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Editor's Note

This is the inaugural volume of the Thammasat Business Law Journal. Its primary purpose is to serve as a place for publication of works of students, professos of the Master of Laws Program in Business Laws (English Program) at the Faculty of Law, Thammasat University, and selected legal scholars. We are pleased to have all articles from the theses of the students who had completed their study in the Program within two academic years published in this very first volume. Some of these students are now enrolling in the LL.M.- Legal Institutions at the University of Wisconsin Law School—Madison and some are going there in the forthcoming Spring.

We hope the Thammasat Business Law Journal will be a contribution to the academic and legal development of Thailand and a source of information for legal study and research.

We appreciate all efforts contributed by all professors, part time and full-time, and members of the Advisory Board and the Editorial Board, Distinguished Scholars, the Manager and staff. Last but not least, without the support of the Faculty of Law, Thammasat University, this Thammasat Business Law Journal will not be able to be in your hands.

Editor
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A Comparative Study of the Singapore and Thai Condominium Acts

I. Introduction

Condominiums are a unique concept in property law. It generally refers to a system of separate ownership of parts of a building. It divides the building into two parts which are "individual units" and "common property"; common parts and facilities of the building. Each individual unit owner is the absolute owner of his particular unit and also the owner of common property in a fixed ratio according to the value of the individual unit. This contributes to the value of all of the individual units in the building. At the time the condominium is constituted, the juristic condominium body, a legal entity and comprises the individual purchasers of each individual unit, is also constituted to administrate, control and maintain the common property.

The Thai Condominium Act B.E. 2522 was enacted in order to support condominium development in Thailand. The Act introduced a concept which applies to all types of condominium developments with the purpose of protecting and regulating condominium residents. To date, the Act has been amended four separate occasions in order to solve legal and practical problems relating to ownership and management. Some legal and practical problems remain unsolved, however, due to the incompleteness of the Act and the growing complexity of condominium structures, management and development.

This article, thus, aims to study the principles of condominium law, analyze the problems of the Thai Condominium Act and propose new legislative solutions in order to resolve the difficulties arising from the Act. In addition, the study will provide recommendations to enhance the effectiveness of the Act by comparing it with Singapore Condominium Law. Singapore's approach to condominium law is considered one of the most effective and

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advanced condominium laws as it effectively captures and addresses the advancement and complexity of condominium development in Singapore; one of the world’s most densely populated cities.

This article identifies unsolved legal and practical problems with the Thai condominium law affecting the rights of condominium consumers, quality and proper living conditions of condominium-living, management of common property and the security of condominium living. The problems address duties of the condominium manager, vote-blockage at committee elections, the lack of a building insurance policy, numerous disputes with condominium issues, and the insufficiency of management in mixed-use development. Some of these problems have arisen from incomplete and inappropriate elements of the Thai Condominium Act while some problems are due to a need for the enactment of the law.

In light of these issues, this article, therefore, proposes new legislative solutions to regulate, in great detail, the large group of people, communities in fact, to ensure that the condominium-related parties, especially the individual unit owners, are properly protected by the Thai Condominium Act. The proposed new legislative solutions include sanctions to control the performance of the juristic condominium body manager, substitution of other evidence for certificates of expenditure on the condominium unit transfer process, an appliance of a proportional vote in committee elections, enforcement to keep the building insured and appliance of the dispute resolution for condominium-living plus instating a two-tiered management scheme for the mixed-use condominium.

II. Advantages of Condominium

Condominiums are popping up everywhere these days. Home buyers are now seeking the conveniences of condominium living and moving from single detached housing towards the condominium. There are several factors that lead to the popularity and success of condominium living in countries throughout the world. Firstly, many people like to live in condominiums as they are attracted to the idea of owning a property at a fairly inexpensive price enhanced by a secure and uncomplicated lifestyle. People strive to reduce travel time and keep the benefits of being right in the middle of the busy city or near commercial areas where facilities for employment, education, recreation, and public services already exist.² Secondly, there is the desire for home ownership rather than tenancy. Most people prefer to own their own home, rather than rent which is one of the reasons condominium consumers would rather pay monthly mortgage installments. It ensures that their monthly payments go towards an eventual asset rather than monthly

² อัชชา ยิมชัย, ปัญหาการบังคับใช้กฎหมายอาคารชุด: ที่มาเฉพาะกรณีการบังคับใช้และจัดการอาคารชุด, วิทยานิพนธ์ปริญญาตรี,มหาวิทยาลัยราชภัฏมหาสารคาม 2546, น. 14 (Atchara Yimchuan, Problems of Condominium Law Enforcement: Focus on the Management of Condominium, a Thesis for the Degree of Master of Law, Faculty of Law, Ramkhamhaeng University 2003, p. 14)
rental for apartment living. Thirdly, there is the low cost\(^3\) of using facilities provided in condominiums such as swimming pools, fitness rooms, saunas, clubhouses, and the like. Some condominiums have retail units designed for commercial purposes such as a mini-marts, bookstores, beauty salons, and restaurants providing extensive conveniences and allowing the condominium resident to stay at home rather than leave the condominium compound. Fourthly, there is the element of security with neighbors above and below their condominium unit as well as the freedom to leave home for months without worrying about the house-break-ins, damage or theft. Finally, there is the issue of condominium unit owners maintaining their own unit. The responsibility of cleaning, maintaining, repairing the garden, the hallways, the lobby, the facilities, and the like are eliminated because these duties are part of the juristic condominium body management’s responsibilities.

II. Definitions and History of Condominium\(^4\)

According to Black’s Law Dictionary, the condominium means a system of separate ownership of individuals units in multiple-unit building.

In the Uniform Condominium Act 1980 of the United States of America, Section 1-103(7), “Condominium” means real estate, portions of which are designed for separate ownership and the remainder of which is designated for common ownership solely by the owners of those portions.

According to the Thai Condominium Act B.E. 2522, Section 4, “Condominium” means the building where persons are able to hold ownership separately according to the section whereby each section consists of personal ownership in the property and joint ownership in common property.

In physical appearance, a condominium is a building where the ownership of parts of a building are separated into two parts consisting of “individual units” and “common areas” such as hallways and recreational facilities of the building. Each individual unit owner is the absolute owner of his particular unit and also the owner of common property in a fixed ratio according to the value of his individual unit in relation to the value of all of the individual units in the building. Thus, the personal ownership of the individual unit and common ownership of the common property together are considered part of each other as an unseparable entity.\(^5\)

\(^3\) วิภณ์ รักพุ่งช่อน, กรรมสิทธิ์ในอาคารชุด, วิทยานิพนธ์ผู้ได้รับปริญญาตรี มหาวิทยาลัยธรรมศาสตร์ 2528, หน. 55 (Vikorn Rakpuangchon, Condominium Ownership, a Thesis for the Degree of Master of Law, Faculty of Law, Thammasat University 1985, p. 55).
According to many scholars, the sales of parts of buildings first occurred during the eras of the Babylonians, Egyptians, Greeks and Venetians. As Albert Ferrer stated “there is at least one record of the sale of parts of a building, in ancient Babylon (modern Iraq), during the First Dynasty, nearly two centuries before the birth of Christ.” The concept of selling parts of a building was very popular in Europe during the middle Ages due to an acute shortage of housing, hence creating a need for a more efficient use of available land. This lead to individual ownership of parts of a building, sometimes even individual ownership of single rooms, in cities such as Orleans and Paris, and became widespread in the French cities of Nantes, Saint Malo, Caen, Rouen, Rennes, and Grenoble. The condominium concept was also popularly exercised in Latin America. In 1928, Brazil was the first to enact a condominium statute followed by Chile in 1937, Argentina, Uruguay in 1948, Cuba in 1952, Venezuela in 1958 and Guatemala in 1959. The condominium statutory of the United States of America came, not from Europe, but from Puerto Rico where large populations lived and continue to live in limited spaces. This is due to an allowance for room for expansion, except upwards, and is limited by proximity to the sea. In 1958, Puerto Rico, the first United States jurisdiction then enacted a condominium statute, providing a solution to land scarcity by incorporated a condominium concept into law called “Horizontal Property Act of 1958.” By 1970, the condominium concept had been incorporated into law in almost every state in the United States and provinces in Canada. For Southeast Asian countries, the Philippines, a United States’ commonwealth, adopted the principle of condominium law from United States in 1966. In 1967, Singapore adopted the Land Title (Strata) Act, and in 1979, Thailand adopted the Condominium Act.

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8 Rakpuangchon, supra note 3, at 2.
9 สุวรรณ บัวชารี, ถึงถ้าทางกฎหมายเกี่ยวกับผู้จัดการย้ายบุคคลอาคารชุด การณ์ที่จำเป็น: ผู้จัดการทำผิดสัญญาทางแพ่งและที่จะมีผลต่อสัญญาเอก, วารสารนิติศาสตร์มหาวิทยาลัยรามคำแหง 2543, ณ. 16 (Suvann Buacharern, Legal Problems Regarding the Manager of Condominium Jurisdiction Person Case Study: The Manager Breaches of Contract and Commits a Wrongful Act Against the Third Persons, Thesis for the Degree of Master of Law, Faculty of Law, Ramkhamhaeng University 2000, at 16).
IV. Significance of Condominium Law

According to the historical background of condominiums, during the middle ages, the co-ownership principle was applied to condominium living created many disputes between unit owners as the co-ownership principle lacked clear-cut rules governing the repair and maintenance of common areas. The condominium law created an entirely new system of separate ownership of parts of a building and the principle of managing the common property by establishing a juristic condominium body; a legal entity set up for the purpose of administration, control and maintenance of the common property areas. It eventuated in order to prevent the disputes as seen in the middle-ages and to regulate, in great detail, the community relations of a large group of people living in condominiums.

