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A Comparative Analysis of the Copyright Law of the Kingdom of Thailand and the Copyright Law of the United States of America : Within the Context of International Trade

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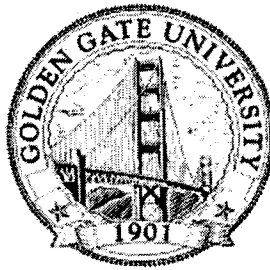
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SCHOOL OF LAW

S.J.D. DISSERTATION

A COMPARATIVE ANALYSIS

OF

THE COPYRIGHT LAW OF THE KINGDOM OF THAILAND

AND

THE COPYRIGHT LAW OF THE UNITED STATES OF AMERICA

(WITHIN THE CONTEXT OF INTERNATIONAL TRADE)

SUBMITTED BY

SUTEE IAMCHAROENYING

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GOLDEN GATE UNIVERSITY

A DISSERTATION FOR THE COMPLETION OF THE S.J.D. PROGRAM
IN INTERNATIONAL LEGAL STUDIES

SAN FRANCISCO, CALIFORNIA, U.S.A.
SPRING 2006

This dissertation is lovingly dedicated to my dear father and mother. Without their support and encouragement, none of my advanced legal studies in the United States would have been possible.

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ABSTRACT

Over the past twenty years, the Kingdom of Thailand's role in international trade has considerably increased. Concurrently, Thailand has been rapidly absorbing and utilizing advanced technology from the developed countries. Along with these favorable consequences, have come concerns regarding intellectual property protection. In fact, intellectual property matters have become one of the focal concerns for the United States, Thailand's most important trading partner. The United States has proclaimed that, to compete with other players in the world, Thailand must develop a sound copyright law reform to sustain its socio-economic development.

The fact that international copyright norms have been evolving may seriously complicate the determination of the extent of copyright protection in any given case. Those norms are not truly universal. Some countries abide by the latest treaty standards, while others adhere only to the lower standards of previous treaty texts or reserve certain rights permitted by the treaties. Therefore, foreign copyright owners must pay particular attention to the copyright law of the forum state where they are claiming copyrights.

Whether a private right, assertable in court, can be derived directly from a copyright or neighboring rights treaty, depends in each case on the nature of the treaty and the constitutional law traditions of the country concerned with protecting its copyrights. Some countries view treaties as self-executing; i.e., a directly applicable source of rights to private parties. In contrast, other countries hold that treaties are not self-executing; consequently, private actions must be founded on domestic legislation that implements the treaty.

One of most interesting topics is the anti-circumvention of technological measures for protecting copyrighted works. The legal issue of this topic is currently

dealt with by the WIPO Copyright Treaties and the WIPO Performances and Phonograms Treaty. Circumvention of technological measures creates a precarious atmosphere for both owners and users of copyrighted works because it can hinder the legitimate use of copyrighted works from the users under “the exception of copyright” doctrine especially when those works are in digital form. Legal machinery is important for the copyright community in its effort to balance individual rights and public good. The author will discuss the comprehensive and systemized legal protection of the United States copyright law as it protects technologies that control access of copyrighted works, and present it as a viable example, which Thailand may or may not consider incorporating into its legal framework.

This dissertation primarily surveys the law of copyright of the United States of America and the Kingdom of Thailand; however, the copyright laws of other countries are also examined as appropriate. Throughout the dissertation, the author presumes that the trend towards greater international protection of copyright will continue. There should, however, be a search for ways and means to improve the developmental process in developing countries while providing, at the same time, the sustainability of a sound international copyright protection system. The author argues that a few relatively modest and realistically implementable changes to international copyright law could help address some of the legitimate concerns of copyright critics while preserving the basic structure of domestic laws, which copyright proponents argue have well served many of the world’s peoples. Thus far, there are no signs that between developed and developing countries the battle on the issue of copyright protection is over.

The opinions, figures and estimates set forth in this dissertation are the responsibility of the author, and do not engage the liability of any of the organizations, or individuals mentioned in this work.

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Chapter I:

INTRODUCTION

In 1976, the United States of America, (U.S.), enacted its current copyright act, known as the *United States Copyright Act (U.S.C.A.) of 1976*.¹ This Act laid a sound foundation for current U.S. copyright law. Since then the U.S. has continually revised and updated its copyright law, and has never ceased urging developing countries, even an ancient Kingdom like Thailand (Thailand), to do the same. As a result of global development of copyright law and other external pressures, a number of questions have arisen relating to the impact of copyright law on developing countries, including Thailand. The questions relating to an appropriate period of copyright protection, the protection of computer programs and protection of copyrighted material on the Internet present controversial issues among international copyright lawyers. These questions have stirred further concerns following globalization and the evolution and world-wide propagation of information technologies.

Copyrights are important resources for developed countries because they confer upon copyright owners, depending on the law, specific rights by which they may control the distribution and reproduction of copyrighted works during the

¹ U.S.C.A. of 1976, Pub.L.No. 94-553, 90 Stat. 2541 (1976) (codified at 17 U.S.C. §§101-810 (1982) & Supp. IV (1986)).

owner's life plus fifty or seventy years.² Without considering the effects that extending the period of copyright protection could have on the growth process in developing countries, most developed countries attempt to lengthen the duration of copyright protection. For example, developing countries may have to deprive themselves of expensive imported technological information, or creative works, in order to satisfy the basic social needs of food, housing, medicine, and clothing. The U.S., a dominant economic power, has tried to indirectly enforce its copyright law internationally by resorting to trade sanctions to protect its copyright owners, while reaping more profit from copyright royalties.

Thailand has developed economic relations with the U.S., as reflected in a considerable number of bilateral treaties, and has welcomed U.S. investment since the end of World War II. Today, the U.S. is Thailand's largest trading partner, with a two-way trade of approximately \$20 billion annually. On the other hand, Thailand is the U.S.'s 19th largest overall trading partner. The U.S. claims to be, after Japan, the second largest foreign investor in Thailand.³ Over \$16 billion is the total accumulated U.S. direct foreign investment in Thailand, primarily in the manufacturing, petroleum, and banking sectors. In addition, Thailand is the U.S.'s 16th largest source of imports, valued at \$14.8 billion.

Furthermore, Thai products already enter the U.S. market duty-free under the Generalized System of Preferences (GSP) deliberated by the Office of the U.S. Trade

² Most countries have an author's life plus 50 years term of copyright protection as provided by the TRIPs agreement. *See infra* § 3.7.

³ *See* U.S. Embassy in Thailand, Background Notes: Thailand, October 2005, <http://bangkok.usembassy.gov/relation/bgnotes.htm> (last visited October 30, 2005).

Representative.⁴ According to statistical data provided by the U.S. Trade Representative (USTR) in 1993, Thailand was the third largest beneficiary of the U.S. GSP program, behind Malaysia and Mexico.⁵ Hence, the Thai economy relies heavily on its trade and investment relationship with the U.S.

The U.S., as one of the largest foreign investors in Thailand, protects its trading interests through the use of the Trade Act of 1974.⁶ Section 301 and Special 301 of the Trade Act of 1974 stipulate a unilateral recourse for the U.S. to retaliate against countries that do not abide by their obligations under trade agreements. These provisions allow the U.S. government to reduce trade privileges for a few Thai export products when the USTR finds that a trade agreement is being breached or an act, policy, or practice is unjustifiable, unreasonable, or discriminatory against the U.S.⁷

The Trade Act of 1974, as a follow up of the Trade Expansion Act of 1962, empowered the President of the U.S. to act against foreign imports in certain circumstances.⁸ World Trade Organization (WTO) members have criticized the use of Special 301 as a unilateral sanction on the part of the U.S. This use, they claim,

⁴ The Office of the U.S. Trade Representative (USTR) is responsible for developing and coordinating U.S. international trade, commodity, direct investment policy, and overseeing negotiations with other countries. Its duty includes oversight of the Generalized System of Preferences (GSP) and Section 301 complaints against foreign unfair trade practices. The head of USTR is the U.S. Trade Representative, a Cabinet member who serves as the president's principal trade advisor, negotiator, and spokesperson on trade issues.

⁵ See Laura R. Sallstrom, *U.S. Withdrawal of Thailand's GSP Benefits: Real or Imagined?*, 9 TDRI Q. Rev., 15 (1994).

⁶ 19 U.S.C. §§ 2411-20 (1988).

⁷ Ted L. McDorman, *U.S.-Thailand Trade Disputes: Applying Section 301 to Cigarettes and Intellectual Property*, 14 Mich. J. Int'l L. 90 (1992).

⁸ See WTO Panel Report of the Panel: U.S. – Section 301-310 of the Trade Act of 1974 WT/DS152/R (22 December 1999) [hereinafter Panel Report].

violates the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU),⁹ as well as the General Agreement on Tariffs and Trade 1994 (GATT). In other words, the issue was whether the Trade Act of 1974 allows the U.S. to suspend unilaterally the concessions of the WTO provisions and take action without consulting the disputing parties as called for in Article 3 of the DSU.

Article 3 of the DSU is a key element of the dispute settlement system, which is designed to provide security and predictability within the multilateral trading system.¹⁰ According to the report of the Panel on the U.S. – Sections 301-310 of the Trade Act of 1974, the European Community and 11 other countries, as third parties, including Thailand, viewed the process of the U.S. taking unilateral actions as derogating from the general principle of “*Pacta Sunt Servanda*,” which requires that international agreements be performed in good faith.¹¹

By applying Section 301 of the Trade Act of 1974, the U.S. has been examining the levels of trade barriers of Thailand since the 1980's. Application of Section 301 and Special 301 is the process of invoking the Trade Act of 1974 against countries that, in the eyes of the U.S., fail to afford adequate intellectual property

⁹ *Understanding on Rules and Procedures Governing the Settlement of Disputes Under Articles XXII and XXIII of the General Agreement on Tariffs and Trade*, in *The Results of the Uruguay Round of Multilateral Trade Negotiations*, annex 2 (GATT Secretariat ed., 1994) (hereinafter DSU).

¹⁰ See DSU, *id.*, art. 3 (providing that “The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.”).

¹¹ This principle is embedded in the 1969 *Vienna Convention on the Law of Treaties*. Article 26 of the Convention states “[E]very treaty in force is binding upon the parties to it and must be performed by them in good faith.” *Vienna Convention on the Law of Treaties*, art. 26 [hereinafter 1969 Vienna Convention], reprinted in 8 Int'l Legal Materials 679, 690 (1969). In addition, the Preamble to the Convention provides that “the principle of *pacta sunt servanda* is universally recognized.” *Id.* at 680.

protection. From 1991 to 1993, Thailand was on the Priority Foreign Country list which is the most egregious level of Section 301.¹² The U.S. Trade Representative (USTR) was not satisfied with rampant proliferation of counterfeit goods and ambiguous interpretation of the Thai Copyright Act (T.C.A.) of 1978 that might apply to computer programs. For instance, during that period, the U.S. found copyright infringement of computer programs significant and problematic.

Prior to 1994, it was still unclear whether Thai law recognized computer programs as copyrightable work. Consequently in 1994, Thailand revised its copyright act on account of pressure from the U.S. to comply with the standard set in Article 10 of the Agreement on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods (TRIPs Agreement).¹³ In the 1994 Revision to the T.C.A. of 1994, Thailand explicitly incorporated computer programs as literary work into the subject matter of copyrightable works.¹⁴ Section 4 of the Act defines literary work as any kind of compositional work such as books, pamphlets, writings, printed matters, lectures, sermons, addresses, speeches, and computer programs.

As a result of the revision, the USTR moved Thailand from Priority Watch List to Watch List in 1995. Further, Thailand demonstrated substantial progress in the intellectual property adjudicative system by inaugurating, on December 1, 1997, the

¹² Chart of Countries' Special 301 Placement (1990-2002) and IIPA 2002 Special 301 Recommendations <http://www.iipa.com/pdf/2002SPEC301USTRHISTORY.pdf> (last updated Mar. 24, 2003).

¹³ Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, Dec. 15, 1993, 33 I.L.M. 81 (1994) [hereinafter TRIPs Agreement]. This agreement requires the members to recognize computer programs as literary works within the meaning of the Berne Convention (the leading multilateral copyright treaty).

¹⁴ See T.C.A. B.E. 2537 (1994) §4 (Thail.).

Central Intellectual Property and International Trade Court (IPIT Court). This specialized court features several unique accommodations to both domestic and international users, whose features form the basis of discussion in Chapter IV.¹⁵

The evolution of international copyright law has enabled people to reap the benefits of their own expression of ideas. Copyright law has moved from the minor publication concerns of the mid-16th century, after the invention of the printing press, to the more complex concerns of the Information Age, especially the creation, the evolution and the world-wide dissemination of the Internet. The crux of the present international disputes over the scope of copyright protection is the differing views between developed and developing countries over the effects of copyright protection. Developed countries own a majority of the copyrighted works distributed in the marketplace, as well as the ownership of economic rights of these works, which fosters and is critical to their export opportunities.

A common belief is that developed countries use copyrights to protect their expression of ideas and to prevent infringement. In contrast, most developing countries deem the overly protective view of developed countries as monopolistic. The U.S., as one of the biggest exporters of technology, has tried to encourage the international community to accept its standard of intellectual property protection.¹⁶

¹⁵ See *infra* § 4.4.2. under “Jurisdiction of the Thai Specialized Court for Copyright Infringement Actions.”

¹⁶ Doris Estelle Long & Anthony D’ Amato, *A Course Book in International Intellectual Property* 11-12, (West Group 2000).

The Berne Convention for the Protection of Literary and Artistic Works (Berne Convention)¹⁷ was concluded in 1886 with a primary purpose of recognizing the rights of authors and artists in an international union for the protection of literary and artistic works. The focus of the Berne Convention was to create minimum standards by which contracting states could protect copyrighted work internationally.¹⁸ The Berne Convention has been revised and amended eight times between 1886 and 1979. On July 17, 1931, Thailand, as a developing country, became a member of the Berne Convention in accordance with the Berlin Amendment of 1908. The U.S. did not become a member of the Berne Convention until March 1, 1989, or nearly 60 years after Thailand acceded to the Convention, and nearly 100 years after its conclusion. Even though prior to 1989 the U.S. Constitution granted exclusive rights to authors,¹⁹ the implication was that it was morally acceptable for Americans to reproduce foreign copyrighted works without prior permission from the foreign authors.²⁰

Moral rights are the personal rights of authors, namely, the right of attribution, the right of integrity, the right of divulgation, and the rights of withdrawal and

¹⁷ Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886 amended Oct. 2, 1979, 828 U.N.T.S. 221 [hereinafter Berne Convention].

¹⁸ Peter Burger, *The Berne Convention: Its History and Its Key Role in the Future*, 3 *The Journal of Law and Technology* 15 (1988).

¹⁹ U.S. Const., art.1, § 8., The Constitution of the U.S. authorizes Congress to "promote the progress of science and the useful arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writing and Discoveries."

²⁰ In the very first copyright law of the U.S., Congress applied copyright protection only to citizens or residents of the U.S., and that nothing in the act should in any way be construed to prevent Americans from printing the works of foreign authors. American publishers were thus allowed, indeed urged, to infringe foreign works. See Aubert J. Clark, *The Movement for International Copyright in Nineteenth Century America*, vii (Greenwood Press 1960).

modification.²¹ The Berne Convention stipulates in Article 6bis²² that moral rights shall be recognized at least until the expiration of the economic rights. However, application of the moral rights doctrine depends on the jurisdiction where a case is brought.²³ Thailand had few, if any reservations in its accession to the Berne Convention, including accepting the moral rights provision. On the other hand, the U.S. recognized and gave effect to moral rights with some limitation, mainly for works of visual art²⁴ as conditioned by the Visual Artists' Rights Act of 1990 (VARA)²⁵ in adherence to the Berne Convention.²⁶ These differing views on moral rights protections trigger the question of whether the intrinsic purpose of copyright is to protect economic rights and moral rights proportionately.

²¹ Dane S. Ciolino, *The Protection of Authors' Moral Rights*, 69 Tul. L. Rev. 935 (1995).

²² World Intellectual Property Organization (WIPO), Guide to the Berne Convention art. 6bis, Pub. No. 615(E) (1978). Article 6bis of the Berne Convention reads:

- (1) Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honour or reputation.
- (2) The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the country where protection is claimed. However, those countries whose legislation, at the moment of their ratification of or accession to this Act, does not provide for the protection after the death of the author of all rights set out in the preceding paragraph may provide that some of these rights may, after his death, cease to be maintained.
- (3) The means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed.

Id.

²³ Ciolino, *supra* note 21, at 940.

²⁴ For the definition of "Work of Visual Art", See U.S.C.A. of 1976, 17 U.S.C. § 101 (1988).

²⁵ U.S.C.A. of 1976, 17 U.S.C. § 106A (Supp. V 1993).

²⁶ See generally Edward J. Damich, *The Visual Artist Rights Act of 1990: Toward a Federal System of Moral Rights Protection for Visual Art*, 39 Cath. U. L. Rev. 945 (1990).

When the U.S. enacted the *Berne Convention Implementation Act of 1988*²⁷ the U.S. Congress did not expand or reduce any right of an author of a work in respect to (1) the right to claim authorship of the work, and (2) the right to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to the work that would prejudice the author's honor or reputation. This position of the U.S. Congress made it questionable as to whether the U.S. had sufficiently complied with the Berne Convention mandate.²⁸

Both the U.S. and Thailand have undertaken to protect copyright because copyright is not only the tool for economic prosperity in terms of trade on copyrighted products and job builders,²⁹ but is also a mechanism for advancing technology that leads to a more desirable life. Thus, international copyright protection should be treated in proper fashion by balancing the interests of all countries and all interest groups. In the long run, international copyright protection can help developing countries to attract foreign investors.

This dissertation examines the standard of copyright protection of Thailand relative to international treaties regarding copyright protection for various domains. The Berne Convention for the Protection of Literary and Artistic Works (Berne Convention) and the Agreement on Trade Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods (TRIPs Agreement), for instance, are international norms to which the U.S. and the Thai governments have acceded. Moreover, this dissertation compares the development of copyright law between the

²⁷ Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988).

²⁸ Harry G. Henn, Summary of the Berne Convention Implementation Act of 1988, 20-21 (Practicing Law Institute 1989).

²⁹ Long & Amato, *supra* note 16, at 598-599.

U.S. and Thailand aiming to anticipate legislative trends in both countries. In comparing copyright laws of the U.S. and Thailand, a few factors must be considered; among these are the legal systems, the extent of economic development, and the educational levels of the population, because each country applies laws that fit its own socio-economic environment.³⁰

Even though, the U.S. has for over fifteen years imposed unilateral sanctions through Special 301, infringement of U.S. copyrighted products remains on the rise globally.³¹ And although the U.S. has the most protective copyright laws in the world, there are still a significant number of illicit products available in the U.S. and many cases have been brought into the courts. One notable example of prevalent copyright infringement in the U.S. is sharing or transferring music files on the Internet. The Recording Industry Association of America (RIAA)³² revealed in 2003 that there were about 1,600 people involved in infringing acts of sharing unauthorized copyrighted music files on the Internet in the U.S. and law suits have followed.³³ Recently, RIAA filed copyright infringement lawsuits against 751 individuals, including students at the college campuses of Drexel University, Harvard University,

³⁰ In a modern and complex society, legal decisions are often dependent on business, scientific, medical, psychological, and technological information. *See* Myron J. Jacobstein et al., *Fundamentals of Legal Research 1* University Textbook Series (7th ed. 1998).

³¹ *See generally*, GAO, *Intellectual Property: U.S. Efforts Have Contributed to Strengthened Laws Overseas, but Challenges Remain*, GAO-05-788T (Washington, D.C.: Jun. 14, 2005).

³² The Recording Industry Association of America (RIAA) represents ninety percent of the music industry and is responsible for the licensing and sale of music. *See* Recording Industry Association of America, About us, at <http://www.riaa.com/About-Who.cfm> (last visited Jun. 3, 2005).

³³ Benny Evangelista, *RIAA to Offer File Sharers Amnesty*, San Francisco Chronicle, Sep. 6, 2003, at B1-B2.

and the University of Southern California for illegally distributing copyrighted music on the Internet via unauthorized peer-to-peer services such as LimeWire and Kazaa.³⁴

The goal of the dissertation is to explore reasonable measures of copyright protection for developing countries, especially Thailand, to follow. In addition, it aims to convince the U.S., a highly developed country, to more fully consider ethical concerns as it struggles to combat infringement and to treat developing countries more leniently when imposing trade sanctions to protect U.S. copyright proprietors. Copyright is a unique and important class of intellectual property because it contains both economical and moral value attaching to the copyrighted products. The world community needs to rethink and redefine appropriate approaches to pursue a sound legal system for mutual interest between developed and developing countries.

§ 1.1. Significance of Copyright

The Oxford English Dictionary in 1989 defined copyright as “the exclusive right given by law for a certain term of years to an author, composer, designer, etc. (or his assignee), to print, publish, and sell copies of his original work.”³⁵ The *Dictionary of Modern Legal Usage*, published in 1995, further extends the more modern meaning of “copyright” as “property rights including literary, musical, artistic, photographic, and film works, as well as in maps and technical drawings.”³⁶ Evidently, the definition of copyright, as commonly known, has evolved along with

³⁴ RIAA, *RIAA Brings New Round Of Lawsuits Against 751 Online Music Thieves*, press room, available at <http://www.riaa.com/news/newsletter/121505.asp> (Dec. 15, 2005).

³⁵ The Oxford English Dictionary 917 (2nd ed. 1989).

³⁶ A Dictionary of Modern Legal Usage 457 (2nd ed. 1995).

the complexity of information technologies, and that definition will keep changing as future modification is required.

Copyright, author's right, and neighboring rights are currently three significant concepts for protecting literary and artistic works. However, neighboring rights are not recognized as a traditional legal concept. Copyright doctrine originally prevailed in common law countries, the former British colonies, and the countries within the British Commonwealth. England is the birth place of the concept of copyright, which arose after William Caxton's founding in 1476 of the first printing establishment. The principle of authors' rights, which is rooted in the civil law countries, is a principle that is generally accepted for protecting the personality of authors. The basis for the protection of author's rights can be attributed to natural right. This principle emerged after copyright laws were enacted throughout the European continent in the late nineteenth century.³⁷ Since then, copyright and author's right have been addressed in the copyright law of most countries.'

Neighboring rights were developed after copyright and authors' rights under the notion that some technological productions such as photographs, sound recordings, and motion pictures were made by a mechanical process, and not by the effort of an author; or even produced by a corporate organization, and not by individual laborers. A few civil law countries allocated to photographs and motion pictures different treatment. The three concepts of copyright, author's right, and neighboring rights were harmonized upon the development of the Berne Convention by incorporating its extensive minimum standards and leaving the disparities

³⁷ Paul Goldstein, *International Copyright: Principle, Law, and Practice* 3 (Oxford University Press 2001).

attenuated. Also, similarities in economic, political, and social structures of countries can assimilate these three principles into domestic law.³⁸

§ 1.1.1. History of Copyright Law

To comprehend the significance of copyright, an understanding of its origin is of paramount importance. During the Renaissance, artists, composers, and performers manifested their talents through the creation of literary and other artistic works. There was, however, no copyright protection to compensate artists if someone else reproduced and sold their work. Neither kings nor soldiers recognized economic rights or moral rights, while at the same time enjoying them, and authors released their works to the public without claiming the exclusive right to make copies.

In 1450, Johannes Gutenberg invented the printing press in Mainz, Germany, enabling the reproduction of multiple copies of writings. In 1476, William Caxton brought printing technology to England. Approximately eighty years later, Queen Mary established the Stationers' Company – a company comprising a group of printers – by granting a royal charter to keep press distribution under her political and ecclesiastical power. The Stationers' Company received the exclusive rights to manufacture and sell all books to meet the Queen's requirements. This form of speech control was probably design to assure the stability of her monarchy. The royal charter functioned as a trade regulation, rather than as a property law to protect the Stationers' market monopoly, and it further empowered the Stationers to seize and destroy unlawful books. If authors wished to have their works published, they had to bargain with the Stationers' Company and the printers decided what was printable. Evidently, the primary purpose of the Stationers' Company was to exercise censorship

³⁸ *Id.* at 4.

of inappropriate or unlawful statements that could have adverse effects on government policy.³⁹

The Stationers' Company adopted the censorship provisions from the royal charter so as to facilitate their exploitation of benefits by dominating the bargaining power with authors and other printers, and from pricing books. This aspect of monopoly discouraged fair competition in the publishing business.⁴⁰ Between 1557 and 1688, the Stationers' Company monopolized publishing and encouraged the Court of the Star Chamber⁴¹ to maintain that status. This was reflected in the Charter in 1557, the Charter in 1586, and the Star Chamber decree of 1637. The Licensing Act of 1662 was enacted to replace the Star Chamber decree of 1637, but it still preserved the censorship and licensing principles.⁴²

Before 1710, English copyright laws only concerned censorship. In 1710, the copyright laws began to address the copyright of authors. The English Parliament replaced the private Stationers' monopoly with a public copyright statute. The Statute of Anne was commenced through petitioning the Parliament on behalf of booksellers to give authors the right to transfer copyrights to any bookseller. The full title of the

³⁹ L. Ray Patterson & Stanley W. Lindberg, *The Nature of Copyright: A Law of User's Rights* 19-20 (University of Georgia Press ed., 1991).

⁴⁰ Michael D. Birnhack, *The Idea of Progress in Copyright Law*, 1 *Buff. Intell. Prop. L. J.* 23 (2001).

⁴¹ The ancient meeting place of the king of England's councilors in the palace of Westminster in London. The Court of the Star Chamber developed from the judicial proceedings traditionally carried out by the king and his council, and was entirely separate from the common-law courts. The Court of the Star Chamber had jurisdiction over the enforcement of royal decrees. The court was created in 1487, which exercised wide civil and criminal jurisdiction. It was controlled by the monarch. Although it functioned without a jury, the court did not abuse its powers, and its proceedings were public. In the 17th century the court began meeting secretly and imposing excessive punishment in an attempt to suppress opposition to royal authority. The court was abolished in 1641. See *The Columbia Encyclopedia*, (6th ed. 2001), at <http://www.bartleby.com/65/st/StarCham.html> (last visited Apr. 6, 2003).

⁴² Birnhack, *supra* note 40, at 23-24.

statute, known as the Statute of Anne, was "An act for the encouragement of learning by vesting the copies of printed books in the authors or purchasers of such copies, during the times therein mentioned."⁴³ Ostensibly, the language of its title purported the ultimate goal of encouraging authors to compose more books in exchange for the right to prohibit others from printing their industrious works without their consent.

There were eleven sections in the Statute of Anne covering three sectors of protection: (1) the stationer's copyright, which extended for twenty-one years; (2) the printing patent; and, (3) the new statutory copyright. One of the important elements of the Statute was an anti-monopoly provision.⁴⁴ If, before the protected term of a book expired, the author died or whenever the protection ended, then the copyright of the book would belong to the public domain. The copyright duration of the Statute was separated into two purviews. The first was unpublished work and the second was published work. For previously unpublished books, authors had a sole right to print or to authorize others to print for fourteen years with an additional fourteen years on renewal. For books published prior to the adoption of the statute, authors, printers and booksellers had the right to print such books for twenty-one years.⁴⁵

As a result, booksellers monopolized copyrights during the period of the Statute of Anne because once all rights embodied in a copyrighted work were transferred to the publishers, they enjoyed a greater duration of protection than did the authors. Consequently, at the commencement of the copyright age, having the right to

⁴³ 8 Anne, ch. 19. This statute is identified by the regal year of Queen Anne, because some historical references date it from 1709.

⁴⁴ Patterson & Linberg, *supra* note 39, at 28.

⁴⁵ 8 Anne ch. 19, §§ 1, 11.

publish was more profitable than having the right of authorship.⁴⁶ In other words, the authors needed to be paid for the product of their intellect, but lacked the ability to print their books. If they wanted their books published, they had to sell their copyrights to the publishers.

Another important feature of the Statute of Anne was that it formalized a system in the early period of U.S. copyright law that required books to be registered and copies to be deposited in order to have the books protected by the statutory law.⁴⁷ U.S. copyright formalities were obligatory to foreign authors until 1989 for compliance with the Berne Convention.

Eventually, the Stationers' copyright duration terminated in 1731 as a result of the twenty-one year limit of the Statute of Anne. As a result, books that were out of copyright protection went into the public domain. This creation of public domain for the literary works was a significant aspect of the Statute of Anne.⁴⁸ In 1738, the Statute of Anne was revised to end the bookseller's monopoly by equating the copyright duration of authors and publishers to fourteen years, with another fourteen-year alternative renewal. The common-law copyright or the perpetual natural right of authors, in contrast, remained and provided perpetual copyright protection to the author if his books had not been published. Recognition of the perpetual authors' copyright was later evident in the 1769 case of *Millar v. Taylor*.⁴⁹

⁴⁶ *Id.*; See also Birnhack, *supra* note 40, at 25.

⁴⁷ Richard C. De Wolf, *An Outline of Copyright Law* 7 (1986).

⁴⁸ Patterson & Linberg, *supra* note 39, at 29-32.

⁴⁹ *Millar v. Taylor*, 4 Burr. 2303; 98 Eng. Rep. 201 (1769); In this case, Lord Mansfield and Justice Aston referred to common-law copyright as the rights of an author to profit from his industry and labor.

Finally, the perpetual common-law right of authors came to an end with the court decision in *Donaldson v. Becket*.⁵⁰ In this case, The House of Lords decided in favor of a publisher by holding that the statutory copyright superseded the common-law copyright.⁵¹ Subsequently, English courts followed the decision in *Donaldson v. Becket* and it was later U.S. Courts assented to it accordingly.

§ 1.1.2. Development of U.S. Copyright Law

After the end of the American Revolutionary War in 1777, most states, led by Connecticut, enacted copyright statutes based on the English Statute of Anne, which recognized a natural right of authors.⁵² Those statutes contained discrepancies in formality requirements, as well as price control regulations,⁵³ and each state's law had effect only within its own borders.⁵⁴ If an author wanted his or her work to be protected in more than one state, he had to comply with the copyright laws of each of those other states. In 1790, following adoption of the Constitution of the U.S., Congress passed the first federal copyright act to harmonize the conflicts embodied in

In addition, an author should be able to prevent publishers from misrepresentation, mutilation or distortion of his original work.

⁵⁰ *Donaldson v. Becket*, 4 Burr. 2408; 98 Eng. Rep. 257; 2 Brown's Parl. Cases 129; 1 Eng. Rep. 837 (1774); 17 Cobbett's Parl. Hist. 953 (1813).

⁵¹ Arthur W. Weil, *American Copyright Law with Especial Reference to the Present U.S.C.A.* 11 Callaghan and Company (1917).

⁵² Robert P. Merges et al., *Intellectual Property in the New Technological Age* 322-23 (Richard A. Epstein et al. eds., 1977).

⁵³ *Id.*

⁵⁴ Patricia Scahill, *Note and Comment: U.S. Copyright Law and Its Extraterritorial Application: Subafilms, Ltd. V. MGM-PATHE Communications*, 19 Maryland Journal of International Law & Trade 296 (1995).

various state statutes and alleviate the burden of compliance with multiple state laws to protect only a single work.⁵⁵

The U.S.C.A. of 1790⁵⁶ was based on three principles as referred to in the full title of the Statute of Anne⁵⁷ which are:

- (1) Encouragement of learning;
- (2) Copyright for authors; and,
- (3) Time limits.

Similar to the title of the Statute of Anne, the language of the copyright clause of the U.S. Constitution, which is the basis for U.S. copyright and patent legislation, states the purposes and the basic condition of legislation as follows:

“The congress shall have power ... 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.”⁵⁸

This language of the Constitutional clause elucidates basic principles and purposes similar to those reflected in the English Statute of Anne. The reasoning behind the Constitutional clause is the following; copyright promotes learning; it preserves the public domain; and, it encourages creation and distribution of works by

⁵⁵ Merges, *supra* note 52, at 322-23.

⁵⁶ U.S.C.A. of 1790, ch. 15, 1 Stat. 124 (1790).

⁵⁷ “An act for the encouragement of learning by vesting the copies of printed books in the authors or purchasers of such copies, during the times therein mentioned.”

⁵⁸ U.S. Const., art. 1, § 8, cl. 8.

rewarding authors.⁵⁹ At the onset of its copyright legislation, the U.S. weighed the benefits of *learning policy* against those of *rewarding-authors policy* and emphasized that it should preserve a limited time period for copyright protection in the public interest.

The first U.S. federal copyright law protected both published and unpublished books. In addition, it included the protection of maps and charts. The protected time of all copyrighted works was 14 years, with alternative renewal for the same term if the author was still alive at the end of the first term. To have federal copyright protection, an author must have met all prerequisite formalities. A copyright owner was required to record the title of his work through the district court clerk, deposit a copy of the work with the Secretary of State, and give notice of the title in at least one newspaper through four advertisements.⁶⁰

In 1802, the U.S.C.A. of 1790 was revised to extend the protection to historical prints, which were designed, engraved or etched, and required a notice of copyright to be printed on the copies of the work to be protected. In 1819, the federal courts of the U.S. were assigned original jurisdiction in copyright cases. In 1831, Congress further expanded copyright protection to musical compositions, and the term of protection was extended to 28 years with another 14 years if renewed. Widows or children of copyright owners could also litigate the rights after the authors' death.⁶¹

⁵⁹ Patterson & Linberg, *supra* note 39, at 49.

⁶⁰ William F. Patry, *Latman's the Copyright Law*, 6 (The Bureau of National Affairs, Inc. 6th ed. 1986). *See also*, Scahill, *supra* note 54, at 296.

⁶¹ Patry, *supra* note 60, at 7.

The first copyright case heard by the U.S. Supreme Court was *Wheaton v. Peters*⁶² in 1834. In *Wheaton*, the Court reached a consensus (similar to the famous case of *Donaldson v. Becket* in English court) that federal copyright law (the Copyright Act of 1790) preempted state common-law copyright because of the non-existence of federal copyright common law.⁶³ The background for this case was that a copyright proprietor had failed to complete the formality requirement for deposit of copies of the work with the Secretary of State as required in the Copyright Act of 1790. However, the copyright proprietor asserted his copyright as the common law of the U.S., which provided perpetuity of copyright protection with no regard to aforementioned non-compliance. The question in this case was whether there was common-law copyright in the U.S. that would exonerate the failure of complying with copyright formality as required by federal law. Four members of the Supreme Court with two justices dissenting and one absent, declared that there was no U.S. common law dealing with copyright. The U.S. Supreme Court emphasized the copyright clause from the Constitution by confirming the utilitarian view that copyrights were exclusive rights of limited duration, granted in order to serve the public interest in promoting the creation and dissemination of new works.

In 1856, "the right of public performance" was first recognized for dramatic compositions. Authors or proprietors of dramatic compositions had rights to prohibit, or authorize others on performing their works in the public. This right protected both profit and non-profit performances. Violators of the performance right could be subject to a fine in an amount of not less than one hundred dollars for the first, and

⁶² 8 Peter's Supreme Court Reports, 591.

⁶³ De Wolf, *supra* note 47, at 18.

fifty dollars for every subsequent performance.⁶⁴ In 1870, a general revision of the law took place to articulate classes of protected works specified to be any paintings, drawings, chromolithographs, statues and models or designs intended to be perfected as works of the fine arts. Infringers of these works could be fined \$10 per copy.⁶⁵

The Copyright Act of 1790 protected only work created or published by U.S. citizens and residents. Foreign work was not recognized, and *vice versa*, foreign nations declined recognition of U.S. copyrights. Not until 1891, 101 years after the first U.S. federal copyright law was enacted, did the U.S., due to the substantial increase in international trade with foreign countries, begin to seek international copyright protection through enactment of the Chace Act of 1891. The Chace Act empowered the U.S. president to negotiate bilateral agreements in a manner that a contracting state would give works of U.S. nationals essentially the same protection it gave work of its own nationals. In exchange, the U.S. was bound to give copyright protection to nationals of those contracting states the same protection it gave its own nationals.⁶⁶

Less than 50 years after the enactment of the Chace Act, the U.S. concluded bilateral copyright agreements with 38 countries, including France, Germany, the United Kingdom and Thailand.⁶⁷ The U.S. had sought to have broader copyright protection from the Berne Convention. However, the country was not ready to

⁶⁴ See *Brady v. Daly*, 175 U.S. 148 (1899). This case was decided by the adoption of this provision.

⁶⁵ De Wolf, *supra* note 47, at 19.

⁶⁶ Scahill, *supra* note 54, at 297.

⁶⁷ The U.S. had the Bilateral Agreement of September 1, 1921 with Thailand during the reign of King Rama VI or King Vajiravudh (1910-1925) to strengthen relationship and to seek copyright protection in foreign countries. See 42 Stat. 1928 (1921).

eliminate formalities such as registration and deposition of copyright works, which had been prohibited since 1908 by the Berlin Text of the Berne Convention. Furthermore, its copyright law could not meet the moral rights standard imbedded in the 1928 revision of the Berne Convention. At that time, the U.S. was unwilling to prohibit an act of modification of an author's work that might prejudice the author's honor or reputation.⁶⁸

Instead of amending the copyright law to comply with the Berne Convention, the U.S. enacted the Copyright Act of 1909⁶⁹ to address miscellaneous laws that were hard to interpret and which resulted in unpredictable legal outcomes. The improvements of the Act of 1909 broadened copyright protection to include all writings of the author and removed the requirement of reprinting foreign language books that were not published in the U.S. Then in 1912, the Act was further revised to extend protection of motion pictures.⁷⁰

Prior to 1978, various states continued to provide common law copyright protection accompanied by the federal copyright law, which perpetually protect unpublished works. In 1976, the U.S. enacted the Copyright Act of 1976 as a comprehensive revision of the Act of 1909. It became effective on January 1, 1978, (and is still applicable today) and as originally intended by the U.S. Congress, ended dual state and federal copyright protection.⁷¹

⁶⁸ Scahill, *supra* note 54, at 297.

⁶⁹ Copyright Act of 1909, 35 Stat. 1075 (1909).

⁷⁰ Scahill, *supra* note 54, at 297.

⁷¹ Scahill, *id.* at 298.

The current U.S.C.A. was created to serve public welfare (so-called *learning policy* rather than natural rights or authors' rights (so-called *authors' policy*).⁷² The U.S. Congress has emphasized the learning policy in the House Report on the Berne Convention Implementation Act of 1988, by stating:

“Sound copyright legislation is necessarily subject to other considerations in addition to the fact that a writing be created and that the exclusive right be protected only for a limited term. Congress must weigh the public costs and benefits derived from protecting a particular interest. The constitutional purpose of copyright is to facilitate the flow of ideas in the interest of learning. The primary objective of our copyright laws is not to reward the author, but rather to secure for the public the benefits from the creations of authors.”⁷³

Considering the statement above, one might wonder that between the learning policy of making copyright work accessible to people and endorsing the authors policy by giving authors monopoly for a limited time, which policy is the greater incentive toward the progress of science and the useful arts. The answers to this question are not absolute. Depending upon the country's need, both policies may be adopted simultaneously and at varying degrees.

The current U.S.C.A. protects “original works of authorship,” which we will examine in Chapter III of this dissertation. There are eight types of works, namely, (1) literary works, (2) musical works, (3) dramatic works, (4) pantomimes and choreographic works, (5) pictorial, graphic, and sculptural works, (6) motion pictures

⁷² Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. at 429 (1984) (citing H.R. Rep. No. 2222, 60th Cong., 2d Sess. 7 (1909).

⁷³ Berne Convention Implementation Act of 1988, H.R. Rep. No. 609, 100 Cong., 2d Sess, 23 (1988).

and other audiovisual works, (7) sound recordings, and, (8) architectural works.⁷⁴ To be eligible for copyright protection, the work has to be fixed in a tangible medium of expression.

In any copyright case claimed in the U.S., a party that claims copyright, must establish that he or she is the author of the original work, that the work is eligible for copyright protection, that he or she has a citizenship of one of copyright contracting states to which the U.S. acceded, that he or she has complied with applicable statutory formalities, and, in case he or she is not the author of the work, he or she must prove a valid transfer of rights or relationship with the actual author, which allow him or her to be the valid copyright claimant.⁷⁵

Under the U.S.C.A. of 1976, a copyright owner has the exclusive rights to do or to authorize any of the following:

- “(1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the

⁷⁴ U.S.C.A. of 1976, 17 U.S.C. § 102 (a) (1988).

⁷⁵ Melville B. Nimmer & David Nimmer, *Nimmer On Copyright* § 13.01(A) (1994).

individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly, and (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.”⁷⁶

To claim any of these exclusive rights in a copyright infringement action, a plaintiff has the burden to prove two elements; ownership by the plaintiff and copying of constituent elements of the original work.⁷⁷

In October 1993, the Council of the European Union extended the duration of copyright protection by issuing Council Directive 93/98/EEC⁷⁸ which established a uniform term of copyright protection for countries within the union. The Directive required European Union countries to standardize the duration of copyright protection at 70 years after the death of an author. The term extension required most European Union countries to extend protection to 20 years beyond an author’s life plus fifty years, which was required by the Berne Convention from their copyright periods by July 1995.⁷⁹

Subsequently in 1998, the U.S. music and movie industries lobbied the House of Representative and the Senate to follow the European Union extension of copyright term protection to receive the same benefit as the extended European term. Because the European countries did not need to apply the new, longer term to works

⁷⁶ U.S.C.A. of 1976, 17 U.S.C. § 106 (1988).

⁷⁷ Nimmer & Nimmer, *supra* note 75, §13.01(A).

⁷⁸ Council Directive 93/98/EEC of 29 October 1993 Harmonizing the Term of Protection of Copyright and Certain Related Rights, 1993 O.J. (L 290).

⁷⁹ Robert L. Bard, Copyright Duration: Duration, Term Extension, the European Union and the Making of Copyright Policy 12 (Austin & Winfield 1999).

originating in countries that provide a shorter protective term, American authors and publishers could not receive the advantages of extended protection abroad. Therefore, Congress was challenged to increase protection in the U.S. to the life of copyright creators plus seventy years.⁸⁰ Subsequently, there was a debate concerning the appropriate term of copyright protection.

Since the U.S. sold more copyrighted products to the European Union countries than it imported from them, the U.S. would receive greater revenue from exporting copyrighted products. Therefore, in 1998, Congress passed the Sonny Bono Copyright Term Extension Act,⁸¹ which added twenty years of protection to all copyrighted works.

Recently, there has been debate concerning just what is the appropriate term of copyright protection. Some people view the current U.S. and European duration of protection (life of an author plus seventy years) as the suitable term. Others view the prior term of life plus fifty years as more appropriate. At one extreme, some even argue that permanent protection should also be considered.⁸² On account of the evolution of copyright laws and differing views of copyright protection policies of individual countries, there is obviously no absolute answer suggesting the best term of copyright protection for all countries.

⁸⁰ *Id.*

⁸¹ See Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998).

⁸² Scott M. Martin, *The Mythology of the Public Domain: Exploring the Myths Behind Attacks on the Duration of Copyright Protection*, 36 Loy. L.A. L. Rev. 253 (2002).

§ 1.1.3. Development of Thai Copyright Law

To understand the development of Thai copyright law, one must have some understanding of Thai legal system. The Kingdom of Thailand has a civil law legal system. This system differs, in several important aspects, from the common law system of the U.S. and other countries that follow the Anglo-Saxon legal tradition (for example, Australia, Canada, Malaysia, and Singapore).⁸³ Generally, the Thai legal system does not recognize a judicial decision, which is based on the principle of *precedent* as traditionally applied in the U.S. and other common law legal systems. This approach to making rules of law is known as “*stare decisis*.” In contrast, the primary role of the Thai judiciary is to interpret the language of the law in a code or an act according to the purposes of the legislature that made the law.⁸⁴ Therefore, as a civil law country, Thai jurists will look upon earlier court decisions and doctrine merely as illustrative material because they consider these decisions secondary authority, not precedents; thus, the Thai court has freedom without any intervention to construe the law in a manner suitable for the moment.

Thai legal development can be traced back to the ancient period of Sukhothai (A.D. 1238-1350). A noteworthy thought in Thai legal history is that Thailand as a predominantly Buddhist nation, has a long history of being governed by monarchs, who have been devout Buddhists, and moreover, the nation has never been colonized. As a result, Thailand’s law is inherently heavily influenced by its culture and religious

⁸³ Tilleke & Gibbins International Ltd., *Thailand Legal Basic: Thai Legal System*, at http://www.tillekeandgibbins.com/Publications/thailand_legal_basics/thai_legal_system.pdf (last visited Sep. 14, 2003).

⁸⁴ *Id.*

beliefs.⁸⁵ In the Sukhothai era, Thailand was influenced by the legal code system of Hindu (the northern part of India) which resulted in the use of Hindu Code of Manu. Then in the Ayuthaya era (A.D. 1350-1767), the Code of Manu was modified to have two parts, which were Dhammasattham and Rajasattham, and laws were developed from the actual decisions of kings in the role of justice.

The next development of the Thai legal system was in the era of King Rama I, the first king of the current dynasty (Chakri dynasty) of Thailand (A.D. 1782-1806), who established the Law of Three Seals. The Law of Three Great Seals (Kotmai Tra Sam Duang) was composed of both the Dhammasattham laws and royal decrees and edicts. Finally, influence from the European legal system came to Thailand in the early twentieth century. Prince Rabi of Ratchaburi, the Father of Modern Thai Law, laid down the infrastructure of the current legal system by reforming the court systems and various laws, most of which were modeled after the legal systems of foreign countries, such as, Germany, Switzerland, France, England, Japan, and Italy.

Thai copyright law began with the Royal Proclamation of the Vachirayan Library for the Protection of Literary work R.S. 111 (A.D. 1892),⁸⁶ one hundred years after the first U.S. federal copyright law. The Vachirayan Library (the National Library) was established as a compliment to King Rama IV by his sons and daughters in 1884. It was administered by an assigned committee under the patronage of King Rama V known as King Chulalongkorn the Great. In 1892, Krommun Naradiph Prabandhbongs (the Minister of the Vachirayan Library and a prince under King

⁸⁵ See Sompong Sucharitkul, *Thai Law and Buddhist Law*, 46 Am. J. Comp. L. 69, 75-76 (1998). Buddhism has influenced Thai law for centuries.

⁸⁶ Royal Proclamation of Vachirayan Library for the Protection of Literary Work, R.S. 111 (1892) (Thail.). See Weerawit Weeraworawit, Copyright in Thailand 47 (The Intellectual Property and International Trade Law Forum Special Issue 1998). (R.S. (Rattanakosinsok) is the dating of the year started from the founding of Bangkok in 1781. The year of Rattanakosinsok is no longer in use).

Rama IV) advised King Rama V to enact the Royal Proclamation of Vachirayan Library to prohibit unauthorized reproduction of the books published by the Vachirayan Library, except with permission from "Kamma-samphathikasapa" (the Library Council). With the prince's opinion, the King accorded the consultation and declared the Royal Proclamation of Vachirayan Library R.S. 111 on September 20, 1892.⁸⁷

The reasoning behind the Royal Proclamation was that all books published in the library were under the subscription of library members. Library members were Thai scholars who composed books and received payment for their intellectual work. Their work was exclusively published by the Vachirayan Library (the National Library in the present day) and therefore, it was considered inappropriate to allow other people to reproduce their industrious writings and sell them without prior authorization. A unique feature of the Royal Proclamation was that no penalties were imposed for violations. Although, there were no enforcement provisions in the Royal Proclamation, it was held among Thai scholars as the first copyright legislation of Thailand.⁸⁸

In 1901, the *Authorship Rights Act* of R.S. 120 (B.E. 2444)⁸⁹ was enacted to expand the right of reproduction to the books published outside the Vachirayarn Library because at that time the protection of books as literary works was recognized in most countries. It is believed that the *Authorship Rights Act* was influenced by the

⁸⁷ Chaiyos Hemaratchata, *A Treatise on Thai Copyright Law* Ch. 1 (2d ed. 1998).

⁸⁸ *Id.*

⁸⁹ *Authorship Rights Act*, R.S. 120 (1901) (Thail.).

Statute of Anne of 1710 and *Literary Copyright Act* of 1842 of England.⁹⁰ Thailand enacted the *Authorship Rights Act* of R.S. 120 to prohibit unauthorized copying of the books and to accord the rights of translation and distribution to the owner of the books. The Act only protected books and did not yet include artistic work, newspapers or any kind of leaflets that were published in Thailand. The authorship rights of the act meant exclusive rights to print, translate, and distribute books in Thailand.

The Authorship Rights Act of R.S. 120 was amended thirteen years later in 1914. Changes involved formalities and included the exclusion of immoral, scandalous, or disparaging books from copyright registration. The revision required the registrant of a book to make copyright notice by including within the book the statement "Ownership Reserved by the Authorship Rights Act of R.S. 120" (in Thai language). Before 1931, the term "copyright" had not been recognized in any Thai legislation. However, under the Authorship Rights Act, application of the act reflected the context of "copyright" in the modern sense. The formality under the Act required an author to register a book within twelve months after the first publication. When an author satisfied the formal requirement, he or she was granted copyright protection for life plus seven years or at least forty-two years from the initial registration of the book, and these rights could be devised to heirs.⁹¹

⁹⁰ Dhajjai Subhapholsiri, *Explanation of Thai Copyright Law* Ch. 1 (2d ed. 1997).

⁹¹ *Id.*

An important milestone for international copyright protection in Thailand occurred on July 17, 1931 during the period of King Rama VII (King Prajadhipok)⁹² when Thailand acceded to the Berne Convention of 1886, as revised in Berlin on November 13, 1908, and completed in Berne on March 20, 1914. To accede to the Convention, Thailand had to implement the "National Treatment Rule"⁹³ and abolish formalities requirement as provided in the Convention, and was obligated to revise its domestic copyright law in accordance with the Convention. Eventually, on June 16, 1931, Thailand promulgated the Act for Protection of Literary and Artistic Works Act B.E. 2474 (A.D. 1931)⁹⁴ to be consistent with the Berne Convention. As a result of full compliance to the Berne Convention, the Berne Union approved the official date of Thailand's membership status as July 17, 1931.⁹⁵

The Act for the Protection of Literary and Artistic Work B.E. 2474 repealed the Ownership Right Act of R.S. 120 (A.D. 1901) and its revision of 1914. It extended copyright protection to both literary and artistic work in the fields of science and arts. Therefore, any work of painting, drawing, sculpture, lithography, and architecture could be recognized as a protected work. There were 33 sections encompassing the protection of national and foreign authors. Any protected work, which was created in Thailand, would receive protection based on the life of the author, plus thirty years starting from the date of first publication. However, if an

⁹² Administration from 1925 to 1935).

⁹³ National Treatment Rule is the basic principle of the Berne Convention which demanded Berne signatories grant authors who are nationals of other Berne member countries the same protection they give to their own nationals. *See Long & Amato, supra* note 16, at 298.

⁹⁴ Act for the Protection of Literary and Artistic Works, B.E. 2474 (1931) (Thail.).

⁹⁵ Subhapholsiri, *supra* note 90.

author died before having the work published, the work still would be protected for thirty years starting at the date of subsequent publication.⁹⁶

Regarding international protection, the Act of B.E. 2474 gave protection to work created by nationals and residents of the Berne Convention member countries, or to work that was first published in the countries of the Berne Convention. However, the Act provided reciprocal copyright protection to other countries in the Berne Union by allowing Thailand to shorten the duration of copyright to the countries that provided shorter terms of protection.⁹⁷ Furthermore, formality requirements were no longer obligatory.

Under the Act for the Protection of Literary and Artistic Work B.E. 2474, the work that was copyrightable received automatic protection as standardized by the Berne Convention as amended in 1908.⁹⁸ Also criminal penalties were prescribed to protect copyrighted work. Again, in conformity with the national treatment rule of the Berne Convention, Thailand had to accord the same copyright protection to the nationals of Berne Convention member countries that it gave to Thai nationals. The language of the Act of B.E. 2474 included the first use of the word "copyright" (as translated from English to Thai) to be embodied in the Thai law.

The Act for the Protection of Literary and Artistic Work B.E. 2474 was in use for 47 years, without revision, and it was the first Thai copyright law consistent with an international standard. It became the basic foundation for subsequent copyright laws in Thailand because it provided protection coverage to a wide variety of literary

⁹⁶ Act for the Protection of Literary and Artistic Works, B.E. 2474 (1931) § 14 (Thail.).

⁹⁷ Act for the Protection of Literary and Artistic Works, B.E. 2474 (1931) § 28 (Thail.).

⁹⁸ See Berne Convention for the Protection of Literary and Artistic Works, art. 4 of Berlin Amendment (revised November 13, 1908).

and artistic works, including foreign works. It contained, for the first time, criminal penalties provisions in case of willful infringement and abolished formality requirements (such as the requirement of announcing copyright in publications) in accordance with the Berne Convention.⁹⁹

In 1978, Thailand enacted the *T.C.A. B.E. 2521*, which went into effect on December 19, 1978.¹⁰⁰ The *T.C.A. B.E. 2521* repealed the *Act for the Protection of Literary and Artistic Work*, B.E. 2474, that had been in force for almost a half century, although some sections were archaic and criminal penalties were inadequate to deter the infringement activity of protected works.¹⁰¹ One of the important changes in the *T.C.A.* of 1978 was having sound recordings protected within the class of audio-visual work, thereby making the scope of protection broader.¹⁰² This change derived from the proliferation and increasing economic value of music cassettes globally.¹⁰³ Under the *T.C.A.* of 1978, copyright endured for the life of the author and then continued for fifty years beyond the death of that author. For criminal penalties, this act added imprisonment in addition to fines, making the punishment more of a deterrent.

⁹⁹ Hemaratchata, *supra* note 87.

¹⁰⁰ *T.C.A. B.E. 2521* (1978) (Thail.).

¹⁰¹ See the Appendix of *T.C.A. B.E. 2521* (A.D. 1978).

¹⁰² See *T.C.A. B.E. 2521* (1978) § 4 (Thail.).

¹⁰³ Weeraworawit, *supra* note 86 at 48.

In 1994, as a member of GATT (General Agreement on Tariffs and Trade) since 1982, Thailand had to ratify to the TRIPs Agreement¹⁰⁴ with respect to intellectual property protection under the agreements package required by the Agreement Establishing the World Trade Organization.¹⁰⁵ The TRIPs Agreement was concluded within the framework of the Uruguay Round of Multilateral Trade Negotiation which began in 1986 and was consummated and acceded to by GATT members, including Thailand in 1994.¹⁰⁶ The 1978 Copyright Act of Thailand was revised to be fully consistent with the TRIPs Agreement. As a result of the revision, the Act of 1978 was repealed and the current *T.C.A. B.E. 2537 (A.D. 1994)* was approved by the Thai Parliament on December 9, 1994, and became effective on March 21, 1995.¹⁰⁷

Unlike the U.S. which has a Copyright Office in the Library of Congress in charge of copyright administration, Thailand's Department of Intellectual Property of the Ministry of Commerce administers the efficient and effective implementation of Thai copyright law. Under current Thai copyright law, copyrightable work includes the following categories:¹⁰⁸

104 TRIPs Agreement, *supra* note 13.

105 Marrakesh Agreement Establishing the World Trade Organization, 33 I.L.M. 13, 21 (1994).

106 The 1994 GATT contains several parts comprising the Final Act and the Agreement Establishing the World Trade Organization, to which numerous annexes are appended. The TRIPs Agreement is included as Annex 1C. Finally, there are various Ministerial Decisions and Declarations. The Members have agreed that the latter two instruments embody the results of their negotiations and hence form an integral part of the Final Act. The TRIPs Agreement is therefore as juridically binding as are other aspects of the GATT.

107 Weeraworawit, *supra* note 86 at 49.

108 See *T.C.A. B.E. 2537 (1994) § 6 (Thail.)*.

- (1) literary work;
- (2) dramatic work;
- (3) artistic work;
- (4) musical work;
- (5) audio-visual work;
- (6) cinematographic work;
- (7) sound recording;
- (8) sound and video broadcasting; and,
- (9) any other work in literary, scientific, or artistic domain.

However, current Thai copyright law does not protect ideas or procedures, process or systems, methods of operation, concept, or principles, discoveries, or scientific and mathematical theories.¹⁰⁹ Thai copyright holders have exclusive rights to the following:

- (1) reproduction or adaptation;
- (2) distribution to public;
- (3) rental of the original or copies of a computer program, an audio-visual work, a cinematographic work, and a sound recording;
- (4) giving benefits accruing from the copyright to other persons; and,
- (5) licensing the rights mentioned in (1), (2), or (3) above.¹¹⁰

Thai copyright law protects both the economic and moral rights of copyright holders. The application of moral right protection of Thai copyright law is somewhat

109 *Id.*

110 *See* T.C.A. B.E. 2537 (1994) § 15 (Thail.).

different from that of the U.S. copyright law,¹¹¹ and it is an interesting exercise in legal analysis to explore the differences.

§ 1.2. Copyright Protection under the Berne Convention

International copyright treaties currently active are the Berne Convention,¹¹² Universal Copyright Convention,¹¹³ and the WIPO Copyright Treaty,¹¹⁴ as well as neighboring rights treaties, the Rome,¹¹⁵ Geneva,¹¹⁶ and Brussels¹¹⁷ Conventions, the WIPO Performances and Phonograms Treaty,¹¹⁸ and the TRIPs Agreement.¹¹⁹ Among these, the Berne Convention is the most widely adopted and oldest multilateral treaty; both the U.S. and Thailand are parties to the Berne Convention.

§ 1.2.1. Historical Perspective of the Berne Convention

The Berne Convention evolved from an international Congress of Authors and Artists in Brussels in 1858. The Congress of Authors and Artists was attended by

¹¹¹ See *infra* § 3.2.5. for a comprehensive comparison of the applications of moral rights in the U.S. and Thailand.

¹¹² Berne Convention for the Protection of Literary and Artistic Works, 1971 Paris Text.

¹¹³ Universal Copyright Convention, 1971 Paris Text

¹¹⁴ WIPO Copyright Treaty, Geneva, 1996

¹¹⁵ International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Rome, 1961

¹¹⁶ Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, Geneva, 1971.

¹¹⁷ Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite, Brussels, 1974.

¹¹⁸ WIPO Performances and Phonograms Treaty, Geneva, 1996.

¹¹⁹ Agreement on Trade-Related Aspects of Intellectual Property Rights, 1994.

delegates from literary societies and universities, as well as by authors, artists, journalists, librarians, and lawyers. In 1878, Victor Hugo, the celebrated French poet and author of the historical novel, *The Hunchback of Notre Dame*, presided over the meeting of an international Congress in Paris. At this convention, five resolutions originated principles that would form the basis of the Berne Convention of 1886. In 1882, the International Association, named *L' Association Litteraire et Artistique International* (ALAI), agreed that the only way to achieve its goal of increased international copyright protection would be to form a Union for the protection of literary property. Consequently, the International Association called a meeting, convened in Berne, Switzerland in September 1883. Participants drafted a treaty consisting of ten articles, the most important providing for national treatment and the absence of formalities as a prerequisite for copyright protection. Following general approval of the draft treaty, the Swiss government invited various governments to meet in Berne on September 8, 1884, for the purpose of forming an international copyright union.¹²⁰

Following the 1884 Berne Conference, two subsequent conferences on the proposed treaty resulted in a final draft of the Convention for the Protection of Literary and Artistic Works. The final draft demonstrated the need for minimum standards for the law of international copyright, but accommodated some national flexibility to implement those minimum standards of copyright protection in the way that fit individual countries. Ten countries signed the Berne Convention in 1886, including Germany, Belgium, Spain, France, the United Kingdom, Haiti, Italy, Liberia, Switzerland, and Tunisia and the treaty went in force on December 5, 1887.

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The historical background in this and the following paragraph is drawn from Paul Goldstein, *International Copyright: Principle, Law, and Practice* 19-28, (Oxford University Press 2001); Peter Burger, *The Berne Convention: Its History and Its Key Role in the Future*, 3 J.L. & Tech. 15 (1988).

The U.S. had representatives that attended the second and the final conferences in 1885 and 1886, but the U.S. did not agree to accede to the treaty until 103 years later.

The original text of the Berne Convention of 1886 laid down the basic principle of "national treatment." The national treatment rule required contracting countries to accord authors who are nationals of other Berne countries the same protection they grant to their own nationals to ensure that there would be no discriminatory treatment among the contracting countries. A minimum term of ten years protection was stipulated for translation rights¹²¹ and contracting countries were allowed to impose formality provisions, such as registration and deposit of copyrighted work according to the law of the country of origin.¹²² The Convention of 1886 protected "literary and artistic works" which were defined as "every production whatsoever in literary, scientific, or artistic domain which can be published by any mode of impression or reproduction."¹²³ Photographs were later explicitly recognized as protected work by the 1896 Paris Additional Act.¹²⁴ The 1886 Berne Convention did not recognize protection for newspaper or periodical "articles of political discussion" or "news of the day."¹²⁵ It explicitly protected the rights of translation and public performance.¹²⁶ However, it was left up to

¹²¹ Berne Convention, 1886 Berne Text, art. 5.

¹²² Berne Convention, 1886 Berne Text, art. 2(2).

¹²³ Berne Convention, 1886 Berne Text, art. 4.

¹²⁴ Berne Convention, 1896 Paris Additional Act, art. 2(1)(B).

¹²⁵ Berne Convention, 1886 Berne Text, art. 7(2).

¹²⁶ Berne Convention, 1886 Berne Text, art. 9.

contracting countries to define the purview of reproduction rights because there was much debate over how long the rights should endure as a minimum convention standard.

§ 1.2.2. Subsequent Revisions of the Berne Convention

The Berne Convention was written such that it could be revised as needed to meet changes over time. This unique feature of the Berne Convention kept former revisions intact, and any country could accede at any time to the latest revision. The revision that a particular country acceded to would provide obligations under the Convention. The Berne Convention has been revised five times, includes two additional acts, and was last amended in 1979 in response to new technological developments that affect authors' rights.¹²⁷ Prominent revisions are discussed below:

§ 1.2.2.1. The Berne Convention as Revised in Berlin in 1908

Several important changes to the Berne Convention were made through the Berlin Act of 1908. The Berlin Act excluded formality requirements such as registration of copyrighted work, copyright notice, and deposition of the work as a condition for the acquisition of copyright.¹²⁸ This exclusion of formalities made the U.S. less likely to adhere to the Berne Convention because its federal law had provisions for prerequisite formalities. These were recordation of the title of copyrighted work with the court, deposition of the work, and giving notice of the title in a newspaper. The duration of copyright protection was extended to fifty years after

¹²⁷ The Berne Convention was revised in 1908, 1928, 1948, 1967, and 1971 with 2 additional protocols in 1896 and 1979. The 1979 amendment concerned only administrative matters and did not state any change of procedural or substantive aspects of the Convention.

¹²⁸ Berne Convention, 1908 Berlin Text, art. 4(2).

the death of an author, subject to respective regulations by the law of each country,¹²⁹ and translation rights increased the duration of protection to the life of the copyright without restriction. Cinematographic productions were included in the subject matter of copyright protection as derivative work.¹³⁰ The Berlin Revision recognized an exclusive right for authors of musical works to authorize the adaptation of their works.

This Berlin revision was completed in Berne in 1914 through an additional protocol.¹³¹ The additional protocol granted full copyright protection to authors of non-Union countries who first published or simultaneously published their works in a Berne Union country. This protocol, later well known as "the back door to Berne," was intended to be an incentive for non-Union countries to join the Convention. It contained, however, a reprisal clause that would allow Union countries to retaliate against non-Union countries that received the protection, but failed to protect adequately copyrights of the Union nationals (presently articulated in Article 6(1) of the 1971 Paris Act). For instance, if the non-Union countries did not reciprocate with adequate protection for Union country authors, the Union countries could restrict protection for such non-Union countries. The U.S. joined the Berne Convention in 1989 because of the enormous losses suffered by copyright proprietors who distributed their copyrighted works abroad needed the greater protection that being under the Berne Convention would provide.

129 Berne Convention, 1908 Berlin Text, art. 7(1), (2).

130 Berne Convention, 1908 Berlin Text, art. 14(2).

131 Additional Protocol [to the International Copyright Convention on November 13, 1908], signed at Berne, March 20, 1914.

§ 1.2.2.2. The Berne Convention as Revised in Rome in 1928

The 1928 Rome Act further modified the Berne Convention by establishing the moral rights of attribution and integrity as minimum rights. These moral rights entitled to authors both the right to claim authorship and the right to object to modifications of their works that prejudiced their honor or reputation.¹³² Recognition and protection of moral rights were mainly supported by civil law countries. However, contracting countries were free to determine the conditions under which these moral rights would be exercised and safeguarded. Consequently, any common law countries which routinely did not directly protect an author's moral rights in their copyright laws could protect them through alternative legal remedies. The U.S., for example, protected moral rights under various federal and state laws.¹³³

The 1928 revision also specifically recognized the right to authorize broadcast of a work. The broadcasting of work was defined as "communication of ... works to the public by radio-diffusion."¹³⁴ However, the right of broadcasting could be subject to compulsory license under the national laws of contracting countries. The revision also provided duration of protection for jointly authored work as the life of the last surviving author and fifty years thereafter.¹³⁵

¹³² Berne Convention, 1928 Rome Text, art. 6bis.

¹³³ See Goldstein, *supra* note 120, at 155. For application of the U.S. moral rights, see *infra* § 3.2.5.4.

¹³⁴ Berne Convention, 1928 Rome Text, art. 11bis.

¹³⁵ Berne Convention, 1928 Rome Text, art. 7bis(1).

§ 1.2.2.3. The Berne Convention as Revised in Brussels in 1948

The 1948 Brussels Act set a minimum mandatory term of protection. Under the revision, life plus fifty years was the minimum term of copyright protection. It expanded the scope of broadcasted work to include television broadcasts,¹³⁶ and recognized cinematographic works as a special category. The 1948 Brussels Act further strengthened and clarified several minimum Berne Convention rights, including moral rights, the adaptation right, and the translation right.

§ 1.2.2.4. The Berne Convention as Revised in Stockholm in 1967

The 1967 Stockholm Act's main purpose was the reduction of treaty obligations such that developing countries could ratify the Convention. It created the World Intellectual Property Organization (WIPO) to administer the Berne Convention. The Act extended protection to authors who were not nationals of a Union country but who had their habitual residence there, and it established a "Protocol Regarding Developing Countries," which permitted developing countries to limit rights of translation and reproduction. The Stockholm revision significantly broadened the conditions for protection of non-Union authors by adopting a "personal criterion" to accompany the previous "geographical criterion" requirement enacted in the 1886 Berne Convention. Under previous conventions, protection for non-Union authors was dependent on first or simultaneous publication of a work in one of the Union countries. This was referred to as the "geographical criterion." The geographical criterion remained, but was additionally attached by the "personal criterion," which provided that authors who were nationals or habitual residents of a

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Berne Convention, 1948 Brussels Text, art. 11 bis.

Union country were protected in all Union countries, no matter where first publication occurred.

The 1967 Stockholm conference also strengthened the Convention's moral right provisions. Under the original moral right provision, enacted at the Rome Revision Conference in 1928, contracting states were required to recognize the moral right until the author's death. At the Brussels Revision Conference, the contracting states strengthened that right somewhat by encouraging Union members to extend the moral right past the authors' death. Finally, at Stockholm, the conferees required Union members to recognize the author's moral right after death for as long as the author's economic right was protected. The conferees, however, made a compromise with Great Britain and other Anglo-American copyright countries, including the U.S. These nations did not recognize moral rights under their copyright laws, but provided equivalent protection under their common laws. For example, in many common law countries, moral rights are protected under the common law of defamation, which usually permits the maintenance of a suit only during the author's lifetime.¹³⁷

§ 1.2.3. The 1971 Paris Act of the Berne Convention

§ 1.2.3.1. Overview

The 1971 Paris Act is the most recent comprehensive revision of the Berne Convention. It is also an international treaty which both Thailand and the U.S. are bound by its obligatory minimum standard provisions. The U.S. became a party to the latest act of the Berne Convention on March 1, 1989. On the other hand, since it would receive more advantages from smaller membership fees, Thailand extended the

¹³⁷ See Long & Amato, *supra* note 18, at 299-301.

effects of its accession from a previous revision to the Paris Act (1971) on May 23, 1995 to Articles 1-21 and the appendix and notification concerning article II of the appendix.¹³⁸ Although, the 1971 Paris Act revision is the newest text of the Berne Convention, it still maintains the basic substance of its previous provisions; for instance, it still prohibits formality requirement.¹³⁹ In addition, it succeeds the primary requirement of national treatment rule that has been present in every revision since 1886.¹⁴⁰

§ 1.2.3.2. Eligible Authors

The 1971 Paris Act continued the criteria for conditions of copyright protection from the 1967 Stockholm Act, comprising personal criterion and geographical criterion.¹⁴¹ As a result, a work would be protected if its author was a national or a habitual resident of a member state, regardless of whether the work had been published.¹⁴² Or alternatively, authors of non-member countries would be granted the protection if the work was first, or simultaneously published, in one of

¹³⁸ See Berne Notification No. 167, Declaration by the Kingdom of Thailand Extending the Effects of its Accession to the Paris Act (1971) to Article 1 to 21 and the Appendix and Notification Concerning Article II of the Appendix, http://www.wipo.int/edocs/notdocs/en/berne/treaty_berne_167.html# (last visited Feb. 19, 2004).

¹³⁹ Berne Convention 1971 Paris Text, art. 5(2). (Provided that “[T]he enjoyment and the exercise of these rights shall not be subject to any formality).

¹⁴⁰ Berne Convention, 1971 Paris Text, art. 5(1).

¹⁴¹ See *supra* § 1.2.2.4 (explaining the application of “personal criterion” and “geographical criterion” under the 1967 Stockholm Text of the Berne Convention).

¹⁴² Berne Convention, 1971 Paris Text, art. 3(1)(a), (2).

member countries.¹⁴³ Simultaneous publication was defined as publication in two or more countries within thirty days of first publication.¹⁴⁴ Published works, for purposes of the convention, must satisfy public access by making available ample numbers of copies and they must be made available with consent of their authors.¹⁴⁵

§ 1.2.3.3. Protected Works

The 1971 Paris Act protected “literary and artistic works”, which were broadly defined as “every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression.”¹⁴⁶ Article 2(1) of the Act also gave examples of protected work in a long list of “books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatico-musical works; choreographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, sketches and three-dimensional works relative to geography, topography, architecture or science.” In addition, Subsection (3) and (5) of Article 2 respectively expanded the range of protected works to translations, adaptations, musical arrangements, and other derivative works and collections of literary or artistic works such as encyclopedias and anthologies.

Article 2(2) left each member country to condition eligibility of copyright works under a fixation requirement that required the works [had] to be fixed in a

¹⁴³ Berne Convention, 1971 Paris Text, art. 3(1)(b).

¹⁴⁴ Berne Convention, 1971 Paris Text, art. 3(4).

¹⁴⁵ Berne Convention, 1971 Paris Text, art. 3(3).

¹⁴⁶ Berne Convention, 1971 Paris Text, art. 2(1).

tangible medium. In other words, an idea must be expressed through a physical format; for example, books or video tapes. However, many national copyright laws of member countries, including the U.S. and Thailand, already contained fixation requirement clauses. Quality of work did not affect the eligibility for protection and no matter how poor the quality, [was] if a work was “qualified” for literary and artistic work within the meaning of the convention, it would be protected.¹⁴⁷ Similarly, each member country had the option to determine special protection for applied art, industrial designs and models. If, however, there was no such special protection, they would then be recognized as artistic works.¹⁴⁸ The protection of the 1971 Paris Act did not apply to “news of the day or to miscellaneous fact having the character of mere items of press information.”¹⁴⁹

§ 1.2.3.4. Rights

The 1971 Paris Act vested in the authors of copyrighted works both moral and economic rights. Article 6bis, which was excluded from economic rights, provided that “the author shall have [the] right to claim authorship of the work and to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.”¹⁵⁰ The Paris Act established a minimum term of moral rights protection by equating it to

¹⁴⁷ Susan Stanton, *Development of the Berne International Copyright Convention and Implications of U.S. Adherence*, 13 Hous. J. Int'l L. 164 (1990).

¹⁴⁸ Berne Convention, 1971 Paris Text, art. 2(7).

¹⁴⁹ Berne Convention, 1971 Paris Text, art. 2(8).

¹⁵⁰ Berne Convention, 1971 Paris Text, art. 6bis(1).

the term for economic rights,¹⁵¹ which was measured by fifty years from the death of the author.¹⁵²

The authors of copyright works enjoyed the exclusive rights to reproduce a literary or artistic work in any manner of form,¹⁵³ to make adaptations or arrangements of the work,¹⁵⁴ to make cinematographic adaptations and reproductions and to distribute and publicly perform works thus adapted or reproduced.¹⁵⁵ They further had the right to make translations,¹⁵⁶ to broadcast¹⁵⁷ or publicly recite the work,¹⁵⁸ and, in the case of dramatic, dramatico-musical and musical works, to perform the work publicly. After the death of an author, there was a possibility for a first transferee of works of art and original manuscripts to enjoy the inalienable right, so called "*droit de suite*" to an interest in resale.¹⁵⁹

In specific cases, however, the reproduction right might be restricted by national legislation that imposed exceptions from liability. This legislation is generally known as "compulsory licensing." Compulsory licensing was subject to the

¹⁵¹ Berne Convention, 1971 Paris Text, art. 6bis(2).

¹⁵² Berne Convention, 1971 Paris Text, art. 7(1).

¹⁵³ Berne Convention, 1971 Paris Text, art. 9(1).

¹⁵⁴ Berne Convention, 1971 Paris Text, art. 12.

¹⁵⁵ Berne Convention, 1971 Paris Text, art. 14(1).

¹⁵⁶ Berne Convention, 1971 Paris Text, art. 8.

¹⁵⁷ Berne Convention, 1971 Paris Text, art. 11bis.

¹⁵⁸ Berne Convention, 1971 Paris Text, art. 11ter(1).

¹⁵⁹ Berne Convention, 1971 Paris Text, art. 14ter.

conditions that "such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author."¹⁶⁰ Scholarship, private study, research, and public uses, such as parody, press, and copying for instruction, were exemplary grounds for receiving a compulsory license.

§ 1.2.3.5. Dispute Settlement Measures

The 1971 Paris Act provided a route for settlement of disputes concerning the interpretation or application of the Berne Convention to be brought before the International Court of Justice (ICJ).¹⁶¹ Parties to a settlement of disputes had to comply with the Statute of the Court, unless the countries concerned agreed on some other method of settlement. Surprisingly, since its inauguration, international copyright disputes had never been brought before the ICJ. Instead, the Berne Union countries opted to use more effective dispute settlement procedures of the TRIPs Agreement.¹⁶²

§ 1.3. Copyright Protection Under the TRIPs Agreement

The TRIPs Agreement is a trade arrangement obligatory to all World Trade Organization (WTO) members. In 1994, the WTO replaced the permanent body of General Agreement on Tariffs and Trade (GATT). Therefore, as members of WTO, both the U.S. (a contracting party to GATT since 1948) and Thailand (a contracting party to GATT since 1982) had to comply with TRIPs provisions. Members were required to adopt TRIPs principles within one year after the TRIPs Agreement went

¹⁶⁰ Berne Convention, 1971 Paris Text, art. 9(2).

¹⁶¹ Berne Convention, 1971 Paris Text, art. 33.

¹⁶² See *infra* § 1.3.4.

into force on January 1, 1995.¹⁶³ Thailand, as a developing country, had a transitional period to implement, and did not need to harmonize its laws until five years after the entry into force in 1995.¹⁶⁴

The TRIPs Agreement is a treaty within the meaning provided by Article 2 (1) of the Vienna Convention on the Law of Treaties (Vienna Convention).¹⁶⁵ Thus, the TRIPs Agreement is binding upon the parties, and the parties must perform their obligation in good faith according to the fundamental principle of treaty law called *pacta sunt servanda*, which was reaffirmed in Article 26 of the Vienna Convention.¹⁶⁶

§ 1.3.1. History of the TRIPs Agreement

The origin of the TRIPs Agreement was the General Agreement on Tariffs and Trade (GATT), which was adopted in 1947 by 23 countries. An initiative towards the TRIPs agreement started with the GATT Tokyo Round in 1979 and entailed an ultimately unsuccessful initiative from the European Community and the U.S. to obtain an “Agreement on Measures to Discourage the Importation of Counterfeit Goods.” The agreement proposal resulted from efforts by economically developed countries to increase the minimum standards of the Berne Convention and other

¹⁶³ See Final Act Embodying The Results of The Uruguay Round of Multilateral Trade Negotiations Apr. 15, 1994, ¶ 3, 33 I.L.M. 1125 (1994). See also TRIPs Agreement, *supra* note 14, art. 65, ¶ 1.

