

**THE APPLICATION OF UNIVERSAL MEASURES  
IN THAI COPYRIGHT LAW**

**PAKAWADEE PRADABKAM**

**A THESIS SUBMITTED IN PARTIAL FULFILLMENT  
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(CRIMINOLOGY, JUSTICE ADMINISTRATION AND SOCIETY)  
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Thesis  
entitled  
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*Pakawadee Pradabkam*

Miss Pakawadee Pradabkam  
Candidate

*Σ C*

.....  
Asso.Prof. Srisombat Chokprajakchat,  
Ph.D.(Public Policy)  
Major advisor

*Tunyatorn Insorn*

.....  
Assoc.Prof. Tunyatorn Insorn,  
Ph.D. (Criminology, Justice  
Administration and Society)  
Co-advisor

*Sarasin Booppanon*

.....  
Mr.Sarasin Booppanon, Ph.D.  
Co-advisor

*Nathee Chitsawang*

.....  
Mr.Nathee Chitsawang, Ph.D.  
Co-advisor

*Patcharee Lertrit*

.....  
Prof. Patcharee Lertrit,  
M.D., Ph.D.(Biochemistry)  
Dean  
Faculty of Graduate Studies  
Mahidol University

*Sunee Kanyajit*

.....  
Assoc.Prof.Sunee Kanyajit,  
Ph.D.  
Program Director  
Doctor of Philosophy Program in  
Criminology, Justice Administration and  
Society  
Faculty of Social Sciences  
Mahidol University

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on  
April 10, 2015

*Pakawadee Pradabkam*  
Miss Pakawadee Pradabkam  
Candidate

*Srisombat Chokprajakchat*  
.....  
Asso.Prof. Srisombat Chokprajakchat,  
Ph.D.(Public Policy)  
Member

*Sunee Kanyajit*  
.....  
Assoc.Prof.Sunee Kanyajit,  
Ph.D.  
Chair

*Tunyatorn Insorn*  
.....  
Assoc.Prof. Tunyatorn Insorn,  
Ph.D. (Criminology, Justice  
Administration and Society)  
Member

*Nathee Chitsawang*  
.....  
Mr.Nathee Chitsawang, Ph.D.  
Member

*Sarasin Booppanon*  
.....  
Mr.Sarasin Booppanon, Ph.D.  
Member

*Nittaya Sumretphol*  
.....  
Asst.Prof. Nittaya Sumretphol, Ph.D.  
Member

*Patcharee Lertrit*  
.....  
Prof. Patcharee Lertrit,  
M.D., Ph.D.(Biochemistry)  
Dean  
Faculty of Graduate Studies  
Mahidol University

*Wariya Chinwanno*  
.....  
Asso.Prof. Wariya Chinwanno,  
Ph.D.  
Dean  
Faculty of Social Sciences and Humanities  
Mahidol University

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Pakawadee Pradabkam

# THE APPLICATION OF UNIVERSAL MEASURES IN THAI COPYRIGHT LAW

PAKAWADEE PRADABKAM 5137812 SHCJ/D

Ph.D. (CRIMINOLOGY, JUSTICE ADMINISTRATION AND SOCIETY)

THESIS ADVISORY COMMITTEE: SRISOMBAT CHOKPRAJAKCHAT,  
Ph.D., TUNYATORN INSORN, Ph.D., NATHEE CHITSAWANG, Ph.D., SARASIN  
BOOPANON, Ph.D.

## ABSTRACT

The objectives of this research were to analyze the problems and obstacles of enforcing the Copyright Act B.E.2537 in order to apply suitable measures of the International Copyright Act to the Thai context.

Qualitative and quantitative research design were used in this study. The sample consisted of 570 individuals. The research instruments were in-depth interviews, focus group discussions, and questionnaires. Subjects were divided into sub groups; 20 executives and experts, 150 staff members, and 400 individual from the public.

The results of the research reveal that the Copyright Act B.E.2537 had prejudiced enforcement in 4 main areas as follows: (1) The severe penalty could not effectively apply to minor infringement and could not stop violations of the law. (2)

The injured person tends to use Criminal rather than Civil action in order to avoid complicated procedures, which is against the fundamental principles of the Copyright protection. (3) The problems caused by the copyright owner entrap the offender to commit the crime. (4) The lack of understanding of Thai in the Copyright Act. The suitable measures of the International Copyright Act that should apply to Thai s are (1) The measure that only commercial scale piracy should be prosecuted as a criminal case while the minute piracy should not be prosecuted in the criminal court and the small scale piracy should be a compoundable offence with specific conditions. (2) The punitive damages should be applied to commercial scale piracy. And (3) The control operation of Enforcement officers should be applied to commercial scale piracy. The result of the application of measures from the International Copyright Act to five Thai Justice Organizations indicated that Thai officers, on average, agreed that the application was suitable (mean 3.30 standard deviation .35) and they were not different from the application of international laws ( $F=1.545$ ,  $p\text{-value}=.192$ ).

Recommendations for this research are as follows: (1) The amendment of the Copyright Act B.E.2537 ; the promulgation of the Exoneration in minute piracy cases, an innocent action should have no criminal penalty, the Exhaustion of Rights, the promulgation of double Restitution, and specific regulations for officers' entrapment. (2) The Thai Government should promote Intellectual property in terms of using copyright for commerce such as; the presentation of Thai tradition and indigenous knowledge values to global markets, the stipulating of laws in limiting the exclusive rights of the copyright holder and reducing the exclusive rights of the products. (3) The adjustment of Thais' attitude on the use of the copyright infringing products.

KEY WORDS: COPYRIGHT INFRINGEMENT/ UNIVERSAL MEASURE  
/COMMERCIAL SCALE /PUNITIVE DAMAGES /  
CONTROL OPERATION

164 pages

การนำมาตรการทางกฎหมายสากลมาประยุกต์ใช้ในกฎหมายลิขสิทธิ์ไทย

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ผกาวดี ประดับคำ 5137812 SHCJ/D

ปร.ด.(อาชีวศึกษา การบริหารงานยุติธรรมและสังคม)

คณะกรรมการที่ปรึกษาวิทยานิพนธ์ : ศรีสมบัติ โชคประจักษ์ชัด,Ph.D.,ธัญญธร อินทร,Ph.D.,นัทธี จิตสว่าง,Ph.D.,  
สารสิน บุญพานนท์,Ph.D.

#### บทคัดย่อ

งานวิจัยนี้มีวัตถุประสงค์ในการวิเคราะห์สภาพปัญหาและอุปสรรคจากการบังคับใช้พระราชบัญญัติลิขสิทธิ์ พ.ศ.2537 เพื่อหาแนวทางการนำมาตรการทางกฎหมายสากลมาประยุกต์ใช้ในกฎหมายลิขสิทธิ์ไทยให้เหมาะสม

ผู้วิจัยเก็บข้อมูลเชิงคุณภาพโดยการสนทนากลุ่มและสัมภาษณ์เชิงลึกกับผู้บริหารและผู้เชี่ยวชาญด้านกฎหมายลิขสิทธิ์ จำนวน 20 คน และเชิงปริมาณโดยใช้แบบสอบถามกับเจ้าหน้าที่ผู้ปฏิบัติงานคดีลิขสิทธิ์ จำนวน 150 คน และประชาชน จำนวน 400 คน ประกอบการวิจัยเอกสารและการสังเกตการณ์ภาคสนาม

ผลการวิจัยพบว่าพระราชบัญญัติลิขสิทธิ์ พ.ศ.2537 มีสภาพปัญหาด้านการบังคับใช้ที่ก่อให้เกิดความไม่เป็นธรรม 4 ประเด็นหลัก ได้แก่ 1.บทลงโทษทางอาญาที่รุนแรงไม่สอดคล้องกับพฤติกรรมการละเมิดลิขสิทธิ์เล็กน้อยๆ และไม่สามารถปราบปรามการกระทำผิดได้ 2. ผู้เสียหายไม่ดำเนินคดีแพ่งเพราะเป็นเรื่องที่ยุ่งยากแต่เลือกให้การดำเนินคดีอาญาส่งผลต่อหลักการพื้นฐานในการคุ้มครองลิขสิทธิ์ 3.ปัญหาที่เกิดจากการปล่อยให้กระทำความผิดหรือปล่อยจากฝ่ายผู้เสียหาย 4.ประชาชนยังขาดความรู้ความเข้าใจเกี่ยวกับการกระทำความผิดฐานละเมิดลิขสิทธิ์สำหรับมาตรการทางกฎหมายสากลที่จะนำมาประยุกต์ใช้ในกฎหมายลิขสิทธิ์ไทยได้อย่างเหมาะสมมี 3 มาตรการ ได้แก่ 1.มาตรการจำกัดระดับความรุนแรงให้การกระทำละเมิดลิขสิทธิ์เพื่อการค้าเท่านั้นเป็นความผิดทางอาญามีการแบ่งแยกระดับการกระทำผิดออกเป็น 3 ระดับ ระดับที่ 1 พฤติกรรมการละเมิดลิขสิทธิ์เล็กน้อยๆ พบว่าไม่ควรมีโทษทางอาญาระดับที่ 2 พฤติกรรมการละเมิดลิขสิทธิ์เพื่อการค้าขนาดเล็กพบว่าเป็นความผิดอาญาที่สามารถยอมความได้แต่ให้ปฏิบัติตามเงื่อนไขก่อนคดีอาญาระดับที่ 3 พฤติกรรมการละเมิดลิขสิทธิ์เพื่อการค้าขนาดใหญ่ที่มีปริมาณในเชิงพาณิชย์ให้เป็นความผิดต่อรัฐยอมความไม่ได้ 2.มาตรการลงโทษทางแพ่งให้หนักขึ้น พบว่า ควรนำมาใช้กับการละเมิดลิขสิทธิ์เพื่อการค้า 3. มาตรการควบคุมการปฏิบัติงานของเจ้าหน้าที่และสายลับพบว่าควรนำมาใช้กับการละเมิดลิขสิทธิ์เพื่อการค้าขนาดใหญ่ที่มีปริมาณในเชิงพาณิชย์ทั้งนี้การนำมาตรการทางกฎหมายสากลมาประยุกต์ใช้กับหน่วยงานในกระบวนการยุติธรรมไทยจำนวน 5 หน่วย นั้น เจ้าหน้าที่ในกระบวนการยุติธรรมเห็นด้วยว่ามีความเหมาะสมแล้วในระดับปานกลาง(ค่าเฉลี่ย 3.30 ส่วนเบี่ยงเบนมาตรฐาน .35)และมีความคิดเห็นเกี่ยวกับมาตรการทางกฎหมายสากล ไม่แตกต่างกัน ( $F = 1.545$ ,  $p\text{-value} = .192$ )

ข้อเสนอแนะที่ได้จากการวิจัยมี 3 ประเด็นหลัก ได้แก่ 1.แก้ไขพระราชบัญญัติลิขสิทธิ์ พ.ศ.2537 บัญญัติข้อยกเว้นความรับผิดให้พฤติกรรมการละเมิดลิขสิทธิ์เล็กน้อยๆ การละเมิดลิขสิทธิ์โดยไม่รู้ ไม่มีโทษทางอาญากำหนดให้มีความระงับไปซึ่งลิขสิทธิ์ กำหนดให้ผู้ละเมิดลิขสิทธิ์จ่ายค่าเสียหายเป็นสองเท่าและออกข้อบังคับการปฏิบัติงานของเจ้าหน้าที่เกี่ยวกับการปล่อยสินค้านี้ละเมิดลิขสิทธิ์ 2.นโยบายรัฐบาลต้องส่งเสริมการใช้ประโยชน์จากทรัพย์สินทางปัญญาในเชิงพาณิชย์ เช่น การสร้างมูลค่าภูมิปัญญาไทยนำเสนอวัฒนธรรมไทยต่อประชาคมโลกและรัฐบาลต้องออกกฎหมายจำกัดสิทธิผูกขาดของเจ้าของสิทธิคิดอ่านจากผูกขาดในสินค้า 3.ประชาชนต้องปรับทัศนคติเกี่ยวกับการใช้สินค้านี้ละเมิดลิขสิทธิ์

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## **CHAPTER I**

### **INTRODUCTION**

#### **1.1 Background and Nature of Problems**

The Copyright Act B.E.2537 is a law stipulated according to Berne Convention (for the Protection of Literary and Artistic Works) and TRIPs (Trade-Related Aspect of Intellectual Property Rights) Agreement that requires civil, criminal and administrative punishment. The Kingdom of Thailand has had various measures in protecting copyright piracy. Oppositely, Thailand has no other sanctions rather than criminal penalty. This is because criminal sanction encourages injured persons in prosecuting the case. Thus, it leads to the selling and buying letter of power of attorney as commercial business in criminal prosecutions. The fact is that Copyright protection in Thailand concerns with police's search warrant and seize infringement products from the accused person, asking for the bail in a great amount and dealing with criminal prosecution in small scale piracy. The amendment of the law in increasing criminal assaults and punishment to be more severe totally becomes the problem of criminal justice procedure. The government organizations themselves play the role as the right protection in place of the right owner and again they stimulate more to the criminal prosecution process. From those reasons, it leads to less prosecution in civil offence. (Chumpol Pinyosinwat : B.E.2552 Principal Reason of Intellectual Property Right's Protection).

Once the copyright infringement occurs, it is necessary to consider whether the application of criminal penalty is suitable or not. As noted that the principal aspect of right protection is accorded to economic aspect as its need is to stimulate innovative creations to the society. Thus principal aspect of right protection could steer the monopoly of creators. However, the principal aspect of criminal punishment is based on peaceful and good morality of people. The statistic of Intellectual Property Court prosecution found that most of the decisions of copyright cases were sentenced suspensions or fined without imprisonment. These are the

reasons why offenders were not afraid of the law and the law now becomes inapplicable. Thus, the aspect of right protection should be revised whether the criminal strategy according to the Copyright Act B.E.2537 can apply to the suppression procedure or it can manage with the copyright piracy convict or not.

The problems of the intellectual property law enforcement are ; Firstly, the offence accorded to Section 27-31 where there is no promulgation provision on behavioral piracy, no behavioral characterization and volume of damages related to copyright piracy. Secondly, the imprisonment and fine provision according to Section 69-70 regulated minimum punishment to be high where it leads to the justice disadvantage since it cannot impose the penalty to be suitable for the fact of each case. Thirdly, injured persons preferred to take criminal prosecution rather than civil prosecution which affect the basic principal in copyright protection. Fourthly, pursuing from injured person side in making offender to breaking the law, affected government officers authorities as well as citizen's right and freedom of the public, seem to be problem. Fifthly, law stipulated that copyright piracy is a compoundable offence effects the loss of government budget in justice procedure since the injured person would utilize criminality as their tools in negotiating for the compensation by offender did not realize for their criminal action and also they keep repeating copyright piracy as a criminal cycling. Finally, the problem of collecting benefits from the use of copyright which seems to be unfair and duplicate from the offender. And also the right's owner did not get benefit from the use of their own copyright . The said problems lead to magistrate in criminal justice procedure, called over criminalization.

According to the Copyright Act B.E.2537, various measures in suppressing of copyright piracy have been mentioned. 1. Criminal measure in increasing of the penalty to be double as said in Section 73, piracy products fall to be of the right's owner and forfeiture of the relevant stuff for piracy commitment as said in Section 75, the provision promulgated for the offender to pay half of the court decision of fine to the right's owner as said in Section 76 . They are all methods of civil damages combined with criminal penalty. 2. Civil measure where the court can use the decrement in deciding damages as suitable as said in Section 64 but the fact is that civil proof of damages are difficult to determine. 3. Administrative measure, by

giving the authority to the Director-General of the Intellectual Property Department, fine penalty to dispose criminal act from the court as said in Section 77. On the other hand, still there is no evidence of mentioned measure. The topics mentioned reflect the nature of problems that Thailand has focused only on criminal measure to copyright piracy suppression and the measures seem to be complicated.

### **The Important of Research Problem.**

Researcher has analyzed the enforcement of Copyright Act B.E 2537 as followed;

1.1.1 Copyright Act B.E.2537 stipulated criminal punishment and penalty higher than the standard minimum of TRIPs Agreement, the international law. Thus, the difference in penalty determination can generate to prejudicial in Thai context.

1.1.2 The injured person prefers dealing with criminal prosecution rather than civil prosecution which has impact on the basic principal of copyright protection.

1.1.3. The problems of lure for sale, arrest and threaten, ask for monetary compromise along with gather among injured person in group in buying the power of attorney from the right's owner to threaten for money instead of case prosecution always exist.

1.1.4 The problem of collecting the use of copyright work piece is unfair and duplicate Song creators occasionally complained that the company did not contribute to them.

Since the Copyright Act B.E.2537 focuses on the protection of the right's owner as exclusive right and broadly defines the characteristic of the piracy leads to unfair of the enforcement of the law and result bad impact on criminal justice procedure. It is understood that economic reason is an crucial aspect of which states all over the world protect copyright. On the contrary, Thailand stipulated the Copyright Act B.E.2537 where severe punishment for small scale piracy and implementation of civil prosecution combined with criminal enforcement still exist. And that even though, injured person prefer using criminal measure as a tool in prosecuting the piracy case, it does not make the offender aware of those prosecutions. This is because the entrepreneurs often hire child labor or alien labor as

a vendors of piracy products. If they are arrested, there would be new ones as circulating sellers but true offender who commits piracy crime did not get penalty, again the piracy problems did not decrease. The phenomenon becomes a critical concern of the international agenda to practice the anti- commercial measures for Thai exported product and leads to unfair practice since it is against the reason and philosophy of international copyright protection. Moreover, ineffective criminal enforcement did not harm the offender and is inapplicable.

In order to make measures according to the international standards to be fair and effective enforcement of copyright of Thai law must be mentioned as:

## **1.2 Research Problem**

As mentioned, Thai copyright law focuses on criminal prosecution and seems to be a crucial aspect to suppress copyright infringement. Civil measure is not effective enough to be applied and correspondingly the administrative measure does not even existed. Therefore, we should recognize that the exercise of criminal prosecution is suitable or not.

## **1.3 Research Objectives**

1.3.1 To analyze nature of problem and obstacles of the enforcement of Copyright Act B.E.2537

1.3.2 To study the suitability of the application of the international laws on copyright within Thai context.

1.3.3 To seek for international law measures where it can be suitable to apply for Thai law.

## **1.4 Research Questions**

How to the application of international law on copyright is suitable within Thai context.

## **1.5 Hypothesis**

1.5.1. The officers working in the justice procedure agree upon that the application of international laws within Thai context is suitable or not and in which level.

1.5.2 Organizational group within the justice procedure have different ideas on the application of international laws in Thai context.

1.5.3 General public think that the application of international law is suitable in Thai context or not and in which level they are suitable.

## **1.6 Research Conceptual Framework.**

1.6.1 To study natures of problems and obstacles on law enforcement of the Copyright Act B.E.2537 from the quantitative group conversation and in- depth officers' interview who work in the justice procedure. Survey quantitative data on officers who work in justice procedure.

1.6.2 From the study of suitability of international laws within Thai context by using qualitative research (literature revision, conversation, in- depth interview) found that 3 measures as follows have been mentioned.

1.6.2.1 Model establishment for the application of the international laws

**First Model** Measure for the punishment proportion to be suitable for the level copyright piracy such as, general piracy, small scale piracy or commercial scale piracy.

Level	Action	Criteria	Domestic measure	International measure	Penalty
1.	general	-not exploitation - can not calculate in money	-civil offence not criminal offence	-	Double fine of virtue damages
2.	small scale for sale	-earn income from copyright piracy not more than 75,000 baht -own piracy products more than 10 pieces for sale	-compoundable offence	-punitive damages -commercial scale	-fine of 50,000-100,000 baht or 2 months to 3 years imprisonment
3.	commercial scale	-earn income from copyright piracy more than 75,000 baht -have organized crime characteristic	-public offence	-punitive damages -commercial scale -controlled operation	-fine of 400,000 to 1,600,000 baht -1 -4 years imprisonment -forfeit of property

**Second Model:** Punitive damages

Civil Measures	Criteria
(Normal Damages)	- Lost Profits) - Royalty
(Additional Damages)	- Double Compensation
(Account Profits)	- Reinstitutionary - Unjust Enrichment
(Injunctive Relieve)	- Asking for court decision to stop and prevent offender from copyright piracy action

**Third Model:** Measure to control officer's operation (Controlled Operations)

Officer	Operational Model	Condition	Operational Plan	Report
-operational officer submits the operational plan	-set up the duration -operational method	-must not pursue anyone to involved with piracy action -not involve with action that have risk for body and other's property damages	-require information before the operation -have reasonable cause to believe that there has been an action of piracy and it was -not a random sampling	-must submit a report to superior level
-superior level endorses the operational plan	-got written permission from superior level	-operation can be withdrawn if it is not suitable	-endorsed by law that the operation is accordance with the law	-superior have to submit the report to the National Police Commander or Director-General of DSI, as suitable

1.6.2.2 To inspect the possibility of the above model from the quantitative research among officers concerned with the copyright enforcement procedure numbering 150 persons and the public numbering 400 persons

1.6.2.3 Data gained from those persons will be analyzed and synthesized to adapt the research as the guideline to the suitable application of the international laws within Thai context.



## 1.7 Scope of research

The study of 3 models consisting of 1. Commercial scale measure 2. Punitive damages measure and 3. Controlled operation measure which have been the international standard measures to be used as the guideline to the Copyright Act B.E.2537

## 1.8 Definition

**International standard measure** means measures of law where developed countries use to apply for management of copyright problems such as measure in defining punishment proportion to be suitable for the copyright piracy level, measure in setting up additional damages other than general damage along with measure to suppress a large scale of copyright piracy.

**Measure in limiting volume execution** to define copyright piracy for commercial scale relies on criminal offence. It means that the punishment proportion must be suitable for the copyright infringement scale where it can divide into 3 level as; general infringement, infringement for sale in small scale and infringement for commercial scale.

**The increased of civil punishment (Punitive Damages)** includes additional damages other than general indemnity which stipulate that the offenders has to compensate injured person in response to the level of their action of copyright piracy. For instance, it obliges offenders to pay indemnity for penalty of fine to be double, profits accounting, institutionary on the basis of unjust enrichment.

**Measure in controlling officer's operation (Controlled Operation)** means the investigative method that enforcement officers may involve with breaching of their duties should 1) submit the operational plan before the implementation and it shall be endorsed in writing from superior officer 2) setting the duration and method of the operation by having cause to believe that there has been the existing of piracy offence (not a random sampling and endorsed that the operation is according to the law) and 4) submit the operational report to a superior officer as the way to inspect the operation.

**Copyright law means Copyright Act B.E.2537**

Fairness means the balance between private benefits of the right owner and public benefits and the right and freedom of persons (Berne Convention Article 9 (1) and the provision of Intellectual Property and International Trade Offence B.E.2540 Section 5.)

**1.9 Significance of the study**

1.9.1 Measure in commercial scale will decrease criminal offences, budget saving in suppressing copyright crime and also leads to a suitable punishment proportion. This would be done by amending the copyright Act B.E.2537, the first paragraph of section 69 and 70.

1.9.2 Punitive Damages measure will help injured person to be remedied in getting a suitable amount of compensation and also the civil offence prosecution will be increasing. It ensues government income from the court fee. This can be done by amending the Copyright Act B.B.2537 Section 64.

1.9.3. Controlled Operations measure will reduce the burden tasks of the officers involved with criminal justice procedure in small scale cases. On the other hand, they could work more effectively with complicated cases in order to protect people's right and freedom. This can be done by amending the Copyright Act B.E.2537 Section 66 by separating the action of compoundable offence from public offence.

## **CHAPTER II**

### **LITERATURE REVIEW**

Philosophy, Theoretical Concept and Relevant Researches

2.1 Concepts and theory related to copyright protection

2.2 Concept on Copyright Protection related to International Agreements according to TRIPs Agreement

2.3 The analysis of Copyright infringement solution in Thailand compare with foreign countries

2.4 Universal measures

2.5 Relevant researches

#### **2.1 Concepts and theory related to copyright protection**

Copyright was obviously developed in 16th century from regulation used among members of the publishers and book sellers called “stationer’s company”. In England, when the publishers were influential and took part in regulative decision to control and monopolize printing business including the use of criminal process as a censorship of the infringers. These exclusive rights have developed to monopoly right in printing business.

Thailand has especially had a substantive and procedural law on copyright protection such as Copyright Act B.E.2537, The Establishing of Intellectual Property and International Trade Court Act B.E. 2539 and Intellectual Property Procedural Regulations B.E.2540. Since the intellectual property cases differed from general civil and criminal cases so the cases will be prosecuted by judges and associate judges who have expertise on intellectual property. That process will facilitate to general public.

Regulations in Section 5. “the prosecution of intellectual property case must be balancing between the right owner and public interest especially in education research and data accessing”.

Copyright means right granted by law to produce and sell literary works, plays, films, photographs, piece of music, symbol (c) acknowledge expressed the copyright protection. (Cambridge University. Cambridge Advanced Learner’s Dictionary, p. 271).

Intellect in the meaning of Intellectual Property means everything created by exercise of human brain (Phillips Jeremy and Alison Firth, Introduction to Intellectual Property Law, 2nd edition, (London, Dublin, Edinburgh: Butterworths, 1990), p.3.) or creation of the mind ...used in commerce (“World Intellectual Property Organization 1967, “What is Intellectual Property?”, (Home <about WIPO <about Intellectual Property), <http://www.wipo.int/about-ip/en/>>.). Andose creations have been protected by law (A.S.Hornby, Oxford Advanced Learner’s Dictionary of Current English, Sixth edition, (Great Britain: Oxford University Press, 2001), p.623.).

The copyright has been protected for many centuries, from the invention of printer in 1450 which make a great development in literary work such as the producing of mass literary works in a short time. As a result, people can read more and leads to a new business. The publishers and book sellers have to invest vast of money in production but they have to lose profit because the infringers copy their works and selling to the public. England government launched Statute of Queen Ann 1709 which can be recognized the first copyright law in the world to grant exclusive right to the stationers to reproduce and selling books and remedy the copyright owner in case of infringing occurred. For instance, fine and forfeiture or damages claiming. It implies this copyright law protects publishers and book sellers rather than the authors. (Thatchai Suphonsiri Copyright Law.3rd edition. Bangkok: Nititham Publishing.2544 p.2-3).

The reason why the law grant monopoly right to the creator is to motivate the creator with compensation and benefit. These remuneration can be compensated the expenses which creator use the expenditure in creating and will be the income for private right of these creators.

**The purposes of intellectual property protection are:**

1. The economic growth
2. The stimulation or promotion of technological progress
3. The benefits of society

**The character of copyright****Exclusive Rights**

Copyright is the right granted by law as the general property right which is beyond the creative innovation of human's brain. The right owners authorize others to use their creative work which they developed such right was technically called "Exclusive Right". It is noticeably that the exclusive right does not mean "Ownership" of that work but the right owner may reproduce or adapt or sell or communicate to public or use such work.

Exclusive rights granted by intellectual property law are negative rights which may not assume what the right owner can do with his work but the right owner authorizes to prohibit any person to perform any action to his work.

The substantial of exclusive right does not mean that the right owner does anything to his work but depend on the right granted by the law, any person cannot perform any action without the right owner's permission. Any person who violate the foresaid shall be deemed as infringement of copyright. The right owner shall be protected and remedied by the court.

Function of intellectual property laws are to deter any person from unauthorized duplication of their work.

**Background of Criminal Penalty and Intellectual Property Law in Thailand**

In the past, Thai law did not obviously separate the criminal and civil liability from each other. Later, Thai regulations have been developed and reformed as the first Penal Code and the penalty of intellectual property infringement has been started at the announcement of the Wachirayan Library B.E.2435 with sanction, which meant the first copyright law of Thailand.

When partied to the Berne Convention, Thailand has implemented its promulgation by issuing the Literature and Art Protection Act B.E.2474 section 25 but the penalty for infringement was only fine and confiscation.

Later, the copyright law has been developed in 1978 called the Copyright Act B.E.2521 to expand the protection of copyright works and increase the penalty to 200,000 baht of fine or 1 year imprisonment and impose as a compoundable offence. As Thailand participated in World Trade Organizations, Thailand had to amend the regulations to meet TRIPs minimum standard and set up serious penalty such as one half of the find paid in accordance with the judgment shall be paid to the owner of the copyright and the four years imprisonment and maximum fine 200,000 to 800,000 baht.

## **2.2 Concept on Copyright Protection related to International Agreements according to TRIPs Agreement**

Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement) is agreement between member countries of World Trade Organizations (WTO).

The achievement in establishing WTO is the latest development of regulation between member countries to intellectual property protection under the GATT Negotiation (Uruguay Round). The agenda contained trade related intellectual property right proposed by industrial member countries where they have economic benefits in intellectual property right protection. These countries realized that regulations related to intellectual property right in existing international agreements was insufficient because it had no sanctions in case member countries could not comply with the regulations.

New mechanism which bond intellectual property protection with international trade was agreement on intellectual property right related to trade or TRIPs which was effective on January 1, 1995. Finally, the intellectual property right protection was completely raised to international level.

TRIPs agreement was the first and only one section of international agreement related to intellectual property right which stipulated criminal liability.

The provisions of Intellectual Property Rights Enforcement is in Part III. “Enforcement of Intellectual Property Rights” as follows

General Obligations , “Article 41 Civil and Administrative Procedures and Remedies” Article 42-49 Provisional Measures , Article 50 Special Requirements Related to Border Measures, Article 51-60

### **Criminal Procedures**

TRIPS Agreement, “ Article 61 Members shall provide for criminal procedures and penalties to be applied at least in cases of willful trademark counterfeiting or copyright piracy on a commercial scale . Remedies available shall include imprisonment and/ or monetary fines sufficient to provide a deterrent, consistently with the level of penalties applied for crimes of a corresponding gravity. In appropriate cases, remedies available shall also include the seizure, forfeiture and destruction of the infringing goods and of any materials and implements the predominant use of which have been in the commission of the offence. Members may provide for criminal procedures and penalties to be applied in other cases of infringement of intellectual property rights, in particular where they are committed willfully and on a commercial scale.”

The liability of the said article limits only the commercial scale infringement that TRIPs agreement mainly focuses on efficient civil prosecution and custom process. But criminal prosecution according to Article 61 is just to set up measure to the right.

In the researcher’s view, it is impossible to prescribe the principal of copyright law among countries as an unification since copyright is an exclusive right in intangible form depend on that policies in copyright protection of each country. State policies to harmonize between public interests and copyright owner’s rights may differ according to society, laws, cultures of such countries, therefore law system cannot be enforced within the same framework .

## 2.3. The Analysis of Copyright Infringement Solution in Thailand Compared with Foreign Countries

### 2.3.1 A Comparative Study with England

England has promulgated a copyright law called “The Copyright Act, Statute of Anne” in 1709 accounted for the world first copyright protection approved by the House to add a copyright to a creative in order to counterbalance the copyright of the publishers by protecting the prose.

Later, England has a bill of **Copyright, Designs and Patents Act 1988** coded on the copyright infringement related to:

**Section 107:** the copyright infringements deemed criminal are the primary infringement and the secondary infringement **aimed for trading or gains**, imported to the United Kingdom by otherwise for one’s family benefits and for the family’s benefit, disseminated by other way besides trading with **volumes destructive to the copyright owner**, and duplicating which infringes the copyright for selling or for leasing or **for the benefits of trading**.

England has least exercised the criminal justice on copyright infringement. The owner sues civil proceedings for direct fines and compensation. Particularly, in the proof of evidence in a civil proceeding, the plaintiff will gain more than a criminal case. The plaintiff just verifies that there is more justifiable evidence which is called the “ Balance of Probabilities Copyright, Designs and Patents Act 1988” coded the criminal responsibility for a copyright infringement both in the primary and in the secondary infringement where they are both coded in the Section 107.

Section 107 imposes the criminal punishment in both levels which are depended upon each offense, i.e. imposing the offense of production for selling or for leasing. Importing or distributing goods of copyright infringement is liable to punishment as in Section 107(4). Whereas the punishment on charges of possession for business, selling or leasing, proposed selling or leasing, disseminating to public and other offenses are liable to punishment as in Section 107(5); therewith the punishments are coded in Section 107(4) and (5), i.e.



**Section 107...**

(4) A person guilty of an offence under subsection (1) (a), (b), (d) (IV) or (e) is liable to:-

(a) On summary conviction to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum, or both;

(b) On conviction on indictment to a fine or imprisonment for a term not exceeding two years, or both. (5) A person guilty of any other offence under this section is liable on summary conviction to imprisonment for a term not exceeding six months or a fine not exceeding level 5 on the standard scale, or both.

Summary of Section 107 – the criminal punishment of production for selling or leasing, importing or distribution of the copyright infringement is imprisonment for a term not exceeding two years or a fine or both. Whereas as the criminal punishment of possession for business, selling or leasing , proposed selling or leasing , disseminating to public and other offenses are imprisonment for a term not exceeding six months or a fine or both.