Thai Condominium Act was incorporated on B.E. 2522 in order to respond to the high demand of condominiums due to population growth, the high cost of real estate construction, and the lack of available land in densely populated areas as well as to provide a law to support the unique character of condominiums; the system of separate ownership of parts of a building by several individual owners, as the principle of co-ownership under property law is ineffective in supporting a separate ownership system. If the principle of co-ownership is applied to condominiums, it creates numerous complications to all parties. For example, it would be impractical to apply the co-ownership principle in which each co-owner may dispose of or mortgage the property upon the receipt of consent from all the co-owners to the unit owners of condominium. It would also be impractical to apply the co-ownership principle where the management of property is decided by the majority of the co-owners, as the unit owners are required to give their consent to all and any maintenance work and repairs to the entirety of the common property.

V. Principles of Singapore and Thai Condominium Law

The Singapore condominium law is considered one of the most effective and advanced, as it captures and addresses the advancement and complexity of condominium development in their country both effectively and efficiently. There are two laws relating

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17 Rakpuangchon, *supra* note 3, at 47.
to the condominium in Singapore which are the Land Titles (Strata) Act\(^\text{18}\) providing the concept of condominium law and the Building Maintenance and Strata Management Act providing a concept of management and maintenance of buildings and common property of condominiums in order to ensure the uniformity of law and policies relating to the maintenance and management of buildings and common property in Singapore.

Basically, the principles of Singapore and Thai Condominium law are quite similar. They share the same basic concept of ownership system of condominium (strata title) which is the concept that divides the building into two parts, which are "personal property" and "common property". Upon registration of the transfer of a unit (lot) ownership, a unit purchaser will become a unit owner (subsidiary proprietor); an absolute owner of his individual lot and undivided interest in the common property in fixed ratio according to the value of his individual unit in relation to the value of all of the individual units in the building. The unit owners are the owners of associated common property. They are required to be involved in financial considerations, insurance of the building & common facilities as well as exercise self-governance and manage its own domestic affairs. Since a condominium has numerous unit owners, it is impractical for every unit owner to manage their common property. A "juristic condominium body" (management corporation); a legal entity comprising the unit owners from time to time of all units comprised in the condominium; is thus constituted to act as a medium for the control and management of the unit owner and to manage the common property as it is the most effective and an expeditious method of administering a joint financial venture. Furthermore, the condominium principle also provides powers and duties to the juristic condominium body, managers; a representative of juristic condominium body, committees (council members); a representative body of members elected from the unit owners for the administration of the day-to-day running of the condominium, unit owners and the condominium regulations (House rules); a rule book that spells out the policies and procedures to be employed in the everyday governance and administration of the condominium,\(^\text{19}\) for the effective management of common property and for community relations of a large group of people living in the condominium.\(^\text{20}\) The unit owners shall be jointly responsible for the expenses of management and maintenance of the common properties to condominium juristic body in shares proportional to the share value of their

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\(^{19}\) Bennett, *supra* note 7.

respective units\textsuperscript{21} in order to enable the condominium juristic body to meet the costs of regular and periodical maintenance of the condominium.\textsuperscript{22}

For the effectiveness of control and management, a general meeting of unit owners is thus organized for idea sharing and participation of the unit owners in managing the condominium for maintaining and or improving their living conditions to meet their desires and standards of "good living." The unit owners can decide for themselves how their condominium should be managed through the details raised and discussed at a general meeting.

For the foreign ownership, both Singapore and Thai condominium law allow foreigners to own a condominium. The slight differences between the laws on foreign ownership are with regards to limitation of foreign ownership dictated by an ownership quota. In Singapore, foreigners are eligible to own units in condominiums or apartments while the Thai Condominium Act limits the quota of foreign ownership in aggregate of not more than forty nine percent of the total unit area of condominium.\textsuperscript{23}

In Singapore, the condominium can be terminated by either the court (the unit owner or a mortgage or the management corporation request an order for the termination and cancellation of the condominium) or by the management corporation (through the consensus of the unit owners). In Thailand, the condominium can be terminated upon four circumstances i) in the case where the juristic condominium body has not yet been registered, the applicant for registration of condominium or the transferee of ownership of all the units in the condominium, whichever the case may be, requests for the termination of condominium; ii) the joint-owners adopt the resolution unanimous to revoke the condominium; iii) the entire of the condominium being damaged and joint-owners adopt the resolution not to build that building again; iv) the whole of the condominium has been expropriated under the law governing the expropriation of immovable property.

VI. Proposal to a New Legislative Solution of Thai Condominium ACT

The Thai Condominium Act B.E. 2522 has been amended four times in order to solve legal and practical problems relating to ownership and management. Some legal and practical problems, however, remain unsolved. Those problems are as follows:

1. The corruption problem with juristic condominium body managers

The Thai Condominium Act stipulated the juristic condominium body shall have a manager as representative and in the case where the manager is a juristic person; such

\textsuperscript{21} The Building Maintenance and Strata Management Act, Section 40(2).
\textsuperscript{23} Condominium Act B.E. 2522, Section 19 bis.
juristic person shall appoint an ordinary person to act on behalf of the juristic person in the capacity as the manager.\textsuperscript{24} Today many condominiums are facing corruption problems with the manager as many of them use their position to gain, directly or indirectly, advantages, pecuniary interest, for himself, or for any other person, which is detrimental to the condominium. For example, some managers request bribes in exchange for issuance of certificate of expenditure from the co-owner, some managers award a contractor or supplier to service the condominium by receiving pecuniary interest from the contractor or supplier, some managers dishonestly convert received common expenses for himself. The position of manager all the time deals with money and interest and can easily gain an advantage. Many managers who were dismissed from the offences of cheating and fraud have moved to be a new manager of another condominium and committed the same offences.\textsuperscript{25} This act causes a lot of problems to condominium management and unit owner.

The Thai Condominium Act is silent on the transparent management of the manager. The Singaporean law: the Building Maintenance and Strata Management Act: the prohibited activity for managing agent; is, thus, recommended to incorporate into the Thai Condominium Act as it will force the manager who is in anyway, directly or indirectly, related to a unit owner in the condominium concerned has duty to declare in writing the nature of his relationship prior to his appointment.\textsuperscript{26} Besides, the manager, whether personally or in the person of his employee or agent is not allow to act as follows:

(a) by word, message, writing or in any other manner endeavor to persuade any person to give, or to dissuade any person from giving, his vote (by proxy or in person) in any particular way at an election;

(b) visit any person entitled to vote at that election at his home or place of work for the purposes of any candidate’s election at that election; or

(c) conduct any other activity for the purposes of any candidate’s election at that election.

The prohibited activity for management agent provision of Singaporean law is appropriate to be incorporated into the Thai Condominium Act as it eradicates conflicts and problems arising from compliance. This provision is, thus, recommended to be adopted and incorporated into the Act for the purpose of protecting the unit owner.

In addition, the performance of the manager should as well be controlled by using a licensing measure by which the license of a manager will be granted to any person who is qualified and his license will be withdrawn if he is found guilty of

\textsuperscript{24} Condominium Act B.E. 2522, Section 35.

\textsuperscript{25} ดร.สมยศ แสงสว่าง, รวมทรัพยากรบัญชีการคุณ, กรมบัญชีการพัฒนา, น. 36 (Dr.Somyot Sangsuvarn, Condominium Management, Bangkok-Wiwat Publishing, p. 36).

\textsuperscript{26} The Building Maintenance and Strata Management Act, Section 66(4).
misconduct in his duties as manager. He will then no longer be able to hold this position in other condominiums. This measure will enhance the performance of the manager and the corruption problems will be reduced.

2. Red-Tape of unit transfer process

Under section 29 the manager has the duty to issue a certificate of expenditure to the co-owners. Under this section, a certificate of expenditure issued by the manager certifies that the unit being transferred is free from outstanding debt is required to be submitted to the competent official for the transfer of unit ownership. The unit owner has to request the manager to issue such certificate and if the unit being transferred is free from outstanding debt; the manager has to issue the certificate to the unit owner within 15 days from the date of receiving the request from the co-owner.

In the past, it was found that the purchaser (new unit owner/transferee) who got the transfer from the seller (previous unit owner/transferor) had not been informed by the seller that the unit had outstanding debt. When the new unit owner refuses to pay those outstanding debts, it causes a shortage of money in the funds of the juristic condominium body’s accounts.27 The juristic condominium body will then have difficulty in carrying out its operation causing improper management and maintenance of the common property as well as the quality living for condominium consumer.28

In order to solve the above mentioned problem, in B.E. 2550, the 4th recent amendment of the Act, section 29, stipulates that the certificate of expenditure certifies that the unit being transferred is free from outstanding debt is a required document for the registration of the transfer of unit ownership in order to ensure that the unit being transferred has no any outstanding debts. Nonetheless, today, many unit owners are facing difficulties of the issuance of the certificate of expenditure by the manager as this procedure creates enormous red tape for the unit transfer process. Besides, some managers request bribes from the co-owners in exchange for the issuance of the certificate of expenditure.29

This problem can be solved, however, by allowing other evidence to be used instead of the certificate of expenditure. Other evidence includes a recent receipt of common expenses payment, or an indemnification letter issued from the unit purchaser/new unit owner indemnified for all outstanding debts.