¹⁶⁴ TRIPs Agreement, *supra* note 15, art. 65, ¶ 2. Thailand was obligated conform its domestic laws to comply with the TRIPs Agreement before January 1, 2000. See World Trade Organization, *Which Countries are Using General Transitional Periods?*, at http://www.wto.org/english/tratop_e/trips_e/tripfq_e.htm#Transition (Jul. 31, 2005).

¹⁶⁵ See Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969 (entered into force January 27, 1980), art. 2 (1) (a), 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

¹⁶⁶ See Vienna Convention, *id.*, art. 26 (providing that “[E]very treaty in force is binding upon the parties to it and must be performed by them in good faith.”).

intellectual property treaties, together with mounting frustration over weak enforcement measures in developing countries.¹⁶⁷

Two years after conclusion of the Tokyo Round, the U.S. proposed a work session to examine issues, including commercial counterfeiting, left unresolved by the Tokyo Round. The U.S., the European Community, Japan, and Canada all agreed on a draft commercial counterfeiting code, which the U.S. submitted to GATT in October 1982. Nonetheless, Brazil and India immediately opposed the proposal, arguing that the World Intellectual Property Organization had exclusive jurisdiction over commercial counterfeiting. After that, a work session was constituted to address consultations between the Directors-General of WIPO and GATT to address these institutional and jurisdictional issues.

A GATT Ministerial Declaration, on November 29, 1982, generated a call for examination of the counterfeit goods issue. A group of experts was appointed to examine the issue in 1984, whereas the European Community proposed that senior officials meet to discuss whether to launch a new GATT round. Later, the GATT Council's first formal discussion of a new round took place in June 1985, but setting the agenda for the proposed new GATT round was delayed. In June 1986, a group of developed countries that included the European Community, Japan, and the U.S. presented an informal declaration of negotiating mandates. The issue relative to the mandates for intellectual property rights was strenuously objected to by several developing countries.

On September 20, 1986, the Uruguay round of the GATT special session was agreed to and attended in Punta del Este, Uruguay by representatives from over

¹⁶⁷ See Goldstein, *supra* note 120, at 52-55.

seventy countries. The contracting parties agreed to the identified objective for intellectual property right protection as follows: "In order to reduce the distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade, the negotiations shall aim to clarify GATT provisions and elaborate as appropriate new rules and disciplines. Negotiations shall aim to develop a multilateral framework of principles, rules, and disciplines dealing with international trade in counterfeit goods, taking into account work already undertaken by GATT. These negotiations shall be without prejudice to other complementary initiatives that may be taken in the World Intellectual Property Organization and elsewhere to deal with these matters."¹⁶⁸

During the trade negotiations in the Uruguay Round, different views between economically developed countries and developing countries culminated in proposals from both sides. The developed countries wanted to have all standards of intellectual property in a single agreement, including copyright and related rights, trademark, patent, layout designs of integrated circuits, and undisclosed information. On the other hand, developing countries, led by India, proposed that the negotiations should focus only on the particular practices that distorted or impeded the integrity of international trade and demanded more lenient obligation on applying the principles of national treatment and most-favored-nation treatment. In the area of patent and trademark, developing countries asked for more favorable treatment pursuant to their development. In December 1988, at the Ministerial Meeting of the Uruguay Round in

¹⁶⁸ Statement by the Chairman, GATT: Ministerial Declaration on the Uruguay Round of Multilateral Trade Negotiations (Sept. 20, 1986), 25 I.L.M. 1623, 1626, (1986).

Montreal, GATT members accepted the view that there should be a substantive law to protect intellectual property globally.

Finally, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) was signed at Marrakesh, Morocco on 15 April 1994. The TRIPs agreement presented the principles of national treatment and most-favored-nation treatment (MFN rule). It also ruled that the protection of computer programs was specifically protected in connection to the Berne Convention for the Protection of Literary and Artistic Works as revised in 1971 at Paris. Importantly, it allowed developing and least developed countries to delay their compliance with TRIPs standards for four years and ten years respectively. Finally, the agreement excluded the moral rights obligations subsisted in the Berne Convention that might be enforceable under the TRIPs Agreement in favor of the U.S.¹⁶⁹

§ 1.3.2. Conditions for Protection

The TRIPs Agreement comprises seven main parts, which encompass a wide array of intellectual property right fields; namely, copyrights, trademarks, geographical indications, industrial designs, patents, lay-out designs of integrated circuits, undisclosed information, and control of anticompetitive practices. It requires WTO members to comply with substantive rules embodied in part I of the agreement regarding National Treatment Rule and Most-Favored-Nation Treatment Rule. In addition, WTO members must recognize and accept a set of minimum standards in order to obtain rights and enforce those rights. The Council for Trade Related Aspects of Intellectual Property Rights (TRIPs Council) will undertake the review of

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See TRIPs Agreement, *supra* note 13, art. 9.

national legislations of member countries consistent with the agreement under its built-in agenda.¹⁷⁰

§ 1.3.2.1. National Treatment Rule

Under Article 1(3) of the TRIPs Agreement, WTO members must accord treatment, with respect to relevant intellectual property right conventions, to nationals of other member countries, who may be natural persons or juristic persons.¹⁷¹ For example, the Berne Convention will govern the implementation of copyright protection under the TRIPs Agreement; therefore, first publication in a Berne Union country will account for receiving copyright protection in addition to personal criterion.¹⁷²

Article 3 of the TRIPs Agreement embraces “National Treatment” as its principle of protection by requiring each WTO member to protect the nationals of other members in the same manner it does its own nationals. The national treatment rule is, however, subject to the exceptions provided in Article 6 of the Berne Convention in relation to copyright protection. Article 6 allows any Berne Union country to restrict the protection it gives the works of authors of any country outside the Union that fails to adequately protect the works of authors who are nationals of the Union countries. Therefore, it is possible that a WTO member country that is not

¹⁷⁰ F. Abbott, *The Course on Dispute Settlement in International Trade, Investment and Intellectual Property (TRIPS)*, United Nations Conference on Trade and Development 4 (2003).

¹⁷¹ Footnote 1 to Article 1.3 of the TRIPs agreement clarifies the word “Nationals” to mean “persons, natural or legal, who are domiciled or who have a real and effective industrial or commercial establishment in that customs territory.”

¹⁷² See The 1971 Paris Act of the Berne Convention, art. 3. (Referring to criteria for eligibility of copyright protection under the Berne Convention).

a party to the Berne Convention may be restricted copyright protection by one or more Berne Union countries.

§ 1.3.2.2. Most-Favored-Nation Rule

The Most-Favored-Nation Rule has been incorporated into Article 4 of the TRIPs Agreement and provides that “with regard to the protection of intellectual property, any advantage, favor, privilege, or immunity granted by a member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other members.”¹⁷³ This Article applies in parallel with the “national treatment” rule under Article 3 of the TRIPs Agreement, but it further prohibits WTO members from prejudicial treatment among other member countries.¹⁷⁴ Most-favored-nation treatment means the country must treat all creative goods of eligible countries of WTO members equally.

§ 1.3.3. Subjects of Copyright Protection in the TRIPs Agreement

Subjects of copyright protection in the TRIPs Agreement are attributable to its antecedent convention, the 1971 text of Berne Convention.¹⁷⁵ The TRIPs Agreement modified the Berne Convention partially in the “national treatment” rule by affording minimum standards applicable not only to natural persons, but also to legal persons of member countries to the Agreement. Member countries of the TRIPs Agreement are free to implement higher standards in their internal laws than the minimum standards

¹⁷³ TRIPs Agreement, *supra* note 13, art. 4.

¹⁷⁴ See Goldstein, *supra* note 119, at 85.

¹⁷⁵ David Nimmer, *GATT's Entertainment: Before and NAFTA*, 15 *Lox. L.A. Ent. L.J.* 133, 144, (1995).

of the Agreement under the condition that the higher standards provisions do not contravene the provisions stated in the TRIPs Agreement.¹⁷⁶

Part II of the TRIPs Agreement obligates members to protect works in accordance with Articles 1-21 of the Berne Convention as revised in 1971.¹⁷⁷ Consequently, any “literary and artistic works” within the meaning of Article 2 of the Berne Convention, including “every production in the literary, scientific and artistic domain,” will be considered within the classes of protected subject matter.¹⁷⁸

Article 10 of the TRIPs Agreement extends protection to computer programs under the definition of literary work by stating that “computer programs, whether in source or object code, shall be protected as literary works under the Berne Convention.”¹⁷⁹ The TRIPs Agreement sets the basis for data bases to be protected by copyright by guiding that “compilations of data or other material, whether in machine readable or other form, which by reason of the selection or arrangement of their contents constitute intellectual creations that shall be protected as such.”¹⁸⁰

Neighboring rights or related rights, provided for in the *Rome Convention for the Protection of Performers, Producers of Phonograms, and Broadcast Organization*

¹⁷⁶ See *id.*; See also TRIPs Agreement, *supra* note 13, art. 1.1 (providing in part that “[M]embers shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice.” ... “such protection does not contravene the provisions of this Agreement.”).

¹⁷⁷ TRIPs Agreement, *supra* note 13, art. 9.

¹⁷⁸ Berne Convention, *supra* note 17, art. 2.

¹⁷⁹ TRIPs Agreement, *supra* note 13, art. 10.1.

¹⁸⁰ TRIPs Agreement, *supra* note 13, art. 10.2.

(Rome Convention),¹⁸¹ are the exclusive rights given to performers, producers of phonograms, broadcast organizations. The TRIPs Agreement requires member-country performers to be given protection from unauthorized recording and broadcasting of live performances.¹⁸² Producers of phonograms have the right to authorize or prohibit reproduction of their phonograms.¹⁸³ Broadcasting organizations are granted the right to prohibit the fixation, the reproduction of fixations, and the rebroadcast by wireless means of broadcasts, as well as the communication to the public of television broadcasts without authorization.¹⁸⁴

Important additions to existing international rules in the area of copyright and related rights at the time the TRIPs Agreement was concluded are the provisions on rental rights. The TRIPs agreement requires that, at a minimum, authors of computer programs and producers of sound recordings be given the right to authorize or prohibit the commercial rental of their works to the public.¹⁸⁵ A similar exclusive right applies to films where commercial rental has led to widespread copying that is materially impairing the right of reproduction.

¹⁸¹ International Convention for the Protection of Performers, Producers of Phonograms and Broadcast Organizations, October 26, 1961 [hereinafter Rome Convention].

¹⁸² TRIPs Agreement, *supra* note 13, art. 14.1.

¹⁸³ TRIPs Agreement, *supra* note 13, art. 14.2.

¹⁸⁴ TRIPs Agreement, *supra* note 13, art. 14.3.

¹⁸⁵ TRIPs Agreement, *supra* note 13, art. 11.

§ 1.3.4. Dispute Settlement Procedure of the TRIPs Agreement

There are two conceivable types of claims regarding the enforcement provisions of the TRIPs Agreement. The first type concerns members who, with regard to enforcement of intellectual property rights, have failed to adopt laws and establish administrative mechanisms that satisfy the basic requirements of Part III of the Agreement. The second type is claims about members who may have adopted the relevant laws and mechanisms, but are nonetheless failing to enforce them in a manner that is “effective.”¹⁸⁶

Article 64 (1) of the TRIPs agreement provides that the rules of Article XXII and XXIII of GATT 1994 will apply to consultations and dispute settlement as elaborated by the Dispute Settlement Understanding (DSU).¹⁸⁷ Article XXIII of the GATT 1994 provides for three categories of causes of action in GATT dispute settlement. Those are “violation,” “non-violation,” and “situation.” The “violation” cause of action is clear by definition. It results from violation of a specific rule entailing harm to a complaining member. The “non-violation” cause of action is based on the allegation that, although a complaint against a member has not violated a specific rule, the alleged member has acted in a way that deprives the complaining member of benefits it expected to obtain when it entered into the agreement. In addition, the “situation” cause of action is an impediment to the attainment of any

¹⁸⁶ Abbot, *supra* note 170, at 32.

¹⁸⁷ Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, in Results of the Uruguay Round of Multilateral Trade Negotiations 1 (1994), 33 I.L.M. 1226, 1238-41 [hereinafter DSU].

objective of the covered agreements. This cause of action has never formed the basis of a decision.¹⁸⁸

The TRIPs Agreement dispute settlement mechanism derives from Articles XXII and XXIII of the 1994 GATT and the DSU. These norms operate interactively through their applications and contexts pursuant to the security and the predictability of the multilateral trading system.¹⁸⁹ A complainant can initiate a claim by requesting consultation to another disputing party if that complainant notifies the Dispute Settlement Body (DSB) and the relevant Councils and Committees of the request.¹⁹⁰ The respondent has 10 days to reply to the request for consultation, which must proceed within 30 days of the request.¹⁹¹

Good offices, conciliation and mediation are alternative solutions and may be requested at anytime by any party to a dispute. If one of the preceding procedures is requested during the consultation period, such a procedure may defer by up to 60 days the request to establish a panel.¹⁹² However, if such procedures do not exist and consultations fail within 60 days after the date of receipt of the request for consultations, the complaining party may request the establishment of a panel.¹⁹³

¹⁸⁸ Abbot, *supra* note 170, at 36.

¹⁸⁹ DSU, *supra* note 187, art. 3.2.

¹⁹⁰ DSU, *supra* note 187, arts. 4.2, 4.4.

¹⁹¹ DSU, *supra* note 187, art. 4.3.

¹⁹² DSU, *supra* note 187, art. 5.4.

¹⁹³ DSU, *supra* note 187, art. 4.7.

When parties do not agree on panelists, the WTO Director General, to avoid any delay, can appoint panelists within twenty days after establishment of the panel.¹⁹⁴

The panel is required to issue a final report within six months of its formation, and there is opportunity for extensions not exceeding three months.¹⁹⁵ Although the appeal is limited to issues of law, a party may appeal the panel report within 60 days¹⁹⁶ to a standing Appellate Body created under DSU Article 17. The decision of Appellate Body will result in recommendations. After the panel report becomes final, implementation of panel recommendations is required. The losing party must “bring the measure into conformity with its obligations.”¹⁹⁷

The DSU procedure provides effective dispute settlement for WTO members over the rights and obligations under WTO agreements and, as noted above, it imposes strict timelines on all panel actions.¹⁹⁸ Since the establishment of the WTO in 1994, over 300 cases have been brought to WTO Dispute Settlement. Apparently, WTO Dispute Settlement is a highly popular method of international dispute settlement for WTO members.¹⁹⁹

¹⁹⁴ DSU, *supra* note 187, art. 8.7.

¹⁹⁵ DSU, *supra* note 187, art. 12.9.

¹⁹⁶ DSU, *supra* note 187, art. 16.4.

¹⁹⁷ DSU, *supra* note 187, art. 19.1.

¹⁹⁸ See WTO Dispute Settlement Timetable in Figure 1.

¹⁹⁹ See WTO Dispute Settlement – Status in Brief of the Disputes, at http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.html. (last visited Apr. 3, 2004) (providing WTO Settlement of Disputes Chronology).

§ 1.4. The Role of World Intellectual Property Organization (WIPO) Pursuant to International Copyright Protection

The World Intellectual Property Organization (WIPO) is an international organization dedicated to promoting the use and protection of works of the human effort. These works, known as intellectual property, are expanding the bounds of science and technology and enriching the world of the arts. Through its work, WIPO plays an important role in enhancing the quality and enjoyment of life, as well as creating wealth for nations.

Headquartered in Geneva, Switzerland, WIPO is one of the 16 specialized agencies of the United Nations system of organizations. It administers 23 international treaties dealing with different aspects of intellectual property protection. The organization has 180 nations as member states, including the U.S. and Thailand, and other countries whose legal systems recognize intellectual property protection.²⁰⁰

§ 1.4.1. Origins of WIPO

The origins of WIPO occurred before the inauguration of the United Nations. During the latter part of the nineteenth century, foreign exhibitors refused to attend the International Exhibition of Inventions in Vienna in 1873 because they feared they would violate their own rights, or that their ideas would be stolen and commercially exploited in other countries. Subsequently, the *Paris Convention for the Protection of Industrial Property* of 1883, and the Berne Convention, two of WIPO's fundamental treaties, were generated to satisfy the need for an international framework for intellectual property rights. In 1893, the secretariats of these two treaties were united

²⁰⁰ See World Intellectual Property Organization, at <http://www.wipo.org>. (last visited Apr. 3, 2004) (allowing access to all WIPO information).

in Berne, Switzerland under the establishment of “*Bureaux Internationaux Reunis pour la protection de la Propriete Intellectuelle*”, or the “United International Bureau for the Protection of Intellectual Property”, generally known as BIRPI.²⁰¹

In 1960, BIRPI was moved to Geneva, Switzerland to be closer to the United Nations and its structure was developed to suit the rapidly growing importance of global intellectual property. Subsequently, to replace BIRPI, WIPO was established by the Convention Establishing the World Intellectual Property Organization of 1967 (“Convention”). The Convention came in to force in 1970, underwent structural and administrative reforms and acquired a secretariat to be central among member states. In 1974, WIPO became a specialized agency of the United Nations being responsible for administering intellectual property matters recognized by the member states of the United Nations.²⁰²

§ 1.4.2. Relation of WIPO to International Copyright Law

As mentioned above, WIPO administered a number of international intellectual property treaties, including copyright and related rights treaties. WIPO, through its Copyright and Related Rights Sector (“Sector”), although the appeal is limited to issues of law, is committed to its crucial role. The Sector works currently on the development of international norms and standards in the area of copyright. It works closely with the Standing Committee on Copyright and Related Rights, which is presently discussing the updating of the international protection on various issues,

²⁰¹ Paul Salmon, *Cooperation between the World Intellectual Property Organization (WIPO) and the World Trade Organization (WTO)*, 17 St. John’s J. Legal Comment. 430 (2003).

²⁰² *Id.*

for example, the possible introduction of international protection of non-original databases, which presently do not qualify for protection under copyright law.²⁰³

In addition, the Sector actively promotes the *WIPO Copyright Treaty* (WCT) and the *WIPO Performances and Phonograms Treaty* (WPPT), known together as the “WIPO Internet Treaties.” It arranges meetings and seminars within the organization and provides speakers for other meetings. These treaties are part of the *WIPO Digital Agenda*, which sets out a series of guidelines and goals for WIPO in its seeking to develop practical solutions to the challenges raised by the impact of new technologies on intellectual property rights.²⁰⁴

§ 1.4.3. WIPO vis-a-vis WTO

The convergence of national policies into an international framework is the primary goal of both the World Intellectual Property Organization (“WIPO”) and the World Trade Organization (“WTO”). WIPO was created in 1967 to administer several multilateral agreements related to intellectual property protection, while the WTO was established in 1994 to deal with rules of trade between nations.

Given that the WIPO dissatisfied its member states, notably with its low level of intellectual property protection and its inability to effectively enforce rights attaching to the protection of intellectual property rights, other international organizations to further protect those rights were needed. Subsequently, the U.S. in particular supported a more effective approach to protection through the General Agreement on Tariffs and Trade (GATT) during the Uruguay Round Negotiations

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See World Intellectual Property Organization, Copyright and Related Rights, at <http://www.wipo.int/copyright/en/index.html>. (last visited Apr. 7, 2004).

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Id.

that commenced in 1986. It was the Uruguay Round Negotiations that led to the establishment of the WTO, which has succeeded in setting an approach for protecting intellectual property rights in the form of TRIPs Agreement.²⁰⁵

WIPO is a specialized agency of the United Nations responsible for intellectual property matters. The WTO, on the other hand, has as its main mission the monitoring of agreements to reduce barriers to trade. One of those agreements is the TRIPs Agreement. The TRIPs agreement draws WIPO's attention because it incorporates the basic provisions of WIPO's administered treaties, the Paris and Berne Conventions. In 1995 during the conclusion of the GATT Uruguay Round, WIPO and the WTO entered into a cooperation agreement under which WIPO provides assistance to all members of either the WTO or WIPO. This advance agreement demonstrates the importance of cooperative relationship and its importance in the development of the TRIPs Agreement.²⁰⁶

The difference between WTO and WIPO is partly the reason why intellectual property discussions moved from WIPO to WTO. WIPO's mission is to promote the protection of intellectual property globally through cooperation among the member states of WIPO. Only moral persuasion, in the General Assembly of WIPO, pressures members to implement their treaty obligations. There is neither a formal enforcement mechanism nor a dispute settlement resolution system among WIPO member states.

²⁰⁵ Frank Romano, *Global Trademark and Copyright 1998: Protecting Intellectual Property Rights in the International Marketplace, International Conventions and Treaties*, Practising Law Institute, PLI Order No. G0-001D October, 1998.

²⁰⁶ Salmon, *supra* note 201, at 434.

Therefore, most developed countries push for discussion on intellectual property in the WTO under the TRIPs Agreement.²⁰⁷

²⁰⁷ Salmon, *supra* note 201, at 432.

Chapter II:

Copyright Law in the Context of International Trade

§ 2.1. Introduction

As discussed in the first chapter, for nearly three centuries, there has been an evolution of copyright law that began with the English Crown and its desire to control sensitive information that could affect the stability of the monarchy. In the mid-sixteenth century, the English Crown granted economic control of book publishing to the Stationer's Company, a London guild of printers and booksellers, through a royal decree that gave the company a monopoly over the English publishing trade. The grant to the Stationers served the Crown's political interests as well as the Stationers' economic monopoly by suppressing trade not only in unauthorized copies of licensed books, but also in unlicensed works. Thereafter, books became the most primary target for copyright infringement following the significance of economic rights of authors.

During the first part of the nineteenth century, prevalent unauthorized copies of foreign books were problematic. Infringed French works in Belgium, for example, reduced the revenues not only of the French authors and publishers, but also of the domestic Belgian booksellers who legally imported French books to distribute in the market and had to compete with illicit foreign copies. Therefore, countries on European Continent concluded bilateral arrangements to serve, on a reciprocal basis, the interests of both publishers based in copyright-importing countries and publishers based in copyright-exporting countries. The United Kingdom, a major copyright

exporter of the nineteenth century, ultimately enjoyed substantial success in concluding bilateral treaties on the European continent, but not with the U.S., the major market for unauthorized copies of English works.¹

In 1891, under the pressure from English publishers as well as from U.S. publishers, the U.S. Congress passed the Chace Act to protect foreign works under the condition that "the foreign state or nation permits to citizens of the U.S. the benefit of copyright on substantially the same basis as its own citizen: or when such foreign state or nation is a party to an international agreement which provides for reciprocity in the granting of copyright, by the terms of which agreement the U.S. may, at its pleasure, become a party to such agreement."²

After the conclusion of the Berne Convention in 1886, the U.S. was the single, commercially most important country to remain outside the Berne Union. The U.S. undertook no copyright relations at all with foreign countries until 1892, when it entered into the first of a series of bilateral copyright agreements. In 1889, the U.S. acceded to the Berne Convention, but only after it was attacked by the reprisal provision, a principle presently embodied in Article 6(1) of the Berne Convention, as revised in 1971, that permits restriction of copyright in a country outside the Union that fails to protect the works of the Union countries.

Beginning in the 1980's, copyright law has become a major concern in discussions of international trade entailing international conflict arising from the infringement of intellectual property rights in high technology, intellectual property-

¹ See generally James J. Barnes, *Authors, Publishers and Politicians: The Quest for an Anglo-American Copyright Agreement, 1815-1854* (1974). The first U.S.C.A. in 1790 extended protection only to works of authors who were citizens or residents of the U.S. Act of May 31, 1790, ch. 15, 1 Stat. 124.

² Act of March 3, 1891, ch. 565 § 13, 26 Stat. 1106.

based products. The U.S., as a major industrialized country, has struggled to secure its competitive advantage in the intellectual property sector. Thailand, China, and South Korea are examples of countries that were sanctioned by the U.S. with accusation of inadequate copyright protection of U.S. copyright proprietors. This chapter will demonstrate the importance of copyright law within the context of international trade. Since each country normally enacts its own copyright law in accordance with cultural values, social norms and economic goals under obligations from binding international treaties, disparities amongst national laws of international trading countries can affect their international trade policy.

In addition, differing viewpoints between developed and developing countries under the roof of the World Trade Organization (WTO) will be provided to show the effect of international copyright protection towards global trade. These viewpoints were intermittently discussed in the myriads of international meetings. The unique characteristics of each country's copyright legislation reflect the need for interested countries to pursue laws capable of appeasing all stake holders in terms of their economic interest.

The goals of this chapter are threefold. First, as an analytic matter, it highlights the enormous tensions between the interests of developed and developing worlds. Second, it identifies problems with current international copyright protection standards. Finally, it provides solutions to compromise conflicts between the two different worlds having different needs and different developmental stages by giving a particular situation between the U.S. and Thailand as an exemplary discussion.

§ 2.2. The Role of Copyright Law in Regard to International Trade

§ 2.2.1. The Legal Development of Global Trade Protectionism on Copyright Products

Copyright law started to become a more critical issue of international trade in the latter part of the twentieth century when technology, accompanied by the emergence of global trade, caused massive reproduction of copyright-related merchandise that required fair competition. Prior to the inception of the Uruguay Round trade negotiation in 1986, most trade negotiators considered rules on international intellectual property rights to be an arcane domain for lawyers. However, nowadays, they are a few of many crucial issues, which are meticulously discussed in most international trade negotiations.

Protectionism on copyright products, which began domestically and then evolved internationally, has ranged from a simple product to a more technologically advanced product, comparatively from books to the “celestial jukebox.”³ Historically, the 15th-Century book trade in England was regulated by a series of royal decrees designed to control the flow of information.⁴ Likewise France, in the seventeenth century, began to regulate the book trade and theatre under state-directed

³ The name “celestial jukebox” was first officially entitled by the Clinton Administration’s White Paper in 1995, proposing the adoption of anti-circumvention measures and rules for managing copyright information. Celestial jukebox refers to information products, such as movies, and music, which people can consume while using or surfing the Internet. Any piece of music or movie in the world is available to anyone at anytime. See Paul Goldstein, *Copyright’s Highway: From Gutenberg to the Celestial Jukebox*, 184, (Stanford University Press 2003).

⁴ Paul E. Geller, *International Copyright Law and Practice* § 2 at 28 (1992).

copyright and state-granted printing and theatrical privileges.⁵ Eventually, in 1710, the legal concept of copyright arose for the first time in England, when the British Parliament enacted the Statute of Anne⁶ to protect rights of authors.

By the nineteenth century, most countries around the world had, in various respects, enacted their own domestic laws to protect copyright works. For example, France, Belgium and Spain recognized both economic rights and moral rights in dualistic concept by separating laws based on moral rights on the one hand, and on the other, economic exploitation rights. In contrast, Germany recognized copyright as a whole which serves to protect both moral and economic interests of authors.⁷ At this stage, control of dissemination of works was shifted from royal power to individual authors and publishers; consequently, copyright became a private right.

As local economies became increasingly more global in the mid-nineteenth century, people in Europe started selling and smuggling illicit books across borders. This called for European countries to negotiate bilateral treaties in order to protect the works of their respective nationals abroad. These treaties, however, lacked uniformity. To achieve the goal of having harmonized rules to bind as many countries as possible, European countries proposed an international convention, this

⁵ *Id.*

⁶ 8 Anne, ch. 19 (1710).

⁷ Adolf Dietz, *ALAI Congress: ANTWERP 1993 The Moral Right of the Author: Moral Rights and the Civil Law Countries*, 19 Colum. J. L. & Arts, 199, 206 (1995).

culminated in 1886 with ten countries signing the Berne Convention. Seven of these were European nations.⁸

Copyright protection under the Berne Convention extended to “literary and artistic works,” which were defined as “every production whatsoever in literary, scientific, or artistic domain which can be published by any mode of impression or reproduction.”⁹ Even though the definition of the Berne Convention was broad, it was the right of member countries to interpret the scope of copyright protection under their domestic laws. As of today, 160 countries, including the U.S. and Thailand, have acceded to the Berne Convention.

The 20th-Century communication media has changed radically in parallel with information communication technology. Sound recordings, motion pictures, satellite, cable and television broadcasts created phenomenal market opportunities for singers and performers. The voice and image of singers and performers was heard and seen by fans, not merely in local concert halls and theatres respectively, but in sound recordings, motion pictures, radio and video broadcasts distributed worldwide. Enterprises in the entertainment sector in Europe lobbied for legal provisions for serving their economic interests. Under the pressure of new media and economic interests, copyright began to expand into far more diverse rights. On July 24, 1971, the Berne Convention was revised in Paris by introducing new minimum rights. Those rights included the rights of authors in literary and artistic works to control

⁸ See Doris Estelle Long & Anthony D' Amato, *A Course Book in International Intellectual Property* 288, (West Group 2000). See also Alexander A. Caviedes, *International copyright Law: Should the European Union Dictate Its Development?* 16 B.U. Int'l L. J. 165, 168 (1998).

⁹ Berne Convention, 1886 Berne Text, art. 4.

broadcasting and cable transmission in article 11bis and reproduction of sound and visual recordings in Article 9.¹⁰

Next, remarkable progress of international copyright protection in the twentieth century took place when the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcast Organizations (the "Rome Convention")¹¹ instituted neighboring rights. The Rome Convention not only protected performing artists, but also sound recording producers and broadcasting organizations. As they have actively initiated revisions of the Berne Convention in the past century, it is notable that European countries have played important roles in developing international copyright conventions and have functioned as a supra-national lawmaking authority in the field of copyright.¹²

The Rome Convention, the first and fundamental convention on neighboring rights, concluded after a ten-day diplomatic conference in Rome. Forty-two nations attended this conference and eighteen signed the draft copy on October 26, 1961.¹³ Although, Thailand was not a party to the Rome Convention, it adopted neighboring rights provisions, embedded in the Rome Convention, into the Thai Copyright Act (T.C.A.) B.E. 2521 (1978) as it deemed appropriate to correspond with changes in

¹⁰ Berne Convention, 1971 Paris Text, art. 9, 11bis.

¹¹ International Convention for the Protection of Performers, Producers of Phonograms and Broadcast Organizations, Oct. 26, 1961 [hereinafter Rome Convention]. The convention is jointly administered by WIPO, UNESCO, and the International Labor Office (ILO).

¹² See Long & Amato, *supra* note 8, at 290.

¹³ See Wihelm Nordermann et al., *International Copyright* 339 (1990).

national and international circumstances.¹⁴ The U.S. ignored the Rome Convention because the Convention did not provide a distribution right. Only the rights of reproduction, public performance, and broadcasting in phonograms were granted in the Rome Convention.

Since performance rights were the most lucrative of all copyrights, the U.S., as a leading copyright export country, ratified instead the Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of Their Phonograms (“Phonograms Convention”) on November 26, 1973. The Phonogram Convention protected distribution rights of phonograms.¹⁵

Subsequently, digital technology became an international concern in entertainment markets of the Internet Age. Through the Internet, sounds of singers and performers can be easily disseminated globally by means of digital transfer. The Phonograms Convention, therefore, became antiquated because it did not grant protection to digital sound recordings.¹⁶ Furthermore, the protection of phonograms was limited exclusively to aural fixation, that is, it did not cover, for example, the sound tracks of films or videocassettes.¹⁷

¹⁴ See Appended Note of T.C.A. B.E. 2521 (1978) (Thail.).

¹⁵ Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of Their Phonograms, Oct. 29, 1971 [hereinafter Phonograms Convention].

¹⁶ While the Phonograms Convention clearly protects analog phonograms, arguably it does not protect digital sound recordings. See Phonograms Convention, *id.*, art. 1(a) (providing that “phonogram” means any exclusively aural fixation of sounds of a performance or of other sounds).

¹⁷ *Id.*

To remedy the obvious deficiencies in other outdated treaties, the *World Intellectual Property Organization Copyright Treaty* (WCT)¹⁸ and the *World Intellectual Property Organization: Performances and Phonograms Treaty* (WPPT)¹⁹ were concluded in 1996, and entered into force in 2002. Both treaties were referred to as the WIPO “Internet Treaties.” As mentioned, the Rome Convention was silent on granting a distribution right to performers, producers of phonograms, and broadcast organizations. The WPPT not only included a distribution right, but also granted a rental right, a right not found in the Rome Convention, to performers and producers of phonograms.²⁰ Furthermore, it addressed the threat of digital technology pertaining to reproduction with recognition that there was the need to introduce new international rules in order to provide adequate solutions to the questions raised by technological development.²¹

The WCT introduced to the international copyright system, through Article 11, a new principle in connection with copyrighted products. Members were obligated to provide protection against the circumvention of effective technological measures used by authors to protect their rights under either the Berne Convention, or the WCT.²²

¹⁸ WIPO Copyright Treaty, *adopted* Dec. 20, 1996, 36 I.L.M. 65 (1997) [hereinafter WCT].

¹⁹ WIPO Performances and Phonograms Treaty, *adopted* Dec. 20, 1996, 36 I.L.M. 76 (1997) [hereinafter WPPT].

²⁰ *See* WPPT, *id.*, arts. 8, 12, 13.

²¹ *See* WPPT, *id.*, Preamble ¶ 2.

²² *See* WCT, *supra* note 18, art 11. (stating that “contracting parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.”).

Member states of the WCT, therefore, must implement laws to prohibit any act of circumventing such technological protection, which would adversely affect legitimate interests of copyright holders. The U.S. adopted this principle and implemented the Digital Millennium Copyright Act (DMCA)²³ because, as a signatory, it agreed to implement its laws in accordance with the obligations of the WIPO Internet Treaties.²⁴

To date, there are 53 and 51 countries acceding to the WCT and the WPPT respectively. Ironically, the majority of countries that have ratified the Internet treaties are developing countries that have very limited Internet access. On the other hand, relatively few developed countries, even though they have greater Internet penetration, have ratified the treaties. Perhaps the fact that developing countries were pressured under bilateral trade agreements and other foreign relations priorities may account for this anomaly.²⁵ Those countries include, for example, Argentina, Columbia, Ecuador, and Guinea, despite their extremely limited Internet access; thus widespread infringement of digital copyright products is not a viable prospect in the immediate future on the part of developing countries.

Thailand, as well as other countries in Southeast Asia, has not yet ratified the WIPO Internet treaties. However, the U.S. has attempted to convince Thailand to follow its standards of copyright protection. This issue is part of ongoing Free Trade

²³ Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (codified in scattered section of 17 U.S.C. (1998) [hereinafter DMCA]).

²⁴ See S. Rep. No. 105-190, at 2 (1998).

²⁵ See Figure 6, 7 (providing the lists of contracting parties to WCT and WPPT respectively).

Area (FTA) negotiations, which are considering differing needs of developing countries relative to economic, social, educational, and technological infrastructure.

§ 2.2.2. The Impact of Copyright Infringement on Global Trade

§ 2.2.2.1. Copyright Infringement as an International Trade Barrier

Over the last two decades, intellectual property has increasingly become an issue affecting international trade. Basically, there are two types of barriers in international trade. The first is a tariff barrier (which is outside the scope of this dissertation); the other is a non-tariff barrier. Copyright infringement is considered to be a non-tariff barrier. The sale of copyright infringing goods, such as illicit copies of phonograms and unauthorized and uncompensated reproduction of copyrighted works have, over past decades, been a recurring international problem in the book trade, and not surprisingly, with the more technologically advanced products in today's world, continues into the present. This problem has caused a divisive debate between developing countries, such as Thailand, and developed countries, such as the U.S.²⁶ The intangible nature of copyright products allows others to copy the work easily, and it is difficult to detect those infringers and much more difficult to police infringement activities.²⁷

²⁶ See Preeti Sinha, *Special 301: An Effective Tool Against Thailand's Intellectual Property Violations*, 1 Pac. Rim L. & Pol'y J. 281 (1992).

²⁷ Jennifer J. Demmon, *Congress Clears the Way for Copyright Infringement Suits against States: The Copyright Remedy Clarification Act*, 17 J. Corp. L. 833, 34 (1992).

Under the theory of "comparative advantage,"²⁸ trade barriers are infamous intrusions into autonomously functioning markets tending to divert resources from more highly valued economic uses.²⁹ Insufficient protection of copyright is considered by some industrialized countries as the main source of trade distortions which lessen the significance of the trade concessions negotiated within the framework of the General Agreement on Tariffs and Trade (GATT). The conflict of interests and differences in technological and cultural structures between developed and developing countries are catalysts for copyright infringement, which in turn leads to undesirable trade distortion.

While it is frequently costly to create information, once in existence, it can be reproduced and possessed by many individuals at much lower cost than creating an original. The creator has choices whether to transfer, or to retain full use of it. Creativity is usually encouraged when as many users as possible have access to the existing formation. The fact that most economically-valuable information is created by developed countries explains why many developing countries demand that information should be disseminated to them through affordable access. However, the creator of a copyright work usually must invest large amounts of time and money to generate quality work and develop it to the point of economic usefulness. In addition,

²⁸ The theory was first described by David Ricardo, a British economist, in 1817. The centre of the comparative advantage theory is the low relative cost of a product compared with other countries, which help a country competes with others. See ESCAP, Training Manual on Increasing Capacities in Trade and Investment Promotion, 3, 2001.

²⁹ See Jeffrey L. Dunoff, *Rethinking International Trade*, 19 U. Pa. J. Int'l Econ. L. 347, 350 (1998).

there is never a guarantee that a particular creative effort will be economically exploitable.³⁰

Developed countries argue that infringing products reduce exports of goods. The producers in developed countries want to distribute fairly in a global marketplace that has a level playing field brought through adequate intellectual property protection. In addition, these countries have found that insufficient protection leads to decreased motivation in creative activities and uncertainty as to return on investment. This view was demonstrated, for example, in Germany's Federal Government Bill concerning the agreement establishing the WTO indicating that disparities among national laws as to the level of protection of intellectual property have an effect equivalent to non-tariff barriers.³¹

From a global economic point of view, permitting copyright infringement activities impacts trade as much as any affirmative governmental intervention to the international trade order. Since exporters or investors are reluctant to introduce products or transfer technology containing key intellectual property for fear that such property will be infringed, infringement becomes a barrier to trade. To the extent that such a trade barrier discourages free trade, it contributes to a decline in competitiveness in the affected countries.³² The TRIPs Agreement reflects the notion of copyright infringement as a global trade barrier through its objectives in the Preamble as "to reduce distortions and impediments to international trade, and taking

³⁰ See Frank J. Garcia, *Protection of Intellectual Property Rights in the North American*, 8 Am. U. J. Int'l L. & Pol'y 817, (1993).

³¹ See Drucksache 12/7655 (neu), Deutscher Bundestag-12 Wahlperiode at 5.1, quoted in *Intellectual Property and International Trade -- The TRIPs Agreement* 126 (WTO 1994).

³² See Frank J. Garcia, *supra* note 30 at 820.

into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade.”³³

§ 2.2.2.2. Pressure from Developed Countries

Normally in the time of peace, developed countries exert their powers to meet their objectives through political or economic influence. This recourse of developed countries applies pressure to developing countries, which have less negotiation power to effectively respond to the situation. Before the TRIPs Agreement existed, developed countries, particularly, the U.S., considered WIPO inadequate in promoting a sustainable global trade regime on the issue of intellectual property protection. During the Uruguay Round Trade Negotiations (1986-1994), under the framework of GATT, developed countries attempted to pressure developing countries into enhancing standards of intellectual property protection, while demanding more efficient enforcement mechanisms by relating intellectual property protection issues to those of international trade. During the 1980's, U.S. policy under the Reagan Administration was that regimes of intellectual property protection would not only increase the competitiveness of developed and developing countries, but that failure to protect intellectual property rights created distortions and inefficiencies in international trade.³⁴

³³ Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, Dec. 15, 1993, Preamble ¶ 1, 33 I.L.M. 81 (1994) [hereinafter TRIPs Agreement].

³⁴ See Intellectual Property Rights: Global Consensus, Global Conflict? 5 (R. Michael Gadbow & Timothy J. Richards eds., 1988).

Specifically to Thailand, the U.S. took protective measures by threatening to eliminate, under the Generalized System of Preferences (GSP), benefits to Thailand. These benefits, roughly \$313 million, were approximately 17 percent of Thailand's exports to the U.S. in 1986.³⁵ The U.S. contended that Thailand was not respecting its copyrights on computer software in particular and demanded that Thailand exact tougher penalties against violators. Through its self-help provisions of the 1974 Trade Act, the U.S. Foreign Trade Department released a report detailing the significant losses Thailand could expect if GSP benefits were withdrawn.³⁶

This use of the powerful threat of retaliation, based in Section 301 of the U.S. Trade Act, has always resulted in bilateral negotiations to comply with U.S. objectives on account of economic dependence of developing countries on special treatment from developed countries. For instance, Thailand and China were subject to U.S. retaliatory pressure between the latter part of 1980's and the beginning of 1990's. On April 28, 1993, Thailand was identified by the U.S. Trade Representative (USTR) under the course of the U.S. Trade Act of 1974 as a "priority foreign country," and such singling out could have led the U.S. to use severe economic retaliation. Since the announcement of that action, the Royal Thai Government has strengthened enforcement of copyright and trademark rights and has committed to bringing Thai intellectual property laws up to international standards. In view of the actions that the Thai Government took and in the expectation of further progress on these issues, the USTR decided on September 7, 1993 to revoke the identification of

³⁵ See P. T. Bangsberg, *Copyright Law: A Hot Issue in Thailand*, *Journal of Commerce* (Hong Kong), June 4, 1987, at 6A.

³⁶ See *id.*

Thailand as a "priority foreign country" under Section 182(c)(1)(A) of the Trade Act.³⁷

On February 4, 1995, the USTR determined China's trade policies and practices, pursuant to section 304(a)(1)(A) of the Trade Act. The USTR declared that certain acts, policies and practices of China, with respect to the enforcement of intellectual property rights and the provision of market access to persons who rely on intellectual property protection, were unreasonable. In other words, these Chinese acts, policies, and practices constitute a burden or restriction on U.S. commerce.³⁸ To retaliate for the lack of adequate Chinese protection of U.S. intellectual property, the USTR determined, in accordance with section 304(a)(1)(B) and 301(b) of the U.S. Trade Act, that action in the form of increasing duties on certain products of China to 100 percent *ad valorem* was appropriate.³⁹

The sanctions on Chinese products entailed an agreement between China and the U.S., whereby China would improve enforcement transparency and effectiveness at all levels of government and at the border. Having reached a satisfactory resolution between China and the U.S., on March 7, 1995, the USTR terminated the action ordered pursuant to Section 301 with respect to raising tariffs on certain products

³⁷ See Thailand: Revocation of Priority Foreign Country Designation, 58 Fed. Reg. 49,090 (1993)(indicating that Thailand took specific actions to improve enforcement of patent laws for pharmaceuticals).

³⁸ See Termination of Section 301 Investigation and Action Regarding the People's Republic of China's Protection of Intellectual Property and Provision and Market Access to Persons Who Rely on Intellectual Property Protection, 60 Fed. Reg. 12,582 (1995).

³⁹ 60 Fed. Reg. 7230 (February 7, 1995).

originating in China, and revoked China's identification as a priority foreign country under Section 182 of the Trade Act.⁴⁰

In the Panel Report of the WTO Section 301 case,⁴¹ developing countries, Brazil, India, and Thailand, for example, reflected their dissenting opinions toward the use of the U.S. Trade Act in a way that coerced developing countries in undue manner of international law. According to Brazil, the freedom to threaten to negate unilaterally the benefits of WTO Agreements might be effective, but it was not compatible with a rule-based multilateral trading system. The system could not survive if its most powerful members wished to enjoy its benefits, but rejected its responsibilities.⁴²

India contended that Sections 301-310 of the U.S. Trade Act of 1974 was both legally indefensible and morally unacceptable. From a legal point of view, it is clear that inasmuch as it embodies unilateralism, Sections 301-310 violated all canons of International Law. From a moral point of view, it was unacceptable because it implied that "might was right" and that the strong could prevail over the weak. India pointed out that it had had a long history of being subjected to Sections 301-310 of the Trade Act on grounds of alleged unfair trade practices. These Sections put pressure on countries like India to conform to what the U.S. believes is "fair trading

⁴⁰ See Termination of Section 301 Investigation and Action Regarding the People's Republic of China's Protection of Intellectual Property and Provision and Market Access to Persons Who Rely on Intellectual Property Protection, *supra* note 245.

⁴¹ WT/DS152/R, U.S. - Sections 301-310 of the Trade Act of 1974, report of the Panel of 22 December 1999 [hereinafter Panel Report].

⁴² Panel Report, *id.*, ¶ 5.35.

practices.”⁴³ Thailand believed that its experience with the U.S. unilateral acts illustrated a pattern of the U.S. violating its WTO obligations, and that these actions should be taken into account by the Dispute Settlement Body Panel in its deliberations.⁴⁴

Developing countries felt that if there was a need for the development of international norms for higher standards in developing countries in the copyright area, WIPO provided a proper forum. In addition, they perceived the WTO as a forum for developed countries, where these countries would have more negotiation power in international trade issues. Consequently, developing countries were reluctant to use the WTO as a forum addressing the new order of additional intellectual property standards.⁴⁵

However, developed countries were successful in integrating the TRIPs Agreement into the *Agreement Establishing World Trade Organization as part of a WTO package deal*. Developing countries had no means to opt out of any contested provision in the TRIPs Agreement. Developing countries, at that time, were satisfied with freer access to the markets of developed countries in exchange for their agreeing to increase their intellectual property protection level to be on par with that of developed nations.⁴⁶

⁴³ Panel Report, *id.*, ¶¶ 5.214 – 15.

⁴⁴ Panel Report, *id.*, ¶ 5.330.

⁴⁵ See Doris E. Long, *Copyright and the Uruguay Round: A New Era of Protection or and Illusory Promise?*, 22 AIPLA Q.J. 531, 543-44 (1994).

⁴⁶ See Ernst-Ulrich Pertersmann, *Constitutionalism and International Organizations*, 17 Nw. J. Intl L. & Bus. 398, 442 (1996-97) (characterizing agreements relating to services and intellectual property as part of “global package deals” negotiated within the GATT/WTO).

§ 2.2.3. Perspectives of Member States on the TRIPs Agreement

§ 2.2.3.1. Rationales for Developed Countries in Pursuing the TRIPs Agreement

There are a number of reasons for developed countries to pursue international intellectual property through the TRIPs Agreement. Firstly, developed countries, with more advanced technology, viewed inadequate protection in the case of intellectual property as a cause of considerable distortion in global trade in certain sectors. European Community negotiator Willy de Clercq reflected the developed countries' view on intellectual property as "[T]he GATT can and must act in parallel with other institutions in framing principles and rules relating to the trade aspects of intellectual property. Our aim in this area must be to create a favorable, dynamic climate which will give a fresh boost to the world economy."⁴⁷ To relate international trade problems to the protection of intellectual property, the World Trade Organization is a favorable institution.

Secondly, the leading justification for the international trade regime is the economic basis.⁴⁸ Compensation is the key to concessions to the TRIPs Agreement of member states. Developed countries are satisfied with enforcement provisions imbedded in the TRIPs Agreement. With the standardizing effect of the TRIPs Agreement, national legislation of member states will have to conform to a significant number of rules concerning the enforcement of intellectual property rights. Non-

⁴⁷ Willy de Clercq, Speech Delivered at the Uruguay Round Trade Negotiations (Sept. 16, 1986), in Bull. Eur. Communities No. 9-1986), quoted in James J. Callaghan, *Analysis of the European Court of Justice's Decision on Competence in the World Trade Organization: Who Will Call the Shots in the Areas of Services and Intellectual Property in the European Union?*, 18 Loy. L.L.A. Int'l & Comp. L.J. 497, 504 (1996).

⁴⁸ See Jeffrey L. Dunoff, *Rethinking International Trade*, 19 U. Pa. J. Int'l Econ. L. 347, (1998).

compliance with the treaty standards and obligations by members could lead to commercial retaliation, if so declared following dispute settlement procedures carried out according to the WTO's dispute settlement understanding.

Finally, remedies for intellectual property rights violations derived indirectly from acts on part of states, either from their policy or from their omission, are the major issue. Before TRIPs, if any country of the Berne union violated a copyright of a U.S. movie, for example, the U.S. was limited to the dispute settlement method of spending years to sue the country in the World Court located in the Hague as provided in the Berne Convention; even then there was little prospect for meaningful relief.⁴⁹

An inherent deficiency of the Berne Convention is that the mechanism of enforcement under the treaty is limited to actions brought by one country against another in the ICJ. This dispute settlement procedure under the Berne Convention is complicated and has never been invoked. Instead, the possibility presents itself that the U.S. could file a complaint under the WTO framework, which has been regarded by a legal scholar as "the most complete system of international dispute resolution in history."⁵⁰

§ 2.2.3.2. Rationales for Developing Countries in Acceptance of TRIPs Agreement

It is imperative to realize that developing countries were, in fact, pushed to accept the deal in the multilateral trade agreements in the conclusion of the Uruguay Round international trade negotiations. Developing countries considered the

⁴⁹ See Berne Convention (Paris text 1971), art. 33(1).

⁵⁰ See Andreas F. Lowenfeld, *International Economic Law* 150 (2002).

inclusion of intellectual property rights in the Uruguay Round particularly inappropriate given the intangible nature of the rights sought to be protected. However, to assume membership in the WTO, developing countries were not allowed any reservation on the agreements within the framework of the WTO Agreement.⁵¹ During the first thirty-five years of GATT's existence, from 1946 until 1981, the developing countries' relationship with the GATT was characterized by a progressive effort to acquire preferential treatment rights referred as "special and differential treatment."⁵²

Through preferential treatment, developing and least-developed countries may postpone implementing most of the required standards for a period of five years, and for a ten-year period with respect to fields of technology previously excluded under their domestic patent laws.⁵³ These transitional provisions have immediate effect on WTO member countries, regardless of their internal constitutional mechanisms. Developing countries must incorporate international law into their domestic legal systems as guided by Article 16(5) of the WTO Agreement and Article 72 of the TRIPs Agreement.⁵⁴ For the transitional arrangement to become effective, no formal statement or reservation is required.

⁵¹ TRIPs Agreement, *supra* note 14, art. 72 (stating "[R]eservations may not be entered in respect of any of the provisions of this Agreement without the consent of the other Members).

⁵² Robert E. Hudec, *GATT and the Developing Countries*, 1992 Colum. Bus. L. Rev. 67, (1992).

⁵³ See TRIPs Agreement, *supra* note 33, art. 65(1)(2), 66(1)).

⁵⁴ See Marrakesh Agreement Establishing the World Trade Organization, GATT Doc. No. MTN/FA art. 16(5), reprinted in 33 I.L.M. 1125 (1994) [hereinafter WTO Agreement]. (stating that "[N]o reservations may be made in respect of any provision of this Agreement. Reservations in respect of any of the provisions of the Multilateral Trade Agreements may only be made to the extent provided for in those Agreements." See also TRIPs Agreement, *supra* note 33, art. 72. (stating that

The ability to obtain compulsory licenses is one of the most convincing reasons for developing countries to accede to the agreement. As its primary objectives expressed in the Preamble, article 7 and 8, WTO members are legally bound to adopt legal rights and obligations, and encourage their nationals to observe them in ways that effectively protect public health and nutrition while promoting the public interest in sectors of vital importance to their socio-economic and technological development.⁵⁵ In this respect, it is very important for developing countries to shape the exceptions to exclusive rights provided in the TRIPs Agreement and measures necessary to prevent abuses of intellectual property rights holders in pursuance of any of the objectives set forth in Articles 7 and 8 of the Agreement.

Importantly, market access for agriculture and textiles are trade-offs for services and intellectual property rights. Since most of developing countries, including Thailand substantially base their export products on agricultural goods, and developed countries are necessary markets for those products, markets access is an exchange for said countries providing adequate intellectual property protection for right holders from developed countries. Furthermore, transfer of technology is a special incentive for developing countries to comply with the TRIPs Agreement, since strong intellectual property protection attracts investments from developed countries.

“Reservations may not be entered in respect of any of the provisions of this Agreement without the consent of the other Members.”).

⁵⁵ See TRIPs Agreement, *supra* note 33, art. 8.

§ 2.3. Key Issues of Thailand and the U.S. on International Trade Related Copyright Products

§ 2.3.1. Thailand – U.S. Economic Relation

During the reign of King Nang Klao (Rama III) (1824-1851), the U.S. began diplomatic exchanges with Siam (the previous name of the Kingdom of Thailand). Since then, Thailand and the U.S. have been trade partners under the Treaty of Amity and Commerce of March 20, 1833, made between both countries in Bangkok.⁵⁶ However, it was during the later reigns of King Mongkut (Rama IV) (1851-1868) and his son, King Chulalongkorn the Great (Rama V) (1868-1910), that Siam reestablished cordial relations with western countries. The diplomatic skills of the monarchs, combined with modernizing reforms, made Siam the only country in Southeast Asia to avoid European colonization.⁵⁷

Due to ethnic considerations, Siam was renamed “Thailand” in 1939. Since World War II, the U.S. and Thailand have developed close relations, as reflected in several bilateral treaties, and by both countries’ participation in United Nations multilateral activities and agreements. The principal bilateral arrangement is the 1966 Treaty of Amity and Economic Relations,⁵⁸ which facilitates U.S. and Thai companies’ economic access. Other important agreements address civil uses of atomic energy, sales of agricultural commodities, investment guarantees, and military

⁵⁶ Treaty of Amity and Commerce, Mar. 20, 1833, U.S.-Siam, 8 Stat. 454, 18 Stat. (2) 693.

⁵⁷ U.S. Embassy in Thailand, *Background Notes on Thailand*, at <http://www.bangkok.usembassy.gov/relation/bgnotes.html> (last visited Aug 2, 2005).

⁵⁸ Treaty of Amity and Economic Relations, May 29, 1966, U.S.-Thailand, 19 U.S.T. 5843, T.I.A.S. No.6540.

and economic assistance. In June 2004, the U.S. and Thailand initiated negotiations on a free trade agreement that was expected to reduce and eliminate barriers to trade and investment between the two countries.⁵⁹

Commercial activities between the U.S. and Thailand range from agriculture products to more technological-based products. After Japan, the U.S. is Thailand's second largest foreign investor. Over the years, American companies have invested approximately \$16 billion in Thailand, whereas Thailand is now the U.S.' 18th largest trading partner.⁶⁰

In 2002, the U.S. and Thailand signed a Trade and Investment Framework Agreement that has paved the way for the start of Free Trade Agreement (FTA) negotiations. Since 2004, Thailand and the U.S. have agreed to conclude a Free Trade Agreement, which is expected to culminate in 2006. During the third round of negotiations in April 2005, which took place in Honolulu, the issue of copyrights and other matters on intellectual property rights were discussed. With its commercially important aspect of copyright law, each country has done industrious research to craft their copyright legislation to fit the level of their national development. Within the framework of the WTO, the TRIPs Agreement simultaneously confers on members' freedom to introduce exceptions and limitations to those rights under broad terms and conditions. Thailand, therefore, must meticulously ponder the sensitive issue of copyright protection since it could affect the livelihood of its nationals in the long run.

⁵⁹ U.S. Embassy in Thailand, *supra* note 57.

⁶⁰ Royal Thai Embassy, Washington, D.C., *An Economic Profile of Thailand*, at <http://www.thaiembdc.org/index.html> (last visited Aug 8, 2005).

§ 2.3.2. U.S. Trade Sanctions Against Copyright Infringements in Thailand

§ 2.3.2.1. U.S. Trade Sanctions

The U.S. uses Trade sanctions to enforce its intellectual property interests in foreign countries. This approach usually is undertaken unilaterally within its discretion.⁶¹ Southeast Asia is a net consumer and importer of intellectual property and the focus of attention from the nations that are net producers and exporters, such as the U.S. and the European Union.⁶² Thailand has been a target for U.S. trade sanctions through its resort to Section 301 of the Trade Act of 1974. The earliest threat of trade retaliation under the U.S. Trade Act for infringements of U.S. copyrights in Thailand can be traced back in 1990. At that time, the U.S. named Thailand as a “priority watch list” country under the U.S. Trade Act. The disputes respecting Thailand’s allegedly lax intellectual property protection had been the most profoundly heated trade irritant.

On November 15, 1990, the International Intellectual Property Alliance (IIPA), the Recording Industry Association of America (RIAA), and the Motion Picture Export Association of America (MPEAA) filed a petition under section 302(a) of the Trade Act, alleging that Thailand did not provide adequate and effective

⁶¹ Andrea Morgan, *TRIPs to Thailand: The Act for Establishment and Procedure for Intellectual Property and International Trade Court*, 23 *Fordham Int’l L.J.* 795, 807, (2000).

⁶² See John J.P. Howley & Antonio B. Roman, *Assessing Enforcement Status of Intellectual Property Rights in Asia*, N.Y.L.J., Apr. 26, 1999 (commenting that, for many years, U.S. has had serious problem with enforcement of intellectual property rights in Asia).

protection for U.S. copyrighted works.⁶³ Specific practices cited included: (1) difficulties in obtaining police searches for infringing products; (2) overly burdensome and unreasonable requests for documents to establish copyright ownership and authority to file complaints; (3) burdensome requirements regarding personal appearances by copyright owner's corporate personnel to present duplicative evidence; (4) lack of consistency in requirements to obtain prosecution of cases; and, (5) inadequate sanctions for copyright infringements that do not deter further offenses.⁶⁴

On December 21, 1990, the USTR initiated an investigation of the Thai government's acts, policies, and practices relating to the enforcement of copyrights through a Federal Register notice dated January 3, 1991.⁶⁵ Subsequently, the USTR invited written public comments on the Thai government's acts, policies, and practices relating to the enforcement of copyrights, and on whether these acts, policies, and practices constituted a burden or restriction on U.S. commerce. On November 19, 1991, the USTR invited further public comment on these issues.⁶⁶ During the course of this investigation the U.S. and Thai governments held a series of consultations on the matters under investigation. The Thai government then increased efforts to enforce its copyright law. These efforts included raids on commercial

⁶³ See Termination of Section 302 Investigation Regarding Thailand's Enforcement of Copyright Protection, 56 Fed. Reg. 67114-07 (Dec. 27, 1991).

⁶⁴ See *id.*

⁶⁵ Initiation of Section 302 Investigation; Thailand Copyright Enforcement, 56 Fed. Reg. 292 (U.S. Trade Rep. Jan. 3, 1991).

⁶⁶ Thailand Copyright Enforcement ACTION: Notice of request for public comment, 56 Fed. Reg. 58416 (U.S. Trade Rep. Nov. 19, 1991).

infringements and seizure of evidence necessary to prosecute offenders. The USTR further complained that prosecution of many of the cases, resulting from the raids conducted after the initiating of this investigation, had not yet been initiated or that the proceedings were sluggish.⁶⁷

To attenuate the situation, Thailand made commitments to the U.S. to effectively and expeditiously prosecute alleged copyright infringers and seek imposition of penalties sufficient to deter current and future infringers. The nation further promised to simplify and regularize the process of raids, including reducing the documentation that copyright owners must submit for each new raid requested, and to amend the current copyright law to strengthen its substantive provisions and improve its enforcement provisions. Implementation of these commitments, however, would come into effect in the future.⁶⁸

The USTR subsequently terminated, after consultation with the petitioners, the investigation on December 27, 1991. It further resolved to monitor Thailand's implementation of these commitments to ensure that adequate and effective protection for U.S. copyrighted works was achieved. The application of U.S. Section 301 put pressure on Thailand to alter its laws and practices to provide greater protection for the intellectual property rights of U.S. citizens. While Thailand appeared to be attempting to accommodate the endless U.S. demands, it had not yet achieved the results sought by the U.S. Therefore, in April, 1991, Thailand was listed under Special 301 as a "priority foreign country" (the most egregious level of Special 301

⁶⁷ See Termination of Section 302 Investigation Regarding Thailand's Enforcement of Copyright Protection, *supra* note 63.

⁶⁸ *Id.*

identification).⁶⁹ Pursuant to Section 302(b)(2)(A) of the Trade Act, the USTR had to decide, no later than May 26, 1991, whether to initiate an investigation of each of Thailand's acts, policies or practices that was the basis for identifying Thailand as a "priority foreign country."

Not only was Thailand threatened by the U.S. trade regulations, but since 1990, other developing countries have also been declared offenders under the provisions of the U.S. Trade Act. Developing countries and even a few developed countries have protested against the unilateral nature of the United State Trade Act.⁷⁰ The main complaint raised against the U.S. with regard to Special 301 is that such unilateral measures destroy attempts to maintain a balanced world trading system developed through multilateral negotiations.

At this moment, the *T.C.A.* B.E. 2537 (1994) appears to be in line with the TRIPs Agreement. Since the Copyright Act came into effect in March 1995, the WIPO Internet Treaties (WIPO Copyright Treaty [WCT] and WIPO Performances and Phonograms Treaty [WPPT]) were later concluded in 1996, and Thailand has not yet become a party to WCT or WPPT. Consequently, Thailand has no obligation to adopt rules under those two treaties.

Recently, Thailand, through a Working Committee on Copyright,⁷¹ has worked on the provisions of a draft amendment to the *T.C.A.* in order to implement

⁶⁹ Notice of Countries Identified as Priority Countries, 56 Fed.Reg. 20,060 (U.S. Trade Rep. 1991). Thailand was again listed as a priority country in 1992. USTR Cited India, Taiwan, Thailand as Worst Intellectual Property Offenders, 9 Int'l Trade Rep. (BNA), at 784 (1992).

⁷⁰ See Panel Report, *supra* note 41. This proceeding has been initiated by the European Communities as a complaining party.

⁷¹ The Working Committee on Copyright comprises officials from the Department of Intellectual Property of Thailand and representatives of copyright industry in Thailand.

provisions embedded in the WIPO Internet Treaties. This dissertation suggests that the USTR should remove Thailand from the Special 301 offenders list. The USTR should be aware that Thailand has taken steps to improve protection of intellectual property rights. It has been responding positively to the USTR's demands thus far, and is continuing to improve its legislation and enforcement activities pursuant to sustainable national development.

§ 2.3.2.2. U.S. Trade Regulations

Initially, the U.S. directed most of its efforts towards unilateral trade sanctions under Section 301 of the Trade Act of 1974 and bilateral trade negotiations.⁷² Through the Omnibus Trade and Competitiveness Act of 1988,⁷³ significant changes were made to Section 301 provisions. Even so, the U.S. Trade Act has been the target of an enormous number of critiques from the legal community.

Section 301 is referred to as Title III, Chapter 1 of the Trade Act of 1974 as amended.⁷⁴ It provides that when a foreign country denies rights owed to the U.S. under a trade agreement, or when a foreign country is unfairly restricting U.S. foreign commerce, irrespective of a breach of an international treaty, the U.S. can, or even must, take retaliatory trade action against that foreign country.⁷⁵ The Section 301 process can be started by a petition from a U.S. national or entity who claims; (1) to have been unfairly denied access to a foreign market; (2) that the foreign country is

⁷² Trade and Tariff Act, Pub.L. No. 93-618, § 301, 88 Stat. 2041, 2042-43 (codified as amended at 19 U.S.C. §§ 2411-20) (1975).

⁷³ Omnibus Trade and Competitiveness Act, Pub.L. No. 100-418, 102 Stat. 1107 (1988).

⁷⁴ 19 U.S.C. §§ 2411-20 (1988).

⁷⁵ 19 U.S.C. § 2411(a) (1988).

not abiding by an international agreement; or, (3) that their intellectual property rights are not being adequately protected.⁷⁶ The U.S. Trade Representative (USTR)⁷⁷ can also start the Section 301 process on his or her own initiative.⁷⁸

Once the USTR agrees to commence, or is required to commence, the Section 301 process, it must investigate and determine whether the rights to which the U.S., or any U.S. person or entity is entitled under any trade agreement are being denied. The USTR must also determine if any act, policy, or practice exists which is “unjustifiable,” “unreasonable,” or “discriminatory,” and which burdens or restricts U.S. commerce.⁷⁹ When the USTR finds that a trade agreement is being breached or an act, policy, or practice is unjustifiable, unreasonable, or discriminatory, the USTR then determines what action to take.⁸⁰

Remedies available include the following: withdrawing benefits the identified foreign country enjoys pursuant to any trade agreement with the U.S.,⁸¹ entering into

⁷⁶ *Id.* It is the USTR’s authority to determine whether to accept the petition and commence the investigation. 19 U.S.C. § 2412(a)(2) (1988).

⁷⁷ The duty of the USTR can be traced from the 1962 Trade Expansion Act, which marked the first significant attempt by Congress to control the Executive in the exercise of trade policy powers. Many members of Congress viewed the State Department as insufficiently engaged or concerned with domestic economic interests to negotiate trade issues on behalf of the U.S., and so Congress created the position of Special Representative for Trade Negotiations (the predecessor to the Office of the Special Representative for Trade Negotiations which was later transformed into the U.S. Trade Representative) to be the chief US representative in international trade negotiations. *See* Dan Sarooshi, *Sovereignty, Economic, Autonomy, the U.S., and the International Trading System*, 15 *Eur. J. Int’l L.* 660 (2004).

⁷⁸ 19 U.S.C. § 2412(b)(1)(A) (1988).

⁷⁹ 19 U.S.C. §§ 2414(a)(1), 2411(a)(1)(B), 2411(b)(1) (1988).

⁸⁰ 19 U.S.C. § 2414(a)(1)(B) (1988).

⁸¹ 19 U.S.C. § 2411(c)(1)(A) (1988).

agreements with the foreign country to eliminate the offending action,⁸² imposing duties or other import restrictions against any goods or economic sector of the foreign country, irrespective of the goods or sector affected by the foreign country's offensive action.⁸³

When the USTR's investigation finds that the rights of the U.S. under a trade agreement are being denied, it is not required to take action if a panel of experts, established pursuant to the GATT, finds to the contrary.⁸⁴ However, if the USTR finds that a foreign country's act, policy, or practice is "unjustifiable," or the measure is determined to be inconsistent with a trade agreement, it must withdraw trade concessions and enter into binding agreements to eliminate the offending action with or take retaliatory trade action to such country;⁸⁵ this process is referred as a mandatory action. Any action the USTR takes is "subject to the specific direction of the President."⁸⁶

However, no action need be taken if the USTR finds that the foreign country "is taking satisfactory measures" to grant the U.S. rights under a trade agreement;⁸⁷

⁸² 19 U.S.C. § 2411(c)(1)(C) (1988).

⁸³ 19 U.S.C. § 2411(c)(1)(B), (3)(B) (1988). *See also* 19 U.S.C. §§ 2411(c)(5) (1988).

⁸⁴ 19 U.S.C. § 2411(a)(2)(A) (1988).

⁸⁵ 19 U.S.C. § 2411(a)(1), (c)(1) (1988).

⁸⁶ 19 U.S.C. § 2411(a)(1) (1988).

⁸⁷ 19 U.S.C. § 2411(a)(2)(B)(i) (1988).

that the foreign country has agreed to eliminate the offending measure,⁸⁸ or that the retaliatory action “would cause serious harm to the national security of the U.S.”⁸⁹ When the USTR finds that the foreign country’s action is “unreasonable” or “discriminatory,” it is advised, at its discretion, to take all appropriate and feasible action to eliminate the offending act, policy, or practice, but no mandatory action is called for.⁹⁰

In 1988, Congress added to Section 301 the processes known as Super 301⁹¹ and Special 301.⁹² Under the Super 301 provision, the USTR has the authority to identify “Priority Foreign Countries” (PFC), which are countries considered to have trade barriers and/or unfair trade practices that might affect the U.S.’ export of goods or services and foreign direct investment.⁹³ When a foreign country is identified in the annual report as PFC (the USTR has significant discretion in identifying the status of the PFC) the USTR must initiate a Section 301 investigation of the trade measure identified as a priority practice.⁹⁴ The USTR is required to attempt to negotiate an

⁸⁸ 19 U.S.C. § 2411(a)(2)(B)(ii) (1988).

⁸⁹ 19 U.S.C. § 2411(a)(2)(B)(v) (1988).

⁹⁰ 19 U.S.C. § 2411(b) (1988).

⁹¹ Omnibus Trade and Competitiveness Act of 1988, Pub.L. No. 100- 418, § 1302, 102 Stat. 1107, 1176-79 (codified as 19 U.S.C. § 2420 (1988)).

⁹² Omnibus Trade and Competitiveness Act of 1988, Pub.L. No. 100- 418, § 1303, 102 Stat. 1107, 1179-81 (codified as 19 U.S.C. § 2242 (1988)).

⁹³ 19 U.S.C. §§ 2241(a)(1)(A), 2420(a)(1)(A), (a)(3) (1988).

⁹⁴ 19 U.S.C. § 2420(b) (1988). The USTR was to initiate a Section 301 investigation pursuant to 19 U.S.C. § 2412(b)(2) (1988).

agreement with the named priority country to eliminate the offending practice,⁹⁵ and if such an agreement is reached before the completion of the Section 301 process, the process is to be suspended.⁹⁶

The Special 301 process is like the Super 301 process in that it requires the USTR to identify, on a yearly basis, the PFC status of foreign countries. The difference is Special 301 is aimed at countries which "have the most onerous or egregious" policies that deny adequate and effective intellectual property rights or deny fair market access to U.S. persons which rely upon intellectual property protection.⁹⁷ The USTR must initiate an investigation under Section 301 of any foreign country named as a PFC.⁹⁸ The Special 301 process requires the USTR to monitor all foreign intellectual property laws and practices and report them yearly. In the first year of Special 301 in 1989, the USTR declined to name any priority countries, although the USTR created a "Priority Watch List" (PWL) and a "Watch List" (WL) naming countries that were, according to the USTR, lax in the protection of intellectual property rights.⁹⁹ India, Thailand, and China (PRC) were designated as priority countries in 1991.¹⁰⁰

⁹⁵ 19 U.S.C. § 2420(c)(1) (1988).

⁹⁶ 19 U.S.C. § 2420(c)(2) (1988).

⁹⁷ 19 U.S.C. §§ 2242(a), (b)(1)(A) (1988).

⁹⁸ 19 U.S.C. § 2412(b)(2) (1988).

⁹⁹ See Office of U.S. Trade Representative, USTR Fact Sheet: "Super 301" Trade Liberalization Priorities (1989), reprinted in 6 Int'l Trade Rep. (BNA) 715-18 (May 31, 1989).

¹⁰⁰ Notice of Countries Identified as Priority Foreign Countries, 56 Fed.Reg. 20,060 (U.S. Trade Rep. 1991).

In summary, there are three processes for applying the U.S. Trade Act against foreign countries: "Section 301," "Super 301," and "Special 301." Using Section 301, U.S. petitioners can make complaints about other countries' unreasonable trade practices that adversely affect their trade prospects. If these complaints are found to be justified, the U.S. can retaliate against the offending country. Super 301 require the USTR to prepare an inventory of foreign trade barriers and attempt to negotiate their removal with the possibility of trade retaliation if the negotiations are ultimately unsuccessful. Special 301 is similar to Super 301 in its approach, but relates to intellectual property and is a continuing threat to the USTR's target countries. It is highly controversial in the international community and remains an ongoing threat as discussed in the following section.

§ 2.3.2.3. Criticisms on the U.S. Trade Act

Since its enactment in 1974 and subsequent amendment in 1988, Section 301 of the Trade Act of 1974 has been the target of an enormous number of critiques from the legal community. These critiques range from economic attacks on the inefficiencies of unilateral trade sanctions to expressions of concern over the broad discretion given to the U.S. Trade Representative (USTR) in implementing the statute.¹⁰¹ The U.S. justified its unilateral use of Section 301 to the General Agreement on Tariffs and Trade (GATT) member states claiming the lack of an effective dispute settlement mechanism and the limited field of action provided under the GATT 1947. During the Uruguay Round trade negotiations (1986-1994),

¹⁰¹ See generally Marshall A. Leaffer, *Protecting U.S. Intellectual Property Abroad: Toward a New Multilateralism*, 76 Iowa L.Rev. 273, 295-97 (1991); Daniel G. Partan, *Retaliation in U.S. and European Community Trade Law*, 8 B.U. Int'l L.J. 333 (1990).

however, U.S. trading partners sought to constrain the nation's "aggressive unilateralism."¹⁰²

Trading partners of the U.S. expressed their views, in the WTO Report of the Panel: U.S. – Section 301-310 of the Trade Act of 1974,¹⁰³ that Section 301 was violating rules under the WTO agreement on dispute settlement.¹⁰⁴ The dispute was brought by European Community against the U.S. According to the panel report, the DSU was intended to strengthen the dispute settlement mechanism of the multilateral trading system. In particular, Article 23 of the DSU, entitled "Strengthening of the Multilateral System," requires that the WTO's Members resolve all trade disputes falling under the scope of the WTO Agreements through the process set out in the DSU, and requires disputing parties to abide by the rules and procedures of the DSU.¹⁰⁵

However, the panel report concluded that Sections 301-310 were not inconsistent with the U.S.' obligations under WTO rules. In reaching this conclusion, the Panel noted that the U.S. had pledged in the Statement of Administrative Actions before the Panel, that it would not exercise its discretion contrary to its obligations under Article 23. The Panel stated that these undertakings effectively and legally curtailed the offending discretionary element, and therefore removed the WTO

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Jagdish Bhagwati, *Aggressive Unilateralism: An Overview in Aggressive Unilateralism: America's 301 Trade Policy and the World Trading System 1-45* (Jagdish Bhagwati & Hugh T. Patrick eds., 1990).

103

Panel Report, *supra* note 41.

104

Understanding on Rules and Procedures Governing the Settlement of Disputes Under Articles XXII and XXIII of the General Agreement on Tariffs and Trade, in *The Results of the Uruguay Round of Multilateral Trade Negotiations*, annex 2 (GATT Secretariat ed., 1994) (hereinafter DSU).

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The full text of Article 23 and other relevant provisions of the DSU are reproduced in Annex II of the WTO Agreement.

inconsistencies created by the statutory language of Sections 301-310. The European Union Trade Commissioner stated that “[N]either side can claim triumph because, while the Section 301 legislation can stay on the books, the Panel has clarified that it can be used against other WTO Members only as long as it strictly follows WTO rule as the U.S. has given the necessary commitments to this effect.”¹⁰⁶

One legal commentator critically observed that the U.S. Trade Act as amended in 1988, which incorporates Super 301, empowers the USTR to determine whether a foreign trade policy is “unfair” under a standard solely set by the U.S. Section 301 requires the USTR to evaluate the economic policy of foreign countries. Without a legitimate basis of prescriptive jurisdiction, however, the USTR’s determination against allegedly “unfair” foreign trade practices should not be enforced because such interference with the national economic policy of a foreign country violates public international law.¹⁰⁷

On its face, Section 301 does not appear to be inherently unreasonable. However, the U.S. can take retaliatory action under Section 301 even when a foreign country is fully complying with its international obligations, since Section 301 gives the U.S. sole discretion to determine what measures are unfair. Section 301 permits action even when the foreign action in question is not a breach of an international obligation.¹⁰⁸ One leading authority has described Section 301 as “aggressive

¹⁰⁶ Press Release by the EC, Press Release No. 86/99, WTO Report on U.S. Section 301 Law: A Good Result for the EU and the Multilateral System (Dec. 23, 1999) <<http://www.insidetrade.com>>.

¹⁰⁷ See Bowett, *Jurisdiction: Changing Patterns of Authority over Activities and Resources*, 1982 BRIT. Y.B. INT’L L. 1, 25. See also Seung Wha Chang, *Taming Unilateralism Under the Multilateral Trading System: Unfinished Job in the WTO Panel Ruling on U.S. Section 301-310 of the Trade Act of 1974*, 31 Law & Pol’y Int’l Bus. 1151 (2000).

¹⁰⁸ See John H. Jackson, *The World Trading System* 106 (1989).

unilateralism” because its employment is designed to make foreign countries yield unreciprocated trade concessions.¹⁰⁹

The international trade system is one in which the rights and obligations among states are equal, and in which trade is based on the principle of nondiscrimination, otherwise known as *most favored nation treatment*.¹¹⁰ The arbitrary unilateral trade sanction under U.S. trade law will result in adverse impacts to the U.S. in the long term because it creates resentment, particularly among developing countries who view imposed bilateral agreements as a type of colonialism.

