

# The Need for a Balanced Approach to Copyright Laws in Thailand

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## ABSTRACT

This paper analyses challenges in Thailand's copyright laws in light of the need for a balanced intellectual property system to foster its creative industries sector. The latter are major contributors to a country's culture and economy. The basic question of this paper is: What are the main problems in Thailand's copyright laws that may impact creativity and the advancement of culture? Several key issues that may affect the balance and the public interest must be monitored: (1) a lack of clarity on how to take advantage of flexibilities under international instruments; (2) the excessive use of criminal enforcement in infringement cases; (3) the need for collective management societies; (4) technological protection measures; and (5) uncertainty over orphan works. These challenges faced by Thailand are part of a global discussion on the need for a balanced copyright system.

**Keywords:** Creative industries, Copyright Thailand, ASEAN intellectual property rights, Knowledge economy

## 1. INTRODUCTION

In the contemporary, globalizing knowledge-based economy (KBE) a balanced international intellectual property rights regime is necessary for incentivizing innovation in creative industries, which are major contributors to a country's culture and economy. Whereas copyright law seeks, in principle, to ensure that authors can benefit from their creations while ensuring that the public's interest in these creations are protected, there is concern over the extent to which copyright standards have become too protective of rights holders, to the detriment of the public interest and hence to the fundamental goal of encouraging further creativity.

In contemporary KBEs, in which intellectual property assets are a key feature, creative industries comprise an increasing percentage of their gross domestic product (GDP). This is borne out in studies around the world over the past 15 years, including in Southeast Asia. There is a broad discussion on the components of creative industries sectors and their contributions to the overall economic welfare of countries (Kenan Institute Asia, 2009). Southeast Asia countries are fast becoming KBEs, with creative industries comprising a major part of the overall economy and the work force in certain countries. A report on Thailand with WIPO's assistance noted that export revenue from copyright industries totaled US\$5.23 billion by 2000 (WIPO, 2015). The 2009 study on Thailand noted that 12 per cent of Thailand's GDP was from the creative industries sector and that the government intended to increase this to 20 per cent by 2012 (Kenan Institute, 2009). The Thai government has promoted creative industries and the development of a more creative economy "as the keys to Thailand's efforts to move beyond low and middle-level manufacturing and agriculture towards higher-value-added activities" (Ibid., p. 1).

This paper examines the role balanced copyright laws play in incentivizing creativity while

providing public interest limitations. Specific debates in copyright law in the Internet-age related to the loss of balance and the expansion of the scope and the duration of protection of copyright are addressed. In addition, a key concern is the diminishment of the traditional latitude to tailor laws to the local circumstances by the imposition of higher international copyright standards – beyond WTO minimum standards – through bi-lateral free trade arrangements in particular. It then examines copyright laws in Thailand and challenges related to creating a balanced legal system that serves to advance creative industries.

This paper explores the contours of these concerns and performs a preliminary assessment of the challenges to the copyright system in Thailand in relation to promoting creativity in Thailand. It addresses a gap in the literature on creating a balanced copyright system in Thailand. Generally, there are few works on intellectual property rights in Asia (see Antons, 2017; Goldstein & Straus, 2009; and Heath, 2002). This paper thus analyses key policy and legal instruments on copyright at the international and national levels in order to identify challenges to a balanced copyright system and the creative sector in Thailand.

## 2. INTELLECTUAL PROPERTY AND THE CREATIVE INDUSTRIES

Fundamental assets in the creative industries are the intellectual assets that are expressed in various forms. Intellectual property protection therefore plays an important role in incentivizing or obstructing creativity and in national development.

IP refers to creations of the mind, knowledge that can be transferred without loss of information to the inventor. IP is divided into copyright and related rights and industrial property (patents, trademarks and geographical

indications). Sui generis IP regimes exist for specific types of technologies, such as plant varieties or the emerging regime for traditional knowledge, genetic resources and folklore. The WIPO Convention that created the organization in 1967 provides a list of the types of intellectual property in Article 2 (viii). It states that “intellectual property” shall include the rights relating to: literary, artistic and scientific works; performances of performing artists, phonograms, and broadcasts; inventions in all fields of human endeavor; scientific discoveries; industrial designs; trademarks, service marks, and commercial names and designations; protection against unfair competition; and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields (WIPO Convention, 1967).

Statutory intellectual property rights represent a public intervention in the free market of ideas and their physical expressions. It is justified on the ground that ‘free riding’ may occur to the detriment of creators and inventors. This would discourage innovation and be contrary to other public interests such as freedom of expression, access to information, education, the advancement of culture and technological innovation. It is fair to note that creativity and innovation has taken place outside of IP frameworks for much of history. IP rights in no way prohibit the free dissemination of knowledge by creators. In such instances, copyright is retained – moral rights – to knowledge freely distributed. Moreover, creators, in academia for example, have generated many creative works despite lower returns from creative income as compared to other sources of income such as salaries.