The criminal offense against right of performances has been divided into another Section in the Copyright, Designs and Patents Act 1988, Section 198. The structure and the criminal offense of infringing the right of performances are similar to the copyright infringement. The coded criminal punishments are in Section 198 (5) and (6) which equates the copyright infringement, i.e.

**Section 198 ...**

(5) A person guilty of an offence under subsection (1) (a), (b) or (d) (iii) is liable to -

(a) On summary conviction to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum, or both;

(b) On conviction on indictment to a fine or imprisonment for a term not exceeding two years, or both.

(6) A person guilty of any other offence under this section is liable on summary conviction to a fine not exceeding level 5 on the standard scale or imprisonment for a term not exceeding six months, or both.

Summary of Section 108 – the criminal punishment for selling or leasing, importing or distributing is imposed as in Section 198(5), which is an imprisonment

for a term not exceeding two years or a fine or both. Whereas the criminal punishment on possession for business, selling or leasing, proposed selling or leasing, disseminating to public and other offenses are liable to the punishment as in Section 198(6), i.e. imprisonment for a term not exceeding six months or a fine or both.

**Civil Measures** started from the right enforcement before trial are the interim injunctions, stopping importation, final injunction, delivery up, monetary awards, and account of profits.

## **A Comparative Analysis between England and Thailand**

### **Government system**

The history of copyright in England is the matter of continuous and prolong strive of the publishers and the distributors of prose who attempt to secure and to expand their monopoly right with the public sector which attempts to restrict the monopoly right claiming the natural law. It has been mounted in the 16<sup>th</sup> century in the form of sovereign conferred to the Stationers Company by case and in charter.

### **Legal system**

England imposes Common Law. The punishment justification coded in the Copyright, Designs and Patents Act 1988 in Section 107, 108 has two levels – objectives to trading or seeking profits and to for trading with the amount damaging the copyright owner. On the contrary, the Thai law on copyright never distributes the levels of offense.

A civil copyright lawsuit in England is generally filed in the County court or High court (Chancery Division) depended on the amount of the capital whereas the criminal lawsuit is under the jurisdiction of the Magistrates Court.

In Thailand regardless civil case or criminal case, it is under the jurisdiction of the Intellectual Property and International Trade Court as in Section 3 and 7 in the Court Establishment Acts.

### **Social dimension**

Benefits from the monopoly right are mainly for the capitalist rather than the creative. It is similar with the Thai social dimension and it is against the rationale of monopoly constituted to be the incentive for the creative and it does not serve the public benefits.

The Anglo-Saxon system or the duplication right gives importance to the copy of the work by giving the importance in preventing duplication, preventing other to unlawfully disturb the work with copyright. In recent historical development, there have been many copyright amendments considering whether the necessity to code criminal punishment influence the appropriateness of selecting criminal prosecution and affect the right and liberty of persons in societies.

#### **2.3.2. A Comparative Study with USA**

The most importance of developing the right protection in USA is to scope the right in the US. Constitution Article 1, Section 8, Clause 8.

To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.

USA is a country which leads promoting intellectual property and the success of the policy in promoting intellectual property boosts its economic growth and UK is the forefront country which runs such policy<sup>1</sup>

The US Copyright Act 1976 has been amended into 17 sections in US Codes (51 sections). The provisions in this law has been enforced in January 1, 1978 and compiled into the Codes in Section 17 of the US codes. It will henceforward be called Title 17. Later in 1980, it was amended to file software computer as a prose (Section 17, Article 102) and permitted modification of the computer program (Title 17 Section 117) in October 1988. 1988. The Bono Copyright Extension Term Act has been coded to extend the period to protect copyright works especially about the

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<sup>1</sup> Reports of a Synthesis on the Study of the Policy Promoting Intellectual Property in Educational Institutions conducted by Assoc. Prof. Dr. Chanita Rakphollamuang et. al., sponsored by Office of the Educational Council, 2007, p. 221).

duplication in library and archiving, fair uses, monopoly, common use of the computer and other similar IT systems.

The right owners in USA enforce their right in the copyright through civil lawsuit as the principle in enforcing the civil right and it is divided into two major types, i.e. injunctive relief and monetary awards.

**Civil liability** in USA has the principle that what act is a copyright infringement in the Copyright Act 1976 by specifying **civil liability** between the infringers and the copyright owners only. Whereas the criminal offense must be an act with intention for trading benefits or monetary benefits or intention to badge the copyright notice unlawfully, and to remove the copyright notice only.

There is no international copyright for the creative around the world automatically. The protection of the copyright works from the disallowed persons relies on the domestic laws. However, almost every country protects foreign copyright by the conditions in the treaties or the conventions stated the international copyright protection. There are two major conventions, i.e. the Berne Convention for the Protection of Literary and Artistic Works (The Berne Convention) and Universal Copyright Convention 1971.

USA has joined the Berne Convention in March 1, 1989 but joined the UCC since September 16, 1955. Normally, the creative works of the people in the country members or having been firstly advertised in the country members or within 30 days since the first advertisement in the country members will be protected under the convention. The Berne Convention has no protocols but the UCC will be connected with pattern copyright and within the position the UCC specifies. The statement of copyright will be symbolized with the circle C, the first year advertisement, and the name of the copyright owner. Such statements must be in the easily eye-catching position but the Berne Convention prohibits protocols which affect the copyright affairs, USA has then amended it in March 1, 1989 to optionalize copyright either to do or not to do. The US laws still reserve such copyright to prevent defendants suing back on copyright infringement without knowledge.

**Injunctive relief:** the copyright owners are usually pleading temporal injunctive relief with civil monetary awards; where the copyright owners plead

temporal injunctive relief for the infringers or the defendants to stop or to halt the copyright infringement.

The court petition procedures for injunctive relief made by the copyright owners of the intellectual property find necessity for investigation or complete exposure of evidences like in the trial. But, it is just the petitioner shows primary evidences with conditions and reasons liable for the petition of temporal injunctive relief. The four evidences are summarized as follows.<sup>2</sup>

1. It is legible that the case prosecuted the petitioner can display self-right and copyright infringement.
2. The petitioner would face serious damages if there is no injunctive relief at first.
3. Weighing all parties' benefits; the benefits of the petitioner on the damages protection are higher than the damages of the accused; then the court orders injunctive relief.
4. The injunctive relief ordered by court will be in compliance to and never conflict of the common good.

### **Monetary awards**

In the case of copyright; the owner may claim damages as in the United States Codes, Title 17, Chapter 5, § 504 (b) (Actual Damages and Profits- The copyright owner is entitled to recover the actual damages suffered by him or her as the result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages. In establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work.

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<sup>2</sup> (See John F. Hornick ET AL., "USA," in International Intellectual Property Litigation, Volume 2, David Harriss & Hilary Newiss eds., (1988, 2006), p. USA/115. Also see Michael A. Epstein, *supra* note 79, pp. 5-62 – 5-63.)

### **Criminal right enforcement**

The criminal trials of copyright infringement are least found. Criminal prosecutions in USA are imposed by the public agencies only. The criminal trials of copyright in the US courts enforce the criminal proof as the standardized criteria for the ruling. It leads the state or the public prosecutors are burdened with criminal proofs higher than the civil standards with the same case.

Punishment justification in the copyright law must be willfully and **for purposes of commercial advantage or private financial gain**. The first US copyright infringement was in 1897 in a petty offense similarly to petty punishment called “misdemeanor”. Until the amendments of the copyright law in 1982, some criminal liabilities have been altered into the general criminal offense or ‘felony’ and increased more punishment as found at present.<sup>3</sup>

**Copyright Act of 1976 Section 506 (a)** is the criminal offense code of copyright infringement and the punishment has been impose in two copies. Most statutes of the infringement component are include in the criminal law, i.e. United States , Code, Title 17 – Copyrights while the punishment imposed in the criminal procedural laws, i.e.

United States Code, Title 18–Crimes and Criminal Procedure

17 U.S.C. § 506(a)

§ 506 Criminal offense

(a) Criminal infringement.-

(1) In General. - Any person who willfully infringes a copyright shall be punished as provided under section 2319 - of title 18, if the infringement was committed for purposes of commercial advantage or private financial gain ...”

18 U.S.C. §2319(b)

§ 2319 Criminal Infringement of a copyright ...

Any person who commits an offense under section 506(a) (1) (A) of title 17 –

(1) Shall be imprisoned not more than 5 years, or fined in the amount set forth in this title, or both, if the offense consists of the reproduction or distribution,

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<sup>3</sup> See Michael Coblenz, “intellectual property crimes.” 9 Alb. L. I. Sci, & Tech, 235, p.244 (1999).

including by electronic means, during any 180-day period, of at least 10 copies or photo records, of 1 or more copyrighted works, which have a total retail value of more than \$ 2,500

(2) Shall be imprisoned not more than 10 years, or fined in the amount set forth in this title, or both, if the offense is a second or subsequent offense under paragraph (1); and

(3) Shall be imprisoned not more than 1 year, or fined in the amount set forth in this title, or both, in this title, or both, in any other cases.

### **Title 17 U.S.C. § 506 (a) (1) (A)**

#### **§ 506 Criminal offense**

In general - - Any person who willfully infringes a copyright shall be punished as provided under section 2319 - of title 18, if the infringement was committed by

**-- for purposes of commercial advantage or private financial gain ...”**

### **Title 18 U.S.C. §2319**

§ 2319 Criminal Infringement of a copyright ... Any person who commits an offense under section 506(a) (1) (A) of title 17.....

Felony (1) subject to punishment with a term of not exceeding five years or a fine not exceeding what is specified in the law or both. Should the offense connects to the reproduction or distribution including the acts by electronic means and **not less than 10 copies** or phonorecords of 1 or more copyrighted works, **during any 180-day period**, which have a total retail value of more **than \$ 2,500**.

(2) subject to imprisonment for a term of not exceeding 10 years or a fine not exceeding as specified in this law or both; should the offense is the reproduction or consequential to the offense in (1).

**Misdemeanor** (3) is subject to imprisonment for a term of not exceeding 1 year or a fine not exceeding as specified in this law or both. On other cases besides mentioned are very few and counted the petty offenses.

The US laws do not want to infringe what is the commercial scale but with what with objectives for the purposes of commercial and advantage or private

financial gain through differing between the financial gains infringement and the non-financial gains infringement.<sup>4</sup>

### **Quantity of the intellectual property cases**

The sources are from Bureau of Justice Statistics , Special Report, Federal Justice Statistics program, US Department of Justice, October 2004 and Progress Report of the Department of Justice's Task Force on Intellectual Property, Department of Justice, June 2006.

**Table 2.1** Quantity of the intellectual property cases in the U.S. District Court

AD	Total	civil	percent	criminal	percent
2001	8,466	8,314	98.20	152	1.80
2002	8,385	8,254	98.44	131	1.56
2003	9,096	8,934	98.22	162	1.78
2004	9,719	9,590	98.67	129	1.33
2005	12,353	12,184	98.63	169	1.37

<http://www.usdoj.gov/opa/documents/ipreport61906.pdf>

### **A Comparative Analysis between USA and Thailand**

#### **Legal system**

Both UK and USA impose Common Law and code criteria to protect the written legal copyright.

Most intellectual property offenses in USA are civil cases and subject to the US district Court under its jurisdiction over the dispute of the copyright. Whereas, the criminal cases are subject to the jurisdiction of the courts authorized to try the common criminal cases without any criminal courts to specifically try the copyright cases and there are no specific criminal trial on the copyright cases. On the contrary, in Thailand, there is special court and specific trial of the copyright cases.

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<sup>4</sup> [www.wipo.int/edocs/lexdocs/laws/en/my/my020en.pdf](http://www.wipo.int/edocs/lexdocs/laws/en/my/my020en.pdf)



There is no criminal statute or compoundable offense against copyright infringement in USA as in Thailand.

### **Social dimension**

The concepts in USA and in EU countries are providing right of intellectual property for individuals will be an incentive to the scientific and artistic growth. This is to encourage individuals to be creative and innovative. USA remunerates with legal right for the creative by prohibiting other persons in societies use the work of the creative except permitted. With this rationale, the copyright owners in these countries do not understand why other countries can use them without prior permission and unnecessarily pay any compensation. The very critical issue in practice is the criminal prosecution against the copyright infringement which is restricted only infringing the mega-investment especially in the affairs connected to the international criminal organization, film copyright infringement and recorded materials without emphasis on the minor infringers or the daily-wage workers as in Thailand.

### **2.3.3 A Comparative Study with Japan**

#### **Civil right enforcement**

Pleading the injunctive relief is to file a petition to stop or to prevent any intellectual property copyright infringement or to amend or to relieve the impacts from such infringement with various measures enacted in each law of intellectual property.

Regarding the copyright, the owner holds rights to ask the infringers to immediately stop or to avoid the infringement. Also, the owner holds right to destroy objects or goods or devices and claims to impose necessary measures.

#### **Civil monetary awards**

**Copyright Law 1970, Article 114** codes the structure how to calculate damages by given the profit gained from each pieces of goods infringed and multiplied by the quantity of goods the owner potentially sells, should there be no infringement. However, the quantity of goods must not exceed the quantity of the copyright owners'

could produce during normalcy. In the case of damages from the lawsuit against different typed of intellectual property; the court may demand both parties to provide verbal statement or investigation for additional evidence.

### **Criminal right enforcement**

The criminal offense in selling or distributing goods of copyright infringement is divided into two Sections by the types of goods as in Section 119(i) and Section 120-2 and the case of the copyright infringed goods on recording is subject to Section 121-2.

“**Section 119:** the following offenses are subject to imprisonment for a term of not exceeding 5 years or a fine of not exceeding five million yens or both.

A copyright infringement against the creative; the right of copyright and the adjunct right (excluded the reproducers or exhibitions for the personal purposes fond in Section 3 Paragraph (1)”

**Section 121-2:** anyone who produces distributes or possesses for distribution of the reproduced phonorecords used in business affairs (included copies of recorded materials unused in business affairs but reproduced from the recorded copies used in business affairs) must be subject to imprisonment for a term not exceeding a year or a fine not exceeding a million yens or both. However, such the production, the distribution or the possession for distribution must be during 50 years counted from the years of recording those phonorecords.

In the procedures of police interrogation on the copyright infringement, the police inquire only upon being noticed from the copyright owner but there must be instruction of lawsuit by the copyright laws Section 119, Section 120-2 (iii) and (iv) and Section 121-2 but subject to the procedure in Section 123(1).

**Table 2.2** All intellectual property cases tried in the District Court

AD	Total	civil	percent	criminal	percent
2001	676	554	81.95	122	18.05
2002	696	607	87.21	89	12.79
2003	741	635	85.70	106	14.30
2004	850	654	76.94	196	23.06
2005	881	579	65.72	302	34.28

National Policy Agency, Heisei [White Paper on Police], 18 Nendo ed. (2006) [Japan], Intellectual Property High Court, “Statistics,”<sup>5</sup>

### **A Comparative Analysis between Japan and Thailand**

#### **Legal system**

Japan imposes Civil Law like Thailand

The civil case is subject to the principle of special jurisdiction from other common civil cases under the Civil Procedural Code of Japan Section 6-2 enacted the copyright cases (excluded the computer programming) are subject to the jurisdiction of the District Court of Tokyo and Osaka.

The criminal cases are subject to the District Court and under general criminal procedures.

#### **Social dimension**

When dispute arisen in using intellectual property right; the main pattern in right enforcement in Japan is to claim for civil monetary awards and injunctive relief. Regarding the criminal proceedings are exempted and least practices. In part of police and the public prosecutors in Japan, they have basic knowledge that the intellectual property is the civil right dispute and discretion to apply criminal measures is just by specific necessity only.

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<sup>5</sup> <http://www.ip.courts.go.jp/eng/documents/statistics.html>, 20 October 2006

#### **2.3.4. A Comparative Study with China**

The People's Republic of China is in the system of Civil Law and the responsibility for copyright infringement in China enacted in the same law, i.e. Criminal Law without separation into the intellectual property law.

The present Criminal Law of The People's Republic of China was enforced in July 1, 1979 and amended in March 14, 1997 adding the legislative act specifically for criminal offense against the property intellectual through amendments in the Part 2 on specific legislative act. Part 3 is the offense against interference on economic order in the socialist system. Part 7 is the intellectual property infringement, Articles 213-220.

Monetary awards in the copyright cases in China are critical pattern which the right owner of the intellectual property enforces right which meets the international standards and the practices enforced in the developed countries. Specifying damages values in the copyright cases is subject to:

**“Article 48** Where a copyright or a copyright related right is infringed, the infringer shall compensate for the actually injury suffered by the right holder; where the actual injury is difficult to compute, the damages shall be paid on the basis of the unlawful income of the infringer. The amount of damages shall also include the appropriate fees paid by the right holder to stop the infringing act.

Where the right holder's actual injury or infringer's Unlawful income cannot be determined, the People's court shall judge the damages not exceeding RMB 500,000 depending on the circumstances of the infringing act.”

#### **(The Copyright Law of the People's Republic of China, Article 48)**

In addition, on part of the copyright cases, there are many provisions related to civil liabilities such as The Copyright Law of the People's Republic of China, Article 46 and 47 enact patterns and responsibilities of the infringers in other pattern such as stopping the infringement, limiting impacts from the infringement, expressing apology, compensating damages. On the contrary, Article 51 authorizes the administrative officials responsible for ordering confiscation against illegitimate profits, confiscating goods and materials in infringing the copyright and so on.

### **Criminal right enforcement**

China enacts responsibility and criminal punishment in the copyright infringement in the same Criminal Law rather separates it into each intellectual property laws like in many countries. The Criminal Law of the People's Republic of China Article 217 is the copyright infringement on commercial for gain and Article 218 is the distribution of copyright infringement for commercial gains.

“**Article 218** - Whoever, for the purpose of making profits, knowingly sells works reproduced by infringing on the copyright of the owners as mentioned in Article 217 of this law shall, if the amount of illegal gains is huge, be sentenced to fixed-term imprisonment of not more than three years or criminal detention and shall also, or shall only, be fined” (The Criminal Law of the People's Republic of China, Article 218).

Enactment of the elements for the offense against Article 218 has been disputed that it creates uncertainty in the interpretation and the enforcement. Meaning, any copyright infringements are criminal or not are depended upon facts in each case and which case earns very high from the offense (Michael N. Schlesinger & Eric H. Smith, "Crimes of Copyright infringement in Chinese Intellectual Property Law and Practice" (1999) p.235).

Later, the Supreme People's Court regulates stipulations with the Supreme People's Procuratorate to scope area of criminal responsibility in Article 218 for various courts to follow in the same standards of further law enforcement. This stipulation is called "Interpretation by the Supreme People's Court and the Supreme People's Procuratorate on Several Issues of the Concrete Application of Laws in Handling Criminal Cases of Infringing Intellectual Property" and enforced in December 22, 2004.

**Article 6:** Whoever, for the purpose of making profits, commits any of the acts stipulated in article 218 of the Criminal Law, if the amount of illegal gains is more than **RMB 100,000** and thus falls under the definition of "the amount of illegal gains is huge" shall be sentenced to fixed-term imprisonment of not more than **three years** or criminal detention and shall also, or shall only, be fined for committing the crime of selling works reproduced by the infringing on the copyright.

The stipulation affects goods distribution of the copyright infringement for not more than RMB 100,000. Though there is no trial but such act is subject civil offense and administrative offense.

**Table 2.3** Statistics of intellectual property case categorized in percentage

AD	Total	civil	percent	criminal	percent	Admins.	percent
2004	15,484	12,205	78.82	2,753	17.78	526	3.40
2005	20,725	16,583	80.02	3,567	17.21	575	2.77

The numbers of the intellectual property case in the Supreme People's Court are grouped into civil cases, criminal cases and administrative (admins.) cases and the above table has been collected from many sources, i.e.

1. White Paper on the intellectual Property Rights Protection in China (1998-2005)
2. State Intellectual Property Office of P.R.C.<sup>6</sup>
3. Judicial Protection of IPR in China.<sup>7</sup>
4. Trademark Office, State Administration for Industry and Commerce.<sup>8</sup>

### **A Comparative Analysis between China and Thailand**

The government system of China is socialism mandated by a Communist Party on its national policy.

#### **Legal system**

China imposes written Civil Law as in Thailand and the copyright owners can claim lawsuit directly to the Supreme People's Court.

The pattern of enforcing criminal copyright in China is scoped just the mega-copyright infringement enacted that the damages are considerably large amount

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<sup>6</sup> <http://www.sipo.gov.cn/sipo> English

<sup>7</sup> <http://www.chinaiprlaw.com/English/info.htm>

<sup>8</sup> <http://www.ctmo.gov.cn/> (Cited in Joomphol Phinyosinwiwat. Rationale of Protecting Intellectual Property Right, pp. 334-335).

to meet the criminal offense. It is the consequence of the criminal law and the adjunct stipulation between the Supreme People's Court and the administration. Comparing to the Thai copyright law, it is found that the Thai law is so broader and limitless on the liability regardless small. As such the Thai law is incompliant to the international law standards.

### **Social dimension**

The socialist system is focused on the highest public goods and prior to individual rights.

The social and culture in the Asian region have no incentive for enforcing individual rights against intellectual property. Different societies in Asian region are influenced by Confucianism where community is the centralization and the sub-units determine individuality. Individuals will not be measured their worth with personal success but the community ones affiliated. Imitation is prevailing and normally, the Asian societies cleverly learn through imitating their ancestors or their elders, intellectual property, and the intellectual property right might not be the proper idea to the oriental societies.

### **2.3.5. A Comparative Study with Singapore**

The offense of copyright infringement in Singapore is against Section 136 (3A) of the Copyright Act 1988 stipulating elements of criminal offense as "Significance Offense" or "an Act of Commercial Advantage". It is added under the United States-Singapore Free Trade Agreement (USSFTA).

Section 136(3A) (Copyright Act 1988)

**Section 136(3A)** Where, at any time when copyright subsists in a work –

(a) a person does any act that constitutes an infringement of the copyright in a work other than an act referred to in subsection (1), (2), (3) or (6);

(b) The infringement of the copyright in the work by the person is willful;  
and

(c) Either or both of the following apply:

(i) The extent of the **infringement is significant**;

(ii) The person does the act to **obtain a commercial advantage**,

The person shall be guilty of an offence and shall be liable on conviction to a fine not exceeding **\$20,000** or to imprisonment for a term not exceeding **6 months** or to both and, in the case of a **second or subsequent offence**, to a fine not exceeding **\$50,000** or to imprisonment for a term not exceeding **3 years** or to both.<sup>9</sup>

### **Civil remedial measures**

The injunctive relief pleaded to court or after submission indictment to court; the monetary awards can be claimed through proving damages from the loss of sales volume, the loss of royalty and the loss of projected sale.

### **Criminal measures**

The punishment of disseminating literature, art performance or music to public or public movie for personal gain will be fined not exceeding S\$ 20,000 or a term of not exceeding 2-year imprisonment or both.

Any persons promote to sell reproduced computer program of copyright infringement in Singapore (regardless within or outside Singapore) excepted by an act of good faith and not knowing them as copyright infringement. The persons are subject to a fine of not exceeding S\$ 20,000 or a term of not exceeding 2-year imprisonment or both. Nevertheless, the broadcast and the computer program record are similar to reproduction of the computer program too.

In the case of the possessor of 5 copyright infringement goods are assumed as possession for other objectives rather than personal uses or possession for commercial advantage except proved otherwise.

The court holds authority to demand elimination of the copyright infringement goods or return them to the copyright owners as seen appropriate regardless the persons are guilty or not or the persons are convicted or not.<sup>10</sup>

### **A Comparative Analysis between Singapore and Thailand**

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<sup>9</sup> ([www.lawreform.go.th/lawreform/index.php?option=com...](http://www.lawreform.go.th/lawreform/index.php?option=com...) accessed 02.02.2013)

<sup>10</sup> (Translated by the Department of Intellectual Property, accessed in [http://www.ipthailand.go.th/ipthailand/index.php?option=com\\_docman&task=cat\\_view&gid=710&Itemid=600](http://www.ipthailand.go.th/ipthailand/index.php?option=com_docman&task=cat_view&gid=710&Itemid=600) on 16.04.2013)



### **Government system**

The Singaporean government is democracy with a President as Chief of the State. Singaporean politics is counted very stable since Singapore has been founded; the government comes from a sole party.

### **Legal system**

The Singaporean law is Common Law. In the civil case of copyright, the victims can file indictment with the Supreme Court. In the criminal case of copyright, it can be reported to the police for lawsuit or directly file the criminal case with the Supreme Court. The procedures are expected to be amended in the Copyright Act in the Amendment Copy.

With the annex strategy of AEC Blueprint, Item No.3: Intellectual Property Right which might be amended the copyright Act 1994 - effective use of copyright system. Meaning, all the country members in ASEAN are the members of WTO and stipulate criminal punishment in the copyright law to be compliant to the TRIPS agreement. However, the copyright law in ASEAN is differed such as the punishment stipulation in Section 69 of the Copyright Act 1994 demands so broad elements of criminal offense to copyright infringement without limiting the offense. On the contrary, in Singapore, Section 136 (3A) of the Copyright Act 1988 (Chapter 63) stipulating the criminal offense element as "Significance Offense" or "an Act of Commercial Advantage". Therefore, in the ASEAN unification, it is necessary to amend to stipulate the offense elements. At the meantime, to avoid discrimination of punishment in the copyright infringement in this ASEAN region, it might be done at the bilateral level such as USA and Singapore.

### **Social dimension**

Singapore emphasizes international trade because it has deep-sea mega ports worth docking cargo liners. They become the junction of trading assembly and delivery of free duty goods. There is also United States-Singapore Free Trade Agreement (USSFTA) with the implication by enacting laws to protect copyright infringement. It is found that modern copyright protection intertwined with

international trade which leads to the criminal punishment bound with international trade, taxation and tariff.

Summary of the analyzing Thailand and foreign countries shows that in abroad the dispute of copyright is mainly imposing monetary awards through civil lawsuit while the criminal measures is the duty of the state which has very few cases and only in necessity while having exceptions which is contradictory to Thailand.

## **2.4. International Law Measures**

**2.4.1 The measure to stipulate proportion of punishment appropriate to the copyright infringement behavior has been classified into 3 levels, i.e. common infringement, small scale commercial infringement and commercial scale infringement.**

The causes that the copyright law has to impose criminal enforcement are Thailand is the member of the Berne Convention and it has the duty to enact laws to evolve with the principle of the Convention and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement). Part 5, The Criminal Procedure No. 61 stipulates that the member state will stipulate the criminal procedure and punishment.....the copyright infringement in the commercial scale, monetary award includes imprisonment and /or a fine must be adequate to halt such acts. Nevertheless, it is corresponded with the level of punishment imposed on equated severity of crime.<sup>11</sup> In the Final Act Collecting the Multilateral Trade Negotiation at Uruguay Round: the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement): seminar handouts on New Principle in The Copyright Act 1994: trails of copyright infringement in the Intellectual Property and International Trade court, proposed by the Judicial Training Institute on October 14-15, 1995, p. 37). TRIPS No. 61 is just a minimum standards that the member countries have to stipulate the copyright infringement is subject to criminal punishment with the case

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<sup>11</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights, translated by the Department of Commercial Economy: Ministry of Commerce, October 1994).

having commercial scale only. Should infringement is non-commercial scale; it is not compulsory to impose criminal punishment.

However, the Copyright Act 1994 with provisions in Sections 69, 70 stipulates that on every copyright infringement deserves criminal punishment regardless being commercial scale or not and is subject to a fine from 20, 000 Baht to 200, 000 Baht. Should it were the act for commercial, it is subject to a term of imprisonment from six months to four years or a fine of 100, 000 Baht to 800,000 Baht or both. It is the maximum punishment. Besides, other punishments would in descending order. It is then found that the punishment is likely severe and it is to standardize the copyright infringement higher than the commitment done internationally. It is not necessarily to impose as such because it becomes over ill-effecting and unfair to the alleged. Consequently, enacting the copyright infringement in Thailand should be enacted only with the case of commercial scale only to deserve the criminal punishment. It is then corresponded with the international principles and fair to all parties.<sup>12</sup>

With the incongruity between the TRIPS agreement which is the international law and the Thai copyright law on offense and punishment as such leads to the number of petty cases unnecessarily flow into the justice administration. For example, selling an old CDs o and individual in the second-handed market or the garment shop opens music for its clients during shopping dresses which is non-commercial scale; the police have to unnecessarily investigate the accused and the public prosecutors have to order lawsuit with petty cases. Finally, the Intellectual Property and International Trade Court have to suspend punishment under the Criminal Code Section 56. It leads to the criminal punishment enforcement under the Copyright Act 1994 is meaningless and the Thai Copyright Law is not the Divine Law.

The punishment rate is indispensable in amendments. For example, a university student writes a few CDs to sell his classmates but meets with the punishment rate as an illegal factory of producing CDs. It currently creates so unfairness and problems because a petty misbehavior and the offense of commercial

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<sup>12</sup> Joomphol Phinyosinwat, 2009, Rationale of Protecting Intellectual Property right.

scale are subject to equal liability, i.e. 100,000 Baht under Section 69, Paragraph 2. The court cannot verdict the minimum punishment. The court replaces by discretion with awaiting sentence rising the copyright owners to criticize the law enforcement that the intellectual property copyright infringers deserve enough severe punishment in order to prevent offense.<sup>13</sup>

In 2007, a draft of the Copyright Act passed the consideration of the National Legislation Select Committee and amended with the 3 levels of punishment. The details can be found in the Copyright Act BE..., Appendix.

With the draft, the researcher comments that common offense of non-commercial scale by Section 69 Paragraph 1 should never be the criminal offense compared to the copyright laws in various countries above which stipulate the punishment justification must be the act for the commercial advantage or for financial gains, only. The researcher hierarchicalizes the copyright infringement as follows.

**Level 1: Common Copyright Infringement** – Were it without the intention for commercial scale or for financial gain; it is then not the criminal offense.

Due to the Thai cultural conscience, reproduction of the copyright works for personal uses or for personal entertainment is not wrong. Such action could be forgiven for the majority. However, social control has no other option better than criminal punishment for such prevention (The Act of piracy must be on a commercial scale).

**Level 2: Copyright Infringement of Small Size Commercial Scale** - this is a commercial scale in misbehaving.

Criteria is small size commercial scale intends trading or earn from the copyright infringement which is not exceeding 75, 000 Baht or possessing more than 10 copyright infringed goods for distribution.

This is compoundable offense because it is still the private law but given criminal offense because it is the state policy enacted as Mala Prohibita.

A fine of 50,000 Baht to 400,000 Baht or imprisonment terms of 3 months to 2 years are imposed (punishment by the Copyright Act, Section 70 Paragraph 2).

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<sup>13</sup> Letter of Ministry of Commerce, MOC0707/V1258 dated March 30, 2011 to the Office of Special Public Prosecutor in the Section of the cases of Intellectual Property and International Trade)

**Level 3: Copyright infringement for Commercial Scale** - the criteria for the commercial scale is to earn from the copyright infringement from more than 75,000B or characterized a criminal organization or individuals holding rights of controlling production, modification, distribution, dissemination or and uses the copyright performance valued from more than 75,000 Baht.

Infringement at his level is non-compoundable offense because there is relationship with severity against the common good or public danger.

Punishment is a fine of 400,000 Baht to 1,600,000 Baht and imprisonment term of a year to four years.

The measure imposed in suppressing the commercial-scale-copyright infringement is the Controlled Operations.

#### **2.4.2 More sever civil punishment measure – punitive damage**

The principle of copyright protection is founded on the economic principle. Generally, the court would impose a fine more than imprisonment. It proves that a copyright is characterized economic law to weigh significantly on compensation<sup>14</sup>

Copyright is a civil right aimed at the creative to claim compensations from the infringers whereas in punishment justification, the state has to examine direct harm of the act against societies and has to be conscious whether the nature of action is distorted from norms and sanctioned by punishment justification by societies. Should the action harm societies and grave which deserves criminal offense, it is then liable to enact infringement and criminal punishment. However, the rate of punishment has to be appropriate with such offense.<sup>15</sup>

The Social Science Research council in USA studying many third-World countries finds that since 2000, there are no data indicating the suppression of copyright infringements at what levels has decreased any infringement regardless of

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<sup>14</sup> Asst. Prof. Dr. Sommai Janrueng, 2013:69, Bar Association.

