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Principles of Copyright Law and Some Legal Aspects of Copyright via the Internet: Comparative Studies of the U.S. and Thai Laws ลักษณะทั่วไปของกฎหมายลิขสิทธิ์ และปัญหาทางกฎหมายบางประการของลิขสิทธิ์บนอินเทอร์เน็ต: เปรียบเทียบกฎหมายประเทศสหรัฐอเมริกา และประเทศไทย

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บทคัดย่อ

ด้วยความก้าวหน้าทางเทคโนโลยี กฎหมายลิขสิทธิ์ที่บัญญัติไว้ในปัจจุบันไม่อาจนำมาปรับใช้กับการคุ้มครองลิขสิทธิ์บนอินเทอร์เน็ตได้อย่างมีประสิทธิภาพ โดยปกติแล้ว เมื่อเจ้าของลิขสิทธิ์จำหน่ายสินค้าภายใต้สิทธิของตนเอง หรือด้วยความยินยอมของตน สิทธิทางกฎหมายเหนือสินค้านั้นย่อมเป็นอันระงับสิ้นไป เจ้าของลิขสิทธิ์จะบังคับสิทธิของตนกับผู้ใช้ประโยชน์จากสินค้านั้นมิได้ แต่การคุ้มครองลิขสิทธิ์บนอินเทอร์เน็ตไม่สามารถนำหลักการระงับสิ้นไปของสิทธิ (The Doctrine of Exhaustion of Rights) ดังกล่าวมาใช้ได้ ในทางกลับกัน หากผู้ซื้อสินค้าทำการจำหน่ายจ่ายโอนสินค้าอันมีลิขสิทธิ์ต่อไปบนอินเทอร์เน็ต ผู้ซื้อสินค้านั้นอาจถือได้ว่าการละเมิดลิขสิทธิ์ ต่อเจ้าของลิขสิทธิ์ได้ ในบทความนี้ จึงนำเสนอลักษณะทั่วไปของกฎหมายลิขสิทธิ์เป็นพื้นฐาน และจะกล่าวถึงปัญหาของกฎหมายลิขสิทธิ์บางประการที่เกิดขึ้นบนอินเทอร์เน็ต โดยศึกษาเปรียบเทียบจากกฎหมายลิขสิทธิ์ของประเทศสหรัฐอเมริกา ควบคู่ไปกับประเทศไทย ซึ่งจะเห็นได้อย่างชัดเจนว่า หลักการ

พื้นฐานโดยทั่วไปของกฎหมายลิขสิทธิ์ของทั้งสองประเทศนี้คล้ายกัน แต่อาจจะต่างกันในลักษณะของการบังคับใช้กฎหมายเท่านั้น

คำสำคัญ: ลักษณะทั่วไปของลิขสิทธิ์ หลักการจำหน่ายครั้งแรก หลักการระงับสิ้นไปของสิทธิการละเมิดลิขสิทธิ์บนอินเทอร์เน็ต ความรับผิดชอบของผู้ให้บริการอินเทอร์เน็ต

Abstract

Due to the growth of technology, the current Copyright Act cannot be applied to the protection of copyright on the Internet efficiently. In general, when the copyright owner disposes the goods under his right or with his consent, his right over the goods is exhausted and the copyright owner has no right to control the transferee's subsequent resale or other transfer of title. This is called the Doctrine of Exhaustion of Rights, which cannot be applied to the protection of copyright via the Internet. On the other hand, if the transferee resells the copyrighted goods to others through the Internet, the said person might be deemed as an infringer of copyright. This article, which focuses on the U.S. and Thai law, includes the principles of copyright law and some legal aspects of copyright via the Internet. This article concludes that the principles of copyright laws of these countries are relatively similar; however, they might differ in the enforcement of law.

