar Association, 2010), at 462.

himself from any damages caused to others. For safeguarding his legitimate interest can be the protection of his interest in connection with moral and culture.⁴⁵

(2) An official can be excluded from penalty based on defamation if he expresses the statement according to his duty.

(3) A fair comment on anything or any person can demonstrate the defendant's good faith. It refers to a statement that the defendant believes that the statement is right and reasonable in the eyes of the public. Moreover, statements about any person or anything deemed a common public criticism because people are generally interested in public figures. Most importantly, the statement must be concerned with the person's work. The defendant cannot be excluded from criminal liability if he expresses the statement in relation to personal matters only.⁴⁶ Except if he expresses a statement that is personal, but is beneficial to public.⁴⁷

(4) A statement that is from a fair report of the open proceedings of any Court or meeting can be a defense to criminal liability. A fair report means a report that contains a true statement and is not distorted or edited.⁴⁸ Also the proceedings of the court or meeting must be open where any person has an opportunity to observe. A defamatory statement from a confidential proceeding is not covered by Section 329.⁴⁹

Second, the defendant who is a party in a case, or his lawyer, can express an opinion or statement in the proceedings of the Court to further his interests in the case. According to Section 331, the defendant will not be guilty

⁴⁵ Yut Saenguthai, *Criminal Law Parts II and III* (Bangkok: Thammasat University Press, 2010), at 274.

⁴⁶ Tingsapat, at 481.

⁴⁷ Supreme Court Decision No. 3755/2557 (2014).

⁴⁸ Tingsapat, at 492.

⁴⁹ Chanhom, at 302.

of defamation.⁵⁰ Only parties or their lawyers are able to avail themselves to this section. Other people, such as witnesses are not covered. The covered statements can be oral or written. Importantly, the statement must be delivered for interests of the party's case in the form of matters in issue only.⁵¹ Other kinds of statement are out of the provision's boundary for justification.

Third, the defendant can ask for an excuse when he is able to prove that the statement is true. However, it is prohibited to prove where the defamed statement is the imputation concerning private matters, and such proof will not benefit to the public, according to Section 330.⁵² Only true statements can be used as an excuse. Although the statement is true, it still can lead to liability when it contains (1) private matters and (2) matters not beneficial to the public. Private matters refer to matters that are irrelevant to the defamed person's job or position, while public benefit means that the statement involves the public interest.⁵³ Out of these conditions, the defendant can prove that the statement is true according to Section 330 Paragraph 2. For example, a defamatory statement that is true and irrelevant to private matters can eliminate liability when it is for the benefit of the public. In this case, a newspaper which states that a person receives bribes, is excused when it can prove the statement is true.⁵⁴ Another example is when the defamatory statement is pertinent to private matters, but the proof benefits public, or when the defamatory

⁵⁰ Section 331 of the Criminal Code.

⁵¹ Supreme Court Decision No. 430/2478 (1935).

⁵² Section 330 of the Criminal Code.

⁵³ Tingsapat, ., at 497.

⁵⁴ Supreme Court Decision No. 1362/2514 (1971).

statement is not concerned with private matters and the proof does not benefit public. All of these types of cases can be used as defenses in Court.⁵⁵

(1.2) Exemptions and Mitigations

The General Part of the Criminal Code provides some exemptions and mitigations which actors can allege as follows:

