

Independent Study Paper Title : The Impropriety of Criminal Sanctions under the Thai Copyright Law
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ABSTRACT

Presently, the Copyright Act B.E. 2537 has imposed criminal sanctions to both of the commercial and non-commercial purposes infringements; which have exceeded the obligation under Article 61 of the Trips Agreement that requires the state members to provide criminal penalties to be applied at least in cases of copyright piracy on a commercial scale. This has created many drawbacks in the copyright protection system. For example, the criminal penalties may be used by the copyright owners as tools to threaten the infringers to pay them money. Moreover, Section 76 of the Copyright Act B.E. 2537 states that "One half of the fine paid in accordance with the judgment shall be paid to the owner of copyright or performer's rights..." has encouraged the copyright owners to prosecute criminal cases against the infringers; as the amount of fines they may receive might exceed the amount of actual losses they suffer. As a result, the criminal sanctions under the Thai copyright law are said to be over-criminalized to protect the rights of the owners. Therefore, this independent study herein aims to research the principles and concepts of criminalization, the imposition of criminal sanctions based on the human right approach, and the economic analysis of law. In addition, a comparative research between the Copyright Act B.E. 2537 of Thailand and the Copyright, Designs and Patents Act 1988 of the United Kingdom shall be conducted in order to find some deficiencies in the Thai copyright law.

From the study, it is found that when assessing from the principle of crime, it may be concluded that the non-commercial purpose infringing conducts are lacking in both of the harm and moral wrongfulness contents. For the Human Right approach, there has to be a balance between private and public interests, by imposing criminal penalties to protect the private rights when it is not necessary to do so; public would be

less likely to access to those works; which creates an imbalance between those two interests. On the economic perspective, it has led to a conclusion that the imposition of criminal penalties to the copyright law is the result of pressures and lobbying efforts from the copyright owners in order to realize monopoly rents to maximize their profits from the copyright works. Hence, this could be implied that the application of criminal penalties is actually to protect the profits of the copyright owners not for the public benefits. In addition, the assessment from the cost-benefit analysis has suggested that the application of criminal penalties to the non-commercial purpose infringing conducts have exceeded the benefits from doing so. The state has to spend a large amount of budgets in both criminal prosecutions and suppression activities to protect those private interests. Moreover, the study has shown that the United Kingdom has also applied the criminal penalties to the copyright infringement activities. However in most cases, the copyright owners have preferred to file civil litigations rather than the criminal prosecutions. This is due to the fact that their civil sanctions are efficient enough in compensating those owners. Comparing to Thailand, the method in which the Court uses to calculate the amount of compensation for the copyright owner is still not clear and is not as of the same standard from case to case. In addition, the measures and injunctions used are also not efficient enough in securing the rights of the copyright owners and infringers. Therefore, the criminal prosecutions are used instead of the civil litigations.

Therefore, it is recommended that the criminal penalties shall not be imposed to the non-commercial purpose infringements. It shall be a matter of civil litigation to compensate for the copyright owners' losses to protect their private rights. In contrast, criminal penalties shall be applied proportionately to commercial purpose infringing conducts. Moreover, there shall also be some improvements for the civil litigations in copyright infringement cases in order to attract the copyright owners to file civil suits instead of criminal prosecutions. The United Kingdom's model may be used as a guideline to improve the copyright civil litigations in Thailand.