In today’s KBE, however, there is great demand for the protection of information assets from unethical and illegal exploitation by potential free riders. The challenges are compounded by the Internet, which enables copying, misuse, and misappropriation on an unprecedented scale. The latter challenges are especially acute

in the area of copyright<sup>1</sup> as copyrighted works are easily reproduced (in multiple forms), and disseminated at the ‘click of a mouse’. The scale, rapidity, and geographic scope of contemporary misappropriation are a major challenge to right holders. Thailand, for example, was in the past seen as a haven for piracy and misappropriation. This affected not only foreign rights owners but also local ones, a situation that is familiar all over the world.

As WIPO has noted on the occasion of an international conference on IP and the creative industries, “In order to nurture and manage creativity, creators and creative enterprises – those engaged in the commercial exploitation of Intellectual Property-based works, i.e. books, film, and music – must count on a balanced Intellectual Property (IP) system” (WIPO, 2007). The elements of the creative industries in Thailand of concern to the discussion in this paper are those that are impacted by copyright, namely, printing and publishing, motion picture production, movie theatre, radio, television and related services and information technology (WIPO, 2015).

A creative environment requires an effective copyright regime which protects author’s rights but allows for easy circulation of information and the enjoyment of the fruits of creativity. Copyright laws across the world and in Thailand attempt to chart a fine balance between protection of authors’ rights and the need to protect the public interest. Recall the justifications for limitations on the rights of copyright holders as documented by Martin Senftleben (2007). Limitations encompass instances where a work may be used without authorization and payment of remuneration. They also include non-voluntary licenses, both statutory and compulsory.

### **3. LIMITING COPYRIGHT PROTECTION IN THE PUBLIC INTEREST**

Copyright limitations rest primarily on the defense of fundamental rights and freedoms,

<sup>1</sup> Protected trademarks, especially well-known marks, are also prone to easy misappropriation and to cybersquatting

such as the guarantee of freedom of expression, including the right to receive information, and the right to privacy. Disseminating information to the public is a corollary to the right of freedom of expression. Already in 1883, at the time of the conclusion of the Berne convention it was noted by the president of the diplomatic conference, that “limitations on absolute protection are dictated... by the public interest” (Senftleben, 2007, p.23). Senftleben recalls Numa Droz, who presided over the conclusion of the Berne Convention and cautioned then that an ever-growing need for mass instruction could not be met if there were reservation of certain production facilities, which at the same time should not degenerate into abuses. Limitations enable, for example, freedom of religion and for the state to carry on its legislative function unhindered by copyright.

### 3.1 Freedom of Expression

Freedom of expression is guaranteed by Article 19 of the Universal Declaration of Human Rights. Thailand is party to ASEAN’s Declaration of Human Rights, which has accepted the rights under the UDHR. Elsewhere, the European Court of Human Rights has noted eloquently that this right “constitutes one of the essential foundations of a (democratic) society, one of the basic conditions for its progress and for the development of every man” (Senftleben, 2007, p.24). Freedom to seek and receive information must be guaranteed. These are essential components of forming an opinion. On the other hand, freedom to impart information must be guaranteed. It has been noted that a society with no public domain is a society in which freedom of speech exists only in relation to owned intellectual components. Strengthening of author’s rights entails potentially barring members of society from using or communicating information under certain circumstances.

Copyright must contribute to the exchange of diverse ideas and perceptions of the world. Expansion of copyright – which means enclosing the public domain – may serve this function if it also encourages the activities of small producers.

However, concentration among commercial producers may stifle cultural diversity rather than foster it. Freedom of authors to build upon the ideas of predecessors, as long as the latter’s selection and arrangement is not copied wholesale, ensures that the creative process remains possible and that free speech is not unduly curtailed. This is why ideas per se are not copyrighted, only the expressions of ideas.

Stronger protection of copyright per se may not be detrimental to freedom of expression provided that appropriate limitations are in place. Privileges in favor of a free press epitomize this. Where even the expressive core of an idea is required to inform the public properly Article 10bis (2) of the Berne Convention allows the free use of literary or artistic works seen or heard in the course of a current event for the purpose of reporting the event. Article 2bis(2) of Berne also allows for lectures, addresses and other works of the same nature which are delivered in public to be freely reproduced by the press, broadcast and communicated to the public. Article 2bis(1) of Berne excludes political speeches and speeches delivered in the course of legal proceedings from the protection granted by the Berne Convention.

### 3.2 Dissemination of Information

Limitations help society to benefit from information contained in works of intellect. This has led to privileges for libraries and archives, for example. Work continues in WIPO’s SCCR on international instruments regarding limitations and exceptions for libraries (Crews, 2017). In the contemporary Internet age, Senftleben argued, copyright law was likely to be a means to ensure the just distribution of information resources. Depriving segments of the population of information would lead to the problem of a ‘digital divide’ of society that might have serious social and political consequences (Senftleben, 2007).