- (a) *Minors according to Sections 73 to 76 of the Criminal Code.* Section 73 excuses minors who are not yet over 10 years of age. Section 74 also excuses minors who are over 10 years of age but not yet over 15 years of age with some conditions such as admonition, determination of conditions on parents and sending the child to a school for training and instruction. Minors who are over 15 years of age but not yet 18 years of age, pursuant to Section 75, might be excused if the Court considers their capacity of committing a crime and other things and decides that they should not be punished. The Court is able to punish them by decreasing the penalty to one-half. Section 76 provides that minors who are 18 years of age or over but not yet over 20 years of age might be decreased penalty from one-third to one-half;
- (b) *Insanity according to Section 65.* Wrongdoers who cannot appreciate the nature or illegality of their act or control themselves are excused from punishment. However, if they are still partially able to appreciate the nature or illegality of their act, or is still partially able to control themselves, the Court may inflict less punishment on them;
- (c) *Intoxication according to Section 66.* In general, Persons cannot allege that their criminal act derives from intoxication, except where such intoxication is caused without the knowledge or against the will of them, and they commit the offense at the time of not being able to appreciate the nature of illegality of their act or not being able to control themselves. Nevertheless, the Court may inflict less punishment if they are still partially able to appreciate the nature or illegality of their act, or are still partially able to control themselves;

⁵⁵ Chanhom, at 310-311.

(d) *Necessity according to Section 67(1)*. When persons are necessity to commit crime due to compulsion or the influence of a force where they cannot avoid or resist, they are exempted from punishment pursuant to necessity.

These four defenses, however, are specific to offenders for excuse or less punishment.⁵⁶ Internet Service Providers cannot allege these defenses for themselves from other acts of criminal defamation. In addition to these exemptions and mitigations, prescription and extenuating circumstances may also be argued before the Court.

Under Section 333 of the Criminal Code, defamation is a compoundable offense. The injured person must make a complaint to the police within three months of the date of knowing the offenses occurred and knowing the identity of the offender. Otherwise, the period of prescription terminates, according to Section 96. Internet service providers can use this section as an exemption to criminal responsibility. In addition, if the offender is not prosecuted and brought to the Court within ten years as from the date of the commission of the offense, the prosecution shall be precluded by prescription, according to Section 95.

In case of extenuating circumstances, the Court can reduce punishment for the offender by not more than one-half, according to Section 78. Some extenuating circumstances that are in connection with Internet service providers might be: (1) the minimization of injurious consequences of the offense; (2) offender's voluntary surrender to an official; and (3) information given to the Court for the benefit of the trial.

(2) Computer Crime Act

⁵⁶ Keitkajorn Vachanasavasti, *Textbook on Criminal Law: General Part, 10th ed.* (Bangkok: Krung Siam Printing, 2008), at 726.

The Criminal Act does not provide specific defenses, exemptions or mitigations for Internet Service Providers. ISPs need to refer to the general defenses, exemptions or mitigations under the Criminal Code, as aforementioned.

(3) Civil Law

(3.1) Specific Exemptions for Defamation

Under the Civil and Commercial Code Section 423 Paragraph 2, persons who unknowingly makes an untrue communication are not liable to provide compensation if they, or the receivers of the communication, have a rightful interest in the statement. Accordingly, Internet service providers can argue they are covered by this provision to the Court if the statement is in relation to their interest and they do not know the statement is untrue.

(3.2) General Exemption

A general exemption for torts is consent. As defamation is a kind of tort, consent is normally exemption from civil liability, according to the Latin term “*volenti non fit iniuria*.” When someone gives consent to express a defamatory statement, the defaming party is not liable for compensation.

(3.3) Exemptions under the Unfair Contract Terms Act

According to Section 8 of the Unfair Contract Terms Act of 1997, Internet service providers can exclude or restrict civil liability for defamation in advance of damage by terms, announcements, or notices only when they are fair and reasonable under to the circumstances.⁵⁷ If the terms, announcements, or notices are fair and reasonable

⁵⁷ The Unfair Contract Terms Act B.E. 1997 Section 8. “The terms, announcement or notice made in advance to exclude or restrict liability for tort or breach of contract respecting loss of life, body or health of another person as a result of an action deliberately or negligently committed by the person making the terms, announcement or notice or by other person for which the person making the terms, announcement or notice shall also be liable, shall not be

according to the Court's decision, Internet service providers can use such terms, announcements or notices to exempt themselves from civil liability.

