

INTERNET COPYRIGHTS IN THAI CONTEXT

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Abstract

The present state of Internet copyright law, as it is reflected in Internet treaties, favours the commercial interests of the enterprises who derive their profits from intellectual property. The prevailing concern of developing countries like Thailand should be providing a fair and equitable access to the information on the Internet for all its citizens. When comparing Thai Internet copyright law to American law, one can see significant similarities. Following American principles in Thai context, however, leave many problems of copyright protection unresolved. It is argued, that Thailand should be more creative in forming its copyright law provisions to meet its national priorities.

Introduction

The Internet offers a fundamental challenge for the law of copyright. At the moment there is a fierce struggle for the degree of the enforcement of copyright law on the Internet between two powers. One power is represented by big entertainment companies which make every effort to ensure that the copyrights are observed by the users of the Internet. Another power is the users themselves. The Internet technology is used both for copying and for preventing copying. Yet, in its origin the nature of the Internet favours free exchange of information much more than a strict copyright control. Even though this struggle is mainly about entertainment materials, the results will be felt by every user of the Internet. Copyright, as it has been expressed in the writings of Lawrence Lessig,¹ one of the leading proponents of a limited application of copyright laws to the Internet, has become the means of controlling the content of the Internet. It can be not only used to protect the creativity, it can also be used to stifle further creativity. The final answer to the question how far to go to enforce copyrights on the Internet will be different from country to country. This paper deals with the following question: what will be the future development of the Internet in Thai law?

1 Lawrence Lessig, **The Future of Ideas: The Fate of the Commons in a Connected World** (Random House, 2001).

Thailand became a contracting party to Berne Convention in 1931, and also adopted in 1995 its revised version made in Paris in 1971.² Thus, Thailand undertook an international obligation to enforce the main principles of copyright law as reflected in this seminal international agreement. According to the Berne Convention, Thailand must grant copyright protection for all “literary and artistic works.” This term encompasses diverse forms of creativity, such as writings, both fiction and non-fiction, musical works; audiovisual works; works of fine art, including drawings and paintings; and photographs. Related rights protect the contributions of others who add value in the presentation of literary and artistic works to the public: performing artists, such as actors, dancers, singers and musicians; the producers of phonograms; and broadcasting organizations. Copyrights include rights of reproduction and of certain acts of communication to the public, such as distribution, public performance and broadcasting.

Even though the Berne Convention brings some uniformity to the copyright laws across the world, it leaves a significant freedom for the countries to define the scope of the works which fall outside copyright protection, for example because of the subject matter of the work, its author, or the expiration of its copyright term. Thailand as any other party to the Convention can give a different interpretation of the particular right by applying an exception or

2 On the current list of contracting parties to Berne Convention see: <http://www.wipo.int/export/sites/www/treaties/en/documents/pdf/berne.pdf>

limitation to copyright protection.³

The problem, however, is not only that different countries can regulate copyrights differently to a certain extent. The development of the Internet has also raised questions about how copyrights apply in the new environment. In particular, when multiple copies are made as works traverse the networks, is the reproduction right implicated by each copy? Is there a communication to the public when a work is not broadcasted, but simply made available to individual members of the public if they wish to see or hear it? Does a public performance take place when a work is viewed at different times by different individuals on the monitors of their personal computers or other digital devices? Does reproduction take place when the user scans printed materials or rips audio files on the Internet? Can a simple act of downloading violate someone's reproduction right? Does electronic transfer of files reproducing copyright works require permission or not? Does uploading of a copyright work to a server constitute distribution if there is an intention to distribute? Or should distribution take place only when the users get access to the material? Does MIDI which allows adding creative and expressive content to the work, trigger derivative works right? If a person sends an e-mail with an attachment containing infringing material, will it be reproduction or distribution? The answer is important since it determines who has the right to claim a copyright violation and the available remedy. Some companies have exclusive

³ Marketa Trimble, "The Multiplicity of Copyright Laws on the Internet" (2015) 25 **Fordham Intell. Prop. Media & Ent. L.J.** 339, 356.

distribution rights. If sending an e-mail is distribution then they have the right to sue.

These questions may appear very technical at first glance, but their solution may be different depending on country's cultural background. The old legal concepts of copyright have to be applied to the new environment. The main issue is whether the Internet signals the end of the multiplicity of copyright laws and the beginning of its unification, or countries like Thailand will be able to preserve some of its independence in forming the content of copyright provisions applied to the Internet.

Internet Treaties and Thailand

The importance of adjusting copyright law to the age of the Internet has been reflected in two treaties which were adopted in 1996 by more than 100 countries at the WIPO (World Intellectual Property Organization): the WIPO Copyright Treaty (WCT)⁴ and the WIPO Performances and Phonograms Treaty (WPPT)⁵ (commonly referred to as the “Internet Treaties”). The both treaties, each having reached their 30th ratification or accession, have entered into force in 2002. Many countries did not sign or ratify those treaties so far, although many countries made their accession afterwards. Thailand at the time of writing this paper is not a party to the treaties.

