PROBLEM OF CRIMINAL OFFENCE OF COPYRIGHT INFRINGEMENT UNDER THE COPYRIGHT ACT B.E. 2537 (A.D. 1994)

BY
MR. TASHI DORJI

AN INDEPENDENT STUDY PAPER SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENT FOR THE DEGREE OF MASTER OF LAWS (BUSINESS LAW)

GRADUATE SCHOOL OF LAW
ASSUMPTION UNIVERSITY

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Independent Study Paper Title : Problem of Criminal Offence of Copyright Infringement under the Copyright Act B.E. 2537 (A.D. 1994)

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Faculty of Law, Assumption University approves this Independent Study Paper as the partial fulfillment of the requirement for the Degree of Master of Laws.

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ABSTRACT

Copyright in Thailand is not a new concept and it has been there since 1892 from the Royal Proclamation of Vachirayan Library for protection of literary works. However, the Copyright Act of Thailand had been changed many times due to technological developments and the increasing globalization of the economy. The enforcement on the copyright protection faces setback under the present Thai Copyright Law B.E. 2537 (A.D. 1994). Under the present Copyright Act, copyright is considered as public right and violation of the copyright is liable with criminal offense, the violating parties may be subject to prison sentence or fines as prescribed by the Act. As the guardian of the copyright protection, the Central Intellectual Property and International Trade Court were established to take up the matters relating to Intellectual Property Rights. Besides all the changes and amendments made for the protection of copyright, still there are certain problems regarding enforcement.

In Thailand, the present copyright law states copyright infringement as criminal offence, this can create the problem of making all the copyright infringers as criminals, leading to the problem of over-criminalization. Certain changes need to be made in the copyright legislation to prevent such problem. The legislature could not further criminalize copyright liability as much as they can and enforcement authority could not enforce copyright as criminal liability without understanding the nature of offence. The civil fundamental root of copyright and the basic concept of crime must be considered seriously. The wide-range legislature labeling most of the people as criminals and must be eradicated. Such problem of criminalizing the copyright infringers can be solved by taking certain measures and changes with
certain sections of the Copyright Act. Section 66, of the Copyright Act B.E.2537 (A.D 1994) states that copyright infringement is compoundable. This section on amendment has a provision to solve the problem of criminalization. The word compoundable provides the provision for the parties to reconcile with the copyright infringement matters. This problem can be solved by categorizing the infringers into certain categories, like manufacturers, sellers, and employees as well as buyers, by looking into the nature of offence committed and amount of harm and wrongs done to society.

It is important to change the penalty provisions, when there is change in the nature of crime. The differences with the penalty must ensure that the minor offenders are not criminalized. The penalties must be imposed according to the nature of crime committed by the infringers, based on the category of the offence as classified under compoundable offence.

To conclude, the problem of over-criminalization can be solved by the compoundable offence, but certain changes need to be made under the provisions of Sections 66, 69 and 70 of the Copyright Act 2537 (A.D. 1994).
ACKNOWLEDGEMENT

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Mr. Tashi Dorji
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Chapter 1
Introduction

1.1 Background and General Statement of the Problems

Copyright is all about the results of the author’s creativity. Its subject matter is formed from new ideas generated by man. New ideas may be applied in as many ways as the human mind can conceive and those new ideas can be embodied in familiar things such as books, music and art, in technical machinery and processes, in designs for household objects and for commercial ventures and in all other source of information. Once it is applied to the human needs, the value of ideas ranges from the industrial and commercial, to the world of literature, art and design, contributing to technology, economy, social and cultural progress. Protecting the development and the application of new ideas aids realization of the benefits can be derived from them. In Thailand, copyright protection has been developed since the announcement of the Vajiranana Library in 1892. In early stage, the coverage was very limited. Such protection did not cover variety of literary and artistic work. The ability to obtain knowledge and utilize such knowledge to the greatest extent possible, especially through creating innovations, is considered an eminent challenge. The government is taking major steps in the protection of copyright piracy. Thailand is a member of WIPO and became a signatory member of the Berne Convention in 1931 and also the country has accepted the standards set by TRIPs under the WTO and as a result of those conventions the amended version of current Copyright Act B.E. 2537 (A.D 1994) came into force. Though there are strong legal provisions implemented in compliance with the treaties and conventions to protect copyright, but still there are certain problems with the law for enforcement. As for the institutional reformation, the Thai Government established the Department of Intellectual Property in 1992, under the Ministry of Commerce with an initial aim to administer copyrights and other intellectual property issues, and cooperate with

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related agencies both domestic and international in the protection of Intellectual Property Rights. This reflects that Thailand has determined and intended to use intellectual property as a dynamic tool for social and economic development. In 1997, the Central Intellectual Property and International Trade Court were established. The Intellectual Property and International Trade Court were empowered with an exclusive jurisdiction over disputes involving intellectual property.

In Thailand, the offence of copyright infringement is considered as criminal offence, which is liable with criminal sanctions. The criminal offence of copyright infringement causes problem of criminalization because all the copyright infringers are charged under the criminal offence. In order to solve the problem of over criminalization, it is necessary to classify the infringers according to direct infringement under section 69 whom are high offenders like manufacturers and large scale sellers, usually known as the primary infringers and indirect infringement under Section 70 are known as secondary infringers, usually consist of minor sellers, buyers and distributors. The penalty prescription under those two sections needs to be changed as minimum fine imposed is 10,000 Baht to 100,000 Baht for the lowest offenders. So in case of a petty offender especially with few copies of DVD’s or CD’s it is not worth imposing such high amount of fines and imposing criminal charges against them.

1.2 Hypothesis of the Study

The problem of criminalizing all the copyright infringers can be solved under compoundable offence by classifying the infringers into three categories, under primary infringement, manufacturers and under secondary infringement, sellers and employees and awarding the punishment according to the nature of offence committed.

1.3 Objectives of the Study

1. To study about the cause of criminalization under the present Copyright Act.
2. To study whether compoundable offence can solve the problem of criminalization by copyright infringement.

3. To find an appropriate solution to avoid criminalizing all copyright infringers with certain measures under compoundable offence.

1.4 Study Methodology

The methodology of this research is a documentary research. The primary sources are the laws such as rules and regulations and acts on the protection of infringement of copyright under International Conventions and copyright law of Thailand, United States, European Union, Japan, and China, related books, sections in law journals and internet will also be referred.

1.5 Scope of the Study

This research will focus on how to solve criminalizing all copyright infringers under the compoundable offence of the Copyright Act B.E 2537 (A.D. 1994).

1.6 Expectation of the Study

1. To understand provision of present copyright Act concerning criminal enforcement on infringement of copyright.

2. To understand the foreign laws concerning enforcement on infringement of copyright.

3. To understand the legal problem under Thai copyright law concerning the enforcement on criminal infringement of copyright.

4. To provide recommendations to solve the problem of criminalization arising out of criminal enforcement of copyright infringement.
Chapter 2
Development of Copyright Protection

2.1 History of Copyright Law in Thailand

The copyright has a very long history in Thailand. This history could trace back in the year 1892, when the Royal proclamation of Vachirayan Library for the protection literary works. The first copyright law in Thailand was started from “Announcement of the Vachirayan Royal Library during B.E. 2435” by the King Rama V. Started from, The Royal of King tried to establish the publication of the Vachirayanvises Book Library and was established in B.E. 2444 (1901). The library Committee reached a resolution that the publication of the Vachirayanvises Book Library wholly or partly prohibited unless the committee permitted and the King Rama V was approved this resolution. This announcement becomes the first copyright law in Thailand because the authority to reproduction of the book was consistent copyright principle where the copyright owner had the exclusive rights to permit the reproduction, adaptation or publication of a work.

When the time passed by, there were so many kinds of books in the Vachirayanvises book library but they cannot be used within the other kinds of books. Then King Rama V established so called “The Ownership of Authors Act B.E.2444 to protect the authors of other books. Then Thai copyright law moved into another step to become the international level in B.E. 2474 by acceding and following Berne Convention for the Protection of Literary and Artistic Works B.E. 2429, revised at Berlin on 13 November B.E.2451 and the additional protocol on March B.E. 2457. Thailand had to enact the domestic law that compiled with the Bern Convention named” the Act for the Protection of Literary and Artistic Works B.E. 2474” and became a contracting member of the Bern Union in B.E 2474 (A.D 1931). This Act repealed the Ownership of Authors Act and the Amendment and compiled with the Bern Convention and adopted the basic principles of the

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convention. This Act was used for forty-seven years without any amendment, until it was repealed and replaced by “the Copyright Act B.E 2521 (A.D.1978)”. In order to access into the international standards by following both TRIPs norms in keeping with the development of economy and trade and also for the protection and promotion of copyright. A new copyright act was adopted known as “the Copyright Act B.E. 2537 (A.D 1994), which became effective on 21 March 1995.

2.2 Copyrighted Works

According to Section 6 of the Copyright Act B.E. 2537, The Copyright works by virtue of this Act include the work of authorship in the form of literary, dramatic, artistic, musical, audiovisual, cinematographic, sound recording, sound and video broadcasting work or any other work in the literary, scientific or artistic domain whatever may be the mode or form of its expression. There are four elements of copyright work that are generally accepted in foreign and domestic copyright laws as follows:

Expression of Idea

The principle of a copyright work must be an expression of idea and not the idea itself, in other words, the ideas are not protected by the copyright according to section 6 paragraph 2 of copyright Act of B.E. 2537 “Copyright protection shall extent to expressions and not to idea, procedures, methods of operation or mathematical concepts as such.”. In a copyright work, if the work is not protected by the copyright Law, any exploitation of the idea is lawful then it does not infringe exclusive rights of the copyright owner.

Types of Copyright Work

Under Section 4 of The Copyright Act B.E. 2537, there are various copyright works and I am going to talk about certain works which is relevant to my research topic as follows:


4 Section 6 the Copyright Act B.E. 2537 (A.D.1994)

5 Section 6, Para. 2 the Copyright Act B.E. 2537 (A.D.1994)
"musical work" means a work with respect to a song which is composed for playing or singing whether with rhythm and lyrics or only rhythm, including arranged and transcribed musical note or musical diagram.

