



SECURED CREDITOR: CASE STUDY ON COPYRIGHT

BY

MR. KHAMJOHN JUTHATHIPAYAKUL

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

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Research Title: Secured Creditor: Case Study on Copyright
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Major: Business Law (International Program)
Advisor: Dr. Poon Vichutripop

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


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ABSTRACT

For recent years, the secured transaction has been developed so much. The present laws such as the Civil and Commercial Code in the matter of secured creditor (such as Pledge, Mortgage, and Guarantee) still has the limitation of the securable property by its principle of law. This can be an obstacle to the new kind of property in present day or in the future to be secured as collateral. The new model law on Secured Creditor such as the model law of the Secured Creditor Act is the new law for securing such property to assure the creditor which is very interesting.

Nevertheless, the copyright is considered as assets of the debtor to be secured as collateral because it has the characteristic that is able to gain economic benefit in the business field, but because of its uniqueness of the Automatically Protection, this will be the one of important obstacles to secure it as collateral. And the evaluation of the secured copyright still has no principle or base about the procedure to evaluate or trace its value.

The result from these obstacles is that copyright is not able to secure as collateral yet. If the secured party wants to secure his copyright as collateral, he must do as in contractual way to absolutely assign his copyright to the creditor.

In this research, it will study both the domestic laws and international laws and look up into the problems of securing the copyright as collateral and try to find the way to solve these problems.

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For the people who have been always teaching and giving instructions to the writer to have these every single day, may all of inherent nobility and supreme glory of my diligence of doing this research will be passed and praise to my mother, father and teachers who still lives and who were gone away to his peaceful. Any mistakes and defects shall become to the hand of the writer.

Khamjohn Juthathipayakul

Chapter 1

Introduction

1.1 The Origin and the Importance of having Secured Intangible Property under the Secured Creditor

In general principle of the law of obligation, a creditor shall have the right to claim any obligations from properties and Things of its debtors completely, include money and other Things of the other persons who are obligated to the debtor. Although, the debtor might has its property enough to cover all of its obligations the debtor should have any other properties to assure to the creditor as collateral when the debtor has failed to perform its obligations. Thus, this will make sure to the creditor that he will have a security of the debtor over the property if the debtor fails to perform his obligations.

In according to Thai laws the Thai Civil and Commercial Code B.E. 2535 Book 3 is rule about the contract which has the collateral to insure as by a person such as Guarantee (section 680 to 701) and insure as by the property such as Mortgage (section 702 to 746) and Pledge (section 747 to 769).

At present, the property which is able to be secured as a collateral in Secured Creditor under Thai laws, it is become extensive expanded in its per se and the methods to secure the property are more diversified, once in a while, it has create a question in law whether the Copyright could be secured as a collateral in Secured Creditor, or not?

Copyright is the right which is able to give the economic benefit and it has its value in itself. Thus, it should be considered a property of the Copyright owner, Licensor, or Licensee, should have the right to procure it as collateral to the creditor in Secured Creditor Contract.

Nevertheless, the security of Copyright as collateral still has a few obstacles in law because Copyright is an intangible property, unable to be as collateral by Pledge because it cannot be delivered which is the essential of the Pledge¹. Furthermore, Copyright is an Automatically Right, it protects to the Copyright Works without registration. So, an unregistered Copyright Work will lack of the essential of the Mortgage².

In the past, there was an attempt to procure Copyright Works as collateral in Secured Creditor Contract in many countries such as E.U. Countries or the United States. Even though, in Thailand, there were the attempts to procure the Literary Work to secure to the creditor as collateral.

Thus, the Secured Creditor by procuring a Copyright as collateral in Thailand should be suitable to do the research about its legal consequences, especially, the possibility methods to secure a Copyright Work as collateral. If it was found any mistake or failure in any point, it should have a better way out to be fixed such as providing a legal support or legal entity to do the duty of inspection in order to give benefit to the economy and the parties in Secured Creditor Contract in the future.

1.2 Hypothesis

There are the problems a securing the Copyright Works as collateral in two major points which are;

1.2.1 The problem of Evaluation of the Copyright Works (Literary Work). Namely, the Copyright Works have many kinds and types; it will be an obstacle to evaluate each Copyright Work from other Copyright Works. For sample, the difference of the Literary Work, its value evaluation will be depended on the kinds such as fiction books, science books, academic books or etc, and also the

¹ Section 747 of Thai Civil and Commercial Code B.E. 2535

² Section 702 of Thai Civil and Commercial Code B.E. 2535

favorable of that Literary Work. In addition, whether it needs to have any principle or base to evaluate its value, or not?

- 1.2.2 The problem of an enforcement or claimant of the secured copyright works to transfer the ownership of that Copyright Work (Assignment of the Copyright) from the debtor (The Copyright owner, Licensor, or Licensee) to the creditor. Thus, whether it needs any principle or base, an organization or legal entity to enforce, or not? Such as the Department of Judgment Execution.

1.3 The Objectives of the Research

This research has 4 main objectives which are;

1. To answer the vague that is it impossible to secure the Copyright Work as collateral in Secured Creditor Contract under Thai laws
2. To study the characteristic of the secured property as collateral in Secured Creditor Contracts.
3. To study the characteristic and the advantages of the Copyright Work that there is the possibility to be secured as collateral in Secured Creditor.
4. To study the development of the idea about secured the Copyright Work as collateral in Secured Creditor.

1.4 The Scope of the Research

The acknowledgement of the laws of Secured Creditor in Thailand, the Laws which concerned with the secured creditor such as Thai Civil and Commercial Code in order to find the way that how can the copyright work be secured in the method of secured creditor, and to know and find the answer of the limitation of the characteristic of the copyright to be secured as a secured creditor in the form of Pledge, which is the obstacle about the lacking of laws to bring the copyright work to secure to the creditor.

1.5 Methodology

The method used in this Independence Research Paper is Documentary Research, obtain the information from both of domestic and globalize databases, the information from the research and analysis of the laws such as Thai Civil and Commercial Code B.E. 2535, The Copyright Act B.E. 2537, The Draft Secured Creditor Act, and etc.

1.6 The Expectation of the Research

The reasons of this research are;

1. To know the advantages of the Copyright Works about taking benefit in business field
2. To have a guideline and principle to secure the Copyright Works as collateral in the future.
3. To study the principle from differences principles and theories to have suitable method to secured copyright as collateral.
4. To have a guideline to develop the law.

From mentioned above, it is interesting that the idea of Secured Copyright Work will against or improper to any present laws, or not? I believe that the consequences of benefit to the practical way and legal way to bring such idea to apply in Thailand and to have a suitable method to do so in the future.

Chapter 2

The General Principle of the Secured Creditor

2.1 Definition

Secured Creditor means a creditor who has any secured property of the debtor, and the debtor was secured those properties he has secured to the creditor for his assure to the creditor for his obligations performance, the Secured Creditor has the right not only against the debtor personally but against specific assets of the debtor which the creditor may be able to sell if that is necessary to recover the amount of the debt.

The definition of Secured Creditor by the law has occur in the section 6 of Thai Bankruptcy Act B.E. 2483, states that *“a Secured Creditor means a creditor who has the right to claim the asset of the debtor in the way of Pledge, Mortgage, or the right of retention or the creditor who has Preference Right to claim as well”*¹.