4 For the text of the treaty see: <http://www.wipo.int/treaties/en/ip/wct/>

5 For the text of the treaty see: <http://www.wipo.int/treaties/en/ip/wppt/>

The most important provision, surprisingly, is contained not in the main text of the treaties but in accompanying agreed statement concerning Article 1(4) of the WCT and in the agreed statement concerning Articles 7, 11 and 16 of the WPPT. It is affirmed in those statements that the storage of a protected work in digital form in an electronic medium constitutes a reproduction. In other words, uploading into a computer memory without authorisation can be considered as a violation of the copyright. Reproduction is, perhaps, the most important right of the copyright holder. It is defined as “the production of even a single additional copy of the work.” The importance of those statements is difficult to overestimate. They involve the claim that making any copy in a digital form falls under the scope of the traditional copyright law.

The treaties contain “anti-circumvention” provision such as: “Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.”⁶ Such provisions ensure that technological devices to protect digital works against copyright infringement are not circumvented by other technological devices. Technological systems of protecting against unauthorized copying may include: anti-copy devices, access control,

6 WIPO Copyright Treaty. Article 11.

electronic envelopes, proprietary viewer software, encryption, passwords, watermarking, fingerprinting (user authentication), metering and monitoring of usage, and remuneration systems. The music industry, for example, has developed copyproof compact disc (CD) technology that prevents CDs being played on computer disc drives.

Further, the treaties protect the “rights management information.”⁷ It can contain electronic information which identifies the work, the author of the work, the owner of any right in the work, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a work or appears in connection with the communication of a work to the public.

It is noteworthy that most support to the Internet treaties comes from the rich countries. The fact that not many developing countries have ratified the treaties so far, reflects a fundamental conflict among different cultural perceptions of the intellectual property. It is likely, however, that most of the countries will yield to the pressures to adopt the provisions of the treaties in their domestic law. Their efficient enforcement will be more doubtful. The composers of the treaties put their trust in technological means to enforce copyrights on the Internet. Their approach to solve the problem is called “digital lock.” After many years of the experience of using those technological means, there is an acknowledgment by their supporters that “the legislative initiatives to support the digital

7 WIPO Copyright Treaty. Article 12.

lock approach have failed.”⁸ The Internet treaties are not welcomed by everybody even in the rich countries. Consumers are not willing to accept the restrictions on their freedom to use digital materials. Electronics manufacturers are increasingly constrained in what they can produce and what they cannot.

What should concern countries like Thailand the most is the issue of providing fair and equitable access to the information on the Internet for all citizens of the world is left without serious attention in those treaties. It appears that the Internet treaties favour the commercial interests of the enterprises who derive their profits from intellectual property.

American and Thai Internet Copyright Law: Comparison

The U.S. was one of the first to implement the provisions of the Internet Treaties by enacting Digital Millennium Copyright Act (DMCA) in 1998.⁹ It follows the Internet Treaties in making it illegal to circumvent digital copyright protection measures. In many respects, the scope of American law is much larger than the one of the Internet treaties.

8 Michael Geist, “ISPs new role in network control”, <http://news.bbc.co.uk/2/hi/technology/7215235.stm>, 29.01.2008

9 U.S. Copyright Office, “The Digital Millennium Copyright Act of 1998: Summery”, (1998) <http://www.copyright.gov/legislation/dmca.pdf>

Internet treaties do not address the issue of liability of internet service providers. The problem with the ISPs is that they serve as conduits of communication between different Internet users who can send illegally the copies of protected literary and artistic works. The Internet transmission of the files involves their temporary copying by the ISPs. Further, ISPs mirror certain popular websites on their servers in order to reduce the time it takes for users to download their sites. The issue arises whether ISPs violate copyright law by linking the Internet users to another website containing copyright infringing materials. The same applies to any website which contains links to the copyright infringing materials situated somewhere else on the Internet.

Because of the failure of digital locks approach to secure the interests of copyright owners, there is a growing pressure on the legislators in the Western countries to impose on the ISPs filtering and content monitoring obligations within their networks. “ISPs would then become private network police, actively monitoring for content that might infringe copyright and stopping it from reaching subscribers’ computers.”¹⁰ Imposition of such duty faces a strong opposition on the same ground as in cases of pornography and defamation: consumer rights, free speech, and personal privacy.