Within the mechanism of the TRIPs Agreement, the periodic reviews of the Council for the TRIPs Agreement provide for two-year reviews of the implementation of the Agreement¹¹¹ and these biannual reviews should substitute for the unilateral policy reviews currently undertaken by the trade representatives. Despite these criticisms, the Clinton administration stated that Section 301 remains unaffected by the WTO agreements.¹¹²

According to this position, the U.S., in implementing legislation of the GATT Uruguay Round Agreements, submitted to the U.S. Congress on September 27, 1994, declared that U.S. law was to prevail in case of conflict: “No provision of the Uruguay Round Agreements, nor the application of any such provision to any person

¹⁰⁹ See Bhagwati, *supra* note 102, at 1, 15, 16-28.

¹¹⁰ Aho, More Bilateral Agreements Would be a Blunder: What the President Should Do, 22 *Cornell Int'l L.J.* 25, 32 (1989).

¹¹¹ See TRIPs Agreement, *supra* note 33, art. 71.1. (providing that the Council for TRIPs shall review implementation of the TRIPs Agreement after two years of its operation.)

¹¹² The U.S. Trade Representative, Mickey Kantor, expressly said that Section 301 “remains exactly today as it always has been.” USTR Says Accord Preserves Section 301: Gephardt Pledges Support For GATT Deal, 11 *Int'l Trade Rep. (BNA)* 1 (Jan. 5, 1994).

or circumstance, that is inconsistent with any U.S. law shall have effect. . . [F]urther, nothing in the Uruguay Round Agreements Act shall be construed . . . to limit any authority conferred under any U.S. law, including Section 301 of the Trade Act of 1974 unless specifically provided for in this act.”¹¹³ Ultimately, the U.S. Trade Act of 1974 does not contain substantial modifications to Section 301 as it stands to date.

§ 2.3.3. Free Trade Agreement between Thailand and the U.S. on the Issue of Copyright Protection

§ 2.3.3.1. An Overview of Thailand – U.S. Free Trade Agreement

There has been a proliferation of negotiations on bilateral trade and/or investment agreements since the establishment of the WTO with its multilateral agreements on trade and investment. Bilateral agreements are another approach to ensure that participating governments do not hinder economic reforms, but promote the liberalization, privatization and deregulation measures. These economic measures are suggested by the World Bank structural adjustment programs, which include domestic free market policies modeled after the economic foundation of developed countries.¹¹⁴ Thailand follows this economic trend by negotiating bilateral free trade agreements with foreign countries, including the U.S.

Since World War II, the U.S. and Thailand have developed close relations, as reflected in several bilateral treaties and by both countries' participation in United

¹¹³ Uruguay Round Agreements Act, H.R. 5110, 103d Cong., 2d Sess. § 102 (1994).

¹¹⁴ See Ibrahim F. I. Shihata, Legal Treatment of Foreign Investment: “The World Bank Guidelines” 396 (Martinus Nijhoff 1993) (surveying key elements of Bilateral Investment Treaties as including fair and equitable treatment, free transfer of proceeds, nondiscriminatory expropriatory measures, and arbitration); Jose Luis Siqueiros, *Bilateral Treaties on the Reciprocal Protection of Foreign Investment*, 24 Cal. W. Int’l L.J. 255, 257-62 (1994) (outlining basic Bilateral Investment Treaty protections).

Nations multilateral activities and agreements. The principal bilateral arrangement is the 1966 Treaty of Amity and Economic Relations, which facilitates Thai and U.S. companies' economic access. The Treaty of Amity and Economic Relations, with exchanges of notes, was signed in Bangkok on May 29, 1966 and entered into force on June 8, 1968.¹¹⁵

In October 2002, Thailand and the U.S. entered into a Trade and Investment Framework Agreement (TIFA). The TIFA created a joint council to further facilitate and liberalize trade and investment between the two countries. The TIFA essentially acts as a working plan for the potential Free Trade Agreement (FTA) between the Thailand and U.S. The U.S. generally requires that for countries of the Association of Southeast Asian Nations (ASEAN) to be eligible for an FTA with the U.S., they must enter into a TIFA with it first.¹¹⁶

During a prime ministerial visit to the White House on June 10, 2003, Thai Prime Minister, Thaksin Shinawatra, and U.S. President, George W. Bush, agreed to make tangible progress on existing commitments under the TIFA, including the areas of intellectual property rights, investment and customs, as a necessary first step towards a possible FTA. Subsequently, the U.S. government announced on October 20, 2003, that it intended to initiate FTA negotiations with Thailand.¹¹⁷

¹¹⁵ Treaty of Amity and Economic Relations, May 29, 1966, U.S.-Thailand, 19 U.S.T. 5843, T.I.A.S. No.6540. The Treaty of Amity and Economic Relations between Thailand and the U.S. allows American companies to maintain a majority shareholding in, or to wholly own, companies or branch offices in Thailand. Under the Treaty, qualifying U.S. companies are not subject to the foreign shareholding requirements imposed by the 1999 Aliens Business Operation Act, which regulates foreign participation in Thai business activities.

¹¹⁶ Liza S. Leung & Edward J. Kelly, IP Protection: Potential Key in Thai – U.S. FTA, at http://www.tillekeandgibbins.com/Publications/pdf/IP_protection_key.pdf.

¹¹⁷ Office of Press Secretary Fact Sheet, Free Trade and Thailand (October 20, 2003), at <http://www.whitehouse.gov/news/releases/2003/10/print/20031020-27.html>.

Having concluded an FTA with Singapore in May 2003, the U.S. is seeking to advance President Bush's Enterprise for ASEAN Initiative, an initiative aimed at enhancing U.S. relations with ASEAN countries. Currently, the U.S. has numerous concerns about Thailand's trade and investment regime, which it hopes to address through these FTA negotiations. These include high tariffs and non-tariff barriers on both industrial and agricultural goods, restrictions on access to the services market, deficiencies in Thailand's intellectual property rights and customs regimes, and other issues.¹¹⁸ Evidently, the current U.S. administration intends to use a bilateral trade strategy to obtain increased intellectual property protections from its trading partners.

Finally, the first round of formal negotiations for the Thai-U.S. FTA began on June 24, 2004 in Honolulu, Hawaii, followed by the second round of the Thai – U.S. FTA negotiations held on October 11-15, 2004 at the same venue. The second round focused on 21 issues ranging from market access of agricultural products, textiles and clothing, intellectual property rights, investment, and competition policy.¹¹⁹

The third round of the Thai – U.S. FTA negotiations was postponed from December 2004 to April 4-8, 2005, and then held in Chonburi province, Thailand due to the preparation for general election of Thai government held in February 2005. During the close-doors negotiation, a group of approximately 1,500 protesters rallied outside the building demonstrating the removal of intellectual property rights issue from the prospective FTA. The demonstrators asserted that broader application of intellectual property rights could restrain farmers from growing patented plant

¹¹⁸ U.S. Trade Representative, *National Trade Estimate 2004*, at http://www.ustr.gov/assets/Document_Library/Reports_Publications/2004/2004_National_Trade_Estimate/2004_NTE_Report/asset_upload_file824_4800.pdf.

¹¹⁹ *Id.*

varieties and they would be overly charged for browsing the Internet.¹²⁰ In the third round, the U.S. submitted written demands to Thailand on intellectual property issues of copyright, trademark, and patent protections. The Thai government did not release the details on intellectual property rights issue resulting after this negotiation round.

The fourth round of the Thai – U.S. FTA negotiations was conducted in Great Falls, Montana during the week of July 11-15, 2005. In this round, the U.S. ensured that U.S. businesses and workers would not be put at a disadvantage with their major competitors from countries such as China and Australia, which already have preferential trade agreements with Thailand. Like other U.S. free trade pacts, a successfully completed Thai-U.S. FTA will be comprehensive in its coverage, while taking into account the sensitive issues, including the one on intellectual property rights protection. Both Thailand and the U.S., based on the progress made during the fourth round, planned for further progress in the next round to be held in late September of 2005 in Hawaii.¹²¹

§ 2.3.3.2. U.S. Position

Negotiation of bilateral and regional free trade agreements (“FTA”) has assumed significant importance in U.S. trade policy. Among other intellectual property rights issues, these negotiations offer an important opportunity to persuade U.S. trading partners to modernize their copyright law regimes so they can maximize protection of U.S. copyrights in the new e-commerce environment and to improve their copyright

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See Porpot Changyawa, *FTA Would Hurt Thais, Expert Warns US Laws on Patents, Copyright Enforced*, Bangkok Post, August 19, 2003.

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See Umesh Pandey, *US-Thai FTA: Final Trade Deal Not Expected in Montana Round*, Bangkok Post, July 11, 2005.

enforcement procedures. Even though Thailand is generally not enthusiastic about engaging in deeper intellectual property rights negotiation, the U.S. is attempting to use the forum of Thai-U.S. FTA negotiations to achieve its objectives, which go beyond the minimum levels of copyright protection in the TRIPs Agreement (so called "TRIPs-plus"),¹²² in order to expand its commercial interests in Thailand.¹²³

The principal U.S. negotiating objectives on the issue of copyright protections in the Thai-U.S. FTA can be attributed to its public law on the Trade Promotion Authority of the U.S., which states that:

"(A) to further promote adequate and effective protection of intellectual property rights, including through--

(i)(I) ensuring accelerated and full implementation of the Agreement on Trade-Related Aspects of Intellectual Property Rights referred to in section 101(d)(15) of the Uruguay Round Agreements Act (19 U.S.C. 3511(d)(15)), particularly with respect to meeting enforcement obligations under that agreement; and

(II) ensuring that the provisions of any multilateral or bilateral trade agreement governing intellectual property rights that is entered into by the U.S. reflect a standard of protection similar to that found in U.S. law;

¹²² "TRIPs-plus" refers to policies, and policy-making processes, that embody commitments which go beyond minimum standards mandated by the WTO TRIPs Agreement. *See* "TRIPs-plus: Where are We Now?" An Informal Report from GRAIN for the Third SAARC Peoples Forum. Bangladesh, August, 2003.

¹²³ *See* Davis Vivas-Eugui, Regional and Bilateral Agreements and a TRIPs-plus World: The Free Trade Area of the Americas (FTAA), Quaker United Nations Office 5-6 (2003).

(ii) providing strong protection for new and emerging technologies and new methods of transmitting and distributing products embodying intellectual property;

(iii) preventing or eliminating discrimination with respect to matters affecting the availability, acquisition, scope, maintenance, use, and enforcement of intellectual property rights;

(iv) ensuring that standards of protection and enforcement keep pace with technological developments, and in particular ensuring that right holders have the legal and technological means to control the use of their works through the Internet and other global communication media, and to prevent the unauthorized use of their works; and

(v) providing strong enforcement of intellectual property rights, including through accessible, expeditious, and effective civil, administrative, and criminal enforcement mechanisms;

(B) to secure fair, equitable, and nondiscriminatory market access opportunities for U.S. persons that rely upon intellectual property protection; and

(C) to respect the Declaration on the TRIPS Agreement and Public Health, adopted by the World Trade Organization at the Fourth Ministerial Conference at Doha, Qatar on November 14, 2001.”¹²⁴

The U.S. ongoing point of view towards copyright protection in Thailand can be seen in the report of USTR on the 2004 Special 301 Watch List.¹²⁵ According to

¹²⁴ Public Law 107-210 Aug. 6, 2002. 116 Stat. 933.

the report, Thailand has made some efforts to strengthen its copyright protection regime through the consideration of draft legislation and regulations, and the development of initiatives to improve enforcement, but has achieved only limited progress. The U.S. continues to have serious concerns about the Thai Government's failure to effectively address the growth in copyright infringement, including optical media infringement, cable and signal infringements, and end-user copyright infringement. The U.S. was satisfied with the stepped-up enforcement efforts that were initiated in the spring and the early fall of 2003 and the reduction in retail of infringing products seen during the October APEC meeting in 2003. However, the U.S. is disappointed that these efforts were not sustained and that infringement levels remain high.¹²⁶

The U.S. considers that copyright enforcement in Thailand is still uncoordinated and sporadic, and that the transfer of some responsibilities from police units to the newly formed Department of Special Investigations has caused problems in the implementation of enforcement activities. The production, distribution, sale, and export of infringing products continue to be a serious concern. Infringing products sold in, or exported from Thailand, include optical discs, computer software, and video games.

In the USTR's view, Thailand also has one of the highest end-user infringement rates in Asia, and book and broadcast infringement are growing

¹²⁵ See U.S. Trade Representative, *The Thailand Section on the 2004 Special 301 Report Watch List*, at http://www.ustr.gov/Document_Library/Reports_Publications/2004/2004_Special_301/2004_Special_301_Report_Watch_List.html.

¹²⁶ *Id.*

problems.¹²⁷ Furthermore, the Thai government has failed to enact an optical disc law, and concerns remain over deficiencies in the current version of the draft optical disc bill and its implementing regulations. In addition, while the draft amendments to the Copyright Act include important improvements, some additional strengthening of the current draft is needed.

Legally, the USTR is under strict guidance from the Congress in the form of the 2002 Trade Promotion Authority legislation to undertake new agreements that build upon the bases established by the TRIPS Agreement.¹²⁸ The Congressional mandate is in harmony with the interests of U.S. industry, as well as traditional free traders, who passionately believe that strong intellectual property protections are necessary to preserve innovations in the marketplace. Thailand must understand that the U.S. will demand intellectual property provisions in the FTA negotiations that are "TRIPS plus" in nature.

§ 2.3.3.3. Thai Position

Bilateral trade agreements have started to become attractive to developing countries, including Thailand. The Thai government might believe that it can create "privileged trade relations" with powerful developed countries, such as the U.S., but Thailand must carefully weigh the cost and benefits on the issue of copyright protection since the U.S. negotiators will try to get as much as they can in preparation for congressional approval.

¹²⁷ *Id.*

¹²⁸ See Dan Sarooshi, *Sovereignty, Economic, Autonomy, the U.S., and the International Trading System*, 15 *Eur. J. Int'l L.* 660 (2004).

As a WTO member, Thailand has fulfilled its commitments deriving from the TRIPs Agreement and has implemented its laws beyond the TRIPs minimum requirements to certain extents, which will be discussed in Chapter III and Chapter IV of this dissertation. At the Thai-U.S. FTA negotiations, Thai negotiators are concerned about so-called "TRIPs-plus" agreements because these types of agreements include commitments that go beyond what is already included or consolidated in the minimum standards of the TRIPs Agreement. Given an antagonistic reaction from developing countries to attempts by developed countries to modify the TRIPs Agreement, bilateral FTAs have become the primary means by which the U.S. pursues its goals.

Potential copyright protection issues to be discussed in the Thai-U.S. FTA negotiations may be anticipated from the outcome of previous negotiations between the U.S. and Singapore. The U.S.-Singapore Free Trade Agreement is the first U.S. FTA with a Southeast Asian nation, and has fundamental value for the prospective Thai-U.S. FTA under President Bush's Enterprise for ASEAN Initiative (EAI) and Prime Minister Thaksin's international trade policy. The U.S.-Singapore FTA expands U.S. market access in goods, services, investment, and government procurement, as well as investment on intellectual property. The U.S.-Singapore FTA was launched on November 16, 2000, and the Agreement was concluded on January 15, 2003.¹²⁹

Under the provisions regarding to copyright protection in U.S.-Singapore FTA, both countries extended copyright protection beyond the TRIPs Agreement minimum standards, called "TRIPs plus" as the following language indicates; The

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USTR, Singapore FTA, *at* http://www.ustr.gov/Trade_Agreements/Bilateral/Singapore_FTA/Final_Texts/Section_Index.html (last visited Dec. 6, 2005).

U.S. and Singapore further agreed to provide strong anti-circumvention provisions prohibiting tampering with technology designed to prevent infringement of copyrighted works over the Internet.¹³⁰ Both sides agreed to criminalize unauthorized reception and re-distribution of satellite signals.¹³¹ Lastly, both sides agreed to provide immunity to Internet service providers for complying with notification and take-down procedures when material suspected to be infringing are hosted on their servers.¹³²

In addition to the TRIPs-plus provisions, the US-Singapore FTA requires Singapore to ratify or accede to the Brussels Convention Relating to the Distribution of Programme-Carrying Satellite Signals (Brussels Convention),¹³³ which requires parties to protect encrypted program-carrying satellite signals. It also requires each party to include full national treatment commitments, with no exceptions for digital products.¹³⁴ The Provisions in The U.S.-Singapore FTA articulate rights that are unique to the digital age, affirming and building on rights set out in several international agreements, including the WIPO Internet Treaties. For instance, a provision clarifies that the right to reproduce literary and artistic works, recordings, and performances, encompasses temporary electronic copies – an important principle

130 USTR, Singapore FTA, *id.* The language in the TRIPs Agreement does not refer to technology tampering.

131 *Id.* The language in the TRIPs Agreement does not require criminalization.

132 *Id.* The language in the TRIPs Agreement does not require notification and take-down procedures.

133 Convention Relating to the Distribution of Programme-Carrying Signals Transmitted By Satellite, *opened for signature* May 21, 1974, Senate Foreign Relations Comm. Treaty Doc. 98-31, reprinted in Records of the International Conference of States on the Distribution of Programme-Carrying Signals Transmitted by Satellite vii-xxiii (UNESCO/WIPO 1974) [hereinafter Brussels Satellite Convention].

134 USTR, Singapore FTA, *supra* note 129.

in the digital environment.¹³⁵ It also calls for each party to provide right to make their works available online.

The U.S.-Singapore FTA also includes provisions on anti-circumvention under which parties commit to prohibit tampering with technology used by authors to protect copyrighted works. In addition, the provisions set out obligations with respect to the liability of Internet service providers in connection with copyright infringements that take place over their networks. Each party must also provide the basic term of copyright protection for the life of the author plus 70 years.¹³⁶

After its entry into a Trade and Investment Framework Agreement (TIFA) with the U.S. in October 2002, the Thai government set up a Working Committee on Copyright, comprising officials from the Department of Intellectual Property (DIP) and representatives of copyright owners, to work on the provisions of draft amendments to the *T.C.A.* B.E. 2537. The draft has been submitted to the Thai Cabinet and is pending further introduction to the Thai Parliament for approval.¹³⁷ If eventually approved, this amendment will be the first revision since the current *T.C.A.* came into effect in March 1995.

In 1994, the Thai parliament enacted the *T.C.A.* B.E. 2537 to bring Thailand's laws into line with TRIPs' requirements. Only one year after the *T.C.A.* came into effect, the WIPO Internet Treaties (WIPO Copyright Treaty [WCT] and WIPO

135 The reproduction right will be interpreted in compliance with that provided in Article 1(4) of the WIPO Copyright Treaty (WCT), which fully applies in the digital environment, in particular to the use of works in digital form. It is understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention. See WCT, *supra* note 225, art. 1(4), 36 I.L.M. 65.

136 USTR, Singapore FTA, *supra* note 129.

137 Woranuj Maneerungsee, *Reforms to Thai Copyright Laws Would End Out-of-Court Deals*, Bangkok Post, September 24, 2003.

Performances and Phonograms Treaty [WPPT] were concluded. The proposed draft amendments were crafted to contain certain provisions that were clearly intended to implement the provisions of the WIPO Internet Treaties and based on the model proposed by WIPO. Nonetheless, despite all the WIPO legislation aimed at improving international copyright issues, Thailand, like many of its Asian neighbors, has yet to ratify the WCT or the WPPT.¹³⁸

Similar to the U.S.-Singapore FTA, significant changes to the current T.C.A. based on the draft amendments being proposed to the Thai parliament includes provisions to prohibit the circumvention of technological measures used to protect copyrighted works. The proposed changes also address the extent to which Internet service providers can be held liable for infringing activities occurring with the use of their services. The draft amendments, nonetheless, do not extend, as the U.S. has urged Thailand to do, the term of protection to the life of the author plus 70 years. Extension of protection term would be considered by Thai people as an intrusion on the public domain. Thus, such intrusion should not be justified by the benefits that will be received by U.S. individual authors and large corporations.

§ 2.3.3.4. Recommendations on Thai-U.S. FTA Negotiations on Copyright Issues

Thai trade negotiators should argue that the term of copyright protection between Thailand and the U.S. should be subject to “national treatment” under the Berne Convention. The Berne Convention provides that foreign works should not

¹³⁸ Thailand became a member to World Intellectual Property Organization (WIPO) in September 1990. Rebecca Rungsang, *Thailand Accedes to WIPO Convention*, IB. Asia, Feb. 8, 1990, at 15.

receive longer protection than domestic works.¹³⁹ This approach under the Berne Convention is reasonable for both Thailand and the U.S. Arguably, if the U.S. succeeds in pressuring the Thai government to implement its copyright law to extend the copyright duration from the author's life plus fifty years to the author's life plus seventy years, it should be able to negotiate a certain transition period for adjustment long enough to sustain its socio-economic development before being bound by intellectual property related agreements.

Since international copyright agreements have a significant and unavoidable impact on access to creative works in the digital age, Thailand must insist on enacting domestic limitations, including the application of compulsory licenses that encourage access and use of digital works. Thailand should refrain from ratifying copyright treaties that extend the negotiated minimum standards, and resist incorporation of these agreements into the TRIPs Agreement.

Finally, to be successful in Thai-U.S. FTA negotiations, Thai negotiators should undertake their duties in a structured, elaborate, and legalized way of negotiating, as well as within a clear framework of the Thai government's objectives. Since the results of the Free Trade Agreement between Thailand and the U.S. are of substantial economic and social interests to both countries, the Thai government needs to have clear and well-prepared information to encounter expected requests from the U.S. to strengthen the level of intellectual property protection beyond Thailand's affordability. This is especially important since the results of free trade negotiations will affect the future livelihoods of all Thai professions. The practicable negotiation on intellectual property rights should not be conducted at the bilateral level but rather

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Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886 amended Oct. 2, 1979, art. 7(8), 828 U.N.T.S. 221.

kept at the multilateral level (in the TRIPs Council and the WIPO) where more comprehensive considerations can be obtained.

The negotiations process should be established to ensure the broad participation of Thai people. This should involve the gathering of information, the expression of opinions, and decision-making. This will also be of great benefit to the Thai negotiating team, who will have comprehensive information and recommendations for use in the negotiations, and it will increase their negotiating power. In other words, the participation of FTA negotiations should not be limited to only one or a few interest groups, but for all Thais as a whole. Deplorably, while the U.S. requires Congress to ratify all international trade agreements, the Thai government claims that parliamentary oversight is not required by the 1997 Thai Constitution.¹⁴⁰ Respectfully, the Thai public is often not informed about the progress and outcome of negotiations; this situation should be rectified.

§ 2.4. Conclusion

In the long run, developed countries pressing for higher standards of protection should expect developing countries to present counterclaims for the higher social costs that such standards would entail. In other words, by shifting international intellectual property protection to the framework of multilateral trade negotiations, developed countries have implicitly acknowledged that compensation has become the new challenging principle.¹⁴¹

¹⁴⁰ Abigail Smith & Jarah Tynan, Full Steam Ahead: Examining the Impact of the Thai – U.S. Free Trade Agreement 30-35 (Martina Meijer et al. eds., 2005).

¹⁴¹ See, e.g., Malcolm D. Rowat, *An Assessment of Intellectual Property Protection in LDCs from both a Legal and Economic Perspective -- Case Studies of Mexico, Chile and Argentina*, 21 Denver J. Int'l L. & Pol'y 401, 429 (1993).

It should be noted that the negotiation of some issues which are crucial to developing countries development is still pending. Among these issues, one can mention the rules of private international law (conflict of laws), private copying, regulation of contracts, satellite broadcast, cable TV, and information highways. Some of these issues have been dealt with in the new WIPO Treaties on copyright, performance and phonograms, which were adopted in Geneva in December 1996.

Equally relevant for the future of the TRIPs Agreement is the position taken by the U.S. not to renounce the application of Section 301 of its Trade Legislation until the TRIPs Agreement is applied to the whole world. In fact, the U.S. continues to exert pressure on trading partners, and adopts unilateral measures against certain countries. Of course, bilateral pressure and unilateral measures may create severe tensions with respect to the application of the TRIPs Agreement. It appears that, once the agreement is adopted and widely applied, there would be no legitimate ground for the use of bilateral mechanisms to demand higher levels of intellectual property protection than that established in the TRIPs agreement. Therefore, developing countries should resist illegitimate pressure in the form of unilateral or bilateral actions from developed countries and urge them to take recourse in the more balanced power fora of the WTO and the WIPO.

Chapter III:

A Comparative Analysis of the Copyright Law of the Kingdom of Thailand and That of the United States of America

§ 3.1. Introduction

This chapter compares the national copyright laws of the U.S. and Thailand within their obligations in the international legal framework, and will further explain basic concepts of their copyright law. Comparing the national copyright law of selected countries is of vital importance because when copyright disputes involve more than one country, the relevant domestic law of the country where infringement takes place will govern the remedy.¹ When U.S. copyright holders expose their copyright products to the Thai market, they should consult lawyers to secure their profits, which are generally derive under the Thai legal framework.

This chapter explores the differences of substantive copyright protection granted under the copyright law of the U.S. and that of Thailand. It does not, however, touch procedural copyright rules of U.S. and Thai Law. These features will be discussed in chapter IV. For foreign investors investing in these countries, discerning the differences between the copyright laws of the U.S. and Thailand is crucial before transferring capital or technology into certain countries.

This chapter concludes that under the principle of sovereignty of states, Thai copyright law applies to determine an infringing act conducted within Thai borders. Any U.S. copyright holder, who claims remedies under a wrongful act committed in

¹ Paul E. Geller, 1 Int'l Copyright Law and Practice, § 1 at 11 (1992).

Thailand, must assert Thai law. On the other hand, if damages can be recovered in the U.S., owners of Thai copyrights can assert their rights in U.S. courts and under U.S. law.

§ 3.2. Nature of Copyright Legislation of Thailand and the United States

§ 3.2.1. Constitutional Basis for Protection of Copyright Works

§ 3.2.1.1. The U.S.

The U.S. copyright law is guided by the U.S. Constitution empowering the U.S. Congress to promote the progress of science and useful arts. Article 1 of the Constitution states that “[T]he Congress shall have Power ... 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”² This clause reflects the belief that a limited grant of private property rights serves the general public interest by encouraging the creation and dissemination of new works.³ The clause also implies that copyright laws are created by Congress and subject to approval by the federal courts. In the U.S., copyright law is one of certain special fields that preempt other domestic laws enacted by individual states. The U.S. judiciary is based on a system of federalism, which complicates the application of the federal Copyright Act and related state laws.

² U.S. Const. Art. 1, § 8, cl. 8.

³ Paul Goldstein, 1 Copyright §1.14.1 (2d ed. 2003).

The subject matter of copyright protection found in the U.S. Constitution are “writings.”⁴ The dynamic term, “writings,” in the Constitution has been adopted by the U.S. Congress, and construed by the courts, in a manner that expands to an unpredictable boundary of copyright works.⁵ The Congress has, for instance, interpreted copyright subject-matter remotely removed from its popular significance, such as photographs, paintings, statuary, and dramas, even if unwritten. The courts have ruled accordingly to protect various new forms of expression created by technological advances, for instance, sound recordings.⁶

The First Amendment to the U.S. Constitution grants the right of free speech to all U.S. citizens.⁷ Even though this right seems to run afoul of the provisions of the copyright statute, it does not.⁸ The Copyright Act of 1976 only restricts expressions which are assimilated from other’s works. Parties to copyright litigation are increasingly raising the First Amendment as a potential limit to the scope of copyright rights. Typically, the First Amendment is raised by defendants who claim that their

⁴ See *supra* note 2.

⁵ S. Rep. No. 6187, 59th Cong., 2d Sess. 4 (1907), reprinted in 6 E.F. Brylawski & A. Goldman, *Legislative History of the 1909 Copyright Act*, at pt. Q (1976). (stating that “[T]he Congress has always construed this term broadly, and in doing so has been uniformly supported by judicial decision.”).

⁶ See *Shaab v. Kleindienst*, 345 F. Supp. 589 (D.D.C. 1972) (per curiam). Cited in 47 *Tenn. L. Rev.* 787.

⁷ See U.S. Const. amend. I. (stating that “[C]ongress shall make no law abridging the freedom of speech”).

⁸ See *Schnapper v. Foley*, 471 F. Supp. 426, 428 (D.D.C. 1979), *aff’d*, 667 F.2d 102 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 948 (1982) (“[I]t is well established that there is no conflict between the First Amendment and the copyright laws.”).

constitutional right to freedom of speech immunizes them from copyright liability.⁹ It is thought that copying works of others distracts from creativity because it discourages authors to develop new works if they believe someone might exploit their works without compensating them.¹⁰ Consequently, an infringer cannot raise the First Amendment of the U.S. Constitution to defend him or herself against liability.

§ 3.2.1.2. Thailand

Since the end of the absolute monarchy in 1932, Thailand has been ruled in accordance with written constitutions. There have been sixteen constitutions, since 1932, including the current 1997 Constitution. Unlike the U.S. Constitution, the Constitution of Thailand does not explicitly empower the legislative to promote intellectual inventions and creative expressions. Instead, Article 81 of the Constitution of Thailand provides a directive principle for fundamental national policies. This principle holds that the State shall support research in various sciences and accelerate the development of science and technology for national development.¹¹ Consequently, the Thai government must act in accordance with the

⁹ Universal City Studios, Inc. v. Corley, 273 F.3d 429 (2d Cir. 2001); Veeck v. S. Bldg. Code Congress Intl. Inc., 241 F.3d 398 (5th Cir. 2001), rehearing en banc granted by, 2001 WL 1153486 (5th Cir. 2001); A&M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896 (N.D. Cal. 2000), aff'd in part, rev'd in part, 239 F.3d 1004 (9th Cir. 2001); Worldwide Church of God v. Phila. Church of God, Inc., 227 F.3d 1110 (9th Cir. 2000), cert. denied, 121 S. Ct. 1486 (2001); L.A. Times v. Free Republic, 54 U.S.P.Q. 2d 1453 (C.D. Cal. 2000); Penguin Books of U.S., Inc. v. New Christian Church of Full Endeavor, Ltd., 55 U.S.P.Q. 2d 1680 (S.D.N.Y. 2000); Intell. Reserve, Inc. v. Utah Lighthouse Ministry, Inc., 75 F. Supp. 2d 1290 (D. Utah 1999).

¹⁰ See Alfred C. Yen, *A First Amendment Perspective on the Idea/Expression Dichotomy and Copyright in a Work's "Total Concept and Feel"*, 38 Emory L.J. 393 (1989), at <http://www2.bc.edu/~yen/FirstAmendPer.html>.

¹¹ See Thai. Const. art. 81. (stating in part that "[T]he State shall support researches in various sciences, accelerate the development of science and the technology for national development and promote local knowledge and national arts and culture").

fundamental policy imbedded in Article 81 of the Thai Constitution pursuant to viable development of science and technology.

It is widely accepted that copyright law is a factor to the progress of science and technology because of its distinct feature, the distribution of knowledge.¹² In pursuance to the language of Article 81 of the Thai Constitution, the Thai National Assembly must enact copyright laws and their amendments by taking into account the progress of science and technology towards national development; the Executive body must administer and apply copyright legislation consistent with the constitutional principle, and Courts must construe the copyright law in accordance with the objectives of Article 81 of the Constitution.

Article 39 of the Thai Constitution guarantees Thai citizens the right of expression, including the rights to express opinions, make speeches, write, print, and publicize.¹³ The Constitution protects Thai residents' freedom of speech by setting limits upon the government's authority to unlawfully prohibit this fundamental right. However, since there is no rule without exceptions, Paragraph II of Article 39 allows the government to restrict the right of expression by passing laws of maintaining the security of the State, safeguarding the rights, liberties, dignity, reputation, family or privacy rights of other person, maintaining public order or good morals or preventing

¹² See Michael D. Birnhack, *The Idea of Progress in Copyright Law*, 1 Buff. Intell. Prop. L.J. 3 (2001).

¹³ See Thai. Const. art. 39 ¶1-2. (stating "[A] person shall enjoy the liberty to express his or her opinion, make speeches, write, print, publicise, and make expression by other means.

The restriction on liberty under paragraph one shall not be imposed except by virtue of the provisions of the law specifically enacted for the purpose of maintaining the security of the State, safeguarding the rights, liberties, dignity, reputation, family or privacy rights of other person, maintaining public order or good morals or preventing the deterioration of the mind or health of the public").

the deterioration of the mind or health of the public.¹⁴ It is believed that Thai copyright laws were enacted under the foregoing reasons. On the matter of constitutionality of Thai copyright laws, the language of Article 39 of the Constitution has not been challenged before the Constitution Court.

§ 3.2.2. Economic Basis for Copyright Protection

§ 3.2.2.1. The U.S.

In addition to the constitutional basis, the philosophy of the U.S. in respect of copyright protection is primarily rendered by an economic incentive. Under economic theory, copyright law represents an attempt to solve the economic problem of intangible products, more specifically that such products are both non-excludable and indivisible. Once information has been produced, it can be consumed without imposing additional cost on the producer, or impeding the enjoyment of that information by other users. To properly allocate the benefits of intangible property between the public and the creators of copyright works, copyright law, by granting economic rights to stimulate artistic creativity for public interest, provides the means by which creators can appropriate value from their work.¹⁵

U.S. copyright law is theoretically based on policy created within a framework that valued the interests of the people as a whole over the interests of an individual creator.¹⁶ The original framework, however, is being slowly dismantled to give more

¹⁴ *Id.*

¹⁵ See A. Michael Warnecke, *The Art of Applying the Fair Use Doctrine: The Postmodern-art Challenge to the Copyright Law*, 13 Rev. Litig. 685, 693 (1994).

¹⁶ H.R. Rep. No. 2222, 60th Cong., 2d Sess. 14 (1909).

weight to the interests of individual creators. This shift in policy is often defended based on the ethics of allowing a creator control over his or her created work. The creative activity of authors is rewarded by the provision of exclusive rights granted to the authors once they complete the creative work, and such exclusive rights subsist until a limited period of protection has expired. Through this approach, individual effort is encouraged and takes a pivotal role to advance public welfare through the talents of authors in "science and useful arts."¹⁷

However, this moral position does not generally extend to moral rights. Moral rights only benefit creators, not publishers or distributors, since these rights protect the personality and reputation of authors. This calls into question whether the extension of rights over the long development of copyright law is based on a moral position or in reaction to pressures exerted by those whose profits depend on the protections granted by copyright. Copyright was created as policy and not as a moral consideration, but many treat the law as if it is, or should be, such a consideration. U.S. copyright law as currently constituted appears neither to have a consistent moral basis nor does it provide a consistent policy to promote learning and the useful arts. This is evidenced by numerous revisions to the U.S. Copyright Acts over two centuries. Evidently, copyright laws were revised to be more profitable to publishers, and distributors, who are not the original authors, but who usually appropriate copyrights by means of assignment.¹⁸

¹⁷ See *Sony Corp. v. Universal City Studio, Inc.* 464 U.S. 417, 429 (1984), *Mazer v. Stein*, 347 U.S. 201, 219 (1954). (emphasizing the encouragement of creating copyright works is the shrewd method to bring an optimal public welfare by the provision of exclusive right to those creative authors).

¹⁸ See Shelly Warwick, *Is Copyright Ethical? An Examination of the Theories, Laws and Practices Regarding the Private Ownership of Intellectual Work in the U.S.*, 1999 B.C. Intell. Prop. & Tech. F. 060505, at http://www.bc.edu/bc_org/avp/law/st_org/iptf/commentary/content/1999060505.html.

§ 3.2.2.2. Thailand

Thai law recognizes both economic and moral aspects of copyright. Economic rights for books originated in 1901 under the Authorship Rights Act R.S. 120 (A.D. 1901).¹⁹ The economic justification for promulgating the Authorship Rights Act R.S. 120, which can be found in its Preamble, is that before the passage of this law, on numerous occasions, publishers copied others' writings and published for sale without permission or authorization from the authors. This situation prejudiced the rights of the authors to normally exploit their works. The economic rights embedded in Article 4 of the Authorship Rights Act R.S. 120 include the exclusive rights of authors to publish, reproduce, translate, and distribute their works.²⁰

Subsequent copyright acts of Thailand followed the economic contribution to copyright owners, but modified the substance of the laws in accordance with obligations to international agreements, to which had Thailand acceded. Unlike the U.S., which continually extends economic rights under its copyright laws, Thailand modifies its copyright laws to expand the scope of economic rights only when such modification must be adopted to accommodate changes in national circumstances.

§ 3.2.3. Sources of Copyright Law

§ 3.2.3.1. The U.S.

A. Federal Copyright Statutes

¹⁹ Authorship Rights Act, R.S. 120 (1901) (Thail.).

²⁰ See Chaiyos Hemaratchata, *A Treatise on Thai Copyright Law* Ch. 1 (2d ed. 1998).

The U.S. is a federalist country and, therefore, its copyright laws are exclusively administered under the authority of the federal government.²¹ The exercise of the federal authority includes legislating copyright statutes by the Congress, interpretation of copyright statutes by the federal courts, and regulating administrative rules by the Copyright Office. Below are primary sources of U.S. statutory copyright law.

The Constitution of the U.S. delegated the exclusive power to the Congress in 1788 to enact copyright legislation. The First Congress passed the Copyright Act of 1790. Afterward, major revisions to the Act were implemented in 1831, 1870, 1909, and 1976 respectively. Of these, only the Copyright Act of 1909 and the Copyright Act of 1976 are in effect today.²²

The Copyright Act of 1909²³ governs all copyright works eligible for protection between 1909 and 1977. If the authors of the books during the stated period were to sue an infringer today, the federal court would determine the rights of the parties under the Copyright Act of 1909, not the Act of 1976. The Act of 1909 vests protection solely upon the authors whose works are published with notice or registered (if the works are unpublished), and copyright has to be renewed at the end of its first term.²⁴

²¹ However, prior to the 1976 Copyright Act, copyright right protection had been asserted along two sources: federal statute and state law. *See* 2-US Int'l Copyright L. & Prac. § 1 (2003).

²² Richard Stim, Copyright Law, 11-15 (Thomson Learning 2000).

²³ Act of Mar. 4, 1909, 35 Stat. 1075 [hereinafter 1909 Act].

²⁴ Stim, *supra* note 22.

The Copyright Act of 1976²⁵ protects works created on or after January 1, 1978. The Act was enacted in 1976 and became effective on January 1, 1978. It terminated formalities as a condition to the protection under the 1909 Act. Therefore, the 1976 Act protects certain unpublished works created before 1978, provided that such works have not already fallen into the public domain.²⁶ The condition for protection distinguishes the current Act from the 1909 copyright law. Under the current Act, a work is protected immediately at the moment it is fixed in a perceptible form with no regard to formalities. Another obvious difference between the current Act and its precedent is the requirement of renewal. Unlike the Act of 1909, the 1976 Act does not require the copyright owner to file a renewal after a number of years.

The *Berne Convention Implementation Act* of 1988²⁷ amended portions of the Copyright Act of 1976. Given that the U.S. is one of 160 contracting parties to the Berne Convention, the U.S. was required to eliminate sections of its copyright law that conflicted with Convention rules, lest it could not become a party. Changes made to the 1976 Copyright Act included the following: the requirement for copyright notice is abolished; works published on or after March 1, 1989, do not have to affix copyright notice; protection is granted for architectural works; and moral rights are granted to a work of fine art.²⁸

²⁵ Act of Oct. 19, 1976, Pub. L. No. 94-553, 90 Stat. 2541. [Hereinafter Current Act, *U.S.C.A.*, or 1976 Act].

²⁶ See 2-US Int'l Copyright L. & Prac. § 1 (2003).

²⁷ Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853.

²⁸ A work of fine art is delimited as individual paintings or sculpture or limited editions of two hundred or less of prints or photographs. See *U.S.C.A.* of 1976, 17 U.S.C. § 106A.

On December 8, 1994, President Clinton signed the Uruguay Round Agreements Act of 1994 (URAA).²⁹ The President's signing implemented the copyright provisions of the TRIPs Agreement under the framework of the WTO Agreement to which the U.S. was a party. The URAA made several changes to the Copyright Act of 1976. Among the changes are its restoration of copyright for certain works first published outside the U.S. that have lost protection for technical reasons, such as failure to affix a copyright notice; its prohibition of computer program rentals; and its prohibition of unauthorized fixation of live music performances.

In 1998, President Clinton signed the Sonny Bono Copyright Extension Term Act³⁰ which extended the duration of U.S. copyright protection. The Act was intended to harmonize U.S. copyright laws with European countries where copyright owners had enjoyed longer protection. The enactment of the Act provided for the following: for works created on or after January 1, 1978, a copyright term is life of the author plus seventy years (increasing 20 years from the previous term); for works for hire and works published anonymously and pseudonymously, protection is extended from seventy-five to ninety-five years; for works in their renewal terms, protection is extended for an additional twenty years; in addition, no new expired copyrights will enter the public domain until 2019.³¹

²⁹ Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994) [hereinafter URAA].

³⁰ Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (to be codified at 17 U.S.C. §§ 108, 203, 301-304).

³¹ See Stim, *supra* note 22, at 13.

In 1998, Clinton also signed the Digital Millennium Copyright Act (DMCA),³² which amended copyright law relating to the Internet and digital transmission of information. Major provisions in the DMCA includes the following: prohibition of the circumvention of digital protection devices; prohibition of the removal of secret codes known as digital watermarks from digital files; limitation on liability for Internet Service Providers (ISPs) in the event an infringing copy is offered online; protection for computer repair workers from certain claims of infringement; allowing Internet providers to operate web cast music (broadcast over the Internet; and, a new form of intellectual property protection for the design of boat hulls.³³

B. State Copyright Laws

Prior to the current Copyright Act, copyright law in the U.S. had developed along two conduits, federal statutes and state laws. Alongside, but wholly apart from the Copyright federal statutes, various states of the U.S. had traditionally accorded copyright protection under the common law, usually for unpublished works. Therefore, a manuscript of a novel completed in 1950 would have been protected by the common law of the state in which it was created because the federal statute required either publication with notice or registration.

However, starting on January 1, 1978, the 1909 Copyright Act was revised through the 1976 Act to attenuate the stringent requirements for protection. Under the 1976 Act, once a work is fixed in "any tangible medium," the work is protected by copyright only under federal statute, whether the work is ultimately published or not.

³² Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 §1201 (1998).

³³ See Carolyn Andrepont, Digital Millennium Copyright Act: Copyright Protections for the Digital Age, 9 DePaul-LCA J. Art & Ent. L. 397, 410-417 (1999).

As a result, works fixed but not yet published prior to 1978 were protected exclusively by the federal system. Nonetheless, works that have not been fixed, regardless of when created, whether before or after January 1, 1978, are still eligible for copyright protection under state laws.³⁴ For instance, California protects any original work of authorship that is not fixed in any tangible medium of expression; nevertheless not every state protects unfixed works of authorship.³⁵

In addition to copyright acts and their revisions, the Copyright Office regulates rules of practices in the Code of Federal Regulations under Title 37 of the U.S. Code.³⁶ These regulations elaborate on the copyright statutes and provide standards for the copyright application and registration process.

C. The Federal Courts

As a common law country, court decisions in the U.S. take precedent. The principle of *stare decisis* requires that courts follow decisions of higher level of courts within the same jurisdiction. Under this common law legacy of *stare decisis*, court rulings are more predictable and consistent.³⁷ Given that the federal government has exclusive jurisdiction over copyright cases, lawsuits involving copyright law can only be brought in the federal courts. This is based on a principle known as *preemption*, which grants the federal government exclusive control over powers granted within the

³⁴ See U.S.C.A. of 1976, 17 U.S.C. §301(b)(1). (requiring fixation of a work as a condition to federal copyright protection).

³⁵ See Cal. Civ. Code § 980(a)(1) (protecting "any original work of authorship that is not fixed in any tangible medium of expression").

³⁶ 37 C.F.R. § 201.1 et seq.

³⁷ See Toni M. Fine, *American Legal Systems: A Resource and Reference Guide* Ch. I.F., II.G. (1997).

U.S. Constitution. If a copyright case is brought in a state court, it must be dismissed for lack of subject matter jurisdiction.³⁸

§ 3.2.3.2. Thailand

Modern copyright law in Thailand finds its primary sources in copyright legislative acts and ministerial regulations.

A. *Copyright Legislative Acts*

The Thai Copyright Act (T.C.A.) B.E. 2537 (A.D. 1994)³⁹ is the basis for all copyright law in Thailand and it remains in effect to date. It was enacted on December 9, 1994 and took effect on March 21, 1995. The Act regulates all kinds of protected works -- literary, artistic, and scientific. Copyright protection under previous copyright acts, such as the *Act for Protection of Literary and Artistic Works* B.E. 2474⁴⁰ (entered into force on June 16, 1931) and the Copyright Act of B.E. 2521⁴¹ (entered into force on December 19, 1978) pose a problem as to what extent the current T.C.A. grants protection to those works created at the time the preceding copyright acts were in effect. The works protected under the previous acts were granted shorter duration of protection and did not provide certain rights, such as economic rights in computer programs, and performance rights, conferred by the current Copyright Act.

³⁸ See Stim, *supra* note 22, at 13-14.

³⁹ Copyright Act, B.E. 2537 (1994) (Thail.) (published in Government Gazette, vol. 111, pt. 59 Kor, Dec. 21, B.E. 2537 (1994)) [hereinafter Current T.C.A.].

⁴⁰ Act for the Protection of Literary and Artistic Works, B.E. 2474 (1931) (Thail.).

⁴¹ T.C.A. B.E. 2521 (1978) (Thail.) (published in Government Gazette, vol. 95, pt. 22, Dec. 18, B.E. 2521 (1978)).

Article 78 of the current Act, under the part of transitory provisions, prescribes a solution to solve this problem. Under Article 78, existing copyrighted works, by virtue of the *Act for the Protection of Literary and Artistic Works* B.E. 2474 or the *T.C.A.* B.E. 2521, as of March 21, 1995, are protected by the current Act (the *T.C.A.* B.E. 2537). Works which were created before the current Copyright Act came into force and which were not copyright works by virtue of the *Act for the Protection of Literary and Artistic Works* B.E. 2474 or the *T.C.A.* B.E. 2521, but became copyright works by virtue of the current Copyright Act, are protected by the current Act, B.E. 2537.⁴²

Property law is closely relevant to Thai copyright protection. Thai lawyers can find the definition of "property" prescribed in the Thai Civil and Commercial Code. By virtue of the Thai Civil and Commercial Code, property is defined as things, whether tangible or not, which contain values and may be covered by title.⁴³ Copyright is a special type of property, which is exclusively confined by the Copyright Act. Since copyright is considered to be a type of property, laws relating to rights and responsibilities in property prescribed in the Civil and Commercial Code can give effect to copyright holders, provided that the Copyright Act is silent on the issue. Consequently, some provisions in the Thai Civil and Commercial Code such as heritage and contract provisions may be applied in copyright disputes.

Lawyers can find procedural rules for the Thai specialized intellectual property court from the *Act for Establishment of and Procedure for Intellectual*

⁴² T.C.A. B.E. 2537 (1994) § 78 (Thail.).

⁴³ See Civil and Commercial Code B.E. 2535 (1992) § 138 (Thail.).

Property and International Trade Court B.E. 2540 (1997).⁴⁴ The Act sets forth procedural provisions that are included in the *T.C.A.* B.E. 2537 (1994). There are forty-five sections separated into four parts respectively comprising jurisdiction of Intellectual Property and International Trade Court, quorum and qualification of the judges in the specialized Court, procedural rules of the specialized Court, and appellate rules.

B. Ministerial Regulations

Currently, there are two crucial ministerial regulations promulgated under the provisions of the *T.C.A.* B.E. 2537, namely the *Ministerial Regulation* B.E. 2540⁴⁵ and the *Ministry of Commerce Proclamation on the Names of Member Countries Which are Parties to the Convention for Protection of Copyright and Rights of Performance* B.E. 2545.⁴⁶

Article 5 of the *T.C.A.* B.E. 2537 assigns the Minister of Commerce to be in charge, confers control of the execution of the Act, and empowers the Minister of Commerce to appoint competent officials, and issue ministerial regulations for the execution of the Act.⁴⁷ Ministerial regulations issued under the Act come into force upon their publication in the *Government Gazette*. In addition, Article 61 of the Act

⁴⁴ Act for the Establishment of and Procedure for Intellectual Property and International Trade Court, B.E. 2540 (1997) (Thail.)

⁴⁵ Ministerial Regulation B.E. 2540 (1997) (Thail.) (published in *Government Gazette*, vol. 114, pt. 3 Kor, Feb. 20, B.E. 2540 (1997)).

⁴⁶ Ministry of Commerce Proclamation on the Names of Member Countries Which are Parties to the Convention for Protection of Copyright and Rights of Performance B.E. 2545 (2002) (Thail.) (published in *Government Gazette*, vol. 119, pt 41 Ngor, Nov. 8).

⁴⁷ See *T.C.A.* B.E. 2537 (1994) § 5 (Thail.).

requires the Minister of Commerce to proclaim the names of member countries of the convention for the protection of copyright or the convention for the protection of performer's rights in the Government Gazette.⁴⁸

The *Ministerial Regulation* B.E. 2540 was issued by virtue of Section 5 and Section 15, paragraph 2 of the *T.C.A.* B.E. 2537. Section 15 of the Copyright Act assigns the Minister of Commerce the responsibility to consider the conditions of licensing agreements, considered to be unfairly restricting competition, and to issue the conditions on a ministerial regulation.⁴⁹ Unfair competition conditions, which are prohibited in any copyright licensing agreement, require the licensee to obtain materials used to produce the licensed work in whole, or in part, from the copyright owner. Alternately, the licensee may get them from the seller specified by the copyright owner either, with or without remuneration.⁵⁰

The *Ministry of Commerce Proclamation on the Names of Member Countries Which are Parties to the Convention for Protection of Copyright and Rights of Performance* B.E. 2545 was issued to meet the requirement of Article 61 of the *T.C.A.* B.E. 2537, which assigns the Minister of Commerce the duty to identify countries of the international intellectual property treaties to which Thailand is a signatory. These international intellectual property treaties include the Berne Convention and the TRIPs Agreement. Thailand has adopted the "national treatment" principle through this Ministerial Proclamation to complete its obligation to other Member parties to both treaties.

⁴⁸ See *T.C.A.* B.E. 2537 (1994) § 61 (Thail.).

⁴⁹ See *T.C.A.* B.E. 2537 (1994) § 15(2) (Thail.).

⁵⁰ See Ministerial Regulation B.E. 2540 Clause 1 (1997) (Thail.).

§ 3.2.4. Effect of Applying International Copyright Treaties to Domestic Legal System

In general, the extent to which national courts will apply treaty provisions directly depends on treaty language and the absence of conditions as to whether their provisions are self-executing or non-self-executing. However, many countries find the distinction between self-executing and non-self-executing, controversial and even vague.⁵¹ Such uncertainty creates a variety of distinct issues that bear on the treaty's enforceability in a given case and before the courts of a specific jurisdiction or country.

Thus, national judges, in different countries, for a great variety of reasons, sometime use the self-execution analysis to apply or dismiss treaties. A treaty may be dismissed by a national judge as non-self-executing because certain provisions are vague and broad; or because the treaty deals with matters that are the prerogative of the legislating body; or because the judge infers that the intent of the parties to the treaty, as reflected in the text, does not confer legal standing or a private right of action on individuals to seek enforcement of the treaty before a domestic court.⁵²

In some member states, such as the U.S., treaties and statutes have equal standing. This means treaties prevail over any earlier statute, while subsequent legislation supersedes them. In other member countries, treaties prevail over any domestic statutes regardless of whether the latter were enacted before or after the entry into force of the former.

⁵¹ See Khaldoun A. Baghdadi, *Apples and Oranges--The Supremacy Clause and the Determination of Self-executing Treaties: A Response to Professor Vazquez*, 20 *Hastings Int'l & Comp. L. Rev.* 701 (1997).

⁵² Andres Moncayo von Hase, *The Application and Interpretation of the Agreement on Trade-Related Aspects of Intellectual Property Rights*, Ch.3 *Intellectual Property and International Trade* 93, (1998).

Theoretically, there are two methods that distinguish the implementation of international law of contracting states; they are *monism* and *dualism*. The monist doctrine instituted by Kelsen⁵³ holds that domestic law and international law are in unity and interrelated in hierarchy of two subsystems. Contrarily, in dualist countries, the domestic court assumes that domestic law prevails in the case of conflict between international law and domestic law. This is because the dualist theory, established by Triepel⁵⁴ and Anzilotti,⁵⁵ considers that domestic law and international law are two discrete systems, and international law must be implemented by undertaking the process of transformation into national law in accordance with intent of the state.

The transformation process might be applied through the congress or the parliament of the countries in concern.⁵⁶ However, the conflict between these doctrines has little or no affect on international practice, since generally the doctrines do not provide an absolute answer to the question of legal status between international

53 Hans Kelsen was an Austrian-American legal philosopher, teacher, jurist, and writer on international law, who formulated positivism principle known as the "pure theory" of law. Kelsen was a professor at Vienna, Cologne, Geneva, and the German university in Prague. He wrote the Austrian constitution adopted in 1920 and served as a judge of the Austrian Supreme Constitutional Court (1920-30). After immigrating to the U.S. in 1940, he taught at Harvard, the University of California at Berkeley, and the Naval War College, Newport, R.I. See Michael Steven Green, *Hans Kelsen and the Logic of Legal Systems*, 54 Ala. L. Rev. 365 (2003).

54 Heinrich Triepel (1868-1946), one of the spokesmen of dualism, is another supporter of the doctrine of the will of the State. See Jianming Shen, *The Basis of International Law: Why Nations Observe*, 17 Dick. J. Int'l L. 287, 312 (1999).

55 Dionisio Anzilotti was an Italian jurist who was one of the main founders of the so-called positive school of international law, a legal philosophy advocating a sharp distinction between the legal and the political and moral aspects of international relations. In 1906 Anzilotti was cofounder of the *Ri Vista di Diritto Internazionale* ("International Law Review"). He was professor of law at the universities of Palermo, Bologna, and Rome (1911-37). In 1921 he was appointed a judge of the Permanent Court of International Justice of The Hague, where he presided from 1928 to 1930. See *The New Encyclopedia Britannica* (2005).

56 Andres Moncao von Hase, *The Application and Interpretation of the Agreement on Trade-Related Aspects of Intellectual Property Rights, Part 1 Intellectual Property and International Trade* 96-97, (1998).

law and domestic law. Rather, the constitutional provisions of various national laws, state practice or *opinio juris* of state, and the rules of general international law are taken into account.⁵⁷

§ 3.2.4.1. The Implementation of Copyright Related Treaties under U.S. Jurisdiction

The U.S. Constitution contains the *Supremacy Clause* which declares that all treaties shall be “the supreme law of the land.”⁵⁸ By the virtue of the U.S. Constitution Article VI Section I Clause 2, the law implies an equivalent standing between treaties and federal statutes. Consequently, in case of conflict over treaties and earlier federal statutes, treaties will prevail on the ground of “last-in-time” rule.⁵⁹ Additionally, where conflict results, subsequent federal statutes will supersede the treaties.

Furthermore, in general, no act of transformation is necessary in the U.S., where the Senate’s approval, is respectively necessary for the treaty’s ratification by the Executive Power.⁶⁰ Once the treaty is internationally in force, no other legislative act is necessary for it to become part of municipal law. However, the U.S. Supreme

⁵⁷ *Id.*

⁵⁸ US Constitution, art. VI, cl.2 (stating “[T] This Constitution, and the Laws of the U.S. which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the U.S., shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).

⁵⁹ See, e.g., U.S. v. Dion, 476 U.S. 734, 738 (1986); Trans World Airlines, Inc. v. Franklin Mint Corp., 446 U.S. 243, 252 (1984), cited in Jordan J Paust, *Rediscovering the Relationship Between Congressional Power And International Law: Exceptions to the Last in Time Rule and the Primacy of Custom*, 28 Va. J. Int’l L. 393, (1988).

⁶⁰ U.S. Constitution, art. II, § 2: “He [the President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.”

Court determined in 1829, in the opinion of Justice Marshall, that a court may consider a treaty as an equivalent of a legislative act whenever the treaty is self-executing, with no need of a legislature's intervention.⁶¹ The primary test to decide which treaty is "self-executing" or "non-self-executing" is generally based on the controversial nature of the treaty in question and whether it requires an act of incorporation into domestic law to be binding and applicable. Two copyright-related treaties, which are binding the U.S. to implement the provisions thereunder, are the Berne Convention and the TRIPs Agreement.

A. *The Berne Convention*

On October 12, 1988, President Reagan signed the *Berne Convention Implementation Act* (BCIA) of 1988, which allowed the U.S. to join the most preeminent treaty for the protection of copyright. Since 1886 to 1988, the U.S. had disagreed with the Convention's fundamental doctrines, including rejection of formalities,⁶² its single lengthy term of protection,⁶³ and its concept of protecting an author's moral rights.⁶⁴ During that period, the U.S. had been neither a leading

⁶¹ *Foster Edam v. Neilsen*, 27 U.S. (2 Pet.) 253 (1829). The holding in *Foster* was not in complete conformity with prior decisions upholding the application of treaties. See Stefan A. Riesenfeld & Frederick M. Abbott, *The Scope of U.S. Senate Control Over the Conclusion and Operation of Treaties*, 67 Chi.-Kent L. Rev. 571, 577 (1991). Furthermore, *Foster* must be read in conjunction with *U.S. v. Percheman*, 32 U.S. (7 Pet.) 51 (1833), where the Court admitted error in its first analysis of the treaty in question. Nonetheless, the basic rule remains that only clauses of treaties that specify duties that directly confer rights may be enforced directly with the courts.

⁶² The Berne Convention provides that the enjoyment and exercise of the rights of copyright "shall not be subject to any formality." See Berne Convention, *supra* note 18, art. 5(2).

⁶³ See Berne Convention, *supra* note 18, art. 7 (stating "[T]he term of protection granted by this Convention shall be the life of the author and fifty years after his death.").

⁶⁴ See Berne Convention, *supra* note 18, art. 6bis (stating "[T]he author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.").

intellectual property exporter nor an advanced protectionist. Nonetheless, because the balance of trade in intellectual property began to shift in the early twentieth century, the U.S. became a party to the Berne Convention on March 1, 1989.⁶⁵

To determine the executory nature of the Berne Convention as adopted in the U.S. legal system, the nature of the treaty in question, and whether it requires incorporation into domestic law to be binding, and legislative circumstances are of assistance. The language of the Berne Convention provisions calls for implementing legislation on the part of signatory states. For instance, Article 11bis of the Berne Convention states that “[I]t shall be a matter for legislation in the countries of the Union to determine the conditions under which rights mentioned in the preceding paragraph (broadcasting and related rights) may be exercised.”⁶⁶ From the clause in Article 11bis, it is clear that the member countries must implement their national legislation in accordance with the requirement of the Berne Convention.

During the Reagan administration, the President’s Letter of Transmittal in 1989 stated that “...the Berne Convention will require legislation. Until this legislation is enacted, the U.S. instrument of accession will not be deposited...” In addition to the President’s statement, both Senate and House Judiciary Committees emphatically stated that this convention is not self-executing.⁶⁷ The Committees on the Judiciary of the House of Representatives inferred, based upon its review of the *WIPO Guide to*

⁶⁵ See Robert J. Sherman, *The Visual Artists Rights Act of 1990: American Artists Burned Again*, 17 *Cardozo L. Rev.* 373, 396 (1995).

⁶⁶ See Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886 amended Oct. 2, 1979, art. 11bis, 828 U.N.T.S. 221 [hereinafter Berne Convention].

⁶⁷ S. Exec.Rep. No. 17, 100th Cong., 2d Sess. 39 (1988), reprinted in 83 *Am.J.Int'l L.*(1989) 64, 67.

the *Berne Convention*,⁶⁸ that the Convention itself was not self-executing in the U.S.⁶⁹ Consequently, to fulfill its commitment to the Berne Convention as a party, the U.S. enacted the Berne Convention Implementation Act of 1988 on October 31, 1988.⁷⁰

The Senate recognized the non-self-executory nature of the Berne Convention and expressly conditioned U.S. ratification of the Berne Convention on its "declaration" (stated in the implementing legislation) that the Berne Convention is not-self executing and thus does not create judicially enforceable rights in U.S. courts. The language of Section 2 of the Berne Convention Implementation Act assures U.S. courts that membership in the Berne Convention is not, of itself, a basis for a cause of action.⁷¹ Therefore, federal courts must find and construe laws in the U.S.C.A., and the implementing legislation, to adjudicate copyright disputes.

B. The TRIPs Agreement

Motivated by concerns for the promotion of research and development, the incentive to create intellectual works, and also the leveling of trade distortions, the

⁶⁸ World Intellectual Property Organization WIPO, Guide to the Berne Convention for the Protection of Literary Works (Paris Act 1971), cited in H.R. Rep. No. 100-609, 100th Cong., 2nd Sess., pt. III, at 29 (1988).

⁶⁹ See H.R. Rep. No. 100-609, 100th Cong., 2nd Sess., pt. III, at 28-32 (1988).

⁷⁰ The Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988) (codified in sections of 17 U.S.C.).

⁷¹ See *id.* § 2 (stating in pertinent part:

- (1) [The Berne Convention is] not self-executing under the Constitution and laws of the U.S..
- (2) The obligations of the U.S. under the Berne Convention may be performed only pursuant to appropriate domestic law.
- (3) The amendments made by this Act, together with the law as it exists on the date of the enactment of this Act, satisfy the obligations of the U.S. in adhering to the Berne Convention and no further rights or interests shall be recognized or created for that purpose.)

U.S., with the support of the European Union (EU) and Japan, placed the *Agreement on Trade Related Aspect of Intellectual Property Rights* (TRIPs) on the agenda of the Uruguay Round (the multilateral trade negotiations aimed at revising the General Agreements on Tariffs and Trade 1947). Eventually, after lengthy negotiations, the TRIPs Agreement was adopted on December 15, 1993, by the 128 countries that had signed *The General Agreement on Tariffs and Trade* (GATT) of 1947.⁷² The TRIPs Agreement gives all WTO members transitional periods so that they can meet their obligations under it. The transitional periods, which depend on the level of development of the country concerned, are contained in Articles 65 and 66. The U.S., as a developed country, had to comply with all of TRIPs provisions before January 1, 1996.⁷³

The nature of the TRIPs Agreement suggests that it is a non-self-executing treaty because it only provides a “framework” for member states to adopt. Article 1.1 of the Agreement suggests that Members shall give effect to its provisions. Members may, but shall not be obliged to, implement into their law more extensive protection than is required by the Agreement, provided such protection does not contravene the provisions of the Agreement. In addition, under the Agreement, members shall be

⁷² See Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, 33 I.L.M. 1 art. 2 (1994). By signing the Final Act, the state representatives agreed to submit the Uruguay Round Agreements for consideration by their respective competent authorities with a view to seeking approval of the Uruguay Round Agreements in accordance with their national procedures. *Id.*

⁷³ Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, Dec. 15, 1993, art. 65, 33 I.L.M. 81 (1994) [hereinafter TRIPs Agreement] (stating that “[S]ubject to the provisions (regarding transitional period of developing and least-developed countries), no Member shall be obliged to apply the provisions of this Agreement before the expiry of a general period of one year following the date of entry into force of the WTO Agreement (January 1, 1995).”)

free to determine the appropriate method of implementing its provisions within their own legal systems and practices.⁷⁴

As pointed out above, the TRIPs Agreement directs WTO member countries to protect intellectual property in an international dimension and aims at implementing the Agreement on minimum standards. This would imply the adoption of a non-self-executing treaty. Since the Agreement is a non-self-executing treaty, the U.S., as a contracting party, must enact implementing legislation in order to meet its obligation to the Agreement; hence, the Agreement required ratification by the legislature of the U.S. The U.S. House of Representatives approved legislation to implement the Uruguay Round on November 29, 1994, by a vote of 288-146, and the Senate voted 76-24 to approve it on December 1, 1994. On December 8, 1994, President Clinton signed the Uruguay Round Agreements Act (URAA) into law as the implementing legislation.⁷⁵

§ 3.2.4.2. The Implementation of Copyright Related Treaties under Thai Jurisdiction

The Constitution of Thailand B.E. 2540 (A.D. 1997),⁷⁶ the latest in a series of sixteen amendments, briefly describes the basic allocation of the treaty making power in Thailand. However, it is silent on the hierarchy between international law and domestic law. Thailand has been a constitutional monarchy with the King as head of

⁷⁴ See TRIPs Agreement, *supra* note 73, art. 1.1.

⁷⁵ Uruguay Round Agreement Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994) (codified as amended at 35 U.S.C. § 154 (1994), as amended by 35 U.S.C.A. § 154 (West 1997) (effective June 8, 1995)).

⁷⁶ Thai. Const. B.E. 2540 (1997), adopted Oct. 11, 1997 (published in Government Gazette, vol. 114, pt. 55 Kor, Oct. 11, B.E. 2540 (1997)).

State since 1932. In that year, the absolute monarchy was abolished and power transferred to the constitutional system that is in force today. Under the Thai Constitution, it is the King's prerogative to conclude a peace treaty, armistice, and other treaties with other countries or international organizations.⁷⁷

Constitutionally, the King exercises his prerogative (as an executive power) of concluding treaties through the Cabinet, which the Prime Minister heads.⁷⁸ Under Section 224 of the Thai Constitution, the King's prerogative of concluding a treaty is subject to a National Assembly approval in two situations. First, a treaty must be approved by the National Assembly when it provides for a change in the territories or the jurisdiction of the State. Second, to effectuate a treaty, the National Assembly must ratify it when it requires enactment of an act for its implementation.⁷⁹

A. The Berne Convention

Thailand has been a member of the 1886 Berne Convention, as revised in 1908, at Berlin, since July 17, 1931. Thailand's obligation to comply with the Berne Convention was fulfilled through the enactment of the *Act for Protection of Literary and Artistic Works* B.E. 2474 (A.D. 1931) on June 16, 1931.⁸⁰ As a result of

⁷⁷ Thai. Const. B.E. 2540 (1997) § 224.

⁷⁸ Thai. Const. B.E. 2540 (1997) § 3 (providing that "[T]he sovereign power belongs to the Thai people. The King as Head of the State shall exercise such power through the National Assembly, the Council of Ministers, and the Courts in accordance with the provisions of this Constitution).

⁷⁹ See Thai. Const. B.E. 2540 (1997) § 224 (stating that "[A] treaty which provides for a change in the Thai territories or the enactment of an Act for its implementation must be approved by the National Assembly.").

⁸⁰ Act for the Protection of Literary and Artistic Works, B.E. 2474 (1931) (Thai.).

Thailand's full compliance with the Berne Convention, the Berne Union approved the official date of Thailand's membership status on July 17, 1931.⁸¹

Subsequently, Thailand acceded to Article 1 - 21 (substantive part) of the Berne Convention as revised in 1971 at Paris on May 23, 1995⁸² and acceded to Article 22 - 38 (administrative part) of the 1971 Paris Text of the Convention on September 29, 1980.⁸³ During the time Thailand acceded to both parts of the Berne Convention as revised in 1971, Thailand already had the *T.C.A. B.E. 2537* (still in force today) in accord with all provisions of the latest revision of the Berne Convention. Therefore, to comply with Thailand's obligation to the Berne Convention, as revised in 1971, Thai courts can apply national copyright law as implementing legislation without referring to the Berne Convention.

B. The TRIPs Agreement

As ratification of the TRIPs Agreement is a compulsory requirement of WTO membership, any country seeking to obtain easy access to the numerous international markets opened by the WTO must enact the strict intellectual property laws that the TRIPs Agreement mandates. Thailand has been a GATT contracting party since

⁸¹ See Hemaratchata, *supra* note 20, Ch. 1.

⁸² See Berne Notification No. 167 Berne Convention for the Protection of Literary and Artistic Works, Declaration by the Kingdom of Thailand Extending the Effects of its Accession to the Paris Act (1971) to Articles 1 to 21 and the Appendix and Notification Concerning Article II of the Appendix (May 23, 1995), available at http://www.wipo.int/edocs/notdocs/en/berne/treaty_berne_167.html (last modified Aug. 24, 2005).

⁸³ See Berne Notification No. 101 Berne Convention for the Protection of Literary and Artistic Works, Accession by the Kingdom of Thailand to the Paris Act (1971) (with the exception of Articles 1 to 21 and the Appendix) (September 29, 1980), available at http://www.wipo.int/edocs/notdocs/en/berne/treaty_berne_101.html (last modified Aug. 24, 2005).

November 20, 1982.⁸⁴ On January 1, 1995, the WTO superseded GATT, which had been in existence since 1947, as the organization overseeing the multilateral trading system. Upon signing the new WTO agreements (which include the TRIPs Agreement), Thailand officially became a “WTO member.”

The TRIPs Agreement allows all WTO developing member countries a transitional period so that they can meet their treaty obligations. The transitional provision for developing countries is contained in Article 65, which allows developing countries to delay their commitment for five years after the Agreement enters into force, which was January 2000.⁸⁵ Thailand met its obligation to the Agreement earlier than the permitted transitional period for developing countries by amending the *T.C.A.* B.E. 2521 (A.D. 1978). The 1978 Copyright Act of Thailand was revised to be fully consistent with the Agreement. As a result of the revision, the Act of 1978 was repealed and the current *T.C.A.* B.E. 2537 (A.D. 1994) was approved by the Thai Parliament on December 9, 1994, and became effective on March 21, 1995.

§ 3.2.5. A Comparison of Moral Rights in the U.S. and Thailand

§ 3.2.5.1. Introduction to Moral Rights

As a rule, copyright protects property rights, which entitles authors to publish and economically benefit from their published works. On the other hand, moral rights safeguard the personality and the reputation of authors, which permit authors to

⁸⁴ See The 128 countries that had signed GATT by 1994, *available at* http://www.wto.org/english/thewto_e/gattmem_e.htm (last visited Aug. 24, 2005).

⁸⁵ See TRIPs Agreement, *supra* note 73, art. 65.2 (providing that “[A] developing country Member is entitled to delay for a further period of four years the date of application (January 1, 1996)).

defend both the integrity of their works and the use of their names. Moral rights originated in Europe with the rise of Western European Romanticism. In the late eighteenth century, a creative author was viewed as having unique gifts, for instance, an original and independent genius who could produce works of art from his or her extraordinary talents.⁸⁶ The extraordinary personality of the author was entitled to a special status in law, which gradually came to be established by scholars and judges. The notion of personality rights later was developed as a doctrine called "droit moral" in France and elsewhere in Europe in the early 19th-Century.⁸⁷

The concept of moral rights can be explained by its intrinsic relation between an author and his creative work. Generally, when an author creates a work, he or she will transmit his or her time, acquired skill, and talent into the work. On the other hand, the work created by the author will also reflect its intrinsic value to the author's personality. This relationship between the author and created work cannot, and should not, be torn asunder in any way; nor should it be diminished or distorted. The moral-rights doctrine was intended to protect the author's personality rights in his or her work.⁸⁸

Theoretically, during the early development of the moral-rights theory, there arose two schools of thought conceptualizing the legal nature of moral rights in connection with copyright works. Those were the "monist" theory and the "dualist" theory. The monist theory, originating in Germany, and based on the writings of

⁸⁶ See Dane S. Ciolino, *Moral Rights and Real Obligations: A Property Law Framework for Protection of Authors' Moral Rights*, 69 Tul. L. Rev. 935, 938-39 (1995).

⁸⁷ Mira T. Sandarac Rajan, *Moral Rights in Information Technology: A New Kind of Personal Right*, 12 Int'l J.L. & Info. Tech. 32 (2004).

⁸⁸ Ciolino, *supra* note 86 at 937.

Kant, holds that authors have a unitary set of personality rights in their works, which are inalienable, non-waivable and non-assignable.⁸⁹ Monistic followers see the economic interests as subsumed within the personal interests.

In contrast, the dualistic theory, influenced by the writings of Hegel, expounds that authors have two distinct interests in their works; personality rights and economic rights. Each of these interests has its own distinct set of legal rights for protection. The first French codification of moral-rights and economic rights, enacted in 1957,⁹⁰ claims to be dominant evidence of the dualistic theory.⁹¹

Generally, moral rights refer to four distinct personality rights, including the *right of attribution*, the *right of integrity*, the *right of divulgation*, and the *rights of withdrawal and modification*. Firstly, the right of attribution protects the author's recognition, prevents the work from being attributed to someone other than the true author, and prevents the author's name from being used on works that he or she did not create. Secondly, the right of integrity assures that the author's work remains a true representation of his or her creative personality even after publication and sale of the work. The right of integrity prevents unreasonable criticism, distortion or mutilation of the work, or even the destruction and unfaithful reproduction. Thirdly, the right of divulgation provides the author the right to decide when his or her work is

⁸⁹ See Neil Netanel, *Alienability Restrictions and the Enhancement of Author Autonomy in U.S. and Continental Copyright Law*, 12 *Cardozo Arts & Ent. L. J.* 1, 20-21 (1994).

⁹⁰ Loi du 11 mars 1957 Sur la Propriete Litteraire et Artistique, 1957 J.O. 2733, 1957 D.L. 102 (Fr.) (translated in UNESCO, 1 *Copyright Laws and Treaties of the World* (1987)[hereinafter *French Copyright Act*]). The dualist nature of French *droits d'auteur* is expressed in Article 2 of the French Act, which accords authors an exclusive incorporeal property right in their works and enumerates two distinct subsets of that right: attributes of an intellectual and moral nature, and attributes of an economic nature.

⁹¹ Ciolino, *supra* note 86 at 939.

ready for publication. Lastly, the rights of withdrawal and modification assure that the author is entitled to remove the work from the public or authorize others to modify it upon payment of indemnity. This means that the author has control over the presentation of his or her works to the public.⁹²

The doctrine of moral rights varies from jurisdiction to jurisdiction. Similarly, many of the fundamental attributes of those rights may be different depending on which jurisdiction within the rights is claimed. For instance, in Germany, moral rights expire with the copyrights (seventy years after the author of the work dies),⁹³ while in France moral rights are perpetual.⁹⁴ The 1957 French copyright law provides that moral rights are "perpetual, inalienable, and imprescriptible."⁹⁵ The French believe that moral rights attach to the person who created the work, and therefore, that individual is incapable of transferring them.

In France, a transfer of the copyright in a work does not result in a transfer of moral rights in the work. Some jurisdictions prohibit agreements that alienate moral rights. In other jurisdictions, waivers of moral rights are permitted because a waiver

⁹² *Id.*

⁹³ Gesetz über Urheberrecht und verwandte Schutzrechte, 1965 Bundesgesetzblatt BGB1. I art. II (F.R.G.) (translated in UNESCO, 2 Copyright Laws and Treaties of the World art. II (1987)). German copyright shall protect the author with respect to his intellectual and personal relations to the work, and also with respect to the utilization of the work. The German Act allows authors to grant licenses to use their works, but does not permit transfer of ownership, except by testamentary disposition.

⁹⁴ See French Copyright Act, *supra* note 90, art. 6, para. 2.

⁹⁵ Decree No. 57-298 of May 11, 1957, Art. 6, amended by Decree No. 85-660, July 3, 1985, translated in United Nations Educational, Scientific and Cultural Organization, Copyright Laws and Treaties of the World France section, item 1 (1992).

is not considered to alienate the moral right.⁹⁶ As one would expect, however, the principle of inalienability of moral rights is subject to exceptions. For instance, French courts have occasionally enforced contracts that alienate moral rights to preserve the meaningfulness of the force of contracts.⁹⁷

§ 3.2.5.2. Moral Rights in the Berne Convention

While different countries recognize varying moral rights with diverse characteristics, the Berne Convention as revised in 1971 suggests two significant aspects of moral rights in Article 6bis. Article 6bis recognizes the rights of attribution and integrity, leaving the rights of divulgation and withdrawal for member countries to decide whether to adopt them.⁹⁸ The right of attribution in Article 6bis includes the author's right to assert whether he or she created the work, to publish anonymously or pseudonymously, with the option of later changing his or her mind and abandoning anonymity, and finally, to prevent using his or her name to reference a work that he or she did not create. Moreover, the right of integrity includes the right to "object to any distortion, mutilation or other modification," which can damage the author's reputation or can be prejudicial to his or her honor.

While many countries adhering to the Berne Convention consider moral rights inalienable, the Convention does not require inalienability. Paragraph 2 of Article 6bis requires moral rights to continue past the author's death for as long as economic

⁹⁶ William Strauss, *The Moral Right of the Author*, 4 Am. J. Comp. L. 517 (1955).

⁹⁷ Russell J. DaSilva, *Droit Moral and the Amoral Copyright: A Comparison of Artists Rights in France and the U.S.*, 28 Bull. Copyright Soc'y 16 (1980).