Actually, the Secured Creditor in the meaning of the Bankruptcy Act is different from the Secured Creditor in the meaning of the Civil and Commercial Code that the Secured Creditor in the Bankruptcy Act means only to a creditor who has property or asset of the debtor as collateral, not include to secured the debt by a person (Guarantee), and the collateral asset or property must belong to the debtor. And the right which the creditor has against the debtor must be the right in the way of Pledge, Mortgage, right of retention or preference right which is able to claim as well as Pledgee only.²

¹ Section 6 of Bankruptcy Act B.E. 2483

² Vicha Mahakhun, Legal Textbook: Bankruptcy Law 8th Edition, (Bangkok: Nitibannakarn Publishing, August 2002), p. 20

Nonetheless, the Secured Transaction has been separated into two kinds which are;

1. Secured Transaction by Security of person (Guarantee)
2. Secured Transaction by security of property or asset (Pledge and Mortgage)

In this research, it will explain only about Secured Transaction by secured property or asset which possible to apply for secured the Copyright.

Pledge is the Secured Transaction that the party called pledger has delivered any his movable property to another party called pledgee for assuring of the pledger's performance of his obligations.³ And Mortgage is the Secured Transaction which the party called a mortgager has secured his immovable property to another party called mortgagee for assuring his obligations performance.⁴

From all the definitions mentioned above, each of the Secured Transaction has their own essential in themselves which will be explain in the next topic.

2.2 The Essential of the Secured Transaction

The important element in each of the Secured Transaction (which will be only explained for 2 types) such as Pledge and Mortgage has its legal content to rule them become a valid secured transaction according to the section 702 and 747 of the Civil and Commercial Code B.E. 2535.

Secured Transaction by Mortgage, the definition by the law has state that Mortgage is the Secured Transaction; a party called a mortgager secured his property to another party called mortgagee for assuring to the mortgager's

³ Section 747 of Civil and Commercial Code B.E. 2535

⁴ Section 702 of Civil and Commercial Code B.E. 2535

performance of his obligations without delivery of the secured property to the mortgagee⁵...

From the law mentioned above, it can explain the characteristic of the Mortgage that are;

1. The mortgager has assigned a property to the mortgagee

The person who wants to secure the creditor by mortgage might be the other persons, not the debtor himself, that person can secure the creditor by his own property for the good of the debtor also. So, the mortgager can be both of the debtor or the other persons and the mortgager can have a many numbers also. The word “assigned a property” means that the registration in the form of formal document in front of the officer of Department of Land under the section 714 of the Civil and Commercial Code⁶.

2. The Mortgager need not to deliver the mortgaged property to the mortgagee

When the mortgager has assign his property to the mortgagee the Mortgage Transaction has been valid without the delivery of the mortgaged property to the mortgagee, the mortgager still has his ownership or the possessory right to the mortgaged property. So the Mortgage Transaction is different from the Pledge Transaction that Pledge Transaction need the pledger to hand over his pledged property to assure to the pledge (the creditor), not the Mortgage because it was already record in the register or document which express to the right against it in order to show or express the burden of that property that it

⁵ Section 702 of Civil and Commercial Code B.E. 2535

⁶ Assistance Professor Jitra Pianlumloed, Legal Textbook Guarantee-Mortgage-Pledge 2nd edition, (Bangkok: Nititham Publishing, November 2003), p. 48

was secured to the creditor⁷. Beside, the mortgagee is holding the right better than the ordinary creditor because the mortgagee is consider as the secured creditor (the preferential creditor) who will be the first person to be remedy from the secured property before the ordinary creditor who doesn't have any secured property to be assured of the debtor's obligations performance be made. All of these, not to consider that the secured (mortgaged) property will be transfer to the other persons because the mortgaged right shall be adhere with the mortgaged property even it was assigned its ownership in many a time.⁸

Secured Transaction by Pledge, it can be explained from the definition by the law about its characteristic that⁹

1. Pledger must deliver his/her secured assets to the pledgee (the creditor)

The delivery can be done by any method in order to deliver pledged property to be lied in the Pledgee's hands. If the parties agree to deliver pledged property but there was no delivery in reality that is not Pledge because it has no any properties to be delivered to the pledgee's hands. If the debtor does not deliver the property to be secured to the creditor's hands, the Pledge (Secured Transaction) could not be valid and enforceable¹⁰ because the Pledge Transaction will be valid by having the delivery of the secured property¹¹. Beside, the delivery of the pledged property might be made by the debtor

⁷Ibid, p.48

⁸ Ibid, p.49

⁹ Ibid, pp. 107-111

¹⁰ The Supreme Court Decision No. 665/2472

¹¹ M.R. Saene Pramote, Legal Textbook Guarantee Mortgage and Pledge, (Bangkok: Nitibannakarn Publishing, B.E. 2516), p. 154

pledges his own property or the other persons pledge his/her own property for secured the other's debt¹².

2. The Pledged Property must be movable property

According to the law of property, the property can be separated by the law into two kinds which are corporeal thing (tangible property) and incorporeal thing (intangible property)¹³; the property which can be pledged can be both of the tangible property and intangible property, intangible property which can be pledged such as the right represented by a written instrument by the law¹⁴. The word "right represented by a written instrument" means the instrument that is used on behalf of the right or the property which is made by the legal form and the assignment must be done by legal procedure of that instrument¹⁵, not include to the normal document which made for being the evidence of the alike regular right otherwise, it is just a transferring of the claim because it is not the right represented by a written instrument¹⁶.

However, not all of the rights which are fall in the meaning of "movable property" is the right presented by a written instrument which will be able to pledge. The right represented by a written instrument, is stated in the section 750 of the Civil and Commercial Code, it will be valid when 1.) The parties have delivered the instrument to the pledge and 2.) The notifying of pledging right is sent to the debtor of that right has been made.

¹² Ibid, p. 108

¹³ Vice Professor Juthamart Nisarart, Civil and Commercial Code (Property) 6th edition, (Bangkok: Ramkhamheang University Publishing, 1999), p. 7

¹⁴ Ibid, p. 112

¹⁵ The Supreme Court decision No. 2051/ 2537

¹⁶ Ibid, pp. 161-162

To compare to the U.S.A. law, Article 9 of the U.C.C. (Uniform Commercial Code) applies to any transaction (regardless its form) which is intended to create a security interest in personal property which secures payment or performance of an obligations¹⁷. Under this law, a security interest may be created in a commercial tort claim and it is enforceable against the owner of the tort of the tort claim without any public filing. The filing of a financing statement would be necessary to perfect the security interest and to give the secured party priority over a lien creditor or another secured party that perfects its security interest, but not merely to create a lien¹⁸.

For a security interest to be enforceable, the debtor must have signed a “security agreement,” in other words a writing that “creates or provides for” a security interest and that contains “a description of the collateral.” The writing requirement does not apply if the “collateral is the possession of the secured party pursuant to agreement”.

According to the Article 9, it places no express limits on what may serve as collateral. Article 9 is sometimes held not to authorize such broad descriptions as “all personal property,” and this may at first glance seem to be a limit. The one limit the UCC places on what may serve as collateral is so broad to be almost invisible. U.C.C. defines a security interest as an “interest in personal property or fixtures”¹⁹.

Another requirement for attachment for attachment of a security interest is that the debtors have either rights in the collateral or the power to convey such rights.

From all of these, we will see that the principle of the security interest between U.S.A. laws and Thailand laws are seemed to be familiar.

¹⁷ U.C.C. Section 1-201 (37) (2003)

¹⁸ Ibid, pp.1635-1636

¹⁹Professor Lynn M. Lopucki and Professor Elizabeth Warren, Secured Creditor: A Systems Approach, (Boston New York Toronto London; Little Brown and Company Publishing), pp. 232-235

2.3 The Right and Duty between the Creditor and the Debtor to the Secured Property in the Secured Transaction

By the general rule, the secured creditor has the right to claim the secured property in order to recover the amount of the debt when the debtor is failing to perform his obligations within the period of time or other circumstances such as the disappear, damaged, or broken of the secured property²⁰.