Keywords: Nature of Copyright Law, Doctrine of First Sale, the Doctrine of Exhaustion of Rights, Copyright Infringement via the Internet, Liability of the Internet Service Provider

Introduction

The Internet, although bringing about remarkable changes globally, has created significant problems for governments and private persons seeking to protect intellectual property rights. Intellectual property rights are those rights that give legal protection to the output of creative energy. A copyright, one of the intellectual property rights, is the protection given to a person for the expression of an idea,

such as a book, poem, musical composition, dance movements, and other such creations.

The difficulty in the dissemination of information concerns the conflict between legal protection given to owners of copyright material and the desire of the public to have unimpeded access to data. In essence, those seeking protection argue that, unless potential copyright holders are protected in their endeavor to gain financial rewards and other

copyright protection, the incentive for creativity may diminish greatly. On the other hand, the pressure for unlimited access to data of whatever kind, from unlimited sources, has brought about conflict between the two opposing interests to a degree almost unimaginable a few years ago (Girasa, 2002: 155).

The current intellectual rights regime has been inadequate to address the issues raised by the new technologies due to the constant stream of innovative changes in the marketplace. Criminal and other tortious conduct occurs often in countries with few legal restrictions, or that have lax enforcement. Such laxity has plagued owners of protected works. Until recently, Thailand was accused of intellectual property rights piracy and was on a priority watch list for possible imposition of sanctions. Although Thailand made some progress in strengthening its Intellectual Property Right regime during 2006, piracy is still widespread in the areas of photocopying of books, cable signals, entertainment and business software, and music on the Internet. Therefore, the United States will continue to work with Thailand to address these significant concerns regarding its intellectual property laws and enforcement (Office of the United States Trade Representative, 2007).

In this article, I will explore one aspect

of intellectual property protection, namely copyright on the Internet. Because Thailand is on the United States Priority Watch List, I will review the nature of copyright law, and the evolving legal structure to protect such right by comparing the U.S. copyright law with Thai copyright law. I will also review the international efforts to afford worldwide and simplified copyright protection. Moreover, I will focus intensely on the copyright infringement and protection measurement via the Internet.

Nature of Copyright Law: Comparative Studies of the U.S. and Thai Laws

As is the case with other intellectual property doctrines, copyright law attempts to reach an optimal balance between the potentially conflicting public interests of: (1) encouraging creativity by giving exclusive property rights in creations; and (2) fostering a competitive marketplace by giving the public access to works of authorship and the ideas they encompass (Barrett, 1998: 179). It is therefore important that the copyright law should stipulate and create a balance in the interests of the author and the public. However, it is fairly difficult to make them efficient, since the idea under each national law varies. Nonetheless, considering the United States and Thai copyright law, it is clear that the principle ideas of the national law are relatively similar.

1. Subject Matter of Copyright

Under Section 102(a) of the United States Copyright Law (“U.S.C.”), copyright protection is given to “*original works of authorship fixed in any tangible mediums of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated either directly or with the aid of a machine or devise*” (United States, Copyright Office, 2008).

The nature of its originality requires the work to be a creative document, not copied from another source. It must be the independent work of the author, which is created by the author’s intellectual endeavor and must exhibit a minimal amount of creativity. (Westlaw, 2008a) Moreover, the creative thought or concept is not sufficient. It must also be fixed in a tangible medium of expression in order to be copyrighted, such as in a copy that may be seen, reproduced, or communicated in a somewhat permanent form. (U.S.C. Section 101) Therefore, works that have not been fixed in a tangible form of expression, for example, choreographic works that have not been notated or recorded, or improvisational speeches or performances that have not been written or recorded are deemed not to be protected by copyright (United States, Copyright Office, 2000).

Works of authorship include, but are not limited to: (1) literary works, (2) musical works, (3) dramatic works, (4) pantomimes/ choreographic works, (5) pictorial, graphic, and sculptural works, (6) motion pictures and audiovisual works, (7) sound recordings, and (8) architectural works (U.S.C. Section 102(a)). Furthermore, an original work of authorship does not extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, unless fixed in a tangible form (U.S.C. Section 102(b)). It can be simply concluded that copyright law protects the expression of an idea and not the idea itself.