⁹⁸ See 1971 Paris Text of the Berne Convention for the Protection of Literary and Artistic Works, Article 6bis, reprinted in S. Treaty Doc. No. 27, 99th Cong., 2d Sess. 37 (1986).

rights subsist, except that countries that recognized no post mortem moral rights at the time they ratified or acceded to the Berne Convention, may continue to afford no protection after the author's death. The third paragraph specifies that the means of redress for safeguarding the Article 6bis rights "shall be governed by the legislation of the country where protection is claimed."⁹⁹ The clause in the third paragraph of article 6bis makes moral rights remedies available in each country depending upon which jurisdiction is claiming moral rights protection.¹⁰⁰

Article 6bis does not bar assignment of moral rights, but merely provides that the author's previous assignment of economic rights does not prevent the author from subsequent assertion of the attribution and integrity rights. After transfer of moral rights, the Berne Convention does not require that those rights rest inalienably with their authors. Although the laws of some countries protect moral rights to a greater extent than article 6bis requires, the language of 6bis merely establishes the Berne minimum standard for Berne member countries to implement into their legislation.

§ 3.2.5.3. The Exclusion of Moral Rights in the TRIPs Agreement

During the course of the GATT negotiations, several nations and groups submitted differing proposals for a GATT intellectual property agreement. These proposals revealed the varying goals of the Uruguay Round participants with respect to moral rights protection. The European Community proposal suggested that the TRIPs Agreement requires its members to provide for the rights granted by the Berne

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Id.

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S. Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986* 475 (1987).

Convention, essentially incorporating the Convention in its entirety, including moral rights and neighboring rights.¹⁰¹

In contrast, the U.S. proposed that the TRIPs Agreement should include only particular economic rights associated with copyright rather than incorporate the entire Berne Convention.¹⁰² Eventually, the Director-General of GATT, Arthur Dunkel, issued a draft agreement of the TRIPs Agreement in December 1991. With respect to copyright, the draft agreement represented a compromise between the positions of the U.S. and the European Community, including neighboring rights provisions while excluding the moral rights protection required by the Berne Convention. Uruguay Round participants adopted Dunkel's draft with only minor changes and that became the TRIPs Agreement.

Article 9.1 of the TRIPs Agreement clearly disregards the moral rights conferred under the Berne Convention.¹⁰³ The WTO members are free to adopt or forgo moral rights protection within their legal systems. Consequently, no member states involved in disputes can invoke moral rights issues before the panel established under the WTO dispute settlement mechanism. However, member states, who had been bound to honor the moral rights, are to maintain compliance to the moral rights provision under the Berne Convention since Article 2.2 of the TRIPs Agreement

¹⁰¹ Guidelines and Objectives Proposed by the European Community for the Negotiations on Trade Related Aspects of Substantive Standards of Intellectual Property Rights, pt. III(D)(3)(c.1), GATT Doc. MTN.GNG/NG11/ W/26 (July 7, 1988), reprinted in GATT or WIPO? New Ways in the International Protection of Intellectual Property 323, 328 (Friedrich-Karl Beier & Gerhard Schrickler eds., 1989)

¹⁰² *Id.*

¹⁰³ TRIPs Agreement, *supra* note 73, art. 9.1 (stating that "[M]embers shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto. However, Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6bis of that Convention or of the rights derived therefrom.").

indicates that the obligation of parties to prior intellectual property right conventions shall be kept intact.¹⁰⁴

§ 3.2.5.4. Moral Rights in U.S. Copyright Laws

Moral rights protection differentiates the U.S.' system from Thailand and other countries that base moral rights protection on European continental law. The U.S.'s unwillingness to recognize author's moral rights in its federal Copyright Act is one reason the U.S. delayed joining the Berne Convention. Since the inception of its copyright development, the U.S. has recognized economic rights for creative works. However, its version of copyright protection of creative works differs from many other countries because the U.S. had not provided all creators with express moral rights in its previous copyright acts.¹⁰⁵

The U.S. resisted joining the Berne Convention for over 100 years, mainly because it would have had to significantly revise its copyright laws to become more harmonious with the treaty. One major concern for the U.S.'s accession to the Berne Convention was the moral rights protection issue. Although the U.S. had not enacted moral rights legislation for literary works, various national and state laws regarding copyright, libel, defamation, misrepresentation, trademarks, and unfair competition

¹⁰⁴ See TRIPs Agreement, *supra* note 73, art. 2.2 (stating "[N]othing in Parts I to IV of this Agreement shall derogate from existing obligations that Members may have to each other under the Paris Convention, the Berne Convention, the Rome Convention and the Treaty on Intellectual Property in Respect of Integrated Circuits.").

¹⁰⁵ See Melville B. Nimmer & David Nimer, *Nimmer on Copyright* § 8D.02 (2005).

(the Lanham Act) seemed to satisfy the Berne Convention's requirements, thus allowing the U.S. to become a signatory.¹⁰⁶

Before ratification of the Berne Convention, most American courts refused to recognize moral rights directly. For instance, in 1949, a New York court granted a judgment to deny the moral right of integrity for the painter of a mural on a wall of the Rutgers Presbyterian Church in Manhattan. The mural was painted over by the church eight years after the original painting because the mural illustrated the Christ in an inappropriate manner.¹⁰⁷ Nonetheless, indirect and limited direct recognition of moral rights was liberally adopted at both state and federal levels.¹⁰⁸

Indirect moral rights recognition in the federal law system has been exercised through the use of Section 43(a) of the Lanham Act.¹⁰⁹ *Gilliam v. American Broadcasting Co.* is a typical case in this respect.¹¹⁰ Under the state law system, indirect moral rights protection was sought in a myriad of legal doctrines, including breach of contract, tort theories of defamation, invasion of privacy, and unfair

¹⁰⁶ See, e.g., *Gilliam v. American Broadcasting Cos.*, 538 F.2d 14 (2d Cir. 1976) (A group of creators of a television series sought review of the decision of a U.S. district court, denying them injunctive relief in their action against the defendant for copyright infringement and violation of § 43(a) of the Lanham Act, 15 U.S.C.S. § 1125(a). The plaintiff learned that the defendant had drastically shortened the programs and edited them for profanity, the plaintiff sued for copyright infringement and violation of § 43(a) of the Lanham Act, 15 U.S.C.S. § 1125(a). The Lanham Act protected against mutilation of artistic works as a false designation of origin of goods. The court enjoined the plaintiff from the infringement.).

¹⁰⁷ *Crimi v. Rutgers*, 80 N.Y.S.2d 575 (Sup. Ct. 1948), aff'd, 87 N.Y.S.2d 430 (App. Div. 1949).

¹⁰⁸ See *Ciolino*, *supra* note 86, at 948-53.

¹⁰⁹ Lanham Act § 43(a), 15 U.S.C. § 1125(a)(1) (Supp. V 1993). (providing that "[A]ny person who, on or in connection with any goods or services, uses in commerce . . . any false designation of origin, false or misleading description of fact, false or misleading representation of fact, . . . shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.").

¹¹⁰ See *Gilliam v. American Broadcasting Cos.*, *supra* note 106.

competition.¹¹¹ Contract theory is, nonetheless, enforceable only between the parties to prevent any distortion, mutilation, or modification after the sale of an artwork and tort theories are possible only if the author's reputation has been injured. This indirect moral rights approach of the U.S. offered more limited protection than traditional moral rights doctrine.

As a result of the problems inherent in the indirect protection of moral rights, eleven states have enacted legislation to protect a limited number of moral rights directly. New York, California, and Louisiana are examples; each has enacted legislation to protect certain moral rights. The New York Artists' Authorship Rights Act directly recognizes the right of integrity and the right of attribution only in visual artworks.¹¹² Visual artworks under the New York act are limited to "only to works of fine art or limited edition multiples of not more than three hundred copies knowingly displayed."¹¹³ Works for advertising or trade usage are unprotected.¹¹⁴ The right of integrity is slightly recognized to prohibit only the display of works so altered.¹¹⁵

The California Art Preservation Act¹¹⁶ provides more expansive protection for moral rights than does the New York act. The California act enforces the right of

¹¹¹ Ciolino, *supra* note 86 at 950-51.

¹¹² N.Y. Arts & Cult. Aff. Laws § 14.03 (McKinney 1992).

¹¹³ N.Y. Arts & Cult. Aff. Laws § 14.03(3)(e).

¹¹⁴ N.Y. Arts & Cult. Aff. Laws § 14.03(3)(d).

¹¹⁵ N.Y. Arts & Cult. Aff. Laws § 14.03(1).

¹¹⁶ California Art Preservation Act, Cal. Civ. Code § 987 (West 1982).

integrity by prohibiting any intentional defacement, alteration, destruction, or mutilation of protected works.¹¹⁷ Additionally, an integrity violation can also arise from deterioration due to "gross negligence."¹¹⁸ The California act even provides that the original artist is entitled to a percentage of the profits gleaned through a subsequent sale of his or her artwork.¹¹⁹ Nevertheless, these states' moral rights legislation only have jurisdiction within their boundaries and, therefore, do not take effect to other artworks outside their state jurisdiction.

When the U.S. decided to ratify the Berne Convention, the Berne Convention Implementation Act¹²⁰ was fervently debated throughout artistic communities and relevant industries of the U.S. and Europe. The issue of moral rights protection concerned the U.S.'s decision to join the Berne Convention because the Berne Convention explicitly recognizes the existence of author's moral rights, a concept that the U.S. limitedly or indirectly accepted. The Implementation Act expressly states that the U.S.'s adherence to the Berne Convention does "not expand or reduce the rights of an author of a work, whether claimed under Federal, State, or the common law."¹²¹ Nevertheless, membership in the Berne Convention was an incentive for the U.S. to change its moral rights laws because the change would improve overall copyright protection of U.S. interests.

¹¹⁷ California Art Preservation Act, Cal. Civ. Code. § 987(c)(1).

¹¹⁸ California Art Preservation Act, Cal. Civ. Code. § 987(c)(2).

¹¹⁹ California Art Preservation Act, Cal. Civ. Code. § 986.

¹²⁰ Berne Convention Implementation Act, Pub. L. No. 100-568, 102 Stat. 2853, 2853-54 (1988).

¹²¹ Berne Convention Implementation Act, *id.* § 3(b).

Soon after the U.S. joined the Berne Convention in 1989, the concept of moral rights was formally recognized in a federal act. The following year, Congress signed into law the Visual Artists Rights Act of 1990 (VARA).¹²² The VARA provides significantly less protection for oral rights than what is available under European moral-rights regimes. Notably, the VARA protects only “works of visual art” which are defined to include only (1) single paintings, drawings, prints, sculptures, or photographic images made “for exhibition purposes only,” and (2) multiple paintings, drawings, prints, sculptures, and certain photographs, in limited editions of 200 or fewer signed and numbered copies.¹²³ Therefore, anyone can colorize films in the U.S. without the directors’ permission because films are outside of the scope of moral rights protection under the VARA.

Under the VARA, authors of visual art works are granted two rights: the right of attribution and the right of integrity, both of which are the minimum moral rights requirement obligated by the Berne Convention.¹²⁴ The right of attribution comprises, (1) a right to claim authorship of the artist’s work, (2) a right to prevent the use of the artist’s name on works of visual art that the artist did not create, and (3) a right to prevent use of the artist’s name on works of visual art that have been distorted, mutilated, or modified and which would be prejudicial to the artist’s honor or reputation.¹²⁵

¹²² Visual Artist Rights Act, 17 U.S.C. § 106A (Supp. V 1993) [hereinafter VARA].

¹²³ U.S.C.A. of 1976, 17 U.S.C. § 101 (1988).

¹²⁴ James M. Treece, *American Law Analogues of the Author's "Moral Right"*, 16 Am. J. Comp. L. 487, 505 (1968).

¹²⁵ See VARA, 17 U.S.C. § 106A.

The VARA recognizes a limited right of integrity under which the artist can prevent: (1) any intentional distortion, mutilation, or other modification of any visual art work that would be prejudicial to the artist's honor or reputation; and, (2) any intentional or grossly negligent destruction of a work of recognized stature.¹²⁶ While moral rights in the VARA are inalienable, they may be waived by the author through an express written agreement.¹²⁷ Moral rights under the VARA expire at the end of the calendar year in which the author dies.¹²⁸

§ 3.2.5.5. Moral Rights in Thai Copyright Law

Thai copyright law was legislated under the dualistic theory. This means the law incorporates economic right and moral right within a single legal regime of the Thai Copyright Act (T.C.A.). Moral rights protection was inaugurated in Thailand under a provision in the *T.C.A.* B.E. 2521 (A.D. 1978).¹²⁹ Section 15, Paragraph 4 of the *T.C.A.* B.E. 2521 only prescribed the right of integrity that prohibits any acts of distortion, mutilation, or modification of a copyrighted work without the author's consent.¹³⁰ Notably, the moral rights in the *T.C.A.* B.E. 2521 was limited to the right of integrity and did not include the right of attribution, the right of withdrawal, or the right of divulgation. Moral rights under the *T.C.A.* B.E. 2521 are considered a

¹²⁶ *Id.*

¹²⁷ U.S.C.A. of 1976, 17 U.S.C. § 106A(e)(1). To be effective, visual artists' waiver of rights under the VARA must be written and unambiguous.

¹²⁸ U.S.C.A. of 1976, 17 U.S.C. § 106A(d)(1).

¹²⁹ See *T.C.A.* B.E. 2521 (1978) (Thail.).

¹³⁰ *T.C.A.* B.E. 2521 (1978) § 15 (Thail.).

personal right and do not succeed to the author's heirs. Therefore, the moral rights vested under the *T.C.A. B.E. 2521* survive only during the author's life.¹³¹

Currently, moral rights protection is provided in Section 18 of the *T.C.A. B.E. 2537* (A.D. 1994).¹³² The *T.C.A. B.E. 2537* adds the right of attribution to supplement the right of integrity of the previous copyright act and also extends moral rights to the author's heirs. Other than that, the current *T.C.A.* has the same effect as the previous act, that is, moral rights under Thai copyright law are alienable and not perpetual. The disparity between Thai copyright law and the U.S. copyright law on moral rights protection can be illustrated in two aspects.

First, Section 18 of the *T.C.A. B.E. 2537* protects moral rights for all nine categories of copyright work recognized by the *T.C.A.*, which includes literary work, dramatic work, artistic work, musical work, audio-visual work, cinematographic work, sound recording, sound and video broadcasting work, and any other works in literary or artistic domain. In contrast, U.S. copyright law in Title 17 of the U.S. Code provides limited moral rights only for visual art works.

Another matter that differentiates the protection of moral rights of Thai copyright law from that of the U.S. is the duration of moral rights protection. While moral rights under the *VARA* expire at the end of the calendar year in which the

¹³¹ Hemaratchata, *supra* note 20, Ch. 5.

¹³² See *T.C.A. B.E. 2537* (1994) § 18 (Thail.) (stating that "[T]he author of a copyright work by virtue of this Act is entitled to identify himself as the author and to prohibit the assignee or any person from distorting, shortening, adapting or doing anything with the work to the extent that such act would cause damage to the reputation or dignity of the author. When the author is dead, the heir of the author is entitled to the right of litigation for the enforcement of such right through the term of copyright protection, unless otherwise agreed in writing.").

author dies,¹³³ moral rights under the *T.C.A. B.E. 2537* subsist until the expiration of economic rights (50 years after the author's death). Under the *T.C.A. B.E. 2537*, when the author dies, the author's heirs are entitled to the right of litigation for the enforcement of moral rights throughout the term of copyright protection.¹³⁴

In a licensing contract, an author may agree to have a disclaimer clause waiving moral rights provided such agreement is written into the contract.¹³⁵ Although, the *T.C.A. B.E. 2537* explicitly protects moral rights, the implementation of moral rights provisions lies in the arcane domain among Thai jurists because such claims have not as yet been brought before the court. Such claims usually result in mutual compromise between parties.

§ 3.3. Copyright Acquisition

§ 3.3.1. Categories of Copyright Works

§ 3.3.1.1. Categories of Protected Works under U.S. Copyright Law

As discussed in § 3.2.1.1. regarding the constitutional basis for U.S. copyright protection, all copyrighted works are rooted in the copyright clause embodied in Article I, Section 8, Clause 8 of the U.S. Constitution that grants Congress the power "to promote the Progress of Science and useful Arts, by securing for limited Times to

¹³³ U.S.C.A. of 1976, 17 U.S.C. § 106A(d)(1).

¹³⁴ See *T.C.A. B.E. 2537* (1994) § 18 (Thail.).

¹³⁵ *Id.*

Authors ... the exclusive Right to their respective Writings.”¹³⁶ Congress and the courts have construed the term “writings” broadly in response to technological advancement. The first United States Copyright Act (U.S.C.A.), enacted in 1790, granted protection to the creators of books, maps, and charts for developmental progress of the new country. Within the past two centuries, Congress has passed various copyright laws to expand the protection of copyright to new technological forms of expression such as motion pictures in 1911, computer programs in 1964, and sound recordings in 1973.¹³⁷ Subsequently, the current Copyright Act of 1976 was drafted.

Congress had originally listed seven broad categories of works in Section 102 of the Act. In 1990, architectural works were added to the list of copyright works as an eighth category.¹³⁸ Section 102(a) of the 1976 Copyright Act lists protected works in eight categories by using the term “include” which illustrates the scope of Section 101 of the Act as “illustrative and not limitative.”¹³⁹ To determine copyright protectability, a work does not need to fall into any one of the eight categories; instead the work must satisfy the requirements embedded in Section 102 of the Copyright Act of 1976, whose principles will be discussed below under conditions for copyright acquisition.

¹³⁶ U.S. Const. Art. 1, § 8, cl. 8.

¹³⁷ See Jack M. Heynes, *Computer Software: Intellectual Property Protection in the U.S. and Japan*, 13 J. Marshall J. Computer & Info. L. 253 (1995).

¹³⁸ U.S.C.A. of 1976, 17 U.S.C. § 102(a)(8) (1990). Starting on December 1, 1990, architectural works both unconstructed and embodied in plans or drawings unpublished are protectable.

¹³⁹ U.S.C.A. of 1976, 17 U.S.C. § 101 (defining the terms “including” and “such as” in the Act as illustrative and not limitative).

Congress intended the eight categories to accommodate identification of works in legal transactions, such as registration of copyright works.¹⁴⁰ These categories are defined in illustrative manner and will not limit any possibility of recognition of new arts to respond the growth of technologies. Furthermore, a work may be listed in more than one category.¹⁴¹ The categories in the current U.S.C.A. are discussed below.

A. Literary Works

“Literary work” is the first category recognized for copyright protection in the U.S. and other countries. Section 101 of the Copyright Act of 1976 provides the definition of literary works as follows:

“ ‘Literary’ works are works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, film, tapes, disks, or cards, in which they are embodied.”¹⁴²

Evidently, according to the U.S.C.A., any books, newspapers, manuals, or anything that can be expressed in words, numbers, or other verbal or numerical symbols are protected as literary works. In 1980, both computer programs and computer databases, such as Windows and Internet Explorer, are statutorily considered as literary works because they can be expressed in computer languages

¹⁴⁰ See U.S.C.A. of 1976, 17 U.S.C. § 102(a)(1)-(8).

¹⁴¹ See H.R. Rep. No. 94-1476, at 53. The House Report explicitly approves of overlap among the categories set forth under Section 102(a) of the Copyright Act.

¹⁴² U.S.C.A. of 1976, 17 U.S.C. § 101.

that use letters, words, or numbers.¹⁴³ Nonetheless, some software programs are not protected where their purposes fall into limited area of “merger doctrine” which notably excludes protection for computer code that represents one of very few ways of serving specific functions.¹⁴⁴ In addition, certain works are not considered literary works, though expressed in words. For instance, song lyrics would be part of a musical work copyright, and the script for a play would be part of a dramatic work.¹⁴⁵

B. Musical Works

The second category in Section 102(a) list is “musical works,” including any accompanying words.¹⁴⁶ A musical work is a musical composition, which includes both the words and music. The copyright owner can control or limit the use of either element or a combination of both elements.¹⁴⁷ Certain music that accompanies an audiovisual work, such as movie soundtracks, would not be protected in the musical works category. Instead such music would be protected and registered as an audiovisual work.¹⁴⁸

¹⁴³ See Computer Software Copyright Act of 1980, Pub. L. No. 96-517, § 10, 94 Stat. 3015, 3028. This Act was the result of considerable study by the U.S. government, also known as CONTU. See National Commission on New Technological Uses of Copyrighted Works, Final Report of the National Commission on New Technological Uses of Copyrighted Works (July 31, 1978).

¹⁴⁴ See, e.g., *Mitel, Inc. v. Iqtel, Inc.*, 124 F.3d 1366, 1373-76 (10th Cir. 1997) (finding command codes for computer hardware to be unprotectable methods that, in any event, lacked originality because functionally dictated or arbitrarily chosen).

¹⁴⁵ *Stim*, *supra* note 22, at 20.

¹⁴⁶ U.S.C.A. of 1976, 17 U.S.C. § 102(a)(2).

¹⁴⁷ See *Stratchborneo v. Arc Music Corp.*, 357 F. Supp. 1393 (S.D.N.Y. 1973).

¹⁴⁸ See U.S.C.A. of 1976, 17 U.S.C. § 101. (defining “audiovisual works” as works that consist of a series of related images which are intended to be shown . . . , together with accompanying sounds.).

C. Dramatic Works

The U.S.C.A. includes, but does not define, "dramatic works."¹⁴⁹ However, its definition is explicated by the case law.¹⁵⁰ A dramatic work is usually a "play" prepared for stage, cinema, radio, or television. Although a dramatic work does not have to have dialogue or plot, it is generally a narrative presented by means of dialogue and action.¹⁵¹ A dramatic work provides directions for performance. That is, it explains how the play should be accomplished. A play can be embodied either in its manuscript form, in video, or some other form of fixation.

D. Pantomimes and Choreographic Works

Choreography, previously, was protected under the rubric of dramatic works under the Copyright Act of 1909.¹⁵² The current U.S.C.A. specifically adds "pantomimes" generally known as gestures without speech and "choreographic works," that is the composition and arrangement of dance movement and patterns into one discrete category.¹⁵³ A choreographic work should be capable of being performed and usually includes direction for movement. Social dance steps such as the *Cha Cha* and other simple routines are excluded from copyright protection

¹⁴⁹ U.S.C.A. of 1976, 17 U.S.C. § 102(a)(3).

¹⁵⁰ See, e.g., *Kalem Co. v. Harper Bros.*, 222 U.S. 55, 61 (1911) ("we see the event or story lived"); *Seltzer v. Sunbrock*, 22 F. Supp. 621, 628-29 (S.D. Cal. 1938) ("story" defined as "thread of consecutively related events").

¹⁵¹ Stim, *supra* note 22, at 21.

¹⁵² U.S.C.A. of 1976, 17 U.S.C. § 5(d) (1909 Act).

¹⁵³ U.S.C.A. of 1976, 17 U.S.C. § 102(a)(4).

because they lack originality as a primary requirement of protection.¹⁵⁴ Pantomimes are considered a mute performance with expressive communication. Since it is a form of acting that consists mostly of gestures, there is an overlap in the categorization of pantomime and dramatic works. Traditionally, pantomimes and choreographic works are fixed in a system of written notation, but the Copyright Act provides that they also may be fixed in any tangible medium including film, video, and photographs.¹⁵⁵

E. Pictorial, Graphic, and Sculptural Works

Pictorial, graphic, and sculptural works¹⁵⁶ are defined as any “two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans.”¹⁵⁷ By their nature, pictorial, graphic, and sculptural works lend themselves to reproduction on many objects. Often these objects are functional, such as toys, shirts, and pins. It is possible to protect an artistic work such as a picture or photograph that is reproduced on a functional object, but is never possible to protect the object itself.¹⁵⁸ Under copyright law, such functional objects are referred to as “useful articles” and are not protected. A useful article is something that has some utilitarian function other than its

¹⁵⁴ See H.R. Rep. No. 94-1476, at 54 (1976), reprinted in 1976 U.S.C.C.A.N. 5659. The House Report excludes social dance steps and simple routines from protection.

¹⁵⁵ Stim, *supra* note 22 at 21.

¹⁵⁶ U.S.C.A. of 1976, 17 U.S.C. § 102(a)(5).

¹⁵⁷ See U.S.C.A. of 1976, 17 U.S.C. § 101.

¹⁵⁸ See *id.* (precluding copyright protection of any “useful article,” which it defines as “an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information.”).

appearance or ability to convey information.¹⁵⁹ Patent law is the exclusive domain for protection of such useful and functional objects.

F. Motion Pictures and other Audiovisual Works

“Motion pictures” under the U.S.C.A.¹⁶⁰ are “audiovisual works consisting of a series of related images which, when shown in succession, impart an impression of motion, together with accompanying sounds, if any.”¹⁶¹ To clarify the meaning of “motion pictures”, an understanding of “audiovisual works” is necessary. “Audiovisual works’ are works that consist of a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes in which the works are embodied.”¹⁶² Evidently, under definitions above, motion pictures are a subset of audiovisual works.

The Copyright Act of 1909 did not initially protect motion pictures. To overcome this obstacle, the early film pioneers printed each reel of film on paper and registered their works as sheets of photographs. In 1912, the Copyright Act of 1909 was amended to include motion pictures.¹⁶³ The justification for the amendment was

¹⁵⁹ *Id.*

¹⁶⁰ U.S.C.A. of 1976, 17 U.S.C. § 102(a)(6).

¹⁶¹ U.S.C.A. of 1976, 17 U.S.C. § 101.

¹⁶² *Id.*

¹⁶³ Act of Aug. 24, 1912, ch. 356, § 5(j), (l), (m), § 11, 37 Stat. 488 (amending Copyright Act of March 4, 1909, ch. 320, § 5, 35 Stat. 1075, 1076-77).

that the production of motion-picture photoplays and motion pictures other than photoplays had become a business of vast proportions. The money invested therein was so great and the property rights were so valuable that the copyright laws had to be amended to give to them distinct and definite recognition and protection.¹⁶⁴

Depending on its use, one picture can be assigned to different categories of copyright work under the U.S.C.A. For instance, an image of a photographic slide is considered to be a pictorial work. But when that same picture is presented as part of a slide show with a series of related slides (for example, the horse in motion of making a jump), the result is an audiovisual work.¹⁶⁵ Audiovisual works are related images in a series (together with any accompanying sounds) that are shown by a machine or device. An audiovisual work does not have to have sounds (despite the use of the term *audio* in the name), and a silent film is protected as an audiovisual work.¹⁶⁶

G. Sound Recordings

The Copyright Act of 1976 defines "sound recordings"¹⁶⁷ as works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the

¹⁶⁴ Goldstein, 412 U.S. at 562 n.17 (quoting H.R. Rep. No. 756 at 1 (1912)).

¹⁶⁵ See H.R. Rep. No. 94-1476, at 56 (1976), reprinted in 1976 U.S.C.C.A.N. 5659.

¹⁶⁶ See U.S.C.A. of 1976, 17 U.S.C. § 101. (defining "audiovisual works.").

¹⁶⁷ U.S.C.A. of 1976, 17 U.S.C. § 102(a)(7).

nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied.¹⁶⁸

According to the definition rendered by the Copyright Act, a sound recording is a work derived from the fixation of a series of musical, or other sounds, including narration or spoken words. The performer, producer, or recording company usually claims copyright in their sound recordings. Because sound recordings are a derivative of musical works, it is necessary to provide separate categories for both musical works and sound recordings. These types of copyrighted work have different objects of protection. A musical work copyright protects the musical composition. A sound recording copyright protects the way the composition is performed and recorded.

Sound recordings were not protected under copyright law until 1972.¹⁶⁹ Recordings embodied in a phonorecord on or after February 15, 1972, are eligible for protection under federal copyright law.¹⁷⁰ If a sound recording were released on a phonorecord prior to this date, it would be protected only under state law. That is, courts have determined that these recordings are protected, though not by federal

¹⁶⁸ See U.S.C.A. of 1976, 17 U.S.C. § 101.

¹⁶⁹ Sound Recording Amendment of 1971, P.L. 92-140 § 3, 85 Stat. 391. See *A & M Records, Inc. v. M.V.C. Distrib. Corp.*, 574 F.2d 312 (6th Cir. 1978).

¹⁷⁰ The Copyright Act of 1976 defines all tangible objects embodying copyrightable works as either "copies" or "phonorecords." Phonorecords are "material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed ... and from which the sounds can be ... communicated, either directly or with the aid of a machine" U.S.C.A. of 1976, 17 U.S.C. § 101.

law.¹⁷¹ Some states, such as California, have passed specific laws regarding the protection of sound recordings fixed prior to February 15, 1972.¹⁷²

H. Architectural Works

An “architectural work” is the last category of copyright work prescribed in Section 102.¹⁷³ It is defined as “the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings. The work includes the overall form as well as the arrangement and composition of spaces and elements in the design, but does not include individual standard features.”¹⁷⁴

The addition of “architectural works” in the U.S.C.A. as an eight category can be traced back to 1990 when it was added to the list of works protected under copyright law. Copyright in architectural works includes the right to reproduce a copy of an architectural work. That is, the building, the plans, or photographs cannot be reproduced without the consent of author of the work (usually the architect or developer). There are several exceptions for architectural works. For example, if the building is located in a place that is ordinarily visible to the public, photo or pictures of the building can be taken, distributed, or publicly displayed.¹⁷⁵

¹⁷¹ Goldstein v. California, 412 U.S. 546 (1973).

¹⁷² Cal. Civ. Code § 980.

¹⁷³ See U.S.C.A. of 1976, 17 U.S.C. § 102(a)(8).

¹⁷⁴ See U.S.C.A. of 1976, 17 U.S.C. § 101.

¹⁷⁵ U.S.C.A. of 1976, 17 U.S.C. § 120(a) (Supp. II 1991). See H.R. Rep. No. 735, 101st Cong., 2d Sess. at 22 (1990); this limits the exclusive rights of the author in an architectural structure under section 106(1) “to reproduce the copyrighted work in copies,” § 106(3) “to distribute copies . . . of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending,”

If they desire to make alter or authorize the destruction of a building, the owners of that building do not have to obtain the consent of the person holding the architectural copyright to the work.¹⁷⁶ However, if that building's interior contains a work of visual art, such as a lobby mural, the unauthorized destruction of the mural may violate state fine art law or the moral rights provision of the U.S.C.A.¹⁷⁷

An example of an architectural copyright case is the law suit involving the buildings for use in the movie *Batman Forever* in 1998.¹⁷⁸ In this case, the owner of an architectural copyright in the building design permitted replicas to be made of the buildings for use in the movie. An artist whose work was included in the architectural design claimed a separate copyright claimed for his art and objected to its use in the movie. The court determined that the artwork was part of the architectural copyright and that the owner of the architectural copyright had the authority to permit or not permit its use in the movie.

§ 3.3.1.2. Categories of Protected Works under Thai Copyright Law

At the early stages of copyright protection in Thailand, the Royal Proclamation of Vachirayan Library R.S. 111 (A.D. 1892)¹⁷⁹ granted protection only to books published by the Vachirayan Library (the National Library). Those books

and under § 106(5) "to display the copyrighted work publicly." U.S.C.A. of 1976, 17 U.S.C. § 106(1), (3), (5) (Supp. II 1991).

¹⁷⁶ U.S.C.A. of 1976, 17 U.S.C. § 120(b) (Supp. II 1991).

¹⁷⁷ U.S.C.A. of 1976, 17 U.S.C. § 106A.

¹⁷⁸ *Leicester v. Warner Bros.*, 47 U.S.P.Q.2d 1501 (C.D. Cal. 1998).

¹⁷⁹ The Royal Proclamation of Vachirayan Library for the Protection of Literary Work, R.S. 111 (1892) (Thail.).

were authored by Thai scholars who subscribed to the Library's service. Subsequently, the Authorship Rights Act R.S. 120 (A.D. 1901)¹⁸⁰ extended the scope of copyright protection to both books inside and outside the Library, but did not yet grant the protection to other kinds of compositions. In 1914, the Authorship Rights Act R.S. 120 was revised to include any printed matter, pamphlets, music sheets, maps, notebooks and lectures into the scope of its protection as an incentive to encourage scholars to disseminate their knowledge to the public.¹⁸¹

After the Authorship Rights Act R.S. 120 and its revision were repealed by the Act for the Protection of Literary and Artistic Works B.E. 2474 (A.D. 1931),¹⁸² copyright protection expanded to include various works in literary, scientific, and artistic domains. Section 4 of the Act defined "'literary and artistic works' as every production in the literary, scientific and artistic domains, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons, and other works of the same nature; dramatic or dramatico-musical works; choreographic works, and entertainments in dumb show; musical compositions with or without words; works of drawing, painting, architecture, sculpture, engraving, lithography, pictorial works, maps, plans, and sketches; three-dimensional works relative to geography, topography, architecture or science; and, photographic works."¹⁸³ Protection under the 1931 Act was intended to be consistent

¹⁸⁰ Authorship Rights Act, R.S. 120 (1901) (Thail.).

¹⁸¹ Hemaratchata, *supra* note 20, Ch. 3.

¹⁸² Act for the Protection of Literary and Artistic Works, B.E. 2474 (1931) (Thail.).

¹⁸³ Act for the Protection of Literary and Artistic Works, B.E. 2474 (1931) § 4 (Thail.).

with the widely accepted international standard constituted by the Berne Convention as revised at Berlin in 1908, to which Thailand acceded on July 17, 1931.¹⁸⁴

Even though the Act for the Protection of Literary and Artistic Works B.E. 2474 (A.D. 1931) tried to give a thorough definition of protected works, it could not overcome the ambiguity of protectability of works that emerged with more advanced technologies in 1970's. Such works included cinematographic works and sound and video broadcastings that arguably might be protected under the 1931 Act. The *T.C.A.* B.E. 2521 (A.D. 1978) was passed to clarify the ambiguity by articulating eight categories of protected works in Section 4 of the 1978 Act, including literary works, dramatic works, artistic works, musical works, audio-visual works, cinematographic works, sound and video broadcastings, and other works in literary, scientific, and artistic domains.¹⁸⁵ No express provision existed, however, for the protection of computer programs.

As a result of Thailand's rapid modernization and greater role in the international trade under framework of the WTO, it had to implement the provisions embodied in the TRIPs Agreement, which was the result of the efforts of many nations, led by the U.S., to connect intellectual property rights enforcement to international trade and make computer programs to be accepted as within the rubric of literary work under Thai copyright law. The *T.C.A.* B.E. 2537 (A.D. 1994) brought Thailand's copyright laws into accord with the TRIPs Agreement by granting protection for computer software programs as well as stipulating other emerging rights, such as performers' rights, rental rights and royalties for particular works.

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See Weerawit Weeraworawit, Copyright in Thailand 47 (The Intellectual Property and International Trade Law Forum Special Issue 1998).

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See T.C.A. B.E. 2521 (1978) § 4 (Thail.).

The *T.C.A. B.E. 2537* (A.D. 1994) articulates copyright work broadly in nine categories by adding sound recordings as a discrete category. The *T.C.A.* was drafted in the same way as the U.S. had designed its law, which was to be amenable to any possible newer technology. However, categories of copyright works may differ from those provided under the U.S.C.A. of 1976.¹⁸⁶ Figure 2 illustrates the difference in categorization between the copyright laws of the U.S. and Thailand. Categories of copyright works under *T.C.A.* are described below.

A. Literary Works

Section 4 of the *T.C.A. B.E. 2537* (1994) gives the definition of “literary work” as any kind of literary work including books, pamphlets, writings, printed matter, lectures, sermons, addresses, speeches, and computer programs.¹⁸⁷ The meaning of the word “printed matter” under the *T.C.A.* can be obtained from the Press Act B.E. 2484 (A.D. 1941) since the *T.C.A.* does not directly address the meaning. Under the Press Act B.E. 2484,¹⁸⁸ “printed matter” means any printed books, papers, or other materials of the same nature, which are issued on a sequential basis.¹⁸⁹ Doubtlessly, “printed matter” in the *T.C.A.* is construed to include any newspapers, magazines, and other materials, which are intended to be released periodically.

¹⁸⁶ See *T.C.A. B.E. 2537* (1994) § 6 (Thail.) *cf.* U.S.C.A. of 1976, 17 U.S.C. § 102.

¹⁸⁷ *T.C.A. B.E. 2537* (1994) § 4 (Thail.).

¹⁸⁸ Press Act B.E. 2484 (1941) (Thail.) (published in Government Gazette, Sep. 30, B.E. 2484 (1941)).

¹⁸⁹ Press Act B.E. 2484 (1941) § 4 (Thail.).

The language of the T.C.A. makes the protectability of computer programs free from doubt because there had been controversies earlier on their status under the previous copyright act (the *T.C.A.* B.E. 2521).¹⁹⁰ The word "computer programs" is defined in Section 4 of the *T.C.A.* B.E. 2537 as "instructions, set of instructions or any other matter, which are used with a computer in order to operate the computer or to generate an output, regardless of the computer language." Currently, the scope of copyright protection for computer programs has not been put to the test in Thai courts as much as has intermittently occurred in U.S. courts.

B. Dramatic Works

Thai lawyers can find the meaning of "dramatic works" within the *T.C.A.* B.E. 2537. The Act defines "dramatic works" as works pertaining to choreography, dancing, acting or performance in dramatic arrangement, including pantomimes.¹⁹¹ Dramatic works in the T.C.A. have a broader scope than do the dramatic works categorized in U.S.C.A. whose scope does not include pantomimes and choreographic works. In fact, the U.S.C.A. constitutes a discrete category for pantomimes and choreographic works as the third category in Section 102 of the 1976 Copyright Act.¹⁹²

C. Artistic Works

"Artistic works" under the *T.C.A.* B.E. 2537 includes seven subcategories as follows: (1) works of painting and drawing; (2) sculptural works; (3) lithographic

¹⁹⁰ Hemaratchata, *supra* note 20, Ch. 2.

¹⁹¹ T.C.A. B.E. 2537 (1994) § 4 (Thail.).

¹⁹² See U.S.C.A. of 1976, 17 U.S.C. § 102(a)(3).

works; (4) architectural works; (5) photographic works; (6) works of illustration, maps, structures, sketches or three-dimensional designs with respect to geography, topography or science; and, (7) works of applied art.¹⁹³ Comparatively, artistic works under the T.C.A. are within the rubric of pictorial, graphic, and sculptural works, which is the fifth category of Section 102(a) of the U.S.C.A..¹⁹⁴

D. Musical works

The T.C.A. B.E. 2537 defines “musical works” as works related to songs which are composed for the purpose of playing or singing either with melody and lyrics or melody alone, including arranged and transcribed musical notes or musical diagrams.¹⁹⁵ The meaning of musical works under the T.C.A. is similar to that of musical works under the U.S.C.A. Both countries’ copyright acts hold that a musical work is a musical composition, including both words and music. Copyright owners can control or limit the use of either element or a combination of both elements.

E. Audiovisual works

Theoretically, audiovisual works are considered to be works of “neighboring rights” or so called “related rights.” This means that their expression is based on other original, fundamental works, such as musical works, dramatic works, artistic works, and literary works.¹⁹⁶ Neighboring rights are awarded for contributions to

¹⁹³ See T.C.A. B.E. 2537 (1994) § 4 (Thail.).

¹⁹⁴ See Comparison of Categories of Copyright Works under the T.C.A. and the U.S.C.A. in Figure 2.

¹⁹⁵ T.C.A. B.E. 2537 (1994) § 4 (Thail.).

¹⁹⁶ Hemaratchata, *supra* note 20, Ch. 3.

productions not resulting from a creator's creativity, such as the financial contribution of a producer. The *T.C.A. B.E. 2537* provides definition of "audiovisual works" as works composed of a series of images recorded on any type of material and capable of being replayed with a device necessary for such material, including the sounds accompanying such work, if any.¹⁹⁷ In general, the definition of audiovisual works in the *T.C.A.* does not differ from that of the *U.S.C.A.*.

F. Cinematographic works

Cinematographic works under the *T.C.A. B.E. 2537* are defined as audiovisual works composed of a series of images that can be displayed in succession as motion pictures, or that can be recorded upon other materials to be shown in succession as motion pictures, including the sounds accompanying such motion pictures, if any.¹⁹⁸ Similar to the motion pictures category of copyrighted works in the *U.S.C.A.*, cinematographic works in the *T.C.A.* are a subset of audiovisual works category. The *T.C.A.* differs from the *U.S.C.A.* only in that the *T.C.A.* places audiovisual works and cinematographic works into different categories. In contrast, under the *U.S.C.A.*, motion pictures and audiovisual works are incorporated into the same category of Section 102(a)(6).¹⁹⁹

G. Sound Recordings

Sound recordings are another type of neighboring rights works because they are contributions to musical works. As a result, the *T.C.A. B.E. 2537* treats them

¹⁹⁷ *Id.*

¹⁹⁸ *T.C.A. B.E. 2537* (1994) § 4 (Thail.).

¹⁹⁹ See Comparison of Categories of Copyright Works under the *T.C.A.* and the *U.S.C.A.* in Figure 2.

differently from other fundamental works, such as literary works, dramatic works, and artistic works, in terms of duration of protection.²⁰⁰ Under the T.C.A., sound recordings mean works composed of a series of music, sounds from a performance or any other sounds recorded on any kind of material and able to be replayed with a device necessary for such material, but not including the sounds accompanying a cinematographic work or another audiovisual work.²⁰¹ Comparatively, the definition of sound recordings in the T.C.A. is similar to that of the U.S.C.A.

H. Sound and Video Broadcastings

The T.C.A. B.E. 2537 defines "sound and video broadcastings" as works which are transmitted to the public by way of radio broadcasting, sound and/or video broadcasting on television or by any other like means.²⁰² Sound and video broadcastings are neighboring-rights-related works which are intended to communicate other types of copyright protected work to the public by means of broadcast. Under the T.C.A., sound and video broadcasting can be transmitted through three forms, namely, radio broadcasting, sound and video broadcasting, and other means, such as wireless telegraphy, cables, and loud-speakers. Although the U.S.C.A. has no separate category for sound and video broadcastings, such works are protected under the exclusive right of those holding copyrights in these works, to communicate them to the public.²⁰³

²⁰⁰ See *infra* § 3.7.3. under Thai Copyright Law on Duration of Protection.

²⁰¹ T.C.A. B.E. 2537 (1994) § 4 (Thail.).

²⁰² *Id.*

²⁰³ See U.S.C.A. of 1976, 17 U.S.C. § 106(5).

I. Other Works in Literary, Scientific, Artistic Domains

The *T.C.A. B.E. 2537* prescribes the last category in a way that provides for a non-exhaustive list of prospective technology advancements. Before March 21, 1994, this category under the previous *T.C.A. B.E. 2521* posed a question of protectability of computer programs to Thai lawyers and computer programs consumers. Nonetheless, the protection of computer programs was not challenged before Thai courts. Rather, the *T.C.A. B.E. 2521* was revised to specify computer programs as protected in the rubric of literary works category in the *T.C.A. B.E. 2537*.²⁰⁴

§ 3.3.2. Conditions for Acquisition of Copyright

The Berne Convention has been the basis for the U.S.C.A. and the T.C.A. since the Convention was adhered by Thailand in 1931 and by the U.S. in 1989 respectively. According to the Berne Convention, the issue of conditions for the acquisition of copyrights in works created by a country's nationals and first published in that country will be determined under the law of that country.²⁰⁵ The U.S. and Thailand have prescribed conditions for copyright acquisition in their copyright legislation as described below.

²⁰⁴ See Bunthit Limsakul, Copyright in Computer Programs 111-15, (1995).

²⁰⁵ See Berne Convention, *supra* note 18, art. 2(2) (providing that "it shall, however, be a matter for legislation in the countries of the Union to prescribe that works in general or any specified categories of works shall not be protected unless they have been fixed in some material form.").

§ 3.3.2.1. Acquisition under U.S. Copyright Law

Section 102(a) of the Copyright Act of 1976 provides the criteria that satisfy copyright protection.²⁰⁶ The language of Section 102(a) sets forth two standards for protection. These are creativity and fixation requirements.

A. *The Creativity Requirement*

The copyright clause in the U.S. Constitution uses the term “useful arts” to connote certain types of works that deserve special protection.²⁰⁷ Nonetheless, determining whether a particular work is a “useful” article within the scope of copyright protection is impracticable since there is no established standard to judge the usefulness of a work. To solve this difficulty, U.S. case law has developed the guideline that copyright works must contain a modicum of creativity in order to satisfy the constitutional requirement. Works that lack of creativity will typically be denied copyright protection. Non-creative works include, for example, phone books,²⁰⁸ food recipes,²⁰⁹ and databases.²¹⁰

²⁰⁶ See U.S.C.A. of 1976, 17 U.S.C. § 102(a). (providing that copyright subsists, in accordance with this title, in original works of authorships fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device).

²⁰⁷ See U.S. Const. Art. 1, § 8, cl. 8.

²⁰⁸ See *e.g.*, *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991) (concluding that “[t]he names, towns, and telephone numbers copied by Feist were not original to Rural and therefore were not protected by the copyright in Rural’s combined white and yellow pages directory.”); *Bell South Adver. & Publ’g Corp. v. Donnelley Info. Publ’g, Inc.*, 999 F.2d 1436, 1446 (11th Cir. 1993) (noting that a telephone directory publisher did not violate copyright law “[b]y copying the name, address, telephone number, business type, and unit of advertising purchased” from another directory).

²⁰⁹ See *e.g.*, *Publ’ng Int’l., Ltd. v. Meredith Corp.*, 88 F.3d 473, 482 (7th Cir. 1996) (finding no violation of copyright law because recipes do not contain “even a bare modicum” of creative expression); *Sassafras Enters., Inc. v. Roshco, Inc.*, 889 F. Supp. 343, 347 (N.D. Ill. 1995) (observing

The U.S. Supreme Court, in a 1991 landmark case (telephone directory case), emphasized the creativity requirement by finding that, for a work to receive copyright protection, it must reflect creative expression or originality.²¹¹ To make a work creative, originality is required; this means that creative work is original *only* with respect to the author. The work does not need aesthetic quality, uniqueness, usefulness, novelty, or distinguishability; such standards are required only by trademark and patent law. Unlike patent law, copyright is not based on priority of creation. Also, the order in which works are created does not automatically establish a superior right. In the other words, being first to create does not guarantee copyright protection or a right to take action against someone. Being original and creative without copying is what constitutes an author's copyright rights.²¹²

B. The Fixation Requirement

Under the Copyright Act of 1976, a work is protected at the moment it is "fixed in any tangible medium or form of expression."²¹³ Copies and phonorecords are the two types of tangible objects in which works, including sound recordings, may be fixed in a manner that permit them "to be perceived, reproduced, or otherwise

that information regarding the use and care of food preparatory mechanisms lacks the requisite originality).

²¹⁰ See *e.g.*, *Cooling Sys. & Flexibles, Inc. v. Stuart Radiator, Inc.*, 777 F.2d 485, 493 (9th Cir. 1985) (holding that the publisher of a radiator catalog did not have a cause of action for copyright infringement where "only facts" were copied).

²¹¹ See *Feist Publications v. Rural Telephone Service Co., Inc.*

²¹² *Stim*, *supra* note 22, at 16-17.

²¹³ See U.S.C.A. of 1976, 17 U.S.C. § 102(a).

communicated for a period of more than transitory duration.”²¹⁴ There are two rationales for the fixation requirement. The first is to encourage the dissemination of creative work; in other words, something captured in physical form can be passed more easily from person to person, place to place, and generation to generation. The second is based on the evidence theory; a work that is fixed in a tangible medium offers a better proof of copyright authorship. To give an example, extending protection to include unfixed expression, such as oral remarks, speeches, and addresses, would pose extraordinary difficulties with respect to who is the original author.²¹⁵ After the date of entry into force of the Copyright Act (January, 1, 1978), works that have not been fixed, regardless of when created, are still eligible for copyright protection under state laws.²¹⁶

§ 3.3.2.2. Acquisition under Thai Copyright Law

The *T.C.A.* B.E. 2537 stipulates conditions for works to be eligible for copyright protection in Section 6; those requirements include being an eligible work, creativity, and expression of idea.

A. Being an Eligible Work

Section 6 of the *T.C.A.* requires that for a work to be protected it must fit in one of nine categories (as discussed earlier in this chapter), namely, literary works,

²¹⁴ See U.S.C.A. of 1976, 17 U.S.C. § 101 (specifying the objects which a work can be “fixed”).

²¹⁵ See Douglas Lichtman, *Copyright as a Rule of Evidence*, 52 *Duke L.J.* 683, 723 (2003).

²¹⁶ See U.S.C.A. of 1976, 17 U.S.C. § 301(b)(1) (providing that “(b) Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to-- (1) subject matter that does not come within the subject matter of copyright as specified by sections 102 and 103 [17 USCS §§ 102 and 103], including works of authorship not fixed in any tangible medium of expression.”).

dramatic works, artistic works, musical works, audiovisual works, cinematographic works, sound recordings, sound and video broadcasting works, and any other works in the literary, scientific or artistic domains.²¹⁷ In addition to being an eligible work, to determine protectability of a work, it must satisfy other conditions stated below.

B. Creativity

According to the first paragraph of Section 6 of the *T.C.A.* B.E. 2537, a copyright work must be “works of authorship.”²¹⁸ However, the *T.C.A.* does not define what the *work of authorship* is; instead, to shed light on perception of a work of authorship, it provides the meaning of who qualifies for being a creative author. Section 4 of the Act states that “creative author” is defined as a person who makes or creates any work, which is a copyright work as determined by this Act.²¹⁹ Consequently, a copyright work under the *T.C.A.* must be originally made by an author’s effort and is not an imitative copy of the original.

C. Expression of Idea

The *expression of idea* requirement is implicitly expressed in Section 6 of the *T.C.A.* Section 6 states that works of authorship must be expressed in whatever mode or form.²²⁰ Therefore, at the moment an author of a poem puts words into a

²¹⁷ See *T.C.A.* B.E. 2537 (1994) § 6 (Thail.) (specifying eligible works in nine categories.).

²¹⁸ *Id.*

²¹⁹ *T.C.A.* B.E. 2537 (1994) § 4 (Thail.).

²²⁰ See *T.C.A.* B.E. 2537 (1994) § 6 (Thail.) (providing that “[C]opyright works by virtue of this Act mean works of authorship in the categories of literary, dramatic, artistic, musical, audiovisual, cinematographic, sound recording, sound and video broadcasting work or any other works in the literary, scientific or artistic domain, whatever may be the mode or form of its expression.”).

notebook, a song composer notes lyrics and melody into a paper, or when a person expresses a speech to public, works of authorship have been created. The current T.C.A. does not require fixation of copyright works. Nevertheless, without fixation of copyrighted works, it is difficult to prove copyright ownership of the works in any lawsuit.

Thai copyright law, as opposed to the U.S.'s approach, confers copyright protection at the moment of creation of the work, which may occur anytime prior to fixation. Under the current T.C.A., any speeches, addresses, or sermons can be expressed without further fixation. This characteristic of Thai copyright law incurs evidentiary problems as to how to prove the actual identity of the author of the work in an infringement action. Furthermore, no successful infringement action has ever been brought for a work that had never been fixed in a medium of its expression, such as tapes, books, and discs.

§ 3.3.3. Special Types of Protected Works

An earlier section (§ 3.3.1) of this dissertation offered information and compared categories of protected works prescribed in the current copyright legislation of the U.S. and Thailand. This section discusses special types of protected works—derivatives and compilations under the U.S.C.A. of 1976, and adaptations and compilations under the *T.C.A.* B.E. 2537.

§ 3.3.3.1. The U.S.

Section 103(a) of the U.S.C.A. of 1976 is the basis for the protection of derivative works and compilations. It provides that the subject matter of copyright, as specified by Section 102,²²¹ includes derivative works and compilations.

A. Derivative Works

The U.S.C.A. of 1976 defined a derivative work as “a work based upon one or more preexisting works such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgement, condensation, or any other form in which a work may be recast, transformed, or adapted.”²²² A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is considered a “derivative work.”²²³ For instance, an author wrote a musical composition which was published in 2000.²²⁴ The author then entered into a contract with a record company, whereby the record company agreed to pay the author a lump sum. In return, the record company acquired the copyright in the musical composition. The record company, in 2003, then created sound recordings based on the musical composition. In this scenario, the sound recordings are the

²²¹ Section 102 protects “original works of authorship fixed in any tangible medium of expression ...” See U.S.C.A. of 1976, 17 U.S.C. § 102.

²²² U.S.C.A. of 1976, 17 U.S.C. § 101.

²²³ *Id.*

²²⁴ A musical composition consists of music, including melody, harmony, rhythm, and any accompanying words. See *Mills Music, Inc. v. Arizona*, 591 F.2d 1278, 1280 n.1 (9th Cir. 1979).

derivative works of the original musical composition and are separately copyrightable.

With respect to the extent of protection, copyright for derivative works protects only new elements. The copyright in a derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the pre-existing material.²²⁵ A derivative work is separately copyrightable. This means that the copyright in the derivative will protect only new material that is significantly original. Consequently, a derivative work does not extend the duration of the preexisting work.²²⁶ For example, based on the fact of the previous scenario, the sound recordings do not extend protection for the originally published underlying musical composition.

B. Compilations

Compilations are another special type of work that is protected by virtue of Section 103(a). A "compilation" is a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. The term "compilation" includes collective works.²²⁷ Nonetheless, U.S. case law

²²⁵ U.S.C.A. of 1976, 17 U.S.C. § 103(b).

²²⁶ Nimmer & Nimmer, *supra* note 105, § 3.01.

²²⁷ U.S.C.A. of 1976, 17 U.S.C. § 101.

provides, as a rule, that the owner of a compilation must demonstrate a creativity requirement by selection, coordination, and arrangement of the data.²²⁸

The definition of "compilations" includes collective works.²²⁹ A collective work is one, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole.²³⁰ Examples of collective works include periodicals (such as magazines and journals), encyclopedias, and anthologies. Like compilations, collective works must contain *sufficient originality*. For example, a selection of a collection of "greatest music hits" recordings from the 1980's would be protectable because an adequate amount of creativity was used in making the selections.

Section 201(c) of the 1976 Copyright Act, which regulates collective works, was designed by Congress to remedy the problem of ownership of copyrights in contributions to collective works, and the relationship between copyright ownership in a contribution and in a collective work in which it appears.²³¹ Section 201(c) provides that copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole and vests initially in the author of the contribution. In the absence of an express transfer of the copyright, or of any rights under it, the owner of copyright in the collective work is presumed to have acquired

228 See *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991). A telephone book company copied the "white pages" of a competing telephone book publisher. The Supreme Court ruled that the names and telephone numbers in the directory were unprotectable facts and the method of arranging the names and numbers did not satisfy the minimum standards of copyright protection.

229 See U.S.C.A. of 1976, 17 U.S.C. § 101.

230 *Id.*

231 Notes of Committee on the Judiciary, H.R.Rep. No. 1476, 94th Cong. (1976), p. 122-23.

only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series.²³²

§ 3.3.3.2. Thailand

The *T.C.A.* B.E. 2537 recognizes adaptations and collective works as protected works under Sections 11 and 12 of the Act respectively.

A. Adaptations

Unlike the U.S.C.A. (which uses the term “derivatives”), the term “adaptations” used in the *T.C.A.* B.E. 2537 is taken from Article 12 of the Berne Convention.²³³ Section 4 of the *T.C.A.* elaborates the definition of “adaptations” as reproductions by transformation, improvement, modification or emulation of the essential part of an original work without creating a new work, whether in whole or in part:

(1) concerning a piece of literary work, it must include a translation, a transformation or a compilation by means of selection and arrangement;

(2) concerning a computer program, it must include a reproduction by means of transformation, improvement or modification of the program of the essential part without creating a new work;

²³² U.S.C.A. of 1976, 17 U.S.C. § 201(c).

²³³ Berne Convention, *supra* note 66, at art. 12 (stating that “[A]uthors of literary or artistic works shall enjoy the exclusive right of authorizing “adaptations” of their works.”)

(3) concerning a dramatic work, it must include the alteration of a non-dramatic work to a dramatic work or a dramatic work to a non-dramatic work, whether in the original language or another language;

(4) concerning an artistic work, it must include the alteration of a two-dimensional work or a three-dimensional work to a three-dimensional work or a two-dimensional work or the creation of a model based on the original work; and,

(5) concerning a musical work, it must include an arrangement of tunes or an alteration of lyrics or melody.²³⁴

With respect to protection of adaptations, Section 11 of the T.C.A. states that the copyright of a work, which is an adaptation of a copyrighted work, must be produced with the consent of the owner of copyright. The copyright of such adaptation vests in the person who makes the adaptation, provided that the copyright in the adaptation does not prejudice the owner of the copyright in the underlying work, or the work created by the original author, which is subsequently adapted.²³⁵ Adaptations neither extend, nor reduce, any right of the copyright owner of underlying copyrighted works. Under Thai law, to have an adaptation protected, an author of adaptations must acquire consent from the author of an underlying work. This character of adaptations under the T.C.A. is in accord with that of derivative works under the U.S.C.A.

B. Compilations

²³⁴ T.C.A. B.E. 2537 (1994) § 4 (Thail.).

²³⁵ T.C.A. B.E. 2537 (1994) § 11 (Thail.).

A copyrighted work, comprising a compilation or a composition of copyright works (under the T.C.A. done with the consent of the owners of copyright or a compilation or a composition of data or the materials which are readable, or conveyable by a machine or other apparatus), vests in the person who makes the compilation or the composition.²³⁶ An author of compilations must create the works by selecting, or arranging them in a manner that does not imitate another person's work, and without prejudice to those owning the copyrights to those works, data or other materials, which the original authors created.²³⁷

Comparatively, there is no difference on the principle of protection of compilations under the T.C.A. and the U.S.C.A.. Compilations under the U.S.C.A. include a work formed by the collection and assembling of preexisting materials or data. Similarly, the T.C.A. recognizes compilations, or a composition of preexisting copyright works, and a compilation or a composition of data or materials are to be protected under Article 12 of the *T.C.A.* B.E. 2537.²³⁸

§ 3.3.4. Works Made for Hire

Usually, the creator of a copyright work is both author and original owner of that copyright because he or she is the first person to own it. Under copyright law, an

²³⁶ T.C.A. B.E. 2537 (1994) § 12 (Thail.)(providing that "[C]opyright in the work which is a compilation or a composition of copyright works by virtue of this Act done with the consent of the owners of copyright or a compilation or a composition of data or the materials which are readable, or conveyable by a machine or other apparatus vests in the person who makes the compilation or the composition; provided that he has done so by means of selection or arrangement in the manner which is not an imitation of the work of another person but without prejudice to the owners of copyright in the works or data or other materials, created by the original authors, which are compiled or composed.").

²³⁷ *Id.*

²³⁸ U.S.C.A. of 1976, 17 U.S.C. §§ 101, 103. *Cf.* T.C.A. B.E. 2537 (1994) § 12 (Thail.).

author can be either a creator of the work or, under certain circumstances, a person who employs a creator or a person who commissioned the work. It may be deemed unusual that an employer can be considered the author, but many countries recognize the rule to guarantee that businesses may own a copyright in employee-created works. Japan, Thailand and the U.S., for instance, have provisions in their copyright laws regarding works done in the scope of employment or commission.²³⁹ However, legal solutions among countries are varied since the Berne Convention does not mandate the issue of works made for hire.

Copyright of works made for hire are subject to different legal treatment under U.S. copyright law and Thai copyright law. The issue requires special attention from creators of copyright works who prospectively do business and want to benefit from their works in the U.S. and Thailand. The following sections set forth the protection of works made for hire into two categories; namely, works created in the scope of employment and commissioned works under the U.S. and Thai Copyright law respectively. The acquisition of copyright in works made for hire will also be discussed.

§ 3.3.4.1. U.S. Copyright Law

Under the Copyright Act of 1976, copyright works created by an employee within the scope of employment and copyright commissioned works are defined

²³⁹ See Copyright Act of 1899 § 15 (Japan). In Japan, if an employee creates a work at his employer's initiative in the course of his duties within the scope of the employment, the authorship of the work attaches to the employer unless otherwise agreed. See also T.C.A. B.E. 2537 (1994) §§ 9, 10, 14 (Thail.). (providing the rules of works in scope of employment). See also U.S.C.A. of 1976, 17 U.S.C. § 201 (b). (granting ownership of copyright for works made for hire under the U.S.C.A.).

under the principle of so called “works made for hire.”²⁴⁰ The central concept of this principle is that the employer or other person for whom the made-for-hire work was prepared is considered the author for copyright purposes, even though he is not an actual creator of the work.²⁴¹ There are two instances where a work can be qualified as “made for hire:” firstly, works created by an employee within the scope of employment; and, secondly, works prepared on special order or commission subject of a written agreement.²⁴²

A. Works Prepared by an Employee within the Scope of Employment

Section 201(b) of the U.S.C.A. states that in the case of a work made for hire, the employer is considered the author for copyright purposes, unless the parties have expressly agreed otherwise in a written instrument they have signed.²⁴³ As an author of works made for hire, employers retain all exclusive rights prescribed in the Copyright Act. To be a work made for hire in this category, the work must be prepared by an employee within the scope of his or her employment.²⁴⁴ However, neither the text of the Copyright Act, nor its legislative history, makes any attempt to

²⁴⁰ See U.S.C.A. of 1976, 17 U.S.C. § 201(b).

²⁴¹ Nimmer & Nimmer, *supra* note 105, § 5.03.

²⁴² See U.S.C.A. of 1976, 17 U.S.C. § 101 (defining a “work made for hire” as: “(1) a work prepared by an employee within the scope of his or her employment; or, (2) a work specially ordered or commissioned for use as, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.”).

²⁴³ U.S.C.A. of 1976, 17 U.S.C. § 201(b).

²⁴⁴ See U.S.C.A. of 1976, 17 U.S.C. § 101.

clearly define the terms “employee” and “scope of employment.”²⁴⁵ To understand the complex concept of a work made for hire, it is necessary to refer not only to the statutory definition, but also court interpretations. In *Community for Creative Non-violence (CCNV) v. Reid*²⁴⁶ the Court established factors for work-for-hire analysis to be used in determining if an employer-employee relationship exists:

- (1) the hiring party’s right to control the manner and means by which the work is created;
- (2) the skill required to create the work; the source of instruments or tools used to create the work;
- (3) the location of the work;
- (4) the duration of the relationship between the parties;
- (5) whether the hiring party has the right to assign additional projects to the hired party;
- (6) the extent of the hired party’s discretion over when and how long to work;
- (7) the method of payment; the hired party’s role in hiring and paying assistants;

²⁴⁵ See *Saenger Organization, Inc. v. Nationwide Ins. Licensing Associates, Inc.*, 119 F.3d 55, 60 (1st Cir. 1997); *Brunswick Beacon, Inc. v. Schock-Hopchas Publishing Co.*, 810 F.2d 410, 413 (4th Cir. 1987).

²⁴⁶ *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989). The Community for Creative Non-Violence (CCNV) is a nonprofit organization dedicated to eliminating homelessness in America. In 1985, CCNV hired a sculptor named Reid to create a sculptural work as portion of an exhibit. Reid agreed to create the sculpture and received a \$3,000. Subsequently, twelve days after the due date, Reid delivered the sculpture and was paid the final \$15,000. After a month on display, the CCNV wanted to take the sculpture to other cities. Reid, who now had possession of the sculpture, objected, claiming it was too fragile. Both parties claimed copyright in the work. The Supreme Court held that the sculpture was not a work made for hire based on established factors because Reid was not an employee, as defined under law. Rather, Reid was an independent contractor.

- (8) whether the hiring party is in business;
- (9) whether the work is part of the regular business of the hiring party;
- (10) the provision of employee benefits; and
- (11) the tax treatment of the hired party.²⁴⁷

Assuming the creator of a work is found to be an employee, to infer the work-made-for-hire status, a court must determine whether the actual process of creating the work was within the employee's scope of employment. If it is found that the employee created the work while working within the scope of employment, the copyright initially resides with the employer, *de jure*.²⁴⁸

Factors used in determining the scope of employment include whether the creation of the work is within the employee's job description, whether the work is of a type traditionally created by a person in the employee's position, whether it was created during official hours on the employer's premises, using the employer's equipment, with the aid of the employer's support personnel, or using information available to the employee as part of the employee's employment, and whether the work was related to the employer's projects.²⁴⁹

Aside from the above, the parties are free to agree, specifying the ownership of the copyright pursuant to a written agreement signed by them.²⁵⁰ If an employee

²⁴⁷ Community for Creative Non-Violence, 490 U.S. at 751-52 (1989).

²⁴⁸ U.S.C.A. of 1976, 17 U.S.C. § 101, 201(b).

²⁴⁹ See Scherr v. Universal Match Corp., 417 F.2d 497, 500-01 (2d Cir. 1969); Food Lion, Inc. v. Capital Cities/ABC, Inc., 946 F. Supp. 420 (M.D. N.C. 1996), *aff'd*, 116 F.3d 472 (4th Cir, 1997) (undercover videotapes made by reporters while employed by grocery store were made outside the scope of employment and, therefore, did not constitute works made for hire).

²⁵⁰ U.S.C.A. of 1976, 17 U.S.C. § 201(b) (providing that "(b) Works Made for Hire. — In the case of a work made for hire, the employer or other person for whom the work was prepared is

wants to retain control of a specific work created during, and under the auspices of employment, he or she may do so by executing an agreement with the employer to confirm ownership.

B. Commissioned Works

Works commissioned by a commissioning party can be considered works made for hire only if the works fall into one of the specified categories listed below, and the parties have signed a contract expressly designating the work as made for hire.²⁵¹ If the two preceding conditions are not satisfied, the commissioned work is not a work made for hire, the commissioning party is not considered an author by law and the copyright renders to the independent contractor.²⁵²

The enumerated categories of commissioned works as a condition for works made for hire are the following:

- (1) as a contribution to a collective work;
- (2) as a part of a motion picture or other audiovisual work;
- (3) as a translation;

considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.”).

²⁵¹ U.S.C.A. of 1976, 17 U.S.C. § 101 (providing that “[A] ‘work made for hire’ is—
 (1) a work prepared by an employee within the scope of his or her employment; or,
 (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. For the purpose of the foregoing sentence, a ‘supplementary work’ is a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes, and indexes, and an ‘instructional text’ is a literary, pictorial, or graphic work prepared for publication and with the purpose of use in systematic instructional activities.”).

²⁵² See U.S.C.A. of 1976, 17 U.S.C. §§101, 201(b).

- (4) as a supplementary work (that is, a work prepared for publication as a supplement to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forewords, afterwards, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes, and indexes);
- (5) as a compilation;
- (6) as an instructional text (that is, a literary, pictorial, or graphic work prepared for use in day-to-day instructional activities, for example, a text book.);
- (7) as a test or as answer material for a test; or,
- (8) as an atlas.²⁵³

These enumerated categories apply only to works created by independent contractors. Under the current U.S.C.A., the copyright in any "commissioned" work created by an independent contractor on or after January 1, 1978, is presumed to be owned by the independent contractor. However, to qualify as commissioned work made for hire, the parties must sign an agreement.²⁵⁴

In summary of the work-made-for-hire rules under the U.S. copyright law, there are two methods for creating a work made for hire. The test should begin with the first method, the employer-employee relationship. The second method is the

²⁵³ *Id.* (Note that such works as photographs, computer programs, sound recordings and musical compositions are not included in these categories.). See *Lulirama Ltd, Inc. v. Axxess Broadcast Services, Inc.*, 128 F.3d 872 (5th Cir. 1997) (court held musical compositions and sound recordings did not fall within the statutory categories).

²⁵⁴ *Id.*

creation of commissioned works. If there is no employment relationship, the person creating the work is an independent contractor. The work will qualify as a work made for hire only if the work was specially ordered or commissioned, there is a signed agreement stating that it is a work made for hire, and the work falls within one of the statutorily enumerated categories.

§ 3.3.4.2. Thai Copyright Law

The *T.C.A.* B.E. 2537 prescribes rules for works made for hire in Section 9 and Section 10 for works created within the scope of employment and commissioned works respectively. The following sections demonstrate dissimilarities of methods and treatment provided under the current *T.C.A.* and the *U.S.C.A.*

A. Works Prepared by an Employee within the Scope of Employment

Section 9 of the *T.C.A.* states that copyright of the work created by an author-employee within the course of employment vests in that person unless it has been otherwise agreed in writing.²⁵⁵ However, the employer is entitled to communicate such work to the public in accordance with the purpose of employment. Contrary to Section 201(b) of the *U.S.C.A.*, the *T.C.A.* designates explicitly that copyright of a work made within the scope of employment resides in the employee who originally created the work.²⁵⁶

²⁵⁵ See *T.C.A.* B.E. 2537 (1994) § 9 (Thail.) (providing that “[C]opyright in the work created by the author in the course of employment vests in the author unless it has been otherwise agreed in writing; provided that the employer is entitled to communicate such work to public in accordance with the purpose of the employment.”).

²⁵⁶ See *U.S.C.A.* of 1976, 17 *U.S.C.* § 201(b) cf. *T.C.A.* B.E. 2537 (1994) § 9 (Thail.).

To determine whether a work was created within the course of employment, lawyers consult legal guidance outside the T.C.A., because there is no definition of relevant terms to shed light on employment status. Nevertheless, Section 575 of the Thai Civil and Commercial Code (TCCC) provides a foundation of relationship between “employee” and “employer.”²⁵⁷ Under the TCCC, “employment” is an agreement between two parties; one is called “employee,” and agrees to work for an “employer” who agrees to remunerate wages to the employee for a work period.²⁵⁸ For a work to be within the scope of employment, it is important that the type of a work must be within the range of activities relevant to an employee’s duties.²⁵⁹ For example, if a music publisher hires an employee to write songs without a specifying written agreement, the employee will own the songs he or she writes.

It is possible for an employer to retain control of a specific work created during the scope of employment. This can be done by executing an agreement with the employee confirming the ownership arrangement. Section 9 of the T.C.A. allows parties to agree otherwise, contrary to the prescribed designation of copyright ownership, by having the copyright of a work created within the scope of employment reside with the employer.²⁶⁰ Nonetheless, such agreement must be written and

²⁵⁷ Civil and Commercial Code B.E. 2535 (1992) § 575 (Thail.).

²⁵⁸ *Id.*

²⁵⁹ See Hemaratchata, *supra* note 20, Ch. 4.

²⁶⁰ T.C.A. B.E. 2537 (1994) § 9 (Thail.).

signed by both parties. Failure to complete the legal form incurs nullification of such agreement.²⁶¹

B. Commissioned Works

Commissioned works are considered another type of work made for hire. Section 10 of the T.C.A. regulates a legal consequence in regard to copyright in commissioned works. Under Section 10 of the T.C.A., copyright in a work created in the course of commission vests in the commissioning party, unless the parties have a written or oral agreement to the contrary.²⁶² The TCCC illustrates the relationship between a commissioning party and a contractor as an agreement between two parties of which one party called "contractor" agrees to complete a work for the other party called "commissioner," and within which the commissioner agrees to compensate for the work created.²⁶³

Regarding copyright of commissioned works, one characteristic that differentiates the T.C.A. from the U.S.C.A. is that the T.C.A. does not stipulate categories of commissioned works to retain copyright in a party for whom the work is made.²⁶⁴ Notably, Section 9 of the T.C.A. requires an agreement reserving rights in the employer, as contrary to the designation of the provision to be contained in a

²⁶¹ See Civil and Commercial Code B.E. 2535 (1992) §§ 9, 152 (Thail.).

²⁶² T.C.A. B.E. 2537 (1994) § 10 (Thail.).

²⁶³ Civil and Commercial Code B.E. 2535 (1992) § 587 (Thail.).

²⁶⁴ See T.C.A. B.E. 2537 (1994) § 10 (Thail.) *cf.* U.S.C.A. of 1976, 17 U.S.C. §§ 101, 201(b), *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-52 (1989).

written instrument signed by both parties.²⁶⁵ In contrast to the U.S. law which require the parties to sign a contract expressly designating the work as made for hire, such agreement stating in contrary to the designation of copyright in commissioned works by Section 10 of the T.C.A., as construed, can be made in either written or verbal agreement.²⁶⁶

§ 3.4. Exclusion of Copyright

§ 3.4.1. Unprotected Elements under the U.S. Copyright Law

Section 102(b) of the U.S.C.A. articulates what are not protected. It states the following:

“[I]n no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.”²⁶⁷

According to the foregoing provision, ideas, procedures, processes, systems, methods of operation, concepts, principles, and discoveries are excluded from U.S. copyright protection. This specific exclusion distinguishes the fields of copyright and

²⁶⁵ See T.C.A. B.E. 2537 (1994) § 9 (Thail.).

²⁶⁶ See T.C.A. B.E. 2537 (1994) § 10 (Thail.).

²⁶⁷ U.S.C.A. of 1976, 17 U.S.C. § 102(b).

patent law. In other words, these unprotected elements are the subject matter for patents, while the expression of ideas is governed by copyright law.²⁶⁸

In addition, under Section 105 of the U.S.C.A., government works are not protected by U.S. copyright even though they may be original to the author.²⁶⁹ A work prepared by an officer or employee of the U.S. government as part of that person's official duties cannot be protected by copyright. For instance, the text of judicial decisions is considered to be in the public domain and may be copied by any person at will.²⁷⁰

§ 3.4.2. Unprotected Elements under Thai Copyright Law

Similar to the U.S. copyright law, the T.C.A. excludes any idea or procedure, process or system or method of operation, concept, principle, discovery or scientific or mathematical theory from copyright protection.²⁷¹ Section 6 of the T.C.A. states “[c]opyright protection shall not extend to any idea or procedure, process or system or method of use or operation or concept, principle, discovery or scientific or mathematical theory.”²⁷²

²⁶⁸ See 35 U.S.C. § 101 (providing the subject matter of patent protection that “[W]hoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefore, subject to the conditions and requirements of this title.”).

²⁶⁹ See U.S.C.A. of 1976, 17 U.S.C. § 105 (providing that “[C]opyright protection under this title is not available for any work of the U.S. Government, but the U.S. Government is not precluded from receiving and holding copyrights transferred to it by assignment, bequest, or otherwise.”).

²⁷⁰ See *Matthew Bender & Co., Inc. v. West Publishing Co.*, 158 F.3d 674, 679 (2d Cir. 1998).

²⁷¹ See T.C.A. B.E. 2537 (1994) §6 (Thail.).

²⁷² *Id.*

The reasoning for excluding ideas from copyright protection can be illustrated by the Thai Supreme Court decision of Dika Court No. 2000/2543.²⁷³ In the *Dika*, the Court ruled that to monopolize the idea of drawing a picture could be prejudicial to humanity by preventing others from making more creative works under the same unprotected idea. Hence, copyright law does not protect ideas, but their expression.

In addition, Section 7 of the *T.C.A.* B.E.2537 enumerates the works which do not fall within the scope of protection granted by the Copyright Act are as follows:

- (1) news of the day and facts having the character of being merely information, which is not a work in the literary, scientific, or artistic domain;
- (2) constitution and legislation;
- (3) regulations, rules, notifications, orders, explanations and official correspondence of ministries, departments or any other government units;
- (4) judicial decisions, orders, rulings and official reports; and,
- (5) translations and compilations of those in (1) to (4) made by ministries, sub-ministries, departments or any other government units.²⁷⁴

The underlying rationale of the provision, in Sections 7(1) - (5) of the *T.C.A.*, which prohibits monopoly of exclusive rights in those works is that they are vital and useful information for national development, and consequently, it is thought Thai

²⁷³ See Attorney General v. Ngamjit Somsakraksinti, San Dika (Supreme Court) No. 2000/2543 (Thail.)(ruling in the case where the drawing of a cartoon picture (Winnie the Pooh) was copyrighted by Disney Enterprises, Inc., U.S.).

²⁷⁴ See *T.C.A.* B.E. 2537 (1994) §7 (Thail.).

nationals should have access to them.²⁷⁵ For example, under Thai copyright law, any person is allowed to take legal texts from legislation that was published in the *Government Gazette* and reproduce them for distribution because legislation is excluded from copyright protection under Section 7(2) of the T.C.A.

§ 3.5. Exclusive Rights in a Copyrighted Work

§ 3.5.1. Exclusive Rights under the Berne Convention and the TRIPs Agreement

As discussed in Chapter II, both the U.S. and Thailand are member parties to the two most widely adopted copyright protection treaties, namely the *Berne Convention for the Protection of Literary and Artistic Works* (Berne Convention)²⁷⁶ and the *Agreement on Trade Related Aspect of Intellectual Property Rights* (TRIPs Agreement).²⁷⁷ The Berne Convention, as incorporated into the TRIPs Agreement, provides the major source of international protection of copyrights.²⁷⁸ These treaties introduced a set of standards for exclusive rights in a copyright work that member states must grant to the author (or the author's assignees). Nonetheless, member nations are permitted to grant greater protection in excess of the minimum standards

²⁷⁵ Hemaratchata, *supra* note 20, Ch. 7.