"audiovisual work" means a work which consists of a sequence of visual images recorded on any kind of material and which is capable of being replayed with an equipment necessary for such material, including the sound track of such work, if any.

"cinematographic work" means an audiovisual work which consists of a sequence of visual images which can be continuously shown as moving pictures or can be recorded upon another material so as to be continuously shown as moving pictures, including the sound track of such cinematographic work, if any.

"sound recording" means a work which consists of sequence of music, sound of a performance or any other sound recorded on any kind of material and capable of being replayed with an equipment necessary for such material but not including the sound track of a cinematographic work or another audiovisual work.

"publication" means the distribution of duplicated copies of a work whatever may be the form of character with consent of the author where such copies are available to the public at a reasonable quantity having regard to the nature of the work provided that the performance or play of a dramatic work, a musical work or a cinematographic work, the lecture or the recitation of a literary work, the sound and video broadcasting of a work, the exhibition of an artistic work and the construction of a work of architecture shall not constitute publication.

Originality

The creator of a literary, dramatic, musical or artistic work is the author and it must be remembered that a work constitutes the particular way in which an idea has been expressed and the skill and effort put into the specific means of expressing of an idea that constitutes creation of a work and the work must not be copied from another work, it should originate from the author.\(^6\)

Uncopyrighted Work

Uncopyrighted work are the work to which copyright law does not extend the protection, which can be described into four categories.

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\(^6\) Catherine Colston and Kirst Middleton, Modern Intellectual Property Law, p. 197.
Uncopyrighted Work

Under Section 7 of the Copyright Act B.E.2537. The Article provides some points to which law doesn’t want to grant copyright. The exclusionary list is necessary because the things mentioned can be copyright works by nature. The following are not deemed copyright works. news of the day and facts having the character of mere information which is not a work in literary, scientific or artistic domain.

Constitution and legislations.

Regulations, by-laws, notifications, orders, explanation and other official correspondence of the ministries, Departments or any other government or local units.

Judicial decisions, orders, decisions and other official reports.

Translation and collections in (1) to (4) made by the Ministries, Departments or any other government or local units.7

Uncopyrighted Work by Nature

This category is meant to cover any creation which is not recognized as a copyright work created against the law such as movie, the work which do not used the idea to be present, slogans or tables.8

Work after Cease of Copyright

This means that the expiration in the terms of copyright protection makes a copyright work become unprotected by the copyright law. This work will fall into public domain where other persons can freely use and no one can claim copyright in that work.9

Waived Copyright Work

This means that a copyright owner in a work may waive or abandon his copyright therein. The waiver may be implicit or explicit, limited or unlimited. If the copyright owner absolutely abandons the copyright, the work will fall into public domain.

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7 Section 7 the Copyright Act B.E. 2537 (A.D.1994)
8 Tathchai Suppaphonsiri, Copyright Law, p.121.
2.3 Copyright Infringement

In the general, the copyright law in each country regulated the exclusive right of the copyright owner, means other person are prohibited to act anything with the copyright works without the permission of the copyright owner, if they use the copyright works without the permission of the copyright owner, their act is called the copyright infringement. Under Thai Copyright Act B.E. 2537 (A.D.1994), the work of authorship under section 6 includes literary, dramatic, artistic, musical, audiovisual, cinematographic, sound recording, sound and vide broadcasting work or any other works in the literary, scientific or artistic domain are protected under Thai law. The owners of the copyright work will have exclusive rights under section 15 on their works, for example, reproduction or adaptation of copyright works, communication to public, assigning of copyright, or etc. In addition, the authors of copyright work also have Moral Rights under section 18 about any acts which would cause damage to the reputation or dignity of the author.

Copyright Infringement can be divided into three main categories.

2.3.1 Primary Infringement

The primary infringement is the same act, which the copyright law states that only the copyright owner has the exclusive rights to do. Whoever reproduces, adapts or communicates to the public of the work protected by copyright without authorization is regarded as an infringement. The Act deals with the primary infringement in two steps. The first step is the general rule of infringement no matter what the copyright work is. The second step involves the primary infringement in specific copyright works.

The general rule of the primary infringement stipulates that the reproduction or adaptation or communication to public of copyright work accordance with the act without the permission of the copyright owner shall be deemed an infringement of copyright\(^\text{10}\).

The meaning of reproduction, adaptation and communication to the public are defined the same as those used in the context of exclusive rights. Thus, it

\(^{10}\text{Section 27 the Copyright B.E.2537 (A.D.1994)}\)
can be concluded that copyright infringement pertain to the reproduction or adaptation or communication to public of a copyright work without authorization from its owner. Moreover it also extends to the doing with substantiality of the copyright work without proper authorization.

The infringer has to pay civil damages to copyright owner. On the other hand, section 69 of the Thai copyright act provided that the infringer under section 27 of the same law has liability for criminal action. The infringer has to pay fine for infringement under section 27 from twenty thousand Baht up to two hundred thousand Baht.

This rule is also applicable to the other sections of the Thai Copyright Act, specifically:

Section 28, which is infringement on cinematographic work, audiovisual work recording

Section 29, which is infringement on sound and video broadcasting and

Section 30, which is infringement on computer program.

These are all direct actions against copyright works. Thus, they are classified as primary infringement for under the copyright Act B.E.2537 (A.D.1994)

2.3.2 Secondary Infringement

The certain activities connected with public performances give rise to the secondary infringement and understood it as the acts, which occur after primary infringement and somehow support the distribution of illegal copies of the work. These acts are treated illegal to establish a deterrent effect to the possible arrangement of distributing channels for the infringing copies of copyright work. The Act, therefore, provides that whoever knows or should have known that a work is made by infringing the copyright of another person and accordingly commits any of the following acts for profit shall be deemed to infringe the copyright stated under Section 30 of the Act as follows:

(1) selling, occupying for sale, offering for sale, letting, offering for lease, selling by hire purchase or offering for hire purchase,

(2) communication to public,
(3) distribution in the manner which may cause damage to the owner of copyright,

(4) self-importation or importation by order into the Kingdom. \(^1\)

Secondary infringement is a special form of infringement that forbids third person from profiting or deriving benefits from the direct infringement committed by another. The law intends to extend protection towards proliferation of infringement by circumvention of what is directly prohibited. Even though the infringer is not the one who directly infringe the copyright works. Thai copyright mandates that indirect actions resulting to infringement is also illegal. On the other hand, infringers who are covered by this provision should have "intent" to do the action describe in Section 31. If the infringers have no intention to commit a wrong, good faith is always an acceptable defense under this provision.

Secondary infringement has civil aspect similar to primary infringement under section 27. It is called secondary because it is indirect infringement and committed with commercial purposes.

Criminal action against secondary infringement is provided in section 70, which is fine from ten thousand baht up to one hundred thousand baht under the same section, the infringer will be liable for imprisonment for a term of three months up to three years or to fine from fifty thousand baht up to four hundred thousand baht, or to bath if committed with commercial purposes.

Both primary infringement and secondary infringement are considered as crime because the Thai Copyright Act says that copyright infringement is a criminal offence. Other actions which are protected against by the law but do not impose criminal liability on infringer is not a crime, for example, infringement of moral right of the author of copyright work in section 18.

2.3.3 Infringement Committed on Commercial Purposes

The infringer of primary infringement and secondary infringement shall be protected and punished accordingly under section 69 paragraph 1 and section 70 paragraph 1. Furthermore, the infringer has additional legal liability if the infringement was committed for commercial purposes as defined by section 69.

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\(^1\) Section 31 the Copyright B.E.2537 (A.D.1994)
paragraph 2 and 70 paragraph 2. The principle which makes the infringer to commit the offense for commercial purpose imposes graver penalty. It is the serious ground that impose additional penalty to the infringer according to the provisions of the applicable laws, for example in section 69 paragraphs 2 and section 70 paragraphs 2 of the Thai Copyright Act. Before imposing additional penalty to any infringement committed for commercial purposes, that illegal act has to possess the necessary elements under the law. In addition, the infringer has to commit that illegal action with serious ground. Copyright infringement must be the unlawful action which completes all the indispensable elements in section 27-31 depending on each case. In all of these, the essential element of the crime must always include the intent to use the infringed product for commercial purposes. Therefore, copyright infringement, which is committed with commercial purposes under section 69 paragraph 2 and 70 paragraphs 2, is especially related with criminal action. When the copyright owner's claims for damages, he/she has the duty to prove the damage from the copyright infringement whether that infringement is committed for commercial purpose or not. Good faith can always be used by the infringer to prove that he/she has no intention to commit the act of infringement especially on a commercial purpose. If compare the difference between non-commercial copyright infringement and copyright infringement committed for commercial purposes, committing with commercial purpose create more damage to copyright owner than normal copyright infringement. In this case, imposing punitive damages should be more appropriate than imposing criminal action because copyright infringement is more civil in nature rather than a criminal violation.  

2.4 Compoundable Offence of Copyright Infringement

Under Section 66 of the Copyright Act states that the offence of copyright infringement is compoundable offence, meaning that the law allows settlement of cases in any circumstances at any stage before the judgment rendered by the court.

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The copyright infringement being a compoundable offence creates barrier for copyright enforcement. Compoundable offence when compared with the primary infringers like manufacturing the infringed goods for the commercial purposes with a monetary benefit does not justify with the secondary infringers who are just retailers and vendors who employees and in some case for the individuals who infringes for personal use.

Meaning of Compoundable Offence

"The act of a party immediately aggrieved, who agrees with a thief or other felony (crime) that he will not prosecute him, on condition that he return to him the goods stolen, or who takes a reward not to prosecute. This is an offence punishable by fine and imprisonment. The mere retaking by the owner of stolen goods is no offence, unless the offence is not to be prosecuted"\(^\text{13}\).