Personal use limitations were already provided for and serve this public policy imperative. However, the traditional “market failure”

justifications for personal use privileges are no longer plausible with the advent of technological capacity to track who is using a work in the digital environment. Therefore the public imperative of dissemination of information is a better basis for the personal use limitation. Senftleben notes that “unrestrained access to information literary and artistic products enables individuals to participate in the intellectual life of society” (Senftleben, 2007).

### 3.3 The Right to Privacy

The right to privacy protects individuals from intrusion of copyright holders into the intimacy of the private sphere of each individual. Personal use and enjoyment of intellectual works are not subject to control by holders of exclusive rights, as long as there is not profit motive in the use of the work. The private use exception, which has traditionally had little impact on the enjoyment of the exclusive right, is provided for in relation to the *public* performances and recitals,<sup>2</sup> and the right of reproduction. With respect to private copying the right of privacy may be invoked. In the digital environment, this justification is on the defensive given the ability to follow consumption patterns and on-line behavior of individuals (Senftleben, 2007).

### 3.4 The Democratic Function of Copyright

It has been argued that “unbridled” copyright protection must be subjected to state involvement insofar as it fulfils a democracy enhancing function. By limiting the scope of the proprietary entitlement, copyright constrains owner control over expressions and must seek to ensure possibilities for critical exchange and diverse reformulation of previous works (Senftleben, 2007).

Stronger copyright protection in the digital age, along with contract law and technological measures have sought to counter an imbalance, namely the ability of users to take advantage of digital technology to access and use copyrighted material in line with the private use privilege. The

TRIPS Agreement, the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty have sought to address this imbalance in the digital era.

As copyright systems around the world seek to conform to international standards they must pay heed to available flexibilities, such as the three-step test provided for in various treaties, notably the TRIPS agreement of the WTO. We shall return to this below.

## 4. THAILAND’S COPYRIGHT FRAMEWORK

Thailand’s copyright system, available on the WIPO Lex database, has been upgraded over the past two decades to conform, largely, to international standards (WIPO Lex, 2017). It has also sought to take advantage of flexibilities permitted by those standards.

Thailand’s copyright laws provides for the protection of expressions of ideas by creators, not the ideas themselves. The protection of creators in Thailand, as elsewhere, is served by the following elements, which reflects international standards. The rights granted include both economic rights (reproduction, distribution, dissemination, adaptation, translation, etc.) in the common-law tradition and moral rights (to authorship) in the French, civil law tradition. Thailand’s laws reflect this general framework that is found in international instruments such as the Berne Convention of 1883 (as amended in 1971) and incorporated in the 1994 TRIPS Agreement of the WTO, as well as in the WIPO Copyright Treaty (1996) and the WIPO Performances and Phonograms Treaty (1996).

### 4.1 Subject Matter for Protection

The Thai Copyright Act, BE 2537 (1994) defines copyright in Article 6 as “a work of authorship in the form of a literary, dramatic, artistic, musical, audiovisual, cinematographic, sound recording, sound and video broadcasting work or any other work in the literary, scientific or artistic field whatever the mode or form of its expression”.

<sup>2</sup> Berne articles 11(1), 11bis(1), 11ter(1), 14(1)(ii) and 14bis(1) and in A.8 of the WIPO Copyright Treaty.

Copyright arises upon fixation of an idea in some form. Copyright does not extend to “to ideas or procedures, processes or systems or methods of use or operation or concepts, principles, discoveries or scientific or mathematical theories.

Exclusions from copyright are stipulated in Article 7 of the Thai Copyright Act: (1) News of the day and facts having the character of mere information, not being works in the literary, scientific or artistic fields; (2) The constitution and legislation; (3) Regulations, bylaws, notifications, orders, explanations and official correspondence of the Ministries, Departments or any other government or local units; (4) Judicial decisions, orders, decisions and official reports; (5) Translations and collections of the materials referred to in items (1) to (4), made by the Ministries, Departments or any other government or local units.

#### **4.2 Principles: Territoriality and National Treatment for Foreign Firms**

Thailand decides whether to grant IP rights to its nationals and to foreigners. The Copyright Act BE 2537 also provides in Section 8 for national treatment, a principle which provides for equal protection in Thailand of foreign authors. It states:

*(1) In the case of an unpublished work, the author must be a Thai national or reside in Thailand or be a national of or reside in a country which is party to the convention for the protection of copyright to which Thailand is party provided that residence must be permanent or that most of the time must be spent on the creation of the work. In the case of a published work, first publication must have been made in Thailand or in a country which is party to the convention for the protection of copyright to which Thailand is a party or in the case of first publication made outside Thailand or in a country which is not party to the convention for the protection of copyright to which Thailand is a party, publication of the work must subsequently be made in Thailand or in a country party to the convention for the protection of copyright*

*to which Thailand is party within 30 days as from the first publication, or the author must be eligible as prescribed in item (1) at the time of first publication.*

IP rights are territorial, meaning that each country decides independently whether to award protection to creators. International treaties provide common norms and processes for acquiring IP rights, though there are attempts to harmonize laws that are discussed in the final part of this essay.