²⁷⁶ Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886 amended Oct. 2, 1979, 828 U.N.T.S. 221 [hereinafter Berne Convention].

²⁷⁷ Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, Dec. 15, 1993, 33 I.L.M. 81 (1994) [hereinafter TRIPs Agreement].

²⁷⁸ See TRIPs Agreement, art. 9.1 (stating that "[M]embers shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto.").

set by the Berne Convention.²⁷⁹ The exclusive rights prescribed in the Berne Convention include the protection of the rights of reproduction, translation, adaptation, distribution, public performance, public recitation, broadcasting, and filming.²⁸⁰

Like the Berne Convention, the TRIPs Agreement sets out basic international standards for copyright protection. In addition to exclusive rights mandated under the Berne Convention, the TRIPs Agreement includes rental rights to be protected at least in computer programs and cinematographic works.²⁸¹ Article 11 of TRIPs attributes to the authors and their successors in title, the right to authorize, or prohibit the commercial rental, to the public of originals or copies of their copyright works, when these works are computer programs or cinematographic works;²⁸² however, the institution of this protection is not stressed similarly for these two kinds of works.

Member states may allow commercial rental for cinematographic works, if such rental does not have a widespread effect that could materially impair the exclusive right of reproduction. For the rental right of computer programs, the program itself must be the essential object of the rental as articulated at the last phrase

²⁷⁹ See e.g., Berne Convention, *supra* note 627, art. 7(6) (providing that “[T]he countries of the Union may grant a term of protection in excess of those provided by the preceding paragraphs.”).

²⁸⁰ See Berne Convention, *supra* note 66, arts. 8, 9, 11, 12, 14.

²⁸¹ TRIPs Agreement, *supra* note 73, art. 11 (stating “[I]n respect of at least computer programs and cinematographic works, a Member shall provide authors and their successors in title the right to authorize or to prohibit the commercial rental to the public of originals or copies of their copyright works. A Member shall be excepted from this obligation in respect of cinematographic works unless such rental has led to widespread copying of such works which is materially impairing the exclusive right of reproduction conferred in that Member on authors and their successors in title. In respect of computer programs, this obligation does not apply to rentals where the program itself is not the essential object of the rental.”).

²⁸² *Id.*

of Article 11.²⁸³ Therefore, an electronic watch programmed with software, for example, is outside the scope of rental rights under the TRIPs Agreement, because the computer program installed in the watch is not the essential object of the rental purpose.

The TRIPs Agreement is not dedicated to copyright protection alone, but encompasses patent and trademark protection as well.²⁸⁴ Notably, the exclusive rights, imbedded in the Berne Convention and the TRIPs Agreement, are substantially similar to those rights granted by Section 106 of the U.S.C.A. of 1976 and Section 15 of the *T.C.A.* B.E. 2537. The exclusive rights under the U.S.C.A. and the *T.C.A.* are discussed below.

§ 3.5.2. Exclusive Rights under U.S. Copyright Law

Section 106 of the U.S.C.A. of 1976 provides a bundle of exclusive rights to an author of a work originating in the U.S.²⁸⁵ These exclusive rights, including the right to reproduce, adapt, distribute, perform, and display are granted for an author to

²⁸³ *Id.*

²⁸⁴ *See generally*, TRIPs Agreement, *supra* note 22.

²⁸⁵ U.S.C.A. of 1976, 17 U.S.C. § 106 (stating that “[E]xclusive rights in copyrighted works Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:
 (1) to reproduce the copyrighted work in copies or phonorecords;
 (2) to prepare derivative works based upon the copyrighted work;
 (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
 (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
 (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and,
 (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.”).

commercially exploit a work. If one of these rights is exercised by anyone without authorization from the copyright owner, that person has infringed the copyright of the work and can be held liable for copyright infringement. Nevertheless, these exclusive rights can be limited by Sections 107 through 120 of the U.S.C.A., whose features will be later discussed in § 3.6.2. of this dissertation.

The first exclusive right granted under Section 106 of the U.S.C.A. is a reproduction right.²⁸⁶ Generally, a copyright holder has the right to prohibit an unauthorized reproduction of his or her work. A work is reproduced when it, or a substantial portion of it, is copied and fixed in a tangible form. For instance, a book can be reproduced by means of photo copy, or by scanning and placing it on a computer file. The right to prepare derivative works, known as “the right to adapt a work,” is the second right provided under Section 106.²⁸⁷ A derivative work is a work based upon one or more preexisting works.²⁸⁸ The right to prepare derivative works extends to all media and includes adaptations, abridgments, translations, and any substantial modification of the preexisting work.

Thirdly, an author of a copyright work has the right to control distribution of the work to the public whether by sale or other transfer of ownership, or by rental, lease, or lending.²⁸⁹ The U.S.C.A. of 1976 only lists the types of distribution covered such as sale, rental, lease, and lending, but does not specifically define the term

²⁸⁶ U.S.C.A. of 1976, 17 U.S.C. § 106(1).

²⁸⁷ U.S.C.A. of 1976, 17 U.S.C. § 106(2).

²⁸⁸ See U.S.C.A. of 1976, 17 U.S.C. § 101.

²⁸⁹ U.S.C.A. of 1976, 17 U.S.C. § 106(3).

“distribution of the work to the public.” Because of the Act’s failure to elaborate on the meaning of “distribute,” Congress has implicitly left the task of interpreting its meaning to the courts. One federal appellate court has attempted to define the “distribution” right in the infringement context. In *National Car Rental System, Inc. v. Computer Associates International, Inc.*,²⁹⁰ the U.S. Court of Appeals for the Eighth Circuit held that an infringement of the distribution right requires an actual dissemination of either copies or phonorecords.²⁹¹

One court held that making a work available to the public constituted “distribution” of the work.²⁹² Furthermore, the term “distribution” in Section 106(3) is considered to include only circulation or dissemination either to a substantial number of persons or to a substantial portion of the market for the work.²⁹³ Thus, distribution to a limited group of persons for a limited purpose, and not to the public

²⁹⁰ *National Car Rental System, Inc. v. Computer Associates International, Inc.*, 991 F.2d 426 (8th Cir. 1993). In *National Car Rental*, the court ruled that dissemination did not occur when National Car Rental, without authorization, allowed third parties to use Computer Associates International's program. The third parties were not given unauthorized copies of the program, but, instead, were allowed to use the program while National Car Rental retained possession of the program. The court ruled that the use of the program without actual distribution may have breached a licensing agreement, but did not amount to a copyright violation.

²⁹¹ *See id.* at 434.

²⁹² *See Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199 (4th Cir. 1997) (listing a copyrighted work in library's catalog system and adding it to library's collection caused the work available to the public and, therefore, constituted “distribution” of the work).

²⁹³ *See Nimmer & Nimmer, supra* note 105, § 8.11[A].

at large, would not infringe the copyright.²⁹⁴ The right to distribute a work to the public is also known as “the right to publish a work” or “publication right.”²⁹⁵

The fourth exclusive right under Section 106 of the U.S.C.A. is the right to perform a copyrighted work publicly in case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works.²⁹⁶ This right is also called the right of public performance. To clarify right of public performance, the terms “to perform” and “to perform a work publicly” are defined in the U.S.C.A. Section 101 of the Act provides the meaning of the term “to perform” as “to recite, render, play, dance or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.”²⁹⁷ Performing a work “publicly” means there is performance of the work where the public is gathered, or the work is transmitted or otherwise communicated to the public.²⁹⁸

The right to display a copyright work is prescribed in Section 106 as a fifth exclusive right.²⁹⁹ The right to display a work is similar to the right to perform a work in that both require a public gathering. The difference is that the work that can

²⁹⁴ *Id.*

²⁹⁵ Stim, *supra* note 22, at 42.

²⁹⁶ U.S.C.A. of 1976, 17 U.S.C. § 106(4).

²⁹⁷ U.S.C.A. of 1976, 17 U.S.C. § 101.

²⁹⁸ *Id.*

²⁹⁹ U.S.C.A. of 1976, 17 U.S.C. § 106(5).

be performed cannot, by its nature, be displayed. Section 106(5) articulates types of work that can be displayed, which are literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work. Contrary to the right of public performance, certain works subject to the right of public performance, such as a movie, is performed and cannot be displayed because the primary intent, of its sequence of images and sounds, is made for performance.

The last exclusive right under Section 106 is the right to perform the copyrighted work publicly by means of a digital audio transmission.³⁰⁰ From the moment that sound recordings first were granted statutory copyright protection in 1972,³⁰¹ the copyright owner had enjoyed no right to control the public performance of sound recordings under the U.S.C.A.³⁰² Consequently, Congress added a new sixth right to the Copyright Act in 1995, especially for sound recordings.³⁰³ This right, unlike the five preceding rights, is limited to one type of work, sound recordings. Unlike the other five rights, it is not a general publication right; instead, it is limited to the domain of "digital audio transmission" in sound recordings.

³⁰⁰ U.S.C.A. of 1976, 17 U.S.C. § 106(6).

³⁰¹ Act of Oct. 15, 1971, Pub. L. 92-140, 85 Stat. 391 (effective February 15, 1972).

³⁰² See Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 8.14[A] (1996).

³⁰³ Digital Performance Right in Sound Recordings Act, Pub. L. No. 104-39, 109 Stat. 336 (1995). The Act added a subsection to U.S.C.A. of 1976, 17 U.S.C. § 106 that gives copyright owners the right, "in the case of sound recordings, to perform [or authorize] the copyrighted work publicly by means of a digital audio transmission." *Id.*

“Digital transmission” is defined as a transmission, in whole or in part, in a digital or other non-analog format.³⁰⁴ Any other non-analog format, from the preceding definition, refers to any form other than digital format that might currently exist or be developed in the future.³⁰⁵ For instance, AM/FM broadcasts or other analog performances are not digital public performance. The U.S.C.A. specifically provides definition of the term “digital audio transmission” (within the scope of exclusive rights in sound recordings) as a digital transmission that embodies the transmission of a sound recording. This term does not include the transmission of any audiovisual work.³⁰⁶ A transmission is a communication received beyond the place from which it is sent and does not include live public performances in restaurants, night clubs or music players.³⁰⁷ Notably, a transmission within the scope of Section 106(6) can be either an initial transmission or a retransmission.³⁰⁸

Even though certain digital audio transmissions committed without an authorization from the copyright owner in sound recordings may constitute copyright infringement, they are exempt from liability if they fall into limitations on the

³⁰⁴ U.S.C.A. of 1976, 17 U.S.C. § 101, added by Act of Nov. 1, 1995, Pub. L. 104-39, § 5(a), 109 Stat. 336.

³⁰⁵ See H. Rep. (Digital Performance Right in Sound Recordings Act), p. 25.

³⁰⁶ U.S.C.A. of 1976, 17 U.S.C. § 114(j)(5).

³⁰⁷ Ronald H. Gertz, *Music on the Internet: Understanding the New Rights & Solving New Problems*, 640 PLI/Pat 125, 128 (2001).

³⁰⁸ U.S.C.A. of 1976, 17 U.S.C. § 114(j)(15).

exclusive right in Section 114(d) of the U.S.C.A.³⁰⁹ These exemptions are matters of specific enumeration to the extent that if an activity falls within one of them, it is then exempt. This exemption is generally the act pertaining to sound recordings occurring as a part of a non-interactive and non-subscription service.³¹⁰ For example,

³⁰⁹ This exemption extends solely to the right of public performance via digital audio transmission. To the extent that any other right is implicated (reproduction, distribution, etc.), the instant limitations are unavailing. U.S.C.A. of 1976, 17 U.S.C. § 114(d)(4)(C) ("Any limitations in this section on the exclusive right under section 106(6) apply only to the exclusive right under section 106(6) and not to any other exclusive rights under section 106.").

³¹⁰ U.S.C.A. of 1976, 17 U.S.C. § 114(d)(1) (providing that "(d) Limitations on Exclusive Right.— Notwithstanding the provisions of section 106 (6)—

(1) Exempt transmissions and retransmissions.— The performance of a sound recording publicly by means of a digital audio transmission, other than as a part of an interactive service, is not an infringement of section 106 (6) if the performance is part of—

(A) a nonsubscription broadcast transmission;

(B) a retransmission of a nonsubscription broadcast transmission: Provided, That, in the case of a retransmission of a radio station's broadcast transmission—

(i) the radio station's broadcast transmission is not willfully or repeatedly retransmitted more than a radius of 150 miles from the site of the radio broadcast transmitter, however—

(I) the 150 mile limitation under this clause shall not apply when a nonsubscription broadcast transmission by a radio station licensed by the Federal Communications Commission is retransmitted on a nonsubscription basis by a terrestrial broadcast station, terrestrial translator, or terrestrial repeater licensed by the Federal Communications Commission; and

(II) in the case of a subscription retransmission of a nonsubscription broadcast retransmission covered by subclause (I), the 150 mile radius shall be measured from the transmitter site of such broadcast retransmitter;

(ii) the retransmission is of radio station broadcast transmissions that are—

(I) obtained by the retransmitter over the air;

(II) not electronically processed by the retransmitter to deliver separate and discrete signals; and

(III) retransmitted only within the local communities served by the retransmitter;

(iii) the radio station's broadcast transmission was being retransmitted to cable systems (as defined in section 111 (f)) by a satellite carrier on January 1, 1995, and that retransmission was being retransmitted by cable systems as a separate and discrete signal, and the satellite carrier obtains the radio station's broadcast transmission in an analog format: Provided, That the broadcast transmission being retransmitted may embody the programming of no more than one radio station; or

(iv) the radio station's broadcast transmission is made by a noncommercial educational broadcast station funded on or after January 1, 1995, under section 396(k) of the Communications Act of 1934 (47 U.S.C. 396 (k)), consists solely of noncommercial educational and cultural radio programs, and the retransmission, whether or not simultaneous, is a nonsubscription terrestrial broadcast retransmission;

or

(C) a transmission that comes within any of the following categories—

(i) a prior or simultaneous transmission incidental to an exempt transmission, such as a feed received by and then retransmitted by an exempt transmitter: Provided, That such incidental transmissions do not include any subscription transmission directly for reception by members of the public;

(ii) a transmission within a business establishment, confined to its premises or the immediately surrounding vicinity;

(iii) a retransmission by any retransmitter, including a multichannel video programming distributor as defined in section 602(12) [1] of the Communications Act of 1934 (47 U.S.C. 522 (12)), of a transmission by a transmitter licensed to publicly perform the sound recording as a part of that

the webcaster of sound recordings transmissions on the Internet is exempt from a legal obligation to seek authorization from copyright owners of sound recordings (usually record companies) provided that the radio stream does not provide an interactive service and is a non-subscription (free) service subject to Section 114(d) of the Copyright Act.³¹¹ Although non-interactive webcasting services can now obtain a compulsory license to stream music to the public by meeting certain requirements, they must still pay public performance fees to sound recording owners.³¹² Such license for digital audio transmission of sound recordings can be obtained from Sound Exchange, Inc. through their website at www.soundexchange.com.³¹³

§ 3.5.3. Exclusive Rights under Thai Copyright Law

Thai copyright holders are entitled to exclusive rights granted by Section 15 of the *T.C.A. B.E. 2537*. Under the Act, those exclusive rights include:

- “(1) the right of reproduction or adaptation;
- (2) the right of communication to public;
- (3) the right of letting for hire of the original or the copies of a computer program, an audio-visual work, a cinematographic work and a sound recording;

transmission, if the retransmission is simultaneous with the licensed transmission and authorized by the transmitter; or

(iv) a transmission to a business establishment for use in the ordinary course of its business: Provided, That the business recipient does not retransmit the transmission outside of its premises or the immediately surrounding vicinity, and that the transmission does not exceed the sound recording performance complement. Nothing in this clause shall limit the scope of the exemption in clause (ii).”.

³¹¹ An actual example of this type of exemption of the right to perform the copyrighted work publicly by means of a digital audio transmission is the website “accuradio.com.”

³¹² U.S.C.A. of 1976, 17 U.S.C. § 114(d)(1).

³¹³ See Joshua P. Binder, *Current Developments of Public Performance Rights for Sound Recordings Transmitted Online: You Push Play, But Who Gets Paid?*, 22 *Loy. L.A. Ent. L. Rev.* 1, 18 (2001).

- (4) the right of giving benefits accruing from the copyright to other persons; and,
- (5) the right of licensing the rights mentioned in (1), (2), or (3) with or without conditions, provided that such conditions shall not unfairly restrict the competition.”³¹⁴

The right of reproduction or adaptation is the first exclusive right prescribed in Section 4 of the T.C.A. This right is exclusive for copyright owners to control the reproduction and adaptation of their copyrighted works.³¹⁵ Comparatively, this right under the T.C.A. is stated in Section 106(1) and 106(2) of the U.S.C.A. respectively.³¹⁶ Under the T.C.A., “reproduction” is defined broadly in Section 4 of the *T.C.A.* B.E. 2537 to include any method of copying, imitating, duplicating, molding, sound recording, video recording, or audio and video recording of the essential part of an original, copy, or publication whether in whole or in part. Moreover, the Act specifically defines “reproduction” with respect to computer programs, as duplicating or copying the program from any medium of the essential part with any method, without a manner of creating a new work, whether in whole or in part.³¹⁷ The reproduction right defined under the T.C.A. is similar to that of the 1976 U.S. Act in that it applies to all categories of copyright work under the U.S. Act.

³¹⁴ See T.C.A. B.E. 2537 (1994) §15 (Thail.).

³¹⁵ T.C.A. B.E. 2537 (1994) § 15(1) (Thail.).

³¹⁶ See Figure 5 (showing a comparison of exclusive rights under the U.S.C.A. and the T.C.A.).

³¹⁷ T.C.A. B.E. 2537 (1994) § 4 (Thail.).

The right of adaptation means the right to control adaptation of a copyrighted work. The T.C.A. provides the definition of “adaptation” as a reproduction by transformation, improvement, modification or emulation of the essential part of an original work, and not being in the nature of making a new work whether in whole or in part.³¹⁸ This same right is also found in and substantially similar to Section 106(2) of the 1976 U.S.C.A.

The second exclusive right under Section 15 of the *T.C.A.* B.E. 2537 is the right of communication to the public.³¹⁹ “Communication to the public” within the scope of the T.C.A. means making the work available to the public by means of performing, lecturing, preaching, playing of music, causing perception by sound or image, constructing, distributing or by any other means.³²⁰ Comparably, the right of communication to the public under the T.C.A. is defined broadly equivalent to the rights to distribute, perform, and display certain categories of copyright work under the U.S.C.A.³²¹ The right of communication to the public under the T.C.A. applies to all categories of copyrighted work.

The next exclusive right under Section 15 of the *T.C.A.* B.E. 2537 is the rental right for computer programs, audiovisual works, cinematographic works, and sound recordings. This exclusive right is comparable to the right to distribute copyright work publicly by rental in Section 106(3) of the U.S.C.A. It is notable that the rental

³¹⁸ *Id.*

³¹⁹ T.C.A. B.E. 2537 (1994) § 15(2) (Thail.).

³²⁰ T.C.A. B.E. 2537 (1994) § 4 (Thail.).

³²¹ Compare T.C.A. B.E. 2537 (1994) § 15(2) (Thail.) with U.S.C.A. of 1976, 17 U.S.C. § 106(3),(4),(5).

right under the T.C.A. expands exclusively to only four types of copyrighted work, namely computer programs, audiovisual works, cinematographic works, and sound recordings. Therefore, books can be rented freely to the Thai public. On the other hand, the rental right under the U.S.C.A. is subsumed in the right of distribution to the public in Section 106(3),³²² which applies to all categories of copyright work. However, the rights in the preceding sentence are limited by the "first sale" doctrine of the U.S. copyright law, whose scope will be discussed further in § 3.6.2.1 of this dissertation.

The fourth exclusive right of copyright owners under Section 15 of the T.C.A. is the right to give benefits accruing from the copyright to other persons.³²³ For example, a copyright owner may give monetary benefit derived from the royalties of his copyrighted work to any person. The right of giving benefits includes the author devising royalties to heirs by means of a will.

The last exclusive right under Section 15 of the T.C.A. is the right of licensing the rights mentioned in subsection (1), (2), and (3).³²⁴ Under Section 15(5) of the T.C.A., copyright owners can negotiate license agreements with other persons to reproduce, to adapt, to distribute, to perform, to display, or to rent his or her work. The licensing agreement under Section 15(5) of the Act may contain conditions on the use of copyright. The said conditions, however, shall not unfairly restrict the competition. Whether the conditions, as mentioned in sub-section (5) of paragraph

³²² Compare T.C.A. B.E. 2537 (1994) § 15(3) (Thail.) with U.S.C.A. of 1976, 17 U.S.C. § 106(3). See also Figure 5 (showing a comparison of exclusive rights under the U.S.C.A. and the T.C.A.).

³²³ T.C.A. B.E. 2537 (1994) § 15(4) (Thail.).

³²⁴ T.C.A. B.E. 2537 (1994) § 15(5) (Thail.).

one are unfair restrictions of competition, are considered in accordance with the rules, methods and conditions set forth in the Ministerial Regulation.³²⁵

In conclusion, exclusive rights under the T.C.A. are granted to copyright owners on a par with those provided under the U.S.C.A. The legislation of both countries on the matter of exclusive rights differs only on the fashion of language which has been developed through their revisions over time under an obligation to international agreements to which both countries are parties.

§ 3.6. Copyright Exception

In the previous section discussed issues pertaining to U.S. and Thailand copyright law, and copyright owner's rights. This section discusses the rights of the public, particularly the rights of the purchaser of a copy and the rights of a person who wants to use a portion of a copyrighted work. The Berne Convention and the TRIPs Agreement provide guidance for contracting states to follow international standards that govern public rights in copyright. The U.S. and Thailand as parties to both treaties comply with those standards by implementing principles of copyright exception under their respective legislation. The exceptions of copyright under the laws of both countries will be discussed and compared below.

§ 3.6.1. Copyright Exceptions under the Berne Convention and the TRIPs Agreement

The Berne Convention and the TRIPs Agreement stipulate possibilities for contracting parties limit copyright protection under certain conditions. The TRIPs Agreement establishes certain exceptions in relation to the protection of copyright and

³²⁵ *Id.*

related rights. Article 13 of the TRIPs Agreement allows the member states to establish limitations or exceptions to exclusive rights in special cases that do not conflict with the normal exploitation of the work and that do not unreasonably prejudice the legitimate interests of the right holder.³²⁶

Noticeably, the provision in Article 13 of the TRIPs Agreement allows broader exceptions than those which are allowed by Article 9(2) of the Berne Convention. Article 9(2) of the Convention refers only to the possibility of allowing “the reproduction” of protected works,³²⁷ whereas, Article 13 of the TRIPs Agreement includes other exclusive rights, for example, the right of reproduction, the right of adaptation, and the right of public performance and of communication to the public, all of which are granted to the right holder. With regard to the rights of performers, producers of phonograms and broadcasting organizations, Article 14.6 provides that any member state may provide for conditions, limitations, exceptions, and reservations to the extent permitted by the Rome Convention of 1961.³²⁸

³²⁶ TRIPs Agreement, *supra* note 73, art. 13 (stating that “[M]embers shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.”).

³²⁷ *See* Berne Convention, *supra* note 66, at art. 9(2) (stating that “[I]t shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.”).

³²⁸ International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Oct. 26, 1961 [hereinafter Rome Convention]. The convention is jointly administered by WIPO, UNESCO and the International Labor Office (“ILO”). *See* Rome Convention, art. 15, *id.* (stating that “[A]ny Contracting State may, in its domestic laws and regulations, provide for exceptions to the protection guaranteed by this Convention as regards:

- (a) private use;
- (b) use of short excerpts in connection with the reporting of current events;
- (c) ephemeral fixation by a broadcasting organization by means of its own facilities and for its own broadcasts;
- (d) use solely for the purposes of teaching or scientific research.”).

However, the exceptions in Article 13 and Article 14.6 of the TRIPs Agreement must be read in conjunction with the preamble and the principle stated in Article 8. These provisions permit member states to adopt measures necessary to promote the public interest in areas vital to their socio-economic and technological development. Consequently, socio-economic development may be asserted by any member state in establishing an exception of exclusive rights.

The main goal of the TRIPs Agreement is: “to reduce distortions and impediments to international trade, taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade.”³²⁹ Furthermore, while copyright is “private rights,” the public policy objectives of national systems for the protection of copyrighted matter include developmental and technological objectives.³³⁰

§ 3.6.2. Copyright Exceptions under U.S. Copyright Law

“First sale” and “fair use” doctrines are the main sources of copyright exception under the U.S. copyright law. Both doctrines will form the basis of the following discussion.

§ 3.6.2.1. First Sale Doctrine

Section 202 of the U.S.C.A. emphasizes that a copyright owner retains his or her rights upon sale of a work, even though he or she no longer owns the actual

³²⁹ TRIPs Agreement, *supra* note 73, Preamble.

³³⁰ *Id.* (Under the Preamble, the parties also recognize that “the underlying public policy objectives of national systems for the protection of intellectual property, including developmental and technological objectives.”).

physical copy because ownership of a copyright is separate from ownership of the material object in which the work is embodied.³³¹ For instance, when a person purchases a book, he only owns the physical copy he bought, not the copyright of the book. In general, all copyrights contain exclusive reproduction, adaptation, and public distribution rights under Section 106 of the Copyright Act.³³² Furthermore, the right of public distribution gives copyright owners the right to control the first public distribution of their copyright works.³³³

The right of distribution, an exclusive right of copyright owners, is limited by the "first sale" doctrine.³³⁴ Under this doctrine, a copyright owner has the right to control the first public distribution of an authorized copy or phonorecord of the work, whether by sale or other transfer of ownership, or by rental, lease, or lending arrangement.³³⁵ The doctrine allows the owner of a legally manufactured copyrighted product to dispose of the item without the permission of the copyright owner. After a copyrighted product is sold for the first time, the copyright owner loses to the public exclusive control over the publication or distribution of that

³³¹ U.S.C.A. of 1976, 17 U.S.C. § 202.

³³² U.S.C.A. of 1976, 17 U.S.C. § 106.

³³³ H.R.Rep. No. 1476, 94th Cong., 2d Sess. 161 (1976), at 62, reprinted in 1976 U.S.C.C.A.N. 5659, 5777.

³³⁴ See U.S.C.A. of 1976, 17 U.S.C. § 109(a) (1988) (stating "[N]otwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.").

³³⁵ See *Burwood Co. v. Marsel Mirror & Glass Products, Inc.*, 468 F. Supp. 1215 (N.D. Ill. 1979).

particular copy of the product.³³⁶ Typical practices of the first sale doctrine in every day life include, for example, the rental of a videocassette, the display of a copyrighted painting, and the resale of a previously owned phonorecord.

Nevertheless, there are exceptions to the first sale doctrine. The first sale doctrine does not permit the rental of computer programs or sound recordings.³³⁷ Notably, the doctrine only applies to the owner of the copy. The person, who possesses the copy but does not own it, cannot assert the doctrine.³³⁸ For instance, a video-store owns lawfully made videocassette copies of movies and can rent them to an individual, who cannot in turn, rent it to someone else.

§ 3.6.2.2. Fair Use Doctrine

Under the U.S. "fair use" doctrine, a defendant may avoid liability if he or she can prove his or her use was reasonably based on statutory criteria and the criteria developed by case law. Furthermore, a person can use others' copyrights in the way that is fair to public interest. The U.S. "fair use" doctrine was first recognized in *Folsom v. Marsh* before the Massachusetts Circuit Court in 1841.³³⁹ In this case, the

³³⁶ *Id.*

³³⁷ See U.S.C.A. of 1976, 17 U.S.C. 109(b)(1)(A) (stating "[N]otwithstanding the provisions of subsection (a), unless authorized by the owners of copyright in the sound recording or the owner of copyright in a computer program (including any tape, disk, or other medium embodying such program), and in the case of a sound recording in the musical works embodied therein, neither the owner of a particular phonorecord nor any person in possession of a particular copy of a computer program (including any tape, disk, or other medium embodying such program), may, for the purposes of direct or indirect commercial advantage, dispose of, or authorize the disposal of, the possession of that phonorecord or computer program (including any tape, disk, or other medium embodying such program) by rental, lease, or lending, or by any other act or practice in the nature of rental, lease, or lending.").

³³⁸ *See id.*

³³⁹ *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841).

owner and editor of a multi-volume collection of George Washington's letters sued Charles Upham for using a substantial part of the letters in a book about Washington's life. Justice William Story found that Upham had infringed the owner's copyright in publishing 350 pages of Washington's letters in a 866-page book.

Upham argued that Washington's letters were not "proper subjects of copyright" because their publication would not harm the deceased author, and because they were not literary in nature. The court disagreed and held that letter writers and their designated heirs, not the persons to whom the letters are addressed, possess copyright in the letters they have written, no matter what the content. In explaining the nature of the infringement, Justice Story said, "It is certainly not necessary, to constitute an invasion of copyright, that the whole of a work should be copied, or even a large portion of it, in form or in substance. If so much is taken, that the value of the original is sensibly diminished, or the labors of the original author are substantially to an injurious extent appropriated by another, that is sufficient, in point of law, to constitute a piracy *pro tanto*."³⁴⁰

Justice Story further explained that, "the question of piracy, often depends upon a nice balance of the comparative use made of one of the materials of the other; the nature, extent, and value of the materials thus used; the objects of each work; and the degree to which each writer may be fairly presumed to have resorted to the same common sources of information, or to have exercised the same common diligence in the selection and arrangement of the materials."³⁴¹

340 *Id.*

341 *Id.* at 344.

The revision of the U.S.C.A. in 1976 was the first time that the “fair use” doctrine was codified. The U.S.C.A. defines “fair use” in Section 107 of the Act of 1976 with four criteria. This section provides an exception to the exclusive rights of owners to make and distribute copies of their works. It states that “the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.”³⁴²

To determine whether the use of a work is a fair use, the following four factors are to be considered: purpose and character of the use; nature of the copyrighted work; the amount and substantiality of the portion used in relation to the whole; and, the effect of the use on the potential market.³⁴³ It is well established that the list of potentially fair uses to be considered in determining “fair” is illustrative rather than exhaustive.³⁴⁴

The first criterion under Section 107 is the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes. That is, the more commercial the use, the more likely the use is unfair.³⁴⁵ The second criterion is the creative nature of copyrighted work. That is, the more

³⁴² See U.S.C.A. of 1976, 17 U.S.C. § 107.

³⁴³ *Id.*

³⁴⁴ H.R. No. 94-1476, at 66 (1976).

³⁴⁵ See U.S.C.A. of 1976, 17 U.S.C. § 107(1); See also *American Geophysical Union v. Texaco, Inc.*, 802 F. Supp. 1, 24 (S.D.N.Y. 1992), aff'd, 60 F.3d 913 (2nd Cir. 1994), cert. dismissed, 516 U.S. 1005 (1995).

creative and the less informational the work, the less the use is fair.³⁴⁶ The third criterion is the amount and substantiality of the portion used in relation to the copyrighted work as a whole.³⁴⁷ The last criterion under Section 107 is the effect of the unrestricted and widespread use upon the potential market for, or value of, the copyrighted work.³⁴⁸ Notably, all of these factors must be considered; the last factor, however, is given the most weight.³⁴⁹

As shown in the notable 1994 case, *Campbell v. Acuff-Rose Music Inc.*, copyright exception, or fair use, under the U.S. copyright law is not limited to educational uses.³⁵⁰ In this case, the Supreme Court ruled that 2 Live Crew's parody of Roy Orbison's song, *Pretty Woman*, was a fair use. The court found that a commercial use could be a fair use especially when the markets for an original work and a transformative work are different.

In response to the advancement of information technology, which has complicated the legal use of copyright, the Working Group on Intellectual Property Rights sponsored the Conference on Fair Use (CONFU) in 1994. CONFU was the venue for discussing the "fair use" in the electronic environment issue. CONFU

³⁴⁶ See U.S.C.A. of 1976, 17 U.S.C. § 107(2); See also *Harper & Row Publishers v. Nation Enterprises*, 471 U.S. 539, 563 (1985).

³⁴⁷ See U.S.C.A. of 1976, 17 U.S.C. § 107(3); See also *Sony Corporation of America v. Universal City Studios*, 464 U.S. 417, 450 n.30 (1984) (copying entire work ordinarily militates against the finding of fair use). *Id.* at 449-50.

³⁴⁸ See U.S.C.A. of 1976, 17 U.S.C. § 107(4); See also *Campbell v. Acuff-rose Music*, 510 U.S. 569, 590 (1994).

³⁴⁹ See *Sega Enters. v. MAPHIA*, 948 F. Supp. 923, 935 (N.D. Cal. 1996).

³⁵⁰ *Campbell v. Acuff-Rose Music Inc.*, 114 S. Ct. 1164, 1168 (1994). Orbison and Dees were credited on the album as the authors of the song *Pretty Woman*, and Acuff-Rose was credited as publisher in the 2 Live Crew album, *As Clean As They Wanna Be* (Luke Records 1989).

participants developed guidelines for fair use of educational multimedia, and proposed guidelines in a number of areas, including interlibrary loan, electronic reserves, digital images, and distance education. The final report of the Conference states clearly that fair use was alive and well in the digital age, and concluded that attempts to draft widely supported guidelines would be complicated by the often competing interests of the copyright owner and user communities.

In addition to the "fair use" exception in Section 107, librarians can raise copyright exception to excuse potential infringements under Section 108 of the Act which allows librarians to reproduce an entire copyrighted work in order to maintain records.³⁵¹ In 1976, Congress appointed the National Commission on New Technological Uses of Copyrighted Works (CONTU) to establish guidelines for the "minimum standards of educational use" under the 1976 U.S.C.A. The CONTU guidelines were designed to assist librarians and copyright proprietors in understanding the amount of photocopying allowable for use in interlibrary loan arrangements permitted under the copyright law.

³⁵¹ See U.S.C.A. of 1976, 17 U.S.C. § 108 (stating "[E]xcept as otherwise provided in this title and notwithstanding the provisions of section 106, it is not an infringement of copyright for a library or archives, or any of its employees acting within the scope of their employment, to reproduce no more than one copy or phonorecord of a work, except as provided in subsections (b) and (c), or to distribute such copy or phonorecord, under the conditions specified by this section, if—
(1) the reproduction or distribution is made without any purpose of direct or indirect commercial advantage;
(2) the collections of the library or archives are
(i) open to the public, or
(ii) available not only to researchers affiliated with the library or archives or with the institution of which it is a part, but also to other persons doing research in a specialized field; and
(3) the reproduction or distribution of the work includes a notice of copyright that appears on the copy or phonorecord that is reproduced under the provisions of this section, or includes a legend stating that the work may be protected by copyright if no such notice can be found on the copy or phonorecord that is reproduced under the provisions of this section.").

§ 3.6.3. Thai Copyright Exceptions

Thai copyright law includes a wide range of copyright exceptions similar to the U.S. copyright law. These exceptions reflect a public policy in Thailand of balancing the interests of society against those of the copyright owner. The T.C.A. prescribes the rules of copyright exceptions in Part 6 of the Act ranging from Section 32 to Section 43. Section 32 provides the fundamental rule for all copyright exceptions under the T.C.A., which provides the following:

“An act against a copyright work by virtue of this Act of another person which does not conflict with a normal exploitation of the copyright work by the owner of copyright and does not unreasonably prejudice the legitimate right of the owner of copyright is not deemed an infringement of copyright.

Subject to paragraph one, any act against the copyright work in paragraph one is not deemed an infringement of copyright; provided that the act is each of the following:

- (1) research or study of the work which is not for profit;
- (2) use for personal benefit or for self benefit together with the benefit of other family members or close relatives;
- (3) comment, criticism or introduction of the work with an acknowledgement of the ownership of copyright in such work;

- (4) news reporting through mass media with an acknowledgement of the ownership of copyright in such work;
- (5) reproduction, adaptation, exhibition or display for the benefit of judicial proceedings or administrative proceedings by authorized officials or reporting such proceedings;
- (6) reproduction, adaptation, exhibition or display by an instructor for the benefit of instruction provided that the act is not for profit;
- (7) reproduction, adaptation in part of a work or abridgement or making a summary by an instructor or an educational institution so as to distribute or sell to students in a class or in an educational institution provided that the act is not for profit; and,
- (8) use of the work as part of questions and answers in an examination.”³⁵²

It is noteworthy, that the language in the first paragraph of Section 32 of the *T.C.A. B.E. 2537* is patterned after Article 9(2) of the Berne Convention, which emphasizes that the exceptions to the exclusive rights of copyright owners under the *T.C.A.* (in Section 32 through Section 43) must neither conflict with a normal exploitation of the work nor unreasonably prejudice the legitimate interests of the author.

³⁵² *T.C.A. B.E. 2537* (1994) § 32 (Thail.).

A reproduction of a copyright work by a librarian is not deemed an infringement of copyright under the Thai law provided that the purpose of such reproduction is not for profit and that Section 32, paragraph 1 is complied with.³⁵³ The exceptions for library use include (1) reproduction for use in the library or another library and (2) reasonable reproduction in part of a work for another person for the benefit of research or study.³⁵⁴ Thus, similar to the “fair use” doctrine under the U.S.C.A., the copyright exception in Section 32 of the T.C.A. exhausts the exclusive rights of the copyright owner to balance the interests of society against those of the copyright owner, and enhances the effectiveness and fairness of the copyright law.

§ 3.7. Duration of the Protection

§ 3.7.1. Minimum Duration as Required by the Berne Convention and the TRIPs Agreement

The Berne Convention, to which the U.S. and Thailand are parties, establishes a general rule regarding duration of protection in case the author is a natural person. The Berne Convention established the norm for member states on the duration of copyright in 1908 under the Berlin Act revision as life of the author plus fifty years. The TRIPs Agreement expands the standard of protection to the work, which a juristic

³⁵³ See T.C.A. B.E. 2537 (1994) § 32 ¶ 1 (Thail.) (stating “[A]n act against a copyright work by virtue of this Act of another person which does not conflict with a normal exploitation of the copyright work by the owner of copyright and does not unreasonably prejudice the legitimate right of the owner of copyright is not deemed an infringement of copyright.”).

³⁵⁴ See T.C.A. B.E. 2537 (1994) § 34.

person creates.³⁵⁵ Under the TRIPs Agreement, the duration of copyright protection is stated in Article 12, which explains the method of calculating the duration of the protection when a member state bases the period of protection not on the life of a natural person.³⁵⁶ Article 12 states:

“[W]henever the term of protection of a work, other than a photographic work or a work of applied art, is calculated on a basis other than the life of a natural person, such term shall be no less than 50 years from the end of the calendar year of authorized publication, or, failing such authorized publication within 50 years from the making of the work, 50 years from the end of the calendar year of making.”³⁵⁷

That means even though the copyright holder is a juristic person, Article 12 provides that the duration must be no less than 50 years from the end of the calendar year. However, member states may implement their copyright law and provide various other terms of protection.³⁵⁸ Article 12 of the TRIPs Agreement was included because the Berne Convention, the preceding convention, did not protect works of juristic persons. An exception is made for photographic works and works of

³⁵⁵ See TRIPs Agreement, *supra* note 73, art 1.3 (stating in part that “[M]embers shall accord the treatment provided for in this Agreement to the nationals of other Members. In respect of the relevant intellectual property right, the nationals of other Members shall be understood as those natural or legal persons that would meet the criteria for eligibility for protection provided for the Berne Convention (1971).”).

³⁵⁶ TRIPs Agreement, *supra* note 73, art. 12.

³⁵⁷ *Id.*

³⁵⁸ See TRIPs Agreement, *supra* note 73, art 1.1 (stating in part that “[M]embers shall give effect to the provisions of this Agreement. Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement. Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice.”).

applied art where the TRIPs Agreement standard for the duration of copyright in both types of copyright work is the same as that under the Berne Convention – 25 years from the taking of the photograph or the making of the work of applied art.³⁵⁹

§ 3.7.2. U.S. Copyright Law on Duration of Protection

§ 3.7.2.1. History of U.S. Copyright Duration of Protection

In the early stages of nation building, the drafters of the U.S. Constitution intended to grant Congress the power to control the copyright system. Shortly after ratification of the Constitution, the first Congress passed the Copyright Act of 1790,³⁶⁰ using the Statute of Anne³⁶¹ as a model. The goal of enacting the Copyright Act of 1790 was to promote learning by providing a monopoly as an incentive for authors to write books by limiting the term of protection. In this way, the public would ultimately receive the benefit of the author's creative efforts upon the work's entry into the public domain at the end of a designated time. Similar to the Statute of Anne, an original term of fourteen years, with a possible renewal term of fourteen years, for a total of twenty-eight years, was granted to the author.³⁶²

³⁵⁹

Berne Convention, *supra* note 66, at art. 7(4) (stating “[I]t shall be a matter for legislation in the countries of the Union to determine the term of protection of photographic work and that of works of applied art in so far as they are protected as artistic works; however, this term shall last at least until the end of a period of twenty-five years from the making of such a work.”).

³⁶⁰

Copyright Act of 1790, 1st Cong. Ch. 15 (1790). The 1790 Act differs from the Statute of Anne in that the author could assign away his rights in the renewal term as a contingency at any time during the initial fourteen-year period.

³⁶¹

Statute of Anne, 1710, 8 Anne, ch. 93 (Eng.).

³⁶²

Christina N. Gifford, *The Sonny Bono Copyright Term Extension Act*, 30 U. Mem. L. Rev. 363.

Over the course of two centuries, the U.S. Congress has expanded the duration of the copyright protection mainly on a socio-economic basis. In 1831, Congress extended the initial term of protection from fourteen years to twenty-eight years. However, it still kept the renewal term at fourteen years.³⁶³ The next change on the duration of copyright occurred with the Copyright Act of 1909 after a group of authors complained to Congress that the term of protection was not long enough. Many authors desired to have the duration of protection span their lifetime plus fifty years. Congress, however, only extended the length of the renewal term to twenty-eight years, making total length of protection fifty-six years.³⁶⁴

After numerous studies were done over a period of twenty years with the participation of authors, publishers, and other parties with economic interests in the property rights, the Copyright Act of 1976 brought the most significant change to U.S. copyright law. The 1976 Act eliminated the two-tiered structure of a fixed term followed by a renewal term. It settled on a single term of life of the author plus fifty years.³⁶⁵ In addition, a separate category of "works made for hire" was created for corporate authors; here the term was a fixed one of seventy-five years. It was believed that the reason for the U.S.' adoption of the new term was its desire to join the Berne Convention.

Under current U.S. copyright law, copyright protection begins once a work is created and generally lasts for the life of the author plus seventy years (for works

³⁶³ See Act of Feb. 3, 1831, ch. 16, §§ 1-2, 4 Stat. 436 (1831).

³⁶⁴ Gifford, *supra* note 362, at 370.

³⁶⁵ See U.S.C.A. of 1976, 17 U.S.C. § 302 (a) (1994) (stating that "[C]opyright in a work created on or after January 1, 1978, subsists from its creation and, except as provided by the following subsections, endures for a term consisting of life of author and fifty years after the author's death").

created by a single author). Other works are protected for one hundred and twenty years from the date of creation, or ninety-five years from first publication, whichever is less. Determining the duration of copyright of a work depends upon a number of factors. These include the date copyright protection begins, the date of creation, the date of publication, and whether the author has renewed the registration of the work.

§ 3.7.2.2. Duration Under the Copyright Act of 1909

The Copyright Act of 1909³⁶⁶ is the earliest revision of copyright acts which provided legal effect for copyright works created during its period. Under this Act, rights were not vested until the author published the work with notice or the unpublished work was registered. If an author wrote a book, but never published, or registered it, the book would not be protected under this Act. However, unpublished work and unregistered works could be claimed under state copyright law.³⁶⁷

Under the 1909 Act, copyright protection lasted for an initial term of twenty-eight years from the date the copyright vested. Copyright existed on the date of first publication with valid notice, or the date on which the work was registered if it had not been published. If the copyright was renewed during the last year of the first term, copyright protection would continue for an additional twenty-eight-year period, known as the renewal term.³⁶⁸ If the copyright was not renewed, protection ended after twenty-eight years and the work would fall into the public domain. Many well-

³⁶⁶ U.S.C.A. of 1909, ch. 320, 35 Stat. 1075 (1909) (amended by the Copyright Act of 1976 and currently codified at 17 U.S.C. §§ 101-1101 (2000)) [hereinafter Copyright Act of 1909].

³⁶⁷ See e.g., Cal. Civ. Code § 980(a)(1) (protecting "any original work of authorship that is not fixed in any tangible medium of expression").

³⁶⁸ U.S.C.A. of 1909 § 24.

known works fell into the public domain because the proprietors failed to renew their copyright. If an author died before the renewal term, his heirs could renew the copyright subject to laws governing transfer of property after death.³⁶⁹

§ 3.7.2.3. Effect of the Copyright Act of 1976

After the Copyright Act of 1976 went into force on January 1, 1978, it appeared unfair that authors under the 1909 Act would receive fifty-six years of protection while authors under the 1976 Act would get seventy-five years, or more, depending on the type of protected works. Therefore, the drafters of the 1976 act offered a bonus to works protected under the 1909 Act, which was that older works could extend the total length of copyright to seventy-five years. If a 1909 protected work was in its renewal term while the Copyright Act of 1976 was in force, the renewal term was extended from twenty-eight to forty-seven years, making the total period of seventy-five years.

Alternatively, a work protected under the Copyright Act of 1909 and still in its first term on January 1, 1978, could be renewed for a period of forty-seven years. This forty-seven-year period is known as the extended renewal term. For example, if a work was first published in 1940 and renewed in 1968, the duration of copyright would automatically be extended to 2015 (forty-seven-year renewal term). This period was later extended again by passage of the Sonny Bono Copyright Term Extension Act³⁷⁰ in 1998, as described in a subsequent section. The length of copyright protection runs through the end of the calendar year, regardless of whether

³⁶⁹ Stim, *supra* note 22, at 110-11.

³⁷⁰ See Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (to be codified at 17 U.S.C. §§ 108, 203, 301-304).

it is under the copyright acts of 1909 or 1976. In other words, the last day of copyright protection for any work is December 31 of the appropriate ending year.

§ 3.7.2.4. Effect of the 1991 Revision to the Copyright Act of 1976

If a work protected under the Copyright Act of 1909 was not in its renewal term on January 1, 1978 (the date the Copyright Act of 1976 went into effect), the owner was required to renew the copyright for an extended renewal term. Failure to renew resulted in loss of copyright protection. For example, if a work was first published in 1960 and the owner did not renew in 1988, the work fell into the public domain. Interestingly, over ninety percent of published works protected under the 1909 Copyright Act were not renewed.³⁷¹

Since this system resulted in many losses of copyright protection, the U.S. Congress amended Section 304 of Title 17 of the Copyright Act of 1976 in 1991 and provided for automatic renewal.³⁷² Copyright owners of works protected under the 1909 Copyright Act no longer have to renew the copyright. The protection has been automatically extended for an additional sixty-seven-year period.

§ 3.7.2.5. Restoring Protection to Public Domain Works

The U.S. Congress enacted the U.S.C.A. of 1976 to comply with its commitments under the Berne Convention and the TRIPs Agreement. In 1994, Congress passed a bill to restore copyright protection for a work that has fallen into

³⁷¹ See Stim, *supra* note 22 at 111-12.

³⁷² See U.S.C.A. of 1976, 17 U.S.C. § 304.

the public domain by enacting Section 104A to the Copyright Act of 1976.³⁷³ The revision was intended to conform to international copyright treaties to which the U.S. is a party, and the revision further permitted certain public domain works to be restored under following conditions:

- (1) A work is in the public domain because the author failed to follow certain formalities, such as renewal or use of copyright notice;
- (2) At the time the work was created, at least one author was a national or domiciliary of an "eligible country;"³⁷⁴
- (3) If the work was published, it must have first been published in an eligible country and must not have been published in the U.S. during the thirty-day period following its first publication in that eligible country; and,
- (4) Copyright protection still exists in the eligible country where the work was created.

Eligible copyrights satisfying the above are restored automatically. On the other hand, if an author wants to enforce rights against a person who relied on the public domain status of the work to reproduce it (called "reliance parties"); the author of a restored work must file a notice of intent with the Copyright Office and with the reliance parties. This notice informs the reliance parties that the work is being restored and to desist from future reproductions.

³⁷³ U.S.C.A. of 1976, 17 U.S.C. § 104A (1994) (codified as amended § 514 Uruguay Round Agreements Act, Pub. No. 103-465, 108 Stat. 4809 (1994))

³⁷⁴ An eligible country is a country, other than the U.S., that is a member of the Berne Convention, the World Trade Organization, or is subject to a presidential proclamation that extends restored copyright protection to that country. U.S.C.A. of 1976, 17 U.S.C. § 104A(h).

If the copyright is restored, protection lasts for the remainder of the term of the copyright that the work would have enjoyed had it never entered the public domain in the U.S. For example, a Thai short story that was first published without copyright notice in 1935 will be treated as if it had been both published with a proper notice and properly renewed; its restored copyright will expire on December 31, 2030 (ninety-five years after the U.S. copyright would have come into existence).

§ 3.7.2.6. The Sonny Bono Copyright Term Extension Act

In 1993 European countries extended the term of copyright protection to the life of the author plus seventy years. The U.S. subsequently perceived an economic benefit in adaptation of its copyright duration on par with that of European countries.³⁷⁵ In order to harmonize U.S. copyright law with European law, the Sonny Bono Copyright Term Extension Act was passed in 1998.³⁷⁶ The passage of the Act extended the time period during which copyrighted works are protected by 20 more years if they existed as of October 27, 1998.³⁷⁷

Works protected under the Copyright Act of 1909 in their extended renewal terms were granted an additional twenty years resulting in a total of ninety-five years of copyright protection. For instance, if a work was first published in 1950 and renewed in 1978, the duration of the copyright would automatically be extended to 2045 (calculated by adding twenty years to the previous forty-seven-year renewal

³⁷⁵ See Arlen W. Langvardt & Kyle T. Langvardt, *Unwise or Unconstitutional?: The Copyright Term Extension Act, the Eldred Decision, and the Freezing of the Public Domain for Private Benefit*, 5 Minn. Intell. Prop. Rev. 193, 201-04 (2004).

³⁷⁶ Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (to be codified at 17 U.S.C. §§ 108, 203, 301-304).

³⁷⁷ U.S.C.A. of 1976, 17 U.S.C. § 304(a), (b).

term). The Term Extension Act saved many 1909 Act works, such as early animated features of Mickey Mouse, from slipping into the public domain.³⁷⁸

Some additional rules regarding works that were unpublished and not registered with the Copyright Office before 1978 are as follows:

- (1) Copyright expires seventy years after the death of the author unless the author has already been dead more than seventy years. In that case, protection expires on January 1, 2003;³⁷⁹ and
- (2) Regardless of when the author died, the copyright in an unpublished work created before 1978 but published before January 1, 2003, will not expire before December 31, 2047.³⁸⁰

For example, Adams died in 1817, but an unpublished Adams manuscript was located and published in the 1990's. The book will be protected through December 31, 2047 resulting in a 230-year duration after his death under the rule in (2) above.

§ 3.7.2.7. Determining the Length of U.S. Copyright

The length of protection under the Copyright Act of 1976 depends on the type of authorship. The basic term of U.S. copyright is now the life of the author plus seventy years, counted from the year of author's death. In the case of a work of joint authorship, the term of copyright is counted from the last surviving coauthor's

³⁷⁸ See Viva R. Moffat, *Mutant Copyrights and Backdoor Patents: The Problem of Overlapping Intellectual Property Protection*, 19 Berkeley Tech. L.J. 1473, 1057 (2004). See also <http://disney.go.com/vault/archives/movies/steamboat/steamboat.html> (last visited Dec. 20, 2004) (dating the first publication of Mickey Mouse: November 18, 1928).

³⁷⁹ U.S.C.A. of 1976, 17 U.S.C. § 303(a).

³⁸⁰ *Id.*

death.³⁸¹ An alternative term of ninety-five years from the year of publication or one hundred and twenty years from that of creation, whichever comes first, applies in cases of works made for hire and for anonymous and pseudonymous works.³⁸² All terms run to the end of the calendar year in which they would otherwise expire in accordance with Article 12 of the TRIPs Agreement.³⁸³

A. Joint Authors

Joint authors are persons who create a "joint work." Under the U.S.C.A., a joint work is a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.³⁸⁴ The protection of joint works extends for the life of the last surviving author plus seventy years.³⁸⁵ For instance, if two authors collaborate to write a book and one dies in 1990 and the other in 2000, the book will be protected until 2070 (seventy years from the date of the last surviving author's death).

B. Works Made for Hire

³⁸¹ See U.S.C.A. of 1976, 17 U.S.C. § 302(a), (b).

³⁸² See U.S.C.A. of 1976, 17 U.S.C. § 302(c).

³⁸³ See U.S.C.A. of 1976, 17 U.S.C. § 305. See also TRIPs Agreement, *supra* note 73, art. 12 (stating "[W]henver the term of protection of a work, other than a photographic work or a work of applied art, is calculated on a basis other than the life of a natural person, such term shall be no less than 50 years from the end of the calendar year of authorized publication, or, failing such authorized publication within 50 years from the making of the work, 50 years from the end of the calendar year of making.").

³⁸⁴ U.S.C.A. of 1976, 17 U.S.C. § 101.

³⁸⁵ U.S.C.A. of 1976, 17 U.S.C. § 302(b) (stating "[I]n the case of a joint work prepared by two or more authors who did not work for hire, the copyright endures for a term consisting of the life of the last surviving author and 70 years after such last surviving author's death.").

Works made for hire are protected for a period of ninety-five years from the first publication or one hundred and twenty years from creation, whichever expires first.³⁸⁶ Therefore, if a publishing company created a work made for hire in 1990 but did not publish it until 2000, copyright protection would extend to 2095 (ninety-five years from the 2000 date of publication).

C. Anonymous and Pseudonymous Works

When an author is not identified on the copies or phonorecords of a work, that work is anonymous. Whenever an author is identified by a fictitious name on the copies or phonorecords of a work, that work is pseudonymous. Copyright protection of anonymous and pseudonymous works is ninety-five years from the date of publication or one hundred and twenty years from creation, whichever expires first.³⁸⁷ However, if the name of the author is later disclosed in the records of the Copyright Office, the disclosure will convert the term mentioned above to the termination of the author's life plus seventy years.³⁸⁸ For example, a book was published anonymously in 1995. The media eventually determined that the author of the book was John. If John were to die in 2030 without disclosing his name to the Copyright Office, the term of copyright for his book would end in 2090 (ninety-five years from publication). If John's name, however, was disclosed, protection would extend until 2100 (seventy years from his death).

³⁸⁶ U.S.C.A. of 1976, 17 U.S.C. § 302(c).

³⁸⁷ *Id.*

³⁸⁸ *Id.*

D. Summary to the length of Protection of U.S. Copyrights

Copyright proprietors and anyone who relies on the use of copyright works can determine the duration of copyright from the date of publication, the date of registration, or the date of creation depending on the nature of copyright works. In the case of works published in the U.S. before 1923, copyright protection has expired and these works have entered into the public domain. The copyright of works published in 1922 and earlier were not protected because the Sonny Bono Copyright Term Extension Act of 1998 only extends protection to works for which the seventy-five-year term of the prior law had not yet elapsed.

Works published with copyright notice from 1923 through 1963 were initially protected for twenty-eight years. If an author renewed the copyright during the twenty-eighth year, the copyright was extended for an additional sixty-seven-year period. For works published with copyright notice from 1964 through 1977, protection is ninety-five years from the date of first publication.³⁸⁹

An author of works created on or after January 1, 1978, regardless of whether the works were published, receives copyright protection for seventy years beyond his life. If the work was jointly created, the copyright lasts for the life of the last surviving author plus seventy years. In the case of works made for hire, copyright protection lasts for ninety-five years from first publication or one hundred and twenty years from date of creation, whichever expires first. Anonymous and pseudonymous works are also protected for the period of ninety-five years from first publication or one hundred and twenty years from creation, whichever expires first. However, if an

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Id.

author's name is disclosed to copyright office, the period of protection will increase to the termination of the life of author plus seventy years.³⁹⁰

§ 3.7.3. Thai Copyright Law on Duration of Protection

§ 3.7.3.1. History of Thai Copyright Duration of Protection

Thailand's method of calculating copyright duration differs from that of the U.S. on all types of works and is less complicated. In 1892, the Royal Proclamation of Vachirayan Library,³⁹¹ the first Thai copyright statute, protected only those books, whose authors, during the time of registration, were under subscription to the library. As long as the books were registered in the Vachirayarn library, no one could publish them without prior permission from the library.³⁹²

Until the Authorship Rights Act R.S. 120 (A.D. 1901)³⁹³ was promulgated, an author of books received a specific copyright duration of protection for a period surpassing his or her life. The Authorship Rights Act R.S. 120 conferred protection upon an author, for the author's life plus seven, or forty-two, years from the date of registration, whichever resulted in the longer term of protection.³⁹⁴ Notably, when the Thai Authorship Rights Act took effect on August 12, 1901, the term of protection

³⁹⁰ *Id.*

³⁹¹ The Royal Proclamation of Vachirayan Library for the Protection of Literary Work, R.S. 111 (1892) (Thail.).

³⁹² Chaiyos Hemaratchata, A Treatise on Thai Copyright Law Ch.1 (2d ed. 1998).

³⁹³ Authorship Rights Act, R.S. 120 (1901) (Thail.).

³⁹⁴ Authorship Rights Act, R.S. 120 (1901) § 5 (Thail.).

under the U.S.C.A. of 1790 (as revised in 1831) was calculated on a basis other than the life of a natural person by granting one initial term of twenty-eight years with another renewal term of 14 years.³⁹⁵ This indicates that while the U.S. was still developing as a country, Thai copyright law was already granting a longer period of copyright protection than did the U.S. However, for a work to be protected in Thailand, the formalities under the Thai 1901 Authorship Rights Act required an author to register that work with the Royal Scribe Department within twelve months after first publication.³⁹⁶

Subsequently, the *Act for Protection of Literary and Artistic Works* (APLAW) B.E. 2474 (A.D. 1931) was enacted so that Thailand could meet the requirements for acceding to the Berne Convention. The APLAW extended copyright protection to both literary and artistic work in the fields of science and the arts. Therefore, any painting, drawing, sculpture, lithography, or architecture could be recognized as a protected work. Any protected work, created in Thailand, would receive protection based on the life of the author and another thirty years starting from the date of first publication. However, if the author died before publishing the work, it still would be protected for thirty years starting on the date of subsequent publication.³⁹⁷

For international protection, the APLAW protected work created by nationals and residents of the Berne Convention member countries, or to the work, which was first published in countries, which are parties to the Berne Convention. The APLAW

³⁹⁵ See Act of Feb. 3, 1831, ch. 16, §§ 1-2, 4 Stat. 436 (1831). The Act provides copyright protection in the initial term of protection for twenty-eight years and fourteen years in the renewal term resulting in the total of forty two years.

³⁹⁶ Authorship Rights Act, R.S. 120 (1901) § 10 (Thail.).

³⁹⁷ Act for the Protection of Literary and Artistic Works, B.E. 2474 (1931) § 14 (Thail.).

also provided reciprocal copyright protection to other countries in the Berne Union by allowing Thailand to lower the duration of copyright to the countries that provided shorter terms of protection.³⁹⁸

In 1978, the *T.C.A.* B.E. 2521 was enacted and went into effect on December 19, 1978.³⁹⁹ The *T.C.A.* B.E. 2521 repealed the APLAW⁴⁰⁰ and extended the term of copyright protection. Under the *T.C.A.* B.E. 2521, copyright protection begins at the moment the copyright work is created and exists during the author's life plus fifty years after his death.

§ 3.7.3.2. Copyright Duration under the *T.C.A.* B.E. 2537

The *T.C.A.* contains several features regarding duration of copyright protection and its calculation, which distinguish it from the U.S.C.A.⁴⁰¹ The general term of protection for works protected under the *T.C.A.* B.E. 2537 (A.D. 1994) is prescribed in Section 19 of the Act. This provision grants protection to most copyrighted works for the period of the author's life and continues for fifty years after his or her death.⁴⁰² However, if the author is dead prior to the publication of the work, the copyright endures for fifty years from the first publication of the work

³⁹⁸ Act for the Protection of Literary and Artistic Works, B.E. 2474 (1931) § 28 (Thail.).

³⁹⁹ *T.C.A.* B.E. 2521 (1978) (Thail.).

⁴⁰⁰ *T.C.A.* B.E. 2521 (1978) § 3 (Thail.).

⁴⁰¹ See Chart of Comparison of Copyright Duration between U.S. Copyright law and Thai Copyright Law in Figure 4.

⁴⁰² *T.C.A.* B.E. 2537(1994) § 19 (Thail.).

instead of death.⁴⁰³ This feature of the T.C.A. helps an author prolong the term of protection, provided the work is published before it enters into the public domain. It is notable that the general term of protection under the *T.C.A.* B.E. 2537 is equivalent to that of the *T.C.A.* B.E. 2521 (the previous copyright act).

Certain types of copyright work under the current T.C.A. are subject to various terms of protection. These works are photographic works, audiovisual works, cinematographic works, sound recordings, and audio and video broadcasting works. The duration of protection of these works is not calculated on the basis of the author's life. Instead, protection endures for fifty years from the creation of the works, provided they are published during such period, then copyright endures for fifty years from the publication date.⁴⁰⁴

Section 22 of the T.C.A. enumerates special duration of protection for works of applied art. The copyright on a work of applied art endures for 25 years as from the creation of the work. However, if the work is published during that period, copyright extends for twenty-five years from the publication.⁴⁰⁵ Therefore, an author of a work of applied art must publish his or her work within twenty-five years of its creation to prevent that work from falling into the public domain.

§ 3.7.3.3. Determining the Length of Thai Copyright

The length of protection under the current T.C.A. depends on the type of works and the type of authorship. The basic term of Thai copyright is the life of the

403 *Id.*

404 T.C.A. B.E. 2537(1994) § 21 (Thail.).

405 T.C.A. B.E. 2537(1994) § 22 (Thail.).

author and fifty years thereafter, counted from the year of author's death. In the case of a work of joint authorship, such duration is counted from the last surviving coauthor's death. The term of fifty years from the year of creation or fifty years from that of publication, whichever results in longer protection, applies in cases of anonymous and pseudonymous works.⁴⁰⁶ All terms run to the end of the calendar year in which they would otherwise expire in accordance with Article 12 of the TRIPs Agreement.⁴⁰⁷

A. Works of Joint Authorship

The duration of protection for works of joint authorship is prescribed in Section 19 of the T.C.A..⁴⁰⁸ However, the Act neither defines the term "works of joint authorship" nor the term "joint authors." The Act implicitly leaves the task of interpreting its meaning to the courts. Thai courts may consider foreign copyright laws to help interpret Section 19 of the T.C.A. as a general principle of law.⁴⁰⁹

The Australian copyright law defines "works of joint authorship" as a work that has been produced by the collaboration of two or more authors and in which the contribution of each author is not separated from the contribution of the other author

⁴⁰⁶ T.C.A. B.E. 2537(1994) § 20 (Thail.).

⁴⁰⁷ See T.C.A. B.E. 2537(1994) § 25 (Thail.). See also TRIPs Agreement, *supra* note 14, art. 12 (stating "[W]henver the term of protection of a work, other than a photographic work or a work of applied art, is calculated on a basis other than the life of a natural person, such term shall be no less than 50 years from the end of the calendar year of authorized publication, or, failing such authorized publication within 50 years from the making of the work, 50 years from the end of the calendar year of making.").

⁴⁰⁸ See T.C.A. B.E. 2537 (1994) § 19 (Thail.).

⁴⁰⁹ See Civil and Commercial Code B.E. 235 (1992) § 4 (Thail.).

or the contributions of the other authors.⁴¹⁰ The same term is defined by the Indian copyright law as “a work produced by the collaboration of the other author or authors.”⁴¹¹ And Japan defines the term “joint work” under its copyright act as a work created by two or more persons in which the contribution of each person cannot be separately exploited.⁴¹² Consequently, we may conclude from the definitions of “works of joint authorship” that in these countries, as a general principle of law, a work may be one of joint authorship when it is created by two or more authors, and their collaborative efforts cannot be clearly delineated, or separated.

Under Thai copyright law, in regard to a work of joint authorship, copyright endures for the life of the joint-authors and fifty years from the death of the last surviving joint-author.⁴¹³ However, if the author or all joint-authors is or are dead prior to the publication of the work, the copyright endures for fifty years from the date of first publication.⁴¹⁴ Publication as stated in this context means the publication of the work with consent of the owner of the copyright.⁴¹⁵

B. Works Made by Juristic Persons

⁴¹⁰ Copyright Act of 1968 § 10(1) (Austl).

⁴¹¹ Copyright Act of 1957 (amended 1994, 1995) § 2(z) (India).

⁴¹² Copyright Act of 1970 (*Chosakuken Ho*) Law No. 48, art. 2(xii) (Japan).

⁴¹³ T.C.A. B.E. 2537 (1994) § 19 (Thail.).

⁴¹⁴ *Id.*

⁴¹⁵ T.C.A. B.E. 2537 (1994) § 24 (Thail.).

Thai copyright law mandates that if the author is a juristic person, the copyright is protected for fifty years from the creation of the work.⁴¹⁶ However, if the work is published during such period, copyright endures for fifty years from the date of first publication. In respect of the duration of protection for Thai juristic persons, their status is governed by the TCCC Section 67, which affirms that juristic persons are capable of exercising rights and duties similar to natural persons except for those rights and duties that by nature can only be exercised by natural persons.⁴¹⁷

C. Anonymous and Pseudonymous Works

In general, when an author is not identified on the copies or phonorecords of a work, that work is anonymous. But when an author puts a fictitious name on the copies of his work without public acknowledgement of his or her identity, the work is pseudonymous under the T.C.A. Under Thai copyright law, copyright protection of anonymous and pseudonymous works is fifty years from the date of creation. However, if the work is published during such period, the copyright endures for fifty years as from the date of first publication.⁴¹⁸ If the name of the author is later disclosed to the public, the disclosure will convert the term to life plus fifty years as applied in Section 19 of the T.C.A. For example, a book was composed by a Thai pseudonymous author and published in 1995 with a pen name unknown to the public. The media later determined that the author's name was Vinai. If Vinai were to die in 2030 without disclosing his name to the public, the term of copyright for his book

⁴¹⁶ T.C.A. B.E. 2537 (1994) § 19 (Thail.).

⁴¹⁷ Civil and Commercial Code B.E. 2535 (1992) § 67 (Thail.).

⁴¹⁸ T.C.A. B.E. 2537 (1994) § 20 (Thail.).

would end in 2045 (fifty years from publication); however, if Vinai were to disclose his name, protection would extend until 2080 (fifty years from his death).

§ 3.8. *Neighboring Rights*

§ 3.8.1. *Overview*

The doctrine of *neighboring rights* or “*droits voisins*” (also called *related rights*) can be attributed to the European concept that credits those who help authors communicate their copyright works to the public. This doctrine arose separately from “authors’ rights” doctrine or “*droit d’auteur*” after the advent of photography and audio recording techniques in the nineteenth century.⁴¹⁹ Under the European common law, works with a minimal degree of creativity or authorship, such as photographic works, sound recordings, and audiovisual works, deserves lower level of protection than the fundamental copyright works, such as literary, musical, and dramatic works.⁴²⁰ Common holders of neighboring rights include performers, producers of phonograms, and broadcasting organizations. Given the uniqueness of neighboring rights, they are treated differently from copyright protection.

Adopted after a five-year negotiation period, the Rome Convention of 1961 was the first and fundamental convention on neighboring rights to protect works in lower degree of authorship through the system of minimum standards.⁴²¹ It was

⁴¹⁹ Nimmer & Nimmer, *supra* note 105, § 8E.01.

⁴²⁰ *Id.*

⁴²¹ Rome Convention, *supra* note 328. Article 2 provides for national treatment and also provides certain minimum rights. These rights either may be invoked directly or indirectly, in that the

constituted under the notion that neighboring rights are related to authors' copyright and fall outside Berne Convention protection. However, it does not appear to have achieved significant participation as compared to the Berne Convention. Some countries, Thailand and the U.S., for example, adopted the "neighboring rights" principle in their national legislation regardless of non-membership status of the Rome Convention of 1961 because the performance right is one of the greatest sources of revenue in the music industry.⁴²² For instance, millions of dollars in royalties are paid by broadcasters and other transmitters each year domestically and internationally.⁴²³

§ 3.8.2. Related Rights under the TRIPs Agreement

The TRIPs Agreement includes both authors' rights and related rights under the single rubric of copyright protection in Part II, Section 1 of the Agreement. Article 14 of the Agreement exclusively enumerates the protection of performers, producers of phonograms, and broadcasting organizations.⁴²⁴ Those rights derived

Contracting States must adopt domestic measures of protection. *See* arts. 7, 12-14. Protection for phonogram producers and broadcast organizations exists in the form of rights of prohibition.

⁴²² Woods v. Bourne Co., 60 F. 3d 978, 983 (2d Cir. 1995) (citing Sidney Schemel and M. William Krasilovsky, *This Business of Music* 196 (1990)).

⁴²³ *Id.*; *See also* Nimmer & Nimmer, *supra* note 105, § 8.19.

⁴²⁴ *See* TRIPs Agreement, *supra* note 73, art. 14 (stating:

"1. In respect of a fixation of their performance on a phonogram, performers shall have the possibility of preventing the following acts when undertaken without their authorization: the fixation of their unfixed performance and the reproduction of such fixation. Performers shall also have the possibility of preventing the following acts when undertaken without their authorization: the broadcasting by wireless means and the communication to the public of their live performance.

2. Producers of phonograms shall enjoy the right to authorize or prohibit the direct or indirect reproduction of their phonograms.

3. Broadcasting organizations shall have the right to prohibit the following acts when undertaken without their authorization: the fixation, the reproduction of fixations, and the rebroadcasting by wireless means of broadcasts, as well as the communication to the public of television broadcasts of the same. Where Members do not grant such rights to broadcasting organizations, they shall provide

from their protection are called "related rights." The Agreement puts this distinctive protection into the provision by effectively placing copyright and the rights of performers, producers of phonograms and broadcasting organizations on the same level.

The term "related rights" is used to designate the rights of performers, producers of phonograms and broadcasting organizations. Under the TRIPs Agreement, performers are given the right to prevent the fixation of their unfixed performances and the reproduction of such fixation without their authorization. Also, if done without their authorization, performers may prevent the broadcasting by wireless means and the communication to the public of their performance. Although the right to prevent the broadcasting by wireless means is granted, the right to prevent the broadcasting by cable is implicitly not granted.⁴²⁵

The TRIPs Agreement gives producers of phonograms the right to authorize or prohibit the direct or indirect reproduction of their phonograms. In addition, it provides producers of phonograms the right to prevent commercial rental of their phonograms without their consent. However, this right may be excluded by a member state whose legislation already provides for equitable remuneration, and the commercial rental of phonograms does not materially impair the rights holder's exclusive rights of reproduction.⁴²⁶

owners of copyright in the subject matter of broadcasts with the possibility of preventing the above acts, subject to the provisions of the Berne Convention (1971).").

425
Id.

426
TRIPs Agreement, *supra* note 73, art. 14 .4.

Article 14 of the TRIPs Agreement does not include a provision equivalent to Article 12 of the Rome Convention,⁴²⁷ under which producers of phonograms and performers are granted the right to an equitable remuneration for the broadcasting or for any communication to the public of phonograms published for commercial purposes. Nevertheless, the Rome Convention allows member states to make a reservation excluding the application of such a right.⁴²⁸

Broadcasting organizations are also given the right to prohibit the fixation, the reproduction of fixations and the rebroadcasting by wireless means of broadcasts, as well as the communication to the public of television broadcasts of protected fixations. The rights of broadcasting organizations are not absolute, however. The TRIPs Agreement allows any member state to ignore these rights when the state provides owners of the broadcasts copyright the possibility of preventing the acts mentioned earlier.⁴²⁹

⁴²⁷ Article 12 of the Rome Convention states that "If a phonogram published for commercial purposes, or a reproduction of such phonogram, is used directly for broadcasting or for any communication to the public, a single equitable remuneration shall be paid by the user to the performers, or to the producers of the phonograms, or to both. Domestic law may, in the absence of agreement between these parties, lay down the conditions as to the sharing of this remuneration."

⁴²⁸ Rome Convention, *supra* note 328, art. 16(1)(a) (stating: "1. Any State, upon becoming party to this Convention, shall be bound by all the obligations and shall enjoy all the benefits thereof. However, a State may at any time, in a notification deposited with the Secretary-General of the United Nations, declare that:
(a) as regards Article 12:
(i) it will not apply the provisions of that Article;
(ii) it will not apply the provisions of that Article in respect of certain uses;
(iii) as regards phonograms the producer of which is not a national of another Contracting State, it will not apply that Article;
(iv) as regards phonograms the producer of which is a national of another Contracting State, it will limit the protection provided for by that Article to the extent to which, and to the term for which, the latter State grants protection to phonograms first fixed by a national of the State making the declaration; however, the fact that the Contracting State of which the producer is a national does not grant the protection to the same beneficiary or beneficiaries as the State making the declaration shall not be considered as a difference in the extent of the protection.").

⁴²⁹ TRIPs Agreement, *supra* note 73, art. 14 .3.

By extending the twenty-five-year protective umbrella for performances and phonograms beyond what is provided in Article 14 of the Rome Convention of 1961, Article 14.5 of TRIPs sets the duration of protection of these rights at fifty years.⁴³⁰ Nevertheless, TRIPs maintains the duration of protection on broadcast works for at least twenty years under the Rome Convention. Even though, the U.S. and Thailand are not parties to the Rome Convention, both are bound by their obligations under the TRIPs Agreement to implement related rights protection into their national legislation.

§ 3.8.3. Neighboring Rights under U.S. Copyright Law

Historically, the U.S. Congress had resisted granting neighboring rights to performers and producers of phonograms, largely due to opposition by broadcasters, a powerful business group.⁴³¹ Until 1994, the *Uruguay Round Agreements Act* added Chapter 11, entitled *Sound Recordings and Music Videos*, to the U.S.C.A. Chapter 11 consists of only Section 1101.⁴³² This section forbids fixing “the sounds or sounds and images of a live musical performance in a copy or phonorecord,” without consent of the performers involved.⁴³³ Also, this prohibition extends to unauthorized reproduction of “copies or phonorecords of such a performance from an unauthorized

⁴³⁰ Compare TRIPs Agreement, *supra* note 73, art. 14 .5 with Rome Convention, *supra* note 328, art. 14.

⁴³¹ See Rebecca F. Martin, Note, *The Digital Performance Right in Sound Recordings Act of 1995. Can it Protect U.S. Sound Recording Copyright Owners In A Global Market?*, 14 *Cardozo Arts & Ent. L.J.* 733, 736-41 (1996).

⁴³² U.S.C.A. of 1976, 17 U.S.C. § 1101, codified by Act of Dec. 8, 1994, Pub. L. 103-465, § 512, 108 Stat. 4809.

⁴³³ U.S.C.A. of 1976, 17 U.S.C. § 1101(a)(1). Fixing the performance in a phonorecord produces an unauthorized sound recording; in a copy, an unauthorized music video.

fixation.”⁴³⁴ It further holds liable anyone who “distributes or offers to distribute, sells or offers to sell, rents or offers to rent, or traffics in any copy or phonorecord” of the illicit copies or phonorecords described above.⁴³⁵ In addition to the foregoing conduct, Section 1101 also forbids transmission or other communication to the public of “the sounds or sounds and images of a live musical performance.”⁴³⁶ This provision creates liability even when such transmission or other communication to the public is absent of any fixation, called “retransmission of live performance.”

The impetus for the addition of neighboring rights for performers under the U.S.C.A. came from conclusion of the Uruguay Round trade negotiations. In order to comply with the U.S. obligations under the TRIPs Agreement, Congress added neighboring rights protection for the sounds and images of musical live performances. Subsequently, on November 1, 1995, the U.S. enacted a very limited performance right in sound recordings entitled “the Digital Performance Right in Sound Recordings Act (DPRSRA).”⁴³⁷ This Act is confined to the digital performance of sound recordings. The right applies only to “interactive,”⁴³⁸ and “subscription”⁴³⁹

⁴³⁴ U.S.C.A. of 1976, 17 U.S.C. § 1101(a)(1).