27 สุลลดา ตั้งเจริญศุภุ์, มาตรการแก้ปัญหาการชุดสัญญาในทรัพย์สินส่วนกลางที่เกี่ยวกับที่บุคคลภายนอก, วิทยานิพนธ์วิศวกรรมศาสตรมหาบัณฑิต มหาวิทยาลัยสัญญาหีลง, น. 4 (Suladda Thangjaicharoenkul, The Measure in Solving the Debt of the Common Property of a Condominium in Relation to the Right of the Third Party, a Thesis for the Degree of Master of Law, Faculty of Law, Ramkhamhaeng University, p. 4).
29 Sangsuvarn, *supra* note 25, at 36.
3. Vote-blockage at committee elections

The committee is a group of persons comprised of not less than three committee members, but not more than nine committee members appointed by general meeting. They are organized for the purpose of controlling and monitoring the management of the juristic condominium body for the effectiveness of the condominium management.

Today, many condominiums are facing with a vote-blockage problem at committee elections as it is done by way of a majority-vote resolution; a decision rule that selects alternatives which have more than half the votes. Thus, the committee members are the representatives of the unit owners who hold the majority vote such as the developers, or investors. They use their votes to elect persons to be on the committee in order to manage the property for their benefit. For example: to elect 9 committee members, if the total numbers of potential votes were to equal 10,000 and the majority holds 6,000 votes, they can nominate and vote any candidate from their group to be on the committee. Practically, when all committee members are elected from the same group of the unit owner, they are likely to take this opportunity to manage the property with the best interest and benefits for the unit owners in mind.

In order to have various opinions and participation in managing common property; the various committee members from many groups of unit owners are required. The cumulative voting is, therefore, proposed to alleviate the vote-blockage problem. Under the cumulative voting, the minority joint-owner will have chance to elect a candidate whom they favor. For example, to elect 9 committee members, if the total number of potential votes were to equal 10,000 and the majority hold 6,000 votes. The unit owner who holds the majority-vote can nominate and vote for 5 committee members whereas the minority vote holders can nominate and vote for 4 members. With this solution, the condominium will have various committee members managing the building, essentially a more democratic and fair policy.

4. The lack of a building insurance policies

Building insurance is one of the most important matters for proper management and maintenance of condominiums due to uncertainty of future happenings and events. If the building is insured, we can rest assured that the condominium is protected from all natural calamities like an earthquakes, rain, floods, fire, tsunamis etc. In Singapore, unless otherwise directed by a resolution by consensus, one of the management corporation's duties is to insure every subdivided building shown in the strata title plan and keep the building insured under a damage policy. Under the damage policy, the building will be

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Black's Law Dictionary: The cumulative voting is a type of voting in which a stockholder may cast as many votes for directors as he has shares of stock multiplied by the number of directors to be elected. The stockholder may cast all his votes for one or more but fewer than all the directors on the slate, and hence, minority representation is promoted. It is a method of voting that allows substantial minority shareholders to obtain representation on the board of directors.
covered by insurance in the event of fire, lightning, explosion or any other occurrence specified in the policy that destroys or damages the subdivided building. Generally, the insurance covers the rebuilding of the subdivided building; the repair or restoration of damage; the payment of expenses incurred in the removal of debris.

The Thai Condominium Act, however, is silent on the building insurance issue. Thus, almost every condominium in Thailand fails to insure the buildings. If damage occurs to the building, numerous people who live in condominium will suffer. The requirement of insurance for condominium where numerous people are living is, therefore, recommended.

The building insurance provision of Singaporean law is appropriate to be incorporated into the Thai Condominium Act as it eradicates conflicts and problems arising from compliance and enforcement. This provision is, thus, recommended to be adopted and incorporated into the Act for the purpose of mitigating the risk of natural calamities, ensuring effective enforcement of practical insurance as well as providing “peace of mind” for condominium owners and dwellers.

5. Numerous disputes in condominiums

Disputes arise easily in densely populated areas such as condominium-living. It is a particular concern when people of different cultures, backgrounds and interests live in close proximity of one another. Today, there are numerous amount of disputes arising from, originating at, and increasing in the condominium-living environment. The disputes occur between unit owners, developers, juristic condominium body committee members with regards to problems such as water leakage, the use of common property, committee manager elections, committee members, the contribution of sinking funds & common expenses, negligence to comply with condominium regulations etc. These disputes are now pending in court or with competent officials and the frequency and totality of the disputes run parallel to the increment of condominiums. The disputing parties are consumed by huge amounts of money and time when faced with the need to present disputes to the court or competent officials. The government sector's time and administrative expenses have also have been exhaustive in resolving these mounting disputes.

In Singapore, the Strata Titles Board, a statutory set-up of a panel of members who are lawyers and experienced practitioners in the building industry, undertakes the duty to resolve disputes. The decisions of the Strata Titles Boards are final. Appeals can only be made to the High Court based on a question of law.

The Thai Condominium Act, however, does not address this matter and today there are numerous disputes arising from condominium life and its unique environment.

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31 The Building Maintenance and Strata Management Act, Section 70.
32 The Building Maintenance and Strata Management Act, Section 115.
A disputes resolution is, therefore, required in order to reduce and solve the disputes as they may cause the condominium concept to become an unpopular, unfavorable living option.

Hence, the dispute resolution provision of Singaporean law is considered an appropriate provision to be adopted and incorporated into the Thai Condominium Act in order to reduce the mounting disputes. This provision is, thus, recommended to be enacted in the Act.

6. The insufficiency of the management in mixed-use development

Nowadays, a condominium with mixed-use development is very popular as it allows more than one type of use in the building. It provides convenience to the people who lives in the building as it includes goods and services such as shopping malls, hotels, residential dwellings, and offices on the same premises.

Even though the condominium with mixed-use development makes condominium life extremely convenient, it also poses problems with development. There are many considerations some of which create problems and conflicts and due to the vast variety of buildings and land usages e.g. vehicular access, parking and parking allocation. A healthy and fair balance of interest regarding the different uses therefore requires effective management and quality of living for all concerned including residents and visiting consumers.

In order for the residents in mixed-use condominiums to maintain and continue a normal, undisturbed life style, the Thai Condominium Act now requires commercial areas to have separate entrance(s) and exit(s) so as not to disturb the customary habitation of condominium living. This is just only one example relating to the imbalance associated with mixed-use development. The Thai Condominium Act does not, however, address the issue to its full extent and many more imbalances are in limbo. Therefore, there is a clear need to resolve this issue and a two-tier management scheme as found in Singaporean law is proposed as a solution to resolve this matter.33

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33 The Building Maintenance and Strata Management Act, Section 24(1a), Section 77, Section 79.
Legal Protection against Secondary Infringement of Copyright: Study on the Case of Landlords and Lessors*

Introduction

Currently, copyright infringement can be performed in many ways. Not only can it be conducted by a direct infringer, who actually performs an infringing act, it can also be conducted by a person who, although does not perform an infringement himself, materially contributes to, facilitates, induces or is otherwise responsible for directly infringing acts carried out by another person. This kind of conduct is defined as “secondary infringement”.

Secondary infringement has become a problem because it creates a tool for provoking a primary copyright infringement. It helps expand and makes available infringing products. Without secondary infringers, piracy problems would be much less than those occurring now. There are various kinds of secondary infringement conduct, whereby the secondary infringer himself is not the one who commits the copyright infringement e.g. a person who sells infringing products, a person who sings a copyrighted song without consent of the copyright owner, a person who imports pirate goods into the country, and a person who allows the use of its premises or website space for infringing activities. However, this article shall focus on the study of the only certain situation of secondary infringement when a landlord, a lessor, an operator or any person allows the other person to use the building, premises, space or area, and such other person exploits such places for purpose of copyright infringement (the “Secondary Infringement”). This article shall specifically study the criminal aspect of the Secondary Infringement in order to impose criminal punishment against the landlord, the lessor, the operator or any other person for the copyright infringement.

* This article is summarized and rearranged from the thesis “Legal Protection against Secondary Infringement of Copyright: Study on the Case of Landlords and Lessors,” The Master of Business Laws (English Program), Faculty of Law, Thammasat University.
occurred on his building, premises, space or area by the person who was allowed to use such place.

Currently, the Thai Copyright Act B.E. 2537 expressly imposes criminal punishment on secondary infringers only for the conduct as prescribed in the Section 31, which in this author’s opinion, is not sufficient and effective enough to control and deter widespread problems of piracy and counterfeit of copyrighted works. It is, therefore, essential to lay provisions to impose criminal punishment on the owner, operator, lessor, sub-lessee or any person who allows other persons to use the premises, building or venue of his own or of others, with knowledge or any reasonable grounds to believe that such persons would use the premises, building, or venue for copyright infringing activities. This will enhance effectiveness of law to reduce copyright infringement crimes in Thailand.

Purpose of Criminal Copyright Law

Copyright is principally a right in a civil aspect as the law aims to grant to an author, who creates a work, an economic right to exploit such copyrighted work for a certain period of time. The idea of criminalizing conduct in criminal law is based on two principles. Firstly, it is based on “the morality and harm of the conduct.” It is generally agreed that “it is appropriate to treat conduct as criminal when it is morally wrong.” The determination of “morally wrong” is based on a culpable state of mind and a morally wrongful act - which is against the “right and good” of the social norm. Hence, if someone chooses to do something that is morally wrong, that person is culpable. Secondly, it is based on “the harm that the conduct causes.” This is because of the idea that a given society has the right to maximize social welfare. In accomplishing such welfare, the society needs to prevent harm from the community. Hence, if someone acts against the welfare of the society, such person is considered causing harm to that society.

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1 Thai Copyright Act B.E. 2537, 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.
3 *Id.*
4 *Id.*
5 *Id.*
6 *Id.*
In regard to the purpose of copyright law, it is to further creativity, invention and learning through rewards to artists and creators. When someone violates the exclusive rights of the artist or the creator, such violation reduces the economic incentive for that author to create works, and ultimately harms the community. This is considered "morally wrong". Therefore, the criminal penalties are included in copyright law to combat the infringement, which is against social welfare and is considered morally wrong.