Under the present laws in Thailand, this topic will explain the principle of the right and duty between the creditor and debtor in secured transaction into 3 kinds which are;

- 1.) Mortgage Transaction
- 2.) Pledge Transaction
- 3.) Secured Transaction under Bankruptcy law

2.3.1 Mortgage Transaction

2.3.1.1. The mortgagee has the right to erase the registered servitudes or real rights which are registered after the mortgage.

Section 722 of Civil and Commercial Code states that *“when a property has been mortgaged and as a servitude or other real right is registered after the registration of the mortgage without the consent of the mortgagee, the mortgage has priority over the servitude or other*

²⁰ Section 723 of Civil and Commercial Code B.E. 2535 states that

“If the mortgaged property has broken or any of the mortgaged property disappear or broken cause to the lack of the security, the mortgagee may immediately claim the mortgage...”

real right and the latter will be erased from the register where its existence prejudices the rights of the mortgagee on the enforcement of the mortgage.”²¹

This section has provide the authority to the mortgagee to ask the court to erase any registered of servitudes or real rights from the certificate or the registered document of the mortgaged property when it has met the legal rules which are;

- (1.) The needs of the registration of that servitude or real right are registered after the registration of the mortgage transaction.

“any other real rights”, in this point, means that the real right under part 4 of Civil and Commercial Code such as servitudes (usufruct, superficies or charge on immovable property) but exclude to the ownership or mortgage right, because that the owner of mortgaged property (mortgager) still has his ownership over mortgaged property, so, he still be able to transfer the secured property to other person by the virtue of section 1336 of Civil and Commercial Code²² and he still has the right to mortgage the secured property again (superimpose mortgage) by virtue of section 712 of Civil and Commercial

²¹ Section 722 of Civil and Commercial Code B.E. 2535

²² Section 1336 of Civil and Commercial Code B.E. 2535 states that

“Within the limits of law, the owner of property has the right to use and dispose of it and acquires its fruits; he has the right to follow and recover it from any person not entitled to retain it, and has the right to prevent any unlawful interference with it.”

Code²³. The mortgager cannot erase the ownership or registered mortgage right after its mortgage transaction has been made.

If it was “personal right” such as right under the rental agreement, even if the mortgager has registered the mortgaged property to any other persons to rent the mortgagee cannot erase the right under rental agreement because this right is not the real right which is able to be erased by the virtue of section 722.

Beside, the servitudes or the any other real rights which are able to be erased under this section must be occurred by the cause of contract, not the course of law such as obtaining of servitude by prescription, even though, it was obtained after that mortgage transaction has been made the mortgagee cannot erase²⁴.

Up to this point, it is interesting to consider that whether the right to gain royalty of copyright is real right or personal right. Even if the Secured Transaction of an intangible property (copyright) is possible to be secured under the mortgage transaction, the creditor of secured intangible property transaction may not be able to erase any burden of that intangible property (copyright) such as the agreement to permit the

²³ Section 712 of Civil and Commercial Code B.E. 2535 states that

“Notwithstanding any clause in the contract to the contrary, a property mortgaged to one person may be mortgaged to another person during the continuance of the previous contract.”

²⁴ Ibid, pp. 70 -72

licensor to produce the goods under the license agreement (copyright) because the right under license agreement is personal right, not a real right or servitude to be erase in the time of mortgage execution.

(2.) The mortgager is not accept to the registration of the servitude or real right after the mortgage transaction has been registered. If so, he cannot take the advantage by the virtue of this section.

(3.) The registration of those servitudes or real rights is damage to the right of the mortgagee when the time of mortgage execution is come.

(4.) The consequence of this section is that the mortgagee has the right to petition to the court to erase any other of service or real right in the time of mortgage execution. But if the mortgagee still has no right to execute to the mortgage property, he has no right to do so.

2.3.2 Pledge Transaction

2.3.2.1 The pledge has the right to hold or retain the pledged property.

Section 758 of Civil and Commercial Code states that *“the pledge is entitled to retain all the pledged property until has received full performance of the obligation and accessories.”*²⁵

²⁵ Section 758 of Civil and Commercial Code B.E. 2535

This section is rule the right of pledge covers to all of the pledge property until the pledger has performed the obligations to the pledge (creditor) completely. If any of the obligation still has exist and not to be performed, the pledgee still has the right to hold or retain the pledged property.

The notice of this section is that the right of pledge transaction (under section 758) is the right between the pledger and the pledgee only. If the ordinary creditor has bring the case to the court to claim the pledged property to perform the debtor's (pledger) obligation, the pledgee only has the right to claim its obligation over that pledged property before the ordinary creditor²⁶.

2.3.2.2 The pledgee has the right to claim the obligations from legal fruits of the pledged property.

Section 761 states that *"Unless otherwise provided by the contract, if the pledged property produced legal fruits, the pledge shall appropriate them in payment of any interest that may be due to him, and, if no interest is due, in payment of the principle of the obligation secured."*

The right of pledge transaction is also cover to the legal fruits of pledged property to perform the debtor's obligations. This section is only cover to the legal fruits of the pledged property, not to the natural fruits of pledged property such as a cow has produced milks. The pledgee has to return that natural fruits of the pledged property to the pledger.

²⁶ Ibid pp.92-95

The words “legal fruits” means that the things or any other benefit which is obtained in the period of the time to its owner from the person who use or take benefit from such things. And it can be evaluated and can be taken hold of in daily or any timed the parties have agreed such as dividend, interest and rent²⁷.

Up to this point, it may consider that the “royalty” of the copyright is the legal fruits. So, the right of the copyright owner or copyright holder to obtain “royalty” can be secured under this transaction. And about the principle of having concrete material to hand over to the pledgee, the certificate of copyright may be to do so.

2.3.3 The secured Transaction under Bankruptcy law.

The secured creditor has the right to claim the obligations to the secured property which the debtor has been secured before he was under the receivership without petition to the receive performance but he has to ask the consent from the official receiver in bankruptcy to inspect that property²⁸.

2.4 The Principle of the Drafted law on Secured Creditor Act (Secured Creditor Act B.E.)

In the year of B.E. 2541 (A.E. 1998) the council of the ministers has appointed the committees vest with authority to make a final decision to resolve the economic problem. The committee has agreed to amend the law of Secured Creditor and the law of Secured Creditor Enforcements in order to consider amending such law²⁹.

²⁷ Ibid p. 98

²⁸ Section 95 of Bankruptcy Act B.E. 2483

²⁹ Dr. Thammanoon Pittayaporn, “A New Reform of the Secured Creditor Law”, Bot Bundit volume 56 part 2, (June 2000): p.43

In the practical way, a business practitioner and the financial practitioner has face the problem about securing the property to the creditor because the matter in the Civil and Commercial Code has limitation in itself such as;

Pledge needs the pledger to hand over the pledged property the pledge, this will cause the pledger is unable to take benefit from the pledged property to produce, sell, or take any benefit in economic way.

And about the Mortgage, although the law has not rule the mortgager to hand over the mortgaged property to the mortgagee the law still has limit the type of the property which is able to secure as mortgage even though there are many kinds and types of the securable property to be secured to the creditor.

All of these, they have forced the business practitioner and the financial firm try to find the way themselves to respond to the demand of the economic desire of securing a property which is not able to mortgage, to use it as collateral in secured transaction through the debtor still be able to use the secured property to take benefit in order to perform its obligations. Moreover, when the debtor has face their insolvency the creditor might have face a problem about the enforcement or claim to the contractual unsecurable property because the contractual creditor will not be considered as secured creditor by the Bankruptcy Law and the creditor has no any preferential right which is used against other creditors. This problem will affect to the reliable of the investment both of domestic and global investors.