The US law makes it clear that an ISP will be liable for copyright violation only if it was aware that the material on the connected

10 Michael Geist, “ISPs new role in network control”, <http://news.bbc.co.uk/2/hi/technology/7215235.stm>, 29.01.2008

website was infringing someone's copyright.¹¹ Further, ISPs can create intermediate and temporary copies as part of an "automatic technical process" when rooting or transmitting communications among Internet users. DMCA expressly exempts from infringement liability temporary copies created in connection with the maintenance and repair of computer systems, but only if these copies are destroyed after the maintenance and repair completed.

In 2015, Thai law has addressed Internet issues in its copyright legislation. Even though Thailand has not yet ratified Internet treaties, it has recently enacted amendments to copyright law which are remarkably similar to the U.S. copyright law. New Thai legislation contains identical to U.S. law provisions related to creating intermediate or temporal copies by ISP in the process of transmitting digital materials. Such copies are deemed as not violating copyrights.¹² Further, the ISP is not liable for the copyright infringements if it does not control, initiate, or order the material to be carried out in the computer system. The owners of copyright have a right to request courts to issue injunctions against the ISP to prevent the distribution of copyright-infringing material. By obeying the court's injunction, it is also exempt from any liability for any possible damage resulted from such compliance.¹³

11 17 U.S.C. 512.

12 Copyright Act (No. 2) B.E. 2558 (2015), Section 4.

13 Copyright Act (No. 2) B.E. 2558 (2015), Section 4.

In new legislation, Thailand adopted “first sale doctrine” as it had been developed by American courts and subsequently incorporated into American legislation.¹⁴ This doctrine has been mentioned in the Internet treaties.¹⁵ It is acknowledged in the treaties as a limitation of the distribution rights of the copyright owner. Previous Thai copyright law did not distinguish distribution rights of copyright owner among other exclusive rights such as reproduction or communication to the public.¹⁶ New Thai legislation explicitly states that “distribution of the original of a copyrighted work or its copy by a person who legally owns it, does not constitute violation of copyright.”¹⁷

The first sale doctrine is a distinct US legal principle. It is different from fair use. It limits the rights of copyright owner to control a copy of the work after it is sold for the first time. Lawful ownership of the copy of a copyrighted work is not the same as owning the copyright of the work itself. The owner of the copy may lend, resell, give away and or/destroy the copyrighted item but is not granted any of the exclusive copyrights. Originally (back in 1908),¹⁸ the principle applied to copies that were sold, but later it was applied to any “owner” of a lawfully made copy regardless whether it was first sold

14 17 U.S.C. 109.

15 WIPO Copyright Treaty, Article 6. WIPO Performances and Phonograms Treaty, Article 12.

16 Copyright Act B.E. 2537 (1994), Section 15.

17 Copyright Act (No. 2) B.E. 2558 (2015), Section 4.

18 **Bobbs-Merrill Co. v. Straus**, 210 U.S. 339 (1908)

or given away.

The Internet presents a challenge for the application of the first sale doctrine. If the copyright owner allows someone to make a copy of his work (such as by downloading), then that copy may lawfully be sold, lent, traded or given away. The digital form of the copy makes it easy to duplicate. In order to prevent it, the copyright owners forbid any duplication of the copyrighted item according to the license agreement. The issue which was raised is whether consumers can make copies of computer programs or music contrary to a license or not.

In *Novell v. Network Trade Center*, the defendant obtained software from the plaintiff under a licence agreement.¹⁹ Later, it distributed this software to others in contrary to the explicit provision of the terms of an End User License Agreement (EULA). The court decided that the defendant was an "owner" by way of sale and was entitled to the use and enjoyment of the software with the same rights as exist in the purchase of any other good. Transfer of a copyrighted work that is subject to the first sale doctrine extinguishes all distribution rights of the copyright holder upon transfer of title. The court did not agree with the argument that the first-sale doctrine does not apply because software is licensed, not sold. US courts ruled that a sale of software is a sale of goods.

19 **Novell, Inc. v. Network Trade Center, Inc.**, 25 F. Supp. 2d 1233 (D. Utah 1998)
Available at: <http://law.justia.com/cases/federal/district-courts/FSupp2/25/1233/2326092/>

Other US courts issued similar decisions applying the doctrine of first sale for bundled computer software even if the software contained a EULA prohibiting resale. Bundled computer software is a package containing many programs that are also available individually. In the *Softman v. Abode* case,²⁰ after purchasing bundled software from Adobe System, Softman unbundled it and then resold the component programs. The California District Court ruled that Softman could resell the bundled software, no matter what the EULA stipulates, because Softman did not read the EULA.

The incorporation of the first sale doctrine in Thai law is a positive step to protect Thai consumers from over-demanding EULA terms, providing that Thai courts will interpret licence agreements in the same way as the American courts did. The danger, however, is that Thai courts will be more cautious, and will look at those agreements as rental rather than sale.