In the international realm, the principle of criminalizing copyright infringement is provided in the TRIPS agreement article 65 as follows:

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

Nature of Copyright Infringement

Copyright infringement can be categorized into two types; primary infringement and secondary infringement, illustrated as follows:

Primary Infringement

Primary infringement, or direct infringement, is an action of those who directly exploit any or all of the copyright owner's exclusive right, e.g. the right to reproduction, the right to adaptation, and the right to distribution to the public, without permission from him. The most common act of primary infringement is copying of copyrighted works. However, as earlier mentioned that copyright is not a monopoly right, one cannot be charged with copyright infringement if he does not access the original work. That is to say, one action shall be considered as copyright infringement when such action involves an original copyrighted work. If one creates a work from his own originality, even it is similar, or even identical, to the existing copyrighted works, that person shall still be granted a copyright protection on his work, so long as he does not copy from an existing original copyrighted work.
Secondary Infringement

Secondary infringement, on the other hand, is an indirect infringement of those who, although do not themselves commit infringing conduct, but deal commercially with infringing copies, contribute to, facilitate, induce or are otherwise responsible for infringing acts performed by another person. The infringed products or infringing conduct, committed by a person called the primary infringer, must exist. In accomplishing said infringing action or in manufacturing said infringed products, or after the products were manufactured, the other person, namely the secondary infringer, is involved in those actions. For example, one who does not make a copy of a copyrighted work himself but he imports, sells, or distributes such infringed works with intention to make profits from such works, or a person who provides means to copy the copyrighted work e.g. providing premises or device to make such copy.

The significant distinction between primary infringement and secondary infringement is that those who commit primary infringing conduct shall be liable even if they claim that they are not aware of committing the copyright infringement act. On the other hand, those who commit secondary infringement shall only be liable if they know, or have any reasonable ground to believe that they are dealing with copyrighted materials or are responsible for the infringement conduct, and is still willing to get involved with the infringing activity.

Secondary Infringement in Foreign Countries

The concept of secondary infringement, varies from country to country. Some countries may recognize one conduct as secondary infringement, while others do not. In this subtopic, the author will study the copyright laws of the United States of America, the United Kingdom and the People’s Republic China as to whether their laws recognize the concept of secondary infringement, and how far their laws have reached to impose criminal punishment on the secondary infringer.

Secondary Infringement under U.S. Law

While the U.S. Copyright Law does not expressly stipulate any provision imposing liability for copyright infringement on a secondary infringer such as a landlord, the court, rather than the Congress, aware of significance of secondary infringement, and has developed case laws on this issue. The courts have formed theories and policies regarding the secondary infringement and set forth a situation under which a person shall be secondarily liable, by extending the infringement to those who contribute to or

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vicariously profit from infringing acts of others, or so called "contributory infringement" and "vicarious infringement", as well as a new theory called "inducement infringement".

Under the contributory infringement doctrine, a person who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a contributory infringer. There must be a direct infringement from a primary infringer, and the secondary infringer must have knowledge of said infringement activity and still provides a material contribution for such action.\(^9\)

By applying the doctrine of contributory infringement to the situation whereby the landlord permits its tenant to use its premises, and the tenants use such premises for infringing activity, the Second U.S. Circuit Court of Appeals set out the rule in Deutsch et al. v. Arnold et al., that a mere relationship of a landlord and tenant is not sufficient in holding the landlord responsible for copyright infringement commit by his tenant on his premises.\(^10\)

Vicarious infringement occurs when someone has a direct financial interest in the infringing act, committed by the other person, and has ability to control such person or action.\(^11\) Under the vicarious infringement doctrine, direct infringement must occur, and said liability shall be imposed upon one who has the right and ability to supervise the infringing activity and also has a direct financial interest in such activity, irrespective of the knowledge of the infringing activity.

The landmark case, in which the doctrine of vicarious liability was applied to sales of a counterfeit product is Shapiro, Bernstein and Co. v. H.L.Green Co.\(^12\) In this case, a lawsuit was brought against the owner of a chain of department stores where a concessionnaire was selling counterfeit recordings. The court tried to impose liability on a defendant who, although lacking an employer-employee relationship, received economic interests from the direct infringer. The store owner was held vicariously liable, even though the defendant did not know of the infringement, because it had the power to control the conduct of its concessionaire, and the store owner received direct financial benefit from the infringement.

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\(^10\) Deutsch et al. v. Arnold et al., 98 F.2d 686, 688 (2nd Cir. 1938). The court stated “In respect to the defendant Dworman and her agent Bernart, there is no proof of any acts of infringement on the part of either. They were not partners of Miss Arnold. They received nothing, and were not entitled to receive anything through her acts of infringement, and there is no proof that either of them knew that acts of infringement were proposed at the time when the lease was made. Something more than the mere relation of landlord and tenant must exist to give rise to a cause of action by plaintiffs against these defendants for infringement of their copyright on the demised premises.”

\(^11\) Leafer, *Supra* note 8, at 431.

\(^12\) Shapiro, Bernstein and Co. v. H.L.Green Co., 316 F. 2d 304 (2d Cir. 1963).
The U.S. court has applied the doctrines of contributory liability and vicarious liability together in determining whether a landlord should be held secondarily liable for the infringing activity of his tenant. The salient case concerning liability of the landowner is Fonovisa, Inc. v. Cherry Auction, Inc.\textsuperscript{13} The lawsuit was brought against Cherry Auction, the operator of a flea market where vendors routinely and openly sold recordings which infringed the Plaintiff’s copyrights and trademark.

In determining this case, the Ninth Circuit Court applied both contributory liability and vicarious liability doctrine. According to the case, it was undisputed that Cherry Auction operated a flea market and was aware that its vendors engaged in selling counterfeit recordings which violated Fonovisa’s trademark and copyrights. In applying the doctrine of vicarious liability, which requires control and financial benefit, the court found that Cherry Auction had the ability to control its vendors under its similarly broad contract and therefore, satisfied the control requirement. Moreover, the court found that the counterfeit recordings available in the Cherry Auction’s flea market was what attracted customers to come to the market, and was enough to constitute to the financial benefit requirement. In applying the doctrine of contributory liability, which requires knowledge and material contribution, it was undisputed that the knowledge requirement was met since Cherry Auction admitted that it was aware of its vendors’ illegal activity. As to the material contribution requirement, the court found that in providing space, utilities, parking, advertising, plumbing, and customers, it already constituted a material contribution. Therefore, Cherry Auction was held liable under both contributory liability and vicarious liability doctrine.

In addition to the state’s case law, the State of New York enacted a provision under the New York Real Property Law to impose liability on the landlords for the copyright and trademark infringement committed by their tenants.\textsuperscript{14} It entitles the landlord to terminate a lease if the landlord discovers that its tenant engages in illegal trade, manufacture or other business. As activity concerning copyright infringement is also considered as “illegal business,” the landlord is given the right by this Section to terminate the lease if

\textsuperscript{13} Fonovisa, Inc. v. Cherry Auction, Inc., 76 F. 3d 259 (9th Cir. 1996).

\textsuperscript{14} According to the New York Real Property Law, Article 7, § 231, it states “Lease, when void; liability of landlord where premises are occupied for unlawful purpose.

1. [W]henever the lessee or occupant other than the owner of any building or premises, shall use or occupy the same, or any part thereof, for any illegal trade, manufacture or other business, the lease or agreement for the letting or occupancy of such building or premises, or any part thereof shall thereupon become void, and the landlord of such lessee or occupant may enter upon the premises so let or occupied.

2. The owner of real property, knowingly leasing or giving possession of the same to be used or occupied, wholly or partly for any unlawful trade, manufacture or business, or knowingly permitting the same to be used, is liable severally, and also jointly with one or more of the tenants or occupants thereof, for any damage resulting from such unlawful use, occupancy, trade, manufacture, or business.”
the landlord is aware that its tenant engages in business relating to copyright infringement. In addition, in case the landlord perceives illegal activities, i.e. copyright infringement, yet, still gives permission to such tenant to occupy the premises for purpose of such infringement business, the landlord shall be liable severally and jointly with the tenants or any occupants of the premises for any damage resulting from such infringement activity for its failure to promptly respond to the illegal conduct occurring on its premises.15

The landmark case for enforcement of this section is Louis Vuitton Mallertier v. Richard E. Carroll.16 In this case, Louis Vuitton filed a lawsuit against the owner of property on Canal Street in the Chinatown area of New York City, claiming that the landlord assisted a multitude of tenants in selling of the designer’s handbags, wallets, sunglasses etc. Louis Vuitton was awarded a preliminary injunction requiring the landlord to expel all tenants who sold counterfeiting goods.

In regard to the criminal sanction, there is no court decision imposing a criminal sanction on a landlord for the copyright infringement occurring on his premises by his tenant.

**Secondary Infringement under UK Law**

The Copyright, Design and Patent Act 1988 of the United Kingdom (hereinafter referred to as “CDPA”) has laid provisions regarding the Secondary Infringement, liability of the landlord for infringement activity in his premises, in Section 2517 and Section 26.18 However, those sections are not concerned with the sale of pirate and counterfeit products on the leased premises of a tenant.

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15 Id.
17 CDPA, Section 25,

[1] Where the copyright in a literary, dramatic or musical work is infringed by a performance at a place of public entertainment, any person who gave permission for that place to be used for the performance is also liable for the infringement unless when he gave permission he believed on reasonable grounds that the performance would not infringe copyright.