The important basic principles of the Drafted law on Secured Creditor Act are³⁰;

1. The kinds and types of the securable property in the section 8³¹ of Drafted law on Secured Creditor Act. This law is rule that every

³⁰ Ibid, p.45

kinds of the property are securable unless it was prohibited by this law.

2. The parties must be the legal entities that operate the business enterprise or any person designated by this law as in the section 6³² and 7³³ of the Drafted law.

³¹ Section 8 of Drafted law on Secured Creditor Act

“ Any kinds of the properties which is exist while the secured transaction has been drafting and will be exist in the future to be secured by this law unless these kinds of property shall not be secured as collateral

(1.)Immovable property unless the collateral which is include in the transaction

(2.)Assets and the right which is not able to be retained or attach by the law or not include in the responsible of the judgment execution.

(3.)The property which is not securable by the law include to the right which is not be assignable by its characteristic.

(4.)The right with its instrument

Money unless the money sourced as follows the section 14 and 29.”

³² Section 6 of Drafted law on Secured Creditor Act

“ The secured debtors are

(1.)A limited company, public limited company, limited partnership, and an ordinary partnership established by the Thai laws or a legal entity as same as these established by foreign laws.

(2.)A Thai or foreign legal entity as specially.

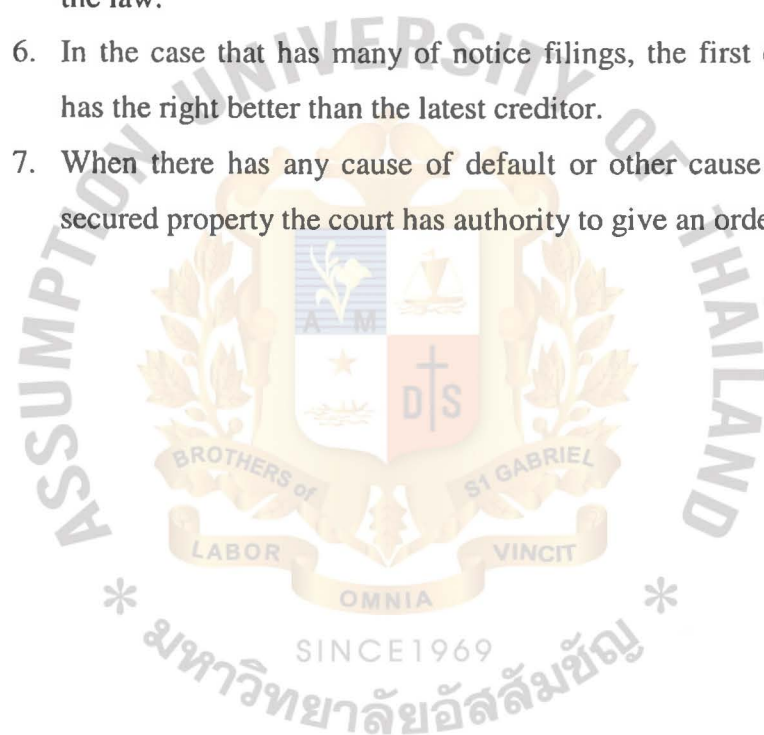
(3.)A legal entity which is operated by the foreign government, a legal entity established by foreign laws, an organization of the foreign government or an organization established by international treaty.

(4.)Any other person stated by the council of ministers and declared in the government gazette.”

³³ Section 7 of Drafted law on Secured Creditor Act

“ The Secured Creditors are

3. The secured debtor needed not to hand over the secured property to the secured creditor.
4. The secured debtor still able to possess the secured property with the right to distribute, transfer, use, produce, combine with other properties, and get the fruitful from the secured property until the Court has an order to claim the secured property.
5. The secured creditor has the right to claim the secured property before the ordinary creditor when he has done the notice filing by the law.
6. In the case that has many of notice filings, the first creditor shall has the right better than the latest creditor.
7. When there has any cause of default or other cause to claim the secured property the court has authority to give an order to enforce.



-
- (1.) *A limited company, public limited company, limited partnership, and an ordinary partnership established by the Thai laws or a legal entity as same as these established by foreign laws.*
 - (2.) *A Thai or foreign legal entity as specially.*
 - (3.) *A legal entity which is operated by the foreign government, a legal entity established by foreign laws, an organization of the foreign government or an organization established by international treaty.*

Any other person stated by the council of ministers and declared in the government gazette.”

Chapter 3

Secured Creditor in Copyright Work

3.1 The Reason that Copyright Work Can Be Secured As Collateral

In today's economy, a company's intellectual property, such as a copyright, can be valuable collateral to the lender. The law regarding perfecting a security interest in copyright is uncertain, however, causing confusion among lenders¹.

The imperfect Rules for perfection in today's high-tech world, a business most valuable asset are often intangible such as copyrights, patents, trademarks and other assets broadly categorized as "intellectual property". Secured lenders are consequently finding their collateral increasingly comprise of computer software, source codes, databases, films, publications, lyrics, media presentations and other "work of authorship" which derive value largely from their uniqueness and from the ability of their owners to protect that uniqueness in the market place².

Under the United States federal Copyright Act, a creator of a "work of authorship" is entitled, with or without registration, to protect the work against copying or other infringement and to derive the economic benefits of marketing the work to others. Specifically, the "copyright" in the work gives the owner the exclusive right to reproduce, modify, distribute and publicly perform and display the work. By registering a copyright with the Copyright Office, an owner becomes entitled to recover certain statutory damages if its copyright is infringed.

¹ Sharon Prise Azurin, an attorney at law in Commercial Law Department, "Banking & Commercial Issue", (September 2000) p.1

² Brian D Murphy and Sherri Snelson of McGuire Woods LLP, <http://www.mcguirewoods.com> access on 28th May, 2005

By design, the registration and notice provisions of the Copyright Act are works specific. The benefits of copyright registration, and any lien filings related to those copyrights, pertain only to the work as registered; post-registration modifications or supplements to the work are deemed to create a new "derivative" work and require a new registration.

For a copyright financier, the requirement that each work be separately registered creates significant risks that valuable items of collateral may escape its security interest. Consider, for example, a lender financing a start-up company's development of computer software designed to monitor the use of office supplies by a multi-office corporation, cost that usage to various profit centers, compare prices among vendors and automate and manage the process of ordering and allocating new supplies. The process of creating such a program involves a number of stages, including analysis, design, coding and testing, which may go through much iteration before a salable product is produced. Moreover, after the product has gone to market, new versions containing additional functions, user-friendly improvements, etc. will almost certainly follow. The software developer might well be expected to balk at the idea that it should be required to register its copyright in each and every incarnation of the program, as well as each addition and modification, and to record the lender's lien with each such registration. However, a recent line of cases from the 9th Circuit purports to require just that.

In *In re Avalon Software, Inc.*, 209 B.R. 517 (D. Ariz. 1997), the United States Bankruptcy Court for the District of Arizona held that the sole method for a secured creditor to perfect a security interest in either copyrighted or copyrightable property (including unregistered copyrights, updates, modifications, amendments and enhancements) and their proceeds is to register (or cause the registration of) the copyrighted and copyrightable materials and to file a record of its security interest with the United States Copyright Office.