#### **4.3 Economic and Moral Rights**

Copyright arises upon fixation of an original work. Economic rights enjoyed by authors are stipulated in Section 15 and include the exclusive rights of: (1) reproduction or adaptation; (2) communication to the public; (3) rental of the original or the copies of a computer program, an audiovisual work, a cinematographic work and sound recordings (which was added to Copyright act of 1994); (4) assigning benefits accruing from copyright to other persons; (5) licensing the rights mentioned in items (1), (2) or (3), with or without conditions, provided that such conditions shall not unfairly restrict competition.

Where a work is assigned under the Act, Section 18 entitles the author of a copyright “to identify himself as the author and to prohibit the assignee or any person from distorting, shortening, adapting or doing anything detrimental to the work to the extent that such act would cause damage to the reputation or dignity of the author”. Amendments to the copyright in 2014<sup>3</sup> provided for recognition of moral rights of performers in addition to the economic rights provided by law. According to Section 51/1, a performer has the right to identify himself or herself as the performer of his or her performances and to prevent his or her assignee or any other person from any modification of his or her performances that would be prejudicial to his or her reputation or dignity.

#### **4.4 Scope of Protection**

Early on, Thai law protected only novels and poems as of 1892 (Sorg, 2009). The Copyright Act, BE 2537

(1994) brought Thai law in line with international standards after Thailand joined the WTO in 1995. The range of “works” that are afforded protection is defined in Section 4 the Copyright Act, BE 2537. These include: Literary works, computer programs, dramatic works, artistic works, musical works, audiovisual works, cinematographic works, sound recording and broadcasting works (see Table 1 for the definition of each type of work). Databases and computer programs are protected as literary works.

#### 4.5 Duration of Protection

The term of copyright protection subsists, as per Section 19, for the lifetime of the author and for 50 years after his or her death. Section 19 also stipulates that:

*In the case of a work of joint authorship, copyright shall subsist for the lifetime of the joint authors and for 50 years after the death of the last surviving joint author. If the author or all*

**Table 1. Types of works under Thai Copyright Law**

No.	Type of work	Definition
1.	Literary works	Any kind of literary work such as books, pamphlets, writings, printed matter, lectures, sermons, addresses, speeches, including computer programs
2.	Computer programs	instructions, a set of instructions or anything which is used with a computer to make the computer work or to generate a result no matter what the computer language is
3.	Dramatic works	a work of choreography, dancing, acting or performance in dramatic arrangement, including pantomime
4.		A work of one or more of the following descriptions: (1) work of painting or drawing, which means a creation of configuration consisting of lines, light, colors or any other element, or the composition thereof, upon one or more materials; (2) work of sculpture, which means a creation of configuration with tangible volume; (3) work of lithography, which means a creation of pictures by printing process and includes printing blocks or plates used in the printing; (4) work of architecture, which means a design of buildings or constructions, a design of interior or exterior decoration as well as a landscape design or a creation of a model of buildings or constructions; (5) photographic work, which means a creation of pictures with the use of image recording apparatus which allows the light to pass through a lens to a film or glass and developed with liquid chemical of specific formula or by any process that creates a picture or an image recorded by any other apparatus or method; (6) work of illustration, which means a map, structure, sketch or three-dimensional work with respect to geography, topography or science; (7) work of applied art, which means a work which takes each or a composition of the works mentioned in items (1) to (6) for utility apart from the appreciation in the merit of the work such as for practical use of such work, decorating materials or appliances or using for commercial benefit, whether with or without artistic merit, and shall include photographs and plans of such works”.
5.	Musical works	A work which is composed for playing or singing whether with rhythm and lyrics or rhythm only, including arranged and transcribed musical notes or musical diagrams
6.	Audiovisual works	A work which consists of a sequence of visual images recorded on any kind of medium and which is capable of being replayed with equipment suitable for such medium, including the sound track of such work
7.	Cinematographic works	An audiovisual work which consists of a sequence of visual images which can be continuously shown as moving pictures or can be recorded on another medium so as to be continuously shown as moving pictures, including the sound track of such cinematographic work, if any
8.	Sound recording	A work which consists of a sequence of music, sounds of a performance or any other sound recorded on any kind of medium and capable of being replayed with equipment suitable for such medium, but not including the sound track of a cinematographic work or other audiovisual work
9.	Broadcasting works	A work which is communicated to the public by means of radio broadcasting, sound or video broadcasting on television or by any other similar means

Source: Section 4 the Copyright Act, BE 2537, Thailand (1994)