(2) In this section "place of public entertainment" includes premises which are occupied mainly for other purposes but are from time to time made available for hire for the purposes of public entertainment.

18 CDPA, Section 26,

[1] Where copyright in a work is infringed by a public performance of the work, or by the playing or showing of the work in public, by means of apparatus for -

(a) playing sound recordings
(b) showing films
(c) receiving visual images or sounds conveyed by electronic means, the following persons are also liable for the infringement:

(2) A person who supplied the apparatus, or any substantial part of it, is liable for the infringement if when he supplied the apparatus or part -

(a) he knew or had reason to believe that the apparatus was likely to be so used as to infringe copyright, or
Although the CDPA does not provide clear provisions for secondary infringement regarding a landlord whose premises becomes a place on which pirate and counterfeit merchandise is sold; in 2003, there was a pioneering case of Redcar & Cleveland Borough Council v Bank in which the court imposed a criminal penalty on a landlord for counterfeit goods sold on the premises it owned or controlled. In this case, several sellers at local fairs sold counterfeit goods at a racecourse. Also, the operator of the sales at Redcar Racecourse, Mr. Banks, was charged with aiding and abetting the sales of counterfeits. Mr. Banks claimed that he was not, in any way, involved in the sale of those counterfeit goods for he was not at the racecourse when they were sold. However, the court was not convinced by Mr. Banks’ argument, and decided that although he claimed that he was not involved with the counterfeiting, the counterfeit products themselves were self-evident. Since he failed to prevent the crime on the premises under his control, he was guilty of aiding and abetting offenses under the Copyright Designs and Patents Act 1988 and the Trade Marks Act 1994 and subject to a 6,000 UK Pounds fine.

In addition to the national level, the county of Kent enacted the Kent County Council Act and the Medway Council Act 2001 (the “Kent Act”), enforcing landlord liability in the United Kingdom at the county level. Those acts, with the same content, were legislated to control the second hand goods trade in the region. The Kent Act is proved to help decrease and deter the trade of counterfeit items in the county of Kent. Unfortunately, it can be enforced only in the small region of Kent.

Secondary Infringement under Chinese Law

The Copyright Law of the People’s Republic of China (hereinafter referred to as the “PRC”) does not make any provision defining conduct of the secondary infringement. However, the concept of the Secondary Infringement appeared in Article

(b) in the case of apparatus whose normal use involves a public performance, playing or showing, he did not believe on reasonable grounds that it would not be so used as to infringe copyright.

(3) An occupier of premises who gave permission for the apparatus to be brought onto the premises is liable for the infringement if when he gave permission he knew or had reason to believe that the apparatus was likely to be so used as to infringe copyright.

(4) A person who supplied a copy of a sound recording or film used to infringe copyright is liable for the infringement if when he supplied it he knew or had reason to believe that what he supplied, or a copy made directly or indirectly from it, was likely to be so used as to infringe copyright.

International Trademark Association (INTA), Disrupting Illegal Business of Vendors Who Sell Counterfeit Goods Through Rented or Leased Premises.

See also at http://www.thefreelibrary.com/Car+boot+boss+is+fined+pounds+6,000-a0128962889

International Trademark Association (INTA), Supra note 20.

Id.
52 of the Trademark Law of PRC\textsuperscript{23} and Article 50 of the Regulations to the Trademark Law of PRC,\textsuperscript{24} which elaborate the Article 52 of the Trademark Law of PRC.

From the open ended provision of Article 52(5) under the Trademark Law of the PRC and the guidelines given in the Regulations to the Trademark Law, Article 50, the court of the PRC applied Article 52(5) with the Secondary Infringement to a case and constituted a principle of “landlord liability”.

The case was filed in September 2005 by the brand owners of Burberry, Chanel, Gucci, Louis Vuitton and Prada against five individual vendors, whereby each of the vendors was alleged to have sold counterfeit products of the plaintiffs’ brands. The plaintiffs also sued a management company of the Silk Street Market, namely Beijing Xiushui Street Garment Market Company Limited “Xiushui”. Before filing the lawsuit, the plaintiffs sent warning letters to Xiushui in order to seek assistance in ceasing the infringing acts occurring in the market under Xiushui’s management. Xiushui, instead of taking prompt action to stop the counterfeiting, ignored the letters and did nothing.\textsuperscript{25} The No. 2 Intermediate People’s court made decision in the first instance in December 2005, followed by an appeal decision in April 2006 by the Beijing Higher People’s Court.\textsuperscript{26} Both courts found Xiushui, as the manager of the market, liable as it did not perform its duty to regulate the market and to prevent illegal conduct. Such failure constituted contributory liability under the PRC Trademark Law Article 52(5).\textsuperscript{27}

In deciding the case, four main legal issues were considered by the People’s High Court of Beijing: (1) whether individual sellers infringed the rights of the trademark owners, (2) whether the landlord had a duty to take prompt and effective measures to cease illegal activity within the premises under its management or control, (3) whether the landlord had knowledge of the counterfeiting, and (4) whether the landlord provided conditions that facilitated infringement activities.\textsuperscript{28}

\textsuperscript{23} The Trademark Law of PRC, Article 52, “Any of the following acts shall be an infringement of the exclusive right to use a registered trademark:
(5) to cause, in other respects, prejudice to the exclusive right of another person to use a registered trademark.”

\textsuperscript{24} The Regulations to the Trademark Law of PRC, Article 50,
[any of the following acts shall be an act of infringement of the exclusive right to use a registered trademark as provided for in Article 52(5) of the Trademark Law:
(1) to use any design which is identical with or similar to the registered trademark of another person on the same or similar goods, as the designation or decoration of the goods, which mislead the public; or
(2) to intentionally provide any other person with such facilities as of storage, transportation, postal service, and concealment in his infringement of the exclusive right of another person to use a registered trademark.


\textsuperscript{26} International Trademark Association (INTA), \textit{Supra} note 20.

\textsuperscript{27} \textit{Id.}

\textsuperscript{28} \textit{Id.}
The court found Xiushui, the defendant, liable in all four issues, on the grounds that the individual sellers obviously infringed the trademark owners’ rights, the plaintiffs had already sent a notice to Xiushui to stop infringement on its premises but they failed to take any action against such infringement activities, and that Xiushui was able to specify and scope the business of the sellers to be engaged in its premises.

The Beijing Municipal Administration for Industry and Commerce (AIC) began to encourage district level administration to impose criminal punishment against landlords. The Silk Market was fined by the Chaoyang District AIC in April 2006. The landlord filed two appeals, but the Beijing No. 2 Intermediate Court in December 2006 upheld the AIC’s penalty.²⁹

**Secondary Infringement in Thailand**

Section 31 of the Thai Copyright Act does recognize the concept of secondary infringement.³⁰ However, it does not include the secondary infringement which concerns this article regarding legal sanction against a landlord, lessor, sub-lessee or whoever has control over leased premises exploited for copyright infringement activity.

Since it is obvious that the owners of premises, the lessor of premises, the occupiers of premises or any persons who allow other persons to use their premises, with knowledge or any reasonable grounds to believe that such persons would use the premises for copyright infringement activities shall not be liable under the Thai Copyright Act, the copyright owner must apply the existing laws, which are the Thai Copyright Act, Sections 27-30, concerning primary copyright infringement and the Penal Code, Section 83,³¹ concerning a principal of an offence, Section 84,³² concerning an instigator of an offence and Section 86,³³ concerning an accessory of an offence. From the author’s point of view, the application of the existing laws on secondary infringement can be analyzed as follows;

Having considered Section 83 of the Penal Code concerning a principal of an offence, the author is of the opinion that the owner, the lessor or the occupier cannot be

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³⁰ The Thai Copyright Act B.E. 2537, Section 31, *Supra* note 1.
³¹ The Penal Code, Section 83, “Whenever any offence is committed by two persons upward, those participating in the commission of the offence are said to be principals, and shall be liable to the punishment provided by the law for such offence.”
³² The Penal Code, Section 84, “Whoever, whether by employment, compulsion, threat, hire, asking as favor or instigation, or by any means, causes another person to commit any offence is said to be an instigator.”
³³ The Penal Code, Section 86, “Whoever, by any means whatever, does any act to assist or facilitate the commission of an offence of any other person before or at the time of committing the offence, even though the offender does not know of such assistance or facilities, is said to be an accessory to such offence, and shall be liable to two thirds of the punishment provided for such offence.”
considered as the principal to a copyright infringement committed by its lessee due to the lack of mutual intention to jointly commit an offence with the lessee. The act of the owner, the lessor or the occupier, allowing the use of the building or premises, is absolutely separated from the act of the lessee, in committing an infringing activity in such building or premises. They do not conspire with each other to commit a copyright infringement by separating their duty whereby one party shall provide premises and the other shall sell the pirating products. As a result, punishment cannot be imposed on the owner, the lessor, or the occupier of the building or premises for the copyright infringement committed by its lessee on ground of principal to the offence.

As to Section 84 of the Penal Code regarding an instigator of an offense, it is not practical that the owner, the lessor, the sub-lesser, or a person who has controlled over the building or premises will cause another person to engage in copyright infringing activity on their premises because a lessee must have had an objective in his mind what he would do before entering into a lease. In addition, the owner, the lessor, the sub-lesser or a person who has controlled over the premises usually is not in a position to influence, provoke or cause their lessee to make decisions to do something. Thus, Section 84 cannot practically be applied to the Secondary Infringement in case of punishment against the owner, the lessor, the sub-lesser or a person who has controlled over the premises for the copyright infringement activity occurred on their premises.