<sup>15</sup> Sakol Nisarath, 'Criminal Law and Appropriate Punishment: the philosophical concept and social justice, 2002, pp.62-75).

nations. Break-in to arrest hundreds leads to tens in lawsuit whom the states wish no imprisonment because prisons serve for graver cases.<sup>16</sup>

Break-in suppression by practices is randomized and it is just a tool to annihilate competitors in the same enterprise who infringe the copyright. Suppression enormously drains the state budgets but the infringement never decreases. However, the riddles found in France when the state agencies responsible for searches and arrests on online infringement such as the HATOPI, they cannot evidently reduce copyright infringements though 12 million euro have annually been spent.<sup>17</sup>

The civil measures under the Copyright Act 1994 Section 64 enacts the court to use discretion to determine damages by appropriation through considering severity of the damages, benefit losses and necessary expenses in enforcing by rights of the copyright owners. From the studies of the Supreme Court verdicts, it was that the monetary awards based on income loss and the lost profits are not evident within the similar fact. On the contrary, the court imposes different monetary awards (The Supreme Court Verdict No. 7807/1999 and 7206/1999). The adjustment and the interpretation of Section 64 reveal that criteria on the charge of monetary awards in the case of copyright infringement and infringement in general under the Civil and Commerce Act, Section 438 are founded on only offense in order to pay the compensation damages. It shows that proving civil damages in many cases is hard. Therefore, the fine is enacted with high rate in order to divide it to the copyright owners stipulated in Section 76.

The recent amendment of the Intellectual Property Law disregards the uniqueness of the intellectual property right. The law improvement is not for effectiveness in the civil procedures and disregards the harmonization with the international agreement under the righteous understanding. On the contrary, it just enacts criminal offense and accrued criminal punishment.

By the criminal and civil case statistics presented in the trails of the Central court of Intellectual Property and International Trade, it is found that most

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<sup>16</sup> Joe Karaganis, "Rethinking Piracy" in Media Piracy in Emerging Economy, edited by Joe Karaganis, (USA: Social Science Research Council, 2011, pp. 1-73 )

<sup>17</sup><http://torrentfreak.com/three-strikes-anti-piracy-budget-too-expensive-to-justify-says-minister-120603/>).

trials of the copyright infringements are prosecution. This is because the victims plead not civil trials but prosecution. This leads to the private bodies make use of the state arms exploiting police, public prosecutors, and courts to be their tools to crack the copyright infringers because it is speedy, severe and ensuring. Meaning, the alleged have to struggle to find security for bailouts or to find money for compensation in order to withdraw the cases including hiring lawyers for defense. It is unfair for the alleged but rises the state expenses of criminal justice administration in the entire offices involved which includes the suppression budget.

With the low proportion of the copyright infringements and they are the matter of private bodies regarding mainly on money and benefits and it is not the matter of peace and order and morality of the people while the victims must pay court fees at 2.50% per the amount of the trial capital under the Ministerial Rule No. 1(1) of the code of Civil Procedure. Contradictory, there are no court fees for the criminal case. The victims thus exploit police, public prosecutors and courts as tools to negotiate monetary awards. This is unfair and so critically impacting social. Therefore, encouraging the private bodies to optimize civil measures is more appropriate than to apply criminal measures.

The research is interested to study the measure of monetary awards in the case of copyright infringement in terms of punitive damages such as doubled compensation is fully relievable to the victimized copyright owner. In the meantime, it can halt copyright infringement which increases effectiveness of the civil measures. This will turn the copyright owners to more use civil measures and better follow the principle of justice administration.<sup>18</sup>

The punitive damages are the additional costs beside common indemnity enforced to the infringer to compensate the victim for the violence of the infringement.

England is the first country enforcing criteria of monetary awards in court. It has been critically developed from the criteria of punishment justification. It rises from a hostile act against sentiment and immoral act as the indicators of infringement or not. Some lawyers comment that punitive damages are characterized criminal punishment which does not serve the case of copyright infringement because it is the

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<sup>18</sup> Kanyathida Bosuwan, 2009, p.1 – Law Development in Specifying Monetary Awards in The Case of Thesis Copyright: Master of Law Program, Private Law, School of Laws: Thammasart University).

civil case. Some comment that punitive damages are truly useful to be the serious action taken against infringement.

The civil measures in the Copyright Act of England are Copyright, Designs and Patent Act 1988

**Section 96 - Infringement actionable by copyright owner**

(2) In an action for infringement of copyright all such relief by way of damages, injunctions, accounts or otherwise is available to the plaintiff as is available in respect of the infringement of any other property right.<sup>19</sup>

Damages can be classified as follows:

1. Normal Damages are the lost profits and the royalty<sup>20</sup>

In some cases, the lost profits or the royalty alone are not the best appropriate relief. The case of Gerber Garment Technology V Lectra Systems RPC443, 486 (CA: 1997); the defendant sells 25 copyright infringement pieces while the plaintiff sells just 15 pieces. The plaintiff pleads the lost profits worth of 15 pieces sold and the royalty for another 10 pieces the defendant has infringed the plaintiff.

2. The additional damages: punitive damages

3. An account profit is the principle of relief in the principle of justice - restitutionary which the defendant must return the unjust enrichment.<sup>21</sup>

The account profit of the defendant is an optional relief for the economic damages which the plaintiff cannot charge in the ordinary monetary awards.

The punitive damages are new and convenient because to find evidences in complementing the damages is hard. The lump sum pay is then more convenient. Thailand has enacted and imposed the principle of indemnity as punitive damages, such as,

1. The Trade Secrecy Act BE 2545 (2002) Article 13 enacts the trade secrecy infringer to return the unjust enrichment by including it in the indemnity and the defendant must pay indemnity in **double** as a punishment.

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<sup>19</sup> [http://en.wikipedia.org/wiki/Copyright\\_law\\_of\\_the\\_United\\_Kingdom](http://en.wikipedia.org/wiki/Copyright_law_of_the_United_Kingdom)

<sup>20</sup> Lionel Bently and Brad Sherman, Intellectual Property Law (Oxford University Press: 2002), pp.1025-1026.)

<sup>21</sup> William Cornish and David Llewelyn, Intellectual Property: Patents, Copyright, Trade Marks and allied rights, 5th ed. (London: Sweet & Maxwell, 2003), p.78.



2. Consumer Procedures Act BE 2551(2008) Article 40 enacts the enterpriser pay the punitive damages in **double** of the real damage cost. Should the real damage cost sentenced by court not exceeding fifty thousand Baht, the court is empowered to prescribe the punitive damages not exceeding five times of the real damage cost.

3. Liability Act for Damages Caused by Unsafe Products, BE 2551 (2008) Article 11 enacts the enterpriser pays the additional punitive damages in **double** of its real indemnity.

#### **2.4.3. Controlled Operations Measures**

On account of the Copyright Act BE2537 (1994) enacts the copyright infringement is a compoundable offense; it is necessary to have petition first before the interrogative officers are empowered to stage inquiries on copyright infringement and it is the legal victims – noninvolvement to allow copyright infringement under the Criminal Procedural Code , Article 2(4) and Article 121. The enactments affect the state authorities and the state agencies, which can be considered in 2 cases, i.e.

(1). In the case of the private body entraps infringement and notifies the state authority to arrest, it is counted the state authority has been exploited as a tool to an unjustified right of the entrapper and it is also counted that the state agency exercise its power disregarding human pride and populace rights and liberty. This discredits the justice administration and the suppressing the offenders is impossible under the policy of the criminal justice administration. In addition, entrapped offense by the private body might persuade the state authority corruption because remuneration from the exploiter entraps offense and the state authority might be found acting for gains.

(2). In the case of the state authority entraps offense itself, it has to be consider whether such entrapment is just to find evidence for taking lawsuit with the infringer or for offense or committing offense itself. Rationally, if it is for offense; it might be inappropriate because the state agents hold duties to prevent and suppress crimes rather than commit crimes themselves. It is misbehavior of the agents and against state policy of public administration which adheres to justice administration. The Criminal Procedural Code or the regulated codes of trails does not stipulate

inspections over the performance of the interrogative officers who enforce laws in the case of necessity to involve in offenses. It is the extensive uses of discretion among the state authority which directly affects the populace rights and liberty and may lead to offense entrapment. It creates distrust among people in societies because it rises reciprocal suspicion on the state performances. The state will lose more budgets in suppressing offenders because entrapment leads to committing crimes.<sup>22</sup>

With the arisen facts, the police become the tools for the authorized who buy the authorization certificate from the victims who file petition and entrap people for arrestment. It becomes a business of selling the authorization certificate by the copyright owners. The entrapped people are thus entrapped to be victims. In fact, such entrapment must be the duty of the private body who is the copyright owners exercising their legal rights but affect the other private body. Such act is unjustified and against the “Constitution of the Thai Kingdom BE 2550 (2007), Section 3 on the Rights and Liberty of the Thai People, Part 2: Equality, Article 30 enacts that “All are equal before law and equally protected by law.” Also on Section 5: The Foundation Policy of the State, Part 5: Law and Justice Policy, Article 81 (2) securing individual rights and liberty from abuses that the state agents and others must equally facilitate justice for people. In the Criminal Procedural Code, Article 226/1 in the presence of the court that a legitimate evidence but from illegitimate act or any evidences gained from unjustified act must not be accepted for hearing excepted being useful to more facilitate justice administration rather than liability affecting the standards of the criminal justice administration or the foundation rights and liberty of people.

Due to Thailand imposes an accusation system, when the victim files petition, the state agent must undertake lawsuit first while proving innocent become the burden of the alleged. It is critically unjust to the alleged who has been subject to lawsuit and has to find bailout and expenses of defense with the state while the victim pays no fees. When the trail ends, there will be dismissal which becomes disgrace of the lawsuit authority of the plaintiff public prosecutor.

The statistics of the copyright infringement in Bangkok and its vicinity show that petition withdrawal at the stage of interrogation in 2012 reached 1,336

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<sup>22</sup> Reports of a study on Models of Offenses and Special Trail of Intellectual Property and Suppression Measures: Office of Intellectual Property, Special Investigation Department: Ministry of Justice, 2006

cases<sup>23</sup>. The high rate is high and their impacts of the law permitting the compoundable offenses create practical issues as follows:

a) Should it be the act of the organized crime which is the mega-offense; it troubles the international relationship because the economic crimes are destructive to the state such as defame and confidence in domestic investment, taxation of the responsible offices. Should they be compoundable with the character of organized crime; it makes the state loses its sovereignty in suppressing critical cases.

b) The state loses expenses in the justice administration; should compoundable offenses be permitted which the criminal case will then be exploited as a negotiated tool and the offenders shall never feel they have committed crimes while possibly becoming cycled recidivism.

c) The state agent meets difficulty to seek a search warrant in the case of copyright infringement from the Intellectual Property and International Trade Court because some judges have prejudice that some of them will use the warrant as a tool to seek gains through cashing from both the victims and from the infringers for compromise or stifling a prosecution.

Offense in the form of organized crime has not been found in the direct enactment of the Thai law but just in the Criminal Code Articles 210 and 211 in racketeering and hideout. The adjustment of offense about the association in such law troubles the attested cases and impossible to punish the real masterminded man. In some countries, they progress their principles of the conspiracy law possible to be enforced for the inchoate offense in order to prevent immediate dangers before they really occur. Just agreed conspiracy and the defendant involve; it is already counted an offense.

Upon the Thai law not enacting the copyright infringement in an organized crime affecting the public at large; it thus deserves to have prudent entrapment and controlled operations. It is another method to protect people and a guarantee for the state agents their actions taken are justified. Evidences gained from their duties taken are legal and useable to punish the offenders. It deserves to also enact that anyone

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<sup>23</sup> Data of the Office of Intellectual Property and International Trade: Office of the Attorney-General.

offends through being entrapped for criminal act from the state agents or representative could be raised as a cause in court for impunity.<sup>24</sup>

An entrapment for offense could be counted illegally gaining evidence and possible for suppression hearing in the court procedures of hearing the illegitimate evidence under the Criminal Procedural Code, Article 226.

The Controlled Operations – There is a research on buying entrapment in the copyright infringement conducted by Amnart Netsupha, et al. (2005). Hearing on entrapment by the state agents in each country is differed. For example, in USA, the enactment states about Substantive Defense while Canada imposing the Abuse Process, whereas England imposes Exclusion of Evidence but Australia imposes Controlled Operations.

The Controlled Operations are applied with the copyright infringement against the commercial scale of level 3 only.

The copyright infringement in commercial scale or in organized crime is the problem against the international relationship. The state has to dump expenses to the justice administration; should the copyright infringement in commercial scale is compoundable. It entails many muddles in practices such as when the state agents take action and the victim withdraw the petition or after confiscation subject to money laundering but restitution by the state is impossible.

Therefore the measures to meet the commercial scale offense are to define the copyright infringement at the commercial scale first before forming the Controlled Operations to curb the organized crime and it must not be compoundable offense.<sup>25</sup>

Examining the Thai laws, it is found that the **Constitution of the Thai Kingdom, BE 2550** (2007) enacts the right of fair trial which is one of the important principles in Due Process. It is found in Article 40(7), “In criminal case, the alleged or the defendant holds the right of interrogation or trial accurately, speedily and fairly with sufficient opportunity of defense”. The Constitution directly opens door to claim rights as the Constitution as defense. **Article 28, Paragraph II** enacts, “Individuals being infringed on rights certified by The Constitution can raise the constitutional

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<sup>24</sup> Amnart Netsupha, 2005, p. 3

<sup>25</sup> Report on Offense Model and Special Trial of the Intellectual Property and Suppression Measures: Office of Intellectual Property, Special Investigation Department: Ministry of Justice, 2006.

provisions for court rights or to be the claim of defending in the court.” **Article 32 Paragraph III** enacts, “Individual arrestment and detention are impossible except given order or the court warrant or any other causes enacted in law. All these provisions are counted the guarantee to protect populace rights and used as defense in the trail when being infringed by the state agents.

In the US legal principles, it accounts very strict exclusionary rules that if the evidence is made illegally, it is also illegal. It is compared with “fruit of the poisonous tree doctrine” (Nardone v. United States, 308 U.S.338, 341(1939)).It might be also the ill-effect to the entire case. The backdrop is n the condition that the court hears the illegal evidence; it might encourage the police exploiting illegal approaches to seek evidences to complement their cases. It corrupts their authority and agents may gloat to trouble the honest people. This could boomerang to defame the justice administration and it is not worth with the value that the Due Process will be destructive just because of convenience to fulfill the duty of the state agents. It is necessary to *nip something in the bud* to retain the standards of justice and fairness process.<sup>26</sup>

Hooking for offending or entrapment, the US Supreme Court ever judged that in the case the state agents led individuals who never thought to offend but thought to offend and have offended; the legal consequence was such offend is not wrong because individuals have been aroused by the state agents to do.<sup>27</sup>

### **The Controlled Operations (of the state agents and secret agents)**

Australia imposes legal measures to check investigation of the state agents and it indirectly affects the entrapment, i.e. “controlled Operations (of the state agents and secret agents) by the National Crime Authority (NCA). NCA defines entrapment as it is a way of investigation where the representative of the law enforcer involve with the offense especially the source of information to the representatives or the police

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<sup>26</sup> Chart Chaidejsuriya, pp.111-112:Legal Measures to Protect Human Rights in the Criminal Justice Administration, 2006 : Duan Tula Printing.

<sup>27</sup>Sorrellsv.U.S.,287U.S.435(1932);Shermanv.U.S.,356U.S.369(1958);U.S.vRussell,411U.S.423(1973))

with the objective to enable to the hearing for punishing the defendant or the conspirators through the trails in order to halt criminal offense.

This method is the solution treating at direct law enforcement which is similar to supporting measures giving indirect consequences in solving the entrapment which is similar to solving at the cause. Before enactment to endorse such method, States in Australia has no enactment to exempt the punishment justification in the case the state agents involve in offense. It is also consequential that the evidences gained cannot punish defendant because the court exercise discretion of suppression hearing counted the gained evidence is illegal. Each state stipulates to control the operations of their agents and secret agents in the case of necessity to use involvement or participatory methods of offense to seek evidence in order to arrest the wrongdoers.

**Controlled Operations** is critical in law enforcement, i.e.

1). This method is useful in investigating the organized crime because it is hard to seek evidence on their offenses unless involvement and participation with them. The controlled operations share action plans with clear target and intervene the state agents to skip responsibility on the consequences. It raises the effectiveness of the state agents.

2). This method is internationally accepted.

3). This method is accepted by court because after the case of *Ridgeway V The Queen The Commonwealth* and enactment was stipulated on the Crimes Amendment ( Controlled Operations ) Act 1196 (C.th) which the Supreme Court accepts on the necessity of entrapment in enforcing law of the state agents in some situations.

4). This method is applicable to other criminal cases except narcotics such as money laundering, where the Financial Action Task Force on Money Laundering (FATF) alleges “ the cooperation in international crime investigation using the controlled delivery which helps know the suspected of the criminal procedures.”

**Benefits of the Controlled Operations are**

1. It is the protection and creating confidence for the enforcers in working.
2. It creates confidence that evidence gained is legal.
3. It frames the police work.
4. It is transparent and inspectable.

### 3 Objectives of the Controlled Operations

1. Gaining evidence of criminal crimes
2. Arresting the involvers of offense
3. Destroying criminal process of the organized crime.

Due to the legal measures do not restrict about action taken on offenses but they are likely applied with narcotics by set the formal inspection criteria of working with the enforcers. Each operation must have action plan for written approval from the higher supervisory, schedule, and approach. Besides, the approach must not be entrapment for other to involve in the offense and not involve in any actions endangering for the body or for the others' properties. Such operations might be lifted if found improper. It results that the enforcers must have primary information before launching their operations. Meaning, there are sufficient reasons in the suspicion that the offense has happened rather than randomization and it is certified by law that such operations are legitimate. It is free from punishment justification. When the state agents have followed every procedure depicted by laws, they are not subject to civil punishment justification. They have to present their performance for their Commanders to acknowledge and the Commanders must further report to the Anti-Corruption of the Authority Commission which also inspects their operations.

Such law has been enacted in each State such as Law Enforcement (Controlled Operations) Act 1997 (NSW), the Criminal Law (Undercover Operations) Act 1995 (S A), the Crimes Amendment (Controlled Operations) Act 1996 (Cth) and so on.

In Thailand, the Criminal Procedural Code or the Police Regulations Code on the cases do not prescribe procedures of the operation inspections in the investigation level of the enforcers in necessity to involve with the offense. Seeking information related to the offense is extensive under the discretion of the state agents which directly affect the rights and liberty of people and leading to the entrapments.

Thailand should adopt the controlled operations to be enacted in order to inspect the state-agents performances because it partly prevents entrapments and shields the honest state agents not to be victimized with the punishment justification

from working. These measures can be coupled with the substantive law and the procedural/adjective law approach to better solve problems of entrapments.<sup>28</sup>

In summary, the controlled operations are to find evidence from the petty wrongdoers before leading to the mega-criminal or the organized crime, which are the necessity. If this measure is rejected, there will be two problems encountering, i.e. not having sufficient evidence to take a lawsuit with a person with multi-offenses and impossibility to access the mega-criminal or the organized crime because all the mastermind exploit the petty wrongdoers to offend for them.<sup>29</sup>

Also, should the commercial-scale copyright infringement can be the compoundable offense and the state agents investigate and arrest the wrongdoers for lawsuit then the victims withdraw the petition; it would critically damage the state because of the operations of the agents.

### **The concept of prosecution and the punishment justification**

#### **1. The concept of individual prosecution**

It is the individual prosecution.<sup>30</sup> The traditional laws were to regulate and settle disputes between two parties rather than both exploit arbitrary retribution. The culture to control crime is the fate of the victims. When crime rises, it is the duty of the victim to take lawsuit and to seek evidence for the court sentence. This authority is cherished by the victim and others cannot claim right to undertake lawsuit. It is still inherited until today in the compoundable criminal offense.<sup>31</sup>

#### **2. The concept of public prosecution**

It is the new prosecution and based on utilitarianism – any acts affecting the state societies who hold duties to keep peace and order will be subject to prevention against societies. The principle of public prosecution is totally based on the European concept or sources aiming to protect the rights of the societal members or

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<sup>28</sup> Supphachai Sawetkittikul, the Entrapment of Criminal Offense, Master of Law Thesis: Chulalongkorn University, 2001, p. 139.

<sup>29</sup> Andrew Ashworth, pp.268-306. Andrew Sanders and Richard Young, Ibid., pp.395-482) ([http:// www.law.emory.edu/ELJ/volumes/SPG98/guido.html](http://www.law.emory.edu/ELJ/volumes/SPG98/guido.html))

<sup>30</sup> Delmar Karlen. Anglo – American Criminal Justice. Oxford University press New York and Oxford.1967, P.19.)

<sup>31</sup> Surasak Likhasitwattanukul: The Criminal Procedural Code Vol. 1References. 2<sup>nd</sup> printing, Bangkok: Winyuchon Printing, 1999, p. 78.



the common good. The countries adopting the public prosecution mostly will have the state agents called “the public prosecutors” with the status of the state representatives.<sup>32</sup>

By the fundamental concept of the public prosecution, individual victims has no rights to file lawsuit and criminal procedure with the state benefits or the societal benefits are great than the individual benefits.<sup>33</sup> The state only has the authority to file lawsuit in maintaining peace and order.

## 2.5 Related Researches

**Somporn Samuthkhun. 1995 – Criminal Punishment on Copyright Infringement: a case study of offense and appropriateness of the punishment** and he finds that the Thai copyright laws allow the commercial scale and the non-commercial scale copyright infringement being the criminal offenses are inappropriate. The infringement of not for commercial scale should not be criminal offense because they have so many reasons, i.e. not corresponded with the objective of punishment, and incomplete conditions to meet the criminal offense. There are many cases that these cases are relative to the copyright exemption which leads to law interpretation. The application of criminal prosecution defames and restricts liberty of the alleged or the defendants. There are other appropriate measures better than criminal law enforcement such as undertaking civil lawsuit in the Intellectual Property and International Trade Court.

**Thanatchamon Techaphatiphong, 2002: The Copyright Protection under WIPO Copyright Treaty** and she finds that the essence of the copyright protection BE2537 (1994) by overview has equal standards. In some affairs, Thailand has greater standards than WIPO Copyright Treaty for examples the scope of reproduction and the nature of protection. Therefore, there are no interferences to be the member of the WTO. However, in practice of law enforcement, there are some problems with the state agents on operations and people have no knowledge about the

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<sup>32</sup> Kittiphong Kittiyarak. Public Prosecutors and Justice Administration. Law Journal, Year 17. Issue 1, p.149

<sup>33</sup> Udom Ratammarit. The Criminal Lawsuit. Journal of Law, Year 22, Issue 2, 1992, p. 245.

copyright law. It creates advantages and benefits to seek commercial gains from the copyrights disregarding the international equilibrium.

**Pasanida Akkrasetthang, 2004: The Compoundable Offense and Public Offense** and she finds that compoundability on the criminal cases is different from compromise under the Civil and Commercial Code. It is the compromise of debt but compound offense is the matter of ending the criminal case and involving the court power. Such compoundability is conditioned to authorize the court. However, the Thai is yet to prescribe the model or organization to inspect this compoundability. It might affect societies because it allows opportunity for the private body a prolong time. Therefore, the victims might exploit as a condition to negotiate the call for benefit. It deserves equilibrium in the public measures to such cases.

Kanyathida Bosuwan, 2009 – Legal Development in Monetary Awards of the Copyright Infringement, she recommends that the relief measures for the criminal damages under the Copyright Act Be 2537 (1994) Article 76 enacts the copyright owner to gain fine at half amount should be dissolved but adopts the punitive damages. By reason, such channel leads to criminal offense. Therefore, adopting the punitive damages who should have been more appropriate because the punitive damages are counted the civil damages aimed at deterrence for recidivist prevention. Also, adding Article 64 to adjust the profits of the defendant from the copyright infringement and the principle of punitive damages could relieve the damages in the case of the copyright infringement by prescribing effective and fair damages for all parties.

**Naiyachon Thathong, 2009 – The WIPO Digital Agenda and the Copyright Protection in the Digital Age in Thailand**, she finds that the WIPO has driven the WIPO digital agenda to help the developing countries to access the digital technology and trade development in terms of e-commerce through the amendments of the Copyright Act BE 2537 (1994). It is to apply the measures of protection, technology, data of administration, rights of database protection, and responsibility of the online providers to be adopted in Thailand.

**Phrakru Sangkharak-amnaji Khemmapanyo ( Yodthong), 2011 - Buddhism and Ethical Problems with the Copyright in the Intellectual Property in the Thai Societies**, His Venerable finds that individuals preach the teaching of

Buddha and claim their own teaching; the Lord Buddha call such persons as “Maha-bandit”. It is similar to the copyright infringement or the moral rights infringement. It is applicable with the principle of *adinnādāna* (the principle of *parajika* Chapter 2). Should any monks infringe copyrights of the intellectual property through *taiyajitta* (theft minded) worth more than 1,250 Bath (5 *masaka*); he deserve disrobe or *parajika*.

**Asst. Prof. Dr. Pareena Sriwanich:** 2013 – **Entrapment Law on Criminal Offense: a comparative study between Thai Law and International Law**; the definition of entrapment is the application of investigation techniques to disguise oneself or to act or to use any tactics made opportunities for the intended offender of the prior offense to offend in order to lead to arrest or evidence collection for lawsuit and to confirm data of the offender or to expand the consequence of lawsuit. Type of entrapped cases is the offense having private body is victimized and difficult to access because the wrongdoer and the involvers reciprocally receive or facilitate the offense such as the infringement of intellectual property right in the member countries. On the contrary, USA protects just its people with domicile in the country only. In the past, many US printers disregarded ethics but sought gains from printing the English works without compensation such as the fictions of Charles Dickens have been, many times, reproduced in USA without permits from the author and never paid compensations.

## **CHAPTER III**

### **METHODOLOGY**

#### **This research comprises of 2 models**

##### **1. Research methodology in law**

Research methodology in law is a research which intends to develop and improve a law system and procedure by bringing documentary research as a tool to compare the distinctive points and weak points of domestic laws and laws in the developed countries. Its aim to improve domestic laws to be more acceptable and in line with international laws. The result of research methodology in law will be recommended to the executive and the administrative officers to be used as means to improve, amend or promulgate the existing laws. Researcher has collected documentary data and information before submitted as an analyzed figure. (Chanathip Chinanawin, Chapter Volume 68 Chapter 1, March 1, B.E. 2555, page 1.)

##### **Documentary Research**

The information from various resources has been analyzed and synthesized both within the domestic and international countries. To cite; law provision, court decision, books, technical books, lectures, essays, thesis, researches related, operational document guideline for public and private sectors, journals, published materials, organizational statistic reports along with internet exploration.

##### **2. Research Methodology in Social Science.**

The research applies a Mixed-Method-Design by using 2 research methodology as qualitative and quantitative research which comprises of steps as follows;

## **2.1 Qualitative Research combined with Triangulation Technique to data approved.**

### **Population cluster and Sampling**

Experts who have authorities and direct experiences to the research topic, well known executives who supervise policy in the designated topic. Selection of sampling population prefers not to use random sampling. (Prof.Dr.Sunee Malikamal , B.E.2550:page 140 Technical Research in Law, fifth publication, Chulalongkorn University Publication, B.E.2550) The sampling characteristic can be analyzed and synthesized and it reflected crucial data on philosophy or hypothesis in law or philosophy and criminology theory or reflected obstacles existed by practice or reflected significant policy information.

#### **2.1.1 Focus Group Discussion amount 10 persons**

The group consists of executives who have familiar experience with the copyright piracy within justice procedure. To mention; investigators from the Economic Crime Suppression Division 2 persons, Special Case Inquiry Officer from the Department of Special Investigation 2 persons, Public Prosecutors from the Office of Intellectual Property and International Trade Attorney 2 persons and Judges of Intellectual Property Court 2 persons, totaling 10 persons. The researcher has proposed the discussion aspect on the possibility and the point of view in applying international law to be used as part of Thai copyright act. The Homogeneity among view will brighten up atmosphere. They have opportunity to listen, response and understand the problems of other organization concerned, got the variety and in depth information. It is understood that the environment is better than individual interview. (Assoc. Dr. Chai Posita . Population and Social Research Institute, Mahidol University).

#### **2.1.2 In-Depth Interview 10 persons**

Most of a group is key performance consisting of experts who have expertise on copyright field. For instance; the investigator from the Economic Suppression Division 2 persons, special case inquiry officer from the Department of Special Investigation 2 persons, officers from the Intellectual Property Department 2 persons, public prosecutors from Intellectual Property Office 2 persons

and Judges form Intellectual Property and International Trade Court 2 persons, totaling 10 persons. Interview schedule is used as a tool for data collection.

### **2.1.3 Non-Participant Observation**

Researcher has observed governmental atmosphere from various places. To cite, the Economic Crime Suppression Division, DSI, Office of Public Prosecutor and Intellectual Property and International Trade Court on their organizational implementation on copyright piracy. The conversations are comfortably dealing with the topic of problems and obstacles in implementing copyright cases, the release of the accused person along with property in dispute process. This is done by taking note to form data analysis.

#### **Steps of qualitative Research**

1) Literature and research theatrical concept was studied and revised to establish questionnaire topic model from focus group discussion, in depth-interview and observation model to cover the desired objectives.

2) Researcher has applied a tool where questionnaire model for focus group, in-depth interview and observation forms were submitted to experts in order to inspect for substantial's reliability and validity whether they are accurate, complete and relevant to studied topics as :

- Measure in setting up proportion of penalty to be suitable to the level of copyright piracy actions where they can be divided into 3 levels. To cite; general infringement, small scale infringement and commercial scale.

Classification between piracy scale considered to be a criminal offence , small scale infringement along with commercial scale should be recognized. As level 1 should not be a criminal offence, whereby only level 2 (small scale infringement) and level 3 (commercial scale) should be recognized as criminal offence since they have more complicated procedure prosecution to criminal justice procedure.

-Measure in increasing civil penalty (punitive damages) or measure in making demand for civil damages (monetary awards).

Right compel method of the right owner can be implemented without any trouble; promptly and complicatedly and it can remedy efficiently and suitable damages for copyright piracy level.

- Measure in controlling officer's operation  
(Controlled Operation)

This measure uses to solve the problem of the principal who occupied a large commercial scale or primary violator who deals with large scale, entrepreneur who owns capital machinery and networks. It is also suitable for criminal organized crime investigation as it is difficult for officials to seek for evidences. Thus, it is inevitably that officials must participate in those criminal organizations. Therefore, controlled operation shall be a part to set up operational plan and must have obvious objectives for the reason that it will protect officials out of the coming liability. The measure reflects official operation to be effective.

### **Qualitative Research Analysis**

Information obtained from the focus group discussion, in-depth interview and observation does not use statistic as a tool to analyze, on the other hand, it is done by interviewee's point of view. Researcher sometimes may refer the interviewee's utterance coupled the analysis in case it does not have an impact toward interviewee. Information referred or analyzed may refer to interviewee's organization, date, time of the interview to confirm that the information do obtained from the focus group discussion and in-depth interview. (Prof. Dr.Sunee Maklikaman, B.E.2550:142.) Afterward, the information will be categorized as a typological analysis and examined for its accuracy by Methodological Triangulation. Additional data would be collected if needed.

### **Report**

Since most of the data is raw, researcher will rewrite into written language as a descriptive report in which accordance with dissertation's objective, hypothesis and crucial aspect design. After that researcher will implement the content analysis to set up a topic/category concept pattern as;

(1) Take information obtained from the focus group discussion, in-depth interview and observation to rearrange accorded to study topic by using technical terms .

(2) Categorize the issue by analyzing the information of each person and each group to be accorded to the questionnaire issue

and main topic of the research where each group would have different information. Therefore, it is necessary to classify group accurately.

(3) Bring the defined contents and the sentences to gather as report theme

(4) Report writing to be accorded to dissertation form. Bring the above information to associate with each other to be a concept model as a conceptualization. (Suchart Prasitrattasin and Kannika Sukkasem, B.E.2547:280 Qualitative Research Procedure: Research Present Problems and Future Research, Bangkok: Feung-fa Printing Co.,Ltd).

## 2.2 Quantitative Research

Questionnaires were used as a tool to data collection as:

2.2.1 Descriptive statistic by clarifying frequency, percentage, mean, standard deviation to analyze personal data and level of their point of view on the suitability of the application of international laws within Thai context.

2.2.2 Inferential statistic by using one-way ANOVA to find out the difference between population group and research hypothesis and examined hypothesis that the organizational groups within the justice procedure differently have attitude toward the application of international law regarding copyright within Thai context and compare means as parallel by using LSD model.

### Population and Sampling

1. Sampling size: Officers who have direct responsibility involved copyright enforcement procedure amount 150 persons. They are all selected, no random sampling has been used.