Under Section 4 of the Thai Copyright Act B.E. 2537 (“T.C.A.”), the work to be protected must be original, that is, not a duplication from a prior work. It is not necessary that the work should be novel, but it must be created or made by the author’s effort and is not copied or reproduced or adapted from other copyrighted works (คำพิพากษาศาลฎีกาที่ 2750/2537, 2551). Since the copyright protection does not extend to ideas or procedures, processes or systems or methods of use or operation or concept, principles, discoveries or scientific or mathematical theories (T.C.A. Section 6 paragraph 2), it is apparent that the copyright law protects the work only in the form in

which it is expressed. However, Thai copyright law does not stipulate the condition of the mode or form of the expression. (T.C.A. Section 6 paragraph 2) Therefore, the fixation is not a requirement of the acquisition of copyright under Thai copyright law. The protected copyright work must only be in the form of literary, dramatic, artistic, musical, audiovisual, cinematographic, sound recording, sound and video broadcasting work or any other work in the literary, scientific or artistic domain (T.C.A. Section 6 paragraph 2).

From the above, it can be summarized that the subject matter of copyright in both countries is relatively similar. The principle of copyright law under the U.S. and Thai laws comprises the originality, creativity, and the expression of an idea. However, the U.S. has more specific conditions on the form of expression, the fixation, whereas in Thailand it is not required.

2. Exclusive Rights of Copyright

Under the U.S. Copyright Act of 1976, the copyright owner has the exclusive rights to do and to authorize others to do the following:

- To reproduce the work in copies or phonorecords;
- To prepare derivative works based upon the work (or the right to adapt the

copyrighted work);

- To distribute copies or phonorecords of the work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

- To perform the work publicly, in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works;

- To display the copyrighted work publicly, in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual works; and

- To perform the work publicly by means of a digital audio transmission, in the case of sound recordings (U.S.C. Section 106).

In addition, in the case of works of visual art, the author has the moral rights of attribution and integrity as described in section 106A of the 1976 Copyright Act.

Under Thai Copyright Act B.E. 2537 (1994), the copyright owner has the exclusive rights as follows:

- Reproduction or adaptation,
- Communication to public,
- Letting of the original or the copies of a computer program, an audiovisual work, a cinematographic work and sound recordings,

- Giving benefits accruing from the copyright to other persons, and
- Licensing the rights mentioned in (1), (2) or (3) with or without conditions provided that the said conditions shall not unfairly restrict the competition (T.C.A. Section 15 paragraph 1).

Additionally, the author of a copyright work still has the moral rights to be identified as the author of the work (the paternity right) is able to prohibit an assignee of copyright or any other person from distorting, shortening, adapting or doing anything against the work to such extent as to cause injury to the reputation or dignity of the author (the integrity right) (ไชยยศ เหมะรัชตะ, 2548: 85). If the author dies, his heirs have the right in litigation to enforce such rights throughout the term of the copyright protection unless otherwise agreed upon in writing (T.C.A. Section 18).

Even though the right of licensing is not provided in the exclusive right under Section 106 of the U.S. Copyright Act, it is provided in Section 101 and 201 that the ownership of the copyright may be transferred... and “a transfer of copyright ownership” includes an assignment, mortgage, exclusive license... Therefore, it is evident that the exclusive statutory rights of a copyright owner in the U.S. and Thailand are stipulated up to the

same standard, both economic and moral rights.

3. Duration of Copyright Protection

In October 1998, the U.S. Congress enacted the Sonny Bono Copyright Term Extension Act (CTEA). It extends the term of most copyrights by twenty years. Thus, copyrights for works created prior to January 1, 1978, generally endure for a term of 28 years with the option to renew for a further term of 67 years. Prior to the CTEA, the renewal term was for 47 years (U.S.C. Section 304).