In regard of Section 86 of the Penal Code concerning an accessory to an offence, it is likely that this Section can best apply to the case of secondary infringement which the owner, the lessor or the occupier of the building or premises permits the other person to use such building or premises, and such person engages in distribution of piracy or counterfeit products. It is possible that the owner, the lessor or the occupier be considered as an “accessory” to a copyright infringement offense for they provide venues for the offender to commit the infringement offence. Permission use a building or premises can be proved to be an action to assist or facilitate the offender. Such assistance is, of course, provided to the lessee, who is the offender, at time of the distribution of pirated or counterfeit goods.

Nevertheless, the most important and the hard to prove element of the offense on the grounds of either principal, instigator, or accessory to copyright infringement offence is specific intention or willfulness of the alleged principal, instigator, or supporter that he is willing or intends to jointly commit the offence, provoke, assist or facilitate the offense at time of the lessee committing the copyright infringement.34

34 The Penal Code, Section 59,
[A] person shall be criminally liable only when such person commits an act intentionally...
To do an act intentionally is to do an act consciously and at the same time the doer desired or could have foreseen the effect of such doing.
If the doer does not know the facts constituting the elements of the offence, it cannot be deemed that the doer desired or could have foreseen the effect of such doing.
As specific intention is a mental element whereby no one, except for the accused person himself, knows what is in his mind, it causes difficulties for a copyright owner or a state attorney to prove specific intent of an owner or the lessor of the building or premises, or a person in charge of the building or premises that he, in providing the building or premises to his lessee, intends to be a joint offender of his lessee (in case of a principal), intentionally causes his lessee to a copyright infringement (in the case of an instigator), or intentionally assists or facilitates his lessee for copyright infringing activities (in the case of an accessory). As a result, although the existing laws, which are the Copyright Act B.E. 2537, Section 27- Section 30, together with the Penal Code, Section 83, Section 84 and Section 86, can apply to the case of the secondary infringement regarding provision of the building or premises for copyright infringement conduct, the prosecutor, which is the copyright owner or the state attorney, must have an arduous burden of proof in proving specific intent of the owner or lessor of the building or premises, or the person who controls the building or premises, that he specifically intends to permit the use of the building or premises so as to jointly commit a copyright infringement with his lessee (in cases of a principal), cause his lessee to a copyright infringement (in cases of an instigator), or assist or facilitate his lessee in committing a copyright infringement (in cases of an accessory).

In the author’s opinion, although criminal litigation of the secondary infringement in countries i.e. the United States of America and the United Kingdom is not favored, it is necessary that in Thailand criminal sanctions be brought against those owners or lessors since the lack of places for distribution of pirating and counterfeit products will cut the main channel for the consumers of infringing merchandise. The reason why the plaintiff in a foreign country e.g. the U.S. decides to bring a civil action, rather than a criminal one, is because prosecution in the U.S. needs to proceed through lawyers who charge very high legal fees. Therefore, in spending money on the litigation, the injured party would rather sue the copyright infringer, as well as the secondary infringer, for damages rather than for the infringers to be criminally convicted and punished. Moreover, unlike Thailand, there are not many department stores, booth stalls, or flea markets that openly provide pirated or counterfeit products to consumers like in our country. In addition, if the new provision specifically prescribes that an act of the landlords, lessors or occupiers, in provision of areas to the lessees for purpose of copyright infringement shall be considered as secondary infringement, it will force the court to apply the new provision to the secondary infringement situation. This will preclude the current uncertainty whether the court will use its discretion to apply the existing laws to the Secondary Infringement or not. For this reason, an amendment to the Thai Copyright Act providing an offence for allowing infringement activities on their premises should be implemented, whereby, such amendment should consist of the following:
Element of Secondary Infringement

An amendment of the Thai Copyright Act should be made, whereby it should add an element which constitutes secondary infringement. Scope of secondary infringement should be added by extending the situation in which an owner, lessor or sub-lessee of the building or premises or a person who is in control of the building or premises, permits another person to use the building or premises of his own, or of the other person, knowing or having a reasonable grounds to believe that his lessee would use the building or premises for purpose of copyright infringement of copyrighted works of another person. To elaborate further, elements of a new amendment of the Thai Copyright Act should consist of the following.

1. An owner, lessor, or sub-lessee of the building or premises or any area, or the person who controls the building or premise or any area.
2. The person in the first element allows, permits or provides the building or premises or any area to another person.
3. The same person knows or has a reasonable ground to believe.
4. The person, who is allowed to use the building or premises or any area, uses such building or premises or any area for purpose of copyright infringement.

Commission of Secondary Infringement

A person liable as a secondary infringer for the commission of copyright infringement by the lessee in a leased building, premises or any place is not only the owner of the leased area, but also the lessor, the sub-lessee, or any person who is in a position to allows the other person to use the premises. Whether or not that person is an ordinary person or juristic person, and whether or not that juristic person is a private sector or public sector is immaterial. In cases where there is more than one lessor and lessee involved, i.e. in cases of sublease, whereby the lessee in the first lease agreement becomes the sub-lessee in the second agreement, a question may arise whether which lessor should be liable for the copyright infringement by the latest lessee. In the author’s point of view, every lessor, whether the first lessor or the following sub-lessee(s), who knows or should have known of the copyright infringement by the latest lessee, and fails to take any action to get rid of such infringement, should be secondarily liable for such wrongful behavior of the lessee.

Section 74 of the Thai Copyright Act B.E. 2537,\(^{35}\) contains a provision, which imposes criminal punishment against a juristic person. This emphasizes that a juristic person can be criminally convicted.

\(^{35}\) The Thai Copyright Act B.E. 2537, 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."
Since an offense under the Copyright Act is a criminal offense, it is implicit that this Act adopts the theory that a juristic person can also be penalized. In addition, punishment also extends to all directors and managers of the juristic person to be jointly punished with the juristic person itself, as those persons are the one who take charge of the juristic person’s business.

In regards to a juristic person, it can be classified into two main types, private juristic person and public juristic person, both of which can be both a plaintiff and a defendant in court. Public juristic persons, or government sectors, who usually play a role as lessors are Bangkok Metropolitan Administration, a juristic person under Order of Revolutionary Council No. 218 Clause 47 and 48\textsuperscript{37} and public universities, juristic persons under control of Ministry of University Affairs.\textsuperscript{38} As to the Crown Property Bureau whose income mostly comes from rental of its land properties,\textsuperscript{39} it is also a juristic person and is able to be a plaintiff or a defendant in court.\textsuperscript{40} As a result, if there are situations when the pirating goods are distributed in the official premises, that authorities who are in charge of such areas may be taken a legal action against as secondary infringers for providing spaces for distribution of pirating products.

**Burden of Proof of Secondary Infringement**

The new amendment should lessen the burden of proof on the prosecutor, by prescribing that the owner or the lessor of the building or premises, or anyone who is in charge of the building or premises, who leases the building or premises to another person, knowingly or having reasonable grounds to believe that such leased building or premises would be exploited for purposes of copyright infringement activity shall be deemed to have committed a copyright infringement. Should the new amendment be prescribed in this sense, it will ease the burden of proof of the prosecutor. The prosecutor, then, shall be responsible for proving to the court that the accused “knew or had a reasonable ground to believe” that his lessee engaged in copyright infringement activities, and the accused fails to take any action in order to prevent such action in the leased building or premises. Therefore, the new amendment shall benefit the prosecutor since proof of knowledge is much less burdensome than proving specific intent of the accused by using the Penal Code.

\textsuperscript{36} ปราพิณ ทวีทรัพย์, ลิขสิทธิ์ในการฟ้องหน่วยงานราชการ (Praphan Sabsang, the Right to Sue Government Sector). Available in http://www.library.coi.go.th.

\textsuperscript{37} Id.

\textsuperscript{38} Office of the Higher Education Commission, History of Public Universities.

\textsuperscript{39} Currently, the Crown Property Bureau has engaged in approximately 37,000 contracts. See กิตติศักดิ์ ภูริวงศ์, ความเป็นมาและปัญหาสถานะทางกฎหมายของส่วนงานทรัพย์สินแผ่นดินมหาวิทยาลัยศาสตราจารย์ 2552 (Kittisak Uraiwong, Background and Legal Status Problem of the Crown Property Bureau, a Thesis for the Degree of Master of Law, Public Law, Faculty of Law, Thammasat University 2009, at 32.)

\textsuperscript{40} Id. at 35.
Punishment of Secondary Infringement

As earlier mentioned, although the countries studied in this article, may not provide punishment of secondary infringement criminal measures to deter the crime of the Secondary Infringement. This is because merely having civil measures is already effective. While their civil courts grant large amount of damages, the Thai court is still very conservative in awarding damages and therefore grants small sums of compensation which the plaintiff thinks it is not worth wasting time and lawyer fees on claiming damages. For this reason, it is essential that Thailand needs a more effective and a more severe measure to cope with the widespread issue of copyright infringement. In cutting a channel for consumers approaching illegal products, by imposing criminal obligation on the owner, the lessor or the operator of places where pirated and counterfeit goods are openly distributed, it is a given that the rate of copyright infringement crime will lessen. In this regard, a mere fine may not be effective enough, the author is of the opinion that punishment by means of imprisonment is also necessary. In cases where the liable person is juristic person who obviously cannot be imprisoned, the directors or managers of that juristic person shall be imprisoned for they are the persons who manage the juristic person’s business.