The most significant part of the Internet treaties deals with “anti-circumvention” (referred to as Technological Protection Measures TPM) and “rights management information”. It requires that the states “should provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures” such as digital locks.²¹ It also requires the states to “provide adequate legal protection and effective legal remedies against any

20 *SoftMan Products Co. v. Adobe Systems, Inc.*, 171 F. Supp. 2d 1075 (C.D. Cal. 2001)

21 WIPO Copyright Treaty, Article 11.

person knowingly performing any of the following acts knowing, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate or conceal an infringement of any right covered by this Treaty or the Berne Convention: (i) to remove or alter any electronic rights management information without authority; (ii) to distribute, import for distribution, broadcast or communicate to the public, without authority, works or copies of works knowing that electronic rights management information has been removed or altered without authority.”²²

American law enforced those provisions in its Digital Millennium Copyright Act.²³ Thai law follows in its main provisions the American law, even though Thailand has not been a party to the Internet treaties at the time of enacting its new copyright legislation. Like American law, Thai law imposes both civil and criminal law penalties for modification of RMI and removal of TPM.²⁴ The civil liability for these new offences is determined according to the old copyright law: “the court may order the infringer to compensate the owner of copyright or performers' rights for damages the amount of which shall be determined by the court taking into account the seriousness of the injury, including the loss of profits and the expenses necessary for the enforcement of the right of the owner of copyright or performers' rights.”²⁵ However, new Copyright Act allows

22 WIPO Copyright Treaty, Article 12.

23 17 U.S.C. 1201.

24 Copyright Act (No. 2) B.E. 2558 (2015), Section 10 and Section 11.

25 Copyright Act B.E. 2537 (1994), Section 64.

Thai courts to impose American idea of punitive damages on a copyright infringer by increasing the compensation up to two times of what would be imposed according to the old law.²⁶

There is, however, a significant difference between American and Thai laws in the way of criminalizing modification of RMI and removal of TPM. American law imposes criminal law penalties only in cases when the acts were committed “willfully and for purposes of commercial advantage or private financial gain.”²⁷ In contrast, Thai copyright law imposes criminal law penalties for modification of RMI and removal of TPM even when it was done without any commercial purposes. It follows a similar practice of old Thai copyright law which imposes fines from 10,000 to 100,000 baht on “non-commercial” offenders.²⁸ If the offense is committed for commercial purpose, the offender can be subject to imprisonment of between three months and two years or/and a fine of between 50,000 baht and 400,000 baht.²⁹

When comparing Thai Internet copyright law to American law, one can see significant similarities. However, Thai law stretches beyond commercial offences in criminalizing circumvention of technological protection and removal of rights control mechanisms. This latter fact make Thai law appear at first as more authoritarian and oppressive,

26 Copyright Act (No. 2) B.E. 2558 (2015), Section 9.

27 17 U.S.C. 1204.

28 Copyright Act (No. 2) B.E. 2558 (2015), Section 11. Copyright Act B.E. 2537 (1994), Section 70.

29 Ibid.

relying more on the police power to protect the profits of copyright owners. However, a more extensive application of fair use and not rigid enforcement of criminal law in copyright cases make this first impression inadequate.

Internet Challenges for Copyright Law

Copyright laws which govern the Internet IP aspects are different from country to country. The Internet is, at the same time, international. It is true that there are several international conventions which impose a minimum standard of copyright protection. However, national law of a particular country which has adopted those conventions can still enforce a higher level of protection. The U.S. copyright law as well as copyright laws of many rich countries recently extended the term of copyright protection of literary works up to seventy years from the death of the author.³⁰ In contrast, Thai law enforces a general and minimum period according to the Berne Convention that lasts the life of the author and fifty years after his or her death.³¹ Fifty years of protection are granted to cinematographic works since their creation, and twenty five years to photographic works. Thai law provisions related to the works which fall outside copyright protection because of the subject matter or its author may also differ from other countries.³² Therefore, what is protected in the U.S., can

30 17 U.S.C. 302.

31 Copyright Act B.E. 2537 (1994), Section 70.

32 Marketa Trimble, “The Multiplicity of Copyright Laws on the Internet” (2015)

be in public domain in Thailand. The Internet allows viewing the same materials regardless the differences in copyright protection.

The disadvantage of different regulation of the life of the copyright is felt not only in the countries with the longer term of copyright protection, but also in the countries with a shorter term of protection. A person, who does what is legal in his country by posing some materials on the Internet, violates the law of another country whose sanction may include such measures as imprisonment for copyright offences. There is a famous case involving International Music Score Library Project (IMSLP) which was an online library of public domain musical scores based in Canada where the term of copyright protection was fifty years after the death of the author. Universal Edition, an Austrian Music Publisher challenged the right of IMSLP to offer access to some works still under copyright protection in Europe.³³ In order to avoid any legal dispute, the library was removed from the Internet even though it was lawful in Canada, and according to a legal opinion, “if Universal Edition were to file a lawsuit in Austria, it is entirely possible that the Austrian court would dismiss it on the grounds that it cannot assert jurisdiction over the Canadian-based site.”³⁴ As long as the Canadian student who started the project does not go to Austria or is not known there to be a copyright violator, there is little problem to worry about a possible

25 *Fordham Intell. Prop. Media & Ent. L.J.* 339, 356.