Organization	Population (persons)	Sampling (persons)
Investigators, Economic Crime Suppression Division	22	22
Special Case Inquiry Officers, DSI	49	49
Officers, Intellectual Property Department	22	22
Public Prosecutors, Intellectual Property Office	30	30
Judges, Intellectual Property and International Trade Court	27	27
Total	150	150



## **2. General public amount 400 persons**

The sampling amount 400 persons are population who are over 19 years of age living in Bangkok. Sample size calculation uses table calculation designated sampling size of Yamane, 1973 and the selection uses a convenience sampling model. The random selection results to the data gained accurately and be accorded to research's objectives. (Assoc.Dr.Srisombat Chokprachakchat, document to the methodology research description on Sampling, Criminology Doctorate Degree, Mahidol University, B.E.2552) Data collecting areas comprise of department stores, shops, restaurants, fitnesses, government organizations, communities within Bangkok Metropolitan area. Questionnaires were already examined for the reliability by testing with 10 persons in Nonthaburi Province of before a factual interviewing in Bangkok. Topic is to survey opinion of the public on the enforcement of copyright problem in Thai society. Questionnaires were collected during in the morning till evening of the same day, for the duration of 1 month. After that researcher would examine questionnaire's completeness and subsequently analyze data with computer program.

### **Steps of setting up Questionnaire**

- 1) Data gained from qualitative research will be set up as criteria and content in order to cover the desired objectives.
- 2) Organized questionnaire will be examined for the liability and validity accorded to the content by the experts.
- 3) Improved questionnaire will be tried out to find the suitability and accuracy with the designed population amount 10 persons of law enforcement who have direct responsibility on the enforcement of copyright piracy and also 10 persons for general public.

### **Quantitative Analysis**

Use SPSS assess program to data analysis

## **CHAPTER IV**

### **RESULTS**

The Researcher has processed and analyse the collected data, sorted by the purposes of the Research as follows:

The Research's purpose

1: To analyse the problems and obstacles in enforcing the Copyright Act B.E. 2537 (1994). In this connection, six issues have been found, i.e.:

1.1 Knowledge, understanding and opinions of the people in Thai society towards the Copyright Law and law enforcement.

Results of quantitative data analysis

1.1.1 From the 400 questionnaires drawn from a sample of population as a tool to measure their knowledge, insights and opinions towards the Copyright Law and its enforcement

Personal information:

Sex: Among the total number of 400 respondents, 198 persons which accounted for 49.50 percent were male; 192 persons or 48 percent were female; while the other 10 persons or 2.50 percent did not specify their gender status.

Age: A number of 71 respondents or 17.75 percent were 19 – 25 years old; 199 respondents or 49.75 percent were 26 –35 years old; 85 respondents or 21.25 percent were 36 – 45 years old; 42 respondents or 10.50 percent aged 46 years old and up; while the other 3 respondents or 0.75 percent did not identify their age.

Residence: A number of 172 respondents or 43 percent resided in Bangkok; 226 respondents or 56.5 percent were originally from the provinces; while the other 2 respondents or 0.5 percent did not reply to this question.

Level of education: A number of 136 respondents or 34 percent were below Bachelor's Degree; 203 respondents or 50.75 percent held

Bachelor's Degree; 51 respondents or 12.75 percent held Master's Degree; 7 respondents or 1.75 percent held Doctorate's; while the other 3 respondents or 0.75 percent did not answer this question.

2. Marital status: A number of 259 respondents or 64.75 percent were single; 121 respondents or 30.25 percent were married; 14 respondents or 3.50 percent were widowed/ divorced; and the other 6 respondents or 1.50 percent did not answer.

Income: A number of 108 respondents or 27 percent earned 2,000 -10,000 Baht/month; 158 respondents or 39.5 percent earned 10,001-20,000 Baht/month; 70 respondents or 17.5 percent earned 20,001-30,000 Baht/month; 61 respondents or 15.25 percent earned higher than 30,000 Baht/month; while the other 3 respondents or 0.75 percent did not answer.

Occupation: A number of 42 respondents or 10.5 percent were students; 114 respondents or 28.5 percent were civil servants; 108 respondents or 26.25 percent were in the labor force; 44 respondents or 11 percent were in trading; 91 respondents or 22.75 percent were in other occupations including farmers, state enterprise employees, rice farmers and employees in other sectors; 91 respondents or 22.75 percent did not specify their occupation; while the rest 4 respondents or 1 percent did not respond to this question.

Information regarding the people's knowledge and understanding about the Copyright Infringement Offence

1. The major number of 279 respondents which was equivalent to 69.75 percent did not know that to turn on someone else's copyright songs for entertaining customers in restaurants without charge it was subject to a copyright infringement offence. To their understanding, just to listen to the songs for pleasant mood while eating is unlikely to cause any damage to the copyright owner. However, a number of 114 respondents or 28.50 percent knew that so doing was an offence, while the other 7 respondents or 1.75 percent did not reply to this question.

2. The major number of 215 respondent or 53.75 percent knew that to download copyright song ring tones into one's phone without permission of the owner it was a copyright infringement offence. This was due to the

fact that the copyright owners already published that there was a charge with song downloads; and that there were a number of websites offering free downloads like [www.4shared.com](http://www.4shared.com), for example, which were fast, convenient and popularly accessible and were widely utilized. However, a number of 177 respondents or 44.25 percent did not know that so doing was an offence, while 8 respondents or 2 percent did not answer this question.

3. The major number of 249 respondents or 62.25 percent did not know that to download books on the Internet (e-book) for reading and publishing without permission it was a copyright infringement offence. This was because they did not like reading books on the Internet, and never thought of downloading books from the Internet for reading. But a number of 140 respondents or 35 percent knew that so doing was an offence, while 11 respondents or 2.75 percent did not answer this question.

4. The major number of 244 respondents or 61 percent did not know that to make a photocopy of the whole book for use or further copying without permission it was a copyright infringement offence. This was because mostly they made a partial photocopy, only of the required part; and sometimes libraries allowed the whole book photocopy. But 148 respondents or 37 percent knew that so doing so was an offence; and 8 respondents or 2 percent had no answer.

5. The major number of 276 respondents or 69 percent did not know that a live football (soccer) program being shown for the customers' pleasure while eating at a restaurant which was a member of the in-house True Vision was a copyright infringement offence. This was because, to their understanding, the charge was already paid to the True Vision which owned the copyright. But 115 respondents or 28.75 percent knew that so doing was an offence, while 9 respondents or 2.25 percent did not answer.

6. The major number of 256 respondents or 64 percent knew that to sell off movie CDs purchased for personal viewing at home as second hand goods in the marketplace it was a copyright infringement offence. This was because they often learned from newspapers and TV headline news about the arrest and prosecution of the offenders. But a number of 136 people or 34 percent did

not know that so doing was an offence, while 8 respondents or 2 percent did not respond.

7. The major number of 277 persons or 69.25 percent. did not know that to download the copyright clips from the You Tube and share to others via the Line Program it was a copyright infringement offence as they saw clips extensively shared through the Facebook. A number of 115 people or 28.75 percent knew that so doing was an offence; while 8 respondents or 2 percent did not provide any answer.

8. The major number of 352 respondents or 88 percent did not know that chanting songs in the Kongtek Ceremony (A ceremony to send the spirit of Chinese people) was a copyright work. This was because they were Buddhist, and did not know about Chinese culture and ritual. But a number of 40 respondents or 10 percent knew that so doing was an offence; 8 respondents or 2 percent had no answer.

9. The major number of 273 respondents or 68.25 percent did not know that the Copyright Law allowed the victim and the accused to negotiate as a compoundable offence in the criminal case. This was because when the copyright infringement offenders were arrested and prosecuted, there was no news about any negotiated compromise. But a number of 118 respondents or 29.5 percent knew that the copyright infringement offence was a compoundable criminal offence; while 9 respondents or 2.25 percent provided no answer.

10. The major number of 323 respondents or 80.75 percent did not know that the singers and dancers that followed “Bai Toey R. Siam” in the Song “Nan Ok” or “Shortness of Breath” to entertain customers in the restaurants were copyright infringement offenders. This was due to the fact that the song and dance have been popularly followed everywhere. But a number of 67 respondents or 16.75 percent knew that such act was an offence; while 10 respondents or 2.50 percent had no answer.

In summary: ten questions were used to measure the people’s knowledge about the copyright infringement offence. The majority of respondents replied correctly only to 2 questions as those questions had been drawn from the true stories that appeared in TV and newspapers in which there was always

wide public criticism about the unfairness brought to the alleged offenders. As regards the other 8 questions, most respondents did not know that those actions were against the copyright legislation because the actions involved trivial matters and were practiced commonly, popularly and extensively in the society as a chance was always open, as well as being easily and quickly accessible.

Information regarding opinions about the problems of the copyright law enforcement in Thailand.

1. The major number of 305 respondents or 76.25 percent agreed that Thai people popularly used pirated goods because they preferred inexpensive or low price goods which could be easily found and bought, and changeable as often as they liked following fashionable trends regardless whether the goods were copyrighted or not. But a number of 90 respondents or 22.50 percent disagreed with the above view while 5 respondents or 1.25 percent had no answer.

2. The major number of 301 respondents or 75.25 percent disagreed that the copyright owners' agents hired technicians to download computer programs and then took criminal action to arrest and prosecute the doers. To them, this was an unethical action; arrest should be made only with a flagrant offence. But a number of 91 respondents or 22.75 percent did not agree to the above opinion; and 8 respondents or 2 percent had no answer.

3. The major number of 214 respondents or 53.5 percent disagreed that selling fewer than 10 pirated music or movies CDs was liable to criminal prosecution. To them, they were a very small amount of goods and the trading may be done for a necessary living. But 179 respondents or 44.75 percent agreed that the above act, though trifling, was a criminal offence; while 7 respondents or 1.75 percent had no answer

4. The major number of 256 respondents or 64 percent agreed that the piracy of foreign music, movies, computer programs in large quantities affected trade between countries because that made it impossible for manufacturers to sell their products and there might be no investment in Thailand. But a number of 138 respondents or 34.5 percent disagreed with negative effects of the pirated goods to international trade since to them a lot of people still preferred copyright goods; and a number of 6 respondents or 1.5 percent had no answer.

5. The major number of 285 respondents or 71.25 percent agreed that those who used cellular phones to record movies in the cinema for personal viewing should be criminally prosecuted because, that is, an offence of theft was committed. But a number of 109 respondents or 27.25 percent disagreed with the above; while a number of 6 respondents or 1.50 percent did not answer.

6. The major number of 208 respondents or 52 percent agreed that the copyright owners' agents could appropriately claim damages from the pirated vendors in lieu of criminal proceedings as the lawsuits would end, the accused would not be further prosecuted and the victims were satisfied to receive the damages. But a number of 186 respondents or 46.5 percent disagreed because otherwise recidivisms or repeated offences would be made and the victims would use the damage claim as a negotiation tool; while a number of 6 respondents or 1.50 percent did not answer.

7. The major number of 221 respondents or 55.25 percent disagreed that the buyers of pirated goods should be criminally prosecuted, because sometimes it was difficult to distinguish between copyrighted and pirated items. But a number of 172 respondents or 43 percent agreed with the above issue; and a number of 7 respondents or 1.75 percent did not answer.

To summarize the public opinions regarding the problems of enforcing the Copyright Law in Thailand : Sometime people failed to identify whether those goods were copyrighted or not. Criminal prosecution should therefore not be applied to the cases. It was also not agreeable to the use of an entrapment through buying pirated goods as it was not fair to the pirated vendor. Legal measures should be laid down on the entrapment practices. Trivial pirated cases should not fall under criminal offences; and copyright infringement should be a compoundable offence.

#### 1.1.2 Questionnaires to 150 officials in the Justice System.

1. A major number of 130 respondents or 86.7 percent perceived that copyright infringement was an important issue in Thailand. But a number 20 respondents or 13.3 percent saw that it was not an important one.

2. A major number of 117 respondents or 78 percent thought that the buyers or consumers of the pirated goods should not be liable for criminal penalties. But a number of 33 respondents or 22 percent agreed to the criminal liability. .

3. A major number of 86 respondents or 57.3 percent viewed that criminal penalty provisions as contained in the Copyright Protection Act 2537 (1994) were not substantively appropriate for the piracy behaviors. But a number of 64 respondents or 42.7 percent believed that the penalty provisions were proper.

4. A major number of 78 respondents or 52 percent believed that to increase piracy-based penalties by more severe criminal punishment would not be able to suppress the piracy. But a number of 72 respondent or 48 percent believed on the contrary.

5. A major number of 128 respondents or 85.3 percent thought that since the pirated cases were criminal offences, entrapment, if applicable, must follow the procedures and rules as prescribed by the Law. But the number 22 respondents or 14.7 percent indicated that there was no need for a law to lay down the procedures and rules of entrapment.

6. A major number of 123 respondents 82 percent saw that if the Law could be further modified, piracy cases which were petty, private, non-commercial and not financially measurable, such as the download of music from the Internet to listen to for personal pleasure, should not fall under criminal offences. But a number of 27 respondents or 18 percent insisted that even tiny piracy cases should be similarly regarded as criminal offences.

Therefore, the followings summarize the state of knowledge, understanding and opinions of people in Thai society towards the Copyright Law and its enforcement from the quantitative data analysis results. The sample lacked knowledge and understanding about the copyright infringement offence. They did not realize that it was an offence because it normally involved minor cases which were performed regularly, widely and popularly. In addition, the chance was always conveniently and speedily accessible. As regard the opinion on the law enforcement, there was a disagreement on the entrapment the victims used to



prosecute the alleged offenders as it was unfair to the accused party. Legal measures on entrapment should be established. Petty piracy cases should not be counted as criminal offences. The piracy offence should be compoundable. As for the sample of officials in the justice system, they saw the piracy as an important problem in Thailand. To them, criminal penalty provisions of the Copyright Protection Act 2537 (1994) were still not appropriate for piracy behaviors. Severe criminal penalty provisions could not suppress the piracy. The Law should also be revised so that trivial, personal, non-commercial, and non-financially measureable cases were not criminally prosecuted.

1.2 The issue on whether a balance between the penalty provisions and the copyright infringement offence or piracy behaviors whereas those non-financially measureable, private and non-commercial piracy behaviors were liable to a fine from 20,000 Baht up to 200,000 Baht in accordance with Section 69 Paragraph 1, and to a fine from 10,000 Baht up to 100,000 Baht according to Section 70, Paragraph 1 of the Copyright Act B.E.2537 (1994) is appropriate or not.

1.2.1 Data analysis Results of Focus group discussions for officials in the justice system.

The majority of the group had the opinion that petty pirated cases which were not conducted for commercial purposes should not at all be placed guilty under the criminal offence. They were also not agreeable to the penalty provisions of the Copyright Act B.E 2537 (1994) in Section 69, Paragraph i regarding the liability to a fine from 20,000 Baht up to 200,000 Baht, and in Section 70 Paragraph 1 regarding the liability to a fine from 10,000 Baht up to 100,000 Baht due to the non-commercial nature of the cases. The penalties, although just a fine, were too strict. The law should not determine minimum penalties as these should be left to the court's discretion. Therefore, law revision should be considered. .

The focus group meeting came up with 2 approaches.

According to The first approach, the copyright infringement behaviors that could not be measured in monetary terms or were private matters and did not involve trading should not be considered criminal offences.

A judge commented that the provisions of Section 69, Paragraph 1, and Section 70, Paragraph 1 in the Copyright Act B.E. 2537 (1994) were in excess of the TRIPs standards. The TRIPs required that criminal penalties be determined on commercial scale and, on the other part, there was no reason that if the practice was not for commercial purposes, criminal penalties would still be applied. Therefore, to enforce criminal measures in all cases was not appropriate.

A public prosecutor had a consistent view that copyright infringement, if involving private matters should not be counted as a criminal offence. This would coincide with the international agreement - TRIPs which insisted that provided that a crime was committed on commercial scale, the criminal punishment would be applied. If there was a general violation was not to the extent of commercial scale, civil lawsuit was sufficient. In suing for the damages from the piracy, which were different from other civil cases, a fine of twice the fixed fines was proposed.

An Inquiry Official of the Intellectual Property Investigation Bureau, Department of Special Investigation did not agree that, trivial and non-commercial piracy cases were also liable for criminal penalties. And if the criminal offence did not involve, minimum penalties would not then be necessary.

The second approach insisted that the copyright infringement, though being none financially measureable, and relating to private and non-commercial matters, was a criminal offence. But the penalties should be revised as the current ones were too tough.

A former Director-General of the Department of Intellectual Property disagreed with the too severe penalties as well as the punishable minimum penalties which made it difficult for the court to make flexible decisions. In his personal view, minimum penalties should not be established. The fine of 200,000 Baht was also too high if the benefits gained were not commercial.

A Legal Officer, Senior Professional Level, Bureau of the Deterrence of Intellectual Property Violation, Department of Intellectual Property insisted that copyright infringement, though for non-commercial purposes, was still subject to criminal punishment. But he did not agree with the too high scale of punishment - a fine from 20,000 up to 20,000 Baht.

Another Public Prosecutor pointed that minimum penalties should not be established, but it should be left to the courts' discretion in determining appropriate penalties on a case by case basis.

1.2.2 Data analysis Results of the in-depth interviews of 10 officials in the justice system.

1.2.2.1. The issue of whether a balance between the laid-down penalties and the copyright infringements offensive behaviors that relate to not financially measureable, personal and non-commercial matters - a liability to a fine of 20,000 Baht up to 200,000 Baht according to Article 69, Paragraph 1 of the Copyright Act B.E. 2537 (1994) - is appropriate or not.

The whole sample groups agreed that the penalties in accordance with Section 69, Paragraph 1, did not conform to non-monetary measureable, personal and non-commercial types of copyright infringement offences.

The copyright infringement on different basis which were none financially measureable or related to private and non-commercial matters have too high scale of punishment in spite of not being for one's own commercial benefits. The intent of the offender was not to violate the copyright to directly cause damage to the copyright's owners. Therefore, to set up the minimum penalties of 200,000 Baht were too heavy. Fine penalties may vary for individual cases, so that the minimum penalties should not be established but be given to the court to exercise its discretion in determining appropriate fine for specific cases.

1.2.2.2 The issue of whether a balance between the laid-down penalties and the copyright infringements offensive behaviors that were secondary and non-commercial - a liability to a fine of 10,000 Baht up to 100,000 Baht according to Article 70, Paragraph 1 of the Copyright Act B.E. 2537 (1994) - is appropriate or not.

The majority of the sample groups indicated that the penalties in Section 69, Paragraph 1, did not conform to secondary and non-commercial copyright infringement offending behaviors.

They had an opinion that the penalties were too severe as well as in Section 69. Similarly, minimum penalties should not be

defined as there were plenty of non-serious offensive behaviors. The punishment was too harsh for the copyright infringed goods that were not for commercial purposes which were, as a result, not a direct exploitation of those pirate goods. Consequently, a fine at a high rate was not proper.

Qualitative data analysis results from group discussion of officials in the justice system: The focus group discussion and in-depth interviews of the officials in the justice system yielded coincident results. The majority of the sample groups agreed that petty piracy lawsuits that were not committed for commercial purposes should not at all involve criminal punishment. They also disagreed with the penalties established in Section 69, Paragraph 1, and Section 70 Paragraph 1 of the Copyright Act B.E.2537 (1994) due to the non-commercial nature of the action. Despite the fine penalty, the penalty was still too strict. Instead of settling down the minimum penalties in the Law, the exercise of court's discretion in this matter would be more appropriate. The legislation should, therefore, be further revised.

1.3 The issue of whether the heavier punishment placed for the defendants who had been subject to final judgment in the copyright infringement offences and, after completing the sentence before the five- year term, committed repeated offences – a liability for twice penalties according to Section 73 of the Copyright Act B.E. 2537 (1994) - can intimidate or inhibit copyright infringement or not.

1.3.1 Data analysis results of the focus group discussions of officials in the justice system

The majority of the focus groups believed that the increased penalties provided in Section 73 of the Copyright Act B.E. 2537 (1994) were appropriate.

A Judge mentioned that in accordance with the principle of punishment, persistent offenders were liable to increased punishment.

A Public Prosecutor disagreed with the increased punishment as the punishment established for persistent offences aimed to threaten offenders and prevent repeated offences. But from statistical records, it was found that most of the copyright infringement offenders were persistent ones. Therefore,

increased penalties would not yield any effects to the pirated offenders. Rather than increasing penalties, other more appropriate measures should be instilled. He also pointed out that increased penalties for offences under the criminal code in general should not be applicable to this type of offence.

An Inquiry Official of the Economic Crime Suppression Division, Central Investigation Bureau, Royal Thai Police, saw that the increased penalties provisions neither chastened the wrong-doers nor hindered persistent offences. As he had chances to talk to a number of the accused, most of them had no other alternative although they knew that the penalties would be increased for repeated acts. They did not even know how to commit more serious offences. What they did was just a CD sale; they did not know how to steal, snatch or rob. Even though the penalties were increased, they would not escape. If they were often arrested, their employers would not allow them to sell for a while. But, after a short break, the Employers called them back to work as usual - This was the whole simple circle. Owing to the increased penalties, the defendants' police criminal history records sometimes appeared in three pages length. When being asked why they did not do something else, the answers were they did not know what else to do. But these people would not commit any more serious offences, except for very few of them who were deadlocked and turned to drugs peddling, as case follow ups suggested.

The former Director-General of the Intellectual Property Department said that increased penalties are legal measures set up to threaten and chasten offenders and inhibit recidivism. That a person did not think of what else to do and committed persistent offences meant that he or she did not think of other occupations, except the one knowingly dealing with fake goods. Though realizing through their subconscious that they did not act in good faith, they continued. As a matter of fact, there are many other occupations for earning a living. He, therefore, personally conformed to the increased penalty provisions.

1.3.2 Data analysis results of in-depth interviews of officials in justice system Most of the sample groups indicated that the heavier punishment provisions in which the defendants who committed repeated offences were liable to twice as much penalty as that provided for such offence according to Section. 73 of the Copyright Act B.E.2537 (1994) were appropriate.

An 8-people sample group agreed that, with the intensified penalty provisions, the offenders would be fearful of making a mistake again; otherwise they would lose their money with a higher fine for subsequent prosecuted acts, as another part of punishment to deter repeated offences. By the court judgment, ones should already be aware of the damage the copyright infringement caused to the copyright's owners, but they kept on acting wrongly without being in awe of the Law. Consequently, the increased punishment to chasten the wrong-doers was appropriate.

A two-people sample group did not agree with the imposition of multiplied penalties in the Law. To them, while such penalties were aimed to intimidate the wrong doers and put off recidivism, from the statistical records, most of the copyright infringement offenders were recidivists. Since the increased penalties did not bear any expected outcomes, other appropriate measures should be considered instead. Increased punishment was also properly used for general offences under the criminal code, rather than for the copyright infringement offence. The copyright infringement offence was not a public condemned offence, and existed as prescribed by the law. The offenders did not feel that they were guilty against any social order or good morals. As well, the sanctions were intended for trepidation rather than for the protection of the rights of the victims.

1.3.3 Data analysis results of 150 officials in the justice system. The major number of 78 officials in the justice system which accounted for 52 percent believed that to intensify the sanction for the piracy offence by a more severe criminal penalties would not be able to suppress such offence. But a number of 72 officials or 48 percent believed the opposite.

To summarize on the issue of the heavier punishment provisions for repeated piracy offenders who are liable to twice as much

penalty as that provided for such offence according to Section. 73 of the Copyright Act B.E.2537 (1994):

The results of qualitative data analysis from focus group discussion and in-depth interview of officials in the justice system are conforming to each other. The all agreed that the increased penalties provided for repeated acts would chasten the offenders. But from the quantitative data analysis results there was a slight disparity - 52 percent of the officials believed that to intensify the piracy offence sanction by more severe criminal penalties would be unable to suppress such offence.

1.4 The issue of the exhibits whereby all things which make up the infringement of copyright will be transferred to the owner of copyright provided that all things used for committing the offence will be confiscated in pursuant to Section 75 of the Copyright Act B.E 2537 (1994)

1.4.1 Data analysis results of focus group discussion of officials in the justice system

The majority of the group disagreed with the penalization which imposed that the pirated goods became the property of the victims who were the owners of the copyright in accordance with Section 75 of the Copyright Act B.E.2537 (1994).

The former Director-General of the Intellectual Property Department said that he disagreed with this clause because the victim made use of all the State's properties including the people's tax money in the process – the police officers, public prosecutors and the court – that is, without any personal investment. But when there was an arrest, the exhibits became the properties of the victim as the copyright's owner.

A Public Prosecutor agreed to the former Director-General's view, adding that in the context of the intellectual property laws, there was not just a single copyright law. There were also a patent law and a trademark law. In the Trademark Act B.E. 2534 (1991) Section 115, for example, all goods in violation of the trademark were to be confiscated. Except for the copyright law, there were no provisions for the goods to be transferred to the ownership of the trademark's or patent's owners in other intellectual property laws. To him, sanctions should be

consistently enforced to all intellectual property laws. The escheat was, at least, a part of standardization that when an act was convicted, the associated illegal merchandises should not fall back into the hands of an individual, for fear that the illicit goods might be misused on the part of the private sector.

An Inquiry Official of the Economic Crime Suppression Division, Central Investigation Bureau, Royal Thai Police, also disagreed that the exhibits belonged to the victims since, in practice, the police had to take responsibility in retaining the goods for a period of time before the prosecution was finalized and the victims, then, came back to take the goods out. The storage of the exhibits put additional burden to the police as each year there were approximately 4,000-5,000 cases; and 3 to 4 years had passed before the judgment goods were removed, which made it difficult to find the goods or to identify where the goods were located. Another part of the burden was to return the judgment goods to the “victims”. When making a complaint, it was the victim’s attorney who did it on the victim’s behalf. But the judgment goods were to be returned to the real victim. As a matter of fact, the real victim may reside abroad; then evidence was required to obtain the goods. As well, the real victim, after making a complaint, stayed away on the date of return. These incidents practically added another burden on the part of the officials involved.

A Judge agreed with the provisions of the law that allowed the pirated goods to become the properties of the copyright’s owners. His view was that by allowing the pirated goods to be possessed by the victims who owned the copyright, it gave pleasure to the copyright’s owners in that they could do anything with the goods. If the goods were confiscated or put to destroy they might spread or be further exploited. On the other side, the copyright’s owners might take a chance to look back into the origin of the production that made pirated goods come about. This might, as a result, contribute to the suppression of copyright infringement or probe of how the copyright infringement could be detected.



#### 1.4.2 Data analysis results of the in-depth interviews of officials in the justice system

The sample both agreed and disagreed, in equal numbers, with the issue of the copyright infringement goods becoming the properties of the victims.

A sample of 5 people agreed that Section 75 of the Copyright Act B.E. 2537 (1994) which specified that the pirated goods belonged to the victims who owned the copyright was appropriate. Given that the owners had the sole right to reproduce, adapt, produce and sell their own goods, when the copyright was violated, the duplicating goods should legitimately become the owners' or the victims'. The victims were, then, likely to feel more comfortable when the exhibits were in their possession, so that they could do anything with the objects as they deemed appropriate. Moreover, as the pirated goods contained the same content as the licensed ones, in doing so repeated offences could not be committed from those goods. If the state authorities were to execute the pirated goods, it would cause more expenses on the government's part for storing and demolishing the objects.

A sample of the other 5 people disagreed with the disputed clause. They argued that the pirated goods should be totally destroyed. In allowing the goods to become the victims' properties, it did not appear that the victims did anything further with the goods. Pirated goods should be the State's assets rather than the victims'; otherwise the goods might later be brought back to expand in the market. When the State settled that pirated products were unlawful and as it was entitled to administer any illegal acts, the State was eligible to keep the products for destroying or for confiscation. The illegal goods should not fall into the hands of the copyrights' owners who did not have any relationship with them. The copyright owners did not have any authority to keep the objects as they might be further misused and there was a chance for low-quality products to be circulated in the market. In fact, the victims were already entitled to damage claims. When the exhibits were seized by the state authorities, the latter were authorized to oversee the objects; and the victims should not gain more benefits from the exhibits.

1.4.3 Quantitative data analysis results from the questionnaires drawn from 150 officials in the justice system: The majority of them also disagreed with the mentioned clause (average 2.59 with .94 standard deviation). The results from qualitative data analysis of the focus group discussions and in-depth interviews of officials in the justice system and the above results were corresponding. The sample of the focus group discussions did not agree with the penalties which permitted the victims who owned the copyright to possess the infringed merchandises. But there were, in equal numbers, both agreement and disagreement among the sample of the in-depth interviews.

1.5 Opinions on the confiscation of all offensive objects according to Section 75 of the Copyright Act B.E.2537 (1994)

1.5.1 Data analysis results from the focus group discussions of officials in the justice system

All of the sample groups agreed with prescribed clause.

1.5.2 Data analysis results from the in-depth interviews of officials in the justice system

All 10 of the sample groups agreed to the prescribed penalty.

According to their points of view, since the copyright infringement was regarded as a criminal offence, the offensive items should be confiscated in pursuant to the Criminal Code. The Law directed absolute confiscation of the entire offensive objects without giving to the Court's discretion whether to confiscate them or not. This was a means to eliminate or abolish offensive objects – to discard the chance for further misuse of the objects. The confiscation of infringed goods played a part in cutting off the cycle of the exhibits from getting back into the market.

Therefore, the qualitative data analysis results from the focus group discussions and the in-depth interviews of officials in the justice system were correlated. They agreed with the confiscation of the offensive objects.

1.6 The issue of the fine where one half of the fine paid in accordance with the judgment was to be disbursed to the owner of the copyright as stated by Section 76 of the Copyright Act B.E. 2537 (1994)

1.6.1 Data analysis results of focus group discussions of officials in the justice system.

The majority of the groups disagreed with the penalties as set out in this clause.

The former Director-General of the Intellectual Property Department mentioned that he did not agree owing to the fact that the State did waste a lot of expenditure in counteracting this offence. As a result, it would be more legitimate if the fine became the property of the State. There should also be some investment or exercise on the part of the copyright owners if they really want to subdue piracy, not putting sole burden on the government.

A Judge said one half of the fine given out to the owner of the copyright would be a motivation for criminal litigation as, in so doing, the copyright owner would gain from both the pirated goods and a portion of the fine.

A Public Prosecutor disagreed with the spelt-out penalties. He argued that although a half of the judgment fine accorded to the copyright owner might partly mitigate the damage, the victim was entitled to damage claims on his own. Likewise, to prosecute an offender necessitated a sum of overhead expenditure. The State was to take responsibility for all expenses accruing in all legal proceedings which involved police authorities, public prosecutors and the court. Consequently, a half of the fine should not go to the copyright owner; but rather the copyright owner or the victim took action to claim damages in his own right.

Another Judge agreed with the stipulated penalties. He believed that with a half of the judgment fine received, if it satisfied the copyright owner or the victim, he might not need to further sue the defendant in the civil lawsuit.

1.6.2 Analysis results of data collected from officials in the justice system, using in-depth interviews

The sample both agreed and disagreed, in equal numbers, to the issue of one half of the judgment fine being given out to the owner of the copyright in accordance with Section 76 of the Copyright Act B.E. 2537 (1994).

A sample of 5 officials or 50 percent agreed that the sanctions on the property intended for partially mitigating the damage to the victim so that, if the victim was satisfied with the amount of the judgment fine received, legal action against the defendant in the civil lawsuit might not be necessary taken. The granted fine was, i.e., a primary remedy prior to filing damage claims in civil litigation.

A sample of 5 officials did not agree that the defendant paid a half of the fine sentence to the owner of the copyright. According to them, a fine charge was a criminal punishment, not a remedy for damages. The actual owner of the copyright was obliged to attest to the court the extent and amount of the damages encountered by him. The fine penalties should only mean to charge a fine as State revenue since the State was authorized of take charge of offenders who were liable to criminal punishment. In order to prosecute wrong-doers, operating costs was required. The State took responsibility for all expenditures involving the police, public prosecutors and the court throughout the procedure. Any portion of the fine should not therefore be shared to the victim. The victim was, on the other hand, to claim for damage on his own; otherwise the State would become the tool of the victim in the future. Even though a half of the paid fines would partially mitigate the damage on the part of the victim, the victim could claim for damages by himself. At present, in particular, the victim, who included the one who might not be the owner of the copyright, usually appointed an attorney to file suit against the accused in his name. Since the copyright infringement cases were compoundable and reparable, if a victim wanted to receive reparations, he should make a negotiated compromise or bring a civil action for full damages.

1.6.3 Analysis results of quantitative data collected from 150 officials in the justice system, using questionnaires: the respondents moderately agreed to the payment of a half the judgment fine to the owner of the copyright following Section 76 of the Copyright Act B.E.2537 (1994), (an average of 2.73 with a standard deviation of .84).

Therefore, qualitative and quantitative data analysis from focus discussion groups and in-depth interviews of officials in the justice system shared dissimilar results. The focus groups sample did not agree with

the mentioned penalties, whereas the in-depth interview sample agreed and disagreed, in equal numbers. Officials in the justice system, thus, moderately agreed with the imposed penalties.

To summarize, as a result of data analysis in response to Objective 1, 6 issues of the copyright law enforcement were analyzed. From both quantitative and qualitative data analysis, it was found that there were 5 problematic issues arising from law enforcement which conducted to injustice. From the research results, it was, therefore, found out that the Copyright Act B.E.2537 (1994) had problems with both its enforcement and the justice it brought about.