Conclusion and Recommendation

The current Thai copyright law cannot effectively control and prevent the widespread problem of copyright crime occurring in Thailand as we can see that pirated and counterfeit merchandise are widely and openly available for consumers to purchase. One of the important factors why Thailand cannot wipe out copyright infringement is because consumers can easily purchase the copyright infringed products as such illegal goods can be openly seen for sale in department stores and flea markets. In compliance with the TRIPs Agreement which stipulates that the member countries should provide criminal procedures for at least copyright infringement and trademark infringement for commercial purposes, and that criminal measures must be sufficient to provide a deterrent, it is essential that an amendment to the Thai Copyright Act be implemented in order to impose criminal punishment against an owner, a lessor or an operator of the a building, premises, booth stall or areas who permits other persons to use such venues, with knowledge or any reasonable ground to believe that such persons would use such venues for copyright infringing activities. In consequence of the new amendment of the Thai Copyright Act, burden of proof that the plaintiff bares in order to hold the owner, the lessor, or the operator of the venues where the copyright infringement conduct occurred liable, shall be lessened. From the high degree of specific intent of the alleged that the plaintiff needs to prove, the plaintiff has to prove only that such accused had knowledge or should have had knowledge of such illegal activity in his venues.
Currently, there is a draft of amendment to the Thai Copyright Act, whereby it aims to amend Section 31 regarding secondary infringement. This draft amendment would extend the scope of secondary infringement activity to the following:

“Whoever allows other persons to use the building or area, with knowledge that such persons would use such building or area for copyright infringing activities, by reproducing, manufacturing, selling, possessing for sale, offering for sale, renting, offering for rent, or offering to lease, it shall be deemed that such person commits an offence under this Act.

Provisions of the first paragraph shall also apply to the website provider.

The scope of building and area in the first paragraph and website providers in the second paragraph shall be in accordance with the rules in the Ministerial Regulations.”

From the draft amendment, the author agrees with the concept to impose criminal obligation on whoever allows the use of a building or area with the knowledge that such building or area would be used to infringe the copyright of others. However, the author is of the view that a mere knowledge may not be sufficient to hold that person liable. The amendment should add that if the prosecutor can prove that the accused had “a reasonable ground to believe” that his lessee may be involved in illegal activity, it is enough to hold the owner, the lessor or the operator of such area secondarily liable. This is to avoid willful blindness of the owner, the lessor or the operator of that area. In addition, the scope of infringing activity by the lessee should be left open, and should not be limited to the copyright infringing by reproducing, manufacturing, selling, possessing for sale, offering for sale, renting, offering for rent, or offering to lease. In addition, the author’s recommendation to this draft amendment is that it should impose a condition precedent to the copyright owner prior to bringing the case before the court. The draft amendment should state that before the copyright owner can bring a legal action against the owners, the lessors, the occupiers or the operators of the leased premises, the copyright owner must give a notice to those persons that their lessee is infringing the copyrighted works of the copyright owner and specify a period of time for the owners, the lessors, the occupiers or the operators of the leased premises to take any action to get rid of such illegal activity in the leased area. This is to make it certain that the owners, the lessors, the occupiers or the operators are aware of infringement activity on their leased premises.
Furthermore, the author's recommendations for the owner, the lessor or the operator to avoid criminal punishment are that they should explicitly state in the lease agreement that illegal activity is prohibited on the leased premises and may lead to termination of lease if the lessee breaches such prohibition. Also, the owner, the lessor and the operator should keep and maintain updated records of his lessees, including name, address and telephone number so as to track down his lessees should anything happen. Lastly, the owner, the lessor and the operator should investigate the leased premises to inspect whether illegal activity is occurring on the leased premises.
Liberalization of Electricity Market in Thailand

Introduction

Electricity industry of Thailand is mainly operated by state enterprises. The generation phase and transmission phase are the responsibility of the Electricity Generating Authority of Thailand-EGAT while the distribution phase is the responsibility of the Metropolitan Electricity Authority-MEA and the Provincial Electricity Authority-PEA. Even though Thailand acknowledges the concept of free and fair market in goods and service as stated in its Constitution, there are some legal barriers that obstruct the liberalization of electricity market in Thailand. Competition law is included. The Trade Competition Act B.E. 2542 does not cover the act of state enterprise including those mentioned authorities. This article aims at studying competition law and special laws regulating the electricity market in the United Kingdom, the United States of America, and the European Union, to observe how law can manage competitive electricity market, in order to compare to the law of Thailand and find solutions for its improvement. In addition, some important principles concerning the electricity market, will be discussed.

Electricity Liberalization

Electricity liberalization means the liberalization of electricity market. As electricity supply is traditionally a natural monopoly, in introducing competition in electricity market, complex and costly system of regulation\(^1\) to enforce and monitor competition is unavoidable. The model that is standard

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\(^1\) Michael Pollitt, Judge Business School and ESRC Electricity Policy Research Group, University of Cambridge gave an opinion that the term regulation in the context of electricity market means the intervention to restrain the operation of market prices or to set standards (e.g. for quality or system security) see Fereidoon P. Sioshansi, *Comparative Electricity Market: Design, Implementation, Performance* (2008), p. 19.
model for electricity liberalization is the “British model”. It began in the late 1980s when the electricity industry of the UK was privatized and underwent vertical de-integration.

For electricity liberalization, there are three essential components.²

(1) Reduction of the role of state which can be done in terms of ownership, command and control, prescriptive solutions and direct cross subsidy.

(2) Establishment and encouragement of competition by deregulation, vertical de-integration or so-called unbundling, horizontal de-integration or so-called divestment and regulated third party access.

(3) Provision of choices for consumers and participation in both short term and long term of demand management and responsibility to secure their energy.

**Electricity Market**

Electricity, in economic terms, is a commodity that can be sold, bought and traded. An electricity market is, therefore, a system that leads to purchases, through bids to buy; sales, through offers to sell; and short-term trades.³

**Wholesale electricity market**

A wholesale electricity market happens when generators offer their electricity output to retailers.⁴ That is to say, the electricity generated by a power company is bought and re-sold. It will be re-priced by the retailers and then they will take it into market.⁵ It is the situation in which large volume users of electricity buy the electricity from the producers or marketers instead of buying it from transportation companies. Local distribution companies may participate in the wholesale market on behalf of their customers who do not have access to competing suppliers.⁶

It is said that the wholesale electricity market is open to anyone who can generate electricity,⁷ by connecting it to the grid system and find a counterparty who is willing to buy such electricity. In some cases, they may need to secure the necessary

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³ http://en.wikipedia.org/wiki/Electricity_market
⁷ Lai, * supra* note 5, at 76.
approvals before entering into the wholesale market. In addition, apart from generators, the players in wholesale market also includes those competitive suppliers and marketers that are affiliated with utilities, independent power producers (IPP) who are not affiliated with a utility, as well as some excess generation sold by traditional vertically integrated utilities. As a consequence, the wholesale market is composed of several participants who will compete with each other on the wholesale market.

In order to be a participant in a wholesale electricity market, one does not need to be the owner of a generation plant nor does he need to serve any end-use customers. That is to say, there are individual traders or power marketers playing a role in the wholesale market by purchasing power on the open market and subsequently re-selling it.

**Retail electricity market**

A retail electricity market involves the final sale of power from an electricity provider to and end-use consumer. It exists when end-users can choose their supplier from competing electricity retailers. It is the situation where all users of electricity are able to buy electricity from producers or marketers. In the United States where the full retail competition is provided, the term ‘energy choice’ is generally used for this type of consumer choice. Customers are free to choose supplier, which is incumbent utility supplier, or other competitive suppliers as opposed to being a captive customer to a single provider. The benefit incurred to customers is that competitive retail suppliers provide a variety of service plans that give consumers and businesses flexibility in their energy purchases. They may also offer services to hedge against price fluctuations, provide choices for alternative energy resources, and newer energy efficiency projects. These opportunities granted businesses and consumers to choose the service that fits their needs.

However, for those customers who do not choose other suppliers, they are served by their incumbent utility through a service call “Provider of Last Resort” (POLR, it is also sometimes referred to as “Standard Offer Service, SOS”), the POLA or SOS supplier will then secure its power in need on the wholesale market through a competitive process of bidding.

The retail markets in the US are regulated at the level of the state. “Public Utility Commission” or “Public Service Commission” is the name well known for state regulatory

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8 [http://www.epsa.org/industry/primer/?fa=wholesaleMarket](http://www.epsa.org/industry/primer/?fa=wholesaleMarket).
9 *Id.*
10 *Id.*
11 Cameron, *supra* note 7, at xlii.
12 [http://www.epsa.org/industry/primer/?fa=sold](http://www.epsa.org/industry/primer/?fa=sold).
13 *Id.*
commissions. These commissions in every state regulate a distribution utility’s cost and rate of return for use and upkeep of the distribution system.\textsuperscript{14} Before serving customers, the alternative competitive supplier must be approved by the commissions. The commission also monitors a POLR or SOS utility’s power procurement and approves the results of the process if the process was fair.\textsuperscript{15}

On the other hand, in states where retail competition is not offered, the commissions regulate the expenditure of the monopoly utilities by allowing a rate of return on most costs.\textsuperscript{16} In general, for those states, utilities are vertically integrated and they usually construct, own and operate power plants. In order to curb inefficiencies incurring from monopoly system, it is required by many states that the utility power resources be acquired through a competitive bid process.\textsuperscript{17}

**Competition Law and Electricity Market**

"Competition (antitrust or antimonopoly) law should be a general law of general application; that is, the law should apply to all sectors and to all economic agents in an economy engaged in the commercial production and supply of goods and service. In this regard, both private and public (i.e. State) owned and operated enterprises should be subject to the same treatment."\textsuperscript{18}

Regarding the application of competition law in the electricity industries, there are two main ideas; (1) the competition law should govern the electricity industry, and (2) the competition law should not govern the electricity industry but there should be special law to regulate the industry instead. Japan and South Korea are countries which do not apply the general competition law to electricity industry whereby Japan’s 1947 Anti-Monopoly Act stipulates that the provision of Section 3 of the Act (Prohibition of private monopolization and unreasonable restraint of trade) shall not apply to conduct characteristic of natural monopolies (public utilities). In regard of Korea, the Monopoly Regulation and Fair Trade Act stipulates in Article 58 that the Act shall not apply to the acts of an Enterprise of Trade Association conducted in accordance with any Act or any decree under such Act. That is to say, the Act shall not govern regulated businesses under specific laws and regulatory bodies such as natural gas, water, public health, and electricity. On the other hand, the other idea that the competition law should govern the electricity industry even though holding characteristic of natural monopoly conforms

\textsuperscript{14} Id.
\textsuperscript{15} Id.
\textsuperscript{16} Id.
\textsuperscript{17} Id.
with the ultimate purpose of the competition law. As the ‘best practice’ of competition law, it recommends that the law should be a general law of general application which should apply to all sectors and to all economic agents in economy engaged in the commercial production and supply of goods and services. The United Kingdom, the United States and the European Union are examples of countries applying general competition law in electricity industry. In addition, in the United Kingdom, the responsible agency under the general competition law and that of the special law regulating electricity industry cooperate to effectively create competition in the electricity market.