(3.4) Prescription

Section 448 Paragraph 1 of the Civil and Commercial Code provides that the claim for damages arising from defamation is barred by prescription after one year from the day when the defamatory act, as well as when the defaming person became known to the injured person, or ten years from the day when the wrongful act was committed. Because defamation is a criminal and civil matters, however, Paragraph 2 provides that if the damages are claimed on account of an act punishable under the criminal law for which a longer prescription is provided, such longer prescription shall apply.

According to Section 51 of the Code of Criminal Procedure, The prosecution relating to defamation can be categorized into three following ways:

- (1) Where the prosecution has been instituted against defamation and the offender has been brought before the Court, but the case is not yet final, the prescription in the civil case is interrupted until the criminal case is finally decided.
- (2) Where the prosecution has ended and a final judgment has been delivered prior to the entry of the civil case, the prescription is 10 years, according to Section 193/20 of the Civil and Commercial Code;
- (3) Where the prosecution had been instituted and a final judgment of acquittal has been delivered prior to the entry of the civil case, the prescription of the victim's right to file such action is one year, according to Section 448 of the Civil and Commercial Code.

VI. Defense Strategies for Internet Service Providers

raised as an exclusion or restriction of the liability. The terms, announcement or notice made in advance to exclude or restrict the liability in any case other than that mentioned in paragraph one, which are not void, shall only be enforceable to the extent that they are fair and reasonable according to the circumstances.”

First, Internet service providers should regularly inspect and screen information under their control. Especially, when reported, they should take action urgently otherwise they might be regarded as providers who ignore such illegal information and might be deemed criminal supporters of the defamatory offense under Sections 328 jointly with Section 86 of the Criminal Code. They might also fall under the scope of a wrongful act under Section 420 or 423 of the Civil and Commercial Code. However, for a civil law matter, Internet service providers might limit their liability by making terms, announcements, or notices in advance of any potential damage, according to Section 8 Paragraph 2 of the Unfair Contract Terms Act.

Currently no insurance providers in Thailand offer policies covering damages caused by defamation. However, the Non-Life Insurance Act of 1992 Section 4 defines the term “Non-Life Insurance” as any damage which may be estimated in terms of money and shall include loss of rights, benefits or income. So, entrepreneurs can enter this business by being given a license to engage insurance for Internet service providers, according to Section 6. Having insurance can decrease loss and risk for Internet service providers, but only in form of compensation.

V. Conclusion

Internet service providers as intermediary persons are now at risk due to the uncertain laws and regulations relating to liability related to defamation, even though several laws provide defenses, exemptions, and mitigations. In relation to civil liability, insurance companies have not begun to provide insurance policies covering civil damages relating to defamation facilitated by Internet service providers. For this reason, Internet service providers found civilly liable will likely have to pay the damages themselves.. ISPs should be aware of this risk and take action against defamatory statements from Internet users until new provisions are implemented. The Thai government should amend its laws concerning Internet service providers and defamation if

the ISP business model is to remain a viable business model in Thailand during the information age.

The Criminal Code

Section 59: A person shall be criminally liable only when such person commits an act intentionally, except when the law provides that liability may stem from negligence or when the act was unintentional. An act is considered intentional when done consciously and with the effects of the act either desired or reasonably foreseen by the doer. If the doer does not know the facts constituting the elements of the offense, it cannot be said that the doer desired or could have foreseen the effects. To commit an act by negligence is to commit an offense unintentionally but without exercising such care as might be expected from a reasonable person under the circumstances, and the doer could exercise such care but did not do so sufficiently. Liability may also arise from a person's failure to act when there is a duty to do so.

Section 65: Whenever any person commits an offense but cannot appreciate the nature, or illegality of his act or not being able to control himself on account of defective mind, mental disease or mental infirmity, such person shall not be punished for such offense. But, if the offender is still partially able to appreciate the nature or illegality of his act, or is still partially able to control himself, such person shall be punished for the offense, but the Court may lessen the punishment to an extent provided by the law for such offense.