<sup>3</sup> WIPO Lex, Copyright Act (No. 3) B.E. 2558 (2015), WIPO Lex No. Th035 and Copyright Act (No. 2) B.E. 2558 (2015), WIPO Lex No. TH036. See Suebsiri Taweepon, “Ten key changes to the Copyright Act,” Tilleke & Gibbins, Bangkok. May 2015. ManagingIP.com

*joint authors die prior to the publication of a work, copyright shall subsist for 50 years as from first publication of the work. Where the author is a legal person, copyright shall subsist for 50 years as from authorship; if the work is published during such period, the copyright shall subsist for 50 years as from first publication. Copyright subsists in various types of works as follows: Photographic, audiovisual, cinematographic, sound recording or audio and video broadcasting – 50 years as from first publication; Applied art – 25 years as from authorship; 50 years from first publication; Copyright in course of employment, instruction – 50 years from authorship and if published 50 years from first publication.*

#### **4.6 Enforcement: Infringement of Copyright**

The charge of infringement seeks to sanction unauthorized use of works. Infringement takes place when a copyrighted work is, without permission of the author, reproduced or adapted and/or communicated to the public. Section 27 stipulates that:

*In relation to an audiovisual work, a cinematographic work or a sound recording infringement also includes rental of the original or copies of a work without permission. (Section 28) Infringement of a sound and video broadcasting occurs when, without permission, (1) there is 'making' an audiovisual work, a cinematographic work, a sound recording or a sound and video broadcasting work in whole or in part; (2) there is rebroadcasting whether in whole or in part; (3) and making a sound and video broadcasting work to be heard or seen in public in return for the payment of money or other commercial benefit. (Section 29) In relation to computer programs infringement takes place when there is unauthorized reproduction, adaptation, communication to the public, or rental of the original or copies of the work. (Section 30) Anyone who knows or should have known that a work is made by infringing copyright also infringes copyright by committing any of the following*

*acts (Section 31): (1) selling, holding for sale, offering for sale, letting, offering for lease, selling by hire purchase or offering for hire purchase; (2) communication to the public; (3) distribution in a manner which may cause damage to the owner of copyright; (4) self-importation or importation on order into the Kingdom.*

While civil remedies are provided for – copyright owners can seek civil protection for their losses or damages – the law also provides for criminal sanctions. Both imprisonment and monetary compensation may be imposed on those committing a crime. Maximum term for jail served is high as 4 years, while fining can be up to 800,000 Baht (approx. US\$20,000). The Thai National Police is engaged in enforcement of copyright along with other bodies.

In 2014, amendments introduced Preliminary injunctions against infringement of copyright in computer systems: Section 32/3 allows copyright owners to seek preliminary injunctive relief against the unauthorized distribution of copyright works in computer systems. If a copyright owner has evidence to believe that copyright infringement is taking place in the computer system of a service provider, he or she may file a motion the court for an order against the service provider to stop such infringement.

The 2014 amendments also provided for punitive damages under Section 64, paragraph 2. If there is clear evidence that copyright infringement or infringement of a performer's right is committed intentionally so that the copyright work or a performer's right can be widely accessed by the public, the court may award higher levels of damages but may not exceed double the amount. In addition, seizure and destruction of counterfeit goods was also introduced. Section 75 has been amended to allow the court to order that infringing materials be destroyed at the expense of the infringer. Previously, an owner



of a copyright or performer's right had to take possession of infringing materials. Unauthorized recording of movies in cinemas, even for personal use, was explicitly prohibited under Section 28/1. Violators of this provision may be subject to the penalties listed in Section 69/1, which include imprisonment for six months to four years, or a fine ranging from 100,000 to 800,000 Baht (US\$3,000 to US\$24,000), or both.

## 5. ISSUES OF CONCERN FOR PROTECTING THE PUBLIC INTEREST IN THAILAND

As noted above a balanced copyright system seeks to incentivize creativity while at the same time preserving the public domain that is vital for creative expression and advancement of culture. Article 27 of the Universal Declaration of Human Rights stipulates that while "Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author", everyone also "has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits".

Changes in Thai copyright law over the past 20 years have sought to bring the Copyright Act in line with international agreements, to which Thailand is a party, including the TRIPS Agreement of the WTO (1994) and the "Internet treaties" of WIPO – the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty (1996) which addressed concerns of right holders in the Internet age.

In relation to Thailand specifically issues that may affect the balance and the public interest may need to be monitored. These are: (1) lack of clarity on how to avail of flexibilities under international instruments, (2) the excessive use of criminal enforcement in infringement cases, (3) the need for collective management societies, (4) technological protection measures and (5) uncertainty over orphan works.