2.5 Enforcement Measures Against Copyright Infringement

In Thailand to protect copyright infringement both the civil and criminal enforcement are available. The Central Intellectual Property and International Trade Court is the competent court which take up the Intellectual Property Rights matters. The parties in both civil and criminal cases can appeal to the Supreme Court, if they are not contended with the decision of the IP & IT Court. These can be studied under two categories as follows:

2.5.1 Civil Remedies

Compensation under Thai Copyright Act on copyright infringement case will come after sufficient evidence proving actual damages. On the other hand proving actual damages can be achieved only through filing a suit in the Civil Court. The infringement of copyright is similar to wrongful act which destroy the right of the copyright owner. Therefore, the basic tort provision under Thai Civil and Commercial Code section 420 would apply to copyright infringement\(^\text{14}\). Generally,

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\(^{14}\) Thai Civil and Commercial Code Section 420.
copyright owner has right to ask court to award damages to infringer, to cease infringement, to extinguish and collect back infringing goods or any ways which can rectify loss of plaintiff. Under Thai Copyright act, right to claim for damages is provided in Section 64. (Damages) “In the case of infringement of copyright or performer's rights, the court has the authority to order the infringer to compensate the owner of copyright or performer's rights with damages the amount which the Court considers appropriate by taking into account the gravity of injury, including the loss of benefits and the expenses necessary for the enforcement of the right of the owner of copyright or performer's rights” which court have power to award damages to copyright owner in appropriate amount under court's consideration. The amount of damages depends on gravity, serious and loss including loss and expenses which copyright owner use in case of enforcing infringement15. This rule gives more right to the copyright owner to recover damages to a greater extent because the plaintiff or the right owner has the right to recover from the loss as well as other expenses which were used in enforcement, for example, expense for proceeding copyright infringement case.

Even though the present copyright law tries to enlarge the way for remedies to copyright owner, the item of damages which copyright owner ask from court are still unclear, for example, how broad is the meaning of damages under section 64. Because Section 64 states that the damages will imposed by the court as it thinks appropriate. The Copyright law doses not give exact guideline to determine the extent of damages.

2.5.2 Criminal Sanctions

The Copyright Act provides criminal penalties, including fines and imprisonment for infringement of copyrighted works. While the Copyright Act provides for confiscation of infringing goods and permits the copyright owner to seek to permanently enjoin an infringer from repeating the offence, the Copyright Act also provides that 50% of the fines levied by the court against the infringer will be payable to the copyright owner under Section 76. In addition, at the time of writing, the Copyright Act provides that the copyright owner may withdraw the

15 Tatchai Suppapholsiri, Copyright Law, pp.266-267.
complaint filed against an infringer and settle the case privately. The settlement in this regard may take place at any time during the criminal proceedings but before the judgment is rendered.

Criminal action against infringers of copyrighted works that are protected in Thailand and taken under the penalty provisions of the Copyright Act (sections 69 to 76). The most important enforcement / penalty provisions for copyright owners are stated as under:

Section 69 states: "Any person infringing the copyright or the performer's rights under section 27, section 28, section 29, section 30 or section 52 shall be liable to a fine of 20,000 baht to 200,000 baht".

Section 70 states: "Any person infringing a copyright under Section 31 shall be liable to a fine of 10,000 baht to 100,000 baht. If the violation under paragraph one is committed for commercial purposes, the offender shall be liable to imprisonment of three months to two years or a fine of 50,000 baht to 400,000 baht, or both".

Section 75 states: "All articles made in or imported into Thailand which constitute an infringement of copyright or performers' rights pursuant to this Act, and are owned by the offender under section 69 or section 70 shall become the property of the owner of the copyright or performer's rights, whereas all articles used for committing a violation shall be forfeited".

Section 76 states: "One-half of the fine paid pursuant to a judgment of a court shall be payable to the owner of the copyright or the owner of performer's rights, but the payment shall not be prejudicial to the right of the owner of the copyright or the owner of performer's rights to bring a civil action to sue for damages which are in excess of the amount of the fine received by the owner of the copyright or the owner of performer's rights".

If the copyright owner wishes to prosecute, or cannot reach a settlement with the infringer, then the public prosecutor would handle the subsequent prosecution. Criminal trials are relatively straightforward and not overly prolonged. While the court can order the imprisonment of infringers, a first time infringer is more likely to be fined, or at worst receive a suspended prison sentence.
2.6 The Penal Provision in the present draft Copyright Act

There is big change in the enforcement of copyright infringement in the present draft act. This draft act has the provision of controlling the over criminalization. The penalty is imposed according to the nature of offence committed. The penalties are categorized into 3 levels. In cases of a general violation that is not related to trade, the original fine has been changed from 20,000 - 200,000 baht to no more than 400,000 baht, or a twice increase in the maximum fine but a removal of the minimum fine. This would give the court a great leeway to pass sentences according to the severity of the violation. As for violations related to trade, the penalty is divided into 2 levels. In cases of a general violation related to trade, such as the copying of a few CDs or a small retail sale, the penalty has been changed from imprisonment and fine to only fine of not exceeding 800,000 baht. But in cases of large scale violation that is related to trade which results in serious injuries and is the cause of severe violations, such as pirated CD production factories, production sites with machines to produce large scale pirated CDs, warehouses, distribution center, wholesale stores, or the smuggling of pirated CDs through borders, that require serious suppression, the Act authorizes more severe penalty in both the minimum and maximum rates, that is, 1-4 years imprisonment or a fines of 400,000-1,600,000 bath, or a combination of both.

Under the previous Act, the above violations were considered as reconcilable but under the new Act reconciliation can be undertaken only in cases of general violation and minor trade violation. As for major violation related to trade, the lawsuit must be carried out to the very end and cannot be reconciled. Indeed, these amendments on the penalty should help make the suppression of large scale violations more effective as well as provide the court with greater leeway to pass sentences according to the severity of the violation and ensure fair sentencing.  

Chapter 3
International Conventions on Enforcement of Copyright Infringement

3.1 Berne Convention for Protection of Copyright

The Berne Convention for the Protection of Literary and Artistic Works was first adopted in 1886 as an agreement to honour the rights of all authors who are nationals of countries that are party to the convention. The Article 2(6) states that the works mentioned in this Article shall enjoy protection in all countries of the Union. This protection shall operate for the benefit of the author and his successors in title. To protect the work of the author, enforcement measures must be included in the national legislation. The enforcement measures under this convention are stated as follows:

3.1.1 Rights of Copyright Owner

The Article 15 of the Bern Convention states about the rights of the right owner and enforcement of the protected rights.

(1) Where author's name is indicated or where pseudonym leaves no doubt as to author's identity;
(2) In the case of cinematographic works;
(3) In the case of anonymous and pseudonymous works;
(4) In the case of certain unpublished works of unknown authorship.

In order that the author of a literary or artistic work protected by this convention shall, in the absence of proof to the contrary, be regarded as such, and consequently be entitled to institute infringement proceedings in the countries of the Union, it shall be sufficient for his name to appear on the work in the usual manner. This paragraph shall be applicable even if this name is a pseudonym, where the pseudonym adopted by the author leaves no doubt as to his identity.
3.1.2 Infringement and Enforcement of Copyright

The Article 16 of the Bern Convention on the infringement of the copies also states about the infringed Copies:

(1) Infringing copies of a work shall be liable to seizure in any country of the union where the work enjoys legal protection.

(2) The provisions of the preceding paragraph shall also apply to reproductions coming from a country where the work is not protected, or has ceased to be protected.

(3) The seizure shall take place in accordance with the legislation of each country.\(^7\)

3.2 Enforcement of Intellectual Property Rights under TRIPS

The TRIPS Agreement has been in force since 1995 and is to date the most comprehensive multilateral agreement on intellectual property. The TRIPS Agreement introduced global minimum standards for protecting and enforcing nearly all forms of intellectual property rights (IPR), including those for patents. International conventions prior to TRIPS did not specify minimum standards for patents. The TRIPS Agreement now requires all WTO members, with few exceptions, to adapt their laws to the minimum standards of IPR protection. In addition, the TRIPS Agreement also introduced detailed obligations for the enforcement of intellectual property rights. TRIPS in its preamble recognizes Intellectual Property Rights as private rights but it also provide a comprehensive foundation for the development of civil, administrative and criminal procedures and remedies necessary for effective enforcement against copyright infringement. Its desire is to reduce distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade. The general

\(^{17}\) Berne Convention for the Protection of Literary and Artistic works. (September 9, 1886)
obligations relating to enforcement are contained in Article 41. Paragraph 1 requires that enforcement procedures must be such as to permit effective action against any act of infringement of intellectual property rights, and that the remedies available must be expeditious in order to prevent infringements and they must constitute a deterrent to further infringements.

Under the TRIPS Agreement both civil and criminal enforcement measures are used for the protection of Intellectual Property Rights as follows:

3.2.1 Civil Measures

The civil judicial procedures must be available in respect of any activity infringing intellectual property rights covered by the Agreement. The provisions of the Section elaborate in more detail basic features that such procedures must provide for and the remedies available as injunctions, damages and other measures. Under Article 44 the remedies available are injunctions as such.

1. The judicial authorities shall have the authority to order a party to desist from an infringement, *inter alia* to prevent the entry into the channels of commerce in their jurisdiction of imported goods that involve the infringement of an intellectual property right, immediately after customs clearance of such goods. Members are not obliged to accord such authority in respect of protected subject matter acquired or ordered by a person prior to knowing or having reasonable grounds to know that dealing in such subject matter would entail the infringement of an intellectual property right.

2. Notwithstanding the other provisions of this Part and provided that the provisions of Part II specifically addressing use by governments, or by third parties authorized by a government, without the authorization of the right holder are complied with, Members may limit the remedies available against such use to payment of remuneration in accordance with subparagraph (h) of Article 31. In other cases, the remedies under this Part shall apply or, where these remedies are inconsistent with a Member's law, declaratory judgments and adequate compensation shall be available.

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18 Article 44 TRIPs Agreement 1995.
Damages under Article 45

1. The judicial authorities shall have the authority to order the infringer to pay the right holder damages adequate to compensate for the injury the right holder has suffered because of an infringement of that person's intellectual property right by an infringer who knowingly, or with reasonable grounds to know, engaged in infringing activity.