Copyrights for works created on or after January 1, 1978, generally endure for a term consisting of the life of the author plus an additional 70 years after the author’s death. Prior to the CTEA, the term after death was for 50 years (U.S.C. Section 302). In the case of “a joint work prepared by two or more authors who did not work for hire,” the term lasts for 70 years after the last surviving author’s death (U.S.C. Section 302(b)). For works made for hire, and for anonymous and pseudonymous works (unless the author’s identity is revealed in Copyright Office records), the duration of copyright will be 95 years from publication or 120 years from creation, whichever is shorter (U.S.C. Section 302(c)).

Generally, the copyright of a work under the Thai Copyright Act subsists for the life of the author and continues to subsist for fifty years after the death of the author. Nevertheless, in the case of a work of joint authorship, copyright subsists for the joint-authors and continues to subsist for fifty years after the death of the last surviving joint-author. Additionally, if the author, or every joint author dies before the publication of the work, the copyright shall subsist for fifty years from the first publication of the work (T.C.A. Section 19). In case of the author using a pseudonymous or anonymous name and being unknown in terms of identity, the copyright for such work shall subsist for fifty years from the date of its creation, but if the work is published during the said period, the copyright shall subsist for fifty years as from the first publication (T.C.A. Section 20).

In essence, a work that is created in the U.S. and Thailand is automatically protected from the moment of its creation. Copyright registration is however not a condition of copyright protection. It is merely a legal formality intended to make a public record of the basic facts of a particular copyright. Compared to the U.S., it seems that Thailand has less advantage from the protection of copyright due to the 20 fewer years copyright protection. However, for a country that does

not have many the copyright owners, such as Thailand, it would be better if Thailand retains the duration of protection as it is now.

4. Infringement of Copyright

Under the U.S. Copyright Act of 1976, anyone who violates one of the copyright owner's exclusive statutory rights is liable for direct infringement of the copyright (U.S.C. Section 501). However, the Copyright Act is a strict liability statute, meaning that knowledge or intent of infringement need not be proved by the Plaintiff (Ferrera, Gerald R, 2004: p. 94).

In addition, there are another two theories of copyright infringement liability: Contributory infringement and vicarious infringement. Though the U.S. Copyright Act does not expressly provide for vicarious or contributory liability for copyright infringement, the courts have long recognized claims of vicarious and contributory liability as a mean of holding persons liable for the infringing acts by others (Barrett, 1998: 245).

Contributory infringement developed by court decisions is based on the fact that a person with knowledge or reason to know of the infringing activity causes or materially contributes to the conduct of the direct infringer (Westlaw, 2007). For there to be a

contributory infringement claim, there must first be a direct infringement by another person.

Vicarious infringement occurs when a company receives direct financial benefit from the infringement by another party and had the right and ability to supervise the infringement activity. Courts have held that vicarious liability requires neither knowledge nor participation in the direct infringement. (Westlaw, 2006)

Under Thai Copyright Act B.E. 2537 (1994), the infringement of copyright is strictly provided: the direct infringement and indirect infringement. In short, the direct infringement means the act when any person violates any of the exclusive rights of the copyright owner and commits to the copyrighted work without permission of the copyright owner (T.C.A. Section 27-30), whereas the indirect infringement means the act when any person knows or should have reason to know that a work was made by an infringement of the copyright of another person and intends to sell, display publicly, distribute or import such work for profits (T.C.A. Section 31).

5. Exception from Infringement of Copyright

It is illegal for anyone to violate any of the rights provided by the copyright law to the

owner of copyright. These rights, however, are not unlimited in scope. Both the U.S. and Thailand establish limitations on these rights. One major limitation is the doctrine of “fair use”.

The doctrine of fair use under the U.S. Copyright Act was created on the basis of flexibility. It is of necessity left somewhat vague, to be applied on a case-by-case basis in light of the specific facts of each case. It gave some illustrative examples of uses of copyrighted material that might be deemed “fair,” and listed nonexclusive factors that courts should consider in determining whether a particular use of a copyrighted work constitutes an excusable fair use. For example, the person who reproduces the copyright material for use in teaching is deemed to not be an infringer of the copyright. However, the court will not make such a decision immediately without thoroughly considering these factors:

- The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- The nature of the copyrighted work;
- The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- The effect of the use upon the potential market or value of the copyrighted work

(U.S.C. Section 107).