In re Avalon Software followed the reasoning in two other 9th Circuit bankruptcy cases, *In re Peregrine Entertainment, Ltd.*, 116 B.R. 194 (C.D. Cal. 1990), and *In re AEG Acquisition Corporation*, 127 B.R. 34 (C.D. Cal. 1991). Under this trio of cases (which unfortunately for lenders represent the only apposite authority on this issue), perfection of a security interest in unregistered copyrights, in unregistered updates, modifications, amendments and enhancements to registered copyrights and in all proceeds related to the foregoing is legally impossible; consequently, a lender is left with the choice between requiring its borrower to register all material copyrightable assets and risking non-perfection.

While *In re Avalon Software* may provide a bright-line test for perfection, its practical implications substantially increase the costs and risks of copyright financing. There are many reasons; including the possibility that compliance with the copyright registration provisions may result in the loss of protection for trade secrets embedded in copyrightable works, why a potential borrower may prefer with good reason not to register its copyrightable assets.

Even for borrowers who register their copyrights, maintaining fully-secured status with respect to those copyrights could become difficult and costly under the *Avalon* precedent. Where a borrower's business involves continual generation of works which may be or become eligible for copyright protection, a lender seeking maximum security must monitor the borrower's activities to ensure that each copyright of material value is registered, either upon completion or, if warranted, at an earlier stage at which its value becomes significant. In addition, each material update, modification, amendment and enhancement must be promptly registered, and a notice of the lender's lien must be recorded with respect to each registration. While the number of filings required for registration and perfection and the time and cost involved may well render copyright-secured financing prohibitively expensive for many borrowers, *In re Avalon Software*, et. al. leaves few practical alternatives.

Although the *Avalon* decision comports with the two California decisions mentioned above, it may well not represent the law in other jurisdictions. We believe it may be

fairly criticized. However, its existence (and that of the two California cases) cannot prudently be ignored.

In making any loan secured by copyright collateral, a lender should thoroughly review the borrower's copyrighted and copyrightable assets to assess the value of the copyright assets as part of the overall collateral package. Where the nature of the borrower's assets makes it important for a lender to acquire a perfected lien in copyright assets, careful attention by legal counsel to the deal structure, representations, covenants (particularly requirements to notify the lender of material changes or additions to copyright portfolios and to take the actions necessary for perfection) and loan monitoring procedures can minimize, although probably not eliminate, a lender's risk of non-perfection. In these situations, the lender should work closely with experienced counsel to structure the collateral arrangements so as to fairly balance the lender's need for a perfected lien in works of material value against the burdens of complying with the rules set forth in *In re Avalon Software*.

Moreover, the reason that the right of the copyright should be able to secure as a secured creditor is that copyright can give the profit in the field of economy and it can be identified itself by the registration, not different from the other rights such as right over the lands that its burden will be record in its document (such as any burden written at the back of the title deed) and the receiver must take any burden or any rights over that land. So, the copyright which is intangible asset would be considered that it is able to have any burden like another rights mentioned also.

Under the Copyright law, the right of right owner will be fall on the hand of any person; it is only need to proof that who is the creator or author of that copyright work (Originality)³ even if that copyright work is not registered to the Department of Intellectual Property, it is able to be protected by the law also (Automatically Right).

³ Section 10 of the Copyright Act B.E. 2537

"Copyright in the work created in the course of commission vests in the employer, unless the author and the employer have agreed otherwise."

Whereas the others security of assets secured creditor need to have it identification of its status, kinds, size, burdens, and the ownership by the registration which is allowed the public to investigate its information. So, the copyright is the right, which has the same qualification as the other rights, should have the possibility to secure as a secured creditor.

3.2 The Features of the Copyright which is Securable as Collateral in the Secured Creditor

The Uniqueness or the characteristic of the copyright which is interested to secure as collateral can refer to its value such as the absolutely right in itself⁴. Moreover, the

⁴ Section 15 of the Copyright Act B.E. 2537

“Subject to Section 9, Section 10 and Section 14, the owner of copyright has the exclusive rights of

(1) reproduction or adaptation;

(2) communication to public;

(3) letting for hire of the original or the copies of a computer program, an audiovisual work, a cinematographic work and a sound recording;

(4) giving benefits accruing from the copyright to other persons;

(5) Licensing the rights mentioned in (1), (2) or (3) with or without conditions, provided that the said conditions shall not unfairly restrict the competition.

Whether the conditions as mentioned in sub-section (5) of paragraph one are unfair restrictions of competition or not shall be considered in accordance with the rules, methods and conditions set forth in the Ministerial Regulation.”

important factors which will really show the value of each copyright is different because it depends on what kinds or types of the copyright to be secured (which will be explained in the Chapter 4). For example, the literary works value might be evaluated from its types (fiction, Knowledge, or Textbook).

According the Copyright Act B.E. 2537, section 15, the Copyright owner shall has the absolutely right of

- (1) Reproduction or adaptation;
- (2) Communication to public;
- (3) Letting for hire of the original or the copies of a computer program, an audiovisual work, a cinematographic work and a sound recording;
- (4) Giving benefits accruing from the copyright to other persons;
- (5) Licensing the rights mentioned in (1), (2) or (3) with or without conditions, provided that the said conditions shall not unfairly restrict the competition.

All of these, the copyright owner may take benefit from his copyright of creation or authorship, by give a permission to the licensor of his right (absolutely right) of section 15 in the form of “royalty”. Thus, this royalty is considered to be an economy benefit and has the capacity to perform the right owner’s obligations.

The term “royalty” was invented centuries ago to describe the payments made by an individual to the Monarch in return for the right to exploit, for instance, a national resource. Royalty (sometimes called license fee) is now the money consideration for IP licensing agreements. In loose terms, a royalty is a financial return for the right to exploit or commercialize a license property. It is a share of the profit or saving that a licensee derives through using licensed property supplied or made available to him by the licensor under a licensing agreement, to manufacture a product or render a service.

There are many approaches to royalty calculation. Payment can be either lump sum or running payment. In most case, royalty calculation is based on the sale of licensed products⁵.



⁵ Tanit Changthavorn, "Intellectual Property Licensing Practice", The Intellectual Property and International Trade Law Forum: Special Issue 2000 Third Anniversary, (Bangkok: Auttaya Millenium Company Limited, December 2000), pp. 104-105

Chapter 4

Analysis of the Problems and Obstacles of Securing Copyright as a Secured Creditor

4.1 Is Copyright A Property Right?

Probably the theory of the legal nature of the author's right is that of a form of property right. At all events, this theory has frequently been applied to explain the copyright system. However, the very nature of copyright—a right to permit or to prevent other people doing certain acts with the author's or owner's work—meant that the effect of regarding copyright as property was to treat it as analogous to land or movable goods, types of property from which others can be physically excluded.

The truth of the matter is that copyright has two dimensions. The first is that of its transmissibility by the author: he can give his copyright away, he can sell it, he can license others to use it and he can leave it to his heirs, just as if it were a lawnmower or a plot of land; in this sense copyright is easily seen as “property”. The second dimension deals with its enforcement against others, and it is in this case that the analogy with property is more difficult to sustain. For example, if copyright is a form of property, it could be questioned why (except to the extent that practical considerations dictate) the possession of that property should be limited in time when the property is incorporeal, and not so limited when it is material. There are indeed many other restrictions on copyright in favour of research, study, education, dissemination of news, and even of entertainment, which are incompatible with the notice of property.

It is understandable, therefore, that both legal theory and practice have made a distinction between the authors's rights in his unpublished works and those in works he elects to publish. According to this view the author is entitled to all the legal rights of person and property while his work remains unpublished, but forfeit these rights (or at least those of property) when he makes his work accessible to everyone and must

accept the right of the state to afford him only such protection as the state, recognizing that it is in the public interest for the author to reveal his work, decides to grant him.