2. The judicial authorities shall also have the authority to order the infringer to pay the right holder expenses, which may include appropriate attorney's fees. In appropriate cases, Members may authorize the judicial authorities to order recovery of profits and/or payment of pre-established damages even where the infringer did not knowingly, or with reasonable grounds to know, engage in infringing activity.\[19\]

Other Remedies under Article 46

In order to create an effective deterrent to infringement, the judicial authorities shall have the authority to order that goods that they have found to be infringing be, without compensation of any sort, disposed of outside the channels of commerce in such a manner as to avoid any harm caused to the right holder, or, unless this would be contrary to existing constitutional requirements, destroyed. The judicial authorities shall also have the authority to order that materials and implements the predominant use of which has been in the creation of the infringing goods be, without compensation of any sort, disposed of outside the channels of commerce in such a manner as to minimize the risks of further infringements. In considering such requests, the need for proportionality between the seriousness of the infringement and the remedies ordered as well as the interests of third parties shall be taken into account. In regard to counterfeit trademark goods, the simple removal of the trademark unlawfully affixed shall not be sufficient, other than in exceptional cases, to permit release of the goods into the channels of commerce.\[20\]

\[19\] Article 45 TRIPs Agreement 1995.

\[20\] Article 46 TRIPs Agreement 1995.
3.2.2 Criminal Sanctions

Besides the civil enforcement measures the TRIPS under Article 61 also provides criminal sanctions and penalties, where the infringing goods were of such number enough to consider the unlawful act as motivated for commercial purposes. The act states that in case of willful trademark counterfeiting or copyright piracy on a commercial scale. Remedies available shall include imprisonment and/or monetary fines sufficient to provide a deterrent, consistently with the level of penalties applied for crimes of a corresponding gravity. In appropriate cases, remedies available shall also include the seizure, forfeiture and destruction of the infringing goods and of any materials and implements the predominant use of which has been in the commission of the offence. Members may provide for criminal procedures and penalties to be applied in other cases of infringement of intellectual property rights, in particular where they are committed willfully and on a commercial scale21.

3.3 Enforcement on Copyright Infringement under WIPO

The copyright enforcement under WIPO is in compliance with the TRIPS Agreement of 1995, which contains detailed provisions on the enforcement of rights. The following paragraphs identify and summarize some of the enforcement provisions found in recent national legislation, which may be divided into the following categories: conservatory or provisional measures; civil remedies; criminal sanctions; measures to be taken at the border; and measures, remedies and sanctions against abuses in respect of technical devices22.

3.3.1 Civil remedies

Under the civil remedies WIPO believes in the right of the right holder and provides the provision to compensate the owner of rights for economic injury

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21 Article 61 TRIPs Agreement 1995.
suffered because of the infringement, usually in the form of monetary damages, and create an effective deterrent to further infringement, often in the form of a judicial order to destroy the infringing goods and the materials and implements which have been predominantly used for producing them; where there is a danger that infringing acts may be continued, the court may also issue injunctions against such acts, failure to comply with which would subject the infringer to payment of a fine.

3.3.2 Criminal sanctions

Under the criminal sanctions WIPO does not favour to use it as a basic tool. But it intended to punish those who willfully commit acts of piracy of copyright and related rights on a commercial scale, and, as in the case of civil remedies, to deter further infringement. The purpose of punishment is served by the imposition of substantial fines, and by sentences of imprisonment consistent with the level of penalties applied for crimes of corresponding seriousness, particularly in cases of repeat offenses. The purpose of deterrence is served by orders for the seizure, forfeiture and destruction of infringing goods, as well as the materials and implements the predominant use of which has been to commit the offense.

3.4 Foreign Laws on Enforcement of Copyright Infringement

The researcher would like to study about copyright infringement in USA, European Union, Japan and China and learn about their enforcement measures and the action taken to protect copyright from infringement.

3.4.1 Enforcement on Copyright Infringement in United States of America

Copyright law in the United States is derived from the United Kingdom. At present it is part of federal law authorized by the U.S. Constitution under Article I, Section 8, Clause 8 of the Congress. Statutory provisions relating to copyright currently in effect are codified in Title 17 of the United States Code. Under United States Copyright Law, it states that “Copyright owner”, with respect to any

one of the exclusive rights comprised in a copyright, refers to the owner of that particular right. In which copyright is considered as private right of the owner. United States Code Title 17 of Copyright Act 1976 states that the owner of a copyright is entitled to relief from unauthorized copying, displaying, distribution or performance of the copyrighted work, all collectively known as copyright infringement. The relief available to a copyright owner for infringement begins when the owner notifies the infringing party that a copyright has been violated. Several types of injunctive relief are available from a court of law. The copyright owner can recover damages and further injunctive relief by way of final judgment and decree on a lawsuit. The relief on the copyright infringement can be obtained through the following procedures:

1. Civil Remedies

In case of copyright infringement, the copyright holder must file a civil lawsuit in federal court to pursue his or her remedies. These remedies fall into two general categories: Injunctions and damages.

Injunctions: Copyright Act §502 authorizes courts to grant both preliminary and permanent injunctions against copyright infringement and against violations of the author's rights of attribution and integrity in works of visual art. There are also provisions for impounding allegedly infringing copies under §503, phonorecords, and other materials used to infringe, and for their ultimate destruction upon a final judgment of infringement.

Damages or the profit earned by the infringer. Copyright Act §504 gives the copyright owner a choice of recovering: (1) their actual damages and any additional profits of the defendant; or (2) statutory damages Where it is proper to do so, considering the flagrancy of the infringement, the court may also order other additional damages to be paid by the infringing party to the copyright owner.

2. Equitable Relief

Both temporary and permanent injunctions are available to prevent or restrain infringement of a copyright. Where the infringer is the government, however, injunctions are not available and the copyright holder can only seek monetary damages.

One form of equitable relief that is available in copyright cases is a seizure order. At any time during the lawsuit, the court may order the impoundment
of any and all copies of the infringing products. The seizure order may include materials used to produce such copies, such as master tapes, film negatives, printing plates, etc. Items that are impounded during the course of the lawsuit can, if the plaintiff wins, be ordered destroyed as part of the final decree.

3. Monetary Damages

Under Copyright Act §504, a copyright holder can also seek monetary damages. Injunctions and damages are not mutually exclusive. One can have injunctions and no damages, or damages and no injunctions, or both injunctions and damages. There are two types of damages: actual damages and profits, or statutory damages. During the course of the lawsuit, the copyright holder can ask the court for both, in the alternative. However, at the end of the case, they are mutually exclusive. Only one can be awarded and not the other. Actual damages are the actual losses suffered by the copyright holder as a result of the infringement. Profits are the profits gained by the wrongdoer as a result of the infringement. Statutory damages are available as an alternative to actual damages and profits.

4. Attorney’s Fees

Copyright Act §505 permits courts, in their discretion, to award costs against either party and to award reasonable attorney fees to the prevailing party. The court may award to the "prevailing party" a reasonable attorney’s fees. This applies to both the winning plaintiff (right holder) and the winning defendant (accused infringer). However, attorney’s fees award is not available against the government. Like statutory damages, attorney’s fees are not available if the work infringed is not registered at the time of infringement.

5. Criminal Sanctions

In addition to the civil remedies, the Copyright Act 1976, Section 506 (a) provides for criminal prosecution in some cases of willful copyright infringement. There are also criminal sanctions for fraudulent copyright notice, fraudulent removal of copyright notice, and false representations in applications for copyright registration. The Digital Millennium Copyright Act imposes criminal sanctions for certain acts of circumvention and interference with copyright management information. There are not criminal sanctions for violating the rights of
attribution and integrity held by the author of a work of visual art. Criminal penalties for copyright infringement include:

- A fine of not more than $500,000 or imprisonment for not more than five years, or both, for the first offense.
- A fine of not more than $1 million and imprisonment for not more than 10 years, or both, for repeated offenses.

Nonprofit libraries, archives, education institutions and public broadcasting entities are exempt from criminal prosecution.

3.4.2 Enforcement on Copyright Infringement under European Union

European Union enforces copyright both civil and administrative. While there are international agreements, such as the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), that have the basic standards for effective Intellectual Property enforcement procedures, under the European Union’s Enforcement of Intellectual Property Rights Directive. Under the Directive, Member States must provide measures; procedures and remedies necessary to ensure the enforcement of IPR that are fair and equitable. All EU Member States must provide “effective, dissuasive, and proportionate” remedies and penalties against those engaged in counterfeiting and piracy. The EU Directive has led many states to adopt national provisions on civil remedies more closely in line with “best practices” standards. These standards include procedural protection, which covers evidence and protection of evidence, and provisional measures such as injunctions and seizure. There is also a “right of information” that allows judges to gain access to names and addresses of those involved in distributing the illegal goods, and the details about the amount of goods involved and the prices. Remedies include the infringing work’s destruction, recall of illegal material, and permanent removal of that work from the EU market. The legitimate copyright holder may be entitled to damages and/or injunctive relief. Thus far, the EU has no criminal remedy available. The civil remedies available under EU Corrigendum to Directive 2004/48/EC of the European

Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights will be discussed as follows:

1. **Provisional and Precautionary Measure (Article 9)**

   Member States shall ensure that the judicial authorities may, at the request of the applicant (a) issue against the alleged infringer an interlocutory injunction intended to prevent any imminent infringement of an intellectual property right, or to forbid, on a provisional basis and subject, where appropriate, to a recurring penalty payment where provided for by national law, the continuation of the alleged infringements of that right, or to make such continuation subject to the lodging of guarantees intended to ensure the compensation of the right holder; an interlocutory injunction may also be issued, under the same conditions, against an intermediary whose services are being used by a third party to infringe an intellectual property right; injunctions against intermediaries whose services are used by a third party to infringe a copyright or a related right are covered by Directive 2001/29/EC; (b) order the seizure or delivery up of the goods suspected of infringing an intellectual property right so as to prevent their entry into or movement within the channels of commerce.