Section 66: Intoxication on account of taking liquor or any other intoxicant may not be raised as an excuse under Section 65, except where such intoxication is caused without the knowledge or against the will of the offender, and such person has committed the offense at the time of intoxication, the offender shall then be exempted from the punishment for such offense. But, if

such person is still partially able to appreciate the nature or illegality of his act, or is still partially able to control himself, the Court may inflict less punishment as allowed by the law.

Section 67 Any person shall not be punished for committing any offense on account of necessity:

(1) When such person is under compulsion or under the influence of a force that such person cannot avoid or resist; or

(2) When such person acts in order to help himself or another person escape from imminent danger, which could not be avoided by any other means, and which such person did not cause himself, provided that no more is done than is reasonably necessary under the circumstances.

Section 68: Any person may commit an act in order to defend himself or another from violent or tortious conduct which is imminent, provided that act is reasonable under the circumstances.

Such act is lawful and will nullify any claims.

Section 69: In the cases as provided in Sections 67 and 68, if the act committed is in excess of what is reasonable under the circumstances or in excess of what is necessary, or in excess of what is necessary for the defense, the Court may inflict less punishment than as provided by the law for such offense. But, if such act occurs out of excitement, fright or fear, the Court may not inflict any punishment at all.

Section 72: If a person commits an offense after being incited by another, the Court may lessen the punishment for such offense as provided by law.

Section 73: A child not yet over ten years of age shall not be punished for committing an offense prescribed by the law. The inquiring official must deliver the aforementioned child to the official as provided under the child protection law in order to implement the child welfare protection as provided by such law.

Section 74 A child between the ages of 10 and 15 years of age who commits a crime shall not be punished, but the Court may do the following:

(1) Admonish the child and then discharge him; and the Court may, if it deems fit, summon the parents or guardian of the child or the person with whom the child is residing to be given an admonition too;

(2) If the Court is of opinion that the parents or guardian are able to take care of the child, the Court may give an order to hand over the child to his parents or guardian by imposing the stipulation that the parents or guardian shall take care that the child does not cause any harm throughout the time prescribed by the Court, but not exceeding three years, and fixing a sum of money, as it thinks fit, which the parents or guardian shall have to pay to the Court, but not exceeding ten thousand baht for each time when such child causes harm;

If the child resides with a person other than his parents or guardian, and the Court does not think fit to summon the parents or guardian to impose the aforementioned conditions, the Court may summon the person with whom the child resides for questioning as to whether or not he will accept the stipulation similar to that prescribed for the parents or guardian as aforesaid. If the person with whom such child resides consents to accept such stipulation, the Court shall give an order to hand over the child to such person by imposing the aforementioned conditions;

(3) If the Court hands over the child to his parents, guardian or to the person with whom the child resides according to Subsection (2), the Court may determine the conditions for controlling behavior of the child in the same manner as provided in Section 56.. In such case, the Court shall appoint a probation officer or any other official to control the behavior of the child;

(4) If the child has no parents or guardian, or has them but the Court is of opinion that they are unable to take care of such child, or if the child resides with a person other than the parents or guardian, and such person refuses to accept the stipulation mentioned in (2), the Court may give an order to hand over such child to a person or organization, as the Court deems fit, to take care of, train, and to give instruction throughout the period of time prescribed by the Court when consented to by such person or organization. In such case, such person or organization shall have the same power as that of the guardian, but only for the purpose of taking care of, training, and giving instruction, as well as determining the residence and making arrangements for the work to be done by the child, as may be reasonable; or

(5) To send such child to a school or place of training and instruction, or a place established for training and giving instruction to children throughout the period of time prescribed by the Court, but only until the child reaches eighteen years of age.

For the orders of the Court mentioned in (2), (3), (4) and (5), if, at any time within the period of time prescribed by the Court, the Court finds, or is shown through the submission documents by an interested person, the Public Prosecutor, or the person or organization to whom or which the Court has handed over the child for caretaking, training and giving instruction, or the official, that the circumstances relating to such order have changed, the Court shall have the power to modify such order or to give a new order according to the power vested by this Section.