This indeed was the legal position, in imprecise form, as it emerged from *Donald v. Beckett*, although not as a conscious application of a principle but accidentally, as a result of the interpretation of the working of the Statute of Anne¹. A clear dichotomy between private and public interest for the author's work still remains, but the detailed provisions of modern copyright law have all but obscured it. In any case this principle, while it has the merit of rationality, does not in itself lead to any specific concept of the author's rights in his published works.

For example, if the author consents to the recording of his work on a CD and to the distribution of that disk to the public, is he entitled to make his consent conditional on the recording not being used as in public performance or broadcasting? Can he argue that if hundreds or thousands of people are to hear his work through the medium of a single disk, then the sales of that CD, in which he has an interest, may be prejudice? It may be objected that the performance or broadcast may in fact promote sales of the CD, but this objection begs the question of principle.

The concept of copyright as a form of property is given colour by the fact that it can be bought, sold, "hired" (licensed). What is concerned here, however, is the right, not the material object in which the work is manifested, which is indisputably a piece of property. The person who owns a picture, sculpture, book or manuscript is not necessarily the owner of the right to publish, reproduce or perform in public the work incorporated into it. In other words, the right must be distinguished from the work itself and from its physical support, if any: and the transfer of the right by the author to another party, along with the physical support, is not necessarily to be regarded as the transfer of the work itself.

¹ The Statute of Anne, 1709

On the other hand, the incorporeal nature of the created work demands that it be treated differently from the material object in which it is embodied. For example, a painting may be destroyed by its owner and will thus cease to exist as property, but the right to copy it will not cease. Or again, if a manuscript is stolen from another, he has lost his property utterly; while if it is copied without his permission, it remains in his possession but can be “stolen” by copying many times over.

Accordingly, if copyright is a form of property this form is very different from that of real property; hence the invention and employment of such terms as “intangible property”, “intellectual property”, “creative property” and “incorporeal property”.

The property theory of copyright is all the more unsatisfactory in that the property may be declared to belong to someone other than the author, on the fiction that it is some other person who is its author. For example, under the Copyright Act 1956 the “author” of a photograph was the owner of the film on which it was taken; and in the U.S., a fellow common law jurisdiction, the “work for hire” doctrine even today deems the employee’s copyright in works created under the service contract, but indeed the “author”.²

4.2 The Problem about lacking of the law to certify the Secured Copyrights as Collateral

IP is an intangible property; it is a concept, not a concrete article. In the absence of any legal rights or other social norms governing the possession and used of anything, there would still be things but there would be no property. Intellectual property law is the body of law, which embraces its objects: patent and utility models, plant variety rights, industrial designs, trade marks, copyright and service marks³.

² Jeremy J. Phillips, Robyn Durie & Ian Karet, Whale on Copyright fifth edition, (London: Sweet&Maxwell, 1997), pp. 14-15

In an important decision, the court in *In re Avalon Software, Inc.* unfortunately followed and extended the holding of *National Peregrine, Inc. v. Capitol Federal Saving & Loan Association of Denver (In re Peregrine Entertainment, Ltd.)*, and held the only way to perfect a security interest in a copyright, in property which is “copyrightable,” and in anything derived from such property, is to file a copyright mortgage with the U.S. Copyright Office⁴. As a result, a secured party that attempted to perfect its security interest solely by the filing of a financing statement was unperfected. The application of this rule to registered copyrights requires a secured party to make sure that any copyrights included in its collateral are registered. In addition, under copyright law, it is not possible to perfect a security interest in copyrights that arise in the future because they have not yet been registered, and a copyright mortgage cannot be filed against an unregistered copyright.

In *Broadcast Music, Inc. v. Hirsch*, 104 F.3d 1163 (9th Cir. 1997), a debtor purported to make an absolute assignment of its rights under a copyright to a secured creditor. The documentation was designed as a security agreement of its and the assigned only enough royalties to satisfy its obligation to the assignee. Nevertheless, the court treated it as an absolute assignment. *Id.* At 1167-68. The court further held that the assignee did not need to register the assignment with the U.S. Copyright Office to defeat the claims of a tax lienor. *Id.* at 1165-66. The court attempted to distinguish the oft-criticized *Peregrine* decision. *Id.* at 1166. It seems unlikely that *Peregrine* can be distinguished, however, and thus, the indirect effect of this case should be to overrule *Peregrine*’s holding that a secured party must perfect its security interest in a copyright by filing a copyright mortgage in the Copyright Office if the secured party wants to prevail over a secured competing party or a judicial lienor. Nevertheless, some courts continue to follow *Peregrine*. In *Academy Entertainment, Inc. v.*

³Ibid , p.101

⁴ “The Business Lawyer; Vol. 54, November 1998”,
<http://www.Heinonline.com>, Accessed on 19 May, 2005

Spectator Films (In re Academy Entertainment, Inc.), Adv. No. LA94-04326 (Bankr. C.D. Cal. Jan. 31, 1997) (on file with *The Business Lawyer*, University of Maryland School of Law), the recording of a Judgment lien with the office of the California Secretary of State was held insufficient to create a lien on royalties derived from a copyright under *Peregrine. Id.*, slip op. at 13.

In the United States, The current copyright recordation system had its origins in the first copyright statute assigning copyright responsibilities to the Librarian of Congress. In the Copyright Act of 1870, section 89 [later recodified as section 4955] provided as follows:

"That copyrights shall be assignable by law, by any instrument of writing, and such assignment shall be recorded in the Office of the librarian of Congress within sixty days after its execution, in default of which it shall be void as against any subsequent purchaser or mortgagee for valuable consideration, without notice."

Courts interpreting the provision ruled that the requirement of recordation was mandatory.

The 1909 Copyright Act enlarged the grace period but otherwise maintained the essence of the previous recordation system. Section 44 [later recodified as section 30] provided as follows:

"Every assignment of copyright shall be recorded in the copyright office within three calendar months after its execution in the United States or within six months after its execution without the limits of the United States, in default of which it shall be void as against any subsequent purchaser or mortgagee for a valuable consideration without notice, whose assignment has been duly recorded."

As with the 1870 Act, courts interpreted the recordation provision in the 1909 Act to be mandatory. With respect to mortgages, the Second Circuit ruled in 1921 that copyrights can only be mortgaged under the federal copyright law.

Based on review of the background to the adoption of the general revision of the Copyright Act in 1976, it seems clear that Congress intended to create a federal system of copyrighted works which included a registry of claims to copyright and of transfers of copyright ownership. The 1961 Report of the Register of Copyrights on copyright law revision noted that although the previous law's requirement of recordation in the Copyright Office applied only to "assignments," it was not entirely clear under that law whether "assignments" included exclusive licenses or other transfers of less than all rights. The Report proposed that the law be clarified to state that other instruments, such as wills, trust indentures, decrees of distribution, mortgages and discharges, and corporate mergers should be considered transfers of copyright ownership. The Office recommended that the new statute specifically cover exclusive licenses and all other transfers of ownership. (Emphasis added).

Records of copyright ownership are increasingly important in our global, networked society. The current recordation system has been in place since 1870. Enactment of the ABA proposal would change many of the established practices. The Copyright Office would not oppose any change on which a broad consensus has been achieved. However, the Office believes many of the proposed changes are controversial. Today's hearing serves a useful function as a starting point for discussion and debate about these issues. We caution, however, that any changes should be considered only after a careful study of the current system, of the needs of copyright owners, creditors and other users of the recordation system, and of the desirability and feasibility of changing the system that has for so long served the interests of the copyright community⁵.