   In the case of an infringement committed on a commercial scale, the Member States shall ensure that, if the injured party demonstrates circumstances likely to endanger the recovery of damages, the judicial authorities may order the precautionary seizure of the movable and immovable property of the alleged infringer, including the blocking of his/her bank accounts and other assets. To that end, the competent authorities may order the communication of bank, financial or commercial documents, or appropriate access to the relevant information.

2. **Injunctions (Article 11)**

   Member States shall ensure that, where a judicial decision is taken finding an infringement of an intellectual property right, the judicial authorities may issue against the infringer an injunction aimed at prohibiting the continuation of the infringement. Where provided for by national law, non-compliance with an injunction shall, where appropriate, be subject to a recurring penalty payment, with a view to ensuring compliance. Member States shall also ensure that right holders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe an intellectual property right, without prejudice to Article 8(3) of Directive 2001/29/EC.
3. Alternative Measures (Article 12)

Member States may provide that, in appropriate cases and at the request of the person liable to be subject to the measures provided for in this section, the competent judicial authorities may order pecuniary compensation to be paid to the injured party instead of applying the measures provided for in this section if that person acted unintentionally and without negligence, if execution of the measures in question would cause him/her disproportionate harm and if pecuniary compensation to the injured party appears reasonably satisfactory.

4. Damages (Article 13)

Member States shall ensure that the competent judicial authorities, on application of the injured party, order the infringer who knowingly, or with reasonable grounds to know, engaged in an infringing activity, to pay the right holder damages appropriate to the actual prejudice suffered by him/her as a result of the infringement. When the judicial authorities set the damages: (a) they shall take into account all appropriate aspects, such as the negative economic consequences, including lost profits, which the injured party has suffered, any unfair profits made by the infringer and, in appropriate cases, elements other than economic factors, such as the moral prejudice caused to the rightholder by the infringement; or (b) as an alternative to (a), they may, in appropriate cases, set the damages as a lump sum on the basis of elements such as at least the amount of royalties or fees which would have been due if the infringer had requested authorisation to use the intellectual property right in question. Where the infringer did not knowingly, or with reasonable grounds know, engage in infringing activity, Member States may lay down that the judicial authorities may order the recovery of profits or the payment of damages, which may be pre-established.

5. Legal Costs (Article 14)

Member States shall ensure that reasonable and proportionate legal costs and other expenses incurred by the successful party shall, as a general rule, be borne by the unsuccessful party, unless equity does not allow this.²⁵

3.4.3 Enforcement on Copyright infringement in Japan

Japan has the history of copyright enforcement over 100 years. The first legislation in the field of copyrights is the publishing Ordinance (Shuppan Jorei) of 1869. The current Copyright Law was enacted in 1970 and amended numerous times, most recently in 2006. As Japan is presently a member of Berne Convention, Rome Convention, the TRIPS Agreement, WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty, it confers broad protection to works and other creation including computer programs and databases. Under the present copyright law, the remedies available for infringement of copyright or neighboring right are, civil remedies of damages, injunctions and honour recovery measures as well as provincial remedies. The criminal sanctions of fines and imprisonment and border measures are also available. The general provisions for civil remedy for the infringement of copyright is awarding compensation for damages caused by unlawful acts. The compensation is fixed by the courts.

1. Civil Remedies

The Copyright Law of Japan has the nature of the civil law. When copyright is infringed upon, general terms of the civil remedies are available under Article 112 to 118. Articles 709 of the Civil Code apply in conjunction with civil and special measures provided for in the Copyright Law.

2. Injunctions and Destructions

The copyright Law provides for injunctive relief to existing or imminent infringement of copyright, moral right or neighbouring right. Article 12 Para 1 provides” Against those who fringe or are likely to infringe moral right, copyright, right of publication, moral rights of performers or neighbouring rights, the authors as well as the owners of these rights may make a demand for cessation or prevention of such infringements”. In addition to injunctive relief, a right owner may

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26 Japan Copyright Office, Copyright System in Japan, At www.cric.or.jp/cric_e/csi/csj.html. (last visited 17 June 2009)

demand destruction of infringing copies and materials for reproduction thereof, or other measures necessary to stop or prevent infringement (Article 112, Para 2)

3. **Damages**

Under the Japanese copyright law, negligent or intentional infringement of copyright, moral right or neighbouring right causes tort liability for injury incurred by the right holder under Civil Code, Article 709, which provides "Any person who intentionally or negligently infringes other person's right shall be liable to compensate the damages caused thereby." On the other hand, an innocent or non-negligent infringer is not liable for damages, while he may be injected as the direct effect of copyright, moral rights or neighbouring rights. The standard of damages are enforced by the court looking into the matter of actual damages which is entitle by the right owner (Article 114, Para. 1), Infringers Profit is considered as the amount of damages suffered by the right owner (Article 114), Reasonable Royalty with the assessment of the damages (Article 114, Para. 3). The Japanese Law does not allow punitive damages considering it to be contrary to the public order of Japan, Japanese courts neither award punitive damages not enforce any foreign judgment that awards punitive damages.29

4. **Honour Recovery**

A moral right holder, an author or a performer, may demand an infringer to post an apology notice on newspaper or other media and other measures necessary to recover his reputation where the infringement injures the right holder's honor or reputation on business (Article 115). Besides there are other provisional remedies including preliminary injunction and impoundment order, issued by the court when the court feels it is necessary to impose them.

5. **Criminal Sanctions**

Under the Copyright Law of Japan 1970, the criminal sanctions are also available when the copyright infringement is done with intention for profit making and infringing the moral right of a deceased person and done through falsification and distribution of commercial phonograms. Such acts will be studies as below:

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28 Civil Code of Japan 1896

Any person who infringes copyrights, moral right or neighboring rights is punishable by imprisonment for a term not exceeding five years and/or a fine not exceeding ten million Yen, or both (Art.119, para.1).

Any person who infringes moral rights of authors or moral rights of performers or who does an act causing others for profit making purposes to use automatic reproducing machines for infringing reproduction of works or performances is considered to constitutes an infringement, punishable by imprisonment for a term not exceeding five years and/or a fine not exceeding five million Yen (Art.119, para.2).

Any person who infringes moral rights of the deceased author is liable with fine up to 5 million Yen. (Article 120)

Any person who does acts of manufacture, distribution, etc. of a device, etc. for the circumvention of technological protection measures is punishable by imprisonment for a term not exceeding three years or a fine not exceeding three million Yen, or both (Art.120bis,Cls1. and 2).

Any person who distributes the copies of work with false authorship punishable up to 3 years imprisonment and/or fine up to 3 million Yen (Article 121)

A legal person who infringes rights is punishable by a fine not exceeding three hundred million Yen (Art.124).

3.4.4 Enforcement on Copyright Infringement in China

although there is no explicit mention of copyright, patent, or trademarks, stated under Articles 20 & 47 of the constitution of People’s Republic of China. In addition, the General Principles of Civil Law Articles 94 to 96 also specifically provides that natural and legal persons are entitled to own trademarks, patents, and copyrights. Although China did not have a tradition of intellectual property in its long history, China has enacted a comprehensive array of modern intellectual property laws and regulations in the span of just two decades beginning shortly after the commencement of the economic reform era in 1978. The Copyright Law (1990, revised 2001) (CD, Copyright Law Implementing Regulations (1991, revised 2002) (CLIR), and the Provisions on Implementing International Copyright Treaties (1992) are the basic copyright laws of the PRC. As with other intellectual property laws, the latest revisions to China’s copyright legislation were intended to bring it more in line with TRIPS. The 2001 revision brings the Copyright Law into compliance with the Berne Convention (the core of which is also incorporated into TRIPS) by providing for full copyright protection for works of literature, art, natural sciences, social sciences, engineering, and technology, among other fields, created in any of the following forms: written works, oral works, musical works, dramatic works, choreographic works, and acrobatic works; works of the fine arts and architectural works; photographic works; cinematographic works; engineering design drawings, product design drawings, maps, sketches, and other pictorial and graphic works; computer software; and other works as provided by relevant laws and administrative regulations. Copyright Law, Article 30. The legal liabilities and enforcement Measures under the Copyright law1991 of China will be stated as follows:

1. Civil Remedies

Under Article 46 copyright law states that: “Anyone who commits any of the following acts of infringement shall bear civil liability for such remedies as ceasing the infringing act, eliminating the effects of the act, making an apology or paying compensation for damages, depending on the circumstances.

Under Article 47 of the Copyright Act states that “Any of the following acts of infringement shall, depending on its circumstances, be demanded for civil responsibility such as cease of the infringement, elimination of effects, public apology or compensation for loss; if the act causes a damage to the public interests simultaneously, the copyright administration department may order the person committing the act to stop the act of infringement, confiscate his illegal gains, confiscate and destroy the infringing copies and impose a fine thereon; if the circumstances are serious, the copyright administration department may also confiscate the key materials, tools and equipment mainly used for making infringing copies; and if the act constitutes a crime, criminal responsibility shall be demanded according to law”.

Under Article 48 (Damages) of the Copyright Law states that, If a copyright or copyright-related right is infringed, compensation shall be paid according to the actual loss of the right owner by the person who made the infringement; if the computation of the actual loss is difficult, compensation may be paid according to the illegal gains of the person who made the infringement. The compensation shall also include the reasonable expenses of the right owner for preventing the act of infringement.

If the actual loss of the right owner or the illegal gains of the person who made the infringement could not be ascertained, the people's court shall judge the compensation not exceeding 500,000 Yuan depending on the circumstances of the act of infringement.

Under Article 48 (Injunctions) of the Copyright Law states that, A copyright owner or copyright-related right owner who has evidence to establish that another person is committing or will commit an act of infringing his right, which could cause a remediless loss to his legitimate rights and interests if the act is not prevented immediately, may apply to a people's court for adopting such measures as order to stop the relevant act and property preservation before he initiates an action.

Under Article 51(forfeiture of goods) of the Copyright Law states that, When trying a case, the people's court may confiscate the illegal gains, infringing copies and materials for the activities of infringement of copyright or copyright-related rights.
Under Article 54 (Arbitration Clause) of the Copyright Law states that, a copyright dispute may be mediated and also, may be filed with an arbitration organization for arbitration according to the arbitration agreement concluded by the parties concerned or the arbitration clause in the copyright contract.