⁴³⁵ U.S.C.A. of 1976, 17 U.S.C. § 1101(a)(3).

⁴³⁶ U.S.C.A. of 1976, 17 U.S.C. § 1101(a)(2).

⁴³⁷ Digital Performance Right in Sound Recordings Act, Pub. L. No. 104-39, 109 Stat. 336 (1995). The Act became effective on February 1, 1996.

⁴³⁸ An “interactive service” is defined as:
one that enables a member of the public to receive, on request, a transmission of a particular sound recording chosen by or on behalf of the recipient. The ability of individuals to request that particular sound recordings be performed for reception by the public at large does not make a service interactive. If an entity offers both interactive and non-interactive services (either concurrently or at different times), the non-interactive component shall not be treated as part of an interactive service. U.S.C.A. of 1976, 17 U.S.C. § 114(j)(4).

services. As stated in the *Senate Report on the Digital Performance Rights in Sound Recordings Act* of 1995, this legislation was intended to accommodate an attempt at greater international harmonization of copyright and neighboring rights at the WIPO.⁴⁴⁰ The DPRSA legislation reflects the recognition of the potential impact of new technologies on the recording industry and a balancing of interests among U.S. broadcasters, recording companies, composers, and publishers. It also indicates that the market for sound recordings has become global and digital technology is proliferating.⁴⁴¹

The DPRSA added Clause 6 to Section 106 of the Copyright Act. This new clause provides that, in the case of sound recordings, the copyright owner has the exclusive right to perform the work publicly by means of digital audio transmission.⁴⁴² Section 101 defines a “digital audio transmission” as a transmission in a digital format “that embodies the transmission of a sound recording.”⁴⁴³ Therefore, the primary purpose of enacting the DPRSA is to protect only copyright holders of sound recordings, usually recording companies, from a technological threat on the Internet.

439 A “subscription transmission” is defined as:
a transmission that is controlled and limited to particular recipients, and for which consideration is required to be paid or otherwise given by or on behalf of the recipient to receive the transmission or a package of transmissions including the transmission. U.S.C.A. of 1976, 17 U.S.C. § 114(j)(8).

440 S.Rep. No. 128, 104th Cong, 1st Sess. 10 (1995).

441 *Id.*

442 “[I]n the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.” U.S.C.A. of 1976, 17 U.S.C. § 106(6).

443 U.S.C.A. of 1976, 17 U.S.C. § 101.

The remedies for infringement of copyrighted sound recordings downloaded from the Internet are found in Section 503 in Chapter 5 of the Copyright Act. The Copyright Act allows for the impounding and destruction, or other reasonable disposition, of “all copies or phonorecords found to have been made or used in violation of the copyright owner’s exclusive rights.....or other articles by means of which such copies or phonorecords may be reproduced.”⁴⁴⁴ Section 503 of the U.S.C.A. also applies to sound recordings illegally downloaded by users on the Internet. Theoretically, this remedy would allow confiscation of an individual’s computer.

§ 3.8.4. Neighboring Rights under Thai Copyright Law

Copyright under the *T.C.A.* B.E. 2537 includes “neighboring rights” or what is also referred to as “related rights,” although the *T.C.A.* does not use any one of these terms, because they have no independent existence in Thai jurisprudence. Until becoming a WTO member in 1994, Thailand adopted into the *T.C.A.* B.E. 2537 (1994) the concept of neighboring rights protection as required by the TRIPs Agreement. Chapter 2 of the *T.C.A.*, entitled “Performers’ Rights” provides separately for rights against specified unauthorized use of performances. The protection of performers’ rights in Chapter 2 of the Act was placed in a separate chapter because performers’ rights are more in the nature of “neighboring rights” for performers, which is distinguished from the initially developed copyright law in Thailand.

The previous Thai copyright law, the *T.C.A.* B.E. 2521 (1978), did not protect neighboring rights protection as does the current Act. In 1994, the *T.C.A.* B.E. 2537

⁴⁴⁴ U.S.C.A. of 1976, 17 U.S.C. § 503(a) (1998).

was enacted to revise and replace the previous Copyright Act. To comply with the related rights provision embedded in Article 14 of the TRIPs Agreement,⁴⁴⁵ Thailand included a new chapter entitled “performers’ rights” in Chapter 2 of the *T.C.A.* B.E. 2537.

Under current Thai copyright law, the protection of “neighboring rights” is prescribed in Chapter 2, Sections 44-53. Performers, nationals or foreigners, who invoke performer’s rights under Thai copyright law, must have Thai nationality or have habitual residence in Thailand.⁴⁴⁶ Another condition, aimed at enabling a performer to claim performer’s rights, is that the performance or the major part of it must take place in Thailand or in a country that is a member of conventions for the protection of performer’s rights, of which Thailand is a member.⁴⁴⁷

Performers are the holders of performers’ rights under the *T.C.A.* B.E. 2537. They are defined in Section 4 of the Copyright Act as “a performer, musician, vocalist, choreographer, dancer, or a person who acts, sings, speaks, narrates or performs in along with the script or performs in any other manner.”⁴⁴⁸ Comparatively, the definition of a “performer” who is entitled to performers’ rights under Chapter 2 of the *T.C.A.* is broader than the definition of “performer” within the meaning of Chapter 11 of the *U.S.C.A.*, which includes only performers of sound

⁴⁴⁵ See TRIPs Agreement, *supra* note 73, art. 14.

⁴⁴⁶ *T.C.A.* B.E. 2537 (1994) (Thail.) § 47(1).

⁴⁴⁷ See *T.C.A.* B.E. 2537 (1994) (Thail.) § 47(2).

⁴⁴⁸ *T.C.A.* B.E. 2537 (1994) (Thail.) § 4.

recordings and music videos in a live musical performance.⁴⁴⁹ However, both nations' copyright laws require that performances subject to the protection must be live.

Section 44 of the T.C.A. prescribes that a performer has exclusive rights with respect to the acts concerning his or her performances of the following:

- “(1) sound and video broadcasting or communication to public of the performance, except sound and video broadcasting or communication to public from a recording material which has been recorded;
- (2) recording the performance which has not been recorded; and,
- (3) reproducing the recording material of the performance which has been recorded without consent of the performer, or the recording material of the performance with consent of the performer for different purposes, or the recording material of the performance which has been done pursuant to the infringement of performer's rights by virtue of Section 53 (copyright exceptions).”⁴⁵⁰

In addition to the right to control the use of performances in Section 44, performers are also entitled to the right of equitable remuneration under Section 45 of the *T.C.A.* B.E. 2537. Any person who directly uses a sound recording of a performance, which has been published for commercial purposes or the copies thereof in a broadcast or a communication to public, is bound to pay an equitable remuneration to the performer. If the parties cannot agree on the remuneration, the

⁴⁴⁹ Compare T.C.A. B.E. 2537 (1994) (Thail.) § 4 with U.S.C.A. of 1976, 17 U.S.C. § 1101.

⁴⁵⁰ T.C.A. B.E. 2537 (1994) (Thail.) § 44.

Director-General of the Department of Intellectual Property shall stipulate to it by taking into account the normal rate of remuneration in such specific business.⁴⁵¹

§ 3.9. Interactive Protection between the Thai Copyright Law and the U.S. Copyright Law

§ 3.9.1. Overview

Generally, a country provides copyright protection to foreign copyright works (a work created by a foreign national, or a work first published in another country) on the basis of its copyright relations with the country to which the work is connected.⁴⁵² However, there are a few exceptions where some countries extend copyright or neighboring rights protection to a foreign work with no regard of any general or reciprocal treaty relationship with the work's country of origin.⁴⁵³ To give some examples, France and Germany provide unconditional and universal protection for an author's moral rights.⁴⁵⁴ Another example is the U.S.C.A. of 1976, which protects unpublished works with no regard to the nationality or domicile of the author.⁴⁵⁵

⁴⁵¹ T.C.A. B.E. 2537 (1994) (Thail.) § 45.

⁴⁵² Paul Goldstein, *International Copyright: Principle, Law, and Practice* 123, (Oxford University Press 2001).

⁴⁵³ *Id.*

⁴⁵⁴ *See* Intellectual Property Code (France), art. L 111-4 (author's rights of attribution and integrity); *See also* Copyright Act (German), art. 121(6) (author's rights of attribution, integrity, and disclosure).

⁴⁵⁵ U.S.C.A. of 1976, 17 U.S.C. § 104(a).

The U.S. and Thailand are granting interactive copyright and neighboring rights protection to each other through the conduit of three treaties, namely, the 1966 Treaty of Amity and Economic Relations between Thailand and the U.S.,⁴⁵⁶ the Berne Convention,⁴⁵⁷ and the TRIPs Agreement.⁴⁵⁸ With respect to the 1966 Treaty of Amity and Economic Relations, and regarding copyrighted works, patents for invention, and other intellectual property, nationals and companies of both countries are entitled to, within the territories of each country, the same right as nationals and companies of the other country ("National Treatment" rule). This rule applies of course, so long as those nationals and companies comply with the applicable laws and regulations required by either nation.⁴⁵⁹

"National Treatment" is a general principle imbedded in both the Berne Convention and the TRIPs Agreement, both of which the U.S. and Thailand must observe.⁴⁶⁰ Under "national treatment," works originating in one of the contracting States (that is, works by an author who is a national of such a State or works first published in such a State) must be given the same protection in each of the other contracting States as the latter grants to the works of its own nationals. Nonetheless, the Berne Convention allows two exceptions from its general requirement of national

⁴⁵⁶ Treaty of Amity and Economic Relations, May 29, 1966, U.S.-Thailand, 19 U.S.T. 5843, T.I.A.S. No.6540.

⁴⁵⁷ Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886 amended Oct. 2, 1979, 828 U.N.T.S. 22.

⁴⁵⁸ Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, Dec. 15, 1993, 33 I.L.M. 81 (1994).

⁴⁵⁹ Treaty of Amity and Economic Relations, May 29, 1966, U.S.-Thailand, art. 5, 19 U.S.T. 5843, T.I.A.S. No.6540.

⁴⁶⁰ See Berne Convention, *supra* note 66, art. 5(1). See also TRIPs Agreement, *supra* note 73, art. 3.1.

treatment, which are for copyright duration and the resale of royalty right or “*droit de suite*.”

Under the Berne Convention, in any case, the duration of protection shall be governed by the legislation of the country where protection is claimed; however, unless the legislation of that country otherwise provides, the term shall not exceed the term fixed in the country where the work originated.⁴⁶¹ Regarding the resale of royalty right, the author (or after the author's death, the persons or institutions authorized by national legislation), with respect to original works of art and original manuscripts of writers and composers, enjoys the inalienable right to an interest in any sale of the work subsequent to the first time the author transfers the work. The protection mentioned above may be claimed in a country of the Berne Union only if legislation in the country to which the author belongs so permits and to the extent permitted by the country where this protection is claimed.⁴⁶²

In addition to the national treatment rule, territoriality and choice of law determine whether an infringed copyright is to be governed by the law of the country in which the infringement occurred.⁴⁶³ In general, copyright under domestic legislation is territorial: a Thai or U.S. copyright does not exist outside Thailand or U.S. respectively.⁴⁶⁴ The territoriality principle holds that a state has no competence

⁴⁶¹ Berne Convention, *supra* note 66, art. 7(8).

⁴⁶² Berne Convention, *supra* note 66, art. 14*ter*(2).

⁴⁶³ See Goldstein, *supra* note 452, at 61.

⁴⁶⁴ See, e.g., *Subafilms, Ltd. v. MGM-Pathe Communications Co.*, 24 F.3d 1088, 1093 (9th Cir. 1994) (referring to the “undisputed axiom that U.S. copyright law has no extraterritorial application”); Nimmer & Nimmer, *supra* note 105, § 17.02. Copyright laws do not have any extraterritorial operation.

to prescribe legal rules to govern activities that occur outside its national borders.⁴⁶⁵

The relevant choice of law rule for copyright infringement calls for application of the law in force in the place where the infringement occurred. Finally, territoriality implies that the law governing an infringement will be the law of the country where the infringement occurred.⁴⁶⁶

§ 3.9.2. Protection Under the U.S.C.A. for Thai Copyrighted Works

As an adherent of a number of international copyright and neighboring rights treaties,⁴⁶⁷ among those being the Berne Convention and the TRIPs Agreement, the U.S. is required to confer national treatment on copyright protection to Thai nationals, since Thailand is also a party to the latter two treaties.⁴⁶⁸ In other words, works originating in Thailand (works the author of which is a national of Thailand and works which were first published in Thailand) must be given the same protection in the U.S. as the U.S. grants the works of its nationals.

Copyright protection under the 1976 U.S.C.A. for works first published in Thailand or created by Thai nationals is divided between unpublished and published works. Unpublished works enjoy full protection under the 1976 U.S.C.A. with no regard to the domicile or nationality of the author or to any treaty relations between

⁴⁶⁵ See generally Hessel Yntema, *The Historic Bases of Private International Law*, 2 Am. J. Comp. L., 297, 305-308 (1953).

⁴⁶⁶ See Goldstein, *supra* note 452, at 61.

⁴⁶⁷ See Figure 6: Chart of Copyright and Related Rights Treaties Administered by WIPO to which the U.S. is a contracting party.

⁴⁶⁸ See Berne Convention, *supra* note 66, art. 5(1). See also TRIPs Agreement, *supra* note 73, art. 3.1.

the U.S. and Thailand.⁴⁶⁹ Published works originating in Thailand or created by Thai nationals, by contrast, will enjoy protection under the 1976 U.S.C.A. only if they meet conditions imposed by Section 104 of the Act, as points of attachment.⁴⁷⁰

Copyright works that are first published in Thailand are granted protection under two provisions articulated in Section 104(b) of the 1976 U.S.C.A. Firstly, to be eligible for the U.S. copyright protection, on the date of the work's first publication, one or more of the authors of Thai copyright works must be "a national or domiciliary of a treaty party."⁴⁷¹ In particular, a "treaty party" is defined by the U.S.C.A. as "a country or intergovernmental organization other than the U.S. that is a party to an international agreement."⁴⁷² The Act further defines "international agreement" to include the Berne Convention, the Universal Copyright Convention, the WTO Agreement, the Geneva Phonograms Convention, the WIPO Copyright Treaty, the WIPO Performances and Phonograms Treaty, and "any other copyright treaty to which the U.S. is a party."⁴⁷³ Consequently, Thailand, a party to the Berne Convention, the WTO Agreement, and the 1966 Treaty of Amity and Economic Relations, with no doubt, is considered as a "treaty party" under the U.S.C.A. Therefore, by this nationality principle, a Thai national who is an author of a copyright work will receive copyright protection under the U.S.C.A.

⁴⁶⁹ U.S.C.A. of 1976, 17 U.S.C. § 104(a).

⁴⁷⁰ U.S.C.A. of 1976, 17 U.S.C. § 104(b).

⁴⁷¹ U.S.C.A. of 1976, 17 U.S.C. § 104(b)(1).

⁴⁷² U.S.C.A. of 1976, 17 U.S.C. § 101 (under "treaty party").

⁴⁷³ U.S.C.A. of 1976, 17 U.S.C. § 101 (under "international agreement").

The second provision enabling Thai copyright works to be protected under the U.S.C.A. depends on the place of publication. A work's first publication in the U.S. or in a foreign country, which is a treaty party⁴⁷⁴ on the date of first publication, will qualify the work for U.S. copyright protection.⁴⁷⁵ As amended on October 28, 1998, by the Digital Millennium Copyright Act (DMCA),⁴⁷⁶ Section 104(b) also provides that, for purposes of Section 104(b)(2), the work is first published in a treaty party, or Thailand, within 30 days after publication in a foreign nation that is not a treaty party shall be considered to be first published in Thailand and is, consequently, qualified for the U.S. copyright protection.⁴⁷⁷

The owner of copyrighted sound recording, first fixed in Thailand, can claim protection against an infringement occurring within the U.S.; this right is rooted in Article 104(b)(3) of the U.S.C.A., that grants copyright protection to a sound recording that was first produced in a treaty party.⁴⁷⁸ Also, the owner of copyright in a pictorial, graphic, or sculptural work that is incorporated in a building located in Thailand is protected under Article 104(b)(4) of the U.S.C.A.⁴⁷⁹

⁴⁷⁴ A "treaty party" is a country or intergovernmental organization other than the U.S. that is a party to an international agreement. U.S.C.A. of 1976, 17 U.S.C. § 101.

⁴⁷⁵ U.S.C.A. of 1976, 17 U.S.C. § 104(b)(2).

⁴⁷⁶ Pub. L. 105-304, 112 Stat. 2826 (Oct. 28, 1998).

⁴⁷⁷ U.S.C.A. of 1976, 17 U.S.C. § 104(b).

⁴⁷⁸ U.S.C.A. of 1976, 17 U.S.C. § 104(b)(3).

⁴⁷⁹ U.S.C.A. of 1976, 17 U.S.C. § 104(b)(4).

§ 3.9.3. Protection Under T.C.A. for U.S. Copyrighted Works

Since Thailand is a signatory to the Berne Convention and the TRIPs Agreement, it is obligated to grant copyright protection under its national legislation to the U.S. and any other country that is a party to these treaties. The *T.C.A.* B.E. 2537 lays down criteria of eligibility applicable to U.S. copyright works.⁴⁸⁰ The acquisition of copyright for U.S. works under the *T.C.A.* B.E. 2537 can be considered under two purviews as described below.

First of all, in the case where the work has not been published, any U.S. national who has created copyrighted works is automatically protected under the *T.C.A.* because Section 8 of the Act extends copyright protection to an author who is a national of, or who resides in a country that is a member of the aforementioned treaties for the protection of copyright; Thailand is a member of these treaties. In addition, whoever has stayed in the U.S., or is a resident of the U.S. throughout the time, or most of the time, of a work's creation is also eligible for protection under the *T.C.A.*⁴⁸¹

Second, in the case where the work has been published, for the U.S. work to be protected under the *T.C.A.*, the first publication must have taken place in Thailand or in a country that is also a signatory to the Berne Convention or the TRIPs Agreement, both of which, Thailand is, of course, a member. On the other hand, if the first publication occurred outside of Thailand, or in a country that is not a member of either the Berne Convention or the TRIPs Agreement, but the work was later published in Thailand or in a country which is a member of copyright treaties of

⁴⁸⁰ For the purpose of this dissertation, throughout this Chapter, "U.S. copyright works" means works originated in U.S. or works created by U.S. nationals or domiciliaries.

⁴⁸¹ *T.C.A.* B.E. 2537 (1994) (Thail.) § 8(1).

which Thailand is also a member, within thirty days as from the date of the first publication.⁴⁸²

Article 61 of the T.C.A. affirms Thai compliance of its obligation to protect the right holders in the countries of the Berne Convention and the TRIPs Agreement. It states that a copyrighted work of an author or a performer of a country, which is a member of the Convention for the protection of copyright or the Convention for the protection of performer's rights of which Thailand is also a member, shall be protected by the T.C.A.⁴⁸³

The Minister of Commerce is empowered to publish, in the Government Gazette, the names of member countries of the Convention for the protection of copyright or the Convention for the protection of performer's rights.⁴⁸⁴ *The Ministry of Commerce Proclamation on the Names of Member Countries Which Are Parties to the Convention for Protection of Copyright and Rights of Performance* is the most updated ministerial proclamation enacted under Section 61 of the T.C.A.⁴⁸⁵ Under this ministerial proclamation, there are 148 countries to which Thailand is bound to grant copyright protection under the Berne Convention and 144 countries to which Thailand is bound to grant copyright protection under the TRIPs Agreement. Both lists of parties to these treaties include the U.S. as a party member.

⁴⁸² T.C.A. B.E. 2537 (1994) (Thail.) § 8(2).

⁴⁸³ T.C.A. B.E. 2537 (1994) (Thail.) § 61.

⁴⁸⁴ *Id.*

⁴⁸⁵ Ministry of Commerce Proclamation on the Names of Member Countries Which are Parties to the Convention for Protection of Copyright and Rights of Performance (Thail.) (published in Government Gazette, vol.119, pt 41 Ngor, Nov. 8, B.E. 2545 (2002)).

§ 3.10. Conclusion

The domestic copyright laws, and neighboring rights, of the U.S. and Thailand are similar on the subject of protected copyright works. This similarity results from the harmonization efforts of both countries to attain the international standards of the Berne Convention and the TRIPs Agreement. However, copyright protection in a few areas are significantly different in both countries' copyright law; for example, the duration of copyright and the protection of works made for hire.

International harmonization under the Berne Convention and the TRIPs Agreement, however, is a process of compromise. As a rule, international copyright treaties were enacted to convince contracting parties to adopt consistent legislation leading to consistent global practices. Such consistency is expected to smooth international trade for all rights holders and communities. In practice, however, copyright law holds a myriad of matters that may not put every country into absolute congruity. This is because harmonization under the TRIPs Agreement, as under the Berne Convention, only requires parties to comply with minimum standards.

In terms of categories of protected works, duration of protection, and the rights conferred, disparities remain between the copyright protection standards established within the framework of the Berne Convention, the TRIPs Agreement, and the implementing legislation of member states. How such discrepancies may be overcome or reconciled within each member state will depend on the legal status that these states may, under their national constitutions, accord treaties. For instance, the U.S. and Thailand hold that the Berne Convention and the TRIPs Agreement are non-self-executing treaties. Consequently, both countries have implemented copyright acts within their own countries to adopt copyright standards as mandated by the treaties.

Chapter IV:

A Comparative Analysis of Copyright Infringement Litigation under Thai and U.S. Legal Systems

§ 4.1. Introduction

This chapter examines and compares the legal aspects of copyright infringement litigation under Thai and U.S. legal systems. Whereas the previous chapter discussed the substantive legal aspects of copyright and neighboring rights treaties and domestic copyright laws of Thailand and the U.S., this chapter expounds upon important procedural and evidentiary rules applied to copyright infringement proceedings in these countries.

Article 5 of the Berne Convention provides little guidance by which Berne Union members can enforce copyright provisions, safeguard the rights of owners, and provide injured parties remedies in case of infringement.¹ Under Article 5(2) of the Convention, the law of the country where protection is claimed governs protection of copyrights, as well as the means of redress.² That means, whereas the Berne Union countries are obliged to enact substantive laws to implement the minimum standards mandated by the Convention, these countries are free to craft, under their national

¹ Berne Convention, *supra* note 18, art. 5(2). (stating in part “[a]part from the provisions of this Convention, the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed.”).

² *Id.*

legislation, judicial procedures to enforce the rights of copyright owners and provide the means to pursue remedies.³

Contrary to the Berne Convention, the TRIPs Agreement regulates a more confined minimum standard for enforcement of intellectual property rights. Under the TRIPs Agreement, WTO member countries are required to make available, under their domestic laws, adequate judicial procedures and effective enforcement of copyright. These requirements are prescribed by Part III of the TRIPs Agreement.⁴ The standards ensure that foreign copyright holders in WTO member countries are provided an adequate range of legal sanctions against actual or potential infringers of the substantive rights covered by TRIPs so as to permit effective action against any act of infringement of intellectual property rights.⁵

Therefore, as parties to the WTO, the U.S. and Thailand must ensure that effective enforcement procedures under their domestic laws are available to foreign copyright holders.⁶ These procedures include expeditious measures to deter infringement, and remedies to "make whole again" any victim of infringement. These procedures should be applied as to avoid creating barriers to legitimate trade, while providing safeguards against their abuse. Furthermore, such procedures must be fair,

³ The dichotomy between procedural law and substantive law is one of the most common concepts in the nineteenth century of legal exposition in both judicial opinions and scholarly analysis in the U.S.. The primary distinction of substantive law and procedural law is that the former constitutes substance and the latter constitutes procedure in cases. *See generally* D. Michael Risinger, "Substance" And "Procedure" Revisited With Some After Thought On The Constitutional Problems of "Irrebuttable Presumptions," 30 UCLA L. Rev. 189, (1982).

⁴ *See* TRIPs Agreement, *supra* note 14, Part III, entitled "Enforcement of Intellectual Property Rights."

⁵ *See* TRIPs Agreement, *supra* note 14, art. 41-50.

⁶ TRIPs Agreement, *supra* note 14, art. 41(1).

equitable, and not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays.⁷

The TRIPs Agreement requires member countries to provide injunctions and other provisional measures to remedy infringement.⁸ Members must provide criminal procedures and penalties to be applied in cases where copyright infringement are committed willfully and on a commercial scale. They must also provide remedies, including imprisonment and/or monetary fines, that are sufficient to provide a deterrent, and that are consistent with the level of penalties applied to crimes of corresponding gravity.⁹

So far, both Thailand and the U.S.'s copyright laws are deemed to be in conformity with the TRIPs Agreement's minimum standards on enforcement of copyright under their national laws. However, the Council for TRIPs is empowered to monitor member compliance with the prescribed enforcement procedures that the Agreement requires.¹⁰ Following are discussions of copyright enforcement and litigation under the U.S. and Thai jurisdictions.

§ 4.2. Legal Considerations Prior to Litigation

§ 4.2.1. Securing Copyrights

⁷ TRIPs Agreement, *supra* note 14, art. 41(2).

⁸ TRIPs Agreement, *supra* note 14, art. 44, 50.

⁹ TRIPs Agreement, *supra* note 14, art. 61.

¹⁰ TRIPs Agreement, *supra* note 14, art. 63(2), 68.

The rapid proliferation of copyrighted works, resulting from globalization and expanded communication technologies, suggests that copyright owners should seek effective means to secure their products of intellectual labor and reduce the risk of infringement. Therefore, it is important that before introducing their works into the marketplace, copyright proprietors should attempt to protect their interests by considering effective solutions to secure them at both domestic and international levels.

Copyright notice, registration, and recordation of copyright works are the most common and effective means in most countries, including the U.S. and Thailand, for securing copyrights and preventing infringers from claiming ignorance of the existence of a copyright, which they have allegedly infringed. However, the rules regarding requisite formalities are varied among the laws of countries where copyright protection is claimed.¹¹ Securing copyrights under the U.S. and Thai copyright law will be canvassed below.

§ 4.2.1.1. U.S. Copyright Law on Securing Copyrights

A. Copyright Notice

A requirement for copyright notice has been part of every U.S. copyright statute since the original act of 1790.¹² For a copyright proprietor intent on obtaining statutory protection under the U.S. copyright law, copyright notice is an important

¹¹ Berne Convention, *supra* note 18, art. 5(2).

¹² From the first copyright statute in 1790, Congress required that authors register their copyrights, give notice (by marking published copies with an indication of copyright status such as the “©” symbol, as well as other information about copyright ownership), and renew their rights after a relatively short initial term by reregistering their copyright. See Christopher Sprigman, *Refor(malizing) Copyright*, 57 Stan. L. Rev. 485, 487 (2004).

factor to determine validity of copyright works created before March 1, 1989 (the effective date of the Berne Convention Implementation Act of 1988).¹³ Under the previous U.S.C.A. of 1909, works published before January 1, 1978, could obtain statutory copyright only by publishing copies of the work with a proper copyright notice.¹⁴ The requirement of copyright notice as a condition to obtain copyright protection continued its role in the U.S.C.A. of 1976. However, with the U.S.'s accession to the Berne Convention in March of 1989, the requirement of copyright notice as a condition for protection was omitted from the U.S.C.A so that the U.S. could comply with the Berne Convention.¹⁵

Before March, 1989, to secure copyright protection, a work had to bear a valid copyright notice upon publication; however, after that date, omission of such notice could be rectified by subsequent reasonable efforts to add notice to all copies that were distributed in the U.S. and by registering the work within five years after the publication.¹⁶ The U.S. gave effect to the Berne Convention through its enactment of the *Berne Convention Implementation Act* (BCIA) of 1988.¹⁷ Under the Act,

¹³ See U.S.C.A. of 1976, 17 U.S.C. §§ 405(a), 405(b).

¹⁴ U.S.C.A. of 1909, 17 U.S.C. §§ 10, 19. The notice requirements under the 1909 Act were less demanding than the comparable requirements under the current Act. The year of first publication had to appear in the copyright notice only in the case of printed literary, musical and dramatic works, and of sound recordings.

¹⁵ The Berne Convention commands that "[t]he enjoyment and the exercise of . . . rights shall not be subject to any formality." See Berne Convention, *supra* note 18, art 5(2).

¹⁶ U.S.C.A. of 1976, 17 U.S.C. § 405.

¹⁷ The Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988) (codified in sections of 17 U.S.C.).

copyright notice for new works distributed on or after March 1, 1989 was entirely voluntary, as required by the Berne Convention.¹⁸

Today, affixing a copyright notice is not obligatory under the current U.S.C.A. By doing so, however, copyright owners will be better protected since this helps inform the public that the work is copyrighted and identifies the copyright owners and publication date of the work.¹⁹ Moreover, the benefits of applying notice, *inter alia*, include the ability to terminate a defense of innocent infringement on part of infringers, which would mitigate actual or statutory damages incurred under infringers' liability.²⁰

The permissive notice provisions of the current U.S.C.A., however, are not retroactive. A work publicly distributed before the effective date of the Berne Implementation Act of 1988 will be governed by prior provisions.²¹ Consequently, to secure copyright protection, it is vital for U.S. copyright owners of pre-1978 works to condition licensees to affix proper copyright notices expressly in writing.²² This requirement affects only domestically published works. One case in 1996, involving the requisite copyright notice for works governed by U.S.C.A. of 1909, ruled that publication of works outside the U.S. without required copyright notice did not

¹⁸ See Berne Convention, *supra* note 18, art 5(2).

¹⁹ See H.R. Rep. No. 94-1476, at 143 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, *cited in* 2-US International Copyright Law and Practice § 5.

²⁰ U.S.C.A. of 1976, 17 U.S.C. §§ 401(d), 402(d).

²¹ See *id.* § 405(a), (b), (c).

²² See *Donald Frederick Evans & Assocs. v. Continental Homes, Inc.*, 785 F.2d 897 (11th Cir. 1986); *Fantastic Fakes, Inc. v. Picwick Int'l, Inc.*, 661 F.2d 479 (5th Cir. 1981), *cited in* 2-US International Copyright Law and Practice § 5.

preclude copyright protection if the work was subsequently published or first published in the U.S. with proper copyright notices.²³

After March, 1989, copyright notice was no longer a condition for protection under the current U.S.C.A. Failure to apply notice to copyright works merely resulted in losing the opportunity to obtain full statutory damages in suit, no matter where the works might have been created. For copyright works originating outside the U.S., the copyright owners of those works, in case they have prospective interests accruing from those works being distributed in the U.S., should apply copyright notice to insure they receive the same benefits given to U.S. works.²⁴ Copyright notice under the 1976 U.S.C.A. comprises three elements: the word "copyright" or its equivalent,²⁵ the year of first publication, and the name of the owner of the copyright.²⁶ For example, "© by Sutee 2005" or "Copyright by Sutee 2005" would suffice for U.S. copyright protection.

With regard to international protection, the U.S. is a party to the Universal Copyright Convention (UCC)²⁷ and the Pan-American Convention Concerning

²³ *Twin Books Corp. v. Walt Disney Co.*, 83 F.3d 1162 (9th Cir. 1996).

²⁴ Given that U.S. copyright law has no extraterritorial effect, there would seem no necessity to comply with U.S. copyright notice standards. However, consequence for protection within U.S. territory can result from acts taken outside its borders. See Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 7.01 (1996).

²⁵ The word "copyright", the copyright symbol "©," or the abbreviation "Copr." are all acceptable as an eligible form of notice. See U.S.C.A. of 1976, 17 U.S.C. § 401 (b).

²⁶ U.S.C.A. of 1976, 17 U.S.C. § 401(b).

²⁷ Universal Copyright Convention, July 24, 1971, 25 U.S.T. 1341, 943 U.N.T.S. 178.

Literary and Artistic Copyright (Buenos Aires Convention).²⁸ The UCC provides that any member country that requires compliance with formalities (such as registration, deposit, or notice) as a condition of copyright protection must consider such formalities as satisfied if all published copies of a work bear the “©” symbol, the name of the copyright proprietor and the year of first publication.²⁹ The UCC formality provision only applies, however, to works that were first published outside the country requiring the observance of formalities and were not authored by one of that country’s nationals.³⁰ As opposed to the Berne Convention, formalities such as registration, as a condition for protection, are permitted in member countries under the UCC.³¹ Therefore, to assure protection for U.S. works that may be placed in a few UCC countries which are not parties to both the Berne Convention and the TRIPs

28 Pan-American Convention Concerning Literary and Artistic Copyright, Aug. 11, 1910, art. 3, T.S. No. 593, 38 Stat. 1785 [hereinafter Buenos Aires Convention]. The Buenos Aires Convention was a treaty proposed in 1910 which provided for copyright protection in 18 countries that were signatories to the convention, for a work created in any member country, where the work carries a notice containing a statement of reservation of rights. This is commonly done by the use of the phrase “[A]ll rights reserved” (or “[T]odos los derechos reservados”) next to the copyright notice. The U.S. acceded to the Buenos Aires Convention on May 11, 1911.

29 Universal Copyright Convention, July 24, 1971, art. III, ¶ 1, 25 U.S.T. at 1345 (stating “[A]ny Contracting State which, under its domestic law, requires as a condition of copyright, compliance with formalities such as deposit, registration, notice, notarial certificates, payment of fees or manufacture or publication in that Contracting State, shall regard these requirements as satisfied with respect to all works protected in accordance with this Convention and first published outside its territory and the author of which is not one of its nationals, if from the time of first publication all the copies of the work published with the authority of the author or other copyright proprietor bear the symbol © accompanied by the name of the copyright proprietor and the year of first publication placed in such manner and location as to give reasonable notice of claim of copyright.”).

30 *Id.*

31 For the comparison of the Berne Convention and the Universal Copyright Convention, *See* Terry Carroll, *Copyright Law Part 4 – International Aspect*, at http://www.totse.com/en/law/justice_for_all/claw4.html.

Agreement (such as Andorra and Laos),³² it is advisable to apply the “©” symbol, accompanied by the name of the copyright proprietor and the year of first publication, on every copy of copyrighted works.

The U.S. has been a party to the Buenos Aires Convention since 1911. Article 3 of this convention requires U.S. copyright owners, who desire copyright protection in member countries, to provide in the work a required statement in order to secure protection.³³ Basically, it was sufficient to substitute a copyright notice with the simple statement “[A]ll rights reserved” on the copies of copyrighted works which are distributed in other Buenos Aires member countries. However, the treaty became essentially obsolete on August 23, 2000, because every country that was a signatory to the Buenos Aires Convention was also a party to the Berne Convention (which required copyright protection to be granted in all signatory countries without requirement of any notice). As a result, the reservation statement under the Buenos Aires Convention is no longer crucial to international protection for U.S. copyright holders.

Under the current U.S.C.A., copyright notice may be placed on copies of copyrighted works “in such manner and location as to give reasonable notice of the claim of copyright.”³⁴ As for phonorecords of sound recordings, an encircled letter P or (P), the year of first publication of the sound recording, and the name of the owner of copyright in the sound recording should be placed on the work in such a manner and location that give reasonable notice; for example, on the phonorecord labels or

³² See Contracting Parties to the Berne Convention for the Protection of Literary and Artistic Works and the Universal Copyright Convention in Figure 10 and 11.

³³ See Buenos Aires Convention, Aug. 11, 1910, art. 3, T.S. No. 593, 38 Stat. 1785.

³⁴ U.S.C.A. of 1976, 17 U.S.C. § 401(c).

containers.³⁵ The "(P)" symbol has also been adopted as the international symbol for the protection of sound recordings by the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms (Phonograms Convention)³⁶ to which the U.S. is a party. However, application of the symbol is not mandatory as a condition for protection under the Phonograms Convention because it only suggests an exemplary symbol to be applied in the contracting states.³⁷

In conclusion, from March 1, 1989, distributing copyright works without notice does not deprive ownership of the copyright. It only extenuates the evidentiary weight of an intentional infringement claim. The copyright owner can still prove through appropriate evidence that the defendant is not entitled to mitigation of damages based on innocent infringement. Under current U.S. copyright law, affixing copyright notice is an inexpensive and effective way for copyright holders to protect their copyrights and discourage a potential infringer from infringement.

B. Registration of Copyright

Under the current U.S.C.A., works created on or after January 1, 1978, the effective date of the current Copyright Act, registration is not a condition for

³⁵ U.S.C.A. of 1976, 17 U.S.C. § 402. Cf. U.S.C.A. of 1909, 17 U.S.C. § 20 (1909 Act), The 1909 Copyright Act required the notice to appear on "the title page or page immediately following" for books, periodicals, and musical works.

³⁶ Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of Their Phonograms, Oct 29, 1971 [hereinafter Phonograms Convention].

³⁷ Phonograms Convention, *id.*, art. 5 (stating "[I]f, as a condition of protecting the producers of phonograms, a Contracting State, under its domestic law, requires compliance with formalities, these shall be considered as fulfilled if all the authorized duplicates of the phonogram distributed to the public or their containers bear a notice consisting of the symbol (P), accompanied by the year date of the first publication, placed in such manner as to give reasonable notice of claim of protection; and, if the duplicates or their containers do not identify the producer, his successor in title or the exclusive licensee (by carrying his name, trademark or other appropriate designation), the notice shall also include the name of the producer, his successor in title or the exclusive licensee.").

obtaining copyright³⁸ because copyright of a work automatically emerges at the very moment of its creation³⁹ or, as the Copyright Act prescribes, “[w]hen it is fixed in a copy or phonorecord for the first time.”⁴⁰ Even though, registration of a copyright work is not required to obtain protection under the current U.S.C.A., it is highly recommended because it functions as a threshold for bringing infringement suits and it is necessary to secure presumptions and certain important remedies in the litigation.

Under the U.S.C.A. of 1976, registration is required for copyright owners to bring infringement suits⁴¹ when a work is either first published or simultaneously published in the U.S. For an unpublished work, registration is required when all the authors are nationals, domiciliaries, or permanent residents of the U.S.⁴² Consequently, Thai copyright proprietors, whose works have not been first or

³⁸ U.S.C.A. of 1976, 17 U.S.C. § 408(a).

³⁹ *Montgomery v. Noga*, 168 F.3d 1282, 1288 (11th Cir. 1999); *Well-Made Toy Mfg. Corp. v. Goffa Int'l Corp.*, 210 F. Supp. 2d 147, 157 (E.D.N.Y. 2002).

⁴⁰ U.S.C.A. of 1976, 17 U.S.C. § 101.

⁴¹ *See id.* § 411(a) (providing that “no action for infringement of the copyright in any *U.S. work* shall be instituted until registration of the copyright claim has been made” with the Copyright Office).

⁴² *See id.* § 101 (stating “[F]or purposes of section 411, a work is a “U.S. work” only if— (1) in the case of a published work, the work is first published—

(A) in the U.S.;

(B) simultaneously in the U.S. and another treaty party or parties, whose law grants a term of copyright protection that is the same as or longer than the term provided in the U.S.;

(C) simultaneously in the U.S. and a foreign nation that is not a treaty party; or

(D) in a foreign nation that is not a treaty party, and all of the authors of the work are nationals, domiciliaries, or habitual residents of, or in the case of an audiovisual work legal entities with headquarters in, the U.S.;

(2) in the case of an unpublished work, all the authors of the work are nationals, domiciliaries, or habitual residents of the U.S., or, in the case of an unpublished audiovisual work, all the authors are legal entities with headquarters in the U.S..”).

simultaneously published in the U.S., are entitled to file suit in U.S. courts without the need of prior registration of their works.

Under the U.S.C.A. of 1976, once registration takes place, a subsequent infringement action may address infringing acts that occurred either before or after that registration, provided that the filing of the infringement action occurs within the term set in the statute of limitations.⁴³ Nonetheless, a question arises as to whether registration, as a prerequisite for bringing an infringement suit, is inconsistent with the Berne Convention rule. The U.S. legislators argued that the *Berne Convention Implementation Act* (BCIA) of 1988 took a minimalist approach to meeting U.S. obligations under the Convention.⁴⁴

In any copyright suit in the U.S., a party may take an evidentiary benefit from the *Certificate of Registration* on the validity of the copyright and the fact stated in it. However, registration must be made within five years of first publication in order to establish *prima facie* evidence underlying the *Certificate of Registration*.⁴⁵ In addition, the *Certificate of Registration* also establishes a *prima facie* presumption of originality since it is a pertinent condition to the issue of the copyright's validity.

⁴³ See H. Rep., p. 157; Reg. Supp. Rep., p. 124.

⁴⁴ See H.R. 4262, 100th Cong., 2d Sess. (1988). See also S. Rept. 100-352, at 13 (emphasis added) (stating "[B]erne does not restrict member nations from imposing formalities on works of domestic origin.").

⁴⁵ See U.S.C.A. of 1976, 17 U.S.C. § 410(c) (providing "[I]n any judicial proceedings the certificate of a registration made before or within five years after first publication of the work shall constitute *prima facie* evidence of the validity of the copyright and of the facts stated in the certificate. The evidentiary weight to be accorded the certificate of a registration made thereafter shall be within the discretion of the court.").

More importantly, registration is a prerequisite for obtaining statutory damages and attorney's fees as provided in sections 504 and 505 of the U.S.C.A.⁴⁶ This benefit is given to a copyright owner of published works, which are registered with the Copyright Office within three months after the first publication of the work.⁴⁷ Statutory damages attract copyright owners of published works because of their significant amounts. To encourage registration of copyright, damages have doubled since the enactment of the previous Copyright Act.⁴⁸ In the case of willful infringement, the increase of statutory damages results in a possible award of up to \$150,000. At the enactment of the Copyright Act of 1976, the maximum statutory damage award for willful infringement was set at \$ 50,000.⁴⁹ When the BCIA doubled all awards, the maximum was raised to \$ 100,000.⁵⁰ The *Digital Theft Deterrence and Copyright Damages Improvement Act* of 1999 raised the maximum to \$ 150,000, which is where it currently stands.⁵¹

The U.S. Copyright Office, a division of the Library of Congress, has the administrative power to undertake the process of registration of copyrights. The effective date of a copyright registration is the day on which the U.S. Copyright

⁴⁶ *Id.* § 412.

⁴⁷ *Id.*

⁴⁸ *Id.* § 504(c).

⁴⁹ *Id.* § 504(c)(2) (1976).

⁵⁰ *Id.* § 504(c)(2) (1989).

⁵¹ *Id.* § 504(c)(2) (1999).

Office receives an application, deposit, and fee.⁵² The registration fee is currently \$30 per work.⁵³ When, after examination, the Register of Copyrights determines that the material deposited constitutes copyrightable subject matter and that legal and formal requirements have been met, the Register will register the claim and issue the applicant a *Certificate of Registration*.⁵⁴ The issue of validity of a registration is to be determined by the Register of Copyrights or by a court of competent jurisdiction.

C. Recordation

Before the effective date of the BCIA, recordation of an interest in a copyright was a requirement prior to bringing suit for copyright infringement.⁵⁵ The BCIA abrogated this requirement for causes of action arising after March 1, 1989.⁵⁶ Consequently, under the current U.S.C.A., recordation of transfers of copyright is not a requirement for bringing infringement suit. Any transfer of copyright ownership or other document pertaining to a copyright can be recorded in the Copyright Office.⁵⁷ To record transfers of copyright, the document filed for recordation must bear the

⁵² *Id.* § 410(d).

⁵³ U.S. Copyright Office Fees, *Basic Registration Fees*, <http://www.copyright.gov/circs/circ04.html> (last modified Dec., 2004).

⁵⁴ U.S.C.A. of 1976, 17 U.S.C. § 410(a).

⁵⁵ *See* U.S.C.A. of 1976, 17 U.S.C. § 205(d) (repl. by Pub. L. 100-568 (effective Mar. 1, 1989)).

⁵⁶ *See id.* § 205.

⁵⁷ *Id.* § 205(a).

actual signature of the person who executed it, or it must be accompanied by a sworn or official certification that it is a true copy of the original, signed document.⁵⁸

Even after March 1, 1989, recordation remains beneficial for copyright owners in the dispute of copyright transfers since it provides a favorable presumption to a party, whose transfer was timely recorded. Between two conflicting transfers, the one executed first prevails if it is either recorded within one month after its execution in the U.S., or within two months after its execution outside the U.S.⁵⁹ Otherwise the later transfer prevails if recorded first in proper manner, and if taken in good faith, for valuable consideration or on the basis of a binding promise to pay royalties, and without notice of the earlier transfer.⁶⁰

§ 4.2.1.2. Thai Copyright Law on Securing Copyrights

Until its accession to the Berne Convention in 1931, Thailand had required copyright owners to register and deposit their works with the Department of Royal Inscription under the Authorship Rights Act R.S. 120 (A.D. 1901). The formality under the Act required an author to register a book within twelve months after first publication.⁶¹ When the author satisfied the registration requirement, he or she would be granted copyright protection. Furthermore, copyright holders needed to make notice on every copy of copyrighted books under the Authorship Rights Act R.S. 120

⁵⁸ *Id.*

⁵⁹ *Id.* § 205(d).

⁶⁰ *Id.*

⁶¹ Authorship Rights Act, R.S. 120 (1901) § 10 (Thail.).

as amended B.E. 2457 (A.D. 1914). Such notice under the Act was the statement "Ownership Reserved by the Authorship Rights Act" in Thai language.⁶²

In 1931, Thailand enacted the *Act for Protection of Literary and Artistic Works* B.E. 2474 to implement the "automatic protection" principle (registration and notice are not a condition for the acquisition, enjoyment, or exercise of copyright) under the Berne Convention to which Thailand acceded.⁶³ The 1931 *Act for Protection of Literary and Artistic Works* repealed the *Authorship Rights Act* R.S. 120 and abrogated all formality requirements for copyright protection under the preceding Act.⁶⁴

Subsequently, the *T.C.A.* B.E. 2521 was enacted in 1978 to amend the *Act for Protection of Literary and Artistic Works* B.E. 2474. The 1978 *T.C.A.* retained its full compliance with the "automatic protection" principle of the Berne Convention, which prohibited formalities as a condition for enjoyment of copyright. This "automatic protection" principle has continued into the *T.C.A.* B.E. 2537 (current *T.C.A.*). Under the current Act, copyright proprietors are neither required to perform copyright notice nor any other formalities as a condition for obtaining copyright. Moreover, copyright holders are not subject to formal requirements such as registration to bring a copyright infringement suit as is the case in the U.S.⁶⁵

Although, the current Thai copyright law does not stipulate formal requirements upon copyright owners as a condition to acquire exclusive rights, it is

⁶² Authorship Rights Act, R.S. 120 (1901) § 22 (amended in 1914) (Thail.).

⁶³ Berne Convention, *supra* note 18, art 5(2).

⁶⁴ Act for the Protection of Literary and Artistic Works, B.E. 2474 (1931) § 3 (Thail.).

⁶⁵ See U.S.C.A. of 1976, 17 U.S.C. § 411(a).

highly recommended for them to make notice on every copy of their works, since information specified in the notice establishes *prima facie* evidence in copyright litigations. Section 62 of the T.C.A. B.E. 2537 rules that in any copyright litigation, a name or a substitution for the name of a person claiming to be the owner of copyright, will be presumed to be the named author of the work.⁶⁶ Absent any such name claiming authorship of the copyright work, the name of a printer or publisher, if evident, will constitute a presumption that the person who is the printer or publisher is the owner of copyright in the work.⁶⁷

Unlike the U.S.C.A., the T.C.A. does not suggest a form for copyright notice. Despite the non-existence of a required form for copyright notice under the T.C.A., Thai copyright owners should apply the “©” symbol since it is internationally recognized as a constraint on prospective infringers. Moreover, copyright holders should give notification of their protected works regarding the subsequent transfers to the Department of Intellectual Property, Ministry of Commerce. There is no cost for the notification, and should infringement occur, notification allows more confidence to the copyright owners towards enforcement of their exclusive rights.⁶⁸

§ 4.2.2. Legal Considerations for Criminal Copyright Sanctions

In general, owners of copyright have an option to protect their exclusive rights by pursuing civil remedies. Yet the possibility of civil sanctions alone is insufficient to deter would-be infringers. Article 61 of the TRIPs Agreement requires contracting

⁶⁶ T.C.A. B.E. 2537 (1994) § 62 (Thail.).

⁶⁷ *Id.*

⁶⁸ See Department of Intellectual Property Regulations for Considering the Notification of Copyright Information and Service Request for Copyright Data B.E. 2545 (2002) (Thail.).

parties to provide criminal penalties in case of willful copyright infringement on a commercial scale.⁶⁹ Both U.S. and Thai copyright law provide copyright holders criminal sanctions to deter infringers. However, the procedures for pursuing criminal charges against violators of copyright differ with each country's laws and will be discussed next.

§ 4.2.2.1. Irreconcilability of Criminal Infringement Action Under the U.S. Copyright Law

The nature of criminal copyright infringement offenses determines the legal proceedings under both U.S. and Thai copyright law. In the U.S., copyright infringement has been a crime since 1897, when criminal infringement provisions were first prescribed by law.⁷⁰ Criminal copyright infringement under the U.S.C.A. is not compoundable. That is, once the government decides to undertake criminal prosecution, the complaining party cannot withdraw the complaint, even though that party later wants to settle through other alternative means of dispute settlement, such as arbitration, conciliation, or mediation. It becomes a matter of federal government enforcement because the activity is a federal crime.⁷¹

Certain, but not all, infringements of copyright constitute federal criminal infringements.⁷² Currently, Title 17 of the U.S. Code defines criminal copyright

⁶⁹ See TRIPs Agreement, *supra* note 14, art. 61.

⁷⁰ U.S.C.A. of January 6, 1897, ch. 4, 29 Stat. 481-82.

⁷¹ *Cok v. Cosentino*, 876 F.2d 1, 2 (1st Cir.1989) (private citizen has no authority to initiate federal criminal prosecution under 18 U.S.C. § 241).

⁷² For a discussion on the basic form of criminal copyright infringement, see § 4.5.1.2. *infra*.

infringement as willful infringement for the purpose of commercial advantage or private financial gain.⁷³ Because the U.S. legal system is based on principles of federalism and federal law preempts state law in the copyright field,⁷⁴ individuals harmed by copyright violations do not have recourse to state criminal law remedies. Hence, in most instances, criminal prosecution of copyright offenders is possible only within the federal system.

Under the U.S.'s criminal enforcement mechanism, supervisory responsibility for copyright infringement prosecutions rests with the Computer Crime and Intellectual Property Section of the Criminal Division, Department of Justice. However, investigative responsibility for complaints involving criminal copyright infringement rests with the Federal Bureau of Investigation (FBI).⁷⁵ The U.S. government, through the Department of Justice, has an exclusive duty to file criminal copyright charges when the committed infringement gives rise to a criminal infringement action under the law.

Criminal copyright infringement actions can be initiated by filing a complaint with the FBI. However, the FBI is usually reluctant to investigate copyright infringement, mainly because strong civil sanctions are already available under Title

⁷³ See U.S.C.A. of 1976, 17 U.S.C. § 506(a) (1988 & Supp. IV 1992).

⁷⁴ See U.S.C.A. of 1976, 17 U.S.C. § 301(a) (stating that "On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.").

⁷⁵ Criminal Resource Manual No. 1843, available in the Justice Manual (2d ed.), available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm01843.htm.

17 of the U.S. Code.⁷⁶ And while a criminal proceeding is typically much faster and results in stronger penalties than a civil suit, there is a drawback associated with criminal prosecution. The copyright owner will necessarily have less control over proceedings instituted by the government than he or she would have over civil litigation.⁷⁷

§ 4.2.2.2. Reconcilability of Criminal Infringement Action Under the Thai Copyright Law

Thai law permits either the public prosecutor or the injured person to institute criminal proceedings.⁷⁸ Individuals can prosecute criminal offenses under the T.C.A. by bringing a private criminal suit.⁷⁹ Deciding to proceed a copyright infringement litigation, a plaintiff must characterize the suit as a private criminal suit (seeking state punishment for actions detrimental to society) or as a civil suit (seeking damages), or join the two suits (with the civil portion governed by the Civil Procedure Code).⁸⁰ Moreover, the Public Prosecutor's decision not to prosecute will not bar the victim from pursuing criminal punishment.⁸¹

⁷⁶ See Kent Walker, *Federal Criminal Remedies For The Theft of Intellectual Property*, 16 Hastings Comm. & Ent. L.J. 681, 684 (1994).

⁷⁷ *Id.* at 687.

⁷⁸ Crim. Pro. Code B.E. 2477 (1934) §§ 5, 28 (Thail.).

⁷⁹ Crim. Proc. Code B.E. 2477 (1934) § 28 (Thail.).

⁸⁰ Crim. Proc. Code B.E. 2477 (1934) § 40 (Thail.).

⁸¹ Crim. Proc. Code B.E. 2477 (1934) § 34 (Thail.) (ordinarily, if both the victim and public prosecutor institute prosecution, the cases will be joined). *Id.* § 33.

Under the current T.C.A., all copyright criminal offenses are compoundable.⁸² To file a criminal case against an infringer, an injured party in a compoundable offence must lodge a complaint to a competent inquiry police official,⁸³ and the police cannot directly initiate the action without the copyright owner filing such a complaint. In furtherance, the competent inquiry police official will conduct investigations, collect all evidence, and file a case with a prosecutor.

Article 66 of the current T.C.A. makes criminal proceedings in Thailand unique in the sense that copyright infringement is compoundable even if it is a criminal offense. Therefore, unlike the U.S., the subsequent decision of a right holder not to pursue the case any further will terminate the criminal justice process regardless of the public money and effort spent to ensure effective enforcement. This unique character of Thai copyright law sometimes constitutes an abuse of copyright on part of copyright holders.

Unlike the U.S. copyright enforcement system, most copyright claimants in Thailand resort to the criminal enforcement system because Thai copyright law avails a more admissible threshold to establish criminal offenses. Moreover, punitive damages under the T.C.A. serve as a strong deterrent to a potential violator. Furthermore, copyright owners may join the government in the action and collect damages under tort law. In contrast, U.S. copyright holders primarily pursue

⁸² See Copyright Act, B.E. 2537 (1994) § 66 (Thail.).

⁸³ See Penal Code B.E. 2499 (1956) § 96 (Thail.). See also Criminal Procedure Code B.E. 2477 (1934) § 121 (Thail.).

remedies through civil actions since the U.S. has a legal system that confers effective injunction and damages for protecting private property rights.⁸⁴

There are two ways to enter the Thai criminal process: (1) the public prosecutor screens the inquiry police official's investigation, and decides to institute proceedings; or (2) the injured person institutes a charge directly with the court, which judicially screens the case by conducting a special preliminary investigation.

In Thailand, most copyright holders have preferred to file criminal charges rather than civil causes of action. This preference is due in part to the inefficiency in pursuance of provisional measures under the Thai Civil Procedure Code. The deterrent in pursuing a civil case is that upon the court's receiving a civil complaint, the willful infringer who operates an infringement business can simply close shop and flee. In contrast, criminal actions allow for the immediate termination of the ongoing infringement act, whereas, interim injunctions are seldom available in civil cases prior to constituting the civil action.

§ 4.2.3. Provisional Measures

Most legal systems provide for preliminary injunctions or interlocutory injunctions against copyright infringements, which are also required under Article 50 of the TRIPs Agreement. As required by Article 50 of the TRIPs Agreement, both the U.S. and Thailand as well as other WTO members must avail themselves the authority to order prompt and effective provisional measures to "prevent an infringement of any intellectual property right from occurring, and in particular to prevent the entry into the channels of commerce in their jurisdiction of goods, including imported goods

⁸⁴ See Vichai Ariyanuntaka, Rethinking Intellectual Property Rights Enforcement in the Light of TRIPs and Specialized Intellectual Property Court in Thailand, in *The Intellectual Property and International Trade Law Forum: Special Issue 1998 12* (1998). (explaining the difference of intellectual property enforcement between Thailand and countries with Anglo-American legal system).

immediately after customs clearance” and to “preserve relevant evidence in regard to the alleged infringement.”⁸⁵

To prevent further damage during this period, a copyright owner often wants to take immediate action to stop the allegedly infringing action, to prevent the evidence being destroyed, and to prevent infringing goods from entering the channel of commerce. On the other hand, it is equally important for an alleged infringer not to have his or her business stopped for a period without reason. These conflicting interests must be balanced by the court, which must also consider that at an early stage of litigation, evidence is unlikely to be complete and that the final decision may lead to another result.

§ 4.2.3.1. Temporary Restraining Order Under the U.S.C.A.

The U.S.C.A. empowers a District Court to “grant temporary and final injunctions on such terms as it may deem reasonable to restrain infringement of a copyright.”⁸⁶ A temporary restraining order is a court directive that prohibits persons from conducting certain activities. In copyright cases, these activities usually include reproducing and distributing infringing materials.⁸⁷ Under U.S. law, temporary restraining orders are commonly sought on an *ex parte* basis whereby no notice of the proceeding is given to the defendant.

⁸⁵ TRIPs Agreement, *supra* note 14, art. 50.

⁸⁶ U.S.C.A. of 1976, 17 U.S.C. 502(a).

⁸⁷ *See e.g.*, Value Group, Inc. v. Mendham Lake Estate, L.P., 800 F.Supp. 1228, 1235 (D.N.J. 1992). A temporary restraining order was issued against construction of a building that allegedly infringed an architectural work.

Rule 65 of the *Federal Rules of Civil Procedure* mainly governs the application of a temporary restraining order. An applicant for a temporary restraining order must satisfy the court that the defendants cannot be found or will transfer, secret, or destroy the infringing materials if notice is given.⁸⁸ A temporary restraining order is ineffective unless the plaintiff provides security to the court. It is, therefore, imperative that a plaintiff arrange for a bond with a qualified surety before filing the application.⁸⁹ This may require the plaintiff to provide the surety with financial statements. A temporary restraining order lasts only ten days, extendable for good cause to an additional ten days.⁹⁰ Given that a temporary restraining order is of limited duration, the amount of the bond is correspondingly low.

The likelihood of success in petitioning the court to issue a temporary restraining order depends solely on the court's discretion. The court usually grants a temporary restraining order based on the plaintiff's submissions when it appears that:

- (1) The plaintiff is likely to succeed on the merits of its copyright claims;
- (2) There is a high probability that plaintiff will be irreparably injured as a result of defendant's continued reproducing, distributing, selling and/or offering to sell unauthorized copies of the copyrighted work and that such injury is caused by the showing made of infringement of plaintiff's copyrights; and,

⁸⁸ F.R.Civ.P. Rule 65.

⁸⁹ F.R.Civ.P. Rule 65(c).

⁹⁰ F.R.Civ.P. Rule 65(b).

(3) The balance of the hardships supports decidedly in plaintiff's favor since the defendant will not suffer significant or irreparable injury through entry of the order.⁹¹

§ 4.2.3.2. Provisional Measures Prior to Litigation Under the T.C.A.

In Thailand, the provisional measures of copyright protection prior to instituting an action are governed by *Rules for Intellectual Property and International Trade Cases* B.E. 2540 (1997).⁹² These rules were established under the *Act for the Establishment of and Procedure for Intellectual Property and International Trade Court* B.E. 2539 (1996) which empowers the Chief Justice of the Intellectual Property and International Trade Court to regulate rules necessary to ensure convenience, expediency, and fairness of the proceedings under the tribunal.⁹³ These rules apply to, *inter alia* provisional measures provisions under the Thai Patent Act B.E. 2522 and the Thai Trademark Act B.E. 2534, the interlocutory injunction provision enunciated in Article 65 of the *T.C.A.* B.E. 2537 (1994).⁹⁴

Article 65 of the *T.C.A.* provides an opportunity for copyright owners or performers to seek a judicial injunction on an *ex parte* basis to order any person who is committing, or about to commit, any infringing act to cease or refrain from such

⁹¹ Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 35.01 (1996).

⁹² See *Rules for Intellectual Property and International Trade Cases* B.E. 2540 (1997) §§ 12-19, 42 (Thail.).

⁹³ *Act for the Establishment of Procedure for Intellectual Property and International Trade Court* B.E. 2539 (1996) § 30 (Thail.).

⁹⁴ *T.C.A.* B.E. 2537 (1994) § 65 (Thail.).

illegal conduct.⁹⁵ Notably, under the *Rules for Intellectual Property and International Trade Cases* B.E. 2540 (1997), regarding provisional measures prior to trial, the provisional measure injunction can be issued not only against the ongoing infringement but also against the impending infringement (which in normal civil cases, the Civil Procedural Code of Thailand limits the issuance of provisional injunctions only after a trial has been commenced).

Similar to the procedure in the U.S. jurisdiction, a plaintiff may seek a provisional injunction prior to trial by showing reasonable evidence that immediate judicial restraint on infringing conduct is necessary.⁹⁶ The plaintiff must also ensure the court that he or she will be irreparably injured as a result of the defendant's ongoing or impending conduct, and that a provisional injunction, will not cause the defendant to suffer significant or irreparable injury. Thus, the question of whether an injunction should issue requires that the court balance the plaintiff's interests against those of the defendant.⁹⁷ At the court's discretion, the plaintiff may be required to give security sufficient to recover any harm that may occur during the execution of the provisional measure.⁹⁸

As opposed to U.S. law, the court's decision to issue a provisional measure prior to litigation under Section 65 of the T.C.A. is final and cannot be appealed. If the court issues a provisional measure order for a plaintiff, the plaintiff has a grace period of 15 days to file an infringement suit against the defendant otherwise the

⁹⁵ *Id.*

⁹⁶ Rules for Intellectual Property and International Trade Cases B.E. 2540 (1997) §§ 13, 42 (Thail.).

⁹⁷ *Id.*

⁹⁸ *Id.* §§ 15, 42.

provisional measure will become invalid after the expiry of the grace period.⁹⁹ Additionally, the defendant may file suit against the plaintiff to collect damages for the injury that occurred during the execution of a provisional measure order that is inappropriately requested by the plaintiff.

§ 4.3. Prescription Periods for Copyright Infringement Actions

The prescription period is a significant factor for copyright owners in estimating how long they can wait before filing a copyright infringement lawsuit. The legal implications of prescription period vary within the national legislation of various countries where copyright is claimed. This direction corresponds with the principle of means of redress under Article 5(2) of the Berne Convention.¹⁰⁰

Also, there is considerable variation in prescription periods for identical civil claims and crimes across jurisdictions around the globe and prescription periods are far from universal. The U.S. and Thailand, for example, have different prescription periods in both civil and criminal actions arising from copyright infringements. Prescription periods for copyright infringement actions applied in U.S. and Thai jurisdiction are discussed below.

§ 4.3.1. Prescription Periods Under U.S. Copyright Law

In the U.S., prescription period provisions are commonly known as “statutes of limitations.” Section 507 of the U.S.C.A. prescribes a statute of limitations for both civil and criminal copyright infringement actions. Under Section 507(a) of the

⁹⁹ *Id.* §§ 17, 42.

¹⁰⁰ *See* Berne Convention, *supra* note 18, art. 5(2) (stating “[a]part from the provisions of this Convention, the extent of protection, as well as the means of redress afforded the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed.”).

U.S.C.A., criminal proceedings cannot be brought unless commenced within five years after the cause of action arose.¹⁰¹ The prescription period can be asserted by criminal defendants as a defense to avoid conviction or prosecution if the plaintiff fails to initiate a criminal action within five years. This five-year prescription period is consistent with most other criminal statutes of limitations under the U.S. criminal law.¹⁰²

For civil actions, Section 507(b) articulates that “no civil (copyright) action shall be maintained . . . unless it is commenced within three years after the claim accrued.”¹⁰³ Therefore, it is important for a plaintiff to find when “a claim accrued” to begin the period under the statute of limitations. One court held that a claim accrues when the plaintiff “knows or had reason to know of the injury upon which the claim is premised.”¹⁰⁴ Consequently, to avoid dismissal of the lawsuit, an injured party must file an infringement lawsuit within three years of the time he or she learned of the infringement.

§ 4.3.2. Prescription Periods Under Thai Copyright Law

In Thailand, any criminal offenses can be prosecuted by either an injured party or by a public prosecutor.¹⁰⁵ For criminal copyright infringement actions, Section 66

¹⁰¹ U.S.C.A. of 1976, 17 U.S.C. § 507(a).

¹⁰² Tim F. Williams, *The Stiff Criminal Penalties for Copyright Infringement*, 14 MAY S.C. Law. 33, 36 (2003).

¹⁰³ U.S.C.A. of 1976, 17 U.S.C. § 507(b).

¹⁰⁴ *Stone v. Williams*, 970 F.2d 1043, 1048 (2d Cir. 1992).

¹⁰⁵ Crim. Pro. Code B.E. 2477 (1934) § 28 (Thail.).

of the *T.C.A.* B.E. 2537 is a key provision to determine prescription periods for criminal copyright infringement actions. Section 66 clearly states that all offenses in the Copyright Act are compoundable. However, this section must be read in accompaniment with the Criminal Procedure Code B.E. 2477 (1934) and the Penal Code B.E. 2499 (1956).

If an injured person in criminal copyright infringement actions decides to file an action through public prosecution, the complaint must first be lodged with an inquiry official under Section 121 of the Criminal Procedure Code B.E. 2477 (1934).¹⁰⁶ Section 96 of the Penal Code B.E. 2499 (1956) applies in conjunction with Section 121 of the Criminal Procedure Code B.E. 2477 (1934) and establishes the prescription period for compoundable offenses. A complaint of criminal copyright infringements must be made within three months after the injured party knows of the offense and the identity of the offender.¹⁰⁷

Once the injured copyright owner files a complaint through an inquiry official, the public prosecutor must bring the criminal copyright infringement case before the Intellectual Property and International Trade Court within the period described under Section 95 of the Thai Penal Code, which is one year or ten years depending on the gravity of the offense.¹⁰⁸ However, if a person injured by criminal copyright infringement decides to take criminal action at his or her own expense, the criminal

¹⁰⁶ See *Crim. Pro. Code B.E. 2477 (1934) §§ 120-21 (Thail.)*.

¹⁰⁷ See *Penal Code B.E. 2499 (1956) § 96 (Thail.)*. See also *Criminal Procedure Code B.E. 2477 (1934) § 121 (Thail.)*.

¹⁰⁸ See *Penal Code B.E. 2499 (1956) § 95 (Thail.)*.

lawsuit must commence within three months after knowledge of the offense and the identity of the offender.¹⁰⁹

For civil actions of copyright infringements, the T.C.A. prescribes prescription periods longer than what are provided under the U.S.C.A. Section 63 of the *T.C.A.* B.E. 2537 (1994) articulates a special prescription period for copyright infringement actions to be brought before the Intellectual Property and International Trade Court (IPIT Court) that differs from the prescription periods applied in other civil actions.¹¹⁰ The lapse of the prescription period bars an injured person from making a claim after three years of becoming aware of the copyright infringement and the identification of the infringer, or after ten years from the occurrence of the infringement.¹¹¹

§ 4.4. Subject of Jurisdiction

§ 4.4.1. Jurisdiction of U.S. Courts for Copyright Infringement Actions

Since the U.S.C.A. was enacted under the federal Constitution, the federal courts of the U.S. are given exclusive jurisdiction to decide copyright infringement cases. The U.S. Constitution provides, "The Congress shall have Power ... To

¹⁰⁹ Penal Code B.E. 2499 (1956) § 96 (Thail.).

¹¹⁰ See Copyright Act, B.E. 2537 (1994) § 63 (Thail.).
But see Civil and Commercial Code B.E. 2535 (1992) § 448 (Thail.). (providing a different prescription period from copyright infringement cases in that the plaintiff is barred to lodge the claim after the end of one year from acknowledgment of the tort and the identity of the wrongdoer or after the end of ten years from the occurrence of tort).

¹¹¹ Copyright Act, B.E. 2537 (1994) § 63 (Thail.).

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.”¹¹² Section 301 of the U.S.C.A. of 1976 provides for preemption by state courts by stating that “no person is entitled to any such right (the exclusive rights within the scope of copyright in the Act) or equivalent right in any such work under the common law or statutes of any state.”¹¹³

In addition, federal courts have the discretion to grant temporary or permanent injunctions to avoid or redress copyright infringements.¹¹⁴ In this respect, Section 1338 of Title 28 of the United States Code states that:

“(a) The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trademarks. Such jurisdiction shall be exclusive of the courts of the states in patent, plant variety protection and copyright cases.

(b) The district courts shall have original jurisdiction of any civil action asserting a claim of unfair competition when joined with a substantial and related claim under the copyright, patent, plant variety protection or trademark laws.”

United States copyright enforcement is territorial to the U.S. and its territories and possessions. This means U.S. copyright law has no extraterritorial application,

¹¹² U.S. Const. art. I, 8, cls. 1, 8.

¹¹³ U.S.C.A. of 1976, 17 U.S.C. § 301.

¹¹⁴ 28 U.S.C. § 1338(a) (1988); 17 U.S.C. § 502 (1988).

and¹¹⁵ therefore, U.S. courts have no jurisdiction over an act conducted outside the physical and political borders of the U.S.

§ 4.4.2. Jurisdiction of the Thai Specialized Court for Copyright Infringement Actions

Jurisdiction for enforcement copyrights in the Kingdom of Thailand is vested exclusively in the IPIT Court. The establishment of IPIT Court has proven to be an active forum in Thailand for strengthening the enforcement of copyright and other intellectual property rights. The Court was inaugurated on December 1, 1997 under the *Act for the Establishment of and Procedure for Intellectual Property and International Trade Court* B.E. 2539 (1996).¹¹⁶ This event is a milestone of the development of Thai intellectual property enforcement mechanisms.

Under Section 7 of the *Act for Establishment of and Procedure for Intellectual Property and International Trade Court*, the IPIT Court has exclusive jurisdiction both in civil and criminal matters on the enforcement of copyrights throughout the Kingdom of Thailand.¹¹⁷ Parties to copyright infringement cases adjudicated under the IPIT Court may appeal the case directly to the Intellectual Property Division of the

¹¹⁵ *Subafilms, Ltd. v. MGM-Pathe Communications Co.*, 24 F.3d 1088, 1093 (9th Cir. 1994). The issue in the case was whether an authorization from inside the U.S. to reproduce the Beatle's animated feature film "Yellow Submarine" outside the U.S. violated U.S. copyright laws. The court held that the reproduction did not violate U.S. copyright laws, and the appellees could not overcome the presumption against extraterritoriality because the acts of infringement took place entirely abroad.

¹¹⁶ The Act for Establishment and Procedure for Intellectual Property and International Trade Court, B.E. 2539 (1996) (Thail.). The Act for the Establishment of and Procedure for Intellectual Property and International Trade Court of 1996 was passed by the Parliament and promulgated in the Government Gazette on October 25, 1996.

¹¹⁷ The Act for the Establishment of and Procedure for Intellectual Property and International Trade Court, B.E. 2539 (1996) § 7(1), (3) (Thail.).

Supreme Court of Thailand without prior adjudication of an appellate court.¹¹⁸ This leap-frog procedure is one of the salient features of the Thai IPIT Court under its intellectual property enforcement regime to minimize procedural delays, in consistence with Article 41 of the TRIPs Agreement. In fact, Thailand has exceeded its obligation under Article 41(5) of the TRIPs Agreement by establishing a specialized court to serve as a user-friendly forum for both national and foreign intellectual property commerce and industry.¹¹⁹

§ 4.5. Legal Considerations for Copyright Infringement

Litigation

§ 4.5.1. Legal Considerations for Copyright Infringement Litigation Under U.S. Law

§ 4.5.1.1. Registration as a Prerequisite for Instituting Infringement Actions

To institute a copyright infringement action in the U.S., as a prerequisite, a claimant must secure a copyright registration from the Register of Copyrights.¹²⁰ However, in any given case where the required registration deposit, application, and

¹¹⁸ The Act for the Establishment of and Procedure for Intellectual Property and International Trade Court, B.E. 2539 (1996) § 38 (Thail.).

¹¹⁹ TRIPs Agreement, *supra* note 18, art. 41(5) (stating "It is understood that this Part (entitled "Enforcement of Intellectual Property Rights") does not create any obligation to put in place a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of law in general . . . Nothing in this Part creates any obligation with respect to the distribution of resources as between enforcement of intellectual property rights and the enforcement of law in general.").

¹²⁰ See U.S.C.A. of 1976, 17 U.S.C. § 411(a).

fee have been delivered to the Copyright Office in proper form and registration is refused, the applicant is still entitled to institute an action for infringement provided that the notice of refused registration, with a copy of the complaint, is furnished to the Register of Copyrights. The Register may become a party to the action with respect to the issue of registrability of the copyright claim.¹²¹ Without a required registration, filing the case may invalidate the jurisdiction of a court to adjudicate a case.

There are three exceptions for registration as a prerequisite to bringing a copyright infringement suit; two are applied to works originated in the U.S. and one is applied to works originated in Berne Convention and the TRIPs Agreement's member countries. The first exception provides for an action brought for a violation of moral rights under Section 106A(a) of the U.S.C.A. The second exception is applied in a lawsuit alleging an impending violation of an upcoming live broadcast. This exception requires the copyright owner to give a timely notification to the infringer not less than 48 hours before performance of the live broadcast.¹²²

The third exception is applied to works, of parties to copyright treaties, that are first published outside the U.S. and that were not simultaneously published in the U.S., and where all of the authors of the work are not nationals, domiciliaries, or habitual residents of the U.S. Significantly, Section 411(a) of the U.S.C.A. requires that only U.S. copyrights be registered as a prerequisite for bringing suit.¹²³

¹²¹ *Id.*

¹²² See U.S.C.A. of 1976, 17 U.S.C. § 411(b); Act of Nov. 13, 1997, Pub. L. No. 105-80, § 6. (This provision is an amendment of the Copyright Act of 1976 in 1997).

¹²³ See *id.* § 411(a). See also *id.* § 101 (defining "U.S. work" as: (1) in the case of a published work, the work is first published—

Therefore, Thai nationals whose copyright works were not first published or simultaneously published in the U.S. can file an infringement lawsuit before U.S. courts without registration of their works with the U.S. Copyright Office.

Registration of copyrights is significant in that it provides ultimate remedies when it is timely done. It is the most important factor today for copyright owners when considering prospective remedies upon being a victim of infringement. Statutory damages and attorney's fees may only be awarded if a registration is made within three months after the first publication.¹²⁴ Statutory damages and attorney's fees are critical to any claimant because the amount of such remedies can make a winning claim unremunerative when actual damages are minimal or difficult to ascertain.

§ 4.5.1.2. Elements of Civil Copyright Infringement

There are two forms of civil copyright infringement under the U.S. copyright law: direct copyright infringement and secondary copyright infringement. Secondary copyright infringement is again subdivided into two categories: contributory and vicarious copyright infringement. The current U.S.C.A. provides only direct infringement as a ground for claiming copyright in a copyrighted work. In addition, nothing in the Act contains provisions for liability based on acts committed by

(A) in the U.S.;

(B) simultaneously in the U.S. and another treaty party or parties, whose law grants a term of copyright protection that is the same as or longer than the term provided in the U.S.;

(C) simultaneously in the U.S. and a foreign nation that is not a treaty party; or

(D) in a foreign nation that is not a treaty party, and all of the authors of the work are nationals, domiciliaries, or habitual residents of, or in the case of an audiovisual work legal entities with headquarters in, the U.S..).

¹²⁴ See U.S.C.A. of 1976, 17 U.S.C. § 412(2).

another.¹²⁵ Third parties can, nonetheless, be liable for copyright infringement under theories developed by case law, drawing from patent law and traditional tort theories of contributory and vicarious liability. Because U.S. copyright law imposes absolute liability for copyright infringement, a copyright owner can obtain both injunctive relief and monetary damages regardless of whether the infringer committed the act intentionally or by accident.¹²⁶

To establish copyright infringement claims, the work that was infringed must be considered to be within the scope of statutorily defined copyrightable subject matter, which are original works of authorship fixed in a tangible medium of expression for the purposes of the Copyright Act.¹²⁷ For instance, data embedded in computer memory, photographs, paintings, films and other forms of preexisting works which may be incorporated into an Internet-based application have been held to be copyrightable works.¹²⁸

A. Direct Infringement

Direct copyright infringement occurs when a party violates one or more of the copyright owner's exclusive rights. To sustain a case of direct copyright infringement, a plaintiff must initially show proof of ownership of a valid copyright

¹²⁵ Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 12.04 (1996).

¹²⁶ *Id.*

¹²⁷ See U.S.C.A. of 1976, 17 U.S.C. § 102.