Unlike the U.S., Thailand has a more specific definition of the doctrine of fair use. Under Section 32 of the Copyright Act, it clearly provides a list of the non-infringement acts, including research or study of the work which is not for profit; use for personal benefit or for the benefit of himself and other family members or close relatives; comment, criticism or introduction of the work with an acknowledgement of the ownership of copyright in such work; reporting of the news through mass-media with an acknowledgement of the ownership of copyright in such work; 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; reproduction, adaptation, exhibition or display by a teacher for the benefit of his teaching provided that the act is not for profit; reproduction, adaptation in part of a work or abridgement 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; use of the work as part of questions and answers in an examination. Moreover, such mentioned acts done in relation to the copyrighted work must not conflict with the normal exploitation

in the copyrighted work of copyright ownership and not unreasonably affect the legitimate right of the copyright owner (T.C.A. Section 32).

6. International Copyright Treaties

There is no such thing as an “international copyright” that will automatically protect an author’s writings throughout the entire world. Protection against unauthorized use in a particular country depends, basically, on the national laws of that country. However, most countries do offer protection to foreign works under certain conditions, and these conditions have been greatly simplified by international copyright treaties and conventions. According to the international copyright relations between the U.S. and Thailand, they both are member of the Berne Convention for the Protection of Literary and Artistic Works or “the Berne Convention” and Trade Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods, or “TRIPs Agreement,” created through the World Trade Organization or “WTO” (United States, Copyright Office, 2003).

Being a contracting state of the Berne Convention and TRIPs Agreement, Thailand is obliged to comply with them. Under the Copyright Act, Thailand specifically stipulated the acquisition of a copyright of any work

which a foreign author created in another country. (T.C.A. Section 8) Any copyrighted work of the author of a contracting state to the convention relating to the protection of copyright to which Thailand is also a contracting state shall be protected by this Act. Therefore, any copyrighted work of an author of any contracting state to the Berne Convention for the Protection of Literary and Artistic Works, such as the U.S. shall be protected under the Copyright Act B.E. 2537 (T.C.A. Section 61).

Some Legal Aspects of Copyright via the Internet: The Doctrine of First Sale or The Doctrine of Exhaustion of Rights

At present, the Internet is deemed as a major tool that is necessary and involved in everyone's life. It includes everything from which people can derive benefit from, namely a method for communication, shopping, education, entertainment, for example. An e-business has two major concerns regarding copyright law: first, to protect its Web site from potential infringers who may copy parts or all of its contents without permission, and second, to be sure its Web pages are not infringing on another owner's copyrighted material. Furthermore, a web site may link to another site that displays copyrighted material without the owner's consent, or the improper

use of e-mail may implicate copyright liability. For example, an e-mail user may send, without the ownership's permission, an attached copy of a copyrighted document that is reproduced in perfect form to a vast global audience. This inappropriate use of electronic communication poses special and unique problems for copyright protection on the Internet. The questions are therefore raised whether the e-business can be sued under a theory of copyright infringement and is there a legal strategy that may limit this potential liability exposure (Ferrera, *et al.*, 2004: 84).

In particular, e-commerce is a popular approach via the Internet. It offers the users the ability to do their business on-line, such as using the Internet to purchase or make payments for their credits, for example. However, when this method involves profit or business, it is inevitable that legal problems regarding the matter will occur. Unlike the U.S., e-commerce in Thailand is not widely used. The statistics of Thais engaged in shopping on the Internet is less than 1%. Most people reason that they do not trust the merchandisers and cannot see or feel the products (ศุภนีย์ เทคโนโลยีอิเล็กทรอนิกส์และคอมพิวเตอร์แห่งชาติ, 2549: 90). By focusing on the U.S. principle of copyright law, it will be shown how Thai copyright law provides protection for online copyright work.