Section 75: Whenever any person between 15 and 18 years of age commits a crime, the Court shall take into account the sense of responsibility and all other things concerning such person in order to decide whether to punish such person. If the Court does not deem it proper to punish the

person, it shall proceed according to Section 74, or if the Court deems it proper to punish the person, it shall reduce the severity of the punishment as provided for such offence by one-half.

Section 76: If any person between 18 and 20 years of age commits a crime, the Court may deem it appropriate to reduce the punishment by one-third or one-half.

Section 78: Whenever it appears that there is an extenuating circumstance, whether or not there be an increase or reduction of the punishment according to the provisions of this Code or the other law, the Court may, if it is suitable, reduce the punishment by not more than one-half.

Extenuating circumstances may include lack of intelligence, serious distress, previous good conduct, the repentance and the efforts made by the offender to minimize the injurious consequence of the offense, voluntary surrender to an official, information given to the Court for the benefit of the trial, or other circumstances which the Court considers to be of similar nature.

Section 83: In a case where an offense is committed by two or more persons, such accomplices deemed to be principals shall be punished as provided by the law.

Section 84: Whoever, whether by employment, compulsion, threat, hire, asking as favor or instigation, or by any other means, causes another person to commit any offense is said to be an instigator. If the employed person commits the offense, the instigator shall receive the punishment as a principal. If the offense is not committed, whether it be that the employed person does not consent to commit, or has not yet committed, or on account of any other reason, the instigator shall be liable for only one-third of the punishment provided for such offense.

Section 85: The publisher of any offending content punishable by at least 6 months in prison, provided it is published for the general public. Shall be liable for one-half the punishment provided by law. If the offense is committed on account of the propagation or publication

according to the first paragraph, the person who made such propagation or publication shall be liable to the punishment as principal.

Section 86: Whoever assists or facilitates another's commission of an offense before, or during the commission, even if such assistance or facilitation is not known by the offender, such assistant is deemed to be a supporter and shall be receive two-thirds of the punishment provided by law

Section 89: Exclusions and defences that apply to a particular offender shall not apply to the other offenders. However, exclusions and defences which apply to offense shall be applied to all offenders.

Section 95: In a criminal case, if the offender is not prosecuted and brought to the Court within the following specified periods of time after the date of the commission of the offense, the prosecution shall he precluded by prescription:

- (1) Twenty years in the case of offenses punishable with death, imprisonment for life or imprisonment of twenty years;
- (2) Fifteen years in the case of offenses punishable with imprisonment of over seven years but not up to twenty years;
- (3) Ten years in the case of offenses punishable with imprisonment of over one year up to seven years;
- (4) Five years in the case of offenses punishable with imprisonment of over one month up to one year;
- (5) One year in the case of offenses punishable with imprisonment of one month or less or other punishment.

If the offender has been prosecuted and brought to the Court, but the offender escapes, or is insane, and the Court gives an order suspending the trial till the specified period has expired reckoning from the date of escape, or the date of an order suspending the trial, the prosecution will be precluded by prescription.

Section 96: Subject to Section 95, in the case of a compoundable offense, if the injured person does not lodge a complaint within three months of the date of offense and when they know the identity of the offender, the criminal prosecution is precluded by prescription.

Section 326: Whoever imputes to one person a statement about a third person in a manner likely to impair the reputation of such third person, or to garner contempt or hatred toward such third person, has committed defamation and shall be punished with up to one year in prison or fined up to twenty thousand baht, or both.

Section 327: Anyone who imputes to a person a statement about a deceased person that is likely to impair the reputation of the father, mother, spouse, or child of the deceased, or expose that the deceased hated or scammed another (I think this is what you mean, correct me if I'm wrong), has committed defamation and shall be punished under Section 326.