⁵ United States House of Representatives 106th Congress, 1st Session Statement of Marybeth Peters, "The Register of Copyrights before the Subcommittee

4.3 The Problem of Evaluation of the Secured Copyright Work

The copyright works has different from each other because of its kind, type, content, famous, language, level, etc. So, each of the copyright works have different value, it will be difficult to evaluate the value of the copyright.

From mentioned above, the evaluation to the copyright is the difficult matter to do because copyright has been separated in many kinds of copyright works⁶, which each of its evaluation principle or base is completely different.

on Courts and Intellectual Property Committee on the Judiciary” , (United States: June 24, 1999)

⁶ Section 4 of the Copyright Act B.E. 2537

...“**copyright**” means the exclusive right to do any act by virtue of this Act with respect to the work created by the author;

“**literary work**” means any kind of literary work such as books, pamphlets, writings, printed matters, lectures, sermons, addresses, speeches, including computer programs;

“**computer program**” means instructions, set of instructions or any other things, which are used with a computer so as to operate the computer or to generate an output, whichever the computer language is;

“**dramatic work**” means a work with respect to choreography, dancing, acting or performance in dramatic arrangement, including a pantomime;

“**artistic work**” means a work of any one or more of the following characters:

(1) work of painting and drawing which means a creation of configuration consisting of either lines, lights, colours or other things or the composition thereof upon one or more materials;

(2) *work of sculpture which means a creation of configuration with tangible volume;*

(3) *work of lithography which means a creation of picture by printing process and includes a printing block or plate used in the printing;*

(4) *work of architecture which means a design of building or construction, an interior or exterior design as well as a landscape design or a creation of a model of building or construction;*

(5) *photographic work which means a creation of images with the use of an image-recording equipment allowing light to pass through a lens to a film or a piece of glass and to be developed with liquid chemical of specific formula or with any process that creates images, or a recording of images with other equipments or methods;*

(6) *work of illustration, map, structure, sketch or three - dimensional work with respect to geography, topography or science;*

(7) *work of applied art which means a work applying each or a composition of the works mentioned in (1) to (6) for other uses apart from the appreciation in the merit of the work, such as for practical use, decoration of materials or appliances, or for commercial benefit; provided that, whether or not the work in (1) to (7) has an artistic value and it shall include photographs and plans of such works;*

“musical work” *means a work with respect to a song which is composed for playing or singing whether with melody and lyrics or only melody, including arranged and transcribed musical notes or musical diagram;*

“audiovisual work” *means a work consisting of a series of images recorded on any kind of materials and capable of being replayed with an equipment necessary for such material, including the sounds accompanying such work, if any;*

“cinematographic work” *means an audiovisual work consisting of a series of images which can be shown in succession as motion pictures or can*

There are a few of favorite kinds of copyright works that influence to secure to the creditor such as the Literary work and musical work which are able to take a huge benefit from the “royalty” fee. In Thailand, the licensee or any person who buys the CD music (Musical work) has to pay the price of that CD music (or Karaoke CD) into 2 purposes that are

1. For self-entertainment or
2. for commercial entertainment (which that CD music will be played in the public place such as restaurant).

So, the problem in this section is about “Tracing Collateral Value”. Tracing Collateral Value will occurs when it is in the case of Bankruptcy, states by the Article 9 of U.C.C. (U.S.A. law).

Article 9 permits a secured creditor to trace value of its collateral through concepts such as proceeds or products and also to pick up additional collateral by means of an after-acquired property clause. Often, it is unnecessary to distinguish whether a creditor claim its security interest in property acquired after the security agreement

be recorded upon other materials so as to be shown in succession as motion pictures, including the sounds accompanying such motion pictures, if any;

“sound recording” means a work consisting of a series of music, sound of a performance or any other sounds recorded on any kind of material and capable of being replayed with an equipment necessary for such material, but not including the sounds accompanying a cinematographic work or another audiovisual work;

“broadcasting work” means a work which is communicated to public by means of radio broadcasting, sound and/or video broadcasting on television or by any other similar means;...

was signed by proceeds or by an after-acquired property clause, so long as it is clear that at least one of the concepts would cover the property in question.

Once debtor was filed for bankruptcy, however, the distinction becomes critical. Bankr. Code section 552 permits the secured creditor to trace the value of its collateral, but it is still narrower than Article 9.⁷

For this point, it can be said that the evaluation of each copyright works and the law (which will be issued to enforce to those method in the future) will not be the same. Fore sample, the literary work will be evaluated by the creditor from such elements (which will affect to the value of the literary work) that might be;

1. Kinds or types of the material such as fiction, textbook, cartoon comics, or etc.
2. The favorite or the reputation of that Literary work
3. The Best seller or any formal reward of that Literary work
4. The respectable or the reputation of the author of that Literary work

Beyond these, the evaluation of intangible property value is seemed similar to the other properties that it has to be evaluated from the principle of evaluation to the property value. The assessor must understand to the price, market, cost and value of the property which is evaluated⁸.

⁷ Professor Lynn M. Lopucki and Professor Elizabeth Warren, Secured Creditor: A Systems Approach, (Boston New York Toronto London; Little Brown and Company Publishing), p. 219

⁸ Pairoj Suengsilpa, The principle of the evaluation to the property 2nd edition, (Bangkok: Suthasin Publishing November, 1992) pp. 11-12

Price is the amount of the money that the purchaser is satisfy to pay and the seller is satisfy to sell for agreement to sell of something which is agreed to make it happen between those parties.

Market is the center place where the purchaser (buyer) and the seller come to have an activity together follow the market mechanism. Market may be mean to the geography or the characteristic of the products, the quantity of the purchaser and seller.

Cost that the assessor uses in the meaning of production is not the exchange; cost may be occurred from the factual circumstance or occurred from the present estimate. Cost that the assessor used has many kinds such as the direct cost, indirect cost, development cost, etc.

Value occurred from the combination of many point of views such as the relation of the price, market and the value from cost of evaluation to the property. Anyway, this word is generally understood is that the prediction of the estimate benefit obtained in the future because of value which is occurred in some circumstance. So, the evaluation of something will reflect to the factual value of something in some circumstance also. It can be seen that the value in some circumstances which ruled is the value of the products, goods or services for the parties.

When the principle of evaluation to the property has concerned with many sections, it is impossible to the assessor to have the knowledge of all evaluation principle of every kinds of property. So, the evaluation of the property will be made from the partake of many occasions, depends on each kind of property to have the procedure of evaluation such as land; the assessor should have the knowledge about purchase-selling agent because when there has a land purchase-sell transaction he should know why the purchaser and the seller are agree

to transfer, the assessor must have knowledge or get usual about the land price and there has to be an inventory of land which is the important factor of property evaluation. Beside, the evaluation of the property should have the opinion of the third person; it could have a fair price from such evaluation⁹.

To evaluate the value of property (in order to have a fair price), it has to be analyzed follow the science of reasoning principle which is the evaluation procedure. In order to have same globalize standard of price evaluation, there has many procedures which is become the basic principle for studying purpose and then it could be suitable developed to appropriate with each circumstance, place, and time, or it may be mutated from this principle also even if it would be the better way to do.

So, the procedure of price evaluation is the procedure settles the problem and plan to solve it by obtained the information, to compile information, to systematize the information and analyze it to modify the value from those informations to have a result in the form of price¹⁰.

The procedure of price evaluation has 7 steps which are¹¹;

- 1.) The settlement of the problem to evaluate
- 2.) The basic analysis and prepare a plan to evaluate
- 3.) The collect and analysis to the informations
- 4.) The analysis to the best and useful benefit

⁹ Ibid p. 9

¹⁰ Ibid, p.33

¹¹ Ibid, pp. 33-34

- 5.) The evaluation of the value
- 6.) The research of the relation between value and final analysis to the value
- 7.) To report the result of evaluation in the form of price

The evaluation to the value of intangible property such as copyright should be supported from the person who has knowledge in each copyright work as an assistant to the assessor to evaluate the fair value of that copyright work. For example, the literary work may be evaluated and have a suitable procedure to evaluate their value from the aforesaid.