The party concerned who fails both to reach an arbitration agreement and to stipulate the arbitration clause in the copyright contract may initiate an action directly before a people's court.

Under Article 55 of the Copyright Law states that, a party concerned who disagrees with an administrative penalty may initiate an action before a people's court within three months from the date of receiving the written decision of penalty. If the party concerned fails both to initiate an action and to comply with the decision as scheduled, the copyright administration department may apply to a people's court for implementation


Whoever, for the purpose of reaping profits, has committed one of the following acts of copyright infringement and gains a fairly large amount of illicit income, or when there are other serious circumstances, is to be sentenced to not more than three years of fixed-term imprisonment, criminal detention, and may in addition or exclusively be sentenced to a fine; when the amount of the illicit income is huge or when there are other particularly serious circumstances, he is to be sentenced to not less than three years and not more than seven years of fixed-term imprisonment and a fine.

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Chapter 4
Analysis on the Problem of Criminal Enforcement of Copyright Infringement

4.1 Analysis on the Problem of Criminal Enforcement of Copyright Infringement.

Thailand has a history of intellectual property right protection for a very long time back since 18th century. The present copyright law is in compliance with the international standard in which Thailand acceded to WTO by becoming a member of Berne Convention and also committed to protecting intellectual property rights in conformity with the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIP), which contains the special provisions relating to protection of intellectual property rights in the aspect of Copyright.\(^{33}\) Not only Thailand is obliged under with Berne Convention under Article 16.\(^{34}\) To follow the international standard it is obliged to comply Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which is the basic standards followed by the member countries as stated under Article 61 of TRIPS Agreement\(^ {35}\). The minimum standard states that the member countries have to impose criminal action, which are fine and imprisonment on copyright infringement only in the cases, where the infringing goods were of such number enough to consider the unlawful act as motivated for commercial purposes. Therefore, where the copyright infringement is not for commercial purpose, member countries do not have obligation to impose criminal action. However, this is only the minimum standard member countries can impose higher action against copyright infringement. Besides, Thailand also exceeded its international obligation under


\(^{34}\) Ibid. p.21.

\(^{35}\) Ibid. p 25.
Article 41(5) of TRIPs by establishing the Intellectual Property and International Trade Court to take the matter relating to Intellectual Property Right.\(^{36}\)

At present, Thailand faces certain problem on copyright enforcement though the country has a very strong law for copyright protection. The present Copyright Law B.E.2537 (A.D.1994) became effective in March 1995 and it was amended in compliance to the international standard. At the same time United States of America, European Union, Japan and China had both civil and criminal enforcement measures against copyright infringement in their copyright law. Since copyright is considered as private right and offence of copyright is liable under civil action in those countries, the penalties and sentences imposed depends upon the nature of the offence committed usually with the amount of damages caused to the right owner. Criminal sanctions are also imposed in the case of large and commercial scale infringement. In Thailand, the offence of copyright infringement is a crime and it is liable under criminal sanctions with minimum fine of 10,000Baht to 100,000 Baht.

4.1.1 The Problem of Over Criminalization on Copyright Infringement

The increasing trend of the copyright enforcement especially in developing countries, currently focuses on an extension of criminal liability of copyright infringement. Reliance on this view, copyright criminal approach is based on a number of sound reasons and can provide advantages. For large scale infringement, for instance, civil remedies are often insufficient for deterring potential violators. Hence, the imposition of criminal sanctions through substantial fines and imprisonment may be more effective. But at the same time it is not justifiable to impose same penalties all copyright infringers and make them criminals. Criminal liabilities is fit to the concept and practice of copyright infringement and civil liability must be given due consideration. It is necessary to focus on the light that copyright criminal legislation can condemn almost many people as criminals, if there is no proper copyright legislation. In Thailand, without careful considerations, legislation should not criminalize copyright infringers as much as they can. These

practices might be derived from the aim of covering all expected and unexpected acts and all possible infringers. To avoid this problem, copyright law must take certain issues into consideration. Some of the important issues include the affordability, the threat to enforce criminal sanction, and the wide-ranging copyright law including categorizing the infringers into primary and secondary. So it is very important to categorize the offenders, because both large scale infringers and a street vendor cannot be put under same penal liability. Such actions will in turn develop criminal behavior of the copyright owner. Criminal sanction may be used as an attractive tool to threaten the infringers but it is important to know the level of infringers and volume of goods infringed. Imposing criminal sanctions for the copyright infringement is not a serious problem as far as the infringers were categorized and punishment is awarded according to the nature of crime committed. Some critics say that there is a problem of over criminalization when all copyright infringers are considered criminals.

On the contrary, the United States legislature is more careful on copyright legislations and gives more details to each provision. For example, the United States copyright law specifies the types of criminal acts and penalties and limits the scope of criminal offences by keeping in view of both volume and value of the infringed goods. As a result, this § 2319 (c) demonstrates a better copyright criminal legislature which differentiates the types of criminal acts and penalties, limits the scope of criminal offenses to only more serious acts by the degree of infringing volume and value. It is worth noting that the US Copyright Act § 506, the main provision of criminal sanction, separates other criminal copyright acts with different degree of penalties, for example, § 506 (c) fraudulent copyright notice shall be fined not more than $ 2,500, § 506 (e) "false representation" shall be fined not more than $ 2,500. The provision shows that US legislature understood the differences of infringing offenses and, thus, imposed the different criminal penalties.

The scope of § 2319 covers the wrongdoing of "manufacturer" and some cases of "seller" and "employee" and in practices; the enforcing authority has focused only on the large-scale infringement. However, in practice, for the criminal enforcement the authorities like in United States, focuses only on the large-scale infringements.
Likewise in Japan, the copyright infringement is resolved through civil litigations in the court and it can reach up to highest level of court. The Japanese copyright law provides broader language by including honorary recovery and apology notice, compare to that in United States. Japan also imposes criminal sanctions in the case of infringement of a copyright, moral rights, neighboring rights intentionally, for profit making, infringing moral rights of a diseased author, circumvention of technological measures, false distribution of authorship, commercial phonogram distribution, failure to indicate source and infringement by the corporations shall be liable to imprisonment and/or fine as prescribed in the law, these shows that criminal sanctions are used only when there is a motive behind. However, there are also other factors that can be used to limit the over-criminalizing of copyright crimes, for example, excluding the individual or employee from criminal area, excluding other non-commercial purpose or commercial scale. The Copyright law of Japan 1970 Articles 112 to 116 provides civil remedies in the form of injunction, damages, honorary recovery and forfeiture of goods. However, the enforcing authority and practice can narrow the scope of criminal enforcement to the large-scale cases. These practices, thus, reduce the problem of making all the copyright infringers criminals.

The copyright enforcement under WIPO is in compliance with the TRIPS Agreement of 1995, which contains detailed provisions on the enforcement of rights with the provision in the national legislation. WIPO considers copyright right as private right and infringement of copyright is resolved through civil remedies in the form of injunctions, monetary damages, and forfeiture of goods and payment of fines. But in case of willful copyright infringement, for repeated offenders and copyright infringed for commercial purposes it enforces criminal sanctions.

Under European Union, the civil remedies available are under EU Corrigendum to Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 which has led many states to adopt national provisions on civil remedies more closely in line with “best practices” standards. The legitimate copyright holder may be entitled to damages and/or injunctive, provisional measures and legal costs as relief under Article 9, 11, 13 and 14. Thus for the EU it has no provision for imposing criminal sanctions. Besides in China under Article 47 it has
the civil remedial measure such as confiscation of equipment, pay compensation and make an apology.\textsuperscript{37} In Thailand Article 69, combining with severe measures for punishment and outspread criminal enforcement, cause problem of over-criminalization under the Thai copyright law. To reduce the problem of "over-criminalization" and practical enforcement, the legislature and enforcement authority must take serious consideration of the concept of copyright and crime, practical enforcement, and related issues must be studies well. Many factors those are provided in the United Stated Code § 2319 and the Copyright Act § 506 to limit the scope of crime are reasonable. The enforcing authority also focuses on the large-scale infringements which can substantially harm the copyright system.

Under the present Copyright Act of Thailand, remedy of civil actions should be favored especially in the case of secondary infringement rather than criminalizing them with a minor offence. When all the copyright infringers are charged as criminals, it doesn't seem to be fair and there is no natural justice. Copyright infringement has civil feature more than criminal offences. Therefore, criminal punishment under Thai Copyright Act should be emphasized more on civil remedial measures in the case of secondary offenders. There is also advantage of civil remedies because copyright owner can recover his losses from the offenders by calculating the losses incurred to the right owner.

In the countries like United States, Japan and China copyright is considered as private right and any problem related to infringement of copyright is tried under civil suits. So in order to enforce the infringement the court usually imposes damages, Injunctions, forfeiture of goods and other recovery measures. In such cases, there is no problem of criminalization arising because the copyright infringers were prosecuted in the civil court with the indentation to recover the damages occurred to the right holders; these are mainly the secondary offences. They also have the provision of imposing criminal sanctions but it is usually for primary infringers, like manufacturers and who knowingly and intentionally infringe for profit making motive. So such remedial measures prevented those countries from the problem of criminalization of the copyright infringers.

\textsuperscript{37} Dinel C. K Chow, \textit{The Legal System of Peoples Republic of China}, p. 431.
4.2 Compoundable Offence as Remedy for Over Criminalization.

Section 66 of the Copyright Act B.E. 2537 (A.D. 1994) states that "the offence in this Act is a compoundable offence", allowing the parties to come to an agreement to settle the criminal case of copyright infringement mutually. The injured owner or right owners are considered most important and copyright infringement being a compoundable offence, with the decision of the right holder not to pursue the case any further may terminate the criminal justice system. The copyright infringement justified as crime only in cases in which the conduct of the infringer causes harm to others and has moral wrongfulness. It is necessary to think whether to criminalize morally wrongful conduct that is not obviously harmful to anyone. Thus the copyright infringement has to be based on the concept of harm and moral wrongfulness. Criminal sanctions may be considered desirable, when copyright infringers have sufficient basis of culpability, social harmfulness, moral wrongfulness, such as in case of manufacturer and some case of seller. It is not appropriate for minor offenders, such as employees or individuals. In order to consider the moral content of copyright infringement as a crime, one needs to consider the moral content of the violation and other related factors.\(^{38}\) Essentially, the responsibility for preserving the integrity of criminal law belongs to the legislatures that enact the laws. It is necessary to enact laws by seriously considering the issues of criminal concept and civil nature of copyright infringement.