Section 328: If the defamation is committed through publication of a document, drawing, painting, film, picture, or letters made visible by any means, gramophone record or recording instruments, recording picture or letters, or by broadcasting or spreading picture, or by propagation by any other means, the offender shall be punished with imprisonment not exceeding two years and fined not exceeding two hundred thousand baht.

Section 329: Whoever, in good faith, expresses any opinion or statement:

- (1) By way of justification or self-defence, or for the protection of a legitimate interest;
- (2) In the status of being an official in the exercise of his functions;

(3) By way of fair comment on any person or thing subjected to public criticism; or

By way of fair report of the open proceeding of any Court or meeting, shall not be guilty of defamation.

Section 330: In the case of defamation, if the person prosecuted for defamation can prove that the imputation made by him is true, he shall not be punished. The offender cannot use this defence if the imputation concerned personal matters and would not benefit the public.

Section 331: The party, or its lawyer, expressing opinion or statement in the proceeding of the Court in favour of his case will not have committed defamation.

Section 332: In a defamation case in which the defendant/accused is found guilty, the Court may give an order:

(1) To seize and destroy the defamatory matter or part thereof;

(2) To publish the whole or part of the judgment in one or more newspapers once or several times at the expense of the accused.

Section 333: The offenses in this Chapter are compoundable offenses. If the injured person dies before making a complaint, the father, mother, spouse, or child of the deceased may make a complaint, and it shall be deemed that such person is the injured person.

The Civil and Commercial Code

Section 420: A person who, willfully or negligently, unlawfully injures the life, body, health, liberty, property, or any right of another person, commits a wrongful act and is bound to make compensation therefore.

Section 423: A person who, contrary to the truth, asserts or circulates as a fact that which is injurious to the reputation or credit of another, or his earnings or prosperity in any other manner, shall compensate the injured for any damage arising therefrom. Compensation is required even if the offender does not know the information or statement was untrue, so long as he should have

known it was untrue. A person who unknowingly makes an untrue communication to another is not liable for compensation if he or the receiver of the communication has a rightful interest in it.

Section 432: If several persons jointly cause damage through a wrongful act, then they are jointly bound to make compensation, regardless if it cannot be ascertained who in the group caused the damage. Persons who instigate or assist in a wrongful act are joint actors. Joint offenders are liable in equal shares for the damage, unless the Court decides otherwise.

Section 438: The Court shall determine the manner and the extent of the compensation according to the circumstances and the gravity of the wrongful act. Compensation may include restitution of the property of which the injured person has been wrongfully deprived, or its value, as well as damages for any injury caused.

Section 447: Upon request of the injured person, or on its own, the Court may order the offender to rehabilitate the injured reputation instead of, or together with, compensation.

Section 448: A claim for damages must be made prior to one year after the wrongful act and when the identity of the offender became known to the injured, otherwise a damages claim is barred. However, if the damages are claimed on account of an act punishable under the criminal law for which a longer prescription is provided, such longer prescription shall apply.

The Computer Act of 2007

Section 3: In this Act,

“**Computer System**” means a piece of equipment or sets of equipment units, whose function is integrated together, for which sets of instructions and working principles enable it or them to perform the duty of processing data automatically.

“Computer Data” means data, statements, or sets of instructions contained in a computer system, the output of which may be processed by a computer system including electronic data, according to the Law of Electronic Transactions.

“Computer Traffic Data” means data related to computer system-based communications showing sources of origin, starting points, destinations, routes, time, dates, volumes, time periods, types of services or others related to that computer system's communications.

“Service Provider” shall mean: (1) A person who provides service to the public with respect to access to the Internet or other mutual communication via a computer system, whether on their own behalf, or in the name of, or for the benefit of, another person; (2) A person who provides services with respect to the storage of computer data for the benefit of the other person.

"Service User" means a person who uses the services provided by a service provider, with or without fee.

“Competent Official” means a person appointed by a Minister to perform duties under this Act.