The Doctrine of First Sale

As mentioned above, the U.S. copyright legally protects a vast array of “original works of authorship fixed in a tangible medium of expression”. In the case of the Internet, they include computer software and architecture (code), movies and other audiovisual works on a Web site, musical compositions, including the lyrics of the song, e-books, web site content, and web site audio transmissions, for example. The Copyright law also provides the owner of an original work of authorship with exclusive statutory rights. One right that is especially related to e-commerce is the exclusive right to distribute copies or phonorecords of the work to the public (U.S.C. Section 106(3)). In other words, the copyright owner has the right to sell or otherwise transfer ownership of his copyrighted work through a Web site on the Internet. Therefore, a person who does not own the copyright electronic clip art files, but makes them available on his Web page for downloading by Internet users, could be liable for infringing distribution rights (Westlaw, 2008b). Since this has become a common practice, Web designers as well as managers should be careful in obtaining permission from the owner of the copyright before using it on their Web sites.

However, the copyright owner’s control over the distribution is limited. Section 109(a)

of the Copyright Act sets forth “The doctrine of first sale”, which provides that once the copyright owner transfers, or authorizes another to transfer, title to a copy or phonorecord of the copyrighted work to a third party, the third party is entitled to sell or otherwise dispose of it without obtaining the copyright owner’s consent. The reasoning underlying the doctrine of first sale is that once the copyright owner has had the opportunity to profit from the initial sale of the copy, the policy goal of protecting the copyright owner gives way to the policies not favoring limitations on the alienation of property. Thus, the copyright owner has the right to control the initial sale or distribution of the copy or phonorecord to the public or one of its members, but once title to that physical embodiment of the work changes hands, copyright law gives the copyright owner no right to control the transferee’s subsequent resale or other transfer of title. Nor may he prohibit the new owner from renting or lending (U.S.C. Section 109(b)) the copy or phonorecord to others (Barrett, 1998: 227). As a result, one who owns a lawful copy of a copyrighted work may resell that copy or may rent it, lend it, or give it away. Used bookstores, used compact disc (CD) stores, public libraries, and video rental stores all flourish in the shelter of the first sale doctrine (Reese, 2003: 577).

However, the doctrine of first sale does not permit the copy owner to make or distribute additional copies. For this reason, the doctrine of first sale may rarely apply to transfers of copyrighted works over the Internet. For example, if someone acquired a copy of a copyrighted work by receiving an e-mail or downloading from a Web page, then retransmitted that work to another person, such action may constitute an infringement. This is because when one transmits a work to another over the Internet, the recipient always receives a new digital copy, and the sender retains the original. Consider the case of a textbook purchase in electronic form (e-book), transferred and delivered to a student through the Internet. If the student resold the textbook electronically, it would involve the infringing acts of reproduction and public display of the textbook, since he still retained a copy. Though the first student subsequently destroys his retained original, the first sale doctrine does not apply thereto. Owing to this technicality, it could be concluded that the doctrine of first sale does not permit the distribution and reproduction of a copy through the Internet. (Ferrera, *et al.*, 2004: 99)

Nonetheless, the distribution of copyrighted goods is regularly found on the Internet through many Web sites, for instance,

www.amazon.com, www.ebay.com, www.barnesandnoble.com, as examples. These Web sites offer many categories of copyrighted goods such as books, DVDs, music CDs, video games, and so forth, both new and used products. Why can these Web sites sell the copyrighted works? Does what they do constitute an infringement in connection with the distribution of goods via the Internet? In the case of the new goods, it is of course not an infringement if the Web manager acquires permission from the copyright owner to sell, and gives him the profit in return. But if the goods are used copyrighted works, the copy owner can still offer to sell these on Web sites and transmit the goods to the customer without violation of the copyright owners' rights. This is because the copy owner shows only the title of the goods together with a short description on the Web page, and makes a deal with the customer that the goods will be shipped by airmail within the prescribed date, not in electronic form. The copy owner does not transmit by an e-mail so that it does not constitute a reproduction or public display of the copyrighted work through the Internet. This is the reason why these Web sites can gain many millions of dollars a year without problems of copyright infringement.