### 5.1 Lack of Clarity on the Fair Use/Dealing Provisions

There is lack of clarity in relation to flexibilities allowed in enacting exceptions and limitations. Court decisions in Thailand have in the past left this aspect unclear. The doctrine of fair use (US) or fair dealing (UK) is a critical component of a balanced copyright system. It allows for the protections – especially economic rights – afforded to creators to be balanced by limitations of those rights in certain instances to serve the public interest.

In enacting exceptions and limitations, Article 13 of TRIPs, following Article 9(2) of Berne provides that, (1) "Members shall confine limitations or exceptions to exclusive rights to certain special cases", (2) "which do not conflict with a normal exploitation of the work" and (3) "do not unreasonably prejudice the legitimate interests of the right holder." This 3-step test has been extended into the digital environment via the Article 10 of the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.

Similarly, Thailand's copyright has taken advantage of this provision and provides that the charge of infringement does not arise in relation to acts listed Section 32:

- (1) Research or study of the work which is not for profit, For educational purposes, Section 34 elaborates further, stating that librarians shall not be deemed to infringe copyright "provided that "the purpose" of reproduction of a copyrighted work by them "is not for profit". In this case they can make a reproduction for use in their library, and make a "reasonable" reproduction" in part of a work for another person for the benefit of research or study."
- (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; and
- (8) Use of the work as part of questions and answers in an examination. Furthermore, Section 33 states adds, fairness dictates that there must be a “reasonable” citation, quotation, copy, emulation or reference in part with an acknowledgment of the ownership of copyright to avoid the charge of infringement.

In the case of computer programs, Section 35 stipulates that infringement will not have taken place if the purpose of the following acts is “not for profit” in relation to the acts under Section 32 and in addition: use of the computer program as part of questions and answers in an examination; adapting the computer program as necessary for use; making copies of the computer program so as to keep them for reference or research in the public interest. A temporary reproduction exception was introduced in 2014. Under Section 32/2, reproduction of copyright works in a computer system, which is necessary for the system to operate normally (as computers make temporary copies of data in the memory), does not amount to copyright infringement.

The 2014 amendments also introduced an exception for disabled persons and a first-sale doctrine exception. Under Section 32 (9),

reproduction or adaptation of copyright works for the benefit of disabled persons is not considered copyright infringement, provided it is for non-profit purposes.

A form of the first-sale doctrine is found in Section 32/1, which states that lawful distribution of an original copyright work or its copies by a person who has lawfully obtained the ownership of such work or copies is exempt from copyright infringement.

A problem that persists, however, at the international level and domestic level in Thailand is the lack of clarity of the fair use doctrine. There is no substantive guidance at both levels on which exceptions may qualify to meet the conditions set out in the 3-step test. This may result in a chilling effect when it comes to devising new exceptions corresponding to their individual socio-economic, cultural, and technological levels of development.

Whereas Thai Courts may provide such guidance, it has been noted that they have yet to do so. Such guidance would provide clarity in infringement proceedings. Noppanun Supasiripongchai has argued that in interpreting the decisions of the Thai IP Court in relation to Article 32: “Importantly, it is still unclear whether or not the two conditions in section 32 paragraph 1 can be applied as a general exception like fair use. ...[The] exception in the Thai copyright law is still limited to certain special cases (Supasiripongchai, 2014).

At issue is whether or not two conditions in section 32 paragraph 1 should be applied as a general exception and, if they can be applied as a general exception, whether they will satisfy the requirement of “certain special cases”. Supasiripongchai argues that “the current legal approach to the copyright exceptions in Thailand is unlikely to pass the second and third criteria of the three-step test.” Allowing

for wholesale reproduction of books, for example, is questionable. Supasiripongchai has noted that in the case of Thailand it was clear that the exception allowed the photocopying or reproduction of entire books and multiple reproductions without any payment of equitable remuneration to the copyright owners (Supasiripongchai, 2014).

Nevertheless, commentators have argued for an equitable approach to interpreting the 3-step test and one that aims at “substantive equality” requires that “interpretation of these norms should be generously construed in favor of development,” which is consistent with the drafting history of the Berne Convention (Chon, 2011). Such an interpretation might hold that the operation of the educational exception provisions within their specific sphere was unaffected by the more general provision in Article 9(2) and that the uses allowed under them are therefore excluded from its scope (WIPO, 2003). The Munich Declaration on the 3-step test, adopted in 2008 by advocates of the copyright system, provided in Article 6 that the test should be interpreted in a manner that respects the legitimate interests of third parties, including interests derived from human rights and fundamental freedoms, interests in competition and other public policy interests, notably in scientific progress and cultural, social or economic development (Munich Declaration, 2008).

### 5.2 Prevalence of Criminal Enforcement Procedures

It has been noted that criminal proceedings are used mainly in enforcing copyright, as well as trademark infringement. Julia Sorg has noted that the criminal route is attractive to right holders because they can initiate criminal proceedings by bringing a private claim even if the Public Prosecution department does not initiate a public criminal action, the criminal track procures a quicker resolution than civil proceedings, and the court can order the infringer to pay the

right holder a fine. Moreover the claimant can request additional damages at the same court if the amount of the fine was not sufficient to compensate him (Sorg, 2009).