4.4 The Problem of the enforcement for claiming to the Secured Copyright Work

The enforcement of claiming the copyright work as a secured creditor, in this section, it will talk about how the enforcement of copyright secured will be applied to? Or could it be applied to the same law as a secured creditor? Or it needs to have only court order or any other methods to enforce one's claim against that copyright work (Secured Copyright work).

At present, the idea of perfection to the security interest in a secured copyright as it can be seen in *Peregrine* case which is mentioned above. The only way to enforce to the secured copyright is that the secured party has accepted the term of contract about absolutely assignment of the copyright to the creditor. In an important decision, the U.S. Court of Appeals for the Ninth Circuit held in *Aerocon Engineering, Inc. v. Silicon Valley Bank (In re World Auxiliary Power Co.)* that a secured party may perfect a security interest in an unregistered copyright only by the filing of a financing statement under the U.C.C. The court also indicated that, upon registration of the copyright, the only way to perfect the security interest would be by a filing in the U.S. copyright office. Accordingly, a security interest in the unregistered copyright

previously perfected by a U.C.C. filing becomes unperfected upon registration of the copyright¹².

In order to perfect the security interest of the copyright, the present method that the practitioner tries to fulfill this condition is the “Notice Filing” of the secured property to the governmental organization such as the Department of Intellectual Property. However it was that, the U.S. Court of Appeal has only treated that as an absolutely assignment because of lacking of the law to enforce or certify as legal to such method.

4.5 The Problem of the lacking of the laws to Claim the right Over the Secured Copy right Work under Thai Law.

At present, there is no law or any principle to support the pledge of the right without any legal document. The pledge of the intangible things without any legal documentation to describe its status is not accept by the law of pledge in Thai Civil and Commercial Code. So, it is impossible to claim against the secured copyright work because of lacking the law to accept the right to claim the secured right over that copyright work. So, the issuing of the new law is necessary in this section, and also the organization that does the duty of “Notice Filing” or any methods to describe the copyright to be secured as a secured creditor.

According to the Thai laws which is mentioned and explained in Chapter 2, the security interest in a copyright seems to be difficult to provide in Thailand because of the limitation of the laws because,

In the Civil and Commercial Code B.E. 2535, Pledge needs the secured party to hand over the secured (pledged) property, Pledge needs the pledger to hand over the pledged property the pledge, this will cause the pledger is unable to

¹² Steven O. Weise, U.C.C. Survey-Article 9 Developments, (U.S.A.; Heinonline) p.1637

take benefit from the pledged property to produce, sell, or take any benefit in economic way.

And about the Mortgage, although the law has not rule the mortgager to hand over the mortgaged property to the mortgagee the law still has limit the type of the property which is able to secure as mortgage even though there are many kinds and types of the securable property to be secured to the creditor.

In conclusion to this point, it can be said that there is no law of Thailand to issue to certify or support the security interest in a copyright to be secured as collateral, to certify the secured transaction of copyright to make this transaction more concrete in the written law.



Chapter 5

Conclusion and Recommendation

5.1 Conclusion

In Thailand, we still have no law to support the secured transaction by using the copyright as collateral. And the present laws have the limitations and tight principles as the general principle to follow to interpret and enforce such transaction as to be valid and enforceable secured transaction by both of our domestic laws and foreign laws. And the copyright per se has its characteristic different from other properties or things to be the secured as collateral in any methods to perfect security interest.

Beside, it is so curious that whether a copyright is a property, or not? If we look into the Civil and Commercial Code, section 138, the property needs not to be a material, it might be a tangible or intangible property which has its value and able to possess. In this sense, a copyright might be a property because it has value in itself and it can be evaluated from its reputation or famousness. For example, a literary work may be calculated its value from its types and kinds of that literary work, its well known, and etc.

In Thailand, the principle of laws of the secured creditor are similar to the other countries, thus these are the obstacles to perfect the security interest of secured copyright to the creditor. The secured party has to absolutely assign his copyright to the creditor in the secured transaction such as security agreement.

However, Thailand has a Drafted Law on Secured Creditor Act to be enforced in the future the section 6 to 8 of the Drafted Law still be vague that the Drafted law will have the legal consequence fit for the secured copyright transaction because the Drafted law still has the exception for the property to be secured as collateral. However the Drafted law of Secured Creditor Act is enforced to the society the

perfection to the security interest of the secured copyright might conflict with the subsection (3) of the section 8.

Thus, there is no suitable method or procedure to perfect the security interest of the secured copyright as collateral because of the copyright's automatic protection, thus, some copyright owners might not be able to know that he has his copyright of his copyright works, though; some of copyright works may be unregistered when there is a secured transaction. The present laws need the secured property to be concrete objective or to be able to show the burden of that secured property.

5.2 Recommendation and Suggestion

From all aforesaid of these points, I have my recommendation that copyright can be considered as a property under the Civil and Commercial Code because copyright can give the economic benefit and has capacity to perform the right owner's obligations.

However it is an obstacle in itself that the unregistered copyright cannot be secured because of lacking of the concrete object. There should be some organization and method or procedures to influence the creator of the copyright work to register his right in order to make such copyright be concrete matter for being a securable copyright.

Beyond these, the important factor to fulfill the idea of this theme is to have a principle of law to follow in order to perfect the security interest of the secured copyright. The Drafted law on the Secured Creditor Act of Thailand provides the exception of the property which is not securable. So, there should have the regulations or principles of the main laws to issue or establish any procedure and organization to fulfill the requirement of such law.

To evaluate the value of an intangible property such as copyright works, the assessor must understand the problem which he has to face with in order to find out the result clearly that what kinds of copyright work he is evaluating with the assistance from the

people who is specialist in each kind of copyright works. Because that the copyright work is a kind of property, it is not different from other kinds of property to be evaluated systematically.



Bibliography

Laws

1. Thai Civil and Commercial Code B.E. 2535
2. Thai Copyright Act B.E. 2537
3. The Drafted law on Secured Creditor Act
4. Thai Bankruptcy Act B.E. 2483

Court Decisions

5. The Supreme Court Decision Number 665/2472 and 2051/ 2537

Books

6. Vicha Mahakhun. Legal Textbook: Bankruptcy Law 8th Edition. Bangkok: Nitibannakarn Publishing, August 2002.
7. Assistance Professor Jitra Pianlumloed. Legal Textbook Guarantee-Mortgage-Pledge 2nd edition. Bangkok: Nititham Publishing, 2003.
8. M.R. Saene Pramote. Legal Textbook Guarantee Mortgage and Pledge Bangkok: Nitibannakarn Publishing, 2516.
9. Pairoj Suengsilpa. The principle of the evaluation to the property 2nd edition. Bangkok: Suthasin Publishing, 1992.
10. Professor Lynn M. Lopucki and Professor Elizabeth Warren. Secured Creditor: A Systems Approach. Boston, New York, Toronto, London: Little Brown and Company Publishing, 2000.

Journal and Other Documents

11. Dr. Thammanoon Pittayaporn. "A New Reform of the Secured Creditor Law". Bot Bundit volume 56 part 2, 2000.
12. United States House of Representatives 106th Congress, 1st Session Statement of Marybeth Peters, "The Register of Copyrights before the Subcommittee on Courts and Intellectual Property Committee on the Judiciary" United States: June 24, 1999