The Doctrine of Exhaustion of Rights

However, in Thailand, the copyright owner has the right to distribute his work under Section 15(2) of the Copyright Act B.E. 2537. The exclusive right of “communication to public” defined under Section 4 of the said Act includes making the work available to the public by means of performing, lecturing, preaching, playing music, causing the perception by sound or image, constructing, distributing or by any other means. Hence, it is obvious that the copyright owner can offer to sell his work to the public by any method, including via the Internet. If any person distributes the copyrighted work without consent from the copyright owner, his act shall be deemed a copyright infringement. However, the term distribution in Thai copyright law excludes rental. The exclusive right of rental is provided under Section 15(3) (วัลลภ ตังสุมิตร, 2543: 19). It merely gives the exclusive right to the copyright owner of computer programs, an audiovisual work, a cinematographic work and sound recordings. Therefore, the purchaser of other copyrighted works such as literary work has the right to offer the novel, which is bought lawfully, for rent without the consent of the copyright owner.

In general, any rules must have exceptions; the right of distribution in the U.S. is limited by the exception of the first sale doctrine.

This doctrine is not unique to the U.S., though the specific contours of the copyright owner’s rights vary from country to country. In civil law jurisprudence, the doctrine is generally known as “Exhaustion” which means the copyright owner’s initial authorized transfer of a copy of the work exhausts the owner’s right to control the distribution of that copy (Reese, 2003: 577). Even though Thai copyright law does not specify this doctrine in writing, Thailand applies this doctrine on the principle of the ownership of property. Once the purchaser bought the copyrighted book, he is deemed as the owner of the book and has the ownership to use his book unreservedly, like the owner of general property (จักรกฤษณ์ ควรพจน์, 2544: 318).

Similar to Amazon.com, Thailand has a major Web site for used goods, www.thaisecondhand.com. Any kind of goods that you would like to buy are offered on the Web page. If you have had an old music CD for a long time and would like to sell it through that Web site, you can log in and post a free advertisement, then wait for the money. The reason why the said act does not constitute an infringement to the copyright owner is because his right was eliminated due to the doctrine of exhaustion of rights. Moreover, you bought that CD lawfully so you have ownership of that item. As soon as you use

your right, which does not conflict with normal exploitation of the copyright work by the owner of the copyright and does not unreasonably prejudice the legitimate right of the owner of copyright, you shall not be deemed an infringer of copyright (T.C.A. Section 32). On the other hand, if you think that posting the advertisement on the said Web site is insufficient, so you send an e-mail directly to your friends showing samples of some songs on offer for sale on the said CD, you may however be deemed an infringer. This is because the doctrine of exhaustion of rights limits only the right of distribution. It does not restrict the right of reproduction, adaptation, communication to public, and letting of the original or copies of the work. (T.C.A. Section 27-28) Therefore, when you sent the said e-mail, you still retained a copy of the said CD. It means that you reproduced the said work through the Internet, and such an act is deemed an infringement of copyright.

Liability of The Internet Service Provider

The infringer in the Internet case may not only be the copyright owner, somehow the Internet service provider (“ISP”) might also be involved. This is because reproductions of documents, sound recordings, art work, or other copyrightable works are made whenever the works are uploaded or downloaded,

the ISP may make numerous additional reproductions of the works as they are transmitted from computer to computer over the Internet. Furthermore, in the absence of express or implied consent from the copyright owner, each of these reproductions may infringe the copyright. In addition, many unauthorized transmissions of works are likely to be deemed infringing distribution rights to the public or public displays, particularly since the doctrine of first sale is unlikely to be deemed applicable to protect the transmissions (Barrett, 1998: 247).