¹²⁸ Donald E. Biederman, et al, *Interactive On-line Entertainment*, Practising Law Institute Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series 477 (2001).

and copying by the defendant.¹²⁹ The U.S.C.A. does not require a showing of intent on the part of a direct infringer. To prevail in a direct infringement action, a plaintiff must prove unauthorized copying by either direct or circumstantial evidence showing that the defendant had access to copyrighted work and that the defendant's work is substantially similar to the original work. Once these initial requirements are satisfied, the plaintiff must prove that the defendant used the copyrighted work in a way that violated one of the copyright holder's exclusive rights described in Section 106 of the U.S.C.A. The case law has affirmed that any intent of a direct infringer is not an element establishing infringement.¹³⁰

Copyright infringement is the violation of copyright owner's exclusive rights provided under Section 106 of the U.S.C.A. Those rights are as follows:

- (1) the right to reproduce the work in copies or phonorecords;
- (2) the right to prepare derivative works;
- (3) the right to distribute copies or phonorecords of a work by any means, including sale, rental, lease or loan;
- (4) the right to perform the copyrighted work publicly (which includes digital transmission via the Internet or otherwise);
- (5) the right to display the work publicly; and,
- (6) for sound recordings the right to perform the work publicly by means of a digital transmission.¹³¹

¹²⁹ *Howard v. Sterchi*, 974 F.2d 1272, 1275 (11th Cir 1992).

¹³⁰ *Id.*

¹³¹ *See* U.S.C.A. of 1976, 17 U.S.C. § 106.

In 1993, the Florida Northern District Court held that Frena, an electronic bulletin board operator, had violated Playboy's copyright when one of their copyrighted photographs was digitized and placed on the bulletin board system by one subscriber and downloaded by another subscriber. According to the decision, "it does not matter that Defendant Frena may have been unaware of the copyright infringement. Intent to infringe is not needed to find copyright infringement. Intent or knowledge is not an element of infringement, and thus even an innocent infringer is liable for infringement; rather innocence is significant to a trial court when it fixes statutory damages."¹³²

B. Secondary Infringement

Secondary copyright infringement occurs where the defendant does not personally engage in the violating activity but still bears some responsibility for the infringement.¹³³ There are two categories of secondary copyright infringement: contributory and vicarious copyright infringement.

Contributory infringement "originates in tort law and stems from the notion that one who directly contributes to another's infringement should be held accountable."¹³⁴ A party liable for contributory infringement is subject to monetary damages and injunctive relief, provided that he or she has knowledge (or reason to know) of the infringing conduct of another, and induced, caused, or materially

¹³² *Playboy Enterprises Inc. v. Frena*, 839 F. Supp. 1552, 1556 (M.D. Fla. 1993).

¹³³ *Shapiro Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304, 308 (2d Cir. 1963).

¹³⁴ *Fonovisa v. Cherry Auction, Inc.*, 76 F.3d 259, 264 (9th Cir. 1996). (ruling swap meet operators held contributorily liable for the infringing liability of vendors who were selling copyrighted music recordings without permission).

contributed to this conduct.¹³⁵ Participation by the defendant need not be substantial.¹³⁶ Observation from case law indicates that contributory infringement has been described as an outgrowth of enterprise liability.¹³⁷

Contributory infringement pragmatically takes place in two situations: first, whenever one's personal conduct forms part of, or furthers the infringement; second, when an individual contributes machinery or goods that provide the means to infringe.¹³⁸ The latter type of contributory infringement considers the extent of control exercised by the defendant over the third party's means of infringement.¹³⁹ The greater the degree of control, the greater the likelihood that contributory infringement will be found.

A party is vicariously liable for copyright infringement when it has authority to supervise a direct infringer's actions, and has induced, caused, or materially contributed to the infringing activity.¹⁴⁰ Unlike contributory infringement, vicarious liability may be imposed even if a defendant has no direct knowledge of the infringing activity. Courts developed the concept of vicarious liability in an effort to "fashion a principle for enforcing copyright law against a defendant whose economic interest

¹³⁵ *Gershwin Publishing v. Columbia Artists Management*, 443 F.2d 1159, 1162 (2d Cir. 1971).

¹³⁶ *See Fonovisa, supra* note 135, 76 F.3d at 264.

¹³⁷ *See* Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 12.04 (A)(2) (1996).

¹³⁸ *See id.*

¹³⁹ *See Lockheed Martin v. Network Solutions*, 194 F.3d 980, 984 (9th Cir. 1999).

¹⁴⁰ *See* Jenifer E. Markiewicz, *Seeking Shelter from the MP3 Storm: How Far Does the Digital Millennium Copyright Act Online Service Provider Liability Limitation Reach?*, 7 *Comm. Law Conspectus* 423, 427 (1999).

were intertwined with the direct infringer's but who did not actually employ the direct infringer."¹⁴¹

A common example of someone who would be held for vicarious liability is a night club owner who economically profits from increased food or drink sales while a band performs illegally copyrighted music. In this scenario, the band is liable for direct infringement of the author's music composition copyrights because the band failed to get a public performance license for the songs it plays, and the club owner is subject to infringement charges on the theory of vicarious liability.

§ 4.5.1.3. Elements of Criminal Copyright Infringement

Criminal prosecution is a serious matter for the federal government in filing a criminal lawsuit against an infringer. If the government succeeds in the case, the infringer could be punished by incarceration or fine, or both.¹⁴² The U.S.C.A. defines criminal infringement as willful infringement for the purpose of commercial advantage or private financial gain.¹⁴³ The government has the burden of proving three elements in a criminal prosecution for copyright infringement under the Copyright Act: (1) that a copyright has been infringed; (2) that the violation was performed willfully; and (3) that the infringement was for purposes of commercial advantage or private financial gain, or that the infringer reproduced or distributed,

¹⁴¹ *Shapiro Bernstein and Co. v. H.L. Green Co.*, 316 F.2d 304 (2nd Cir. 1963). Cited in 76 F.3d at 262.

¹⁴² *See infra*. § 4.5.1.4. B. under Criminal Remedies.

¹⁴³ *See* U.S.C.A. of 1976, 17 U.S.C. § 506(a).

during a 180-day period, one or more copies or phonorecords of one or more copyrighted works, valued at more than \$1,000.¹⁴⁴

Similar to civil cases, the first element of criminal copyright infringement can be proven by direct,¹⁴⁵ or by circumstantial evidence, showing that the defendant had access to the copyrighted work and that the alleged copy is “substantially similar” to the original work.¹⁴⁶ In case of the violation of a distribution right, the government may establish criminal infringement even though the infringer distributing the infringing work is not the actual person who produced the illegal copies.¹⁴⁷

The second element that the government must establish is “intent to infringe.” A majority of courts have interpreted the term “willfully” to mean that the government must show that the defendant specifically intended to violate the copyright law.¹⁴⁸ But the Second and Ninth Circuit courts have taken the minority view, holding that “willfulness” requires only intent to copy, not intent to infringe.¹⁴⁹

¹⁴⁴ *Id.*

¹⁴⁵ *See U.S. v. Larracunte*, 952 F.2d 672, 673 (2d Cir. 1992) (discussing infringement element of prima facie case).

¹⁴⁶ *See U.S. v. Cohen*, 946 F.2d 430 (6th Cir. 1991) (upholding a conviction of criminal copyright infringement supported by circumstantial evidence).

¹⁴⁷ *See U.S. v. Moore*, 604 F.2d 1228, 1235 (9th Cir. 1979).

¹⁴⁸ *See U.S. v. Morison*, 844 F.2d 1057, 1071 (4th Cir. 1988) (establishing willful to mean that defendant knowingly did an illegal act); *U.S. v. Cross*, 816 F.2d 297, 303 (7th Cir. 1987) (holding that defendant must act with the knowledge that his activity is illegal); *U.S. v. Manzer*, 69 F.3d 222, 226 (8th Cir. 1995) (holding that government need only prove intent to defraud, and not intent the law, but must go beyond proof of merely intent to copy).

¹⁴⁹ *See U.S. v. Hernandez*, 952 F.2d 1110 (9th Cir. 1991) (deciding that defendant had requisite intent to join conspiracy to infringe because he had control over tapes, had shown others how to duplicate tapes, and had transported tapes from production site to storage unit); *U.S. v. Backer*, 134 F.2d 533 (2d Cir. 1943) (holding that defendant unlawfully gave orders to make copies closely resembling copyrighted work without causing “copyright trouble”).

With regard to the third element, intent to profit, the Seventh Circuit Court has held that a defendant need not actually realize commercial advantage or private financial gain to be convicted of copyright infringement. It is adequate that the defendant commit the violation for the purpose of financial gain.¹⁵⁰ In addition, the government can establish the element of intent to profit by proving that one or more copies were reproduced or distributed with a total retail valued of more than \$1,000.¹⁵¹

§ 4.5.1.4. Legal Remedies for Copyright Infringement

This section discusses the remedial features of copyright litigation in the U.S. Under U.S. law, both civil and criminal remedies are available for copyright infringement.

A. Civil Remedies

The U.S. copyright law imposes absolute liability for infringement and the copyright owner can obtain both injunctions and monetary damages, including actual damages, statutory damages, and costs and attorney's fees. The court may award an injunction to prohibit the infringer from further infringement; it might divest profits from the infringement, or could even order the infringer to reimburse reasonable license fee for continued exploitation of the work. Section 502 of the Copyright Act

¹⁵⁰ See *U.S. v. Moore*, 604 F.2d 1228, 1235 (9th Cir. 1979) (holding that the copies were not sold for money was deemed irrelevant where hope of gain existed).

¹⁵¹ U.S.C.A. of 1976, 17 U.S.C. § 506(a). The definition of "retail value" in cases involving copies of good quality is "the suggested retail price of the legitimate copyrighted work when it was released and not the value of the infringing copies." See *States v. Larracuente*, 952 F.2d 672 (2d Cir. 1992).

confirms that any court having jurisdiction may grant temporary and final injunctions on such terms as it may deem reasonable to prevent copyright infringement.¹⁵²

Unlike most other areas of law, an action for copyright infringement is frequently resolved by prompt proceedings and a motion for preliminary injunction under Rule 65 of the Federal Rules of Civil Procedure. The plaintiff may seek a preliminary injunction at the time an action for infringement is initiated. Preliminary injunctive relief is also available to a party who successfully shows either: (1) a combination of success on the merits¹⁵³ and the possibility of irreparable harm;¹⁵⁴ or (2) that serious questions are raised and the balance of hardships tips in the plaintiff's favor.¹⁵⁵ The affirmative equitable relief available to a prevailing copyright owner includes preliminary impoundment of goods that contain, or that may be used to produce allegedly infringing material, as well as the "destruction or other reasonable disposition" of such things upon final judgment.¹⁵⁶

In addition to injunctive relief, upon proving infringement, a copyright owner may choose between actual damages and profits, or statutory damages, at any time before final judgment is rendered. The court's goal is to compensate the copyright owner's losses and prevent the infringer from profiting from his or her

¹⁵² U.S.C.A. of 1976, 17 U.S.C. § 502.

¹⁵³ See *Nimmer & Nimmer*, *supra* note 21, § 14.06[A], at 14-1-104 ("[I]n most cases ... reasonable likelihood of success ... is determinative.").

¹⁵⁴ See Charles Alan Wright & Arthur Miller, *Federal Practice and Procedure: Civil* § 2948 (1973) (2d ed. 1995).

¹⁵⁵ *Prudential Real Estate Affiliates, Inc. v. PPR Realty, Inc.*, 204 F.3d 867, 874 (9th Cir. 2000).

¹⁵⁶ U.S.C.A. of 1976, 17 U.S.C. § 503.

infringement.¹⁵⁷ A prevailing copyright owner may be eligible for a monetary award including, among other measures, an award of “statutory damages for all infringements involved in the action.”¹⁵⁸ Proof of actual damages is not a prerequisite to the recovery of statutory damages. The court may grant a single award of statutory damages in an amount of “not less than \$750 or more than \$30,000” for “all infringements” of “any one work.”¹⁵⁹ However, courts may adjust the amount of such awards to account for the infringer’s culpability. Therefore, courts can order a willful infringer to pay as much as \$150,000, or order an innocent infringer to pay as little as \$200.¹⁶⁰

A copyright owner who does not elect statutory damages is eligible to receive compensatory relief as measured by the “actual damages suffered” due to the infringer’s improper appropriation.¹⁶¹ Section 504(b) of the current U.S.C.A. specifies that the copyright owner who prevails in an infringement action is entitled to recover the actual damages suffered as a result of the infringement, and any profits

¹⁵⁷ *Id.* § 504; H.R.Rep. No. 1476, 94th Cong., 2d Sess. 161 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5777.

¹⁵⁸ U.S.C.A. of 1976, 17 U.S.C. § 504(c).

¹⁵⁹ U.S.C.A. of 1976, 17 U.S.C. § 504(c)(1).

¹⁶⁰ *See id.* § 504(c)(2). The court “may increase the award of statutory damages to a sum of not more than \$150,000” if the copyright owner proves that the “infringement was committed willfully.” *Id.* Conversely, the court may reduce an award of statutory damages to a sum not less than \$200, or even remit statutory damages entirely in some cases, when the defendant’s infringement was innocent.

¹⁶¹ U.S.C.A. of 1976, 17 U.S.C. § 504(a)-(b).

that are attributable to the infringement.¹⁶² Attorney fees and costs may also be awarded at the court's discretion.¹⁶³

B. Criminal Remedies

The Copyright Felony Act¹⁶⁴ provides the main remedies for criminal copyright infringement. It states that a felony offense consists of the reproduction or distribution, during a 180-day period, of at least ten unauthorized copies, of one or more copyrighted works, with a collective value of more than \$2,500.¹⁶⁵ First-time offenders may be either imprisoned for not more than five years or fined not more than \$250,000 per individual (\$500,000 for an organization).¹⁶⁶ Offenders may be both fined and imprisoned.¹⁶⁷

In addition, if the offender derives personal financial gain from the offense, or causes financial loss to another, the offender may be fined up to the greater of twice the gross gain or twice the gross loss.¹⁶⁸ If the offender has been previously

¹⁶² U.S.C.A. of 1976, 17 U.S.C. § 504(b).

¹⁶³ U.S.C.A. of 1976, 17 U.S.C. § 505.

¹⁶⁴ Pub. L. No. 102-561, 106 Stat. 4233 (codified as amended at 18 U.S.C. § 2319(b)-(c) (1994)).

¹⁶⁵ 18 U.S.C. § 2319(b)(1), incorporated by reference in 17 U.S.C. § 506(a). Note that the Copyright Felony Act does not require that all affected copyrights be of the same class or held by the same copyright owner.

¹⁶⁶ 18 U.S.C. § 3571(b)-(c).

¹⁶⁷ 18 U.S.C. § 2319(b)(1), incorporated by reference in 17 U.S.C. § 506(a).

¹⁶⁸ 18 U.S.C. § 3571(d) (1994) (providing "[A]lternative fine based on gain or loss.--If any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or

convicted under the statute, the maximum prison sentence increases to not more than ten years, and a repeat offender may also be subject to the \$250,000 fine.¹⁶⁹ Moreover, the Copyright Felony Act prescribes a misdemeanor sentence of not more than \$100,000 fine and a maximum of one year imprisonment for criminal copyright infringement falling below the numerical thresholds described above.¹⁷⁰ Finally, it is the courts' discretion to order the forfeiture and destruction of infringing items and all implements, devices, or equipment used in their manufacture.¹⁷¹

§ 4.5.2. Legal Considerations for Copyright Infringement Litigation under Thai Law

The *T.C.A. B.E. 2537* prescribes remedies for infringement of copyrights in Part 5, Sections 27 to 31. However, it should be observed that offenses under said sections are penal in nature and subject to criminal penalties under Sections 69 and 70 of the Act (as discussed further under the subject of "criminal remedies").¹⁷² This indicates that Thailand considers violation of exclusive rights of copyright owners as an economic crime.

twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process.").

¹⁶⁹ 18 U.S.C. § 2319(b)(2), incorporated by reference in 17 U.S.C. § 506(a).

¹⁷⁰ 18 U.S.C. §§ 2319(b)(3), 3571(b)(5).

¹⁷¹ U.S.C.A. of 1976, 17 U.S.C. § 506(b).

¹⁷² See discussion *infra*. § 4.5.2.3.B.

§ 4.5.2.1. Elements of Civil Copyright Infringement

The *T.C.A. B.E. 2537* (A.D. 1994) does not provide for statutory compensation for the owner of an infringed copyright. Compensation for actual proven damages may be obtained by the filing of suit in civil courts under the principle of torts. The basic tort provision of the Thai Civil and Commercial Code (TCCC) is Section 420, which states that “a person who, willfully or negligently, unlawfully injures the life, body, health, liberty, property or any right, is said to commit a wrongful act and is bound to make compensation therefor.” Infringement of copyrights is an unlawful act that injures the rights of the copyright owner. Therefore, Section 420 would apply to copyright infringement.¹⁷³ To establish copyright infringement claims, the work that was infringed must be considered within the scope of statutorily defined copyrightable subject matter under the *T.C.A. B.E. 2537*.

Under the Thai copyright law, copyright infringement is separated into two categories, which are direct and indirect infringements. Direct copyright infringement involves any exercise of exclusive rights without authorization of the copyright holder or the performer.¹⁷⁴ In the other words, the infringement is “direct” when it is done directly to the original work of authorship, for instance, copying a book or making a copy of sound recordings. Indirect infringement is an infringing act indirectly

¹⁷³ Civil and Commercial Code B.E. 2535 (1992) § 420 (Thail.).

¹⁷⁴ *T.C.A. B.E. 2537* (1994) §§ 27-30 (Thail.).

conducted to the copyrighted work, such as importation or sale of infringing copies with knowledge or reasonable grounds to have known about the infringement.¹⁷⁵

§ 4.5.2.2. Elements of Criminal Copyright Infringement

Similar to other criminal offenses under Thai law, criminal sanctions for copyright infringement in Thailand's jurisdiction may not be imposed unless the defendant's action has met two elements: (1) committing a wrongful act; and (2) having the requisite *mens rea* or culpable mental state.¹⁷⁶ In a copyright infringement prosecution, the government can succeed in a criminal action against a copyright infringer only when it proves the defendant's "intent to commit a crime."

The wrongful act element of criminal copyright infringement is the violation of the exclusive rights to the copyright owner. Similar to a civil action, the criminal infringement of copyright is divided into two categories: direct infringement and indirect infringement.

A. Direct Infringement

Under Thai law, any of the following acts in relation to all types of copyrighted work, except for sound and video broadcasting, shall constitute an direct infringement of copyright: (1) reproduction or adaptation; and (2) dissemination to the

¹⁷⁵ T.C.A. B.E. 2537 (1994) § 31 (Thail.) (providing that "[A]ny person who knows or has a reasonable ground to know that any work is made in violation of another person's copyright commits any of the following acts to the said work for profit shall be deemed to have infringed the copyright:-- (1) sale, possession for sale, offer to sell, rent, offer to rent, hire purchase, or offer to hire purchase; (2) distribution to the public; (3) disseminating in the manner which could be prejudicial to the right holder; and, (4) importing or ordering for importation into the country.").

¹⁷⁶ Penal Code of Thailand B.E. 2499 (1956) principally governs all criminal offenses under Thai jurisdiction. Section 59 of the Code sets forth a general rule that a person, who committed a crime will be punished with criminal penalties, *if such person intentionally committed it*, except in case the law prescribes otherwise. Penal Code B.E. 2499 (1956) § 59 (Thail.).

public.¹⁷⁷ However, relative to audiovisual work, cinematographic work, sound recording work, or computer program, the infringement of copyright also includes the letting of an original or duplicate of such works.¹⁷⁸ Moreover, any one of the following acts in relation to a copyrighted sound and video broadcasting work shall constitute an infringement of copyright: (1) producing audio-visual work, cinematographic work, sound recording or sound and video broadcasting work, whether wholly or in part; (2) rebroadcasting of sound and visual images, whether wholly or in part; and, (3) arrangement of the sound and video broadcasting work to be heard and/or seen by the public, by asking for a fee or other commercial benefits in return.¹⁷⁹ All of the above are considered direct infringement under Thai copyright law; now let's consider indirect infringement.

B. Indirect Infringement

Indirect infringement, under Thai copyright law, occurs when any person, who knows, or should have reason to know that someone made the work by infringing the copyright of another, and that person who knows, or should have reason to know, does any of the following acts in relation to such work for profits: (1) selling, possessing to sell, offering to sell, letting for hire, offering to hire, selling by hire-purchase or offering to sell by hire-purchase; (2) dissemination to the public; (3)

¹⁷⁷ T.C.A. B.E. 2537 (1994), §§ 27,28,30 (Thail.).

¹⁷⁸ T.C.A. B.E. 2537 (1994), §§ 28,30 (Thail.).

¹⁷⁹ T.C.A. B.E. 2537 (1994) § 29 (Thail.).

distributing in such manner as to be prejudicial to the copyright owner; and (4) importing or making an order for importation into the Kingdom.¹⁸⁰

§ 4.5.2.3. Legal Remedies for Copyright Infringement

Similar to U.S. law, there are essentially two alternative paths to a remedy for legal action against an infringer: civil remedy, criminal remedy, or both, under Thai law. However, the premises of and the extent of remedies for copyright infringement litigations in Thailand are different from those provided under U.S. law. The remedies for copyright infringement in Thailand will be discussed below.

A. Civil Remedies

The legal framework for civil remedies under copyright infringement actions in Thailand is set out in the TCCC. The *T.C.A.* B.E. 2537 (1994) provides a legal mechanism to pursue civil damages under the provisions of Section 76. Section 76 states that “the right of the owner of copyright or performer’s rights to bring a civil copyright infringement action for damages for the amount which exceeds the fine that the owner of copyright or performer’s rights has received shall not be prejudiced.”¹⁸¹

An injured copyright holder is entitled to take civil action for remedies under the principle of torts in the TCCC, Section 420 of that code states that “any person who, either willfully or negligently, unlawfully injures the life, body, health, liberty, property or any right of another person, is deemed to commit torts and is liable to

¹⁸⁰ T.C.A. B.E. 2537 (1994) § 31 (Thail.).

¹⁸¹ See Copyright Act, B.E. 2537 (1994) § 76 (Thail.).

make compensation therefore.”¹⁸² Since copyright infringement is an act that affects a person’s right to intellectual property, the infringer can be subject to civil liability for damages incurred from the infringement.¹⁸³

Damages accruing from civil liability are granted under the broad discretion of the court after it takes into account the seriousness of the damage, the loss of profit, and necessary legal expenses taken on the enforcement of the copyright or performers’ rights.¹⁸⁴ Before March 1995 (the effective date of the current T.C.A.), section 438 of the TCCC directed the court’s discretion to grant damages to an injured party. It stated that “the court shall determine the extent of compensation in accordance with the circumstances and gravity of the wrongful act.”¹⁸⁵ From the language of section 438, the court is preserved sole discretion in a civil tort action to decide the amount of indemnity adequate to repair the loss of an injured party for a copyright infringement. In a civil law suit, the court will weigh the gravity of the wrongful act and the circumstances to determine pecuniary damages. Paragraph 2 of section 438 of the TCCC provides remedies in general as being applied in any civil lawsuit through a compensation for actual damages.

However, when the *T.C.A. B.E. 2537* came in to force, Section 64 of the Act, which provides broader scope of damages, aborted the use of Section 438 of the TCCC for the matter of copyright infringement in civil actions and applied the provisions of Section 64. Section 64 empowers the court to order an infringer to

¹⁸² Civil and Commercial Code B.E. 2535 (1992) § 420 (Thail.).

¹⁸³ Chaiyos Hemaratchata, *A Treatise on Thai Copyright Law* Ch.7 (2d ed. 1998).

¹⁸⁴ T.C.A. B.E. 2537 (1994) § 64 (Thail.).

¹⁸⁵ Civil and Commercial Code B.E. 2535 (1992) § 438 (Thail.).

compensate the owner of copyright or performers' rights with damages for an amount which the court deems appropriate by taking into account the gravity of injury (but not the gravity of the wrongful act). Included are actual damages, loss of reputation, loss of profits and the expenses necessary for enforcing the right of the owner of copyright or performers' rights.¹⁸⁶

B. Criminal Remedies

Criminal remedies for copyright holders against infringers of copyrighted works protected in Thailand are found under the penalty provisions of the T.C.A. (Sections 69-77). The most important enforcement/penalty provisions for discussion are Sections 69, 70, 73, 75, and 76. These criminal remedies range from fines and imprisonment to injunctive relief.

The penalty stipulated in the T.C.A. has been increased from what were provided under the previous 1978 T.C.A. Section 69 states, "Any person infringing the copyright or the performer's rights under Section 27, Section 28, Section 29, Section 30, or Section 52 shall be liable to a fine of 20,000 Baht to 200,000 Baht."¹⁸⁷ The aforementioned offenses are regarded as direct infringement on all types of copyright works, including broadcasting works that contain neighboring rights.

Any person indirectly infringing the copyright under Section 31 of the T.C.A. B.E. 2537 is liable to a fine from 10,000 Baht to 100,000 Baht. If said offense is committed for commercial purpose, the offender is subject to a imprisonment term of

¹⁸⁶ See T.C.A. B.E. 2537 (1994) § 64 (Thail.). See also *RS Promotion 1992 Co. Ltd. v. Rattana Iamsutti, San Dika* (Supreme Court) No. 7807/2542 (Thail.). (ordering the defendant to indemnify the plaintiff for actual damages, including loss of reputation from defendant's use of low quality materials; loss of profits; and costs and attorney's fees).

¹⁸⁷ See Copyright Act, B.E. 2537 (1994) § 69 (Thail.). Exchange rate as of 30 November 2005, 1 US\$ equals 41.20 Baht. Currency Calculator (November 30, 2005), available at <http://www.x-rates.com>.

three months to two years or to a fine from 50,000 Baht to 400,000 Baht, or to both.¹⁸⁸ Furthermore, the T.C.A. B.E. 2537 includes a provision to increase penalties in certain circumstances. For example, if a person who has been convicted of an offense, commits another within five years from the date he or she is released from the punishment, that person shall be liable to double the prescribed penalty.¹⁸⁹

As discussed above, Thai law allows for criminal and civil action to be taken against copyright infringers. Even though, the procedures for criminal and civil actions differ, both criminal and civil actions permit forfeiture of things used for committing an infringement of copyright or performers' rights such as copier machines, and the court may order the infringing goods devolve to the possession of plaintiffs.¹⁹⁰

The *T.C.A.* B.E. 2537 also provides copyright owners a portion of fines. Section 76 stipulates that one half of the fine paid in accordance with the judgment shall be disbursed to the owner of copyright or performer's right, provided that the copyright owner or performer may bring a civil action for damages for the amount

¹⁸⁸ See Copyright Act, B.E. 2537 (1994) § 70 (Thail.). (providing that "[A]ny person infringing a copyright under Section 31 shall be liable to a fine of 10,000 Baht to 100,000 Baht. If the violation under paragraph one is committed for commercial purposes, the offender shall be liable to imprisonment of three months to two years or a fine of 50,000 Baht to 400,000 Baht, or both.")

¹⁸⁹ See Copyright Act, B.E. 2537 (1994) § 73 (Thail.).

¹⁹⁰ T.C.A. B.E. 2537 (1994) § 75 (Thail.). (providing that "[A]ll articles made in or imported into Thailand which constitute an infringement of copyright or performers' rights pursuant to this Act, and are owned by the offender under Section 69 or Section 70, shall become the property of the owner of the copyright or performer's rights, whereas all articles used for committing a violation shall be forfeited.").

which exceeds the portion of a fine that the copyright owner or performer has received.¹⁹¹

§ 4.6. Copyright Infringement Actions: Rules of Evidence under U.S. and Thailand Jurisdiction

§ 4.6.1. Relevant Rules of Evidence under the U.S.C.A.

§ 4.6.1.1. Evidentiary Presumption

The U.S.C.A. gives an evidentiary credit to copyright registration certificates. In any copyright judicial proceedings, the *Certificate of Registration* constitutes *prima facie* evidence of the validity of the copyright and of the facts stated in the certificate, provided that such certificate is made before or within five years after first publication of the work.¹⁹² The mere pleading of a certificate establishes the plaintiff's *prima facie* case on all issues, but the infringement issue, including the originality of the copyrighted work, ownership of the copyright by the plaintiff, compliance with the formalities required to establish copyright and the like, and shifts to the defendant the burden to come forward with evidence to the contrary.¹⁹³

¹⁹¹ See T.C.A. B.E. 2537 (1994) § 76. (Thail.).

¹⁹² See U.S.C.A. of 1976, 17 U.S.C. § 410(c).

¹⁹³ *Original Appalachian Artworks, Inc. v. Toy Loft, Inc.*, 489 F.Supp. 174 (N.D. Cal. 1980), *aff'd*, 684 F.2d 821 (11th Cir. 1982).

The presumption of validity and facts upon the certificate of a registration applies to all works including non-U.S. Berne and W.T.O. works.¹⁹⁴ Therefore, an owner of copyrights in non-U.S. Berne and W.T.O. works is required to prove the ownership of the valid copyright work under U.S. copyright law in order to establish an effective claim unless the work was registered before or within five years after first publication. This outcome is susceptible to the question whether this evidentiary presumption complies with Article 5(2) of the Berne convention and therefore, TRIPs standards.

§ 4.6.1.2. Burden of Proof

In civil copyright infringement actions, proof of willful intent to infringe is not required for plaintiffs to prevail on the underlying claim of infringement, because copyright infringement is a strict liability tort.¹⁹⁵ However, such proof in civil actions may result in an increased damage award. This means that a defendant can be liable for the plaintiff's damages without requiring the plaintiff to prove the defendant's willfulness or negligence.¹⁹⁶

With regard to criminal infringement cases under the U.S. law, the government must prove the defendants' intent to infringe. According to the language of the U.S.C.A., the government must prove that the defendant infringed "willfully

¹⁹⁴ See Matthew Bender & Company, 2-US International Copyright Law and Practice § 5. See also *Norma Ribbon & Trimming v. Little*, 51 F.3d 45 (5d Cir. 1995).

¹⁹⁵ *Buck v. Jewell-LaSalle Realty Co.*, 283 U.S. 191, 198 (1931).

¹⁹⁶ See U.S.C.A. of 1976, 17 U.S.C. § 504(c)(2) ("In case where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than \$150,000.").

and for purpose of commercial advantage or private financial gain.”¹⁹⁷ Although the Act uses the term “willfully” in describing criminal copyright infringement, the term is not defined by the Act and therefore, it is left up to the court to determine its application.

§ 4.6.2. Relevant Rules of Evidence under the T.C.A.

§ 4.6.2.1. Evidentiary Presumption

Thai copyright law, to assist parties in meeting their burden of proof, establishes certain special rules of evidence regarding the presumptions of validity and ownership of copyright or performers' rights. Section 62 of the *T.C.A.* B.E. 2537 presumes that the work in litigation is protected by the Act (or the work has a valid copyright), unless the defendant rebuts the presumption. In addition, the plaintiff is also presumed to own the copyrighted work, or performers' rights, unless rebuttal is raised that disputes these rights.¹⁹⁸ Furthermore, printers and publishers are also presumed to have title to the copyright of works bearing no name or where the name was forgone by the copyright owner.¹⁹⁹

In the case where a juristic person commits an offense under this Act, every director or manager of such a juristic person shall be regarded a joint offender with that juristic person, unless the director of manager can prove that the juristic person

¹⁹⁷ U.S.C.A. of 1976, 17 U.S.C. § 506(a).

¹⁹⁸ See *T.C.A.* B.E. 2537 (1994) § 62.

¹⁹⁹ *Id.*

acted without the knowledge or consent of the director or manager.²⁰⁰ Finally, there is no requirement that a copyrighted work be recorded or registered in Thailand to be protected, but there is a mechanism under the administration of the Department of Intellectual Property, Ministry of Commerce for recordation. Recordation proves helpful in any litigation as evidence of ownership of the copyright.

§ 4.6.2.2. Burden of Proof

As discussed in the previous part on the evidentiary presumption under the T.C.A., the law presumes the issues of ownership and validity of copyrights in favor of the plaintiff. Therefore, the defendant has the burden to prove the contrary. In criminal cases, to penalize the infringers with the maximum penalties under Paragraph 2 of Sections 69 and 70, the government must successfully establish the element of intention for “trading purposes” on part of the infringer. This can be done by any one of the following: (1) showing infringement committed by selling, keeping in possession for sale; (2) offering for sale, renting, offering for rent, selling by hire-purchase or offering for hire-purchase; (3) disseminating to the public, distributing in such a manner as to be prejudicial to the rights of the copyright owner; or, (4) importing or making an order for importation into Thailand, for the purpose of seeking profit, by any person who is aware or should have been aware that a particular work has been made by infringing a copyrighted work.

§ 4.7. Conclusion

Under U.S. and Thai copyright law, an injured person of copyright infringement, who seeks redress through a proceeding, may find relief in both civil

²⁰⁰ See T.C.A. B.E. 2537 (1994) § 74.

and criminal remedies, since copyright infringement lawsuit can lead to civil and penal actions. The threshold for criminal actions for copyright infringement under Thai law is liberally more permissive than that of U.S. law. In the U.S., prosecutions of criminal copyright infringement are reserved only for large scale commercial pirate operations, especially aimed against the motion picture and record industries, and activities involving organized crime. Consequently, unlike the U.S., criminal proceedings are the preferred method in Thailand when a party seeks damages because the threshold of bringing a suit is more permissive and the action is conducted on behalf of the government through public prosecutors.

Damages and criminal penalties under the Thai legal framework are considered to be adequate and sufficient for copyright holders and capable to deter infringers from committing an infringement. Therefore, compared to the U.S.C.A., the T.C.A. serves as an effective legal instrument to protect both national and foreign copyright proprietors under Thai jurisdiction. The T.C.A. also sufficiently corresponds with international standards of copyright enforcement provisions under Part III of the TRIPs Agreement in that it provides legal sanctions against actual or potential infringers of substantive rights. And as with the U.S.C.A., the T.C.A. includes the opportunity to obtaining injunctions and provisional measures to prevent infringement. Moreover, unlike the U.S.C.A., the T.C.A. contains draconian criminal penalties for any copyright infringement, even when it was committed without financial gain. Therefore, both domestic and foreign individuals or business entities can be confident in protecting their copyrights in Thailand.

Chapter V:

Copyright Law as a Contribution to National Development

§ 5.1. Introduction

A country's copyright policy can significantly affect of its national development. For centuries, the socio-economic principle that copyright protection encourages individual effort and invariably enriches the society has been the guiding principle behind enacting and enforcing the copyright law of many countries. To a great extent, through compliance with varying international agreements on copyright and the enactment of implementing laws for their enforcement, most countries employ two means of formulating a copyright system: the *incentive justification* approach, and the *political economic justification* approach.¹ The emphasis of their application varies among countries according to the local internal and external circumstances. However, in most countries today the political economic justification approach has been given the greater emphasis. Under these two approaches, all countries have the same goal of achieving sustainable national development. Under global standards, the copyright policy for developing countries is expected to differ from that of developed countries mainly on the stage of technological and legal development. The difference in copyright policy can reflect the extent of protection, the duration of copyright, and the exception or limitation to copyright under a country's copyright law.

This last chapter seeks ways or means to duly balance the interests among global stake holders of copyright within the context of national development from a

¹ See *infra* § 5.3 under Copyright Policies of Developing Countries for National Development.

developing country's perspective. To achieve that purpose, comprehension of the role of copyright law towards national development is indispensable. Moreover, the author provides, during chapter discussion, historical implications for developed countries as they pursue more robust and extensive copyright protection. Finally, recommendations will be proposed for Thailand so that it can sustain a reasonable level of copyright protection. To reach that goal, the copyright protection in the U.S. and Thailand will be particularly compared and discussed.

In pursuance of national development, the issue of human rights is closely related to national policy since these rights are incorporated into most countries' constitutions. Although, based on legislative history, the copyright law of the U.S. and Thailand does not directly mention human rights; human rights are implicitly a driving force for countries to benefit from scientific progress and to develop infrastructure. The General Assembly of the United Nations proclaimed, on December 10, 1948, Article 27 of the Universal Declaration of Human Rights:

“(1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

(2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.”²

The language of Article 27 of the Universal Declaration manifests the basis for copyright protection as a merger of protectionism and utilitarianism. Article 27

² Universal Declaration of Human Rights, art. 27, G.A. Res. 217A, U.N. GAOR, 3d Sess., Supp. No. 16, at 71, U.N. Doc. A/810 (1948), available at <http://www.un.org/Overview/rights.html> (last visited Dec. 15, 2005) [hereinafter Universal Declaration].

embraces a balance of interests between the authors' proprietary rights over their works and the rights of other members of society to enjoy these works.³ Although the Universal Declaration is not a treaty that states are parties to, it is a declaration proclaiming universal rights that people should have wherever they live.⁴

In accordance with the Universal Declaration, Article 15(1) of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) to which the U.S. is not a party, but to which Thailand has acceded, provides as follows:

“The States Parties to the present Covenant recognize the right of everyone:

- (a) To take part in cultural life;
- (b) To enjoy the benefits of scientific progress and its applications;
- (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.”⁵

³ Göran Melander, Article 27 in the Universal Declaration of Human Rights: A Commentary 429, 430 (Asbjörn Eide et al. eds., 1992).

⁴ See Gudmundur Alfredsson & Asbjörn Eide, Introduction to The Universal Declaration of Human Rights: A Common Standard of Achievement xxx (Gudmundur Alfredsson & Asbjörn Eide eds., 1999) (“[The Universal Declaration] is not a convention subject to the ratification and accession requirements foreseen for treaties. Nevertheless, it is clear that [it]... carries legal weight far beyond that of ordinary resolutions or even other declarations emanating from the General Assembly [of the United Nations].”).

⁵ International Covenant on Economic, Social and Cultural Rights [hereinafter ICESCR], adopted 16 December 1966, 933 U.N.T.S. 3 (entered into force 3 January 1976), art. 15(1), G.A. Res. 2200 (XXI), 21 U.N. GAOR Supp. (No.16), U.N. Doc. A/6316 (1966). The U.S.A. signed, but has not yet ratified, on ICESCR on October 5, 1977. Thailand acceded to ICESCR on September 5, 1999. See Office of the United Nations High Commissioner for Human Rights, *available at* <http://www.ohchr.org/english/countries/ratification/3.htm> (last visited Dec. 19, 2005).

To exploit the benefits of the technological development stated above, the ICESCR implies that everyone should have access to intellectual information or copyright works (e.g. journal articles, books and movies) equally with respect to the exclusive rights of copyright owners. The ICESCR may function as a direct enforcement, or as customary international law, or as an independent source of binding norms, depending on the judicial system of a particular country. The domestic courts of any country should apply the provisions in Article 15(1) of the ICESCR as a guide to interpreting domestic law.⁶

Although the immediate goal of this chapter is to present a general introduction to the contribution of national development under the current regime of international copyright law from a developing country's point of view, it also has a larger purpose which is examining an appropriate direction for developing countries pursuant to sound copyright regime. Throughout the chapter it is important to consider a major theme of the recent fundamental changes that have taken place in the World Intellectual Property Organization (WIPO). Why, despite its century-long delay in adherence to the Berne Convention, for example, has the U.S. recently decided to enter the *WIPO Copyright Treaty (WCT)*⁷ and the *WIPO Performances and Phonograms Treaty (WPPT)*,⁸ known together as the "WIPO Internet Treaties"? There are two apparent answers. First, copyright and other forms of intellectual

⁶ See Wesley A. Cann, *On the Relationship Between Intellectual Property Rights and the Need of Less-Developed Countries for Access to Pharmaceuticals: Creating a Legal Duty to Supply Under a Theory of Progressive Global Constitutionalism*, 25 U. Pa. J. Int'l Econ. L. 755, 845-46 (2004).

⁷ WIPO Copyright Treaty, adopted Dec. 20, 1996, 36 I.L.M. 65 (1997) [hereinafter WCT].

⁸ WIPO Performances and Phonograms Treaty, adopted Dec. 20, 1996, 36 I.L.M. 76 (1997) [hereinafter WPPT].

property are a large part of world trade and the U.S. is a bright spot in an otherwise dismal balance of trade in copyright-related products. Second, the U.S. has been a leading developed country for several decades and it strongly desires to maintain that status by protecting U.S. copyrighted material, as one of its most valuable economic resources.⁹

On the other hand, even though Thailand as a yet developing country, was flattered by the world community as a fifth tiger in Asia during the late 1980's,¹⁰ it never ceases to enforce copyright rights and maintains sound legal mechanisms under the obligations of copyright-related treaties to which it belongs. Lastly, this chapter explores the U.S. - Thailand copyright relationship, points out the drawbacks of the U.S. approach to its foreign copyright policy, and suggests alternatives to the current U.S. stance. The ultimate goal of this chapter is to shed light, under international copyright law, for an alternative norm that might be taken into account for amending the Thai Copyright Act to achieve sustainable development for Thailand.

§ 5.2. Roles of Copyright in Pursuance of National Development

Empirical evidence on the role of copyright in promoting national development generally remains limited and inconclusive. However, under public

⁹ The latest available government estimates in the United States value of copyright-based industries at US\$430 billion, representing more than 5% of its GDP. Given the impact of the age of electronic commerce, copyrighted material will be one of the most valuable commodities to be offered and sold on-line. See IFPI, *Copyright & Creativity*, available at http://www.ifpi.org/site-content/copyrightcreativity/what_is_copyright.html (last visited Dec. 25, 2005).

¹⁰ See Robert J. Muscat, *The Fifth Tiger: A Study of Thai Development Policy* 3-4, 223 (1994). The Tiger economies have also been referred to as Newly Industrialized Countries (NIC). They include Taiwan, South Korea, Singapore, Hong Kong and Thailand.

international law, the protection and enforcement of copyrights should, in principle, contribute to the promotion of technological development and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge in a manner conducive to social and economic welfare.¹¹

Copyright protection can be a daunting challenge; for one thing, one has to determine whether a relationship exists among copyright protection and economic, social and cultural development. A second query investigates whether copyright protection is directly relevant to sustainable development and achievement of agreed upon international development goals.¹² In many countries, the relationship between copyright and economy has long been regarded as obvious. Furthermore, the economic status of every country contributes to, and affects social, educational and technological development. Consequently, on the issue of copyright protection, developing countries must have the capacity, especially the least developed among them, to formulate their negotiating positions and become well-informed negotiating partners in international meetings

§ 5.2.1. Copyright Protection as a Contribution to Cultural Dissemination

Cultural diversity is a fundamental human right and governments are free to adopt policies necessary to support the diversity of cultural expression and the

¹¹ See ICESCR, *supra* note 4, art. 15(1).

¹² The United Nations established "the Millennium Development Goals" in 2000 to achieve by 2015. Among other goals are eradication of extreme poverty and reaching universal primary education. See UN Millennium Development Goals, *available at* <http://www.un.org/millenniumgoals/> (last visited Dec. 23, 2005).

viability of enterprises that produce and disseminate this expression.¹³ Among growing types of intellectual property, there are three that are mainly recognized as the genesis of intellectual property protection; they are patents, trademarks and copyrights. While patents and trademarks are primarily protected as industrial property, copyrights are recognized as cultural property.¹⁴ Authors and creators of copyright works disseminate culture through various ways such as publishing, filming, television, music, performing arts and visual arts. Right of translation is known to be a fundamental device of intercultural communication for understanding the power differentials among societies, when not only language, but also the native way of thinking is being translated.

Copyright can act as a protector of cultural creations. By vesting exclusive rights in the work's creator and providing injunctive and pecuniary remedies for breach, copyright protection immunizes the creation from distortion and misattribution – no one can take any protected element of expression from the artist's work and pass it off as his or her own, or reproduce, alter, or deviate from the work, without the author's consent. The author of copyrighted works has a duty to monitor and prevent his or her contribution to the nation's culture from being infringed.¹⁵

¹³ See Universal Declaration, *supra* note 1, art. 27.

¹⁴ K.J. Greene, *Copyright, Culture & Black Music: A Legacy of Unequal Protection*, 21 *Hastings Comm. & Ent. L.J.* 339, 254 (1999).

¹⁵ John H. Merryman & Albert E. Elsen, *Law, Ethics, and the Visual Arts* 196-213 (2d ed. 1987).

§ 5.2.2. Copyright Protection as a Contribution to Artistic and Scientific Development

Copyright not only protects culture but also fosters artistic and scientific development. In general, the theory behind copyright protection is that it promotes development of creative works in the areas of science and the arts and allows artists to benefit from their creations.¹⁶ Moreover, it is widely accepted that because of this distinctive feature, copyright law is a factor in the progress of science, technology, and the distribution of knowledge.¹⁷ Drafters of copyright law in many countries recognize that future creation in the arts, and future developments in science, are dependent on creations that eventually reach the public domain. The importance of copyright policy as a contribution to artistic and scientific development is clearly evident in the Copyright Clause of the U.S. Constitution. This clause empowers Congress to pass statutes providing for copyright protection and establishes the background norm informing courts the purpose of such laws — “[t]o promote the Progress of Science and useful Arts.”¹⁸ Nonetheless, there is no hard evidence supporting the conceptual foundation that copyright protection primarily and directly contributes to the progress of artistic and scientific development.

¹⁶ See generally Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society.

¹⁷ See Michael D. Birnhack, *The Idea of Progress in Copyright Law*, 1 *Buff. Intell. Prop. L.J.* 3 (2001).

¹⁸ U.S. Const. art. I, § 8, cl. 8.

§ 5.2.3. Copyright Protection as an Economic Driver

Enshrined in international copyright law for more than one century, copyright provides the economic foundation for creating and disseminating music, literature, art, films, computer software, and other forms of creative work. Since the establishment of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement)¹⁹ in 1995, numerous public pronouncements and policy statements have argued that the spread of intellectual property values and regimes, including enforcement systems, will create significant economic benefits for both developed and developing countries.²⁰ In particular, it is said that intellectual property rights protection stimulates economic growth in terms of trade in copyrighted products and subsequently increases employment.

However, numerous studies have found that developed countries are the main beneficiaries of intellectual property rights.²¹ Overall, the U.S. net surplus in its intellectual property trade with other countries was more than \$23 billion in 2003. The United Kingdom, which was second to the U.S., was the only other party to have an export-import surplus, but it trailed far behind with a surplus of only \$900 million. Developing countries have never had a surplus in intellectual property trade and, in fact, not a single one of the fifty least-developed countries has any calculable intellectual property revenues. Therefore, there is a large financial incentive for

¹⁹ Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments--Results of the Uruguay Round vol. 31, 33 I.L.M. 81 (1994) [hereinafter TRIPs Agreement].

²⁰ See World Bank, *Global Economic Prospects and the Developing Countries* 129, 133 (2002) (suggesting that increased copyright protection can induce investments in cultural industries).

²¹ See *id.* (showing that the United States, Japan, Germany, and France benefit the most from patent and copyright royalties).

corporate interests in the richer, developed countries, especially the U.S., to pressure developing countries to provide the strongest possible protection to copyright-protected products within their own borders since the products protected are primarily of U.S. origin.

§ 5.3. Copyright Policy for National Development

In order to comply with legal obligations of copyright treaties and contribute to sustainable national development, the establishment, enforcement, and keeping up-to-date with copyright legislation is an important task of any country's government. This part argues theoretical policies for countries in determining the scope and extent of copyright protection within their jurisdiction. The incentive justification and the political economic justification are the primary policies ubiquitously adopted among countries. These policies will form the basis of discussions below.

§ 5.3.1. Incentive Justification

The "incentive justification" that is used to determine the scope and extent of copyright protection originated nearly three centuries ago. It had its inception, in 1710, as provided by the English Statute of Anne, which is widely known among international copyright scholars as the first copyright legislation in the world. The Statute expressed its incentive policy in its title: "*An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors of Purchasers of such Copies.*"²² The drafters of the Statute created a statutory copyright with three dimensions – cultural, economic, and social. First, by using copyright as an incentive

²² An Act for the Encouragement of Learning, 8 Ann., c. 19 (1710) (Eng.) [hereinafter Statute of Anne], reprinted in Harry Ramsom, *The First Copyright Statute: An Essay on an Act for the Encouragement of Learning*, 109-17 (1956).

to create, the statute encouraged authors to contribute to the culture of society. Second, by protecting the right to publish a work, it gave entrepreneurs the incentive to distribute the works. Finally, by limiting the rights of the copyright owner upon the expiry of copyright, it gave the user freedom to use the work for the purpose of learning.²³ The primary goal of copyright was to enhance the public welfare; economic reward to the author was secondary.²⁴

Under the incentive theory, it is necessary to provide adequate incentives for authors to engage in creative activity. The nature of incentives for creating new works can be either monetary or non-monetary. In regard to the monetary incentive, without copyright protection, others could easily copy and distribute an author's works, quickly driving the price of the work down to the marginal cost of producing an additional copy.²⁵ Authors would thus be unable to recoup the costs of their original creative labor. As a result, authors would not choose to engage in such labor in the first place, and creative works would not be produced. However, monetary reward is not the sole source of inducement to create new works. There is much to suggest that non-monetary incentives are equally, if not more, important in some cases.²⁶ Occasionally, a book author is induced by visions of fame or personal

²³ L. Ray Patterson, Free Speech, Copyright, and Fair Use, 40 Vand. L. Rev. 1, 25-26 (1987).

²⁴ Gary Kauffman, Exposing the Suspicious Foundation of Society's Primacy in Copyright Law: Five Accidents, 10 Colum. V.L. J. L. & ARTS 381 (1986).

²⁵ See William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. Legal Stud. 325, 333 (1989); Neil Weinstock Netanel, Copyright and a Democratic Civil Society, 106 Yale L. J. 283 (1996).

²⁶ See, e.g., *Princeton Univ. Press v. Michigan Document Servs.*, 99 F.3d 1381, 1410 (6th Cir. 1996) (en banc) (Ryan, J., dissenting) (summarizing testimony of numerous academic authors "that they write for professional and personal reasons" and "that the receipt of immediate monetary compensation such

pleasure to create a work. Consequently, copyright law also obliges people to acknowledge an author's moral rights by requiring citations and protecting his or her non-monetary incentive to create copyright works.

§ 5.3.2. Political Economic Justification

Economy and politics have long been regarded as having correlation with copyright policy in many countries. This is because copyright entrepreneurs, who have significant stakes in their copyrighted material, have often played a political role in pursuing laws that accommodate their best interests in the marketplace. Since intellectual property assets determine the wealth and financial resources of enterprises, developed countries, whose economies depend heavily on intellectual property, are likely to make laws in favor of those enterprises that benefit their nation's wealth. A few notable examples of political economic justification as applied to U.S. copyright legislations include, (1) the decision to accede to the Berne Convention²⁷ in 1989, (2) the enactment of the Digital Millennium Copyright Act (DMCA),²⁸ and, (3) the enactment of the Sonny Bono Copyright Term Extension Act (Sonny Bono CTEA)²⁹ in 1998.

as a share of licensing fees is not their primary incentive to write"); *See also*, Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 Harv. L. Rev. 281 (1970) (arguing that the additional incentive provided by copyright is not necessary to the survival of the book publishing and computer software industries).

²⁷ Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886 amended Oct. 2, 1979, 828 U.N.T.S. 221 [hereinafter Berne Convention].

²⁸ Digital Millennium Copyright Act, Pub. L. No. 105-304, 24 (1998) (to be codified at 17 U.S.C. §§ 101, 104, 114, 512, 1201-1204 [hereinafter DMCA]).

²⁹ Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) [hereinafter Sonny Bono CTEA].

With regard to the U.S. decision to join the Berne Convention, the trade economics of copyright-based products is the primary reason for developed countries to pursue premier legal standards under leading copyright treaties. After World War I, the foreign market for U.S. copyrighted goods grew rapidly.³⁰ This growth prompted some representatives of copyright interests, especially from the entertainment and, later, the computer software industry, to suggest that ratification of the Berne Convention would grant U.S. copyright holder's remedies against infringement in foreign countries.³¹ Finally, in 1989, U.S. legislators realized that the U.S. must join the world community because it was not the only dominant economic force in the world. Therefore, the U.S. could no longer maintain a legal regime, which radically departed from a world-wide consensus on certain legal standards such as the prohibition of formalities as conditions for protection and the protection of moral rights. On October 31, 1988, President Reagan signed into law H.R. 4262, the Berne Convention Implementation Act (BCIA).³² Upon the entry into force of BCIA, the U.S. gained membership status under the Berne Convention on March 1, 1989.

³⁰ According to Secretary of State Cordell Hull in a 1936 memorandum to President Roosevelt, More than a quarter of a century has elapsed since there was any comprehensive alteration in the law of the United States granting and regulating copyrights. During the period many changes have occurred in the type and scope of the production and distribution of literary and artistic works. The United States is probably the world's largest producer of literary and artistic works. These works are known throughout the world and are an important factor in domestic and foreign commerce. H.R. Rep. No. 2514, 74th Cong., 2d Sess. 2 (1936).

³¹ See Universal Copyright Convention and Implementing Legislation: Hearings on Executive M, 1st Sess., the Universal Copyright Convention and S.2559, a Bill to Amend Title 17, U.S.C., Entitled "Copyrights" Before a Subcomm. of the Senate Comm. on Foreign Relations.

³² Berne Convention Implementation Act of 1988, Pub. L. No. 100-658, 1988 U.S. Code Cong. & Admin. News (102 Stat.) 2853 (to be codified at 17 U.S.C. § 116A) (previously H.R. 4262, 100th Cong., 2d Sess. (1988) [hereinafter BCIA]).

Another example of political-economic justification of the U.S. copyright policy is the enactment of the DMCA. When the World Wide Web was developed in the early 1990s, the music industry immediately recognized the threat the innovation posed. Since that time, the Recording Industry Association of America (RIAA), which represents the \$15 billion recording industry and record companies that distribute approximately 90% of legal sound recordings in the United States, has fought actively against Internet infringement of their copyrighted music. Additionally, it has pursued bills that would effectively protect copyrighted material online. John Alderman, a musician and recording industry insider, wrote that the RIAA has consistently dominated media reports and courtroom dramas involving copyright issues in cyberspace, and he lobbied "the government to enact laws that are favorable to the industry."³³ An important provision of the DMCA is the one currently embedded in Section 512 of the U.S.C.A., a section that limits the liability of Internet service providers whose users infringe the copyrights of others. While the provision limits liability, it also offers significant powers to a copyright holder seeking to prosecute online copyright infringers.

The last example to support political economic justification of the U.S. copyright policy is the passage of the Sonny Bono CTEA in 1998. In October 1993, the Council of the European Union extended the duration of copyright protection by issuing Council Directive 93/98/EEC³⁴ which established a uniform term of copyright protection for countries within the union. The Directive required European Union

³³ John Alderman, *Sonic Boom: Napster, MP3 and the New Pioneer of Music* 24 (2001).

³⁴ Council Directive 93/98/EEC of 29 October 1993 Harmonizing the Term of Protection of Copyright and Certain Related Rights, 1993 O.J. (L 290).

countries to standardize the duration of copyright protection to 70 years after the death of an author. The term extension required most European Union countries to extend protection to 20 years beyond an author's life plus fifty years from their copyright periods by July 1995.³⁵ Notably, the term of an author's life plus fifty years was formerly required by the Berne Convention to member countries.

Subsequently, in 1998, the U.S. entertainment industry, desiring to receive the same benefit as the extended European term, lobbied the House of Representative and the Senate to follow the European Union extension of copyright term protection. At that time, ten of the thirteen original sponsors of the Sonny Bono CTEA in the House received the maximum contribution from the Walt Disney Corporation's political action committee; in the Senate, eight of the twelve sponsors received contributions.³⁶ Because the European countries did not have to apply the new, longer term to works originating in countries that provide a shorter protective term, U.S. authors and publishers could not receive the advantages of extended protection abroad. Since the U.S. sold more copyrighted products to European Union countries than it imported from them, the U.S. would receive greater revenue from exporting copyrighted products. Eventually, in the same year, Congress passed the Sonny Bono CTEA, which added twenty years of protection to all copyrighted works.

On the other hand, the unwillingness of developing countries to strengthen the protection of intellectual property rights also stems from political economic

³⁵ Robert L. Bard, *Copyright Duration: Duration, Term Extension, the European Union and the Making of Copyright Policy 12* (Austin & Winfield 1999).

³⁶ The Recording Industry Association of America and the Motion Picture Association of America were estimated to have spent over \$1.5 million lobbying in the 1998 election cycle. They paid out more than \$200,000 in campaign contribution. The Walt Disney Corporation was estimated to have contributed more than \$800,000 to reelection campaigns in the 1998 cycle. Lawrence Lessig, *Free Culture 218* (2004).

justifications. Over the last 30 years, the U.S. and Europe have persistently applied pressure to countries around the world in an effort to get them to enact and enforce copyright laws at a level that at least reduces, if not eliminates, infringement of their copyrights. The U.S., for some time, has imposed pressure on numerous countries to improve their enforcement of intellectual property rights. For example, over the last decade, the U.S. has repeatedly threatened trade sanctions against China, because it has been a major source of infringed goods.

Consequently, developed countries have introduced higher standards of protection and encouraged developing countries to accept them. For example, computer programs were initially thought to be better suited for protection as industrial property than for protection as literary property. In 1977, the World Intellectual Property Organization promulgated a set of *sui generis* "Model Provisions for the Protection of Computer Software."³⁷ By the early 1990s, however, many developed countries in the Berne Union brought computer programs under their copyright legislation. Ultimately, the consensus of the *E.C. Software Directive*,³⁸ the *TRIPs Agreement*,³⁹ and the *WIPO Copyright Treaty*⁴⁰ that computer programs are to be protected as "literary works," under the Berne Convention, has today effectively concluded the question of the copyrightability of computer programs as a matter of international law.

³⁷ See Lawrence Perry, *The Legal Protection of Computer Software: The WIPO Model Provisions*, 1 E.I.P.R. 34, 36-37 (1979).

³⁸ European Commission Directive no. 91/205/CE, of 14 May 1991, art. 1.1.

³⁹ TRIPs Agreement, *supra* note 19, art. 10.1.

⁴⁰ WIPO Copyright Treaty, *supra* note 7, art. 4.

§ 5.4. Sound Copyright Law for National Development of Developing Countries

Sound copyright law for national development can be viewed from two perspectives. The first considers what would meet the needs of developed nations; the other addresses the need for developing nations to utilize copyright policy as a tool for sustainable development. The latter group of countries will be the primary subject of discussion in this part. Before going into detail, a revisit of copyright conceptual basics for national development is essential.

As a rule, copyright law is believed to be an incentive generator necessary for knowledge diffusion, technology transfer, and private investment flow. However, excessive copyright protection can hinder sustainable national development in terms of limiting availability of educational materials for schools and students in developing countries. Furthermore, by overpricing, copyright holders indirectly deny access to educational sources. Thus, impoverished peoples, who are the majority in developing countries, lack the opportunity to afford advanced, exorbitantly priced information. To secure a reasonable level of national development, a balance between the interests of copyright owners to receiving fair reward for their intellectual labor, and the interests of copyright users in developing countries in receiving reasonable access to copyright materials, should be maintained. This section demonstrates how developing countries can use copyright law to advance their development strategies under international law.

§ 5.4.1. Limitations and Exceptions of Copyright

Copyright protects the expression of ideas; however, certain ideas are often crucial to supporting the scholarship, research, comment, and criticism that is necessary to promote the competitiveness of developing countries in the modern and highly complex world. The economic rights of copyright holders should be balanced with developing countries' need to gain access to information. Under the concept of copyright limitation and exception, the use of information derived from those necessary ideas should never be available to only those with the greatest ability to pay. Several developing countries have called for exemptions that would allow people to fully realize their access to lawfully acquired information. It should not be forgotten that copyright, in principle, is a limited monopoly right. Without limitations and exceptions, copyright owners would have a complete monopoly over learning. Such monopoly can hinder the progress of national development in developing countries.

It has long been recognized that limitations of authors' rights and exceptions upon authors may be justified in particular cases. Thus, at the outset of the negotiations that led to the formation of the Berne Convention in 1884, the distinguished Swiss delegate Numa Droz stated that it should be remembered that "limits to absolute protection are rightly set by the public interest."⁴¹ In consequence, the Berne Convention and subsequent copyright-related treaties have contained provisions granting latitude to member states to limit the rights of authors and exempt users from liability in certain circumstances. These limitations and exceptions in copyright law can be grouped roughly under the headings that follow below.

⁴¹ Actes 1884, 67 (closing speech to the 1884 Conference).

§ 5.4.1.1. Provisions that Exclude Protection for Particular Categories of Works

There are numerous and striking instances of provisions that exclude protection for particular categories of works in the Berne Convention, which the TRIPs Agreement incorporates by reference.⁴² These include official texts of a legislative, administrative, and legal nature,⁴³ news of the day,⁴⁴ and speeches delivered in the course of legal proceedings.⁴⁵ These provisions might be described as “limitations” on protection, in the sense that no protection is required for the particular kind of works in question. Provisions of the same nature under Thai copyright regime can also be found in Article 7 of the *T.C.A. B.E. 2537*, which states that “(1) news of the day and facts having the character of mere information which is not a creative work in literary, scientific or artistic domain; (2) constitution and legislation; (3) regulations, rules, announcements, orders, explanations and official correspondence of the ministries, departments or any other government or local units; (4) judicial decisions, orders, rulings and official reports; and, (5) translation and

⁴² See TRIPs Agreement, *supra* note 17, art. 9.1. (stating that “[M]embers shall comply with Article 1 through 21 of the Berne Convention (9171) and the Appendix thereto”).

⁴³ Berne Convention, *supra* note 27, art. 2(4) (providing that “[I]t shall be a matter for legislation in the countries of the Union to determine the protection to be granted to official texts of a legislative, administrative and legal nature, and to official translations of such texts).

⁴⁴ Berne Convention, *supra* note 27, art. 2(8) (providing that “[T]he protection of this Convention shall not apply to news of the day or to miscellaneous facts having the character of mere items of press information).

⁴⁵ Berne Convention, *supra* note 27, art. 2bis(1) (providing that “[I]t shall be a matter for legislation in the countries of the Union to exclude, wholly or in part, from the protection provided by the preceding Article political speeches and speeches delivered in the course of legal proceedings”).

compilation of those in (1) to (4) made by the ministries, departments or any other government or local units are not copyright work.”⁴⁶

§ 5.4.1.2. Provisions that Allow for the Granting of Immunity from Legal Liability

Provisions that allow for the granting of immunity from legal liability give permission for several kinds of use under the law. These can be termed “exceptions” to protection. The Berne Convention provides copyright exceptions in Article 2bis(2) regarding certain uses of lectures and addresses,⁴⁷ Article 9(2) regarding general exceptions to reproduction right,⁴⁸ Article 10(1),(2) regarding quotation and use for teaching purposes,⁴⁹ and Article 10bis regarding certain uses for reporting of news. Similar provisions exist in the TRIPs Agreement. Specifically, Article 9(2) of the

⁴⁶ T.C.A. B.E. 2537 (1994) § 7 (Thail.).

⁴⁷ Berne Convention, *supra* note 27, art. 2bis(2) (providing that “[I]t shall also be a matter for legislation in the countries of the Union to determine the conditions under which lectures, addresses and other works of the same nature which are delivered in public may be reproduced by the press, broadcast, communicated to the public by wire and made the subject of public communication as envisaged in Article 11bis(1) of this Convention, when such use is justified by the informatory purpose”).

⁴⁸ Berne Convention, *supra* note 27, art. 9(2) (providing that “[I]t shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author”).

⁴⁹ Berne Convention, *supra* note 27, art. 10 (providing that “(1) It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries. (2) It shall be a matter for legislation in the countries of the Union, and for special agreements existing or to be concluded between them, to permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilization is compatible with fair practice”).

Berne Convention is repeated in Article 13 of the TRIPs Agreement, with respect to all exclusive rights of the right holder, not just simply the right of reproduction.⁵⁰

Copyright exceptions form an important part of many national copyright regimes. For example, under Thai copyright law, the best known copyright exception is Section 32 of the *T.C.A.* B.E. 2537 which provides the fundamental rule for all copyright exceptions under the *T.C.A.* Section 32 provides that the use of a copyrighted work of another person is not an infringement of copyright if it does not conflict with a normal exploitation of the copyright work by the owner of copyright, and does not unreasonably prejudice the legitimate right of the owner of copyright under following categories of usage:

- “(1) research or study of the work which is not for profit;
- (2) use for personal benefit for family members or close relatives;
- (3) comment, criticism or introduction of the work with an acknowledgement of the ownership of copyright in such work;
- (4) news reporting through mass media with an acknowledgement of the ownership of copyright in such work;
- (5) reproduction, adaptation, exhibition or display for the benefit of judicial proceedings or administrative proceedings by authorized officials or reporting such proceedings;

⁵⁰ See TRIPs Agreement, *supra* note 19, art. 13 (providing that “[M]embers shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder”).

(6) reproduction, adaptation, exhibition or display by an instructor for the benefit of instruction provided that the act is not for profit;

(7) reproduction, adaptation in part of a work or abridgement or making a summary by an instructor or an educational institution so as to distribute or sell to students in a class or in an educational institution provided that the act is not for profit; and,

(8) use of the work as part of questions and answers in an examination.”⁵¹

§ 5.4.1.3. Compulsory Licenses Provisions

The Berne Convention provides that developing countries may institute a system of compulsory licenses for the reproduction or translation of foreign works. Compulsory licenses provisions allow a particular use of copyright material subject to the payment of compensation to the copyright owner. The Berne Convention permits signatory nations to enact laws providing compulsory licenses, including recording licenses, and broadcasting licenses.⁵² In addition, the Appendix of the Berne Convention describes when special compulsory licenses to assist developing countries are permissible, which are notably for educational and developmental purposes. Under such a system, a publisher of a developing country is entitled to reprint and translate a work upon payment of a statutorily set royalty when the copyright holder has failed to license reprint or translation rights in the developing country for a

⁵¹ T.C.A. B.E. 2537 (1994) § 32 (Thail.).

⁵² Berne Convention, *supra* note 27, arts. 11bis(2), 13.

reasonable price and within a reasonable time after the work is available elsewhere. The history leading up to this addition to the Berne Convention, as revised in 1971, was complex and controversial, and the present provisions of the Convention's Appendix detail a hard-fought compromise between developing and developed countries.⁵³

Upon a declaration to the WIPO regarding the Appendix, Article II of the Berne Convention, a developing country's government may establish a system of nonexclusive and non-transferable rights for a fee, after a prescribed period has expired, and after good faith efforts to secure a voluntary license from the copyright holder have failed.⁵⁴ Thailand has availed itself of the provisions in Article II of the Appendix of the Berne Convention with respect to compulsory licenses on translation. It adopts the compulsory licenses provisions in Chapter 3 of the *T.C.A. B.E. 2537*, entitled "*Use of Copyright in Special Circumstances*." Under the Act, a Thai national may seek a compulsory license to translate or publish a copyrighted work for the benefit of study, teaching, or research through submission of an application to the Director-General of the Department of Intellectual Property, provided that:

- (1) the copyright owner has not translated or authorized any person to translate the work into [the]Thai language for publication within three years after the first publication of the work; or,
- (2) the copyright owner has published the translation in [the]Thai language but, beyond three years after the last publication of the

⁵³ See generally, S. Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986*, Centre for Commercial Law Studies, Queen Mary College London, 1987, chapter 11.

⁵⁴ Berne Convention, *supra* note 27, Appendix [Special Provisions Regarding Developing Countries] arts. II, IV.

translation, no further publication is made and all editions of the published translation is out of print.⁵⁵

§ 5.4.2. Due Protection Term of Copyright

Since the founding of copyright law, copyright always has had a limited duration, after which the protected material enters the public domain and may be freely used by anyone for any purpose. This is a crucial aspect to copyright because it guarantees an enormous treasure trove of resource material that is permanently available to education, research and the development of new creative works. Because copyright works range from trivial material, such as music, to material important to national development, such as educational materials, the duration for protecting various kinds of copyright works should be set at a level commensurate with their contributory potential to national development. However, the entry of copyright works into the public domain has been restrained by successive increases in the duration of copyright. The maximum duration of copyright, when the first Copyright Act was passed in England following the passage of the Statute of Anne, was 28 years. Since then the duration of copyright has increased in many jurisdictions to the life of the author plus 70 years, which is far beyond any reasonable prospect of commercial exploitation.

The author proposes that an appropriate duration of protection for the purpose of stimulating development in developing countries should be structured in two phases with the total of 28 years being similar to the pattern used in the Statute of Anne and the early copyright acts of the U.S. The two-tiered structure has proved effective in revolutionizing the development process of many developing countries.

⁵⁵ T.C.A. B.E. 2537 (1994) § 54 (Thail.).

A two-tiered structure of sound copyright duration is composed of a fixed initial term followed by a term of renewal. This pattern serves the purpose of copyright law by benefiting both authors and the general public. This system will allow copyright works that are no longer profitable to fall into public domain at the end of certain period, assuming the author would not pay to renew rights in a work that is not generating income. This proposed system is also fair for authors in the sense that their works might achieve popularity during the first term by providing them an opportunity to renew the copyright on commercially viable works and to renegotiate licensing terms and conditions of sale. Nevertheless, to adopt this recommended proposal, the Berne Convention must be amended in Article 7 with respect to the term of protection.

§5.5. Comments on Copyright Protection in the World of Evolving Information Technologies for Thailand

§ 5.5.1. Introduction of Legal Concerns on the Circumvention of Technological Protections

Through the revolutionary technology of the 20th Century, computer programs could integrate words, sounds, and images into digital form. Remarkably, at the end of that century and continuing into the 21st Century, entertainment and information products were recorded, stored, transmitted, and received digitally on the World Wide Web.⁵⁶ This digital revolution has challenged lawyers domestically and worldwide to

⁵⁶ Paul Goldstein, *Copyright's Highway: From Gutenberg to the Celestial Jukebox*, 163, (Stanford University Press 2003).

confine the scope of exclusive rights and liability of copyright owners and infringers respectively.

While the Berne Convention and the TRIPs Agreement include important provisions governing the equal application of copyright protection between member states, they do not address the core concerns raised by the online environment such as technical protection measures (technology that can be used to "control" copyright materials). This issue is currently dealt with by the WIPO Copyright Treaties (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), concluded in 1996.⁵⁷ While several countries, most prominently the U.S., have ratified the WCT, many others, including Thailand, have moved slowly to alter their copyright laws to incorporate the provisions that may prospectively become "WIPO compliant."

Recently, the U.S. has signed free trade agreements with numerous countries, which specifically require the signatories to adopt WCT provisions prohibiting circumvention of technologies that protect copyrighted works. For example, the U.S.-Singapore Free Trade Agreement states that "[I]n order to provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that authors, performers, producers of phonograms, and their successors in interest use in connection with the exercise of their rights and that restrict unauthorized acts in respect of their works, performances, and phonograms,

⁵⁷ See WIPO Copyright Treaty, *supra* note 7, art. 11 (providing "[C]ontracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law"); WIPO Performances and Phonograms Treaty, *supra* note 8, art. 18 (providing "[C]ontracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by performers or producers of phonograms in connection with the exercise of their rights under this Treaty and that restrict acts, in respect of their performances or phonograms, which are not authorized by the performers or the producers of phonograms concerned or permitted by law").

each Party shall provide that . . . any person [who,] knowingly, or having reasonable grounds to know, circumvents without authority any effective technological measure that controls access to a protected work, performance, [or] phonogram . . . shall be liable and subject to remedies.”⁵⁸

The delay in spreading the WIPO standard throughout the world has frustrated the U.S., which as a major producer of movies, music, and books, has long promoted stronger copyright protections. In response, when negotiating bilateral free trade agreements, the U.S. has begun to demand inclusion of copyright protections akin to those found in the WIPO treaties. Developing countries, such as the Dominican Republic, view the inclusion of stronger copyright protections as an acceptable, costless choice. For such countries, the harm that may result from excessive copyright controls pales in comparison alongside more fundamental development concerns, and they are therefore willing to surrender copyright policy decisions in return for tangible benefits in other trade areas arising from bilateral agreements with the U.S.⁵⁹ However, before Thailand adopts any of the WIPO’s newest copyright standards as a model study, it should carefully consider the drawbacks, or the impact of the WIPO rules on the liability of circumvention of technological measures. Thailand can do this by examining the U.S. copyright law on the provisions for the protection of technological measures.

⁵⁸ U.S. – Singapore Free Trade Agreement, May 6, 2003, U.S. – Sing., Pub. L. 108-78, *available at* www.ustr.gov/assets/Trade_Agreements/Bilateral/Singapore_FTA/Final_Texts/asset_upload_file708_4036.pdf.

⁵⁹ Michael Geist, *Why We Must Stand on Guard over Copyright*, The Toronto Star, October 20, 2003, at D03.

§ 5.5.2. U.S. Copyright Protection under the Threat of Infringing Technologies

Since the 1990's, the Internet has become an integral part of American life. As an industrialized country, the U.S. has faced technological threats originating from emerging technologies that make reproduction of copyrighted materials simpler. An evident example of recently infringing technologies includes circumvention technologies, advances in compression technology, recording devices, and the falling prices of digital storage. Such threats impact the music and films industries. The problems range from production of illicit copies, to undermining the carefully times progression of theatrical release that is scheduled for DVD sales, home pay-per-view, and free television viewing. Section 1201 of the Digital Millennium Copyright Act (DMCA) of 1998 is an implementing legislation of the WCT and WPPT, which the U.S. signed on April 12, 1997, intended to combat the use of circumvention technology.⁶⁰

The following discussion will examine the text of Section 1201 of the U.S.C.A. regarding anti-circumvention of technologies provisions and its judicial and administrative interpretation.⁶¹ The text of Section 1201 defines three violations:

⁶⁰ The Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (codified in scattered sections of 17 U.S.C.) [hereinafter DMCA]. DMCA was signed into law on October 28, 1998. Title I of the DMCA implemented the WIPO Treaties of 1996 - the WCT and the WIPO Performances and Phonograms Treaty (WPPT) - and created the new Chapter 12 of Title 17 of the United States Code. The provisions of this Chapter became effective on the effective date of the DMCA. However, the access control anti-circumvention provision in § 1201(a)(1)(A) was delayed until October 28, 2000, in order to see how the implementation of access control technology "affect[s] availability of works in the marketplace for lawful uses."

⁶¹ Section 1201 provides, in relevant part:
§ 1201. Circumvention of copyright protection systems
(a) Violations Regarding Circumvention of Technological Measures.

(a)(1) to circumvent technological protection measures that control access to copyrighted works; (a)(2) to manufacture, disseminate or offer, etc. devices or services, etc. that circumvent access controls and (b) to manufacture, disseminate, or offer, etc. devices or services that circumvent a technological measure that “effectively protects a right of the copyright owner ...” It is important to appreciate that these violations are distinct from copyright infringement.

Section 1201 thus appears to expand the scope of copyright in the following ways:

(1)(A) No person shall circumvent a technological measure that effectively controls access to a work protected under this title. The prohibition contained in the preceding sentence shall take effect at the end of the 2-year period beginning on the date of the enactment of this chapter...

(2) No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that --

(A) is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under this title;

(B) has only limited commercially significant purpose or use other than to circumvent a technological measure that effectively controls access to a work protected under this title; or

(C) is marketed by that person or another acting in concert with that person with that person's knowledge for use in circumventing a technological measure that effectively controls access to a work protected under this title.

(3) As used in this subsection --

(A) to “circumvent a technological measure” means to descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner; and

(B) a technological measure “effectively controls access to a work” if the measure, in the ordinary course of its operation, requires the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work.

(b) Additional Violations. (1) No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that --

(A) is primarily designed or produced for the purpose of circumventing protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof;

(B) has only limited commercially significant purpose or use other than to circumvent protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof; or

(C) is marketed by that person or another acting in concert with that person with that person's knowledge for use in circumventing protection afforded by a

technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof.

(2) As used in this subsection --

(A) to “circumvent protection afforded by a technological measure” means avoiding, bypassing, removing, deactivating, or otherwise impairing a technological measure; and

(B) a technological measure “effectively protects a right of a copyright owner under this title” if the measure, in the ordinary course of its operation, prevents, restricts, or otherwise limits the exercise of a right of a copyright owner under this title.

17 U.S.C. § 1201 (2000).

1. It creates a claim for unauthorized access to works of authorship;
2. It makes distributors of circumvention devices directly liable for the dissemination of the means to gain unauthorized access;
3. It makes distributors of circumvention devices directly liable for the dissemination of the means to make copies or to engage in communications to the public; and,
4. It makes disseminators of both kinds of devices liable even if some of the end users to whom the devices are distributed would employ the devices for non-infringing purposes.