33 Michael Geist, “ISPs new role in network control”, <http://news.bbc.co.uk/2/hi/technology/7074786.stm>, 02.11.2007

34 Ibid.

prosecution. However, there is a higher risk for a big company or publisher who may be sufficiently known in the second country or has some financial interest there. This company or the publisher may be forced to comply with the law of the second country, and disregard the public policy to provide a quicker free access to the artistic and literary work in its own country.

Further, the interpretation of international accepted rules on copyright and its protection can and does significantly differ from country to country. In Thailand, copying is generally allowed if it is done for research or education, or even for personal use without pursuing commercial goals.³⁵ Such freedom would not be allowed in the developed countries even though research and education can, to a limited degree, justify unauthorized copying of protected materials. That creates an enormous difficulty to enforce any single policy of copyright protection on the Internet.

Another difficult issue relates to the beginning of Internet copyrights, and its proof in cases of dispute. The establishment of the date of creation is important not only for proving who is the author, but in some cases (cinematographic and photographic works) also for the validity of the copyright itself. According to IP law, those copyrights begin from the moment of creation of the materials that is even before those materials are displayed on the Internet. There can be a problem of identifying the exact date of creation of the materials at

35 Copyright Act B.E. 2537 (1994), Section 32. There, however, limits. For Thai Supreme Court policies see: Supreme Court Decision (No. 5843/2543 [2000] คำพิพากษาลักษณะที่ 5843/2543

issue. When one accesses, for example, any literary work posted on the Internet, there is often no way and even time for a modern user to check the age of the literary piece. Materials posted on the Internet can be copied by millions of their users.

If the owner of the copyright tries to sue those users, he must prove that he is the creator of the material. That presents certain difficulties. For example, two users of the Internet argue who created the material. The only way is to check the date when the users were found in the possession of the material. The author of the disputed copyright may present the computer records showing the date when the author has saved his digital art or graphic to his hard disk. Property icon attached to the file tells the date of its creation indeed. But how reliable is this record? A sophisticated user can change the date. Further, the author could slightly modify the file later after the copyright violation took place. By making such modifications, the computer record concerning the date of creation would help little to provide reliable evidence. It is true that a careful author can assert one's rights on the Internet materials through saving the product to a disk and then mailing it to himself via certified mail. He can keep the envelope sealed in a safe place, which he then can present as an evidence of the date of creation when he asserts his copyright. In some countries, the author can register his copyright with the copyright registration office. However, there are many inconveniences in doing all these things. The authors are often too busy to go to the post office or to contact the copyright registration office each time they

have created something new. It does not solve the problem for those authors who did not follow those precautions.

Above all, the nature of the Internet is based on copying. It is driven by the culture of free unlimited access to the information disregarding the fact whether the material is protected by the copyright or not. This anti-copyright nature of the Internet is seen, for example, in the open source software movement. Open source refers to the development of software which is publicly available in source code form. Source code is written in a recognized programming language which other programmers can use. Open source software is publicly available on the Internet. Its quality is certified by so called the Open Source Initiative (OSI), a non-profit corporation.³⁶ The software is distributed free of licensing restrictions. This encourages users to run, modify, copy and distribute the software freely, so long as certain conditions are met, including that the program's source code remains publicly available and the holder of the source code license does not collect royalties. It is argued that open source helps to develop software better and faster than the one protected by the copyright, and therefore everyone and the community benefit more than from the regime imposed by copyright laws. Thus, the Internet challenges the fact of the existence of copyright law itself.

New changes in copyright law of Thailand hardly address these complicated issues. Indeed, there is no country in this world which can alone copy with the complicated problems of Internet copyright.

36 For more information see: www.opensource.org/

One solution would be to have an international agreement which would apply unified copyright standards to the Internet taking into account its specificity and the philosophy of freedom of exchange. That, however, would involve an increased governmental control of the Internet to which many are opposed.³⁷ Another suggested solution is to apply conflict of laws mechanisms. This, however, is considered as ineffective means to enforce copyrights on the Internet.³⁸

Enforcing Copyright of the Internet

It is a common truth that copyright owners face significant difficulties in protecting their exclusive rights on the Internet. One organization which represents their interests worldwide is International Intellectual Property Alliance. Every year, it publishes its reports on almost every country in the world, including Thailand, complaining about poor enforcement of the rights of intellectual property owners.³⁹ These reports are of great interest, despite being biased, because they try to be as factual as possible. Each year they come to the same conclusion. Thailand has a poor enforcement of its copyright laws in general and on the Internet in particular.⁴⁰

37 Kristen E. Eichensehr, “The Cyber-Law of Nations” (2015) 103 *Geo. L.J.* 317.

38 Marketa Trimble, “The Multiplicity of Copyright Laws on the Internet” (2015) 25 *Fordham Intell. Prop. Media & Ent. L.J.* 339, 356.