In 1998, Congress codified online copyright infringement liability limitation Act as Section 512 of the Digital Millennium Copyright Act. The purpose behind the safe harbor is to provide those entities that qualify as network systems providers with the federal immunization from claims brought against them by copyright owners (Ferrera, et al., 2004: 102).

ISP such as access providers, search engines, and bulletin board services (Digital Millennium Copyright Act Section 512(k)(1) (A-B), routinely reproduce works, as well as transmit them, in the course of their day-to-day operations. Thus, if users infringe copyrighted works on the Internet, the ISPs who provide the users with the means to transmit, distribute, post, or locate the infringing works may

themselves be deemed liable either as direct infringement or as vicarious or contributory infringers. (ISP may be found liable for indirect infringement by permitting another to use one's facilities for illicit purposes. In *Randall Stoner v. eBay Inc.*, eBay was sued under California state law for permitting the sale of copyrighted and bootleg musical recordings by persons using its auction facilities. The California state court held that the Communications Decency Act gives eBay immunity in that it is an interactive service provider, it is not a content provider as to the unlawful activity, and the information originated from outside, third-party sources.) So long as the ISPs are in compliance with the DMCA by using proper notification of its policy regarding the alleged copyright infringement and establishing a company agent to be notified in the event of such infringement, they are exempt from such liability and only the direct infringers will be held liable for copyright damages.

In Thailand, piracy on the Internet is growing steadily. Several infringing works were found for downloading and sending on many Web sites. The Business Software Alliance (BSA) noted a huge increase in the number of software infringements in Thailand, from 358 per month in 2006, to 949 per month in 2007. In addition, recent statistics suggest

that mobile Internet penetration in Thailand is extremely high, at well over 50% (International Intellectual Property Alliance, 2008).

Nowadays, there is no legislation in Thailand on ISP liability similar to the United States. However, there is an Act on Organizations Allocating Frequency Waves and Supervising Radio/Television Broadcasting and Telecommunication Business B.E. 2543 (2000) enacted for controlling the granting of licenses. Pursuant to the Notification regarding the Licensing for the ISP, ISPs must comply with the condition provided in the said Notification, requiring the ISPs to control, verify, or warn their customers not to use their services in ways that contradict any laws. Otherwise, they will be fined or have the ISP license withdrawn.

Moreover, the majority of ISPs in Thailand generally cooperate in blocking illegal websites. It does not appear that ISPs are at present obligated to immediately remove or take down an infringing website, but police and copyright owners may request an ISP to remove an infringing website from its system when there is evidence of infringement. The police may also request ISPs to provide information regarding the identity of the persons operating a website when such information is required for investigation or when there is evidence of infringement.

Whether an ISP will be regarded as a direct infringer or contributory or vicarious infringer will be considered on a case by case basis since there is no rule or judgment for ISP liability in Thailand at present.

Conclusion

As aforementioned, the principle of copyright law in The U.S. and Thailand have similar ideas. The nature of copyright law, the exclusive right, or even the exceptions are relatively along the same line. However, the enforcement of the said law shows greatly different outcomes. Thailand is among the top perpetrators of copyright piracy according to the U.S. It is clearly shown in the special 301 report that, in 2007, Thailand was still placed in the Priority Watch List, since it causes U.S. trade losses due to copyright piracy in the industries of motion pictures, records and music, business software, entertainment software, and books to the total amount of 361.1 million dollars. (International Intellectual Property Alliance, 2008)

In addition, online piracy is still in crisis since there is no legal protection serving high technology, and the ISP liability is not provided for in any act. Nonetheless, The Department of Intellectual Property is aware of these significant problems. They arrange meeting

among scholars and practitioners to review a draft of the amendment to the Copyright Act that includes the ISP liability and technologically protection measures. However, this amendment is still in the process. All we can do now is to wait and see for the said amendment. We have to follow to what extent the new Copyright Act of Thailand can fix the piracy problems.

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