“Minister” means a Minister who has responsibility and control for the execution of this Act.

Section 14: If any person commits any of the following offenses, he or she shall be subject to imprisonment for not more than five years or receive a fine of not more than one hundred thousand baht, or both:

- (1) that involves the importation to a computer system of forged computer data, either in whole or in part, or false computer data, in a manner that is likely to cause damage to that third party or the public;

- (2) that involves the importation to a computer system of false computer data in a manner that is likely to damage the country's security or cause a public panic;
- (3) that involves the importation to a computer system of any computer data related to an offense against the Kingdom's security under the Criminal Code;
- (4) that involves the importation to a computer system of any computer data of a pornographic nature that is publicly accessible;
- (5) that involves the dissemination or forwarding of computer data already known to be computer data under (1) (2) (3) or (4).

Section 15: Any service provider intentionally supporting or consenting to an offense under Section 14 within a computer system under their control shall be subject to the same penalty as that imposed upon a person committing an offense under Section 14.

Section 17: Any person committing an offense under this Act outside the Kingdom and;

- (1) the offender is Thai and the government of the country where the offense has occurred or the injured party is required to be punished or;
- (2) the offender is a non-citizen and the Thai government or Thai person who is an injured party or the injured party is required to be punished; shall be penalized within the Kingdom.

Section 18: Within the power of Section 19 and for the benefit of an investigation, if there is reasonable cause to believe that there is the perpetration of an offense under this Act, then a relevant competent official shall have any of the following authorities only as necessary to identify a person who has committed an offense in order to:

- (1) issue an inquiry letter to any person related to the commission of an offense under this Act or summon them to give statements, forward written explanations or any other documents, data, or evidence in an understandable form;
- (2) call for computer traffic data related to communications from a service user via a computer system or from other relevant persons;
- (3) instruct a service provider to deliver to a relevant competent official service users-related data that must be stored under Section 26 or that is in the possession or under the control of a service provider;
- (4) copy computer data, computer traffic data from a computer system, in which there is a reasonable cause to believe that offenses under this Act have been committed if that computer is not yet in the possession of the competent official;
- (5) instruct a person who possesses or controls computer data or computer data storage equipment to deliver to the relevant competent official the computer data or the equipment pieces;
- (6) inspect or access a computer system, computer data, computer traffic data or computer data storage equipment belonging to any person that is evidence of, or may be used as evidence related to, the commission of an offense or used in identifying a person who has committed an offense, and instruct that person to send the relevant computer data to all necessary extent as well;
- (7) decode any person's computer data or instruct any person related to the encryption of computer data to decode the computer data or cooperate with a relevant competent official in such decoding;

(8) seize or attach the suspect computer system for the purpose of obtaining details of an offense and the person who has committed an offense under this Act.

Section 20: If an offense under this Act is to disseminate computer data that might have an impact on the Kingdom's security as stipulated in Division 2 type 1 or type 1/1 of the Criminal Code, or that it might be contradictory to the peace and concord or good morals of the people, the competent official appointed by the Minister may file a petition, together with the evidence, to a court with jurisdiction to restrain the dissemination of such computer data. If the court gives an instruction to restrain the dissemination of computer data according to paragraph one, the relevant competent official shall conduct the restraint either by himself or instruct the Service Provider to restrain the dissemination of such computer data.

Section 26: A service provider must store computer traffic data for at least ninety days from the date on which the data is input into a computer system. However, if necessary, a relevant competent official may instruct a service provider to store data for a period of longer than ninety days, but not exceeding one year, on a special case by case basis or on a temporary basis.

The service provider must keep the necessary information of the service user in order to be able to identify the service user from the beginning of the service provision, and such information must be kept for a further period not exceeding ninety days after the service agreement has been terminated. The types of service provider to whom the provisions under paragraph one shall apply and the timing of this application shall be established by a Minister and published in the Government Gazette. A service provider who fails to comply with this Section must be subject to a fine of not more than five hundred thousand baht.