39 International Intellectual Property Alliance, “2015 Special 301 Report on Copyright Protection and Enforcement” <http://www.iipa.com/rbc/2015/2015SPEC301THAILAND.pdf>

40 International Intellectual Property Alliance, “2014 Special 301 Report on

After reading all these repetitive complaints against Thailand, it is natural to ask the question: whether the problem is not that those people who do not follow the law are bad, but the law demanding from people impossible is bad. To be more specific, the question is: to what extent should the Internet be subject to copyright protection laws? The fundamental principle of intellectual property law is that a copyright protection covers literary, scientific, and artistic works, whatever the form of expression, provided that such works are fixed in a tangible or material form. This is called the condition of tangibility. Therefore, as long as the materials on the Internet have got this tangible form, the copyright law claims its jurisdiction. Any written material, any play, movie or song transmitted through the Internet, a photograph, and even HTML coding and a computer graphic are theoretically covered by the copyright law, since they are recorded and kept on a disk or a computer hard drive. Since Thailand has not yet become a party to the Internet treaties, it has more space for maneuver by excluding even partly Internet materials from the full application of copyright law provisions.

The copyright protection according to the general principles of intellectual property law means that the owners of the literary and artistic works have exclusive rights to reproduce, prepare derivative works, distribute, perform and display the work publicly. Exclusive

Copyright Protection and Enforcement” <http://www.iipa.com/rbc/2014/2014SPEC301THAILAND.PDF>. International Intellectual Property Alliance, “2012 Special 301 Report on Copyright Protection and Enforcement” <http://www.iipa.com/rbc/2012/2012SPEC301THAILAND.PDF>.

right means that no one else can do it unless authorized by the owner of the right. If applied fully to the Internet, it means that nobody may access a web site and copy its layout, text or graphic until the owner of the layout, text or graphic gives permission to do so. That, however, runs against the whole usage of the Internet, where people access web pages and copy everything they want without asking any permission. According to a non-Internet use of copyrights, such permission is necessary and is often issued in a written form.⁴¹ The Internet poses significant problems for this rule.

Apart from determining whether or not the material is copyrighted, there can be enormous inconvenience to obtain copyright license. For example, I found on the Internet a good piece of poetry written recently with the name of the author and the copyright statement that all rights are reserved. I want to copy this poem and post it on my website. An easy way to get the license would be writing to the owner of the web site where I saw the poem making necessary enquiries. However, not everything posted on the other web site can be asserted by their owners as their intellectual property. The owner of web site may not be necessarily the owner of the copyright. Even though, the owner of the web site might have permission to post copyrighted materials, this permission does not mean intellectual ownership of that material. In other words, it does not entitle the owner of the web site to allow other people freely to copy it. Only the owner of copyright can do that. In relation to some

41 See for example: Copyright Act B.E. 2537 (1994), Section 15. Section 16. Section 27.

songs and films, it is easy to obtain permission because there is a developed system of organs which are authorized to grant copyright licenses. But it is not as easy in relation to many literary, scientific, and artistic works which are not distributed on a big commercial scale.

Thai legislators should be creative in finding a Thai solution to the conflict between the reality of the Internet and the old principle of requesting an authorization from the copyright owner. The American copyright legislators cannot accept the reality: the underlying principle and practice of the Internet is that the user accesses the web pages often solely for copying the Internet materials. At the same time, the owner of the copyright materials, who consents to posting them on the Internet, knows it. If only the legislators were brave and would acknowledge that by the very fact of posting his material on the Internet, the owner has abandoned his exclusive copyright (without abandoning moral rights), then many difficulties and uncertainties of the applicability of the copyright law to the Internet would be solved. It is true, that such decision would not solve all problems. One problem would be that there is often no way to check whether the material is posted with consent of the owner or not. Another problem would be that by making the owners abandon their exclusive rights (but not moral rights) by the mere fact of voluntary publicizing the material on the Internet can discourage them for making the material available on the Internet for a limited use. Thus, the legislators must find a way to protect the legitimate

interests of the copyright owners who did not consent to the circulation of their works on the Internet or would like to reserve certain exclusive rights. One way to achieve it is to create a fund which would grant some limited compensation to copyright owners for letting their materials freely circulate on the Internet. The amount of compensation, the type of materials, as well as the contributions to the fund have to be carefully thought through.