The research objective 2: to study the suitability of applying international legal measures to the Thai copyright law.

2.1 A measure to limit the degree of severity of penalties regarding the copyright infringement on a commercial scale which was liable to a criminal offence: The offence was divided into 3 levels as follows:

2.1.1 Level 1 – a petty piracy behavior, which was an act not being intended for commercial purposes or for monetary benefits.

2.1.1.1 Analysis results of data collected from officials in the justice system, using focus group discussions

The majority of the focus groups' view was that the Level 1 behavior which involved minor piracy, without either commercial purposes or monetary profits, should not be focused on criminal measures, but rather on the increased efficiency of civil measures.

An Inquiry Official of the Intellectual Property Investigation Bureau, Department of Special Investigation, stated that the offences at Level 1 should be liable to civil litigation.

A former Director-General of the Intellectual Property Department said that the Intellectual Property Department had never used Section 77 of the Copyright Act B.E.2537 (1994); and never had anyone brought the cases under Section 77 to the Department. In the Department, fine payment in lieu of criminal measures, regardless of whether in contained in any acts was never been imposed. He insisted that Thailand was a developing country. A

criminal law approach had been consistently applied. In his personal view, this should not be altered to civil measures. Otherwise, it would be difficult to tell the public that only for copyright infringement cases you needed to take civil action. They would not understand because all other matters followed criminal measures. He confirmed that criminal measures were appropriate, but not with minimum penalties available.

A Public Prosecutor voiced that in order to substitute civil litigation for criminal litigation, as discussed by the former Director-General, it might be necessary to build up common understanding. Another point to consider was how the entrepreneur would be able to use the civil channel expediently, speedily and uncomplicatedly. Presently, the Act on the Establishment of and Procedure for the Central Intellectual Property and International Trade Court B.E. 2539 (1996) had accommodating provisions; but the enforced civil measures in the current Act had to be analyzed whether they could be developed or improved as incentive to the private sector in enforcing civil measures instead of criminal ones as an alternative. If the civil measures could be performed quickly and with better benefits in return on the part of the private sector, People in general or entrepreneurs would choose from whatever they gained the most benefits. And this would also efficiently avoid criminal measures in the future. A model should be designed on how to make the civil measures more efficient and more stimulating than criminal measures.

A Judge suggested that, as a matter of fact, it was only because the lawyer or even the judge were not familiar with practices in using such measures as evidence hearing before entering a charge, temporary protection before entering a charge, proof measures, etc. that made them feel difficult to do so.

An Inquiry Official of the Economic Crime Suppression Division, Royal Thai Police, said that if trifling piracy is liable to civil procedure, work burden on the police would obviously decrease. He also agreed with the Inquiry Official of the Intellectual Property Investigation Bureau, DSI, who proposed the fine penalty guidelines. The victim should be entitled to exercise his right on his own whether he wanted to take legal action or not. If he wanted to, then followed civil procedure. He might choose to reprimand rather than to use his

legal right. In Thailand, if the civil litigation is satisfying and non-time consuming, criminal cases would decrease.

2.1.1.2 Analysis results of data collected from officials in the justice system, using in-depth interviews

Level 1: Petty piracy behavior - action not being intended for commercial purposes or for monetary profits. It was found that the majority of the sample noted that the offence at this level should be a civil, not a criminal one.

A sample of 7 people pointed out that the offence at this level should be liable to civil litigation, not criminal one, because of the trifling and non-profits nature of the offence. As regards measurement criteria, quantities of exhibits and the behavior and the severity of the misconduct should be taken into account. The exhibits should not exceed 1-2 pieces and the offence should be committed only for one's own benefits, not for proprietary or trading exploitation. The penalties should be used to compensate for actual damages accrued to the victim, as the victim was obliged to attest to the Court the extent of damage that caused to him. Penalties should not set down the amount of the minimum penalty, but should leave to the discretion of the court to impose liability upon the burden of proof of the copyright owner. This was the offence committed between private parties, which did not affect the society, morality and the economy of the country. It could be observed that the claims of the complainant or the owner of the right was mostly concerned with the amount of damages rather than criminal sanctions. As a result, being pushed into the criminal process, the punishment would not correspond to its purpose. The punitive damages sanction measures should not be applied to this level of offence since such type of damages claims were intended for penalizing offenders with a serious level of behavior as a deterrent. It was, therefore, an excessive punishment, not being balanced with the damage. Compensation for actual damages and confiscation of pirated works in the offender's possession should then be applied as penalties for this level of offence. Also, measurement criteria should be considered from the use of pirated works.

A sample of 3 people had the opinion that the abuse at this level should be a criminal offence, so as to bar it from

expanding to a higher level of offence, and double damages should not be allowed. Rather, the measurement criteria should be based on the market price of the pirated exhibits. The offence should only be punishable by a fine charge which might be calculated from pieces by pieces of pirated items, taking into account the intent of the wrong-doer and how much damage that the act caused to the copyright owner or the public at large. If trifling piracy offences were given civil cases status, the prosecution would be difficult because of the need to gather evidence about the offender including residence, circumstances of the misdeeds, and relevant oral, documentary and material evidences. Litigation costs and expenses were also high and not worthwhile when being compared to the damages received. In consequence, there might be no one who would take a civil action. Therefore it was suggested that measuring criteria should be applied by being based on the intent of the violator, the damage to the copyright owner and the public at large, the quantity of the arrested goods as well as punishment in a manner to deter repeat offenders.

2.1.1.3 Analysis results of data collected from officials in the justice system, using questionnaires

Officials in the justice system strongly disagreed that trifling piracy, such as turning on pirated songs to entertain patrons in a papaya salad food stall on the sidewalk was subject to criminal liability (an average of 1.68 with a standard deviation of .929).

Officials in the justice system disagreed that the sale of miscellaneous goods such as milk bottles, handkerchiefs with a cartoon image of not exceeding 10 pieces was criminalized. (average 2.45 standard deviation 1.96) .

2.1.1.4 Analysis results of data collected from the general public, using questionnaires

A major number of 214 respondents which was equivalent to 53.5 percent disagreed that selling fewer than 10 pirated song or movie CDs was liable for criminal prosecution as the goods were very few, and peddling might be done for a living. A number of 179 people or 44.75 percent, on the contrary, agreed with the said subject. And there were 7 people or 1.75 percent who provided no answer.



A major number of 222 respondents or 55.5 percent disagreed with the arrest and seizure of the pirated goods – 5 baby milk bottles with cartoon Daemon design - for criminal charge because the goods were too few for criminal sanction. Major piracy dealers should rather be arrested. A number of 171 people or 42.75 percent agreed to the subject while 7 people or 1.75 percent did not answer.

The data analysis results which showed that the measures regarding copyright infringement conduct at Level 1: a trifling piracy behavior - an act which was not intended to gain commercial benefits or monetary profits – should not be liable to criminal punishment, were applicable in Thailand, The summary was as follows:

1. Opinions of the majority of the focus groups sample: Criminal measures should not be exercised for the Level 1 misconducted behavior - trifling piracy not intended for trading or financial gains, but rather the efficiency of civil measures should be increased.

2. Opinions of the majority of the in-depth Interviews sample: Civil liability, not criminal liability, should be exercised to the Level 1 behavior - trifling piracy not intended for trading or financial gains.

3. Opinions of the questionnaires sample of officials in the justice system: Most of them disagreed that trivial piracy behavior was criminal.

4. Opinions of the questionnaires sample of the general public: Most of them disagreed that trivial piracy behavior was liable to criminal prosecution.

Therefore, qualitative and qualitative data analysis results from the above 4 parts of data shared similar views that a petty piracy behavior that was not intended for commercial purposes or financial benefits should not be counted as a criminal offence

2.1.2 Level 2 - Piracy behavior for small-scale trading. Criteria for small-scale trading were to have from 10 pieces or

more of pirated goods for sale or to earn from the piracy not exceeding the value of 75,000 Baht.

2.1.2.1 Analysis Results of data collected from officials in the justice system, using focus group discussions.

The majority of the focus group discussions viewed that there were distinct behavior-rating criteria which divided the misconduct' level following the nature of the misconduct. As for the Level 2 behavior, they were of the view that the criteria for measuring small-scale business were not yet appropriate. It necessitated to also take into consideration multiple factor criteria as individual pieces of goods might vary in both prices and numbers.

A judge argued that the criteria for measuring small-scale business were not yet appropriate as the amount of pirated items or goods was too small. He proposed the criteria in which the pirated goods should not exceed 50 pieces with individual sales prices as a basis. He, however, agreed with the identified minimum quantities of goods. But the minimum value of income earned from the piracy was not defined. To him, the price of the pirated goods must be stated clearly. If the items were sold by pieces, item prices must make up the criteria. For example, the sticker price was less than 10 Baht/piece, while the Program Software's price was 300,000 Baht. Therefore, it was necessary to apply multiple factor criteria given the fact that each individual piece of items was split into both prices and numbers. The offence at this level should also be compoundable because of the non-serious illicit behavior and the disproportionately small amounts of exhibits. The sanctions including a fine from 50,000 Baht up to 400,000 Baht, imprisonment from a term of 3 months up to 2 years or confiscation of properties following Article 70, paragraph 2 of the Copyright Law were also inappropriate given that the penalties were too heavy with an imprisonment penalty imposed on small retail traders.

A Public Prosecutor argued that the small-scale trade measurement criteria were appropriate. The levels of offences were classified by the offences' nature. Clear rating criteria made them impartial to both the offenders and the owner of the copyright. The application of

punitive damage measures to this level of misconduct behavior was not yet suitable. The offence at this Level should be a criminal offence which was compoundable because it concerned with individuals. In practice, there might be a problem with the loss of the exhibits. In some cases, the watches were arrested by full stall, but only one piece of the exhibits existed. Therefore, as mentioned, this might cause problem in practice.

An Inquiry Official of the Economic Crime Suppression Division, Royal Thai Police, noted that the figures of items might be fitting to a certain country but not to another. As for Thailand, the figure of 10 pieces was too few; and, to prove the damage, what criteria would be applied to measure actual damages -75,000 Baht/day or forever. At present, the Police and DSI officials, despite breakpoint number for a large scale criteria, charged all arrested cases as piracy or intellectual properties lawsuits. Therefore, breakdowning the magnitude of offence was only possible in theory, in practice, on the other hand there was no such splitting.

Chief of Operating Group.  
Office of Prevention and Suppression of Intellectual Property Rights Violation, Department of Intellectual Property agreed with the Judge's view. To him, criteria should be clearly defined. In the case of downloading, for example, the extent to which the downloading would be within the scope of piracy for commercial purposes, e.g. directly downloading etc., must also be considered as a component.

2.1.2.2 Analysis results of data collected from officials in the justice system, using in-depth interviews.

A sample of 5 people viewed that the small scale trade measurement criteria were appropriate because of the classification of the levels of the offence according to the natures of the acts with clear-cut rating criteria and financially-calculable quantities of pirated items. Due to the small amounts of earnings from and small numbers of abused items, the categorization as small scale trade was appropriate and fair to both the wrong-doer and the copyright owner, by looking at the quantity and price of the pirated products and income generated from the piracy. As for the application of punitive damage as

sanction measure to this level of misconduct, the sample objected and proposed the copyright owner took civil action as it involved individual harm.

A sample of another 5 people argued that small scale trade measurement criteria were inappropriate as merely 10 pieces of pirated products or goods were too small numbers. The pirated goods in possession should not exceed 100 pieces. Individual sales prices should also constitute a criteria basis. The offending behavior of copyright infringement and the amounts of pirated items should constitute components in imposing penalties. The amounts of goods offered for sale on the stall should be taken as a basis and added on the number from that. For the small trade, the minimum and maximum quantities of pirated goods in possession should be determined. In case of violation other than selling of pirated products such as a downloading service, the criteria for the small trade should take into account the intent of the offenders, the damage to the copyright owner, damages to the public at large, as well as the quantities of the items being arrested and the sanctions to deter radicivicism.

The issue of whether the wrongdoing at this level should be a criminal offence which was compoundable or not

A sample of 9 people commented that the wrongdoing at this level should be a compoundable criminal offence; as the State was not a victim who was directly affected by the act. It was not a very serious harm; and the exhibits were few. General traders who were not manufacturers or generators of huge commercial business that caused damage to the public should have opportunity to return to the proper channels of the society. The misconduct was at an individual level. Although it was an offence against small trading, It should be left to the copyright owner to decide whether to compromise or not as he might prefer civil compensation claims to criminal sanction focus. The offences might be committed for making necessary living and might not mean for placing a large business. Being charged with a compoundable criminal offence, the offender would be able to reform by compensating the damages to the owner of the copyright, and the court would not then be overwhelmed with lawsuits.

A one-person sample argued that the offence at this level should be a non-compoundable criminal offence.

Only the State should be eligible for being the victim because it should not be an individual victim to negotiate using the justice system as a tool. The victim could take civil action only after the criminal lawsuit was terminated.

Were the fine penalties from 50,000 Baht up to 400,000 Baht or the imprisonment penalties for a term from 3 months up to 2 years or seizure of property appropriate or not (sanctions in pursuant to Article 70 Paragraph 2 of the Copyright Law)?

A sample of 6 people mostly agreed that the stated penalties were appropriate. Relatively heavy penalties should make the offenders feel guilty about what they had done. The level of penalties was in proportion with the characteristics of the offences. There was space between the scales of punishment so that the court could exercise its discretion in proportion to the circumstances of the offences.

A sample of 4 people argued that the penalties were not appropriate as they were too heavy, with an imprisonment penalty imposed despite a small trader. The sanctions were also quite different from those laid down in the Trademark Act. Minimum penalties should not be specified; only maximum penalties should be settled. The penalties of imprisonment for not exceeding 2 years, a fine of not exceeding 400,000 Baht and property confiscation would cut off for a small trader the opportunity to make a living after being sentenced to pay court fines.

2.1.2.3 Analysis results of data collected from 150 officials in the justice system, using questionnaires

Officials in the justice system moderately agreed with the piracy behavior toward small scale trading of which the measurement the criteria were: there were more than 10 pieces of pirated items for sale or earnings from the piracy were in the value not exceeding 75,000 Baht (an average of 3.05 with a standard deviation of .814).

Officials in the justice system agreed very much that the piracy behavior toward a small trade was a criminal liability which was compoundable (an average of 3.53 with a standard deviation of .895).

A majority of officials in the justice system numbered at 94 people or 62.7 percent mentioned that the penalties of a fine from 50,000 Baht up to 400,000 Baht or imprisonment from 3 months up to 2 years (Article 70, Paragraph 2 of the Copyright Act B.E. 2537 (1994)) were heavy enough to deter such behavior. The minority of 56 people or 37.3 percent believed that the penalties were not appropriate.

The analysis results of data regarding the copyright infringement measures at Level 2 - piracy behaviors for small trade, by which the small trade was to possess 10 or more pieces of pirated items for distribution and to earn from the piracy no more than the value of 75,000 Baht, could be applied in Thailand. Conclusions could be drawn as the followings:

1. Opinions from the Focus Group meetings: The majority of the focus group saw that there were clear-cut rating criteria that classified the level of the wrong-doing following the characteristics of the act. As for the Level 2 Behavior, the small trade measurement criteria were not yet appropriate. Multiple factor criteria needed to be taken into consideration or applied as each individual piece of the goods might be split into both prices and numbers.

2. A sample of the In-depth Interview saw that the piracy behavior of a small trade which involved the possession of 10 or more pieces of pirated items for sale or income earned from the piracy of no more than the value of 75,000 Baht were appropriate and, with equal votes, inappropriate. Regarding the penalties, most of the sample agreed that the penalties were appropriate, and the Level 2 Offence should be compoundable.

3. Opinions of a sample of officials in the justice system collected through questionnaires: They agreed with the behavioral measurement criteria and the proportionate sanctions for Level 2 - small-scale trading piracy behavior.

Therefore, from the results of qualitative and quantitative data analysis of all 3 parts above, there were comments the the Level 2 – piracy behavior for small trade, whereby the criteria for the small trade was the possession of more than 10 pieces of pirated items for distribution or the

earning from the piracy of no more than the value of 75,000 Baht., can be used as criteria for measuring piracy behavior at the preliminary stage. There should be advanced criteria and pricing details available on each piece of merchandise. Regarding the penalties of a fine from 50,000 Baht up to 400,000 Baht or imprisonment from 3 months up to 2 years or confiscation of properties (penalties following Article 70, Paragraph 2 of the Copyright Law), the majority of the sample viewed as appropriate, and insisted that the offence at this level should be a criminal offence that was compoundable.

2.1.3 Level 3: Piracy Behavior for large scale business with commercial quantities whereby the criteria for measuring big business with commercial quantities were: to earn income from the piracy from 75,000 Baht up, to have the characteristics of organized crime or a person who had the right to control the production, adaptation, sale, dissemination or the use of the pirated work which were calculable in financial terms from 75,000 Baht up.

2.1.3.1 Analysis results of data collected from officials in the justice system, using focus group discussions

The majority of the sample agreed that criteria for measuring small business and big business with commercial quantities should be established. But the existing criteria were not yet appropriate because it was difficult to define and divide between small business and big business with commercial quantities, which would largely affect litigation process. The compromise should apply the same criteria, without a small trade being measured against big business with large commercial quantities, because that would cause problems in enforcing the law. As for penalties, there were a variety of opinions, both that the criteria were suitable for dealing with offence behavior of major entrepreneurs, and that the punishment was too high.

A Judge agreed that the measurement criteria for big business with large commercial quantities were appropriate because with the income from 75,000 Baht up business owners were considered major entrepreneurs that had impact on the public and confidence between countries or international trade, as well as the withdrawal of Thailand's trade preferences. However, it should still be a compoundable criminal offence because

although being a large scale business owner, he did not commit a serious economic crime. To be a compoundable offence implied that the victim was pleased to compromise. The penalties of a fine from 400,000 up to 1,600,000 Baht or imprisonment from a term of 1 year up to 4 years or confiscation of property were appropriate because there were both fine and imprisonment penalties. These would startle those who were to commit such act.

A Public Prosecutor suggested that the measurement criteria for large business with commercial quantities were not appropriate because the revenue from 75,000 Baht was too low, it should rather be 100,000 Baht. The criteria should measure the benefits the offender gained from the piracy and the number of items that highly affected the nation's economy. The offence at this level affected the country's economy further because of its influence to national gross income, including the income tax that would accrue to the State. The offence should be a criminal offence which was compoundable because even though it affected the country's economy, it was a matter between the private sectors. He also indicated that the minimum fine penalty of 400,000 Baht was too high.

The former Director-General of the Intellectual Property Department said the copyright case was a criminal offence; the level of the act, thus, needed to be also considered. This was because in the current Copyright Law the levels of offences were classified as direct and indirect offences according to Section 31. He, however, did not agree with the compromise in a lawsuit.

Another Judge said that what the Court wished was the space between the penalties so that it could define them as deemed appropriate to the circumstances of the cases. The trademark and the copyright laws had not much difference in maximum penalties. But the Copyright Law stipulated minimum penalties while the trademark Law did not. For example, to sell Lacoste misbranding shirts would be liable for a fine charge of 500 Baht while to sell pirated Winnie the Pooh, the minimum penalty would be a fine charge of 50,000 Baht – similar crimes were committed but punishment differed. That was the rationale



why the suspension of the determination of punishment should be applied. He left the proposal to the Intellectual Property Department.

A Public Prosecutor said when court fines were high, the number of cases largely decreased.

2.1.3.2 Analysis results of data collected from officials in the justice system, using in-depth interviews

The majority of the sample perceived that piracy behavior for large-scale business with commercial quantities whereby the criteria for measuring such business were: to earn income from the piracy from 75,000 Baht up, to have the characteristics of organized crime, or to be a person who had the right to control the production, adaptation, sale, dissemination or making use the pirated works which were calculable in financial terms from 75,000 Baht, was appropriate.

A sample of 6 people commented that the measurement criteria for large-scale business with commercial quantities were appropriate. To them, to earn income from 75,000 Baht was regarded as major commercial entrepreneurs. The act seriously affected the goods' production system and took advantage of the copyright owner. However, clear-cut definitions for each case must be specified. There must be a clear definition in each case. In case of using the income criteria, if the prescribed criteria were not met, the offence might not be within the scope of Level 3. The measurement criteria should include the violation case in the form of a production factory, business making and normal trade as well.

A sample of 4 people thought that the measurement criteria for large-scale trading with commercial quantities were not appropriate because the amount of income from 75,000 Baht was too small. An income at the amount of 100,000 Baht would be more appropriate. What to be also measured should be the benefits that offenders received from the copyright infringement and the number of items that highly affected the nation's economy. An amount of income from 750,000 Baht was not specified whether to be counted per month, per year or per each offence. This level of offence should only be enforced with the organized crime. Maximum and minimum quantities of the goods should also be defined. In case of violation without selling the good items, such as a

violation on the internet, how to decide whether the misconduct was for large-scale trading.

All 10 of the sample noted that the behavior at this level had an impact on the public and international confidence and trade.

As a result, Thailand might be withdrawn from trade preferences and national trading system and economic stability would be destroyed. This directly caused commercial damages to the copyright owner. Furthermore, no one would further create any copyright work as there was no protection for it. Development of innovations might not occur. Taxes could not be collected from those abusers. Countries that owned the copyright might use the piracy problem as a tool to coerce smaller countries in economic matters. Pirated goods may flood the market, and foreign countries would not trust Thailand's commercial fidelity. This would cause unfair trade competition. Consumers obtained unsafe goods. Internal and international trades were damaged. The country's total revenue was affected, including the income tax as State revenue

The majority of 7 samples had the opinion that this level of fault should be a non-compoundable criminal offence. The reason was because the misdeeds had an impact on the State's economic and social sectors as well as its reputation. The State was therefore a direct victim. At present, Thailand was watched over by the USA in international trade matters under the Priority Watch List (PWL). The violators were major offenders. Punishment was necessary for intimidating them and deterring recidivism. If the compromise was amenable, the channel would be open for negotiating, using monetary benefits to abate punishment for the offence committed. Large-scale commercial piracy, therefore, was not punishable by the law. Negotiation with the State authority was used to be liberated from imprisonment penalty. In effect, a passage was open for large-scale commercial piracy to escape from law enforcement; and further opportunity for exterminating small scale or minor piracy was lost.

A sample of 3 people argued that the misbehavior at this level should be a compoundable criminal offence. Although it involved major entrepreneurs, it was not a serious economic crime. It did

have certain economic impact on the country; but it is a private matter between individuals. Being a compoundable offence implied that the victim was satisfied to compromise as it was only the damages that they wanted.

A major sample of 7 people commented that the penalties of a fine of 400,000 Baht up to 1,600,000 Baht or imprisonment from a term of 1 year up to 4 years and the confiscation of properties (penalties, according to the Copyright Bill B.E. .... as passing through the consideration of the extraordinary Commission of the National Legislative Assembly on December 18, 2007) were reasonable. This was due the fact that this was a large scale offence with complete cycle of culprits and accomplices, which made it difficult to capture. The high scale of both fine and imprisonment penalties could threaten those who were thinking of committing such an offence

A sample of 3 people voiced that the fine penalties from 400,000 Baht up to 1,600,000 Baht or imprisonment penalties from 1 year to 4 years and confiscation of property were not appropriate. To them, the scale of the minimum penalty was too high. Punishment did not mean only to impose heavy punishment, the principle of proportionality in sentencing, which required that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender, should be considered. The court should be allowed to exercise discretion in fine penalties.

2.1.3.3 Analysis results of data collected from 150 officials in the justice system, using questionnaires.

Officials in the justice system were moderately in favor that the piracy behavior for large scale trade with commercial quantities, the measuring criteria of which being to earn from copyright infringement from 75,000 Baht up, to have the characteristics of organized crime or a person who had the right to control the production, adaptation, distribution, dissemination and exploitation of the copyright work which was monetarily calculable from 75,000 Baht up (an average of 3.21, with a standard deviation of .780).

Officials in the justice system strongly agreed that the piracy behavior for large scale trade with commercial

quantities affected the public and economic stability of the country, or as public danger, and international trade (an average of 4.05 with a standard deviation of .892).

Officials in the justice system strongly agreed that the piracy behavior for large scale trade with commercial quantities should be a crime against the State (an average of 3.93 with a standard deviation of .043).

The majority of 60 percent or 90 officials in the justice system saw that the fine penalties from 400,000 Baht up to 1,600,000 Baht or imprisonment penalties for a term from 1 year to 4 years were severe enough to inhibit the piracy behavior for large scale trade with commercial quantities. The minority of 60 officials or 40 percent argued that the punishment was not yet appropriate.

Data Analysis results regarding the measures on the Level 3 piracy behavior of large scale business with commercial quantities measured by the revenue from copyright infringement from 75000 Baht, the organized crime characteristics or a person who has the right to control the production, sale or dissemination and exploitation of the copyright work which were monetarily calculable from 75,000 Baht up were applicable in Thailand could be drawn from the following conclusions:

1. The majority of the focus group agreed that criteria for measuring small scale trading and large scale trading with commercial quantities should be defined. But the criteria are not yet appropriate as it was difficult to define and divide between small scale trading and large scale trading with commercial quantities, as this would largely affect the litigation. As for the compromise, the same measurement criteria should be applied regardless of whether they were a small trade or a large scale trade with commercial quantities, otherwise there would be problems in enforcing the law. Regarding the penalties, there were a variety of opinions. Some believed that the punishment were suitable for the circumstance of the offence in dealing with major entrepreneurs. They also noticed that the punishment was too heavy.

2. A sample of the in-depth interviews had the opinion that the amount of income from 75,000 Baht was too low.

To them, the income from 100,00 Baht would be appropriately defined for major commercial entrepreneurs. The offence had a severe effect on goods production system and took advantage of the in-depth interviews sample expressed the opinion that the amount of income from 75,000 Baht was too small. To them, the income from 100,000 Baht would be appropriately termed for major commercial entrepreneurs. Since the copyright violation severely affected goods production system and took advantage of the copyright owner, to measure the income earned from the violation in the amount of 75,000 Baht was not a clear-cut measurement criterion. As for other criteria, they were properly set; but individual cases should be clearly defined. In case of using the income criterion, unless the criterion was met, the misconduct might not be as serious as the Level 3 Behavior. Therefore, violation in such forms as production plants, business making and ordinary trade should also be included in this measurement criterion. As for the penalties, the majority of the sample agreed that they were adequately appropriate, while noting that the Level 3 Offence should be a non-compoundable offence.

3. The questionnaires sample of officials in the justice system largely agreed to the behavioral measurement criteria and the proportion of punishment in the Level 3: a piracy behavior for large-scale trading with commercial quantities. They strongly agreed that the large-scale trading with commercial quantities should be a criminal offence against the State, and the penalties were severe enough to intimidate the piracy behavior for large-scale trading with commercial quantities.

Therefore, the qualitative and quantitative data analysis results from the 3 parts above stated the opinions that the Level 3 Behavior should regard the income earning from 100,000 Baht as a major commercial entrepreneur as the violation had a severe effect on the goods production system and took advantage on the copyright owner. The measurement of the income earned from the violation in the amount of 75,000 Baht was not a clear-cut criterion. Likewise, while other measurement criteria were proper, definitions needed to be clearly established for individual cases. In case of using the income criterion, if the criterion was not met, the misconduct might not be liable to the Level 3 Behavior. Therefore, violation in the form of production plants, business making and ordinary

trade should also be set as part of the measurement criterion. As for the sanctions, the majority of the sample agreed that they were adequately appropriate, while noting that the Level 3 Offence should be a non-compoundable offence.

## 2.2 Punitive Damages

### 2.2.1 Analysis results of data collected from officials in the justice system, using focus group discussions

The majority of the focus group discussions sample agreed to the application of a heavier civil punishment measures - Punitive Damages - to Thailand.

A Judge mentioned that currently there were provisions that allowed more damages than those for the violations in Section 438 of the Civil and Commercial Code, such as expenses incurred in the enforcement of the 3 Intellectual Property Laws under the responsibility of the Department of Intellectual Property Rights. Although it did not go so far as Punitive Damages, other types of damages were in a developing process. From the table as drafted by the Researcher, if taking the table as a core, everything was already covered. The problem nowadays was to prove in civil litigation. Thailand was familiar with a “snake eats its tail” system. In the past, the court fee ceiling was limited to two hundred thousand Baht. Therefore, the actual proof and damages proof, without an academic basis, caused chatters on both parties. In some matters without a sufficient rationale, actual proof might be needed. But in case of being non-provable, it seemed that the court cut off almost all damages. Therefore, as a matter of development, additional damages had to be reserved for selection like a snake eating its tail. Regarding the points that the law could add to, punitive damages were ones of the sanction points. As for civil measures, twice of the sanctions was not necessary. That would imply more violation would be more preferred, as the damages received were greater than the actual damages proved. Thus, in some cases, there must be a reason why punitive damages were to be applied. An obvious example was about the trade secret because once it was given away, it was irrecoverable and was unusable as a trade secret anymore. Otherwise maximum damages had to be determined. It was a matter of unlimited damages fees, e.g. a reckoning fee. As for the injunction, it was used to prevent further damage or to or further abuse after an action had been made or filed.

A Prosecutor said that with regards to civil litigation in general, the court was mandated to calculate the amount of damages. But sometimes it was not known what approach or economic principle the court used to calculate the amount of damages caused by the copyright violation. If there was an evident and unquestionable calculation basis such as the value of goods and profits reckoning, that would likely ensure justice.

A Judge argued that would depend on the damages proof parties to demonstrate how much were the actual damages, both in terms of being monetarily calculable and incalculable. If the law so stipulated, discretion could then be exercised.

2.2.2 Analysis results of data collected from officials in the judicial process, using in-depth interviews

The major number of 9 people commented that punitive damages or monetary awards measures should be used as a tool to deal with the problem of piracy for commercial purposes.

The calculation of the mentioned damages was based on of the actual damages and as a means to remedy the victim and deter further infringements. Such measures were, therefore, appropriate to be enforced as their objectives were the deterrence which resembled to the high rate of punishment in the criminal cases. In the criminal cases there were also the penalties to pay half of the judgment fine to the owner of the copyright in accordance with section 76 of the Copyright Act B.E.2537 (1994). But there may be obstacle in choosing to use civil measures.

In the overall view, that was appropriate, but there still were some parts that needed thorough consideration. For example, the addition of the lost profits which was the incremental revenue from the value cost of the copyright works as a profits, the incremental revenue of each type of the copyright works or the same type but different works with different value as normal compensatory damages which the court would define as a minimum damage cost whereby the abuser would never know the actual lost profits of the copyright owner without the court discretion regarding this portion of the damages. This was different from what the Civil and Commercial Code defines specifically a claim for damages of

infringements in Sections 438 – 448 whereby the Court was entitled to claim compensation and the wrongdoers had to be liable for unforeseeable damages which resulted directly from his act. This was because the Civil and Commercial Code Section 222 was not applied to the tort cases. Whether the Court would determine such damages or not, depended on the damage proof by the victim which resulted in the victim of copyright infringement case was accorded protection that differed from those who were injured in other cases. These were unfair discrimination against a person because of the difference in the status of the person, which in contrary to the provisions of the Constitution of the Kingdom of Thailand B.E. 2550 (2007) in Article 30, Paragraph 3, and the Copyright Act B.E. 2537 (1994) which inclusively set up the principles regarding the damages according in Section 64.

As regards the inclusion of the royalty as normal compensatory damages it was applicable by using the royalty that the copyright owner was entitled to in his copyright works as a basis for calculating normal compensatory damages as the Court would determine according to according to the circumstances and the gravity of the wrongdoing act in which the victim of the abuse had to prove to the Court that he was affected by the damage on his royalty.

Additional damages as twice of the compensation were to impose additional sanctions from the normal compensatory damages to intimidate further violation of copyright. If this was implemented, an explicit framework should be outlined that the damages twice of the compensation would be paid in case of infringement against large scale commercial trade or of making infringements as usual business or of recidivism, etc.

The defendant's profits account was used as another method to calculate the actual damages of the abused. That is, the copyright owner could prove the damage from the falling sales volume of their goods, and the sales volume of the pirate, which would then be calculated for the actual damage more accurately. The proof method might be considered from the pirate's goods that were available for sales in the market. That piracy would cause less amount profits earned by the victim. The attestation must prove that if there were no pirated items sold in the market, how much profits value the victim would yield.



To seek a judicial injunction to order the defendant to stop further act or to prevent copyright infringements, the Copyright Act B.E. 2537 (1994) Section 65 supplemented by the Rules for Intellectual Property and International Trade Cases B.E 2540 (1997), Rule 12 entitled the copyright owner to seek a judicial injunction to order the person who was doing or about to do any act which was an infringement of copyright to cease or refrain from such act. Therefore there was no more need for reestablishing criteria on this subject.