The aggressive use of criminal enforcement does not necessarily enhance respect for IP, given increasing numbers of criminal cases and given a general cultural context in which law has been seen as a punitive institution rather than a protective one. In addition, Supasiripongchai, has noted the decline in creativity due to “over-deterrence” and fears of involvement in the criminal system (Supasiripongchai, 2014).

A necessary complement to criminal enforcement is the creation of collective management societies (CMS)<sup>4</sup> for different types of works. While CMS exist for the music sector, there are few or none for literary works. Supasiripongchai has noted that such rights management organizations that act on behalf of right holders – licensing and collecting royalties – could provide a better avenue for the protection of right holders while not negatively impacting on small businesses (Supasiripongchai, 2011).

### 5.3 Technological Protection Measures (TPMs)

TPM provisions seek to protect authors from illegal circumvention of technological measures that protect their works. Amendments in 2015 provide that circumvention of TPMs is punishable by either a fine of up to 100,000 baht or, if undertaken for commercial purposes, of imprisonment up to 4 years and/or a fine of up to 400,000 Baht (US\$12,500) (Tunsarawuth, 2015).

From the perspective of access to knowledge (or A2K), especially for development and the transfer of technology and know-how, TPMs have raised concerns. They have been used to restrict access to copyright protected works. WIPO Copyright Treaty Article 11 stipulated that Members “shall provide adequate legal

<sup>4</sup> Collective management societies (CMS) are organizations that act in the interest of copyright owners. They ensure that owners’ rights are respected and that they receive payment for use of their work.

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.”

Anti-circumvention provisions based on those in American copyright law have been included in the IP chapters of the bilateral free trade agreements (FTAs) that the U.S. has concluded with various countries around the world. The Trans Pacific Partnership, if it is revived after the current American administration abandoned the hard-won treaty, may require signatories to provide legal sanctions for circumventing technological measures added to protect copyrighted works.

The concern, expressed by copyright experts, is that TPMs may override fair use applications and create serious barriers to accessing information and the promotion of research and innovation. Barbara Stratton, Advisory Board Member, of the International Federation of Library Associations (IFLA), had noted at the time of the adoption of the A2K Treaty, that “The chasm between the digitally advanced and the digitally deprived is widening. Current copyright rules foster the dependence of developing countries on developed countries” (IFLA, 2005). The IFLA argued for “the promotion of pro-development norm setting including the recognition of different countries’ levels of technological, economic and social development and also the recognition of the rights of different stakeholder groups and the citizen as users of IP, and the development of supportive IP and trade policies by industrialized countries”.

The Lyon Declaration on Access to Information of August 2014, adopted by 597 libraries and

related associations, called upon all member States of the UN, as they engaged in drafting the Sustainable Development Goals for 2016-2030, to “ensure that everyone has access to, and is able to understand, use and share the information that is necessary to promote sustainable development and democratic societies.” A right to information would be “transformational” and supports development by empowering people, *inter alia*, to “be economically active, productive and innovative” (Lyon Declaration, 2014).

Provisions in Thai copyright law on TPMs must ensure that they do not create obstacles to accessing information. As a developing country, Thailand can avail itself and make effective use of flexibilities under international copyright instruments, which serve to protect right owners but also to preserve the right of everyone to access and share information necessary for sustainable development.

#### 5.4 ISP Providers

ISP providers face secondary liability for infringements of copyright law and are subject to take-down duty after notice. Some Thai scholars have argued for the tightening of rules related to ISPs because of, *inter alia*, increased illegal file sharing of copyrighted content (Korrasut, 2011). Amendments in 2015 stipulate that the onus is on copyright owners to file requests before the court to order a service provider to stop any violation of his or her copyrighted work.

It is to be noted that the meaning of the term “service provider” is borrowed from the Computer Crime Act of 2007, which covers providers for technical access to the Internet, providers of platforms for communication between or among people and providers of computer data storing. However, in court cases prosecuted under the Computer Crime Act, the following are also regarded as service providers: people who are webmasters, website owners, or

people who provide content on the Internet and allow readers or users to comment or post on their web pages (Tunsarawuth, 2015).