The law has also to address the issue of the increased burden of policing and enforcing copyrights as well the social costs of litigation based on the claims of copyright violation on the Internet.⁴² This high cost of policing and enforcement of copyright is the reality in the Western countries, and Thailand will do better by channeling its resources to combat more socially dangerous types of offences. The current Thai law may potentially criminalize the majority of the Internet users. For example, one provision criminalizes reproduction of a copyrighted work without the owner's consent:⁴³ The Internet provides plenty of materials including texts, music, video, software, web graphics, photographs and etc. Downloading them is considered by the Internet treaties as an act of reproduction. The law should protect people, who while downloading them, believe that the materials belong to public domain and they can do whatever they

42 For the general overview of the complexity of maintaining copyright enforcement mechanism see: UK Government, *IP Crime Annual Report 2012-2013*. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/307829/ipcreport12.pdf

43 Copyright Act B.E. 2537 (1994), Section 69. Section 29.

want with the copied files. Most of the Internet users would not read any copyright conditions when downloading those files.

Practically, it is hardly possible to sue the person who simply downloaded a song, even though such downloading constitutes a willful violation of someone's copyright. It is much easier to do with an infringer who makes the song available for the other Internet users either by copying it on his own web site or by means of different file sharing networks. The problem, however, will appear in cases of an infringer who believes that the song is in public domain. He could upload it without any knowledge that the song is protected by copyright. If the owner of the copyright has a single remedy to demand from such person the removal of the song from being available to the other users, there would be little effectiveness for protecting copyrights.

There must be something more effective to deter willful offenders who can always claim that they were ignorant of existing copyrights. Giving the copyright owner compensation in every case of infringement would be unjust if non-willful infringement is treated as willful. Making a clear distinction between them creates an enormous difficulty in proving presence of the intent particularly when taking into account the nature of the Internet communications. Thai law has to develop the working model which would exclude an uneven and arbitrary application of penalties. Following the Western practice of selective punishment of individual copyright infringers on the Internet, while letting others to keep on copying, will do little justice.

Fair Use

The doctrine of "fair use" exempts certain unauthorized uses of copyrighted material from infringement liability. The doctrine is accepted internationally. Thai law contains this concept in Section 32 of Copyright Act.⁴⁴ It reflects the fundamental principle of copyright

44 Copyright Act B.E. 2537 (1994), Section 32: An act against a copyright work under this Act of another person which does not conflict with normal exploitation of the copyright work by the owner of copyright and does not unreasonably prejudice the legitimate rights of the owner of copyright shall not be deemed an infringement of copyright.

Subject to the provision in the first paragraph, the following acts in relation to a copyright work shall not be deemed an infringement of copyright:

- (1) research or study of the work which is not for profit;
- (2) use for personal benefit or for the benefit of the user and his family members or close relatives;
- (3) comment, criticism or introduction of the work with an acknowledgment of the ownership of copyright in such work;
- (4) reporting of news through mass media with an acknowledgment of the ownership of copyright in such work;
- (5) reproduction, adaptation, exhibition or display for the benefit of judicial proceedings or administrative proceedings by authorized officials or for reporting the result of such proceedings;
- (6) reproduction, adaptation, exhibition or display by a teacher for the benefit of his teaching provided that the act is not for profit;
- (7) reproduction, adaptation in part of a work or abridgment or making a summary by a teacher or an educational institution so as to distribute or sell to students in a class or in an educational institution provided that the act is not for profit;
- (8) use of the work as part of questions and answers in an examination.

law which aims at striking a balance between the interests of the copyright owner on the one hand and the interests of the society to have an easy access to information on the other. In relation to the Internet, it means that copying is normally allowed if it is done for educational purposes, when quoting from copyrighted sources in reporting, reviews, and scholarly research, and some other uses depending on the law of each country and its interpretation. Whether the use is fair or not, depends much on the ability of the user to obtain a license from the copyright owner, and also on the scope of the use.

The commercial use of the protected work is normally outside the scope of fair use. However, if the commercial use is "transformative" then there is no copyright violation. Transformative use imparts some new expressive meaning by using the copyrighted material. Copyright law does not bar other authors to make a creative use of existing works. The fair use doctrine "permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster."⁴⁵

In determining whether unauthorized copying is a fair use, it is important to look at the impact of the use on the interests of the copyright owner. If there is a significant impact on the existing market for the copyrighted material, there is no fair use. If the original work is not readily available, copying may be allowed. Copying may also

45 Christopher Wolf, **The Digital Millennium Copyright Act: Text, History, and Caselaw** (Pike & Fischer - A BNA Company, 2003) p. 1094.

be allowed if it is done sparingly. In any case, the existing accepted practices of the users will be taken into account when deciding whether there is a fair use or not.