The application of Section 1201 of the U.S.C.A. can be best explained in *Universal City Studios v. Reimerdes*.⁶² Since Hollywood studios began releasing movies to consumers on DVD in 1997, the format has become, for them, immensely popular and also very lucrative. However, because the DVD format is able to store a great deal more data than analog videotape, and that its digital format can enable users to easily make near-perfect copies, studios hesitated to release movies on DVD until adequate piracy protections were in place.⁶³ Thus, in 1996, the studios adopted the Content Scramble System (CSS) to protect their DVD copyrighted movies.⁶⁴ Today, almost all movies released on DVD are protected by CSS. In September 1999, however, Norwegian teenager Jon Johansen and two people he met on the Internet

⁶² 111 F. Supp. 2d 294 (S.D.N.Y. 2000). This section also refers to *Universal City Studios v. Corley*, 273 F.3d 429 (2d Cir. 2001) (hereinafter *Corley*), the Second Circuit decision that affirmed *Reimerdes*.

⁶³ *Corley*, 273 F.3d at 436.

⁶⁴ Ryan L. Van Den Elzen, *Decrypting the DMCA: Fair Use as a Defense to the Distribution of DeCSS*, 77 *Notre Dame L. Rev.* 673, 674 (2002). CSS encryption was developed for the studios by members of the consumer electronics and computer industries.

reverse-engineered a licensed DVD player and discovered the CSS technology. This discovery enabled them to create DeCSS, a computer program that could decrypt CSS-encrypted DVDs, thereby allowing playback on non-compliant computers as well as the copying of decrypted files to computer hard drives. Johansen then posted the executable object code for DeCSS on his personal Web site. Shortly thereafter, copies of DeCSS spread throughout the Internet.

Two months after DeCSS was created, Eric Corley wrote an article about the creation and uses of DeCSS and posted it to his Web site, 2600.com, along with the object and source code for DeCSS, and links to other Web sites that offered DeCSS for download. In an attempt to prevent the further distribution of DeCSS, the movie industry sent "cease-and-desist" letters to many of the Web sites that contained DeCSS. Some Web site operators removed DeCSS from their sites, but others, including Corley, refused. Consequently, a coalition of Hollywood studios filed suit against a few of these Web sites and their operators, including Corley. In this case, *Universal City Studios v. Reimerdes*, the court held that since DeCSS was created "solely for the purpose of decrypting CSS," the program is therefore a product that is "primarily designed ... for the purpose of circumventing a technological measure that effectively controls access to a work" protected by the DMCA. Thus, the court held that Corley's posting of DeCSS and links to other sites containing DeCSS on his Web site constituted "trafficking," thereby violating section 1201(a)(2)(A) of the DMCA.⁶⁵

The court further rejected the argument that posting DeCSS and links to other DeCSS sites fell under the reverse engineering exemption found in section 1201(f) because Corley did not engage in any reverse engineering--he merely obtained

⁶⁵ Reimerdes, 111 F. Supp. 2d at 319.

DeCSS from another Web site and posted it on his site. In addition, the court held that Corley's actions were not protected by the *fair use* doctrine. The court stated that while section 107 of the Copyright Act allows for fair use of copyrighted material, Corley was not being sued for copyright infringement, but rather for violating the anti-tools provision of section 1201(a)(2) of the DMCA. In the end, the court issued a permanent injunction, barring Corley from posting the DeCSS program and linking to other sites that contained DeCSS. Corley subsequently appealed, but the Second Circuit upheld the injunction slightly more than one year later.⁶⁶

§ 5.5.3. The Recommendations for Thai Copyright Protection of Technological Measures

Currently, Thailand has not acceded to WCT or WPPT, both of which includes anti-circumvention provisions. Unlike the U.S., it has no international obligation to provide rights to authors and copyright holders to prohibit the circumvention of technological protection measures that control access to copyrighted works or to prohibit manufacturing, disseminating or offering devices or services that circumvent access controls equipped by the copyright owner. Furthermore, for a long time, no Thai copyright owners have claimed that such provisions were crucial to protect their interests under the current technological development stage of Thailand.

Regardless of pressure from the U.S., Thailand should continue its stance not to sign the WCT since that appears to be a lesser threat compared to what WIPO requirements mandate. In particular, technological copyright protection measures embedded in the WCT are a significant issue for the world's education communities,

⁶⁶ Corley, 273 F.3d 429 (2d Cir. 2001).

because these measures can override and effectively eliminate any copyright exceptions. This is because such technological measures do not distinguish between uses which are not authorized by the copyright owner but are permitted by law, on one hand, and those uses which are not authorized by the owner and also infringing, on the other. For example, the same copy-control mechanism that prevents a person from making infringing copies of a copyright work, could also prevent a student from making legitimate exception copies for beneficial educational purposes. At issue is the danger that only those who can afford information will be able to take advantage of the benefits of digital information.

Thailand is a follower of the U.S. in technological development. Any technology that has posed legal problems in the U.S., such as circumvention of protection technologies, will potentially cause ambiguity of legal application in Thailand in the future. By closely watching developments in U.S. copyright law, Thailand will be able to adjust its legal system appropriately according to its current stage of technological development at any point in time. However, as a whole, existing Thai copyright law, as compared to legislation in other countries, provides relatively high levels of protection for copyrighted materials, even in digital form.

Section 4 of the *T.C.A.* B.E. 2537 stipulates that a copyright owner is entitled to the exclusive rights to literary works, including computer programs. The same section also defines "reproduction" as imitation, duplication, block-making, sound recording, video recording or sound and video recording of the original, a duplicate, or an advertisement in its material form, whether in whole or in part. With regard to computer programs, this refers to the copying or duplication of substantial portion of a

computer program from media by any method, without creating an essentially new work.⁶⁷

§ 5.6. Conclusion

§ 5.6.1. Supplementary Means to Repress Copyright Infringements in Thailand

Given the perceived dissatisfaction of the U.S. Trade Representative (USTR) with the results obtained via traditional enforcement mechanisms based strictly on copyright law, strategies based on existing Thai tax law to monitor persons involved in circumstances of unusual wealth should also be considered when formulating a scheme to trace and target copyright infringers.⁶⁸ Thai tax law is enforced by a multitude of agencies, including the Customs Department, the Internal Revenue Department, and the Excise Department. The enforcement of the tax law is far more popular with the government and the general populace because violations are considered public crimes as opposed to the supposed private crimes against only copyright owners.

If action through these other government agencies can complement or supplement claims based on intellectual property violations, then the objective of keeping infringing products out of the market will be brought closer within reach. When a police raid captures substantial quantities of illegal materials, the Revenue and Excise Departments should be notified. After that, the authorities should

⁶⁷ T.C.A. B.E. 2537 (1994) § 4 (Thail.).

⁶⁸ U.S. Trade Representative, *2005 Special 301 Report*, at http://www.ustr.gov/assets/Document_Library/Reports_Publications/2005/2005_Special_301/asset_upload_file195_7636.pdf.

investigate the matter and seek punitive actions for tax evasion by copyright infringers (VAT, corporate and personal income taxes, and excise taxes).

Understanding of the concept of copyright can also discourage people from infringing activities. As a citizen of a predominately Buddhist country, Thai people believe that stealing others' idea is susceptible to a violation of one of the five commandments of the Lord Buddha because of the intangible aspect of copyright. Informational campaigns can help encourage people to respect others' copyright rights.

Pricing of copyright products is also a key factor when people make a decision to buy or not to buy an infringing product. If people are able to get products and content in easy, inexpensive ways, they might not think it is worthwhile to buy illegal material. In the case of Thailand, infringement activities are rising due to the economic recession, the increase in unemployment, and cheap labor costs — people are struggling to survive in today's complex Thai society. Moreover, reproductions of some copyright works, for instance, sound recordings and computer programs, is often inexpensive and can be made in a significantly large quantity, and Thai citizens and tourists are constantly eager to obtain a bargain for their money. This situation shows that even perfect legislation cannot alone terminate infringement activities. A combination of other approaches, such as educational, social and economic, is also needed.

§ 5.6.2. Recommended Direction for Thai Copyright Legislation

Currently, Thailand is bound by two international copyright norms, namely the Berne Convention and the TRIPs Agreement. Under international obligation, Thai copyright law, like that of other countries, has been attempting to strike a fair balance between the original creators of works and the entrepreneurs, whose contributions are

necessary for the widespread dissemination and distribution of the copyright works and information.

The cost and availability of copyright works are central problems in Thailand, because libraries in rural areas are hard to sustain. As one result, shelves are empty and books are worn-out. The government should provide subsidies to the local libraries so that they may serve the general public more adequately. As a developing country, participating in any international meeting on copyright treaties, Thailand should play an important role in its region to promote the use of exceptions regarding overpriced copyright products. Respectfully, to bridge a gap between rich and poor countries, collecting groups should voluntarily reduce the price to the level, which laymen in developing countries may obtain copyright works necessary to lift them to levels of national development adequate to compete in the world marketplace. If the price control proposition becomes internationally accepted, to solve the overpricing problem, Thailand's copyright law should be amended by the Thai Parliament. Pursuant to Thai public interest, the amended law should constitute a copyright review board. The board, with advice from the Director General of the Department of Intellectual Property, should have the power to issue compulsory licenses to override a copyright, and issue a compulsory license if the copyright is deemed as not being used locally, or if the price is deemed unreasonably high. This approach is rightfully supported by the police power of states under Article 17 of the Berne Convention.⁶⁹

The Asian and Pacific region is projected to become one of the world's economically dynamic regions, although it still harbors potential risks of conflict in

⁶⁹ Berne Convention, *supra* note 25, art. 17 (stating "[T]he provisions of this Convention cannot in any way affect the right of the Government of each country of the Union to permit, to control, or to prohibit, by legislation or regulation, the circulation, presentation, or exhibition of any work or production in regard to which the competent authority may find it necessary to exercise that right").

the 21st Century; for instance, the war on terrorism, and the rising of oil prices. The U.S., as a leading developed country, should act in accordance with United Nations principles in bridging the gap between rich and poor countries by promoting sustainable development in developing countries rather than its current stance of legislating copyright law in favor of copyright entrepreneurs.

With the increasing competition in the world markets, Thailand and other countries around the region have tried to transform their bases of economies from agricultural societies to newly industrialized countries (NIC) by using more technologies in the process of production to increase outputs and stimulate economic growth. In order to receive demanded technologies, Thailand has raised important issues relating to intellectual property rights and the constant protection of such rights. Infringement of intellectual property in Thailand is viewed as a significant barrier to foreign investments, which are the important source of technology transfers.

The government of Thailand realizes that the level of intellectual property rights protection must be raised to attract foreign investors and to comply with the TRIPs Agreement. As a rule, efficiency of intellectual property enforcement and economic stability are major factors for anyone undertaking investments to consider. Sufficient, yet fair to both rights holders and users of copyrighted material, copyright protection creates an appropriate climate favorable to foreign investments.

Finally, the author presumes that the trend towards greater international protection of copyright will continue. However, there should be a search for ways and means to improve the developmental process in developing countries while providing, at the same time, the sustainability of a sound international copyright protection system. The author argues that a few relatively modest and realistically implementable changes to international copyright law on duration of copyright and

prices control could help address some of the legitimate concerns of copyright critics. Concurrently, the basic concept of copyright protection should be preserved since it has well served many of the world's peoples. Thus far, there are no signs that between developed and developing countries the battle on the issue of copyright protection is over.

Appendix: The Copyright Act B.E. 2537 of the Kingdom of Thailand*

H.M. KING BHUMIBOL ADULYADEJ

Given on the 9th day of DECEMBER B.E. 2537 (1994)

being the 49th year of the present reign.

By royal command of His Majesty King Bhumibol Adulyadej it is hereby proclaimed that:

Where as it is proper to amend the law on copyright, IT IS HEREBY ENACTED by the King's Most Excellency Majesty with the advice and consent of the National Legislature as follows:

Section 1. This Act shall be cited as the Thai Copyright Act B.E.2537.

Section 2. This Act shall come into force at the expiration of ninety days from the date of publication in the Government Gazette.

Section 3. The Thai Copyright Act B.E.2521 shall be repealed.

Section 4. In this Act:

“author” means a person who makes or creates any work which is a copyright work by virtue of this Act.

* This translation is provided by Department of Intellectual Property of Thailand, at <http://www.ipthailand.org/Static/ThaiLaws.aspx> (last visited Aug. 20, 2005).

“copyright” means the exclusive right to do any act according to this Act with respect to the work created by the author.

“literary work” means any kind of literary work such as books, pamphlets, writings, printed matters, lectures, sermons, addresses, speeches, including computer programs.

“computer program” means instructions, set of instructions or anything which are used with a computer so as to make the computer work or to generate a result no matter what the computer language is.

“dramatic work” means a work with respect to choreography, dancing, acting or performance in dramatic arrangement, including a pantomime.

“artistic work” means a work of any one or more of the following characters:

(1) work of painting and drawing which means a creation of configuration consisting of lines, lights, colors or any other things or the composition thereof upon one or more materials.

(2) work of sculpture which means a creation of configuration with tangible volume.

(3) work of lithography which means a creation of picture by printing process and includes a printing block or plate used in the printing.

(4) work of architecture which means a design of building or construction, a design of interior or exterior decoration as well as a landscape design or a creation of a model of building or construction.

(5) photographic work which means a creation of picture with the use of image-recording apparatus which allows the light to pass through a lens to a film or glass and developed with liquid chemical of specific formula or with any process that creates a picture or an image-recording with any other apparatus or method.

(6) work of illustration, map, structure, sketch or three-dimensional work with respect to geography, topography or science.

(7) work of applied art which means a work which takes each or a composition of the works mentioned in (1) to (6) for utility apart from the appreciation in the merit of the work such as for practical use of such work, decorating materials or appliances or using for commercial benefit. Provided that, whether or not the work in (1) to (7) has an artistic merit and it shall include photographs and plans of such work.

“musical work” means a work with respect to a song which is composed for playing or singing whether with rhythm and lyrics or only rhythm, including arranged and transcribed musical note or musical diagram.

“audiovisual work” means a work which consists of a sequence of visual images recorded on any kind of material and which is capable

of being replayed with an equipment necessary for such material, including the sound track of such work, if any.

“cinematographic work” means an audiovisual work which consists of a sequence of visual images which can be continuously shown as moving pictures or can be recorded upon another material so as to be continuously shown as moving pictures, including the sound track of such cinematographic work, if any.

“sound recording” means a work which consists of sequence of music, sound of a performance or any other sound recorded on any kind of material and capable of being replayed with an equipment necessary for such material but not including the sound track of a cinematographic work or another audiovisualwork.

“performer” means a performer, musician, vocalist, choreographer, dancer, and a person who acts, sings, speaks, dubs a translation or narrates or gives commentary or performs in accordance with the script or performs in any other manner.

“broadcasting work” means a work which is communicated to public by means of radio broadcasting, sound or video broadcasting on television or by any other similar means.

“reproduction” includes any method of copying, imitation, duplication, block-making, sound recording, video recording or sound and video recording for the material part from the original, copy or publication whether of the whole or in part and, as for computer program, means

duplication or making copies of the program from any medium for the substantial part with any method without a character of creating a new work whether of the whole or in part.

“adaptation” means a reproduction by conversion, modification or emulation of the original work for the substantial part without a character of creating a new work whether of the whole or in part.

(1) with regard to literary work, it shall include a translation, a transformation or a collection by means of selection and arrangement,

(2) with regard to computer program, it shall include a reproduction by means of transformation, modification of the program for the substantial part without a character of creating a new work,

(3) with regard to dramatic work, it shall include the transformation of a non-dramatic work to a dramatic work or a dramatic work to a non-dramatic work, whether in the original language or a different language,

(4) with regard to artistic work, it shall include the transformation of a two-dimensional work or a three-dimensional work to a three-dimensional work or a two-dimensional work or the making of a model from the original work,

(5) with regard to musical work, it shall include an arrangement of tunes or an alteration of lyrics or rhythm.

“communication to public” means making the work available to public by means of performing, lecturing, preaching, playing music, causing the perception by sound or image, constructing, distributing or by any other means.

“publication” means the distribution of duplicated copies of a work whatever may be the form of character with consent of the author where such copies are available to the public at a reasonable quantity having regard to the nature of the work provided that the performance or play of a dramatic work, a musical work or a cinematographic work, the lecture or the recitation of a literary work, the sound and video broadcasting of a work, the exhibition of an artistic work and the construction of a work of architecture shall not constitute publication.

“officials” means the persons appointed by the Minister to act in accordance with this Act.

“Director General” means the Director General of the Department of Intellectual Property and includes the persons designated by the Director General of the Department of Intellectual Property.

“Committee” means the Copyright Committee.

“Minister” means the Minister who is in charge of this Act.

Section 5. The Minister of Commerce shall be in charge of this Act and shall be authorized to appoint officials and issue the Ministerial Regulations so as to implement this Act.

The Ministerial Regulations which have been proclaimed in the Government Gazette shall be enforceable.

Section 6. The copyright work by virtue of this Act means a work of authorship in the form of literary, dramatic, artistic, musical, audiovisual, cinematographic, sound recording, sound and video broadcasting work or any other work in the literary, scientific or artistic domain whatever may be the mode or form of its expression.

Copyright protection shall not extend to ideas or procedures, processes or systems or methods of use or operation or concept, principles, discoveries or scientific or mathematical theories.

Section 7. The followings are not deemed copyright work by virtue of this Act: (1) news of the day and facts having the character of mere information which is not a work in literary, scientific or artistic domain, (2) constitution and legislations, (3) regulations, by-laws, notifications, orders, explanations and official correspondence of the Ministries, Departments or any other government or local units, (4) judicial decisions, orders, decisions and official reports, (5) translation and collection of those in (1) to (4) made by the Ministries, Departments or any other government or local units.

PART 2

ACQUISITION OF COPYRIGHT

Section 8. The author of a work is the owner of copyright in the work of authorship subject to the following conditions:

(1) In the case of unpublished work, the author must be a Thai national or reside in Thailand or be a national of or reside in a country which is a member of the Convention on the protection of copyright of which Thailand is a member provided that the residence must be at all time or most of the time spent on the creation of the work ;

(2) In the case of published work, the first publication must be made in Thailand or in a country which is member of the Convention on the copyright protection of which Thailand is a member, or in the case the first publication is made outside Thailand or in a country which is not member of the Convention on the copyright protection of which Thailand is a member, if the publication of the said work is subsequently made in Thailand or in a country which is member of the Convention on the copyright protection of which Thailand is a member within thirty days as from the first publication, or the author has the qualifications as prescribed in (1) at the time of the first publication. In the case the author must be a Thai national, if the author is a juristic person, it must be established under the Thai law.

Section 9. Copyright in the work created by the author in the course of employment vests upon the author unless it has been otherwise agreed in writing provided that the employer is entitled to communicate such work to public in accordance with the purpose of the employment.

Section 10. Copyright in the work created in the course of commission vests upon the employer unless the author and the employer have agreed otherwise.

Section 11. Copyright in the work which is an adaptation of a copyright work by virtue of this Act done with the consent of the owner of copyright vests upon the person who makes such adaptation but without prejudice to the owner of copyright in the work created by the original author that is adapted.

Section 12. Copyright in the work which is a compilation or a composition of copyright works by virtue of this Act done with the consent of the owners of copyright or a compilation or a composition of data or the materials which are readable or conveyable by a machine or other apparatus, vests upon the person who makes the compilation or the composition provided that he has done so by means of selection or arrangement in the manner which is not an imitation of the work of another person but without prejudice to the owners of copyright in the works or data or other materials created by the original authors which are compiled or composed.

Section 13. Section 8, Section 9 and Section 10 shall apply mutatis mutandis to the acquisition of copyright under Section 11 or Section 12.

Section 14. The Ministries, Departments or other government or local units are the owners of copyright in the works created in the course of employment, order or control unless it is otherwise agreed in writing.

PART 3 COPYRIGHT PROTECTION

Section 15. Subject to Section 9, Section 10 and Section 14, the owner of copyright has the exclusive rights of :-

- (1) reproduction or adaptation,
- (2) communication to public,
- (3) letting of the original or the copies of a computer program, an audiovisual work, a cinematographic work and sound recordings,
- (4) giving benefits accruing from the copyright to other persons,
- (5) licensing the rights mentioned in (1), (2) or (3) with or without conditions provided that the said conditions shall not unfairly restrict the competition. Whether the conditions as mentioned in sub-section (5) of the paragraph one are unfair restrictions of the competition or not shall be considered in accordance with the rules, methods and conditions set forth in the Ministerial Regulation.

Section 16. If the owner of copyright by virtue of this Act permits a person to exercise the right according to Section 15(5), it shall be deemed that the permission does not restrict the owner of copyright to

also give such permission to another person except that the written permission specifies the restriction.

Section 17. The copyright is assignable.

The owner of copyright may assign the copyright of the whole or in part and may assign it for a limited duration or for the entire term of copyright protection.

The assignment of copyright by other means except by inheritance must be made in writing with the signatures of the assignor and the assignee. If the duration is not specified in the assignment contract, the assignment shall be deemed to last for ten years.

Section 18. The author of the copyright work in this Act is entitled to identify himself as the author and to prohibit the assignee or any person from distorting, shortening, adapting or doing anything against the work to the extent that such act would cause damage to the reputation or dignity of the author. When the author has died, the heir of the author is entitled to litigation for the enforcement of his right through the term of copyright protection unless otherwise agreed in writing.

PART 4

TERM OF COPYRIGHT PROTECTION

Section 19. Subject to Section 21 and Section 22, copyright by virtue of this Act subsists for the life of the author and continues to subsist for fifty years after the death of the author.

In the case of a work of joint authorship, copyright subsists for the joint-authors and continues to subsist for fifty years as from the death of the last surviving joint-author.

If the author or all joint-authors die prior to the publication of the work, copyright subsists for fifty years as from the first publication of the work.

In the case of the author being a juristic person, copyright subsists for fifty years as from the authorship; provided that if the work is published during such period, the copyright continues to subsist for fifty years as from the first publication.

Section 20. Copyright by virtue of this Act in a work which is created by a pseudonymous or anonymous author subsists for fifty years as from the authorship; provided that if the work is published during such period, copyright subsists for fifty years as from the first publication.

If the identity of the author becomes known, Section 19 shall apply *mutatis mutandis*.

Section 21. Copyright in a photographic work, audiovisual work, cinematographic work, sound recordings or audio and video

broadcasting work subsists for fifty years as from the authorship; provided that if the work is published during such period, copyright subsists for fifty years as from the first publication.

Section 22. Copyright in a work of applied art subsists for twenty-five years as from the authorship; provided that if the work is published during such period, copyright subsists for twenty-five years as from the first publication.

Section 23. Copyright in a work which is created in the course of employment, instruction or control in accordance with Section 14 subsists for fifty years as from the authorship; provided that if the work is published during such period, copyright subsists for fifty years as from the first publication.

Section 24. The publication under Section 19, Section 20, Section 21, Section 22 or Section 23 which is the commencement of the term of copyright protection means the publication of the work with the consent of the owner of copyright.

Section 25. When the term of copyright protection expires during a year and the expiry date is not the last calendar day of the year or the exact date of expiry is not known, copyright continues to subsist until the last day of that calendar year.

Section 26. The publication of a copyright work after the expiry of the term of copyright protection shall not cause anew the copyright in such work.

PART 5
INFRINGEMENT OF COPYRIGHT

Section 27. Any of the following acts against a copyright work by virtue of this Act without the permission in accordance with Section 15(5) shall be deemed an infringement of copyright:

- (1) reproduction or adaptation,
- (2) communication to public.

Section 28. Any of the following acts against an audiovisual work, a cinematographic work or a sound recording copyrightable by virtue of this Act without the permission in accordance with Section 15(5) whether against the sound or image shall be deemed an infringement of copyright:

- (1) reproduction or adaptation,
- (2) communication to public,
- (3) letting of the original or copies of the work.

Section 29. Any of the following acts against a sound and video broadcasting copyrightable by virtue of this Act without the permission in accordance with Section 15(5) shall be deemed an infringement of copyright:

- (1) making an audiovisual work, a cinematographic work, a sound recording or a sound and video broadcasting work whether of the whole or in part,
- (2) rebroadcasting whether of the whole or in part,

(3) making a sound and video broadcasting work to be heard or seen in public by charging money or another commercial benefit.

Section 30. Any of the following acts against a computer program copyrightable by virtue of this Act without the permission in accordance with Section 15(5) shall be deemed an infringement of copyright:

- (1) reproduction or adaptation,
- (2) communication to public,
- (3) letting the original or copy of the work.

Section 31. Whoever knows or should have known that a work is made by infringing the copyright of another person and commits any of the following acts against the work for profit shall be deemed to infringe the copyright:

- (1) selling, occupying for sale, offering for sale, letting, offering for lease, selling by hire purchase or offering for hire purchase,
- (2) communication to public,
- (3) distribution in the manner which may cause damage to the owner of copyright,
- (4) self-importation or importation by order into the Kingdom.

PART 6

EXCEPTIONS FROM INFRINGEMENT OF COPYRIGHT

Section 32. An act against a copyright work by virtue of this Act of another person which does not conflict with a normal exploitation of

the copyright work by the owner of copyright and does not unreasonably prejudice the legitimate right of the owner of copyright shall not be deemed an infringement of copyright.

Subject to the provision of paragraph one, any act against the copyright work in paragraph one shall not be deemed an infringement of copyright provided that the act is each of the followings:

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

Section 33. A reasonable recitation, quotation, copy, emulation or reference in part of and from a copyright work by virtue of this Act with an acknowledgement of the ownership of copyright in such work shall not be deemed an infringement of copyright provided that Section 32 paragraph one is complied with.

Section 34. A reproduction of a copyright work by virtue of this Act by a librarian in the following cases shall not be deemed an infringement of copyright provided that the purpose of such reproduction is not for profit and Section 32 paragraph one is complied with:

- (1) reproduction for use in the library or another library;
- (2) reasonable reproduction in part of a work for another person for the benefit of research or study.

Section 35. An act against a computer program which is a copyright work by virtue of this Act in the following cases shall not be deemed an infringement of copyright provided that the purpose is not for profit and Section 32 paragraph one is complied with :

- (1) research or study of the computer program,
- (2) use for the benefit of the owner of the copy of the computer program,
- (3) comment, criticism or introduction of the work with an acknowledgement of the ownership of the copyright in the computer program;
- (4) reporting of the news through mass media with an

acknowledgement of the ownership of copyright in the computer program;

(5) making copies of a computer program for a reasonable quantity by a person who has legitimately bought or obtained the program from another person so as to keep them for maintenance or prevention of loss;

(6) reproduction, adaptation, exhibition or display for the benefit of judicial proceedings or administrative proceedings by authorized officials or for reporting the result of such proceedings;

(7) use of the computer program as part of questions and answer in an examination;

(8) adapting the computer program as necessary for use;

(9) making copies of the computer program so as to keep them for the reference or research for public interest.

Section 36. The public performance of a dramatic work or a musical work as appropriate which is not organized or conducted for seeking profit from such activity and without direct or indirect charge for watching the performance and the performers not receiving remuneration for such performance shall not be deemed an infringement of copyright provided that it is conducted by an association, foundation or another organization which has objectives for public charity, education, religion or social welfare and that Section 32 paragraph one is complied with.

Section 37. A drawing, painting, construction, engraving, moulding, carving, lithographing, photographing, cinematographing, video broadcasting or any similar act of an artistic work, except an architectural work, which is openly located in a public place shall not be deemed an infringement of copyright in the artistic work.

Section 38. A drawing, painting, engraving, moulding, carving, lithographing, photographing, cinematographing or video broadcasting of an architectural work shall not be deemed an infringement of copyright in the architectural work.

Section 39. A photographing or cinematographing or video broadcasting of a work of which an artistic work is a component shall not be deemed an infringement of copyright in the artistic work.

Section 40. In case another person apart from the author jointly owns the copyright in an artistic work, the subsequent creation by the same author of the artistic work in such a manner that a part of the original artistic work is reproduced or the printing pattern, sketch, plan, model or data acquired from a study which has been applied in the creation of the original artistic work is used shall not be deemed an infringement of copyright in the artistic work provided that the author does not reproduce or copy the substantial part of the original artistic work.

Section 41. A restoration in the same appearance of a building which is a copyright architectural work by virtue of this Act shall not be deemed an infringement of copyright.

Section 42. When the term of protection for a cinematographic work has come to an end, the communication to public of the cinematographic work shall not be deemed an infringement of copyright in the literary work, dramatic work, artistic work, musical work, audiovisual work, sound recording or any work previously used to create such cinematographic work.

Section 43. A reproduction of a copyright work by virtue of this Act which is in the possession of the government by an authorized official or by an order of such official for the benefit of government service shall not be deemed an infringement of copyright provided that Section 32 paragraph one is complied with.

CHAPTER 2

PERFORMERS' RIGHT

Section 44. The performer has the following exclusive rights with respect to the acts concerning his performance;

(1) sound and video broadcasting or communication to public of the performance except the sound and video broadcasting or communication to public from a recording material which has been recorded;

(2) recording the performance which has not been recorded;

(3) reproducing the recording material of the performance which has been recorded without the consent of the performer or the recording material of the performance with the consent of the

performer but for another purpose or the recording material of the performance which falls within the exceptions of the infringement of performer's rights by virtue of Section 53.

Section 45. Whoever causes the sound broadcasting or the direct communication to public of the audio recording material of a performance which have already been disseminated for commercial purpose or the copies thereof is bound to pay a just remuneration to the performer. In case the parties can not agree upon the remuneration, the Director General shall stipulate the remuneration by taking into account the normal rate of remuneration in such specific business.

A party may appeal the order of the Director General according to paragraph one to the Committee within ninety days as from receiving the letter informing the order of the Director General. The decision of the Committee shall be final.

Section 46. Where there are more than one performer involved in a performance or an audio recording of a performance, those performers may appoint a joint agent to take care of or administer their rights.

Section 47. A performer has the rights in his performance according to Section 44 provided that the following conditions are met:

- (1) the performer has Thai nationality or has a habitual residence in the Kingdom or;
- (2) The performance or the major part of the performance takes place in the Kingdom or in a country which is a member of the Convention

on the protection of performers' rights of which Thailand is also a member.

Section 48. A performer is eligible to receive the remuneration according to Section 45 provided that the following conditions are met:

(1) the performer has Thai nationality or has a habitual residence in the Kingdom when the audio recording of the performance takes place or when he exercises a claim of his right or;

(2) the audio recording of the performance or the major part of the audio recording of the performance takes place in the Kingdom or in a country which is a member of the Convention on the protection of performers' rights of which Thailand is also a member.

Section 49. The performer's rights according to Section 44 last for fifty years as from the last day of the calendar year in which the performance takes place. In case the performance is recorded, the performer's rights lasts for fifty years as from the last day of the calendar year in which the recording of the performance takes place.

Section 50. The performer's rights according to Section 45 last for fifty years as from the last day of the calendar year in which the audio recording of the performance takes place.

Section 51. The performer's rights according to Section 44 and Section 45 are assignable whether of the whole or in part and may be assignable for a fixed duration or the whole term of protection.

In case there are more than one performer involved, each performer is entitled to assign the rights which specifically belong to him.

The assignment of rights by other means except by inheritance must be made in writing with the signatures of the assignor and the assignee. If the duration is not specified in the assignment contract, the assignment shall be deemed to last for three years.

Section 52. Whoever acts as specified in Section 44 without the consent of the performer or without paying remuneration in accordance with Section 45 shall be deemed to infringe the performer's rights.

Section 53. Section 32, Section 33, Section 34, Section 36, Section 42, and Section 43 shall apply mutatis mutandis to the performer's rights.

CHAPTER 3

USE OF COPYRIGHT IN SPECIAL CIRCUMSTANCES

Section 54. A Thai national who desires to seek a copyright license for a work which has already been communicated to public in the form of printed materials or other similar forms according to this Act for the benefit of study, teaching or research without a profit-seeking purpose may submit an application to the Director General by showing evidence that the applicant has previously sought a license from the copyright owner to translate the work into Thai or to reproduce the copies of the translation published in Thai but his request has been denied or after a reasonable period of time having elapsed the

agreement can not be concluded provided that at the time of submitting the application:

(1) the copyright owner has not translated or authorized any person to translate the work into the Thai language for publication within three years after the first publication of the work or;

(2) the copyright owner has published the translation in the Thai language but, beyond three years after the last publication of the translation, no further publication is made and all the editions of the published translation are out of print.

The application according to paragraph one shall follow these rules, methods and conditions:

(1) The Director General shall not grant the license for the application according to paragraph one if the time specified in paragraph one (1) or (2) has elapsed not exceeding six months.

(2) in case the Director General grants the license, the grantee shall be solely entitled to translate or publish the licensed translation provided that the Director General shall not permit another person to make the Thai translation from the same original copyright work if the time specified in the license has not elapsed or has elapsed not exceeding six months.

(3) the grantee is prohibited from assigning the granted license to another person.

(4) if either the copyright owner or the licensee can assure the Director General that he has made the Thai translation or has published the translated version in Thai content of which is identical to that of the

printed materials which are the subjects of license according to Section 55 and has distributed the printed materials at appropriate price comparable with that of another work of the same nature being sold in Thailand, the Director General shall order that the license granted to the grantee be terminated and shall inform the grantee of such order without delay.

The grantee may distribute the copies of the printed materials which have been made or published prior to the order of termination by the Director General until they are out of stock.

(5) the grantee is prohibited to export the copies of the printed materials of the licensed translation or publication in Thai except for the following conditions :

- (a) the recipient abroad is a Thai national;
- (b) the printed materials serve the purposes of study, teaching or research;
- (c) the delivery of the printed materials is not for a commercial purpose; and
- (d) the country to which the printed materials are delivered allows Thailand to deliver or distribute the printed materials to or within that country.

Section 55. Upon receiving the application according to Section 54, the Director General shall arrange an agreement between the concerning parties as to the remuneration for and the conditions of the license. In case the parties can not reach the agreement, the Director General shall give an order on the just remuneration by taking into

consideration the normal rate of remuneration in such business and may stipulate conditions for the license as he deems appropriate.

When the remuneration and conditions are stipulated, the Director General shall issue the license certificate to the applicant.

The concerning parties may appeal the order of the Director General according to paragraph one to the Committee within ninety days as from the receipt of the letter informing the order of the Director General. The decision of the Committee shall be final.

CHAPTER 4

COPYRIGHT COMMITTEE

Section 56. A committee called "the Copyright Committee" shall be established and to be composed of the Permanent Secretary of the Minister of Commerce as Chairman as well as distinguished members not exceeding twelve persons appointed by the Cabinet in which not less than six persons are appointed from representatives of associations of the owners of copyright or performers' rights and representatives of associations of the users of copyright or performers' rights.

The Committee may appoint any person secretary and assistant secretary.

Section 57. An office term of the distinguished members is two years. The member who has been out of office may be reappointed.

In case a member is out of office before the end of his office term or in case the Cabinet appoints additional members while the previously appointed members are still in office, the office term of the member appointed to replace the vacant post or the additional member shall be equal to the remaining term of the previously appointed members.

Section 58. The distinguished members are out of office upon

- (1) death;
- (2) resignation;
- (3) discharge by the Cabinet;
- (4) becoming bankrupt;
- (5) becoming an incompetent or a quasi-incompetent person;
- (6) getting an imprisonment by a final judgment to impose imprisonment except an imprisonment for the offence which has been committed by negligence or for a petty offence.

Section 59. The quorum of the committee meeting shall consist of not less than one-half of the number of the whole committee members. If the Chairman is not present or is not able to perform his duty, the attending committee members shall elect one committee member to preside over the meeting. The resolution of the meeting shall be decided by majority.

Each committee member has one vote. In case of equal votes, the presiding chairman shall have one additional casting vote.

Section 60. The Committee shall have the following authorities:

(1) to give advice or consultation to the Minister for the issuance of Ministerial Regulations under this Act;

(2) to decide appeals against orders of the Director General according to Section 45 and Section 55;

(3) to support or facilitate the association or organization of authors or performers with respect to the collection of royalties from users of the copyright work or the performer's rights and the protection or safeguard of the rights or any other benefits under this Act;

(4) to consider other matters as assigned by the Minister.

The Committee is authorized to appoint a Sub-committee to consider or perform any matter as assigned by the Committee and Section 59 shall apply mutatis mutandis to the meeting of the sub-committee.

The Committee or the Sub-committee is authorized to issue a written order summoning any person to testify or to submit documents or other materials for consideration as necessary.

CHAPTER 5

INTERNATIONAL COPYRIGHT AND PERFORMER'S RIGHTS

Section 61. A copyright work of an author as well as rights of a performer of a country which is a member of the Convention on the protection of copyright or the Convention on the protection of

performer's rights of which Thailand is also a member or a copyright work of an international organization of which Thailand is a member shall be protected by this Act.

The Minister has an authority to proclaim the names of the member countries of the Convention on the protection of copyright or the Convention on the protection of performer's rights in the Government Gazette.

CHAPTER 6

LITIGATION WITH RESPECT TO COPYRIGHT AND PERFORMER'S RIGHTS

Section 62. It shall be presumed in a litigation with respect to copyright or performer's right, whether it be a civil or criminal case, that the work in dispute is a copyright work or the subject of performer's right in this Act and the plaintiff is the owner of copyright or performer's rights in such work or subject unless the defendant argues that no one owns the copyright or the performer's rights or disputes the plaintiff's right.

As for a work or subject bearing a name or a substitution for name of a person claiming to be the owner of copyright or performer's rights, it shall be presumed that the person who is the owner of the name or the substitution for name is the author or the performer.

As for a work or subject bearing no name or no substitution for name or bearing a name or a substitution for name without a claim of

ownership in copyright or performer's rights and having a name or a substitution for name of a person claiming to be the printer or the publisher or the printer and publisher, it shall be presumed that the person who is the printer or the publisher or the printer and publisher becomes the owner of copyright or performer's rights in such work or subject.

Section 63. No action on copyright infringement or performer's rights infringement shall be filed after three years as from the day the owner of copyright or performer's rights becomes cognizant of the infringement as well as the identity of the infringer provided that the action shall be filed not later than ten years as from the day the infringement of copyright or performer's rights takes place.

Section 64. In the case of infringement of copyright or performer's rights, the Court has the authority to order the infringer to compensate the owner of copyright or performer's rights for damages the amount which the Court considers appropriate by taking into account the seriousness of injury including the loss of benefits and expenses necessary for the enforcement of the right of the owner of copyright or performer's rights.

Section 65. In case there is an explicit evidence that a person is doing or about to do any act which is an infringement of copyright or performer's rights, the owner of copyright or performer's rights may seek the injunction from the court to order the person to stop or refrain from such act.

The injunction of the court according to paragraph one does not prejudice the owner of copyright or performer's rights to claim damages under Section 64.

Section 66. The offence in this Act is an offence allowing settlement.

CHAPTER 7

OFFICIALS

Section 67. For the benefit of operation under this Act, the officials shall be the officials according to the Penal Code and have the following authorities:

(1) to enter a building, office, factory or warehouse of any person during sunrise and sunset or during the working hours of such place or to enter a vehicle to search or examine the merchandise when there is a reasonable suspicion that an offence under this Act is committed,

(2) to seize or forfeit documents or materials relating to the offence for the benefit of proceeding a litigation when there is a reasonable suspicion that an offence under this Act is committed,

(3) to order any person to testify or submit accounting books, documents or other evidences when there is a reasonable suspicion that the testimony, accounting books, documents or such evidences shall be useful for the finding or the use as evidence for proving the offence under this Act.

Any person concerned shall provide suitable convenience for the operation of the officials.

Section 68. In performing his duty, the officials must show his identification card to any person concerned.

The official's identification card shall comply with the form stipulated by the Minister.

CHAPTER 8

PENALTIES

Section 69. Whoever infringes the copyright or the performer's rights according to Section 27, Section 28, Section 29, Section 30 or Section 52 shall be inflicted with a fine from twenty thousand Baht up to two hundred thousand Baht.

If the offence in paragraph one is committed with the commercial purpose, the offender shall be inflicted with imprisonment for a term from six months up to four years or a fine from one hundred thousand Baht up to eight hundred thousand Baht or both imprisonment and fine.

Section 70. Whoever commits a copyright infringement according to Section 31 shall be inflicted with a fine from ten thousand Baht up to one hundred thousand Bath.

If the offence in paragraph one is committed with the commercial purpose, the offender shall be inflicted with imprisonment for a term from three months up to two years or a fine from fifty

thousand Baht up to forty hundred thousand Baht or both imprisonment and fine.

Section 71. Whoever fails to testify or submit any documents or materials as the Committee or the Sub-committee has ordered according to Section 60 paragraph three shall be inflicted with imprisonment for a term not exceeding three months or a fine not exceeding fifty thousand Baht or both imprisonment and fine.

Section 72. Whoever obstructs or fails to provide a convenience to an official who performs his duty according to Section 67 or defies or ignores the order of the official who gives the order according to Section 67 shall be inflicted with imprisonment for a term not exceeding three months or a fine not exceeding fifty thousand Baht or both imprisonment and fine.

Section 73. Whoever having committed an offence and having been penalized by virtue of this Act subsequently commits an offence under this Act within five years after being discharged from the penalty shall be inflicted with double penalty as prescribed for the offence.

Section 74. In case a juristic person commits an offence under this Act, it shall be deemed that all directors or managers of the juristic person are joint offenders with the juristic person unless they can prove that the juristic person has committed the offence without their knowledge or consent.

Section 75. All things made or imported into the Kingdom which constitutes an infringement of copyright or performer's rights by virtue of this Act and the ownership of which are still vested upon the offender under Section 69 or Section 70 shall belong to the owner of copyright or performer's rights provided that the things used for committing the offence shall be all forfeited.

Section 76. One half of the fine paid in accordance with the judgment shall be paid to the owner of copyright or performer's rights provided that the right of the owner of copyright or performer's rights to bring a civil action for damages for the amount which exceeds the fine that the owner of copyright or performer's rights has received shall not be prejudiced.

Section 77. The Director General shall be authorized to prescribe the fine for the offence according to Section 69 paragraph one and Section 70 paragraph one.

TRANSITORY PROVISION

Section 78. The existing copyright work by virtue of the Act for the Protection of Literary and Artistic Works, B.E. 2474 or the Thai Copyright Act B.E. 2521 on the day this Act comes into force shall enjoy the copyright protection by this Act.

The work made before this Act coming into force and not being a copyright work by virtue of the Act for the Protection of Literary and

Artistic Works B.E. 2474 or the Thai Copyright Act B.E. 2521 shall enjoy the copyright protection by this Act.

Countersigned by;

Chuan Leekpai

Prime Minister

NOTE :- The reason for the proclamation of this act is as follows: whereas the Thai Copyright Act B.E.2521 has been long in force, the provisions therein become inconsistent with the changing internal and external circumstances particularly the development and expansion of domestic and international economy, trade and industry, the copyright protection measures therefore should be improved to be more efficient to accommodate those changes and to promote the increasing creation of work in literary and artistic domain and other relevant fields. This Act so be enacted.

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Date of entry into force March 21, 1995.

Figure 1: TRIPs Agreement Dispute Settlement Timetable Chart

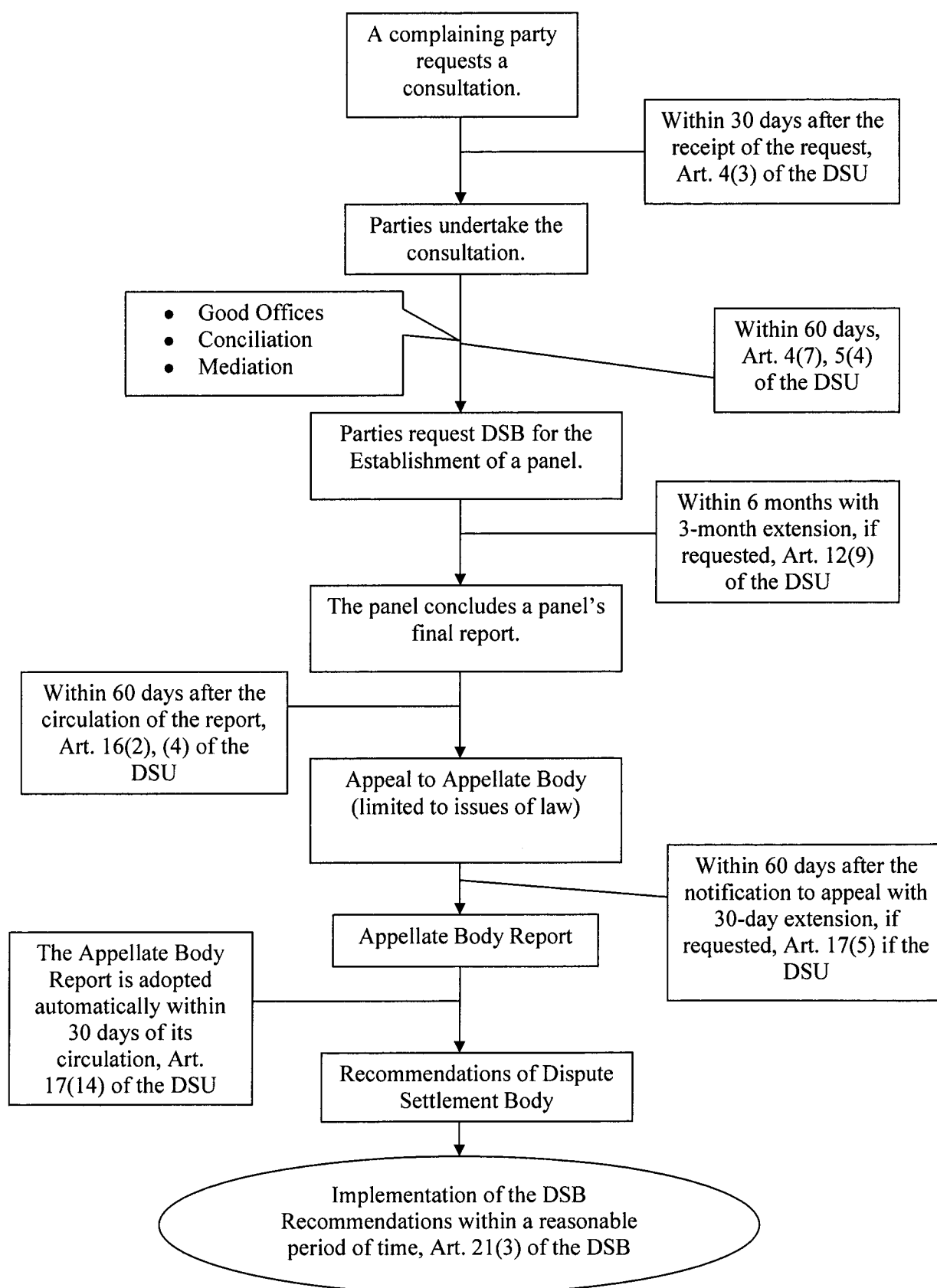


Figure 2: Comparison of Categories of Copyright Works under the T.C.A. and the U.S.C.A.

Categories of Copyright Works under the <i>T.C.A. B.E. 2537 § 6</i>	Categories of Copyright Works under the <i>U.S.C.A. 1976 § 102</i>
<ol style="list-style-type: none"> 1. Literary works 2. Dramatic works 3. Artistic works <ul style="list-style-type: none"> ● Paintings & Drawing ● Sculptural works ● Lithographic works ● Architectural works ● Photographic works ● Maps, illustrative works ● Works of applied art 4. Musical works 5. Audio visual works 6. Cinematographic works 7. Sound recordings 8. Sound & video broadcasting works 9. Other works in literary, scientific, and artistic domain 	<ol style="list-style-type: none"> 1. Literary works 2. Dramatic works + accompanying music 3. Pantomimes & Choreographic works 4. Musical works + accompanying words 5. Pictorial, graphic, and sculptural works <ul style="list-style-type: none"> ● Maps ● Works of art ● Reproductions of works of art ● Photographs ● Prints and labels ● Fabric and Clothing Designs 6. Motion pictures & audiovisual works 7. Sound recordings 8. Architectural Works

Figure 3: Chart of Thailand's Special 301 Placement (1990-2005)

Country	USTR Placement					
	1995 - 2005	1994	1993	1992	1991	1990
Thailand	WL	PWL	PFC	PFC	PFC	PWL

Notes:

PFC = Priority Foreign Country

PWL = Priority Watch List

WL = Watch List

Sources: Chart of Countries' Special 301 Placement (1990-2002) and IIPA 2002 Special 301 Recommendations <http://www.iipa.com/pdf/2002SPEC301USTRHISTORY.pdf> (Mar. 24, 2003) and various later issues.

Figure 4: Chart of Comparison of Copyright Duration between U.S. Copyright Law and Thai Copyright Law

The T.C.A. B.E. 2537 (A.D. 1994), Thailand	The Copyright Act of 1976, The U.S.
<u>Basic Term §19</u> <ul style="list-style-type: none"> ● The life of the author plus 50 years ● Or 50 years from the first publication, in case that the author dies before the first publication, whichever is longer 	<u>Basic Term §302(a)</u> <ul style="list-style-type: none"> ● The life of the author plus 70 years §302(a)
<u>Joint Works §19</u> <ul style="list-style-type: none"> ● The life of the last surviving coauthor plus 50 years ● Or 50 years from the first publication, in case that one or all of coauthors dies before first publication, whichever is longer 	<u>Joint Works §302(b)</u> <ul style="list-style-type: none"> ● The life of the last surviving coauthor plus 70 years
<u>Anonymous & Pseudonymous Works §20</u> <ul style="list-style-type: none"> ● 50 years from the creation ● Or 50 years from the first publication, whichever is longer 	<u>Anonymous & Pseudonymous Works §302(c)</u> <ul style="list-style-type: none"> ● 95 years from the first publication ● Or 120 years from the creation, whichever is shorter
<u>Works of Juristic-person Authors §19</u> <ul style="list-style-type: none"> ● 50 year from the creation ● Or 50 years from the first publication, whichever is longer 	<u>Works Made for Hire §302(c)</u> <ul style="list-style-type: none"> ● 95 years from the first publication ● Or 120 years from the creation, whichever is shorter
<u>Photographic Works, Audiovisual Works, Cinematographic Works, Sound Recordings, and Audio and Video Broadcasting Works §21</u> <ul style="list-style-type: none"> ● 50 years from the creation ● Or 50 years from the first publication, whichever is longer 	
<u>Works of Applied Art §22</u> <ul style="list-style-type: none"> ● 25 years from the creation ● Or 25 years from the first publication, whichever is longer 	

The Authorship Rights Act R.S. 120 (A.D. 1901)	The Copyright Act of 1790
<ul style="list-style-type: none"> ● The life of the author plus 7 years from registration § 5 ● Or 42 years from the registration, in case the author's death results in shorter than 42 years of protection § 5 	<ul style="list-style-type: none"> ● 14 years with another 14-year alternative renewal term subject to formality requirements
The Act for the Protection of Literary and Artistic Work B.E. 2474 (A.D. 1931)	The Copyright Act of 1831
<ul style="list-style-type: none"> ● The life of the author plus 30 years § 14 	<ul style="list-style-type: none"> ● 28 years with another 14-year alternative renewal term
The T.C.A. B.E. 2521 (A.D. 1979)	The Copyright Act of 1909
<ul style="list-style-type: none"> ● The life of the author plus 50 years ● Or 50 years from the first publication, in case that the author dies before the first publication, whichever is longer 	<ul style="list-style-type: none"> ● 28 years with another 28-year alternative renewal term for published works with © or registered works, if unpublished

Figure 5: Comparison of Exclusive Rights under the U.S.C.A. and the T.C.A.

Section 106 of the U.S.C.A. of 1976, Exclusive rights in copyrighted works

Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and,
- (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

Section 15 of the T.C.A. B.E. 2537, Exclusive rights in copyrighted works

Subject to Section 9, Section 10 and Section 14, the owner of copyright has the exclusive rights of:

- (1) reproduction or adaptation;
- (2) communication to public;
- (3) letting for hire of the original or the copies of a computer program, an audiovisual work, a cinematographic work and a sound recording;
- (4) giving benefits accruing from the copyright to other persons; and,
- (5) licensing the rights mentioned in (1), (2) or (3).

Figure 6: Chart of Copyright and Related Rights Treaties Administered by WIPO to which the U.S. is a contracting party

Contracting Party	Treaty	Status	Entry into Force
U.S. of America	Berne Convention ¹	In Force	March 1, 1989
U.S. of America	Film Register Treaty ²	Signature	
U.S. of America	Phonograms Convention ³	In Force	March 10, 1974
U.S. of America	WCT ⁴	In Force	March 6, 2002
U.S. of America	WIPO Convention ⁵	In Force	August 25, 1970
U.S. of America	WPPT ⁶	In Force	May 20, 2002

¹ The Berne Convention for the Protection of Literary and Artistic Works (1886)

² Treaty on the International Registration of Audiovisual Works (1989)

³ Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms (1971)

⁴ WIPO Copyright Treaty (1996)

⁵ Convention Establishing the World Intellectual Property Organization (1967)

⁶ WIPO Performances and Phonograms Treaty (1996)

Figure 7: Chart of Copyright and Related Rights Treaties Administered by WIPO to which Thailand is a contracting party

Contracting Party	Treaty	Status	Entry into Force
Thailand	Berne Convention	In Force	July 17, 1931
Thailand	WIPO Convention	In Force	December 25, 1989

Figure 8: Contracting Parties to WIPO Copyright Treaty (WCT), Geneva 1996

State	Date on which State became party to the Treaty
Albania	August 6, 2005
Argentina	March 6, 2002
Armenia	March 6, 2005
Belarus.....	March 6, 2002
Botswana	January 27, 2005
Bulgaria	March 6, 2002
Burkina Faso.....	March 6, 2002
Chile	March 6, 2002
Colombia	March 6, 2002
Costa Rica.....	March 6, 2002
Croatia	March 6, 2002
Cyprus.....	November 4, 2003
Czech Republic.....	March 6, 2002
Ecuador.....	March 6, 2002
El Salvador	March 6, 2002
Gabon	March 6, 2002
Georgia	March 6, 2002
Guatemala.....	February 4, 2003
Guinea.....	May 25, 2002
Honduras.....	May 20, 2002
Hungary	March 6, 2002
Indonesia.....	March 6, 2002
Jamaica	June 12, 2002
Japan	March 6, 2002
Jordan	April 27, 2004
Kazakhstan.....	November 12, 2004
Kyrgyzstan.....	March 6, 2002
Latvia.....	March 6, 2002
Lithuania.....	March 6, 2002
Mali	April 24, 2002
Mexico	March 6, 2002
Mongolia.....	October 25, 2002
Nicaragua.....	March 6, 2003
Oman	September 20, 2005
Panama	March 6, 2002
Paraguay	March 6, 2002
Peru.....	March 6, 2002
Philippines	October 4, 2002
Poland	March 23, 2004
Republic of Korea.....	June 24, 2004
Republic of Moldova	March 6, 2002
Romania.....	March 6, 2002
Saint Lucia.....	March 6, 2002
Senegal	May 18, 2002
Serbia and Montenegro.....	June 13, 2003
Singapore.....	April 17, 2005
Slovakia.....	March 6, 2002
Slovenia	March 6, 2002
The former Yugoslav Republic of Macedonia	February 4, 2004
Togo.....	May 21, 2003
Ukraine	March 6, 2002
United Arab Emirates	July 14, 2004
U.S. of America	March 6, 2002

Total Contracting Parties: 53

Source: World Intellectual Property Organization,
http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=16, 26 July
 2005.

Figure 9: Contracting Parties to WIPO Performances and Phonograms Treaty (WPPT), Geneva

1996

State	Date on which State became party to the Treaty
Albania	May 20, 2002
Argentina	May 20, 2002
Armenia	March 6, 2005
Belarus.....	May 20, 2002
Botswana	January 27, 2005
Bulgaria	May 20, 2002
Burkina Faso.....	May 20, 2002
Chile	May 20, 2002
Colombia	May 20, 2002
Costa Rica.....	May 20, 2002
Croatia	May 20, 2002
Czech Republic.....	May 20, 2002
Ecuador.....	May 20, 2002
El Salvador	May 20, 2002
Gabon	May 20, 2002
Georgia	May 20, 2002
Guatemala.....	January 8, 2003
Guinea.....	May 25, 2002
Honduras.....	May 20, 2002
Hungary	May 20, 2002
Indonesia.....	February 15, 2005
Jamaica	June 12, 2002
Japan	October 9, 2002
Jordan	May 24, 2004
Kazakhstan.....	November 12, 2004
Kyrgyzstan.....	August 15, 2002
Latvia.....	May 20, 2002
Lithuania.....	May 20, 2002
Mali	May 20, 2002
Mexico.....	May 20, 2002
Mongolia.....	October 25, 2002
Nicaragua.....	March 6, 2003
Oman	September 20, 2005
Panama	May 20, 2002
Paraguay	May 20, 2002
Peru.....	July 18, 2002
Philippines	October 4, 2002
Poland.....	October 21, 2003
Republic of Moldova	May 20, 2002
Romania.....	May 20, 2002
Saint Lucia.....	May 20, 2002
Senegal	May 20, 2002
Serbia and Montenegro	June 13, 2003
Singapore.....	April 17, 2005
Slovakia	May 20, 2002
Slovenia	May 20, 2002
The former Yugoslav Republic of Macedonia	March 20, 2005
Togo.....	May 21, 2003
Ukraine	May 20, 2002
United Arab Emirates	June 9, 2005
U.S. of America	May 20, 2002

Total Contracting Parties: 51

Source: World Intellectual Property Organization,
http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=20, 26 July
 2005.

Figure 10: Contracting Parties to the Berne Convention for the Protection of Literary and Artistic Works

Status on January 19, 2005

State	Date on which State became party to the Convention	Latest Act of the Convention to which State is party and date on which State became party to that Act
Albania	March 6, 1994	Paris: March 6, 1994
Algeria	April 19, 1998	Paris: April 19, 1998
Andorra	June 2, 2004	Paris: June 2, 2004
Antigua and Barbuda	March 17, 2000	Paris: March 17, 2000
Argentina	June 10, 1967	Paris: Articles 1 to 21: February 19, 2000 Paris: Articles 22 to 38: October 8, 1980
Armenia	October 19, 2000	Paris: October 19, 2000
Australia	April 14, 1928	Paris: March 1, 1978
Austria	October 1, 1920	Paris: August 21, 1982
Azerbaijan	June 4, 1999	Paris: June 4, 1999
Bahamas	July 10, 1973	Brussels: July 10, 1973 Paris: Articles 22 to 38: January 8, 1977
Bahrain	March 2, 1997	Paris: March 2, 1997
Bangladesh	May 4, 1999	Paris: May 4, 1999
Barbados	July 30, 1983	Paris: July 30, 1983
Belarus	December 12, 1997	Paris: December 12, 1997
Belgium	December 5, 1887	Paris: September 29, 1999
Belize	June 17, 2000	Paris: June 17, 2000
Benin	January 3, 1961	Paris: March 12, 1975
Bhutan	November 25, 2004	Paris: November 25, 2004
Bolivia	November 4, 1993	Paris: November 4, 1993
Bosnia and Herzegovina	March 1, 1992	Paris: March 1, 1992
Botswana	April 15, 1998	Paris: April 15, 1998
Brazil	February 9, 1922	Paris: April 20, 1975
Bulgaria	December 5, 1921	Paris: December 4, 1974
Burkina Faso	August 19, 1963	Paris: January 24, 1976
Cameroon	September 21, 1964	Paris: Articles 1 to 21: October 10, 1974 Paris: Articles 22 to 38: November 10, 1973
Canada	April 10, 1928	Paris: June 26, 1998
Cape Verde	July 7, 1997	Paris: July 7, 1997
Central African Republic	September 3, 1977	Paris: September 3, 1977
Chad	November 25, 1971	Brussels: November 25, 1971 Stockholm: Articles 22 to 38: November 25, 1971
Chile	June 5, 1970	Paris: July 10, 1975
China	October 15, 1992	Paris: October 15, 1992
Colombia	March 7, 1988	Paris: March 7, 1988
Comoros	April 17, 2005	Paris: April 17, 2005
Congo	May 8, 1962	Paris: December 5, 1975
Costa Rica	June 10, 1978	Paris: June 10, 1978
Côte d'Ivoire	January 1, 1962	Paris: Articles 1 to 21: October 10, 1974 Paris: Articles 22 to 38: May 4, 1974
Croatia	October 8, 1991	Paris: October 8, 1991
Cuba	February 20, 1997	Paris: February 20, 1997
Cyprus	February 24, 1964	Paris: July 27, 1983
Czech Republic	January 1, 1993	Paris: January 1, 1993
Democratic People's Republic of Korea	April 28, 2003	Paris: April 28, 2003
Democratic Republic of the Congo	October 8, 1963	Paris: January 31, 1975
Denmark	July 1, 1903	Paris: June 30, 1979
Djibouti	May 13, 2002	Paris: May 13, 2002
Dominica	August 7, 1999	Paris: August 7, 1999
Dominican Republic	December 24, 1997	Paris: December 24, 1997

State	Date on which State became party to the Convention	Latest Act of the Convention to which State is party and date on which State became party to that Act
Ecuador.....	October 9, 1991	Paris: October 9, 1991
Egypt.....	June 7, 1977	Paris: June 7, 1977
El Salvador.....	February 19, 1994	Paris: February 19, 1994
Equatorial Guinea.....	June 26, 1997	Paris: June 26, 1997
Estonia.....	October 26, 1994	Paris: October 26, 1994
Fiji.....	December 1, 1971	Brussels: December 1, 1971 Stockholm: Articles 22 to 38: March 15, 1972
Finland.....	April 1, 1928	Paris: November 1, 1986
France.....	December 5, 1887	Paris: Articles 1 to 21: October 10, 1974 Paris: Articles 22 to 38: December 15, 1972
Gabon.....	March 26, 1962	Paris: June 10, 1975
Gambia.....	March 7, 1993	Paris: March 7, 1993
Georgia.....	May 16, 1995	Paris: May 16, 1995
Germany.....	December 5, 1887	Paris: Articles 1 to 21: October 10, 1974 Paris: Articles 22 to 38: January 22, 1974
Ghana.....	October 11, 1991	Paris: October 11, 1991
Greece.....	November 9, 1920	Paris: March 8, 1976
Grenada.....	September 22, 1998	Paris: September 22, 1998
Guatemala.....	July 28, 1997	Paris: July 28, 1997 ^{Error! Bookmark not defined.}
Guinea.....	November 20, 1980	Paris: November 20, 1980
Guinea-Bissau.....	July 22, 1991	Paris: July 22, 1991
Guyana.....	October 25, 1994	Paris: October 25, 1994
Haiti.....	January 11, 1996	Paris: January 11, 1996
Holy See.....	September 12, 1935	Paris: April 24, 1975
Honduras.....	January 25, 1990	Paris: January 25, 1990
Hungary.....	February 14, 1922	Paris: Articles 1 to 21: October 10, 1974 Paris: Articles 22 to 38: December 15, 1972
Iceland.....	September 7, 1947	Paris: Article 1 to 21: August 25, 1999 Paris: Articles 22 to 38: December 28, 1984
India.....	April 1, 1928	Paris: Articles 1 to 21: May 6, 1984 Paris: Articles 22 to 38: January 10, 1975
Indonesia.....	September 5, 1997	Paris: September 5, 1997
Ireland.....	October 5, 1927	Paris: March 2, 2005
Israel.....	March 24, 1950	Paris: January 1, 2004
Italy.....	December 5, 1887	Paris: November 14, 1979
Jamaica.....	January 1, 1994	Paris: January 1, 1994
Japan.....	July 15, 1899	Paris: April 24, 1975
Jordan.....	July 28, 1999	Paris: July 28, 1999
Kazakhstan.....	April 12, 1999	Paris: April 12, 1999
Kenya.....	June 11, 1993	Paris: June 11, 1993
Kyrgyzstan.....	July 8, 1999	Paris: July 8, 1999
Latvia.....	August 11, 1995	Paris: August 11, 1995
Lebanon.....	September 30, 1947	Rome: September 30, 1947
Lesotho.....	September 28, 1989	Paris: September 28, 1989
Liberia.....	March 8, 1989	Paris: March 8, 1989
Libyan Arab Jamahiriya.....	September 28, 1976	Paris: September 28, 1976
Liechtenstein.....	July 30, 1931	Paris: September 23, 1999
Lithuania.....	December 14, 1994	Paris: December 14, 1994
Luxembourg.....	June 20, 1888	Paris: April 20, 1975
Madagascar.....	January 1, 1966	Brussels: January 1, 1966
Malawi.....	October 12, 1991	Paris: October 12, 1991
Malaysia.....	October 1, 1990	Paris: October 1, 1990
Mali.....	March 19, 1962	Paris: December 5, 1977
Malta.....	September 21, 1964	Rome: September 21, 1964 Paris: Articles 22 to 38: December 12, 1977
Mauritania.....	February 6, 1973	Paris: September 21, 1976
Mauritius.....	May 10, 1989	Paris: May 10, 1989
Mexico.....	June 11, 1967	Paris: December 17, 1974
Micronesia (Federated States of).....	October 7, 2003	Paris: October 7, 2003
Monaco.....	May 30, 1889	Paris: November 23, 1974
Mongolia.....	March 12, 1998	Paris: March 12, 1998

State	Date on which State became party to the Convention	Latest Act of the Convention to which State is party and date on which State became party to that Act
Morocco.....	June 16, 1917	Paris: May 17, 1987
Namibia.....	March 21, 1990	Paris: December 24, 1993
Netherlands.....	November 1, 1912	Paris: Articles 1 to 21: January 30, 1986 Paris: Articles 22 to 38: January 10, 1975
New Zealand.....	April 24, 1928	Rome: December 4, 1947
Nicaragua.....	August 23, 2000	Paris: August 23, 2000
Niger.....	May 2, 1962 ^{Error!}	Paris: May 21, 1975
Nigeria.....	September 14, 1993	Paris: September 14, 1993
Norway.....	April 13, 1896	Paris: Articles 1 to 21: October 11, 1995 Paris: Articles 22 to 38: June 13, 1974
Oman.....	July 14, 1999	Paris: July 14, 1999
Pakistan.....	July 5, 1948	Rome: July 5, 1948
Panama.....	June 8, 1996	Stockholm: Articles 22 to 38: January 29 or February 26, 1970 Paris: June 8, 1996
Paraguay.....	January 2, 1992	Paris: January 2, 1992
Peru.....	August 20, 1988	Paris: August 20, 1988
Philippines.....	August 1, 1951	Paris: Articles 1 to 21: June 18, 1997 Paris: Articles 22 to 38: July 16, 1980
Poland.....	January 28, 1920	Paris: Articles 1 to 21: October 22, 1994 Paris: Articles 22 to 38: August 4, 1990
Portugal.....	March 29, 1911	Paris: January 12, 1979
Qatar.....	July 5, 2000	Paris: July 5, 2000
Republic of Korea.....	August 21, 1996	Paris: August 21, 1996
Republic of Moldova.....	November 2, 1995	Paris: November 2, 1995
Romania.....	January 1, 1927	Paris: September 9, 1998
Russian Federation.....	March 13, 1995	Paris: March 13, 1995
Rwanda.....	March 1, 1984	Paris: March 1, 1984
Saint Kitts and Nevis.....	April 9, 1995	Paris: April 9, 1995
Saint Lucia.....	August 24, 1993	Paris: August 24, 1993
Saint Vincent and the Grenadines.....	August 29, 1995	Paris: August 29, 1995
Saudi Arabia.....	March 11, 2004	Paris: March 11, 2004
Senegal.....	August 25, 1962	Paris: August 12, 1975
Serbia and Montenegro.....	April 27, 1992	Paris: April 27, 1992
Singapore.....	December 21, 1998	Paris: December 21, 1998
Slovakia.....	January 1, 1993	Paris: January 1, 1993
Slovenia.....	June 25, 1991	Paris: June 25, 1991
South Africa.....	October 3, 1928	Brussels: August 1, 1951 Paris: Articles 22 to 38: March 24, 1975 ^{Error! Bookmark not}
Spain.....	December 5, 1887	Paris: Articles 1 to 21: October 10, 1974 Paris: Articles 22 to 38: February 19, 1974
Sri Lanka.....	July 20, 1959	Rome: July 20, 1959 Paris: Articles 22 to 38: September 23, 1978
Sudan.....	December 28, 2000	Paris: December 28, 2000
Suriname.....	February 23, 1977	Paris: February 23, 1977
Swaziland.....	December 14, 1998	Paris: December 14, 1998
Sweden.....	August 1, 1904	Paris: Articles 1 to 21: October 10, 1974 Paris: Articles 22 to 38: September 20, 1973
Switzerland.....	December 5, 1887	Paris: September 25, 1993
Syrian Arab Republic.....	June 11, 2004	Paris: June 11, 2004
Tajikistan.....	March 9, 2000	Paris: March 9, 2000
Thailand.....	July 17, 1931	Paris: Articles 1 to 21: September 2, 1995 Paris: Articles 22 to 38: December 29, 1980
Republic of Macedonia.....	September 8, 1991	Paris: September 8, 1991
Togo.....	April 30, 1975	Paris: April 30, 1975
Tonga.....	June 14, 2001	Paris: June 14, 2001
Trinidad and Tobago.....	August 16, 1988	Paris: August 16, 1988
Tunisia.....	December 5, 1887	Paris: August 16, 1975
Turkey.....	January 1, 1952	Paris: January 1, 1996
Ukraine.....	October 25, 1995	Paris: October 25, 1995
United Arab Emirates.....	July 14, 2004	Paris: July 14, 2004
United Kingdom.....	December 5, 1887	Paris: January 2, 1990

State	Date on which State became party to the Convention	Latest Act of the Convention to which State is party and date on which State became party to that Act
United Republic of Tanzania ...	July 25, 1994	Paris: July 25, 1994
U.S. of America	March 1, 1989	Paris: March 1, 1989
Uruguay	July 10, 1967	Paris: December 28, 1979
Uzbekistan	April 19, 2005	Paris: April 19, 2005
Venezuela	December 30, 1982	Paris: December 30, 1982
Viet Nam	October 26, 2004	Paris: October 26, 2004
Zambia	January 2, 1992	Paris: January 2, 1992
Zimbabwe	April 18, 1980	Rome: April 18, 1980
		Paris: Articles 22 to 38: December 30, 1981

Total: 159 states as of January 19, 2005

Source: World Intellectual Property Organization,
http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=15

Note:

“Paris” means the Berne Convention for the Protection of Literary and Artistic Works as revised at Paris on July 24, 1971 (Paris Act); “Stockholm” means the said Convention as revised at Stockholm on July 14, 1967 (Stockholm Act); “Brussels” means the said Convention as revised at Brussels on June 26, 1948 (Brussels Act); “Rome” means the said Convention as revised at Rome on June 2, 1928 (Rome Act); “Berlin” means the said Convention as revised at Berlin on November 13, 1908 (Berlin Act).

Figure 11: Contracting Parties to the Universal Copyright Convention

Universal Copyright Convention, Geneva, 6 September 1952¹

States	Date of deposit of instrument	Type of instrument	Type of Instrument
1	Andorra	31/12/1952 ²	Ratification
2	Cambodia	03/08/1953	Accession
3	Pakistan	28/04/1954	Accession
4	Lao People's Democratic Republic	19/08/1954	Accession
5	Haiti	01/09/1954	Ratification
6	Spain	27/10/1954	Ratification
7	U.S. of America	06/12/1954	Ratification
8	Costa Rica	07/12/1954	Accession
9	Chile	18/01/1955	Ratification
10	Israel	06/04/1955	Ratification
11	Germany	03/06/1955	Ratification
12	Monaco	16/06/1955	Ratification
13	Holy See	05/07/1955	Ratification
14	Luxembourg	15/07/1955	Ratification
15	France	14/10/1955	Ratification
16	Switzerland	30/12/1955	Ratification
17	Japan	28/01/1956	Ratification
18	Liberia	27/04/1956	Ratification
19	Iceland	18/09/1956	Accession
20	Portugal	25/09/1956	Ratification
21	Italy	24/10/1956	Ratification
22	Mexico	12/02/1957	Ratification
23	Ecuador	05/03/1957	Accession
24	Cuba	18/03/1957	Ratification
25	Austria	02/04/1957	Ratification

26	United Kingdom of Great Britain and Northern Ireland	27/06/1957	Ratification
27	India	21/10/1957	Ratification
28	Argentina	13/11/1957	Ratification
29	Ireland	20/10/1958	Ratification
30	Liechtenstein	22/10/1958	Accession
31	Lebanon	17/07/1959	Accession
32	Brazil	13/10/1959	Ratification
33	Belgium	31/05/1960	Ratification
34	Sweden	01/04/1961	Ratification
35	Nicaragua	16/05/1961	Ratification
36	Denmark	09/11/1961	Ratification
37	Nigeria	14/11/1961	Accession
38	Paraguay	11/12/1961	Accession
39	Canada	10/05/1962	Ratification
40	Ghana	22/05/1962	Accession
41	Panama	17/07/1962	Accession
42	Norway	23/10/1962	Ratification
43	Finland	16/01/1963	Ratification
44	Greece	24/05/1963	Accession
45	Peru	16/07/1963	Ratification
46	New Zealand	11/06/1964	Accession
47	Guatemala	28/07/1964	Ratification
48	Zambia	01/03/1965	Accession
49	Malawi	26/07/1965	Accession
50	Kenya	07/06/1966	Accession
51	Venezuela	30/06/1966	Accession
52	Netherlands	22/03/1967	Ratification
53	Malta	19/08/1968	Accession
54	Australia	01/02/1969	Ratification
55	Tunisia	19/03/1969	Accession

56	Mauritius	20/08/1970	Notification of succession
57	Hungary	23/10/1970	Accession
58	Fiji	13/12/1971	Notification of succession
59	Morocco	08/02/1972	Accession
60	Cameroon	01/02/1973 ³	Accession
61	Russian Federation	27/02/1973	Accession
62	Algeria	28/05/1973 ³	Accession
63	Senegal	09/04/1974 ³	Accession
64	Bulgaria	07/03/1975 ³	Accession
65	Bangladesh	05/05/1975 ³	Accession
66	Colombia	18/03/1976 ³	Accession
67	Bahamas	13/07/1976	Notification of succession
68	Poland	09/12/1976 ³	Accession
69	El Salvador	29/12/1978 ³	Accession
70	Guinea	13/08/1981 ³	Accession
71	Belize	01/12/1982	Notification of succession
72	Dominican Republic	08/02/1983 ³	Accession
73	Barbados	18/03/1983 ³	Accession
74	Sri Lanka	25/10/1983 ³	Accession
75	Saint Vincent and the Grenadines	22/01/1985	Notification of succession
76	Republic of Korea	01/07/1987 ³	Accession
77	Trinidad and Tobago	19/05/1988 ³	Accession
78	Niger	15/02/1989 ³	Accession
79	Rwanda	10/08/1989 ³	Accession
80	Bolivia	22/12/1989 ³	Accession
81	Cyprus	19/09/1990 ³	Accession

82	Croatia	06/07/1992	Notification of succession
83	China	30/07/1992 ³	Accession
84	Kazakhstan	06/08/1992	Notification of succession
85	Tajikistan	28/08/1992	Notification of succession
86	Slovenia	05/11/1992	Notification of succession
87	Uruguay	12/01/1993 ³	Ratification
88	Czech Republic	26/03/1993	Notification of succession
89	Slovakia	31/03/1993	Notification of succession
90	Bosnia and Herzegovina	12/07/1993	Notification of succession
91	Ukraine	17/01/1994	Notification of succession
92	Belarus	29/03/1994	Notification of succession
93	Saudi Arabia	13/04/1994 ³	Accession
94	Azerbaijan	07/04/1997	Notification of succession
95	The former Yugoslav Republic of Macedonia	30/04/1997	Notification of succession
96	Republic of Moldova	23/06/1997	Notification of succession
97	Serbia and Montenegro	11/09/2001	Notification of succession
98	Togo	28/02/2003 ³	Accession
99	Albania	04/11/2003 ³	Accession

¹This Convention entered into force on 16 September 1955. It subsequently entered into force for each State three months after the date of deposit of that State's instrument, except in cases of notifications of succession, where the entry into force occurred on the date on which the State assumed responsibility for conducting its international relations.

²Date upon which an instrument of ratification was deposited on behalf of the Bishop of Urgel, Co-Prince of Andorra. Date upon which an instrument of ratification was deposited on behalf of the President of the French Republic, Co-Prince of Andorra.

³Date upon which an instrument of accession to the Universal Copyright Convention as revised at Paris on 24 July 1971 was deposited on behalf of the State in question. In accordance with Article IX(3) of that Convention, such accession also constitutes accession to this Convention.

Source: UNESCO Organization,

<http://erc.unesco.org/cp/convention.asp?KO=15381&language=E>

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