The damage remedy following this measure was likely to be closest to the damages the plaintiff or victim experienced, except for the calculation of twice additional damages to deter the person or defendant from a misact, which was a matter of criminal cases.

Regarding the damages, if the punishment was increased to twice of the actual damages claims, it should be specified to be applied to repeat offenders according to the Copyright Act. Although different not on the same basis offence basis in the legal period, had to prove the actual damages was needed. If there was not yet a proven violation in case of being unprovable, but the infringement did occur, the court should be authorized/have the power to determine due damage appropriate (that was suitable) to the circumstances. It was the victim's burden of proof the victim must prove to the Court that it was damaged so that the court could clearly understand the extent of the damage incurred by the victim. In order that the victim could also directly make a direct claim, that he could protect his own goods against the damaging act by means of a civil action, non-pecuniary damages such as opportunity cost or the decreased/reduced market value of the property/assets might have to be determined, by also taking into account economic-oriented damage.

This measures as used as punishment for those who deliberately committed a violation which caused damage that is likely to be blamed or condemned from the society. Punitive damages would serve as a deterrent to repeat acts.

A 1-person sample saw that the punitive damages were inappropriate since they were too high damages. The damages that copyright owners duly received were actual compensatory damages only.

### 2.2.3 Analysis results of data collected from 150 officials in the justice system, using questionnaires

Officials in the justice system strongly agreed that the offender paid damages, including lost profits) and royalties. Punitive damages as twice of the compensatory damages, the calculation of profit accounts of the pirate. The seeking of the court injunction to order the defendant to stop or prevent from acts of piracy could remedy the injured appropriately (an average of 3.51 with a standard deviation of .784).

Officials in the justice system strongly agreed that if there were appropriate and uncomplicated civil remedies to the victims, they would choose to take civil litigation rather than criminal one (average 3.53 sanctions measures -punitive damages were applicable in Thailand could be drawn from the following conclusions:

1. Most of the focus group discussions sample agreed with the application of punitive damages in Thailand.

2. Most of the in-depth interview sample had the opinion that punitive damages or monetary rewards should be instrumental in dealing with the piracy for commercial purposes.

3. The questionnaires sample of officials in the justice system strongly agreed with the application of punitive damages in Thailand (an average of 3.52 with a standard deviation of .65).

Therefore, from the qualitative and quantitative data analysis results of the above 3 parts similar opinions were shared. That is, punitive damages or monetary awards should be applied as being instrumental to deal with the problem of piracy for commercial purposes.

## 2.3 Measures to regulate the conducts/ control the operations of officials and infiltrators (Controlled Operations)

### 2.3.1 Analysis results of data collected from officials in the justice system, using Focus Groups Discussions.

Most of the focus groups discussions sample agreed to the application of controlled operations to the copyright infringement cases in to Thailand

A Public Prosecutor stated that there were complaints that the entrepreneurs used unfair rights to use a police officer or person who was not a police officer to act in a manner of coercing as the copy right infringements were compoundable offences, therefore unfair treatment occurred through coercing using compoundable measures as threatening criminal measures to exploit/intimidate. That was why there were a number of complaints were made to various agencies. At that time he was a Sub-Committee member in the Office of the National Human Rights Commission, there was a thought/figured out how to bring justice to the cases. Foreign law were studied. In fact, the police were left independently to seek evidence without screening or checking. For example, the entrepreneur informed the police, then the police inquiry officer investigated the case/ took further action by himself. For a good police, legal procedure would be accurately/correctly followed. But in many cases/many times the action was taken in such a way that taking sides with the victim and the criminal penalties were used to force compromise. In operational process, the official authority needed to have a mechanism to control. In foreign countries, Controlled Operations are in terms of measures for competent authorities in pursuit of evidence that would need to be monitored or controlled by an authorized person. Therefore a proposal on the part of the copyright infringement lawsuit was that if it was a compoundable offence, there should be measures to control and check the use of power of state authorities in seeking the evidence, which sometime might take the risk of abuse or unfair exercise of rights. It was very often that for the police authority to pursue evidence in some general cases, the Court's approval for inspection and arrest was needed. But in many compoundable offence, evidence was pursued on this part without control. In the matter of copyright is a part that inquiry authorities could do anything, negotiating or coercing, in the same way as other compoundable offences. This was one of the problems that had to be reviewed was how the evidence seeking process be controlled by other public sector organizations to prevent distortion of the use of rights process. to set aside provisions

An Inquiry Official of the Intellectual Property Investigation Bureau, Department of Special Investigation mentioned that the acquisition of evidence of intellectual property violation cases, mostly needed to have

access to evidence to be presented against a court in order to obtain a search warrant for preliminary demonstration that violations actually happened. But as a normal /usual practice, the authority, if a product did not exist, the authority would not ask for finding one. Rather they chose to entrap/ entice purchases from what products that normally

Existed, whether it being pirated CDs or other pirated goods. But there were cases where the authorities took sides with the victim and asked the victim to do what they had not done. Thus they would have trouble in getting the evidence wrongfully. An explicit standardized controlling process would likely be useful in making the acquired testimony more weighty and amenable.

Another Inquiry Official of the Intellectual Property Investigation Bureau, Department of Special Investigation As regards the laws under the responsibility of Department of Special Investigation, there are other special measures, such as primary infiltration into the system, which was already controlled by the higher-up authorities. Therefore, if these measures were used, how they would be controlled so cautiously that there would be no practical problems.

The former Director-General of the Intellectual Property Department said that if time was waste with drafting plan, timely arrest might not be possible and the exhibits would be gone in a flash.

An Inquiry Official of the Economic Crime Suppression Division, Central Investigation Bureau, Royal Thai Police stated that operational control and supervision already existed as an usual practice, but might not be strict to an extent that they would need to write a plan or clear practical guidelines as such. The operational control and supervision was split into 2 approaches, proactive and reactive ones. With proactive approach, the police would investigate the evidence themselves. In this connection, a plan needed to be submitted step by step because of the unhurried nature of the case. But in reactive cases where the victim informed and made complaints, the matter must be reported to the superiors according to the procedures. In practice, submission for the superior's approval was currently needed before releasing each operation. Whether this would delay the operation or make the news leak out or not depended on the responsible higher-up authorities. As their order to delegate anyone they were accountable to such works, including internal

control was also available. Therefore, this was not considered a new practice. He was therefore agreeable to the concept which was a trouble-free practice without any obstacles. He believed that the work would be effective, the evidence submitted to the Court to request a search warrant would be cautious and complete.

2.3.2 Analysis Result of data collected from officials in the judicial process, using in-depth interviews

A sample of the total 10 people had the opinion that the Controlled Operations measures should be applied to suppress piracy movement in Thailand.

Because if it was a major offender, this would make it difficult to get access to him. To get in touch with the offender within the most intimate distance would be beneficial, but it needed to be controlled from a higher-up level in hierarchical order. If access to the proxy was successful, have access to, litigation could be taken. And this would be the litigation taken against the root cause (TDD) not the end result such as the contractor. Therefore it should be able to deal with the piracy movement. If implementation planning was systematically developed, clearly defining the target area and target group by probing that the target group were actually guilty. The suppression will then succeed, and at the same time a circuit of communication to the public of pirated products would be broken, But the operation must be cautious, and officials, in addition to knowledge and capability, must be honest and not exploiting the benefits that might be offered by the offenders. Working with a fully integrated system and acquisition of evidence by correct method might make known the instigator, but the officials needed to be well trained, well equipped to perform tasks, (with advanced technological equipment and to focus on work with a clear hierarchical command, operational framework based on legitimate procedure, with the officers taking action. If the planning process carried out with correct information, it would help optimize the performance of the officials. Likewise, with checking by the superior, this would likely to be beneficial to effective suppression law enforcement. At present, the abuser would have source of production concealed to prevent being arrested. The source may be located at the end of the Soi or the area that officials could not get access to in the area or areas that most officials are not really able to follow the trail. Therefore, there should be a law to allow

authorities to entrap or enter the organization in disguise to collect information and evidence to present to the court in a request for the search warrant or for arrest planning. This would make investigations and evidence collection to prove the guilty clearer, fairer and more effective and would make officials foresee copyright infringement acts, including the persons or organizations, process and route/path in connection with other copyright abuses/piracy that had not been detected, or had no information of the abuses.

If the victim subsequently withdraw the complaints, that would be good. As the victim received direct remedies satisfactorily, then forgave the case settled without further litigation onto the justice system, both in the procedures of inquiry, public prosecutor and the court because the lawsuit ended sooner which resulted in a lower government expense.

As regards disadvantages, there are two major issues, i.e.

First, offenders might repeat the acts if they saw that negotiations could be settled with the victim without high charge, which, in this case, meant that the

offenders were really major and with extensive networks. That is, although they committed the crime again and was arrested and there was negotiations for damage compensation negotiations, it was still considered worthwhile to make a mistake again. Offenders might continue the violation and expanded to a larger market, which might damage the domestic trade system and international trade, and the offenders did not intimidate and were not fearful of the law. In this connection, in negotiating with the victim should consider the appropriate form of reparation should be considered before accepting and withdrawing the complaint.

Secondly, the State lose budget and personnel in the useless suppression. The operational staff would be discouraged at the wasteful time, thoughts, planning and energy for the exercise to inspect and arrested offenders in order to bring them to punishment, then the victim withdrew the complaint. Government agencies were seen as tools of the private sector, which owned the copyright and took advantage of the general public, as the Government had to use its

public tax in the crackdown only for some small part of the private sector as part of its crackdown. Time and expense were wasted to collect evidence without punishing offenders according to the law. Therefore, offences related to large-scale commercial trade should be defined as non-compoundable cases since it might discourage the operation teams from the duties as the seizure was difficult but the abolition of trial by only one party – the victim- was very easy. Can't handle the real Offenders could not be seriously handle. Expenses were wasteful for prosecution by State and enforcement of law by the victim. Officials lost their morale and courage in using perseverance and running the risk of being exposed to offenders which caused a loss of state budget and personnel and this became a bargaining tool in the criminal process.

#### 2.3.3 Analysis results of data collected from 150 officials in the justice system, using questionnaires

Officials in the justice system strongly agreed that there should be the law provisions for regulations and procedures in performing tasks related to the entrapment of pirated goods (an average of 3.60, with a standard deviation of 1.62).

Officials in the justice system strongly agreed with the evidence obtaining from the lured purchase of the pirated goods by officers, which was amenable (an average of 3.58, with a standard deviation of .936).

Officials in the justice system moderately agreed the lured purchase will provide in-depth evidence, which will led to the arrest of key figure in the organized crime for punishment (an average of 3.38, with a standard deviation of .974).

Officials in the justice system moderately agreed with evidence derived from the enticed purchase of pirated items by the victim, which was amenable (an average of 2.89, with a standard deviation of .928).

#### 2.3.4 Analysis Results of Data collected from the general public, using questionnaires

The major number of 215 people or 53.75 percent agreed that there should be a law about the purchase entrapment of pirated goods, because this should not be let to the victim to conduct it independently without any

legal controls, but such entrapment must involve the case of major traders and a large quantity of the exhibits. But a number of 176 people or 44 percent disagreed with the subject and a number of 9 people or 2.25 percent did not respond.

The major number of 306 people or 76.5 percent disagreed that the victim's agent secretly downloaded the victim's copyright music in the Internet café, and then brought the police to arrest the restaurant's owner, accusing the latter of pirating. This was an unethical act and intentionally caused the wrong-doing. But a number of 87 people or 21.75 percent people agreed with the subject and a number of 7 people or 1.75 percent did not respond.

Data analysis results regarding measures to control the conduct/performance of officials and infiltrators (Controlled Operations) could be applied in Thailand as drawn from the following conclusions:

1. The opinions of the Focus Group Discussions sample: they mostly agreed with the application of the Controlled Operation measures with the piracy cases in Thailand.

2. The opinions of the In-depth Interviews sample: all of them agreed that the Controlled Operation measures should be applied to should be applied to piracy suppression in Thailand.

3. The opinions of the questionnaires sample of officials in the justice system: most of them moderately agreed with the application of Operations Controlled measures to suppress piracy movement in Thailand (an average of 3.36, with a standard deviation of .62).

4. The opinions of the questionnaire sample of people in general: most of them agreed with the application of the Controlled Operations measures in Thailand.

Therefore, the results of the qualitative and quantitative data analysis from the above four parts shared similar opinions. That was, the application of Controlled Operations measures to Thai copyright law was agreeable.



### **The research hypothesis**

The researcher conducted a quantitative analysis of 150 officials directly involved in the process of copyright law enforcement to respond to the research objectives and hypothesis as follows: .

Quantitative research results.

Symbols used in data presentation

X stands for a grade point average (Mean)

S.D. stands for Standard Deviation

F stands for F-test statistic value (F - distribution.)

stands for statistical significance level .05

From the quantitative research results concerning the application of international legal measures to the Thai copyright laws, research questionnaires were distributed to 150 people, and all the 150 questionnaires or 100 percent were returned. The analysis results were presented as follows:

1. Opinions regarding the conditions of the Copyright Act's enforcement.

At the overview level there was a disagreement with the enforcement of the Copyright Act (an average of 2.51, with a standard deviation of .57).

When considering individual lists of issues, the opinions were moderate agreement in 3 issues as follows:

- The Copyright Act B.E.2537 (1994) could prevent and resolve the piracy problem in Thailand.

- Penalties that required defendants to pay half the judgment fine to the owner of the copyright could appropriately remedy the victim without further resort to civil prosecution.

- Penalties that required the pirated goods to be in the possession of the copyright owner could appropriately remedy the victim.

The opinion was at the disagreement level regarding the sales of miscellaneous pirated goods such as milk bottles, handkerchiefs with a cartoon image for a number of not exceeding 10 pieces being liable to a criminal offence.

The opinion was at the strong disagreement level regarding minor piracy such as turning on pirated songs for the entertaining of clients in a papaya salad food stall on the sidewalk being liable to a criminal offence.

Details were as in Table 4.1

**Table 4.1:** Means and Standard Deviation regarding opinions on the conditions of and problematic issues arising from the enforcement of the Copyright Act.

Conditions of and problematic issues from the enforcement of the Copyright Act	$\bar{X}$	S.D.	Level of opinions	Ranks
1. Opinions on whether the Copyright Act B.E. 2537 (1994) could prevent and resolve the problem of copyright infringement in Thailand.	3.05	.79	Moderately agreed	1.
2. Opinions on whether the penalties for defendants to pay half the judgment fine to the copyright owner could appropriately remedy the victim without resort to civil prosecution.	2.73	.84	Agree medium	2.
3. Opinions on whether the penalties for copyright infringed goods to be belong to the copyright owner could appropriately remedy the victim.	2.63	.94	Moderately agreed	3.
4. Opinions on whether the sales of miscellaneous pirated goods such as milk bottles, handkerchief with a cartoon image copyright violations of which the number not exceeding 10 pieces, should be considered a criminal offence	2.45	1.10	Disagreed	4.
5. Opinions on whether minor piracy, such as turning on copyrights songs to entertain clients in in a papaya salad stall on the sidewalk should be considered a criminal offence.	1.68	.93	Strongly disagreed	5.

## 2. Information on opinions regarding the application of international legal measures to Thailand's judicial process

At the overview level, there was a moderate agreement (an average of 3.30, with a standard deviation of .35).

Looking into each measure, it was found that:

1. Officials in the justice system strongly agreed with:

- Measures to classify the levels of piracy severity, which defined the piracy on commercial scale as a criminal offence, on content aspects (an average of 3.55, with a standard deviation of .56).

- Punitive damages measures, on content aspects (an average of 3.5, with a standard deviation of 2 .65 ) .

2. Officials in the justice system moderately agreed with:

- the Controlled Operations Measures, on content aspects (an average of 3.36, with a standard deviation of 6.2.

- measures to classify the levels of piracy severity, which defined the piracy on commercial scale as a criminal offence, on the aspect of its applicability to Thailand . (an average of 3.06, with a standard deviation of .59).

- measures to regulate the conduct of the officers - Operations Controlled – in the aspect of its applicability to Thailand (an average of 3.03, with a standard deviation of .51).

- measures for heavier civil sanctions - punitive damages - on the aspect of its applicability to Thailand (an average of 2.88, with a standard deviation of .55).

3. Officials in the justice system did not agree with the enforcement of the Copyright Act B.E. 2537 (1994) (an average of 2.51, with a standard deviation of .57).

Details as in Table 4.2

**Table 4.2** Means and standard deviations of opinion towards the application of international legal measures to Thailand's government agencies in judicial process.

Opinions on whether international legal measures were applicable to Thailand's agencies in judicial process.		$\bar{X}$	S.D.	levels of opinions	Ranks
1.	Commercial scale measures, on content aspect	3.55	.56	Strongly agreed	1.
2.	Punitive damages measures, on content aspects	3.52	.65	Strongly agreed h	2.
3.	Controlled Operation Measures, on content aspects	3.36	.62	Moderately agreed	3.
4.	Commercial Scale measures on applicable aspect	3.03	.59	Moderately agreed	4.
5.	Controlled Operations measures, on applicable aspect	3.03	.51	Moderately agreed	5.
6.	Punitive damages measures, on applicable aspect	2.88	.55	Moderately agreed	6.
<b>Total</b>		<b>3.30</b>	<b>.35</b>	Moderately agreed	

3. Opinions towards measures to classify the levels of piracy severity, which defined the piracy on commercial scale as a criminal offence, on the content aspect

Looking into individual issues, there were 3 issues that were strongly agreed

- Piracy behaviors for large-scale trade with commercial quantities affected the public at large or the economic stability of the country, public threat or international trade.

- Piracy behaviors for large-scale trade with commercial quantities should be a criminal offence against the State.

- Piracy behaviors for small-scale trade should be a criminal offence that was compoundable.

2 Issues were moderately agreed:

- Piracy behaviors for large-scale trade with commercial quantities in which the criteria for large-scale trade with commercial quantities were income earned from the piracy from 75,000 Baht, or to have a

characteristic of organized crime or being a person who had the right to control the production, adaptation, sale, dissemination or made use of the copyright works which was calculable in the value of 75,000 Baht up were appropriate.

- Piracy behaviors for small-scale trade in which the criteria were having pirated goods of 10 pieces or more for sales and earnings from the piracy no more than the value of 75,000 baht were appropriate. As details in Table 4.3

**Table 4.3:** Opinions towards measures to classify the levels of piracy severity, which defined the piracy on commercial scale as a criminal offence, on the content aspect

Opinions towards measures to classify the levels of piracy severity, which defined the piracy on commercial scale as a criminal offence, on the content aspect	$\bar{X}$	S.D.	levels of opinions	Ranks
1. Opinions on whether piracy behaviors for large-scale trade with commercial quantities affected the public at large or the economic stability of the country, public threat or international trade.	4.05	.89	Strongly agreed	1.
2. Opinions on whether piracy behaviors for large-scale trade with commercial quantities should be a criminal offence against the State.	3.93	1.04	Strongly agreed	2.
3. Opinions on whether piracy behaviors for small-scale trade should be a criminal offence that was compoundable.	3.53	.90	Strongly agreed	3.
4. Piracy behaviors for large-scale trade with commercial quantities in which the criteria for large-scale trade with commercial quantities were income earned from the piracy from 75,000 Baht, or to have a characteristic of organized crime or being a person who had the right to control the production, adaptation, sale, dissemination or made use of the copyright works which was calculable in the value of 75,000 Baht up were appropriate.	3.21	.78	Moderately agreed	4.
5. Piracy behaviors for small-scale trade in which the criteria were having pirated goods of 10 pieces or more for sales and earnings from the piracy no more than the value of 75,000 baht were appropriate.	3.05	.81	Moderately agreed	5.

#### 4. Opinions towards Punitive damages measures, on content aspects

At the overview level, there was a strong agreement (an average of 3.52, with a standard deviation of .65).

Looking into individual issues, it was found that there was strong agreement in 2 issues:

- Opinions regarding if there was appropriate and uncomplicated civil remedy for the victim. The victim would choose civil litigation rather than criminal litigation.

- Opinions towards the offender had to pay the damages which included lost profits, royalty, punitive damages twice of compensation damages, calculation of the profit accounts of the offenders, seeking/obtain the court's injunction to order the defendant to stop or prevent acts of piracy could appropriately remedy the victim.

Details as in Table 4.4

**Table 4.4:** Means and Standard Deviation regarding punitive damages, on content aspect

Opinions about punitive damages, on the content aspect	$\bar{X}$	S.D.	Levels of opinions	Ranks
1. Opinions about whether the appropriate and not complicate civil remedy would make the victim choose to take civil rather than criminal litigation.	3.53	.96	Strongly agreed	1.
2. Opinions about the damages payment by the offender which included the lost profits, the royalty, punitive damages twice of compensation damages, calculation of the profit accounts of the offenders, the seeking of the court's injunction to order the defendant to stop or prevent acts of piracy could appropriately remedy the victim.	3.51	.78	Strongly agreed	2.

5. Opinions about the Operations Controlled measures, on the content aspect

Opinions about the measures to regulate the conducts of officers and infiltrators - Operations Controlled – on the content aspect, in overview, it was at the level of moderate agreement (an average of 3.36, with a standard deviation of .62).

Looking into individual issues, it was found that 2 issues were at the level of strong agreement as follows:

- There should be legal provisions on the criteria and operating procedure with regard to pirated goods entrapment.
- Evidence derived from the enticement by officials was amenable.

There are 2 issues at the level of moderate agreement:

- The entrapment could gain in-depth evidence which would bring a key figure in the organized crime to punishment.
- Evidence derived from the enticement by the victims was amenable.

As detailed in Table 4.5

**Table 4.5:** The means and standard deviations of opinions about measures to regulate the conducts of officials - Operations Controlled – on the content aspect

Opinions about the Operations Controlled Measures, on content aspect	$\bar{X}$	S.D.	Levels of Opinions	Ranks
1. Opinions about whether there should be legal provisions on the criteria and operating procedure with regard to pirated goods entrapment.	3.60	1.06	Strongly agreed	1.
2. Opinions about whether evidence derived from the enticement by officials was amenable	3.58	.94	Strongly agreed	2.
3. Opinions about whether the entrapment could gain in-depth evidence which would bring a key figure in the organized crime to punishment.	3.38	.97	Moderately agreed	3.
4. Opinions about whether evidence derived from the enticement by the victims was amenable.	2.89	.93	Moderately agreed	4.

## 6. Opinions about the application of the measures to classify the levels of piracy severity, which defined the piracy on commercial scale as a criminal offence in Thailand

In the overview, the opinions about the application of the measures to classify the levels of piracy severity, which defined the piracy on commercial scale as a criminal offence in Thailand were at the level of moderate agreement (an average of 3.06, with a standard deviation of .59).

Looking into individual issues, the issues that was strongly agreed was if the law provides for only the piracy for commercial purposes was a criminal offence, that would make the operations of state agencies more efficient.

- The opinions at the level of disagreement if if the law provide that only the piracy for commercial purposes was a criminal offence that would cause problems and obstacles to the agencies' operations.

As detailed in Table4.6

**Table 4.6:** The Means and Standard Deviation of opinions about the application of measures to classify the levels of piracy severity, which defined the piracy on commercial scale as a criminal offence in Thailand

Opinions about the application of measures to classify the levels of piracy severity, which defined the piracy on commercial scale as a criminal offence in Thailand	$\bar{X}$	S.D.	Levels of Opinions	Ranks
1. Opinions about whether the law provides for only the piracy for commercial purposes was a criminal offence, that would make the operations of state agencies more efficient.	3.53	.78	Strongly agreed	1.
2. Opinions about whether if the law provide that only the piracy for commercial purposes was a criminal offence that would cause problems and obstacles to the agencies' operations.	2.59	.94	Disagreed	2.



7. Opinions about the application of heavier civil penalty measures - punitive damages – to Thailand (An average of 2.88, with a standard deviation of .55).

Opinions about application of punitive damages measures to Thailand, in the overview, the level of the opinions was moderate agreement (an average of 2.88, with a standard deviation of .55).

Looking into individual issues, the opinions were at the level of moderate agreement as follows:

Opinions about if the law provided for the offenders to pay the damages including the lost profits, the royalty, punitive damages twice of compensation damages, calculation of the profit accounts of the offenders, the seeking of the court's injunction to order the defendant to stop or prevent acts of piracy that would make the operations of relevant agencies efficient.

Opinions about if the law provided for the offenders to pay the damages including the lost profits, the royalty, punitive damages twice of compensation damages, calculation of the profit accounts of the offenders, the seeking of the court's injunction to order the defendant to stop or prevent acts of piracy that would cause problems and obstacles to the operations of relevant agencies.

As details in Table 4.7 .

**Table 4.7:** The Means and standard deviations of the opinions about the application of punitive damages measures to Thailand

opinions about the application of punitive damages measures to Thailand	$\bar{X}$	S.D.	Levels of Opinions	Ranks
1. Opinions about whether the law provided for the offenders to pay the damages including the lost profits, the royalty, punitive damages twice of compensation damages, calculation of the profit accounts of the offenders, the seeking of the court's injunction to order the defendant to stop or prevent acts of piracy would make the operations of relevant agencies efficient.	3.08	.77	Moderately agreed	1.
2. Opinions about if the law provided for the offenders to pay the damages including the lost profits, the royalty, punitive damages twice of compensation damages, calculation of the profit accounts of the offenders, the seeking of the court's injunction to order the defendant to stop or prevent acts of piracy that would cause problems and difficulties to the operations of relevant agencies.	2.69	.73	Moderately agreed	2.

8. Opinions about the application of the measures to regulate the conducts of officers and infiltrators – Controlled Operations – to Thailand ( an average of 3.03, with a standard deviation of .51)

In the overview, the opinions were at the level of moderate agreement (an average of 3.03, with a standard deviation of .51)

Looking into individual issues, it was found that the issue at the level of strong agreement was that legal provisions on the criteria and operating procedure with regard to pirated goods entrapment would bring efficiency to the agencies' performance. And the issue which was moderately agreed was that legal provisions on the criteria and operating procedure with regard to pirated goods entrapment would cause problems and difficulties in the agencies' performance.

As details in Table 4.8

**Table 4.8:** The Means and Standard deviation of opinions about the application of Controlled Operations Measures in Thailand

Opinions about the application of Controlled Operations Measures in Thailand	$\bar{X}$	S.D.	Level of Opinions	Ranks
1. Opinions about whether legal provisions on the criteria and operating procedure with regard to pirated goods entrapment would make agencies' performance efficient.	3.43	.89	Strongly agreed	1.
2. Opinions about whether legal provisions on the criteria and operating procedure with regard to pirated goods entrapment would cause problems and difficulties in the agencies' performance.	2.63	.94	Moderately agreed	2.

### Hypothesis testing.

Officials in the justice system were in different professions, types of careers, different careers, their opinions about the application of international legal Measures to agencies in the justice system in Thailand were different.

The researcher did tested the hypothesis by One way variance analysis (One-way ANOVA). The finding was that in the overview, officials in the justice system who were in different types of careers, their opinion had no different opinion about the application of international legal Measures to agencies in the justice system in Thailand agencies **on the whole were not different** ( $F=1.545, p\text{-value}=.192$ )

## **CHAPTER V**

### **DISCUSSION**

The Researcher will be discussing the research results, sorted by the research objectives and hypotheses as follows:

#### **Objective 1. Problems and obstacles derived from the enforcement of the Copyrights Act B.E. 2537 (1994)**

##### **1.1 Copyright infringement problems in Thai Society**

The study found that people still lack knowledge and understanding about copyright infringement offences. People are not aware of what acts constitute such wrongdoings because they generally do not know which works are copyrighted. To their understanding, the acts against copyright works in trivial matters have been commonly practiced in the society because opportunities are open for convenient, expedient and popular access. From 10 questions used to measure the knowledge and understanding about the copyright infringement offence, most people responded correctly at only 2 questions as those were drawn from the fact that appeared on the TV and newspapers news where there has been mounting criticism about injustice brought to the offenders. Regarding the other 8 questions, on the other hand, the respondents did not know that they are offences.

This is in consistency with the concept of innocent copyright infringement whereby the "Innocent Infringer is the person who infringes unknowingly or without reason to suspect that he is infringing" (Leon R. Yankwich, *Intent and Related Problems in Plagiarism*, Southern California Law Review, Vol.33, 1960, page 233), or, in other words, that it is solely a violation of the rights of the copyright owner, without knowing or reasonable suspicion that the infringement is being acted against those rights (Kent Sinclair, *Liability for Copyright Infringement - Handling Innocence in a Strict-Liability Context*, California Law Review, Vol.58, Issue 4, 1970, page 949).

Study results show that the majority of people do not know which items are pirated goods. The innocence involved with the mental state (the infringer's is not recognized as a subject of psychological complications) of the infringer who is innocent in good faith (R. Anthony Reese, *Innocent Infringement in U.S. Copyright Law: A History*, Columbia Journal of Law and the Arts, Vol.30, No.2, 2007, page 133), and there is no evil (culpability). This will distinguish the innocent copyright infringers from those violating with the evil spirit and know that their action is a violation of copyright (The defendant's mental state appears to some extent to have served the function of distinguishing culpable, knowing infringers by reference from blameless independent creators. R. Anthony Reese, *Innocent Infringement in U.S. Copyright Law: A History*, Columbia Journal of Law and the Arts, Vol.30, No.2, 2007, page 166).

This corresponds to Chumphon Pinyosinwat - Copyright litigation cannot adjust soever the Mens Rea Principle or the Schuld Theory, especially to people in poor countries. This is due to the fact that people in poor society are aware that copyright infringement is not so bad as to be liable to criminal sanctions.

#### 1.2 Problems and obstacles derived from the enforcement of the Copyright Act B.E. 2537 (1994)

From the study, it was found that the sample of officials in the justice system saw that copyright infringement is an important problem in Thailand. Criminal penalties under the Copyright Act B.E. 2537 (1994) are not yet appropriate for the copyright infringement behaviors. Severe criminal sanctions cannot suppress the offences. The law should be modified so that minor piracy, or piracy for personal/private benefits, for non-commercial purposes, or non-pecuniary measurable should not be a criminal liability.

This is in consistency with the Conflict Theory which saw that certain behaviors are defined as criminalization while others are not. The copyright law is a law that has been used as a tool of certain groups that have the power to maintain the interests of the groups, by the criminalization of all levels of piracy. This style of legislation is intended to maintain the benefits of influential groups in the society, i.e. the capitalist groups who are harmed. All levels of piracy behaviors,

although the behavior not damaging the copyright owners, were identified as illegal and being the behaviors of powerless groups.

This is consistent with the concept of the copyright infringement litigation not being useful as a kind of profit that the owner of the rights are supposed to/ ought to/ receive as a reward/the reward/supposed to be rewarded. Sanctions should, as a result, be that offenders do not benefit from their acts. The punishments appropriate for/ fit the copyright violation offence are a fine charge and confiscation of properties, because such punishments are for the prevention of offences intending for commercial interests with profits as rewards from the vulnerability to crimes, which matches the asset advantages motivation criteria. The punishment should, therefore, aim to abolish the proceeds of crime in order to eliminate incentives to illegal acts/ dispose of the motivation for crime, except in case where the fault is associated/ coincide with public threats such as organized crime. This is consistent with the perceptions of many scholars who believe that copyright infringement is a matter of the private law. It is only enacted following public policies and it is only criminal guilty acts prohibited by law (*mala prohibita*). But it was found that Thailand's prevention and suppression measures are, in turn, drastic criminal measures that rather exercised through the administrative branch. This can be noted from the 1/ 2011 Meeting of the Sub-Committee on Prevention and Suppression of Intellectual Property Rights Violation on 10 February 2554 (2011) inform the concerns of the private sector who were the owners of the intellectual properties, by voicing that the punishments for those who act in violation of intellectual property rights should be severe enough to prevent the offence (An Official Letter from the Ministry of Commerce, No. PN 707/cir. 1258 dated 30 March 2554 (2011), to the Office of the Special Prosecutor for Intellectual Property and International Trade Litigation). That is, the fact that the recidivism has nothing to do with the provisions of the law. In spite of drastic law in effect, it is not a serious threat to a person against wrongdoing.

1.3 Problem about increased penalties when the defendant experienced final judgment in piracy. After that, the defendant was acquitted in the previous litigation before passing maturity five years. The defendant repeated the copyright infringement offence again, are liable for double penalty according to

Article 73 of the Copyright Act B.E.2537 (1994). Whether this can intimidate copyright infringement?

Study results are divided into two parts. Part 1 - qualitative data -, it was found that increased punishment provisions for recidivism will intimidate the wrongdoers. But Part 2 - quantitative data, it was found that severer criminal penalties for piracy do not inhibit to repeat the mistakes.