The concept of fair use varies from country to country. American law provides much narrower concept of fair use than Thai law. Section 107 of the US Copyright Act offers a nonexclusive list of fair uses: for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research.⁴⁶ American courts also allowed copying with the purpose of parody. These purposes do not generally involve infringement of copyright. However, in many cases, the uses for such purposes were considered by American courts as copyright infringing. In *Los Angeles Times v. Free Republic*,⁴⁷ the court rejected a fair use defense. The defendant was a website operator who allowed subscribers to post stories from various newspapers and then encouraged discussion of the supposed biases of the articles' authors. The court agreed with the defendant that the news reports had factual nature and, in principle, were outside copyright protection. However, the court found that the use was commercial and that it would impair the plaintiff's ability to license its works. In deciding so, the court applied the requirement of section 107 of the US Copyright Act to consider "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes."

46 17 U.S.C. 107.

47 *Los Angeles Times v. Free Republic*, 2000 U.S. Dist. LEXIS 5669, 54 U.S.P.Q.2d (BNA) 1453 (C.D. Cal. 2000).

Although the commercial nature of a use is not determinative, American courts, as it happened in *Los Angeles Times v. Free Republic* case, deny fairness of the use when it is commercial and profit-seeking in nature.

Moreover, according to American law, a use need not involve direct financial gain or payment to be held "commercial." For example, in famous Napster case,⁴⁸ the court held that individual users of the file sharing system engaged in a commercial use. There was no payment to the individual users. But "repeated and exploitative unauthorized copies of copyrighted works were made to save the expense of purchasing authorized copies." The most important factor for the US courts is whether the act of copying would damage financial interests of the copyright owner. These financial interests are understood very broadly. In the Napster case, the American Court considered file sharing as a copyright infringement also because it reduced CD sales among the Internet users and made it difficult for the plaintiff to enter the market for the digital downloading of music.

American courts place great emphasis on whether copying is "transformative." The use is transformative when it adds something new altering the original copy with new expression, meaning, or message. Such copying is considered fair since it is consistent with the constitutional purpose of the copyright law: the encouragement of creativity. A simple technical (digital) transforming in an online

⁴⁸ *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (2001)

medium was not sufficient for American courts to constitute fair use. Further, unauthorized use of all, or a significant portion, of a work will not be considered by the US courts as fair use.

The doctrine of fair use will be naturally used in much broader meaning in Thailand as in other developing countries with the different cultural heritage and the concepts of copyright. Everything what is copied for personal non-commercial use on the Internet should be permitted unless the copyright owner offers to an infringer an easy and affordable access to the work. Some commercial uses should also be allowed particularly when no financial damage is caused to copyright holders. The concept of transformative use should be incorporated in Thai law to encourage individuality and creativity.

Conclusion

Thus, Thai lawmakers have to address the issue of fundamental difficulty to enforce copyrights in the world of the Internet. Big companies may still afford suing many of those who violate their rights by copying music on the Internet. But most of the copyright owners would have little possibility even to monitor what happens on the Internet, not talking about successful litigation. If law can be easily broken, the whole integrity of law suffers. The Internet users must have a clear conscience that what they do is legal. If they act with the doubt that their act might be illegal, the damage to their

overall culture of law abiding would be difficult to estimate. The copyright law must be realistic and demand only what it can effectively enforce.

The solution to the problem of copyright enforcement would be to acknowledge a limited scope of applicability of copyright law on the Internet. People should be allowed to copy freely if they do it for their personal use only. If there is a commercial aim in copying, then the copyrights must be strictly enforced. This solution cannot solve all problems for those who upload materials on their web sites. Whether copyright protection is applied fully or within some limits, the difficulty of identification which materials are subject to copyright and which are not, remains. Large proportion of the Internet materials has become a public domain. Therefore, there can be ambiguity whether posting the material requires a licence from the copyright owner, and often the difficulty to identify the owner himself. Therefore, for the web sites which do not pursue commercial goals, it is possible to apply a more relaxed standard of identifications which materials are likely to have copyright claims. The commercial entities have more financial, organizational, and skills potential to inquire whether the material in issue is protected by copyright law or not.

Since the Internet has become the major largely uncontrolled channel of access to literary, scientific and artistic works for many people around the world, it is doubtful whether the copyright law in its present form can last any longer in its old form. The Internet poses a significant challenge to the fact of the existence of copyright

itself. It is clear that the institution of copyright can survive in the environment of the Internet only if certain important changes, like those suggested above, are made. The concept of fair use must take the central place in reforming the old copyright law in the new digital environment. Thai law makers should keep the broad idea of fair use to meet educational goals of their national policies.