In the opinion of the researcher, compoundable offence making ways for negotiation and reconciliation does not affect the copyright enforcement. Since copyright is the private right of the owner and for the small scale infringers, it is better to opt for reconciliation rather than following long court proceedings. This method facilitates the civil enforcement measures for the copyright protection though it is a criminal offence. The Compoundable nature of copyright infringement can be a better solution to solve the problem of small scale copyright infringers and it will prevent from making all the copyright infringers as criminals. If Thailand, still wants

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to remain with the criminal offence of copyright infringement, it needs to categorize the infringers according to the nature of crime committed under compoundable offence. Under the compoundable offence, it is necessary to divide the infringers into primary infringers where mainly manufacturers fall and secondary infringers where small sellers, employees and individuals fall. It is not fair to consider both the manufacturer and a street seller into same category of crime. Besides certain important matters regarding the possession of the infringed goods, age of the offenders, purpose for infringement and volume of the goods must be looked into. Because the law cannot offend a person as a criminal for merely possessing few pieces of pirated goods.

In this research the researcher would like to group the infringers into four categories:

4.2.1 Manufacturers

Manufacturer includes main distributor and large scale retailers. This category will usually be large scale retailers that cause vast damages to copyright owner. The infringement in this level is manufacturing of illegal product, in plant or warehouse, and distributing of the illegal products to the lower retailers.

4.2.2 Sellers

In this level the offenders receive the illegal product from the manufacturers and distributors to the buyers. The seller who owns the selling place and sell the infringed products (pirated goods) will be included into these goods since they directly earn monetary benefits from the business.

4.2.3 Employees

This group is the workers who are practically hired by the seller to distribute the pirated goods to the end users and receive the daily wages or salary. Although employees does not enjoy the revenue from the infringement directly, in Thailand they are charged under criminal offence as they are the one actually possessing the pirated goods during the sale or distribution.

4.2.4 Buyers

These groups are individuals who purchase the pirated products for their personal use and they are the end user. This group is the largest group in every country and even an individual buy a legal product; he might also commit crimes
during use, by copying, reproducing, distributing and lending or giving the product. So when those individuals are caught they are also charged under criminal offence.

Since copyright is a private right and the ownership is vested with the copyright owner, usually when the dispute arises relating to property matters it can be resolved through civil actions. Under the Section 66 it provides discretion to the copyright owner as well as to the infringers to reconcile the matter before it is pursued further in the court of law. So this section provides an opportunity to resolve a dispute of copyright infringement through civil nature though the offence is considered criminal offence. Such methods can solve the problem of making all the copyright infringers as criminals. But the same method will not apply to the manufacturers and in some case of large scale sellers infringing copyright for commercial purposes. "Try to catch the big fish instead of small fish". 39 This means to impose heavy penalty for the commercial infringers and rather than imposing same for the small offenders.

When we categorize the infringement into primary and secondary according to the nature of infringement, especially under the secondary infringement certain measures must be taken into consideration. The word compoundable in Section 66 may be one of the causes for ineffective enforcement because strict enforcement is not possible when the copyright owner, police or public prosecutors agree not to pursue the case any further. In Thailand the usual method of enforcing copyright law against the infringers are usually done by conducting police raids. So such preventive measures under article 65 40 of the present Copyright Act must be supported by the judiciary in order to prevent infringement. The judicial authority needs to facilitate the law enforcers for quick actions by issuing search warrants and

39 Interview with Nattapong Posakabutra, Director, Faculty of Law, Assumption University of Thailand, Bangkok, Interview 17 May 2009.

40 Article 65 "In case there is an explicit evidence that a person is doing or about to do any act which is an infringement of copyright or performer’s rights, the owner of the copyright or performer’s rights may seek the injunction from the court to order the person to stop or refrain from such act. The injunction of the court according to paragraph one does not prejudice the owner of copyright or performer’s rights to claim damages under Section 64."
arrest warrants without delay. There is also problem of innocent agents in the case of secondary infringement. Most of the sellers in Thailand are children and old people. So it is difficult to prosecute them. Such problem must be taken care in order to avoid infringed goods filling the market. These issues are related to facts where sometime infringement is done in front of the eyes, but law forbids them from prosecution. The fact issues usually arises from the inefficiency in law enforcement caused by the poor actions of the enforcement authorities. Though Thailand has a strong copyright law to protect copyright infringement but the enforcement mechanism needs to be improved. In Japan, under Article 62 and Article 63, anyone who induces another person to commit a crime is punished under reduced penalty. Enforcement measures in the case of juveniles, old people and accomplices' where law forbids them from prosecution, separate provisions must be added for enforcement.

4.3 Analysis of the Penalty Provision

The penal provision prescribed under Sections 69 paragraph one and 70 paragraph one of the Copyright Act B.E 2537 (A.D 1994), states about the infringement in a very broad manner. The provisions include every wrongdoer from "manufacturer," "seller," "employee," to "individual" and every kind of wrongdoing. As a matter of fact, these provisions may cause many people of the country to become criminals. From certain analysis on these issues, the law should be more specific and the scope of the criminal punishment should be limited to the necessity extent. The present draft copyright has the best measures for preventing criminalization problem. The act has categorized the copyright infringers into three levels and penalty is imposed according to the nature of offence committed.

Similar to the new amending to the present Draft Copyright Act, the problem of criminalizing the infringers can be solved with the changes in the penal provisions. All the copyright infringers should not be imposed same penalty or sentence. The penalty must be imposed according to the nature of

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41 Takashi B. Yamamoto, Copyright Enforcement in Japan, Infringement and Remedies, At www.itlaw.jp, (last visited 23 May 2009)
offence committed by the infringers. The penalties must be categorized into three levels as mentioned in this chapter. There has to be flexibility in passing sentences by the court according to the severity of the violation and severe punishment is necessary in case of large scale violation, which caused serious injuries to the right owner. In other countries, the penalty imposed depends upon the nature and degree of crime committed. Commercial infringers are always imposed with criminal sanctions resulting to severe punishment and fines. So the criminal offence of copyright infringement being compoundable offence can reduce the problem of criminalization, if appropriate measures are taken into legislation with the categorization of the penalty provisions according to the nature of offence committed.
Chapter 5

Conclusion and Suggestions

5.1 Conclusion

Protection of copyright infringement has become a priority for Thailand. Several changes are made in the copyright legislation in compliance with international treaty obligations for the protection of copyright. Thailand has solemnly undertaken to international standards for protection copyright from the concept of copyright infringement as a crime, like states have the power to impose criminal sanctions for intentional wrongful conducts that cause serious harm or injuries to other people in the society. In principle, the regulatory crime causing harm to others will be justified only in the case which has moral wrongfulness. Many countries have recently realized the importance of the Copyright and thus have provided the criminal enforcement to broaden copyright criminal liabilities to cover all expected and unexpected infringements, including the case that civil remedies could not suffice. The copyright enforcement legislation under TRIPs, WIPO, USA, EU, Japan and China as studied in the previous chapter consider copyright as private right and emphasize on civil enforcement measures, but criminal sanctions are also available for enforcement in case of willful infringement, use of technology for reproduction, use the name of deceased author and commercial copyright infringement. Since Thailand being the member of the Berne Convention and TRIPs Agreement, the copyright Act B.E. 2537 (A.D.1994) covers the TRIPs obligation in compliance with Section 5, Article 61 of TRIPs Agreement to adopt criminal procedures and penalties, in case of copyright piracy on commercial scale and use criminal laws as a way for enhancing copyright protection.42

Hence the imposition of criminal sanctions through substantial and imprisonment and huge amount of fines may be more effective.\textsuperscript{43} 

Potentially sound protection for copyright is worthless unless it is backed up by effective methods of enforcement. Such complications do not meet the required standards in these respects of remedies covering injunctions, damages and costs in most cases in the infringing items\textsuperscript{44}. The basic purpose of any criminal prosecution is to punish the offender while the civil remedy is aimed at securing adequate compensation of the defendant’s wrong doing for the plaintiff. The civil procedure is an appropriate one, but civil enforcement is not necessarily effective in all countries. Considering the concept of copyright a crime liable with criminal sanction may be desirable when the wrongdoings have sufficient basic of culpability, social harmfulness, and moral wrongfulness. Copyright criminal liability is desirable to large-scale infringement and organized infringers.