The challenges to ISP providers are captured in a proposed A2K treaty, adopted in May 2005 by A2K advocates (A2K Treaty, 2005). Provisions related to ISPs in Articles 3-5 on ISPs stipulated that members agreed that the exclusive economic rights of copyright owners including but not limited to reproduction, distribution, display, performance, adaption and communication to the public shall not apply to:

- (1) An ISP transmitting routing or providing connections for material through a system or network controlled or operated by or for the service provider, or by reason of the intermediate and transient storage of that material in the course of such transmitting, routing or providing connections
- (2) An ISP's intermediate and temporary storage of material for the purposes of caching material, as long as they do not modify the material or provide it in a manner inconsistent with access conditions set by the copyright holder,
- (3) An ISP's storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider.
- (4) The referring or linking to an online location containing infringing material or infringing activity in cases in which the service provide has the right and ability to conduct such activity, this exemption applies only if the ISP does not receive a financial benefit directly attributable to the infringing activity,
- (5) The caching of electronic documents for the purposes of enhancing functionality of internet search engines, as long as the original webpage address is clearly indicated on the cached page, and it is clear that the cached page may not be the most up-to-date version
- (6) The transmitting of a universal resource

locator or other electronic points that has the effect of instructing a user's browser to load electronic documents from a third-party server.

Thailand's copyright experts and policy makers can draw on the concerns that arose in an American case, *Lens v. Universal Music Corporation* which came before the US. 9<sup>th</sup> Circuit, in September 2015. In this case fair use provisions came under fire after copyright holders of a song, used in a home video uploaded on YouTube featuring a child dancing to a popular tune (that was very faintly heard in the background), sought to have the clip taken down. While their motion was defeated, the chilling effect of such an action was clear (Suebsiri & Chidapa, 2015). In considering an appropriate system for regulating ISPs in Thailand Korrasut recalled that this notice and takedown system could have a chilling effect on freedom of expression. He argued that ISPs should not bear the burden of acting on behalf of the entertainment industry or other right holders as they are not the direct infringer in the context of file sharing for example. He argued for a balance between ISPs' duties and stakeholders' rights (Korrasut, 2016).

### 5.5 Orphan Works

Works that are protected by copyright but whose authors or right-holders are not known or cannot be located or contacted to obtain permission, fall in the category of orphan works. This situation is inclusive of the following circumstances: the publishing of a work by an unknown author, there are no heirs, the publishers are bankrupt, and authors are not interested in copyright protection because he or she has no intention of commercializing.

Under Thai law, orphan works are addressed, somewhat, in Sections 20 and 62 of the Thai Copyright Act. Section 20 states that works created by a pseudonymous or anonymous

author will be protected for 50 years from the date of authorship. If the work is published during this period, the protection will last for 50 years from the date of first publication. Copyright subsists even if the author is unknown. Section 62 describes the presumptions of copyright ownership that apply in litigation. It sets out the presumption that ownership of a copyright work that bears no name or claim of ownership will vest in the printer or publisher of the work. There is lack of clarity in cases where an enterprise goes out of business. The intellectual property office provides a service for the search of right-owners.

These provisions in Thai copyright law are important in light of the global access to works enabled by the Internet. Google Books, for example, has sought since 2005 to make available such works through digitization, raising concerns over copyrighted materials and the potential usurpation of the rights of copyright-holders (Hutchens, 2011). Uncertainty surrounding the use of orphan works, and potential charges of infringement, have led the US Copyright Office to study the matter in a report to the US Congress, "Orphan Works and Mass Digitization". The report noted that "For good faith users, orphan works are a frustration, a liability risk, and a major cause of gridlock in the digital marketplace" (US Copyright Office, 2015, p. 35). It continued:

*By electing to use a work without permission, users run the risk of an infringement suit resulting in litigation costs and possible damages. By foregoing use a significant part of the world's cultural heritage embodied in copyright-protected works may not be exploited and may therefore fall into a so-called "20th-Century digital black hole" (US Copyright Office, 2015, p. 35).*

This would unduly restrict access to millions of works that might otherwise be available to

the public, an outcome that would be difficult to reconcile with the objectives of the copyright system. There appears to be a significant orphan works issue across the European Union and North America.

Solutions may include legislative provisions related to fair use of orphan works, exceptions to exclusive rights for the use of orphan works so that use of an orphan work would not be considered copyright infringement, a government license model for orphan works in which putative users of an orphan work submits evidence of failed diligent search for the owner to a government agency, extended collective licensing where a fee is paid to a collective management organization that then distributes the proceeds to those owners, and a limitation on liability model in which good faith users provide notice of use allowing owners to connect with the users.

## 6. CONCLUSIONS

This paper has noted the importance of a balanced copyright law in fostering creativity. An effective copyright system is one that protects both authors' rights and the public interest. Thailand's system has been upgraded and seems to be in line with international standards and with contemporary realities of the digital era. At the same time, Thailand must ensure that its copyright system takes full advantage of the flexibilities that are available in international copyright standards so that it does not hinder the progression of its creative industries. There are some legal issues that need fine tuning, in particular the 3-step test. Further research is necessary in a few areas: (1) to measure precisely the impact of tightened copyright rules on local creativity and the creative sector and (2) to analyze the impact of lack of clarity in relation to the 3-step test in Thailand. At this point, we have merely sought to identify the general contours for such analyses.

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