Regarding those research results of qualitative data, the discussion showed that adding penalties to impeach those who repeat the offence will keep to dread the very offenders in accordance with the theory of punishment to terrorize inhibition Ray Jeffery's Deterrence Theory of Punishment that a person will not make a mistake if he is arrested and punished harsher, which will inhibit him. To avoid people from illegal acts, the effectiveness of the law with severe, speedy, and certain rate of penalties and a high chance of be arrested is required. This Theory is the foundation for the enactment of law/legislation and the philosophy of the administration of criminal justice. A person who commits a copyright infringement offence is owing to the rationality of a thought process before making a decision. Based on the principle that it is the nature of human beings to profit as much as possible and minimize losses. So if person thinks the chance to be arrested and the rate of punishment to get are not exchangeable with the piracy profits, pecuniary profits are not redeemable with the deterioration of the future for honest and secure, he will not choose to act illegally as well as the selection of alternative legitimate means. Therefore, the most effective piracy prevention is pursuing a judicial process that makes people believe that piracy will bring about negative consequences rather than benefits to gain from the offence. If a person is to be prevented from piracy, the law requires effectiveness and appropriate penalty rates in order to make the people believe or perceive that the negative consequences of piracy outdo its benefits.

Part 2 - quantitative data, it was found that the concept of increasing the piracy penalties to severer criminal sanctions being unable to suppress the misdeeds do not coincide with the Deterrence Theory of punishment which ruled that punishments must be appropriately provided, tantamount to the guilt and proportionate penalties are required. If the sanctions are too light, disproportionate with the offences, offenders and people in general will not fear and it will not worth in

risky wrongdoings. But if penalties are too heavy, the offender will attempt to conceal their misconduct. The justice system will have to work harder to bring the offenders to punishment because it has the burden of proving explicit evidence. Thus, the penalties have to be appropriate and tantamount to offending in order to have deterrent effects (Nathee Chitsawang, 27).

1.4 Problems of balance between penalties and non-pecuniary measurable piracy behaviors or for private matters or for non-commercial purposes must be punished with a fine from 20,000 Baht up to 200,000 Baht according to Section 69, Paragraph 1, and must be punished with fine from 10,000 Baht up to 100,000 Baht according to Article 70, Paragraph 1 of the Copyright Act B.E. 2537 (1994). Are they appropriate or not?

The study found that from the sample which are officials in the justice system felt that minor piracy litigation which is not associated with the commercial purposes should not at all subject to criminal liability. They also do not agree with the penalty provisions of the Copyright Act B.E. 2537 (1994), Article 69 Paragraph 1, and Article 70, Paragraph 1 since the guilt has not been done for commercial purposes. Although a fine penalty, but it was too severe. The law should not define minimum penalties, but leave it to the Court's discretion in determine penalties. Law should therefore be revised further.

This is consistent with Karl Marx's Theory that labor productivity is greater than the compensation they receive in the free market. The pursuit of the surplus value is the basis of economic gain under the capitalist economy, The working class group with creative labor which includes inventors, writers, and artists are in the same status as other labor groups in capitalist system. That is, is the class groups that create works in exchange with compensation or wage so there is no need to have intellectual property laws to create incentives or special compensation to the middle class that work on the creative labor. In contrary, the intellectual property laws are necessary of capitalist groups to expand their power to the control key mechanism in the production process. That is, the right to monopolize goods in the form of the intellectual property legislation. The State must consider the interests of the nation as a whole. When the State realized the intensive impact of piracy on one society, but if it does not harm their own society, the piracy law enforcement should



be alleviated. Because law enforcement measures depend on the extent to which the people in the society follow and respect the law. If they do not have faith and respect in the law, law enforcement is defected in spite of the strict state suppression. The criminal litigation on copyright infringement cannot adjust soever the evil intent or the Mens Rea Principle or the Schuld Theory, especially to people in poor countries. This is due to the fact that people in poor society are aware that copyright infringement is not an evil thing, to such an extent that criminal sanctions should be exercised.

1.5. The problem of the exhibits whereby some pirated goods fall to the victims who is the owner of the copyright in accordance with Section 75 of the Copyright Act B.E. 2537 (1994)

From the study, it was found that a sample of officials in the justice system did not agree with the sanctions which provide that the pirated goods belong to the victim who owns the copyright.

This is in accordance with the Anti-Counterfeiting Trade Agreement, Article 25, which provide for the forfeiture or destruction of pirated copyright goods, including any materials and implements predominantly used in the creation of pirated copyright goods and the working concept of the Department of Intellectual Property that when the court orders pirated copyright goods belong to the victim who is the right holder. But as for some type of goods that the copyright owner did not want to have it and did not want to bring it for sale, then the goods were left. This pushes the burden onto the government to spend budgets in destroying the exhibits, which may be useful for the copyright owner in protecting their rights. As, at the end, the pirated goods and a half of the judgment fine will belong to the right owners. Therefore the law should be amended so that the owner of the copyright has a shared responsibility for the transportation, storage and demolition of the exhibits, and so that the State has not to spend public taxes for the management of the exhibits.

1.6 The Problem of the fine penalties whereby a half of the judgment fine amounts are to be paid to the copyright owner according to Article 76 of the Copyright Act B.E.2537 (1994)

From the study, it was found that the sample of officials in the justice system both agree and disagree that the defendant pay a half of the judgment fine amount to the owner of copyright.

Under criminal law, this half of the fine amount is both a civil damage and a criminal sanction, with the effect that the defendant must compensate civil damages with criminal sanction. That stipulation has a criminal and including punitive damages in some cases, according to the official letter of the Office of the Council of State No. RS 601/584 dated 19 May 2521 (1978).

The agreeing sample is in accordance with the concept and rationale for the enactment of the law which is meant to resolve the difficulty in proving damages in civil lawsuits by giving the copyright owner the right to receive compensation in the form of a share of fines in criminal prosecution, without having to take another civil action. And in order that the amounts of the fine is big enough to be shared out to the right owner. The drafter of the Copyright Act B.E.2537 (1994) thus, the law adds a fine penalty in the penalty provisions at a very high rate. .

The disagreeing sample is consistent with the concept that the claims of copyright owners need to bring civil litigation to claim for damages, not associating civil damages with criminal litigation which is against the philosophy of punishment.

Summary of data analysis results based on an Objective 1., 6 issues related to the problem of copyright law enforcement are analyzed. From a quantitative and qualitative data analysis, it was found that there are 5 issues related the problem of unfair copyright legislation enforcement. It is therefore summarized that from this research, it was found that the Copyright Act B.E. 2537 (1994) have problems in enforcement and equilibrium.

This is consistent with the concept of the importance of Justice as bestowed by His Majesty the King that "The main purpose of the law is to equally administrating to all people, to live together peacefully, equally and orderly. To this purpose, two points of main factors are required to succeed; one is the good law on the one hand and good practices on the other. Therefore, the enactment of law should be directed to well-being of the lives of peoples and to the administration of genuine justice to all people. The application of law must also aim to implement the law following its purpose. The law user must not adhere too strictly to the legal

Provisions, but rather to be essentially based on the rationale pursuant to the reality of the case, on an individual case basis" (His Majesty the King's

Speech on the auspicious occasion of the opening of the 7th General meeting of the Law Associations for Asia and the Pacific (LAW ASIA) at the Dusit Thani Hotel, on 8 August 2524 (1981). Later in the year 2528 (1985), Her Royal Highness Princess Maha Chakri Sirindhorn has addressed the royal guidance emphasizing principle of maintaining justice that should not be considered to maintain justice in the Kingdom is to only to maintain the justice in law obedience. It is necessary to expand the scope of justice to ethics and morality, as well as the reasons of all fair parties, so that all honest persons are fully protected by the law and judicial process and the dishonest persons cannot use the law to protect or promote their illegal practices unhampered. Her Royal Highness has also addressed the injustice of the law that "There must be research or amendment to some parts of the laws", "Assisting the Legislative Assembly by pointing out how the laws should be amended", "Informing the people or the executives and proposing to the Legislative Assembly or the Council of State ... and fruitfully altering rules and laws" (Her Royal Highness Princess Maha Chakri Sirindhorn's Address in the graduation ceremony for barristers-at-Law, Class 37, At the Amphorn Garden, New Building, on 7 August 2528 (1985))

**Objective 2. To study the suitability of applying international legal measures to Thailand's copyright law.**

2.1 From the study, it was found that a sample of official in the justice system and the general shared the same opinions that the copyright infringement measures at level 1 – minor piracy behavior, which is not intended for commercial benefits or financial gains should not be a criminal liability.

This is consistent with the earlier concept of copyright protection. In the past, most of the superpowers saw that intellectual property rights are civil rights, there should be only civil mandatory provisions, rather than criminal ones to impose on those who violate the intellectual property rights, as the violation did not cause much harm to the public. But later, the superpowers realized that civil enforcement cannot stop or reduce the number of abusers. Therefore, groups of superpowers assembled to negotiate the drafting of the Anti-Counterfeiting Trade Agreement, an agreement against counterfeit trade. The goals of the talks were to establish agreed standards in the enforcement of measures to protect intellectual

property rights. In this Agreement, provisions on criminal enforcement were included. But Thailand had not joined as a party to the Anti-Counterfeiting Trade Agreement (Prachaya Rewlertsirikul : Contemplating the structure and legal issues on anti counterfeiting trade agreement: criminal enforcement,: a Master Project, Faculty of law, Bangkok University academic year 2554 (2011)) .

The use of criminal measures is a result of a call to amend the Copyright Act since Thailand had made a treaty with the United States as a government-to-government contract, called the Treaty of Amity and Economic Relations between the Kingdom of Thailand and the United States of America. The United States took Article 5, Paragraph 2 which stipulated that “Nationals and companies of either Party shall, have within the territories of the other Party the same right as nationals and companies of that other Party in regard to patents for inventions, trade marks, trade names, designs and copyright in literary and artistic works, upon compliance with the applicable laws and regulations, if any.”, in which the United States claimed that Thailand had an obligation to give protection for copyright in literary and artistic works to nationals and companies of the United States, whereas the United States used such economic interests such as the Generalized System of Preferences, or GSP, which is a preferential tariff system which provides for exemption or lowering of tariffs imposed on imports from Thailand in bargaining negotiation for Thailand’s amendment of relevant laws to protect the intellectual property rights of the United States. Later on, the Copyright Act was amended. The Government, through Ministry of Foreign Affairs supported the amendment of Copyright Act B.E. 2521 (1978), perceiving that copyright protection is at the heart of the international trading system. Law amendment would affect the well-being of people across the country through goods monopoly while Thailand are granted tariff preferences. Gross impact was that the amended law was permanently enforced when it was exchanged only for a few occasional benefits. This is the creation of law that is inconsistent with the principle of Latin legal proverbs that "Politics must be adjusted to suit the laws, not the law being adjusted to suit the politics” ( Prosecutor Magazine, Vol. 37 issue 4, January 2524 (1981), citing a Dictionary of Criminal law and Criminology terms (with Legal Latin Doctrines), book 2, printed at World Prints, Assoc. Prof. Dr. Thunyathorn Insorn, 2557 (2014) p.199.

Although some of the sample groups see that criminal and non-minimum fine penalties should be imposed, with the discretion of the Court to determine the penalties, it still does not comply with the principle of legal Latin doctrines and principles that mentioned that, "The best legal system must give the least discretion to the judge, and the best judge must exercise their discretion at the least." (The Prosecutor Magazine, Vol. 73 Issue 7, January 2527 (1984), Assoc. Prof. Dr. Thunyathorn Insorn, a Dictionary of Criminal law and Criminology Terms (with legal Latin Doctrines) Volume 2, World Prints, 2557 (2014), page 194.

2.2 From the study, it was found that a sample of officials in the justice system and the general public viewed that the Level 2 piracy behaviors for small trading whereby the criteria for small trading were having for distribution from 10 pieces up of pirated items or earning income from the piracy in the value not exceeding 75,000 Baht could be used as primary measurement criteria for piracy behaviors at the beginning. But there should also be advanced criteria and pricing details for each piece of items. As for the fine penalties from 50,000 up to 400,000 Baht or imprisonment penalties from 3 months to 2 years or confiscation of properties (penalties under Copyright Act B.E. 2537 (1994), Article 70, Paragraph 2) most of the sample groups agreed that they were already appropriate, and saw that the offence at this level should be compoundable.

To limit the scope of copyright infringement behavior for small trade is in accordance with the Peter Drahos's concept that each enactment of a new law or amendment/modification of a law in order to protect the rights to monopoly, have the same effect in constructing social capitals which are intangible, do not have a shape, there are no boundaries, and are in the form of monopoly rights. Therefore law enactment must be with extraordinary caution and need to limit only to an appropriate scope.

The extent of penalty provisions in the law, how high or low, is a matter of policy of each country, perceiving the importance of intellectual property protection. In placing penalties for this offence, there should be measures that correspond to the nature of the offence. And the feelings of the people in the society should be considered as a criminal policy matter. And the specialized characteristics of each type of intellectual property must be taken into consideration (corresponding

to Surin Nakvichien, The Use of the Discretion in Determining the penalties in Intellectual Property Cases, 2543 (2000) p. 135.

The principle of punishment of the Copyright Act B.E. 2537 (1994) does not correspond to the Principle of Criminological sanctions, such as imprisonment, to substitute revenge in proportion with the offences committed and to intimidate other people. At the same time, during the imprisonment, the inmates must receive vocational training, to have carried-on knowledge after acquittal (Nathee Chitswang). It is observable that the high rate of minimum penalty is harmful to the overall justice system. The Court, as a result, cannot adjust the punishment to suit the facts-in-issue in a given case. Penalty provisions, for example, of the Film and Video Act B.E. 2551 (2008) Article 38, Paragraph 1 complemented with Article 79 which provides that the entrepreneurs who operate movies distribution without license are liable to fine penalties from 200,000 Baht up to one million Baht. This offence includes film distribution which are copyright infringement, and covers from major operations to small sales, such as a weekend market stalls or car boot sales, which are liable to too high minimum penalties which are not suitable to the behaviors. If one cannot afford to pay the fines, according to the Criminal Code, Section 30, were liable to confinement in alien with the rate of penalty equal to 200 Baht per day. The type of penalties does not comply with the legal Latin Doctrines and principles which provides that "Freedom is not calculable" (Prosecutor Magazine, Vol. 6 Issue 65, May 2526 (1983), Criminal law and Criminology terms (with legal Latin Doctrines) Volume 2, "World Prints, Page 195, 2557 (2014). Assoc. Prof. Dr. Thunyathorn Insorn.

In principle, the cases of violation of intellectual property rights have the characteristic of no profitable benefits to be duly rewarded to the right holder. In Sanctions should, thus, result in that offenders do not gain benefits from their acts. Penalties appropriate for the offence are fine charge and confiscation of properties because they are punishable to prevent offences aimed for commercial benefits with profitable rewards from vulnerability to crimes, which meet the criteria that if the motivation for the wrong-doing is proprietary benefits, the proprietary benefits gained by the wrong-doers should be destroyed to eliminate incentives to illegal acts, except in the case where the fault is associated with serious public threats,

such as organized crime or public harm (Surin Nakvichien, " The Use of Discretion in determining punishments for intellectual property violation cases ", Intellectual Property laws and international trade Periodicals, December 2543 (2000), Page 135, .)

This kind of piracy offence should be a criminal offence that are compoundable is consistent with the *Khanit Na Nakon*. The damage causing huge suffering to those committed, but the general public almost don't realize the effects of the offence. The offence is committed to the actual protection of the victim, the respect for the victim's intention is deemed and the offence being compoundable. Chonapat Winayawat, 2556 (2013), concept Study on Thai law development guidelines with regard to compoundable offences, it was found that Thai compoundable offences create the opportunity for the two parties to independently hold a negotiation, depending on the intent of the victim whether to prosecute or not. The condition is that if the victim wants to prosecute, a complaint must be made within the periods and under the terms prescribed by law. If the victim wishes to terminate the prosecution, he would always be able to do, regardless of whether the case is in which step of progress, by declaration of the intention to withdraw the complaints. Government officials do not have a role in the negotiating process between the two parties. There is a single Domestic Violence Victim Protection Act, B.E, 2550 (2007) that provides that the victim and the accused cannot make an independent negotiation, it needs prior approval from competent officials prior to the settlement of the case. Therefore, no legal measures may be used to maintain peace in society or govern the conduct of those who act against the law in the future. For this reason, it should be restricted to the victim and the defendant not to held negotiation on their own. In other words, the compounded offence will result in the termination of the lawsuit with certain conditions such as the case settlement arrangement requires prior screening and approving by competent officials etc. This differs from the UK which imposes that criminal offences are non-compoundable. Germany and Japan, on the other hand, see that some criminal offences specifically affect the private sector. Therefore, it is necessary to also listen to the intent of the victim for prosecution. However in compoundable offences, both parties cannot negotiate for compromise on their own. The State still has control of the manifestation of the intent of the victim.

The victim's manifestation of intent does not bind the Police, the Prosecutor or the Court of Japan and Germany to take action in accordance with the needs of the victim.

The agreement of the victim and the accused to abate the action without the state agencies' authority to intervene in the negotiation between them do not apply the criminology principle. Although the definition of compoundable offence with the principle and method used in Thailand in considerably decreasing a lot the numbers of cases going to the Court, the society may have no guarantee that there will be no repetitive offence again in the future, because there are no restraining and corrective measures.

2.3 From the study, it was found that a sample of officials in the justice system and the public comments that the Level 3 behavior with income from 75,000 Baht is a too low amount. What they see the amount should be 100,000 Baht to be considered a big commercial suppliers. This was harm against the goods production system, takes advantage against the copyright owners. The measurement of income from piracy at the amount of 75,000 Baht are unclear measurement criteria. The use of other measures are appropriate, but each case must be clearly defined. In case of using the income criteria, if the income does not meet the criteria, the offence may not considered as violent as the Level 3. Therefore, piracy cases that do not have the characteristic of/resemble production factory, business making or ordinary trading should also be used as measurement criteria. As for penalties, most of the samples are of the view that penalties are appropriate, and this Level 3 Offence is against the State it should non-compoundable.

This is consistent with the Anti Counterfeiting Trade Agreement, Article 23 which provided that each party country shall provide for criminal procedures and penalties the law provides criminal sanctions with imprisonment or monetary penalties to be applied at least in cases of copyright or related rights piracy on a commercial scale, and TRIPS Agreement Article 61 - Criminal Procedures, criminal penalties are given for intentional violation of intellectual property rights with commercial scale.

This is consistent with the concept of criminal liability, it is intended for the purpose of criminal sanctions for criminal offenders, but the correct criminal justice process is not available for civil exploitation or compensation sought



for the right holder to monopolize. Therefore, for the general rationale principle, criminal procedures are not consistent with the manner and purpose of the protection of intellectual property rights. However, the large scale piracy which may severely affect the society, it may be appropriate under criminal liability as well, but it needs to be a criminal liability and punishment proportionate to the guilty.

Severe penalties, which comes from the Copyright Act, B.E. 2537 (1994) are not consistent with the philosophy of punishment, because of a lot of added and altered penalties. But did the various Government agencies that proposed intellectual property laws and legislative organs get to know or consider the characteristics of intellectual property with the understanding? To pass each bill is not done simply to collect words and translations into Thai. There must be a debate about philosophy of criminal penalties. If the provisions of the law do not conform to the international standards, without understanding the specific characteristics of the intellectual property, it will have negative impact on right protection in Thailand (Jumpol Pinyosinwat : Page 451).

Whether the penalties are appropriate or not must be considered together with the criminology principles, namely the imprisonment penalties is mostly based on the severity of the case or serious offences as the principal. The more severe is the misconduct result, the higher is the sanction. The less severe is the misconduct result, the lower is the sanction. Following the criminology principle, the action or penalties against the wrong-doers must consider the offender's behaviors whether they are able to be remedied, or too deep to resolve. Treatment of offenders in different criminal bases must be different, such as in cases of minor offenders do not have backgrounds as culprit. These people do not need to be imprisoned to be able to return to the normal society; community training opportunities should be able correct them. To punish them, their history, environment, behaviors and causes of offending need to be taken into account (Nathee Chitsawang, Pages 197-199).

Large scale commercial piracy should be offences against the state, which is non-compoundable, which is consistent with Khanit Na Nakon. If severe damage occurs, social advantages will be in a higher position. The right to prosecute shall principally fall in the responsibility of the State. Victims cannot

interfere as a condition for prosecution. This is in accordance with the concept of Banyong Limproyoonwong and Sataya Aruntharee Study on Prosecution by the Public Prosecutor in the Court on the Intellectual Property and International Trade: Case Study of Criminal Liability on Copyright Infringement, Part of the Research, Training Course, High Level Executives of the Justice System, Class 3, College of Justice, Ministry of Justice, 2541 (1998), Pages 63-2541 (1998), 64), and in accordance with the Trade Agreement Anti-Counterfeiting Trade Agreement, Article 26, competent officials in criminal rights enforcement, with authorized duties conduct the investigation and inquiry by themselves, without prior lodging the complaints by the victim if the misconduct is in the form of organized crime. Since this is the issue of relationship at national level, is an economic crime which cause damage to the State, such as the reputation and reliability of investment within the country and tax collection of responsible agencies. If this leaves to be compoundable with the organized crime, the State will lose its power in the suppression in association with significant cases, and loss public expenditure in the judicial process. If the settlement of the case is left unattended, the criminal lawsuit will be used as a tool for negotiating. As well, the offender will not realize that he commits a criminal offence and is subject to a repeated cycle of the misconduct. The guilty related to large scale trading must be fully prosecuted without be compounded.

Moreover, the compounding principle contained in Article 66 of the Copyright Act B.E. 2537 (1994) does not comply with the Patent Act B.E.2522 (1979) and Trademark Act B.E.2534 (1991), which define the guilty as a public criminal offence despite the same nature of laws related to intellectual property rights.

2.4 From the study, it was found that a sample of officials in the justice system have opinion that punitive damages measures should be used as a tool to deal with the problem of piracy for commercial purposes.

This is in accordance with the rationale of the monopoly rights in civil rights enforcement and the right protection of intellectual property in various international agreements, including TRIPS, Article 45 (Damages), which may be split into three parts, i.e. 1) damages to compensate for the damage, which is the damages caused by an intentional violation, 2) expenses loss, including prosecutors', 3) profits

and damage which is primarily prescribed, even though the violators do not know or do not have due reason to know that they are relating to the infringement action.

But it does not correspond to the concept of Aristotle in that similar things should be treated equally by corrective or remedial or cumulative justice is justice; that is, the justice must mainly take into consideration the damage, taking as the major principles that damage must be corrected or remedies exactly wherever it causes. For example, a person cause damage to others, that person must take responsibility others damaged. The applicant was liable to pay damage based on the damage that the property numbers are true (arithmetic equality) (citing in the jewels, "justice," Sophon, science, volume 25, part 2, pages 376-2511 (1968). 382.).

2.5 from the study find that a sample of that officer in the justice system and the public comments that it should be the task of the control measures, officials and spies Controlled Operations applicable to copyright law Thailand .

In accordance with international law, about the entrapment and entrapment offense: English, United States, Philippines, Singapore. Australia all countries accept the lure (Sting Operation), as long as no more than until stepping into the lure (Entrapment). There are laws and regulations, most of which is the performance of the officials about buying Mule (Asst. Prof. Dr. Parina Siwanit. Study : The laws regarding the purchase, to entice the criminal offense: a comparative study of law and international law).

Typically, the State should consider that when it is necessary to apply the principle to control crime in the correct way or law societies of their property by the severity of the condition may be based on the crime, need urgent or policy of the State in which the crime occurred in their territory to a previous point in time, because this principle has both ideas and best practices across each other and who may be affected by applying any one idea to use it may be either a citizen or law enforcement, but also by.

In accordance with the criminal code how to consider section 226 determined that evidence that the defendant is guilty, citing as evidence. But the testimony did not occur due to fraudulent or without motivation like another. This story is the basis of the measures the protection of those involved in the criminal case

is entitled to take all positive evidence into court and traced widely negatively is one testimony, denied cuts have brought evidence that happens without trace because he likes to travel, it's not valid, legitimate. The destruction of the justice system by the Bulletin (Khemchai Chutiwong, legal witness (feature description : Nitibannakarn Publishing,2527 (1984)), page 273) and is consistent with the principle that the correct way of legal property. (Due process of law), focusing on the actions of government officials cannot violate the principles of Justice and fairness give priority to freedom of the people by limiting the powers of the State (Available from: <http://definitions.uslegal.com/c/c.Rime-control-model/>), which is the most important thing in the justice system is to provide fundamental justice according to the law on the rights of the defendant. Victim's rights, not limited to the powers of the police to protect the power divine people in the justice system must comply with the rules. Processes and guidelines to insure justice and committed in the justice system , and the Government should not assume someone is guilty without the facts alone, but the person who should be accused as offenders, the Government has followed the process of searching for the truth. .

United States courts have considered a criterion to be an precipice, or not, is divided into 3 guidelines. 1. Subjective theory of Considering that the Government officials are the Director directs, the defendant guilty or not. 2. the theory of retribution, Marie (Objective Theory). Based on the actions of government officials during investigations to prevent becoming the Act of government officials to make the person who normally follow the laws decided do crash 3. theory of legal procedure, believing, caring (Due Process Theory). Focuses on whether the actions of the police must not violate the principles of Justice and fairness.

Measures to control the work of officials and spies (Controlled Operations) related to this research is the issue of copyright infringement in the case of entrapment. Amnat Netayasupha and Staff : 2548 (2005) to hear to testimony from the trick done by government officials in each country has a different approaches, such as the United States has Substantive Defence. Canada uses The Doctrine of Abuse of Process. England uses of Exclusion of Evidence, and Australia uses Controlled Operations. From studies of the copyright infringement issue, a lawsuit of the entrapment, Amnat Netayasupha and staff: 2548 (2005) found that if the officer or

private can lure the offending copyright without any control by the law will cause impacts on the rights and liberty of people, including guilty done without intent. Government officials were used as tools to prosecute those who entrapped, and led to corruption. Thus, the controlled operation should be applied as in Thailand.

The research hypotheses.

Hypotheses research deals 1. officials in the justice system think that the application of universal measures in the Thai copyright is appropriate.

It was found that officials in the justice system think about the overall of those universal legal measures were at medium levels . (average 3.30 standard deviation .35).

Hypotheses research deals 2. groups of agencies in the justice process, comments about the international legal measures applied in Thai copyright law were different.

The study found that officials in the justice system who have different occupations, think that the overall application of universal measures in Thai judicial process were not different ( $F = 1.545$ ,  $p\text{-value} = .192$ ).

Considering in each measure , it was found that officials in the justice system who have different occupations, also had different points of view in the application of universal measures in Thai judicial process significantly the level of .05 , as follows:

1.1 Comparative points of view related to the copyright law enforcement defined by occupations , it was found that officials in the justice system who have different occupations, have different points of view toward the copyright law significantly at level of .05 and found that

The Prosecutor did not agree with the copyright law enforcement more than any other occupations since the prosecutor thought that the Copyright Act B.E.2537 (1994) section 69 to 72 prescribed minimum penalties are high. The small scale infringer must be exceedingly punished more than it should be.

1.2 Comparative points of view related to the category of copyright infringement as commercial scale, found that officials in the justice system who have different occupations, had significantly different points of view in the level of .05.

Department of Intellectual Property officers, agree at most with measures of commercial scale infringement more than any other occupations with reason of the minimum penalty in copyright law is very high without the behavioral infringement.

In case of a small scale infringement will affect to the public interests since copyright law realizes public interest in protection of copyright, not only with the benefit of the copyright's owner only. The agreement on intellectual property rights relating to trade section 7, promulgated that "the protection and enforcement of intellectual property laws aimed to promote technological advances, broadcast and technology dissemination to the benefit equally between the creators and users, and in a way that will generate benefits to society and the economic system, and to balance between the rights and duties involved." .

Therefore, determining the punishment to be suitable for the facts, size of infringement and the damages in each case, infringement category for commercial scale piracy should be a criminal guilty.

1.3 Comparative of opinions related to punitive damages classified according to occupation.

It was found that officials in the justice system who have different occupations have the points of view have different opinions related to punitive damages in level of level .05.

The Department of Intellectual Property's officials agree to subject of punitive damages more than any other .

At present, Department of Intellectual Property has proposed a Copyright Act draft B.E. .... amended section 64 promulgated that the copyright with willful infringement causes the copyright work is accessible to the public, the can order infringer to pay compensation not exceed than double damages which this measure can reduce the infringement (the Department of Intellectual Property).

1.4 Comparative opinion related to Controlled Operation classified by occupations

It was found that officials in the justice system who have different occupations have different opinions about Controlled Operations at the level .05 as follows:

The Prosecutor agreed with Controlled Operations more than any other occupations since the copyright is a compoundable offence. If police officer pursuits for evidence on their own without controlling by senior officer, it may threaten public rights and liberty of people and evidence obtained shall not be admitted by the court.

1.5 Opinions concerning the level of commercial scale infringement in Thailand classified by occupations.

It was found that officials in the judicial process with different occupations have different opinions with commercial scales not differently.

Since all officials in the justice system think that the enforcement of Copyright Act of B.E. 2537 (1994) specially related with criminal penalties in accordance with section. 69 and 70, promulgated the minimum penalty in every paragraph. , which is different from the penalty provisions of the trademark Act B.E. 2534 (1991) and Patent Act B.E.2522 (1979). In practice, the defining of minimum penalty will result the unfair justice, especially with law enforcement, which is consistent with the sampling group's analysis of officers in the justice system, a qualitative and quantitative data. This is because copyright law has an content that covers creative work in general. The characteristics and circumstances of the misconduct can be varied according to the facts.

1.6 Comparative points of view on the application of punitive damages in Thailand classified by occupations:

It was found that officials in the justice system who have different occupations have opinion toward the application of punitive damages differently with statistical significance level .05 as follows;

Officers of Department of Intellectual Property agree on punitive damages measure more than any other occupations.

Because the Department of Intellectual Property has proposed measures to increase damages as punitive damages sanctions in the draft Copyright Act B.E. ... with the reason that copyright infringement that appears on internet network is difficult to control and find the infringers. The measure has launched the Court's power to punish the infringers who intend to infringe on internet network to pay double damages.

A staff from the Economic Suppression Division staff thinks that the application of punitive damages can cause problems since the copyright owners have to initiate the case and that it is simpler to grant the investigation to the police where the copyright owner might not be harmful to themselves.

#### 1.7 Comparative points of view related to the application of Controlled Operations in Thailand classification by occupations.

It was found that officials in the justice system who have different occupations have opinions on the measures of controlled operation differently at a statistical significance level .05 as follows:

Officers from the Department of Special Investigation agree on the application of controlled operations more than any occupation.

The reason why they agree with that measure is that the obtaining of evidence on intellectual property infringement, most of the cases will need to access preliminary finding to show to the Court. If there is a standard process to control the access of evidence, it will be useful for the Court. In practice, the Special Case Investigation Act also has special measures, such as being of detectives in order to access evidences but they have to be controlled by a senior level. Therefore, if the measure used are controlled properly, there will be no problems.

Hypotheses research deals 3. People in general the application of universal standard laws with copyright law Thailand is appropriate.

From the study it was found that people disagree with the luring for sale method since it is unfair to the infringers. There should be a measure related to lure for sale (Controlled Operations) and a petty infringement should not be criminal. (Commercial Scale Infringement) which sometimes people cannot distinguish whether which items are piracy or not. The infringer should not be executed as criminal offenders and that the case should be a compoundable offence.

The comment comes from the case that caused panic to the unfair justice of the copyright law and The Movies Act which has punished the penalty of fine of 133,400 baht to a garbage collector who sold a few CDs and an infringer who sold second hand books. There should be an exception of liability of the innocent infringers.



**Objective 3. To study and seek for proper guidelines of the application of the international legal measures within a Thai copyright law.**

The study found that the sampling group who are officers in the justice system and the public people have opinions related to copyright infringement in Thailand that can be summarized as 6 aspects as the following:

**3.1 The creation of values, awareness and campaign**

It is consistent with the strategy of the Intellectual Property Department of the 2557 (2014) strategy 2: develop intellectual property management systems by promoting knowledge, supporting the creative initiation by using of campaign strategy to create awareness on the importance and the respect intellectual property rights of the owners .

**3.2 The creation of a balance of intellectual property law. .**

It is consistent with the concept of Peter Drahos who has placed the Instrumentalism principle which mentioned that the State set monopoly right with the intellectual property right, the State also have set up duty-bearing privilege for the copyright owners, which helps the monopoly rights in intellectual property contribute for the balance of intellectual property. Instrumentalism is a framework to give priority to the overall society or a macro principle that intellectual property right is subset of the community, or is a component that enables the society can appropriately continue. Perception under Instrumentalism , thus, has to consider the overall picture that concerns public interests and the role of intellectual property rights.