In Thailand, the present copyright law states copyright infringement as criminal offence, this can create the problem of making all the copyright infringers as criminals and it will lead to over criminalization. So certain changes need to be made in the copyright legislation to prevent such problem. The legislature could not further criminalize copyright liability as much as they can and enforcement authority could not enforce copyright as criminal liability without understanding the nature of offence. The civil fundamental root of copyright and the basic concept of crime must be considered seriously. The wide-range legislature can label most of the people as criminals, which must be extinguished. Such problem of criminalizing the copyright infringers can be solved by taking certain measures and changes in certain sections of the act for enforcement. Section 66, of the Copyright Act B.E.2537 is one of the sections in the act, which on amendment can solve certain problem of criminalization. This section states that the offence of copyright infringement is a compoundable offence. The word compoundable provides the provision for the


parties to reconcile with the copyright infringement matters. In the opinion of the researcher, the problem of over criminalization can be solved under the compoundable offence. This problem can be solved by categorizing the infringers into the nature of crime committed. In the present copyright act there is no clear segregation of the offenders and who ever infringe copyright they are liable with the criminal sanctions amounting to minimum of 10,000 Baht. The main changes necessary to make in this section is to categorize the infringers into primary infringement and secondary infringement. The primary infringers are the ones who willfully infringe copyright for commercial benefit and the secondary infringers are the small scale infringers. In the group of the primary infringement are the manufacturers, who initiate the large scale infringement, usually invests and finances the whole process and the massive volume of production could harm the copyright owner and flood the country with pirated goods. In this case there is a greater possibility to harm the society as well as encourage illegal criminal activities in the country. So it is justifiable to enforce criminal sanctions in this case. The secondary infringement includes large scale sellers to small retailers including street vendors and in some cases individuals who infringe copyright for personal uses also. The effect on infringement caused by this group is much smaller. It is necessary to look into the seriousness of crime of those sellers by looking into the volume of sale and other activities which affects the copyright problem in the market. Criminalizing this group of infringer may not have enough substance to support for social and moral wrongfulness. So for those small scale infringers' corrective measures are much appropriate than punitive measures. Considering copyright as criminal offence by categorizing infringement into various types is an important measure for preventing copyright infringement because punishment can be awarded according to the nature of crime committed. Criminalization of copyright infringement is undesirable and unreasonable to some extent especially when there is no differentiation on nature of offence committed by offenders. Criminal sanction may be appropriate, when the wrongdoers have sufficient basis of culpability, social harmfulness and moral wrongfulness. There has to be difference in the degree and volume of offence committed between the manufacturers, large scale sellers and small offenders such as employees or individuals. The offence committed by the third group is mostly not
very serious and committed for their living or for personal use only. So it is important to make certain changes under section 66, in the present copyright law together with the review of penalty provisions under Section 69 paragraph one and Section 70 paragraph one by not imposing same penalty for all the infringers, without looking into the nature of the offence committed will solve the problem of criminalization.

5.2 Recommendations

5.2.1 Categorize the Infringers

The imposition of criminal sanctions in Thailand must be made in compliance with the international standards. In order to accomplish this nature, offence committed should be considered properly and penalties imposed should be in accordance with the nature of the crime offence committed. It is not appropriate to impose same criminal sanctions to all the infringers without judging the nature of offence. Criminal sanctions must be imposed to the primary infringers, who intended to commit serious infringement in the case of commercial infringement and large scale sellers. The present Thai copyright law should be in compliance with the other international standard to provide fair and equitable guidelines by differentiating primary infringers and secondary infringers for imposing punitive damages. Infringers who are liable for payment of punitive damages should be considered as primary infringers because they are big time manufacturers, who always remain behind the scene and carry on with multi million worth business. Copyright law must provide a guideline in relation to the matter concerning imposition of punitive damages to the retailers and street vendors, which usually fall under secondary offenders. The offences they commit are small scale in nature and some of them are employees earning daily wage and some are individual users. It is not justifiable to impose punitive damages to the secondary infringers and consider them same as primary infringers. In order to prevent over criminalization, more emphasis should be taken on corrective and preventive measures for secondary infringers rather than punitive damages. The damages imposed should be in computation with the infringed goods. For example, it is not justifiable to imprison an infringer (roadside
vendor) for possessing only few copies of pirated DVD’s for sale, where as the manufacturer owns multimillion worth of pirated goods. So there should be differentiation between primary and secondary infringers.

Article 66 of the current Copyright Act B.E. 2537 (A.D. 1994) provides the provision for reconciliation of copyright infringement. Under this section the right owners are given power to exercise their rights at any stage of legal or trial proceeding in the court. In the opinion of the researcher, there is a remedy under this section to solve the problem of over criminalization. Likewise in other countries, the copyright infringers in Thailand must be categorized under different groups and award the punishment according to the nature of offence committed. The researcher would like to provide the following recommendations to solve the problem of criminalization by categorizing the infringers into following groups:

1. Categorize the copyright infringers into three group’s manufacturers, sellers and employees or individuals. Since “manufacturers” or producers are infringers for commercial purposes grade them as primary infringers.

2. Grade the “sellers” as secondary infringers. This includes from large sellers and low level investors to the small sellers or street sellers. Large scale sellers should not be grouped under the third group

3. Grade the third group “employees” and “individuals” as also secondary infringers. They are the end users working for daily wage employees and the individuals committing infringement for personal use only. The offences committed by those two groups usually have no commercial aspects and is not serious and have no monetary benefit gaining from the infringed goods.

After categorizing the infringers into three categories, compare the nature of offence committed and find which category has more criminal nature, desirable with the criminal sanctions by looking into, whether the wrongdoers have sufficient culpability, social harmfulness and moral wrongfulness. So when compared all the actions as manufacturers or producers, who has greater criminal liability must be grouped under the liability with criminal sanctions.

The second group is the sellers, the seller ranges from large scale sellers to small sellers and street vendors. The effect caused by this group is much lower than manufacturers and the damage vary from level of sellers. So the penalty must be
imposed by judging the nature of the offence committed and looking into social harm and wrongful acts caused by the act infringers. Under this group civil remedies and tort claims must be also made available in the case of lower nature of offence committed, usually in case of the low level sellers.

The last groups are the employees and individuals, which is also called the buyers. Those are the distributors of the infringed goods in the market and personal users. The employees are just daily wage earners and the offences they committed are not even measurable. The maximum numbers of copyright offenders fall under these category. This group is the first victim to be caught in the copyright enforcement and is prone to raids and arrests conducted by the police and law enforcing agencies. The offence they committed and risk of harm they have done is very low and it is not worth prosecuting in the court. So the last category should be given the opportunity to reconcile or do away with mere fine by looking into the nature of offence and social wrongs they have done. Since this group consists of maximum number of copyright infringers, so enforcement by reconciliation and other civil remedial measures without prosecuting those offenders under criminal offence will solve the problem of criminalization.

5.2.2 Penalty Provisions

In order to reduce the problem over criminalization, certain changes must be made in the penalty provisions. The penalty should be imposed according to the nature of offence committed by the infringers. The penalties should be categorized into same three levels as mentioned in the above section. In cases of general copyright infringement, like employees and individuals, the penalty should be imposed according to the severity of the infringement. As for sellers, the penalty should be divided into two levels. In cases of general infringement related small sale, such as the copying of few DVD's, CDs or a small retail sale, the appropriate penalty should be imposing fines rather than imprisonment. In case of large scale sellers, which results in more harm and wrongful offence causing severe violations, such as commercial infringers and producers, more severe penalty should be imposed. This would give the court a great flexibility to pass sentences according to the severity of the violation. As for violations related to sellers, the penalty is
divided into three levels. Like in the case of secondary infringers punishment is by imposing only fine, looking at the nature of offence committed and wrongs done to the right owner and in the case of minor matters there should be provision allowing reconciliation with petty fine by measuring the offence committed. In case of primary infringers since they are the main infringers producing the goods for commercial scale, higher penalty and imprison or both must be made available. Indeed, these amendments on the penalty should help make the suppression of large scale violations more effectively as well as provide the court with greater flexibility to pass sentences according to the severity of the violation and ensure fair sentencing\textsuperscript{45} for the lesser infringers. The penalties and sentences should be awarded according to the degree of crime committed by the offender. Article 69 Paragraph 1 and Article 70 paragraph 1 of the present copyright must be amended. Because the copyright infringement not committed with commercial purpose should not be punished by criminal sanctions in lieu of fine amounting to minimum of 10,000 Baht to 100,000 Baht.

5.3 Other Enforcement Measures.

The copyright enforcement should not be seen in isolation and effective enforcement is necessary depending on a holistic approach to the issue. First and foremost is education and awareness with the strong sense of responsibility taken by the responsible agents including police and public as general. Such activities will open the link between copyright and its protection. The role of law enforcement is to serve and protect society and the individuals deprived of their rights. So the researcher would like to bring some solutions for law enforcing agents as follows:

5.3.1 The police must be made aware of the importance of copyright and their role in the protection of copyright. Proper trainings must be given to combat copyright crimes.

5.3.2 The court must facilitate the law enforcing agents especially the police to conduct raids and searches. For these actions it is necessary to issue warrants without delay.

5.3.2 Public awareness is one of the most important measures for the protection of copyright infringement. There is a need for coordination among copyright holders, local authorities and law enforcers to organize dissemination campaign among the public in order to throw light on the concept of copyright protection and enforcement. Such actions could bring these laws to the people through seminars, symposiums, group discussion and televised debates.

5.3.3 The other remedy is that, In Thailand, it can declare one particular day as a year to combating copyright crime and repeat the same trend by organizing some activities from year after. Same like teacher’s day, mother’s day and world no tobacco day must be celebrated for providing awareness to the public.

In conclusion, the practical aspects of copyright criminal enforcement have been promoted in many developing countries and even it existed in the developed countries, especially in the case of commercial infringement. Criminal enforcement is also necessary in case if civil remedies cannot cover all the problem of copyright infringement. Enforcing criminal sanctions to protect copyright from infringement is not a problem unless there is a proper method of enforcement, like categorizing the infringers according to the nature of the offence committed. In Thailand, though there are problem arising with criminal enforcement of copyright causing criminalization of all copyright infringers. Still there is chance of solving this criminalization problem if certain changes are made under the compoundable offence provision. The compoundable offence dividing the infringers into categories in accordance with the nature of offence committed and penalty imposed according to the crime committed will be the best solution to solve the problem of criminalization. The problem of criminalization can be solved, if the above actions are taken cautiously and necessary changes are made in the copyright legislation especially under Section 66, 69 and 70 by categorizing the infringers and imposing the penalties according to the nature of the offence committed.
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Theses

Interview
Nattapong Posakabutra. Director, Faculty of Law, Assumption University of Thailand, Bangkok, Interview 17 May, 2009.

Law
Berne Convention for the Protection of Literary Works
TRIPs Agreement
WIPO
Thai law
Article 86 of the Constitution of the Kingdom of Thailand (B.E. 2550)
Section 64, Section 66 and Section 69 of the Copyright Act B.E. 2537 (A.D.1994)
U.S. law
Article 107 of the Copyright Act 1976
European Union law
Japan Law
Article 114 of the Copyright Act 1970
China Law
Internet


Japan Copyright Office. Copyright System in Japan. At www.cric.or.jp/crice/csj/csj.html. (last visited 17 June 2009)