**3.3 The creation of duties for the copyright owners in protecting their own rights.**

This is consistent with the concept of Lawrence Lessig who proposed a structural design architectures, controlled by a set of commands in a computer program that require a password or decrypt data. If the executable is not user-defined criteria, the user cannot access the data. The original infrastructure of the Internet network is open and does not emphasize the creation of a security system (unsecured) where Lessig called the freedom of the Internet network "the net has a nature, and that its nature is liberty" (Code and Other Laws of Cyberspace (New York: Basic Book, 1999), pp.30.). At present, the objectives of Internet network using has

changed to support for business and commerce. The need to modify the design of basic architectural structure to facilitate commercial transactions has respectively greater. The "code" that is designed to not be controlled or monopoly has been developed and modified to become the "code" into monopoly and control Internet network.

It is in accordance with the Trade Agreement Anti-Counterfeiting Section 27, the enforcement in the digital age has to be defined the protection against technological measures and the protection covers the prohibition of production, dissemination, distribution of equipment and service for avoiding technological measures for the enforcement of rights in the digital age, there are no provisions that protect electronic data or any technological measures to prevent further infringement of the right owners. However, Thailand has tried to amend to protect the right owners in digital age which promulgated the protection of technological measures that control access to a copyrighted work (Access Control) and defined restrictions on the production of tools or equipment or service to avoid technological measures. However at present, there is also a Computer Act to protect the copyright owner in case an electronic infringement has occurred.

It is in accordance with WIPO Copyright Treaty: WCT Section 11: which defined that member countries must provide a legal protection to prevent the inevitable technological measures, which the copyright owners initiated for the creative tasks.

#### 3.4 Establishment of an organization to collect the compensation

It is in accordance with the Ministry of Commerce policy since some copyright owners have exercised their right unlawfully. For example, the representative of the right owner collected money from those who sell pirated products on a monthly basis and also they threatened innocent copyright users of imprisonment penalty not to proceed the Court prosecution. The situation causes the complaints that the copyright owners had proposed the unfair compensation, especially for the small scale infringers. The establishment of an organization to collect the compensation is also an aspect in accordance with an operational plan to

take part in the ASEAN Economic Community where its member countries should have Collecting Societies within the year 2558 (2015).

3.5 The reducing of petty infringements and focusing on the major cases.

From the past copyright suppression has utilized criminal measure. It was found that copyright prosecution as a criminal case was 95 per cent of all cases (Division of Planning and Information, the Intellectual Property and International Trade Court). Such practices are not consistent with the concept of the Thai lawyers, such as Professor Vichai Arayanantaka, Professor Chaiyot Hemaratchata, Dr. Chumphon Phinyosinwat, who believe that copyright law is a private law (Chumphon. "Problems of Over Criminalization" and "the Enforcement of Intellectual Property Rights," periodical of intellectual property laws and international trade, (Special Edition), (Bangkok: Gaingrow Company Limited : 2546 (2003)) page 61, 70) which too much affects the stability of the people because copyright case can easily access to the justice system and the State loses revenue from the Court's fines and fees. .

The penalties as defined in section 75 cause incentives to prosecute criminal rather than civil litigation since the case has to first start with criminal prosecution with one half of fine to the injured person. Thus, the Court has a burden responsibilities in criminal prosecution than necessary (Over Criminalization) and it affects the stability of the people, when it was found it was easy to enter to criminal punishment. Problems of losing revenue of the State from such fines and fees are consistent with the concept of Piyanan Panchanawanich , " Problems Related to the Defining of the Compensation in the Copyright Infringement Case, Law, Graduate Thesis , Thammasat University, 2531 (1988), page 80-84.

Thailand has no law in classifying offenders by using the term "Any person where it cannot extend to a large commercial scale infringers. Punishment by Thai law did not recognize proportion or quantity or quality of the copyright products. This means a criminal punishment does not classify the copyright infringement scale and it impacts on public welfare in the absence of legal protection, even minor infringement shall be gained a criminal penalty, leading to problems of over criminalization. Thus, the aspect is in accordance with the concept Jumpol

Pinyosinwat, «: Criminal Enforcement of IPR: The problem of over-criminalization», the Intellectual Property and International Trade Law Forum: Special issue 2003, p. 88.

### 3.6 Fair Product pricing.

Analysis of data from a public inquiry, it was found that the copyright products price is too high and the desirable quality does not differ from the pirated goods. It is consistent with the study of Wisit Sripiboon who studied the satisfaction of consumers accepted toward infringed products, revealed that 50 per cent of people in general think that counterfeit product quality does not much differ from the genuine product and 66 percent indicated that right owners should reduce their own prices. (Wisit Sripiboon and staff, "Research Report on the Problems of Copyright Infringement in the Developing Countries, Concept, Problem, Resolution and its Development" the First Edition 1, Bangkok : the ML Creation and printing, September 2546 (2003), pages 106-164).

## **CHAPTER VI**

### **CONCLUSION AND RECOMMENDATIONS**

The research found that suitable copyright protection has to base on the precise understanding that copyright is an exclusive rights binding with abstract appearance granted by law for those creators, with its objective is to promote science and art progress of the country. However, in Thai society the right has to be suitably balance between public profit and benefit of creators.

TRIPs has not yet stipulated the infringement offences' characteristics, therefore, the stipulation in defining infringement action is accorded to the domestic law of the member countries. (Pitsawat Sukhonthapan, Basis Concept on Thai Copyright (Bangkok, Nititham Publisher), 2551, page 81-85). Peter Drahos has the idea upon new law enactment or the amendment to protect the exclusive right that effected social capital, recognized as nonappearance, no limit and in form of exclusive right capital. As a result, the enactment of the law should be carefully and suitably implemented.

This research has studied the classification aspect of infringement behaviors between the infringement which its volume shall recognize as criminal offence, petty infringement that civil sanction shall be used and a large scale infringement which shall be performed as a serious criminal prosecution.

The problem of copyright protection in Thailand does not actually balance with the principal theory of criminal punishment. The Copyright Act B.E.2537 protects the right owner to monopolize his right without limit and the characteristic of infringement is broadly recognized. It would result to the unfairness in law enforcement and affect to the criminal justice system. To cite;

1. Copyright Act B.E.2537 has stipulated the offence and the punishment promulgation higher than standard minimum of TRIPs, the international law. The difference of the level of punishment leads to the unfairness in Thai society context. For instance, section 69 and 70 have set up the minimum penalty in each paragraph

different from the punishment promulgation in the Trademark Act B.E.2534 and the Patent Act B.E.2522. In practice, the enactment of the minimum penalty would affect to the fairness of the court enforcement. This is accorded to the analysis of sampling who are officers in the justice system where copyright law has a broad protection. In contrary, the behavioral characteristic of infringement in practice is different such as employed seller sells infringed CDs along the street, comparing with the owner of a large scale CD who hires many employees to sell as networks. The law section 69, second paragraph had launched penalty from 6 months to four years imprisonment or fine of 100,000 baht to 800,000 baht. Two cases are different in behavioral infringement volume but they both have the same penalty. The obligation for the court to decide for the minimum penalty (6 months imprisonment or fine of 100,000 baht) for every case was unfair. Thus, the stipulation of minimum penalty at high level results to the unfairness and criminal justice system which cannot set up a suitable punishment according to the cases of infringement and damages.

2. The Copyright Act B.E.2537 has mentioned various criminal punishments such as imprisonment and fine that does not limit for the action (according to section 69 and 70), increasing of penalty to be double (according to section 73) and the penalty in seizing the infringement products fall into the right owner possession, the forfeiture of property and tools used for infringement (according to section 75), issuing one half of fine penalty to be of the right owner (according to section 76). It is understood that the criminal measures according to the Copyright Act B.E.2537 has protected the right owner more than the standard minimum of TRIPs and it causes the burdens of the officers in criminal system called “Over Criminalization” and impact on people in general’s security. The statistic of criminal and civil offences in the Court of Intellectual Property and International Trade found that most of the copyright cases are criminal since the injured persons prefer to choose criminal prosecution rather than civil prosecution. It leads to the using of police, public prosecutors and judges as a tool to cope with the infringers as criminal prosecution is rapid and has serious sanctions.

3. The problem of luring for sale from the right owner. Copyright Act B.E.2537 section 66 has stipulated that the copyright infringement is compoundable offence. Right owner has to launch a complaints with the enforcement officer to give

them the authority to investigate the case. The injured person in the legal sense means injured person must not take part in the unlawful action (Penal Code Procedure Section 2 (4) and Section 121). That promulgation has the impact on the governmental officers and governmental organizations. The fact is that the police will be used a tool of attorney in fact, who buys a letter of attorney from the injured person, shall make a complaints and lure for people's seize. This impacts on selling and buying letters of attorney from the right owners as business. People are lured in breaking the law and fall to be victims of the right owner. In general, the said luring from the injured person understood as private action of the right owner granted by law has impact on other private actions and seem to be unfair and contrast with the following laws. 1. Constitution of the Kingdom of Thailand B.E.2550 Chapter 3 Right and Liberties of the Thai People, Part 2 Equality Section 30 which stipulated that " All persons are equal before the law and shall enjoy equal protection under the law". 2. Chapter 5 Directive Principles of Fundamental State Policies Section 81 (2) to protect rights and liberties of the people against the violation from State officials and other persons, provided that the administration of justice shall be offered to all people on the basis of equality. 3. The Penal Code Procedure section 226/1 which stipulated that in the case where it appears in the Court any evidence has arisen duly but has been derived by acting in bad faith or has been derived by means of the data arisen or derived wrongfully, such evidence shall not be admitted by the Court, unless the admission of such evidence will be more advantageous in rendering justice than being disadvantageous due to an impact on the standard of criminal justice system or basic right and liberty of people.

The above nature of problems have been background of this research to bring the international measures of law as application for Thai copyright law.

Expected objectives from the application of the international law within in Thai context is that copyright law will be fairer, the criminal offence will reduce, the civil offences will be increased, rights and liberties of people will be protected and the organizations concerned can efficiently implement the law.

The researcher uses a Mixed-Method Design between qualitative research such as focus group discussion numbering 10 persons and in-depth interview numbering 10 persons. Most of a group are key performance consisting of experts who

have expertise on copyright field. For instance; the investigators from the Economic Suppression Division 4 persons, special case inquiry officer from the Department of Special Investigation 4 persons, officers from the Intellectual Property Department 4 persons, public prosecutors from Intellectual Property Office 4 persons and Judges from Intellectual Property and International Trade Court 4 persons, totaling 20 persons. Another method is quantitative research from officers who are dealing with the copyright enforcement numbering 150 persons and people in general public totaling 400 persons.

The researcher started from studying of problems and obstacles of the Copyright Act B.E.2537 enforcement, with the qualitative data such as literature review, focus group discussion and in-depth interview with the officers working in justice system. In addition, quantitative data was also surveyed among people in general public. As a result, data has been analyzed that what measures should be suitably implemented with those problems. Finally, the research has focused on the application of international measures by using the qualitative research from the literature review, focus group discussion and in-depth interview. It was found that three measures should be implemented as commercial scale measure, punitive damages measure and controlled operation measure, derived from England, United States of America, Japan, China and Singapore. The researcher has formed three models to examine the suitability for its application within Thai context. The quantitative research has been implemented with officers directly associated with the copyright enforcement numbering 150 persons and people in general public numbering 400 persons.

## **6.1 Research Conclusion**

Objective 1 Nature of problem and obstacles of the enforcement of Copyright Act B.E.2537

6.1.1 The understanding and concept of Thai people on copyright law found that they still lack of knowledge and understanding of the copyright infringement offence. This means they did not know that they committed wrongful



action, copyright infringements are petty offences and many people generally performed this kind of action. Regarding the law enforcement, people did not agree with luring for sale in infringed products method of the right owner for it is unfair. There should be a legal measure for luring for sale. Petty offence or infringement in small scale should not be criminal offence. In addition, the officers in justice system thought that the copyright infringement has been a crucial problem of Thailand but the Copyright Act B.E.2537 is not suitable for the infringement behavior and that the punishment is not serious enough to its suppression. Therefore, the amendment of the law should be implemented.

6.1.2 Balance between penalty and the infringement behavior such as the case of uncountable in money or a compoundable offence and not for commercial sale, the penalty is fine of 10,000 – 100,000 baht according to section 70 of the first paragraph, Copyright Act B.E.2537. The question is that whether this penalty is suitable or not? It is found that most of the sample group think that petty offences in infringement which is not for commercial scale should not be criminal offence. They did not agree with the penalty in section 69 and section 70, the first paragraph as it is not for commercial intention. Even though there is only fine penalty stimulated in those sections but it is a serious penalty. The law should not set up the minimum penalty for the reason that the court can use their judicial discretion.

6.1.3 The increasing of punishment in case the offender had a final judgment as an infringer. After he acquitted from the punishment and again became the infringer within 5 years, the penalty would be two times according to section 73 of the Copyright Act B.E.2537, shall it restrain the action? Qualitative analysis found that the increasing of penalty could make the persistent offender to be afraid of. On the other hand, the quantitative analysis found that there is a bit differences. To mention, most of officers working in justice system think that the increased penalty cannot suppress the infringer actions.

6.1.4 The penalty in forfeiture infringed products to fall into the right owner possession according to section 75 of the Copyright Act B.E.2537 found that the officers working in the justice system do not agree with it.

6.1.5 The offers working in justice system agree with the forfeiture method of machine and tool used for copyright infringement according to section 75 of the Copyright Act B.E.2537.

6.1.6 Paying one half of fine accorded to the court decision to be of the copyright owner possession as said in section 76, Copyright Act B.E.2537 the focus group discussion found that they did not agree with it. However, the in-depth interview with the officers found that they both agree and disagree in equal amount. In addition from the quantitative data the officers in average agree with that section.

The result of the objective related to 1. found that the problems of copyright infringement can be defined in 6 aspects. Quantitative and qualitative analysis found five aspects in copyright law enforcement would result to the unfairness. Thus, research concludes that the Copyright Act B.E.2537 still produces problems on enforcement and unfairness.

Objective 2. The suitability of the application of the international laws on copyright within Thai context.

2.1 Measure in setting up proportion of penalty to be suitable to the level of copyright piracy actions be divided into three levels. Most of the contents are suitable and some have to be improved.

2.1.1 Level 1 general infringement or petty infringements where the infringer does not intend to perform commercial wrongful action or monetary profit, should not be criminal offence.

2.1.2 Level 2 small scale infringement for commercial sale such as having the infringed products more than 10 pieces or having income from selling infringed products not more than 75,000 baht, found that this criteria can be used as a tool to define the infringement behavior in general but there should have the maximum criteria and details of the sale price. Most of the sampling groups agree that suitable penalty of fine of 50,000 - 400,000 baht or 3 months to 2 years imprisonment according to Section 70, second paragraph of the Copyright Act B.E.2537 is suitable and should be compoundable offence.

2.1.3 Level 3 Commercial scales which is a large scale of infringement products for the purpose of commerce. It means the infringer has income more than 75,000 baht or has an organized crime characteristic. The study

found that the amount of income should be 100,000 baht, and other criteria used is suitable but there should have more clarification in the definition of its level. Thus, the manufactures, businesses and ordinary commerce should be considered in this level. For the aspect of penalty of the fine of 400,000 – 1,600,000 baht and 1 year – 4 years imprisonment, most of officers agree that it is suitable and that should be public offence.

2.2 Measure in punitive damages, most of officers agree that it is suitable but it should be implemented only with the copyright cases.

2.3 Measure in controlled operation; most of officers agree that it is suitable.

### Hypotheses

1. Officers working in the justice system in average agree on the international standard of laws (average 3.30 standard deviation .35). When considering in each measure, we found that

1.1 Officers mostly agree upon the classification of the infringement levels, for commercial scale shall be criminal offence. For substantial (average 3.55 standard deviation .56). In case the measure will be implemented in Thailand, they agree in average (average 3.06 standard deviation .59).

1.2 Officers working in the justice system strongly agree with the punishment procedure to civil penalty to be more severe called punitive damages. Substantial is 3.52 and standard deviation is .65. In case the application of that measure in Thailand, they agree in average (average 2.88 standard deviation .55).

1.3 Officers working in the justice process in average agree with the controlled operation measure. Substantial is 3.36 standard deviation .62 and its application is Zaverage3.q3 standard deviation.51)

2. Organizational groups working in the justice system have point of that view differently with the above three measures on the application of international standard within the Thai context.

Hypotheses has been tested by the analysis of variance (One-way ANOVA). It was found that the officers working in the justice system working in different departments overall agree (not differently) on the application of international standard of law within Thai justice process. ( $F=1.545$ ,  $p\text{-value}=.192$ )

The finding can be summarized that every occupation has the same point of view in applying the international standard of law within Thai context. Therefore, it is not necessary to launch budget for knowledge and attitude training for one organization particularly.

Anyway, considering in each measure, it was found that officers working in justice system in various occupations have different point of view as the following;

2.1 Public prosecutors disagree with the enforcement of the Copyright Act B.E.2537 more than any other occupations because they think that the law has in practice various problems. For instance, the arrest of employees instead of employers may cause the cycling of infringers. The enforcement officers cannot approach them since they have good relationship with powerful politicians. If the law is amended but in practice, law enforcers could not function as the law written, it is not anymore necessary to amend the law.

2.2 Officers of the Intellectual Property Department most substantially agree more than other occupations with the classified level of seriousness for commercial scale infringement that it shall be criminal offence because it makes the infringers be afraid of the law and that private sector as the right owner cannot use government officers as a tool to compound cases and ask for benefits anymore. The law enforcement will be beneficial to people in general as the tax owners. The situation of copyright infringement will be decreasing.

2.3 Measure in commercial scale. According to the application of international standard of law, it is found that every occupation has no distinctive point of view. It is understood that it will be beneficial with the work of law enforcers. They shall operate their work more efficiently because they can focus solely on a large commercial scale rather than petty offences.

2.4 Officers of the Intellectual Property Department agree with the substantial and the application of the international standard of law within Thai context upon punitive damages measure more than other occupations since it will motivate injured person to have alternative choices to execute civil procedure. In addition, it can prevent the infringer to be afraid of the prosecution because the infringers have to be criminally prosecuted to pay the fine and property

forfeiture. They also have to pay for punitive damages such as normal and additional compensation to the right owner as the injured person. This makes the injured person to participate in the suppression directly and that motivate them to civil prosecution.

2.5 Public prosecutors agree with the measure in controlled operation in substantial more than any other occupations because it will result in gaining reliable evidences to prove the infringement's actions and also increase the evidence liability and the operation plan was already endorsed by superior officer. However, the detective must be honest and faithful in order to keep the operation secret and that the evidence existing in the investigative report shall be reliable and be legal evidence.

2.6 Officers of the Department of Special Investigation agree with the measure in controlled operation more than other organizations since DSI also conceal themselves for evidences' collection and the operation is controlled by superior officer before asking for search warrant. In case justice procedure in Thailand require to use this method, it can be acceptable.

3. Public people agree with the bringing of international standard law to be applied with Thai law. It is found that they agree with controlled operation measure since they do not agree with the method of injured persons in luring for sale. They also agree with measure in commercial scale since they think that petty infringements should not be criminal offence.

## **6.2 Recommendations**

### **6.2.1 Recommendations derived from the research**

6.2.1.1 Measure in commercial scale should be suitably applied in Thai copyright law.

1. The promulgation of liability exemption of petty infringement by adding the sentence in Section 32/...to the behavior in petty infringements where the infringer has no intention for commercial sale or monetary

benefits and have infringement products not more than 10 pieces, is not criminal offence.

2. The stipulation the liability exemption of innocent infringement such as the infringers do not know that the work piece is infringement, infringer believes by faith that the work piece fall into the public property, infringer believes that the use of that work piece is not infringement or the infringer has gained the infringed work piece from others and he does not know that it is infringement. Therefore, the Copyright Act should enact clearly on its promulgation to protect the infringement with innocent actors by adding section 31/.... or 32... (Frank L.Fine, Record Piracy and Modern Problems of Innocent infringement: A Comparative Analysis of United States and British Copyright Laws, Loyola of Los Angeles Entertainment Law Review, Vol.1, 1981, page 132)

3. The setting up of exhaustion of rights. The limitation of copyright law such as fair use and exhaustion of rights are limited more than ownership's principal. For example, copyright owner has sold books to sellers, person who bought that books shall have right to sell to other persons by recognizing that he has not been the infringer. This can be done by adding the exception of copyright (Section 32/...) that the sale of copyright products which lawfully obtained is not recognized as copyright infringement.

4. Measure of commercial scale should be used with the infringement for minor scale by adding the definition of minor infringement for sale in the penalty provision on commercial scale for that level. Such as adding the words in section 69/...to fine for the characteristic of having infringement products from 10 pieces and more, having the purpose for sale or having the income from selling those products not more than 75,000 baht. However, there should be the maximum scale with the details of product price. Moreover the penalty from 50,000 baht to 400,000 baht of fine or the 3 months to 2 years imprisonment or forfeiture of property should be the compoundable offence and should have some conditions before the case settlement.

5. Measure of commercial scale to be used with large scale infringement for commercial sale by adding the definition of large scale for commercial, the punishment and penalty on commercial scale level 3 in section

69/...as behavior for commercial scale infringement. This is defined by having the income from those products of 100,000 baht or having characteristic of organized crime or being a person who control of the production, adapt, sell, disseminate, use of infringement calculated as 100,000 baht or more. In case of manufacturer, business or normal sale will be recognized as additional characteristic. The punishment will be 400,000-1,600,000 baht of fine and 1 year to 4 years imprisonment, forfeiture of property, and shall be public offence.

6. The adaptation of consent in criminal offence from international countries. There should have conditions which clearly defined in law by adding words in section 66 that basic principal where litigants can settle their case in case there is an obviously fair, reasonable and adequate fact and it is not a product of collusion and also add the word in section 66, second paragraph of the Copyright Act by defining that the infringement for commercial scale is a public offence.

7. In case, the amendment of the law to set up the commercial scale for sale is a public offence and also it should be a predicate offence for money laundering according to Anti-Money Laundering Act. This will be done by adding the definition provision "predicate offence" in section 3 of Anti-Money Laundering Act B.E.2542 amended by Anti-Money Laundering Act (Forth Volume) B.E.2556 (13) Offense relating to trading under the Penal Code only where it is associated with the counterfeiting or violating the intellectual property rights to goods or the commission of an offense under the laws on the protection of intellectual property rights with a nature of business conduct". The intellectual property right violation related to copyright infringement by for commercial scale shall be predicate offense. This is to forfeit of property from copyright infringement actions where it can threaten the infringers to be afraid of. At present, copyright in a minor scale infringement has also been a predicate offence according to the Anti-Money Laundering Act where the infringers were forfeited of property, unless they can prove that their properties are not related to the offence. It is sometimes have effects on infringers' rights. in practice, there would be problems of properties in forfeiture.

8. Repeal of wording in Section 75 of Copyright Act B.E.2537 as said that the dispute products shall be fallen into the right owner's

possession to forfeiture of infringement products or have them destroy. In addition, infringers have to pay for those expenses.

6.2.1.2. The application of International law measures (punitive damages) to be suitably employed and amended within Thai context. recommended by the Department of Intellectual Property.

It can be done by adding the words in section 64 , the second paragraphs of the Copyright Act B.E.2537 as “the Court shall order the infringers to pay double compensation accorded to the first paragraph.

In case adding of the foresaid wordings in section 64 of the Copyright Act B.E.2537, section 76 shall be repealed, especially one half of fine accorded the court decision to the right owner. The reason why the law stipulated this section, is to solve the problem of the difficulty in proving civil compensation by having the right owners gain compensation in the form of a fine in criminal case and that they will not complain for civil prosecution as another case. To elevate the fine to be much more for the right owners, the drafter of Copyright Act B.E.2537 has increased a fine in the penalty provision to be higher and set up the minimum fine to be high. But it is opposed to the principal of punishment.

The characteristic of section 76, one half of fine is for civil damages, at the same time, it is obvious a criminal penalty. This results infringer to compensate the civil damages with criminal penalty. Therefore, when using of civil measure, there should be the repeal of one half of fine accorded to section 76.

6.2.1.3 The suitable application of controlled operations to Thai Copyright law, recommended by the National Police Department. The controlled measured will be used to stipulate as laws, regulations and obligations for the officers' operations related to luring for sale. In case officers implemented the cases according the laws and regulation, the evidence shall be lawful and acceptable according to section 226 of Penal Code Procedure. On the contrary, if they do proceed accorded to the law, such evidence shall not be admitted by the court unless the admission of such evidence will be more advantageous in rending justice than being disadvantageous due to the impact on the standard of criminal justice system or basic rights and liberty of people according to section 226/1.



The Department of Special Investigation has its own law on the finding of evidence by being detectives according to the Special Case Investigation Act B.E.2547 section 27 which promulgated that “ If it is necessary and to benefit the compliance with this Act, the Director-General or person designated thereby shall have the power to have anyone prepare a document or evidence or falsify his/her identity in an organization or a group of people for the benefit of the investigation, which however shall be according to the regulations provided by the Director-General. When preparing such a document or evidence or when falsifying his/her identity in a particular organization or a group of persons for the purpose of the investigation as stated in paragraph one, this action shall be considered legitimate. However, the other enforcement organizations still do not have this kind of authority granted by law. Therefore, the promulgation in this case should be added in the Copyright Act B.E.2537 in Chapter 7 on Officials.

6.2.1.4 The Application of other measures generated from the study.

1) The Intellectual Property Department should set up the of injured persons' responsibilities in defining the public on copyright identification such as Rights Management Information (RMI), the information indicating copyright work piece which systematically help facilitate copyright management, the identification of content and licensing. There should be promulgation for injured persons to inform their right to the Department of Intellectual Property before putting it into force. This is to prevent the claim of right or the use of right unlawfully. For example, ISBN for searching of books in library, ISAN (International Standard Audiovisual Number), ISWC (International Standard Musical Work Code). Injured person must have responsibilities to inform information related to creators, creative works, conditions and the uses of copyright work piece. This is to notify infringers on their liability in case they violate the law and also the right owners have to inform their rights with the Department of Intellectual Property before their operation in order to prevent claims of the unauthorized persons.

2) The Intellectual Property Department should ask for the amendment of the law by setting up responsibilities for injured persons, the utilizing of Technological Protection Measure to prevent copyright duplication or control

copyright work piece in order to protect copyright infringement. For example the right owners can use encryption technology to prevent other persons to access e-book and webcasting.

3. The Department of Intellectual Property and Ministry of Technology and Information would like to amend the Copyright Act B.E.2537 and the Act on Computer Offence to set up the responsibility and liability of the internet service provider (ISP) especially when infringement is an online network and the information is sent and accessed by the public. World Intellectual Property Organizations (WIPO) has pushed various measures related and has raised WIPO agenda section 5 to develop the laws regarding the liability of ISP. Internet provider that may take the responsibility in help disseminate infringed work piece if someone has uploaded the work of others which is piracy. For example, in case someone has uploaded movie on YouTube, where it appears very difficult for the ISP to know whether the movie is piracy or not, but when the ISP is informed by copyright owners or their representatives that they are the right owner of work piece, ISP should remove it from website. If the ISP agrees to remove that the copyright piracy, they would be exempt for the liability on disseminating or taking part in the infringement. However, if the ISP still disseminates the infringement work piece, they would plead for the offence of disseminating or taking part in that copyright infringement. In this case, injured persons can ask the Ministry of Technology and Information to block the website.

4. Government has to stipulate the law to limit the exclusive right of the right owner and reduce the monopoly power on the products since the law has granted exclusive right to right owners in his own products. They are free to set up the price. However, the law has exempted the Fair-Use to make the balance between consumers and the copyright owner. That means the right owner has appropriate profit and consumer can access the copyright work piece with a suitable price.

5. The Department of intellectual Property has to establish the Copyright Management Organization (CMO) to properly promote copyright collection fee with the copyright owners and persons entitled. The system will gather the copyright owners as members of organization and functions the collection fee on behalf of members announced among the public. There should be regulations on rate

of collection fee, the deduction rate for company's expenses and payback rate to the copyright owners, and those rates have to announce to the public to inform them the fee contributed to the company and the song creator. This is the mean to inform buyers in advance to choose products. Thus, the collecting company can perform their work systematically and transparency, copyright owner for song creators will be protected and can absolutely gain benefits. This method will promote and motivate the innovation of song creators and at the same time of work piece user can choose lawful songs from various companies depend on their demand regarding to song's quality and collection fee rate. This is to protect the duplication of collection fee or threaten for prosecutions. (Banyong Limprayoonwong, Law on Fee Collection: Who Gains Who Losses, December 18 B.E.2550).

6. Ministry of Education has to take part in educational promotion on the innovation since it is an innovative knowledge and the creative of people creation. The ministry should support on changing Rote-based learning to student-center and also supplement intellectual property and innovative economy curriculum. At present, the Department of Intellectual Property has already implemented the pilot project in high school level and occupational schools to create basic perspective on intellectual property in Thai educational system.

7. Government has to formulate politics and international policy in participating as ASEAN member countries to negotiate with the United States of America in lowering the PWL. The reason is that the problem derived from trade obstruction policy of developed countries due to they suffer a loss of international trade. Even Thailand has continuously implemented various measures on the protection and suppression of copyright infringement, but Thailand still remained in PWL.

8. Government has to improve the law on promotion of creation and the use of intellectual property in terms of business. For example, the law on the enhancement and promotion of innovative economy to promote the investment, export, and top of private sectors businesses, policy regulation on intellectual property promotion and technology transmitting from university to industrial and business sectors. At present, Thailand does yet not have technology transmission law whereas USA has formulated Bay-Do Act 1980 or Patent and Trademark Amendment Act

(P.L.96-517) which is the prototype of technology transmitting from university and institute to industrial sectors by permitting universities to possess and own intellectual property derived from R&D supported by government. To cite, Japan has formulated Basic Law on Intellectual Property or Law No.122 of 2002 which set up fundamental government policy on intellectual property and its implementation, as well as research promotion in university to facilitate the use of researches in terms of business. In addition, Japan has formulated the Law to Strengthen Industrial Technique Ability B.E.2543 to push industrial sectors in granting scholarships to the university researchers in order to response the needs of industrial sectors. The office is also permitted to use TLO, facilities of university personals without any expenses and permitted universities and institutes to work as members of private sectors. (Synthesize Research on Intellectual Property in Educational System, B.E.2532, Associate Professor Chanita Rakpolamuang and participants B.E.2550).

9. The right owner should have the policy on fixing of product's price. The analyzing of consumer's behavior is a crucial aspect to the industrial tradition and consumer model. Digital technology, song downloading initiate to online presentation and traditionally song consumed. Therefore, the right owner should propose song information through website for consumers to access their services. Reducing in price of legally CDs can motivate consumers to buy. (consumption patterns, digital technology and music downloading by Luca Molteni and Andrea Ordanini, LRP long range planning 36 (2003) pages 389-406.

10. Public in general should change attitude to realize the important of copyright since consumers think that copyright infringement is not criminal offence. Consumers think that infringers do not commit the crime of larceny since property still lies in the same place. They just make additional copies. The researcher thinks the Copyright Act B.E.2537 should be adapted and amended; various measures mentioned earlier will result to public's fairness and the criminal justice system.

### **6.2.2 Recommendation for a future research**

6.2.2.1 Top up study related to the research recommendations should be implemented according to 6.2.1 to formulate as a new model and

implementation measure whether it is applicable or not and what are the problems and efficiency.

6.2.2.2 Top up study related to criteria of infringement to be clearer such as how to measure downloading of copyright work piece.

6.2.2.3 The study related to the application of measure for safety accorded to the Penal Code section 39 (5) the prohibition to exercise certain occupation. When any person is given judgment infliction punishment by the Court, and if the Court deems that the offence committed by such person taking the opportunity of carrying on own occupation or profession , and deems that such offence will be committed again by such person if such person carry on own occupation or profession further, the Court may issue an order in the judgment prohibiting such person to carry on own occupation or profession for a period not out of five years as from the date of passing over the punishment according to (Section 50). Whether and how it can be implemented?

6.2.2.4 The study on business and industrial promotion related to innovative economy should be implemented such as Thai indigenous knowledge and Thai traditional. Government should play a crucial role in copyright protection , especially in case of the infringement from foreign countries such as Thai massage, Thai medicine, jasmine rice . Trade responding such as custom tax or bilateral agreement have to be operated by the government to preserve and reserve nation rights for all without any exploitation.

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## BIOGRAPHY

<b>NAME</b>	Miss Pakawadee Pradabkam
<b>DATE OF BIRTH</b>	18 December 1975
<b>PLACE OF BIRTH</b>	Pathumthani
<b>INSTITUTE ATTENDED</b>	Sripathum University , 1997 Bachelor of Law Institute of Legal Education of the Thai Bar, 1998 Thai Barrister at Law, Thaibar 51 Chulalongkorn University, 2006 Master of Political Science (Sociology) Chiangmai University, 2013 Master of Science (Knowledge Management)
<b>POSITION &amp; OFFICE</b>	Public Prosecutor attached to the Office of the Attorney General, Department of Intellectual Property and International Trade Litigation 1 Public Prosecutor attached to the Office of the Attorney General, Department of Civil Rights Protection and Legal Aid , Pathumthani