**Competition Law and Liberalization of Electricity Market in Thailand**

The Constitution of the Kingdom of Thailand B.E. 2550, Article 84, supports the concept of free market, ensures free and fair competitive market and prevents direct or indirect monopolistic behavior in order to protect consumers. Article 87 of the Constitution also encourages participation of private sectors in public services. In addition, the 10th National Economic and Social Development Plan supports the idea of a competitive market. This is based on the premise that a competitive market is benefits consumers who are able to choose the products that suit them in terms of quality, price and after-sale services. For legislation, Thailand has the Trade Competition Act of 1999 that has crucial aim to regulate all restrictive trade practices in all areas of business that create or might create a monopoly or decrease competition.

However, for electricity utilities, the dominant entities, which are the Electricity Generating Authority of Thailand-EGAT, the Metropolitan Electricity Authority-MEA and Provincial Electricity Authority-PEA hold their status as state-owned enterprises. This corresponds to the exemptions of the Trade Competition Act of 1999 as one of the exemptions are state-owned enterprises to which the act shall not apply. Therefore, even though the Energy Industry Act of 2007, of which the goal is to restructure the energy industry, enhances greater role of private sectors, in energy industry and prevents abusive use of monopoly power, applies directly in electricity industry, the author is of the opinion that by this circumstance, competitive market will not completely happen. The Energy Industry Act of 2007, through its regulatory body, the Energy Regulatory Commission, will be only a middleman that helps recruit new players in the industry but EGAT, MEA and PEA will still be the main players who truly monopolize the market.

The monopolistic features of the three main entities are supported by several explicit facts. The first circumstance that supports this is that, from the upstream phase, apart from sources power on its own capacity, EGAT is the sole buyer of power generated from other generating such as IPPs. In this circumstance, EGAT holds its power to select and impose conditions on those IPPs in the power purchase agreements. Competition in
the wholesale market has not yet occurred for the time being. Moreover, there is a report showing that EGAT is a holding company in various energy companies of the country.\textsuperscript{19} This can be assumed that EGAT can control the energy market in the country indirectly which also reflects the monopolistic character as the dominant player in the market. For the transmission phase, EGAT is also the only owner of the transmission grid and it is the only operating entity. In downstream electricity market, the monopolistic status is quite obvious because, at the moment, MEA and PEA are solely responsible for distribution and billing of electricity in the country. Consumers have no other choices but to accept MEA and PEA. If the consumers are not satisfied with services of these two incumbents, they have no other choices.

Comparing to electricity market in foreign countries, the United Kingdom which is known as a successful country in liberalizing its electricity market has adopted the EC Treaty and The Competition Act of 1998 as general competition law and has enacted the Electricity Act of 1989 and The Utilities Act of 2000 as special laws in the area of electricity. In this case, the author is of the opinion that the agencies established under the Competition Act and the Utilities Act, namely OFT and Ofgem respectively having their parallel functions, are competent organs to monitor competition in the country.

The Competition Act grants the Gas and Electricity Market Authority and also other sectorial regulators concurrent powers to apply and enforce Article 81 and 82 of the EC Treaty together with Chapters I and II prohibitions. The authority has the ability to investigate suspected violations under Section 26-28A, impose interim measure during the investigation under Section 35, to give directions to end such violations under Section 32, to apply Article 81(3) to agreements violating Article 81(1) and Section 9 to agreement violating Chapter I prohibition, to accept binding commitments to address competition concerns where appropriate by virtue of Section 31A, and to impose financial penalties on undertakings of up to 10 percent of an undertaking’s worldwide turnover in the business year preceding the date of the decision.\textsuperscript{20}

As the UK is a member state of the EU, OFT is also granted power to assist or act on behalf of the European Commission in connection with European Commission’s investigating regarding Article 81 and 82. The OFT can undertake an inspection on behalf of a national competition authority of another Member State when requested. On the other hand, the authority does not have direct powers under the CA98 to be an assistant of the European Commission or other Member States to undertake any inspection on their behalf. Ofgem, however, can assist fully in such investigations which are under Ofgem's areas of jurisdiction and under Ofgem's expertise.\textsuperscript{21} The jurisdiction of the Authority in light of

\textsuperscript{19} http://pr.egat.co.th/AnnualReport/annual2008/annual08_th/annual2008th_p22.pdf.
\textsuperscript{21} \textit{Id.}
the application of Article 81, Article 82, Chapter I or Chapter II prohibitions is provided in Section 43 of the Electricity Act 1989. Ofgem, in its jurisdiction, will examine on a case-by-case basis whether the agreements or conduct in question relate to commercial activities connected with the generation, transmission or supply of electricity.

Regarding the competition law of Thailand, as discussed earlier that the Trade Competition Act B.E. 2542 contains Section 4 which provides exemptions whereby the Act does not cover the trade of state-owned enterprises including EGAT, MEA and PEA.

In order to enhance free market economy in Thailand and to decrease monopoly, there are two suggestions in different points of view. The first suggestion is the idea which supports the opinion that the Trade Competition Act B.E. 2542 should be amended so as to cover the act of state-owned enterprises to make them compete on an equal footing with the private sector. At present, not only in the area of electricity in which competition between state-owned or government’s companies and private sectors arises, there are also a number of other businesses in which private and government sectors compete such as, telecommunications, other energy industries and air transport services and where a level playing field shall be created. On the other hand, the other idea is influenced by the concept introduced by Japan in which the natural monopoly is not governed by the competition law but is regulated by special law and specialized agency organization. The two mentioned suggestions could be elaborated as follows.

- **The Trade Competition Act B.E. 2542 should be amended to cover the act of state enterprises.**

Regarding the scope of the Trade Competition Act B.E. 2542, as discussed earlier in topics 4.2.3.3 and 4.2.3.4, it governs undertaking in agriculture, industry, commerce, finance, insurance, service and other undertakings prescribed by Ministerial Regulations. The scope of the act should be extended to state owned enterprises which compete with public sectors in various kind of business including energy industries.

In the arena of electricity industry, the provision of exemptions relating to the issue is subsection (2) of Section 4 of the Trade Competition Act B.E. 2542 which excludes the Act from application to state enterprises under the law on budgetary procedure. The provision of Section 4 of the Act has been influenced by antitrust and trade competition law of Korea which has been accordingly influenced by the same law of Japan. In Korea, the scope of the antitrust and trade competition law does not apply to regulated industries including electricity industry as there is a special law establishing

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a regulatory agency for the industry, therefore there is no need for such industry to be
governed by the general antitrust and competition law to avoid redundancy. In Japan,
the scope of antitrust law and trade competition relating to electricity industry is alike to
such of Korea whereby the law of Japan does not govern natural monopoly which includes
electricity industry.

However, even though the antitrust and competition law of Japan and Korea
which are the model of the Section 4 of the Trade Competition Act B.E. 2542, it is
suggested that the scope of this exemption should conform to the economy of one
country. A good example is earlier mentioned whereby the UK laws demonstrate the
possibility that redundancy can be avoided in applying the Competition Act as the general
competition law and special law which is the Electricity Act. Furthermore, there is the
evidence showing that some Thai economists do not agree with the idea that the Section
4 of the Trade Competition Act B.E. 2542 should exempt state enterprises because
almost all public utilities such as electricity, water, air transportation, rail transportation
and maritime transportation are undertaken by state enterprises. In view of the
service sector, such state enterprises hold dominant position and in some services are
monopolistic, for example, electricity generation, electricity transmission and distribution,
purchase and sale of natural gas and water supply. In this case, it is observed that
this problem arises from the law establishing state enterprises which give them monopolistic
power for example, EGAT is the sole entity to sell electricity to end users while other
generators have to sell their power to EGAT under the system of enhanced single
buyer.

In order to amend the Trade Competition Act B.E. 2542 by imposing conditions
to include state enterprise within the jurisdiction of the Trade Competition Act B.E. 2542,
it is suggested Section 4 should be drafted as follows.

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24 Id. at 1.
25 Id. at 244.
26 See Nipon Poapongsakorn and Deunden Nikomborirak, Reviewing the Regulatory Reform Process in Thailand, a paper presented at APEC-OECD Cooperative Initiative, October 2003, Vancouver, Canada, p. 130, 134; Id.
28 Thanitkul, supra note 24, at 246.
29 ปี 2548 ถึงวันนี้ ค่ากระแสไฟฟ้า รวมถึงการไฟฟ้า ที่จ่ายจากรัฐบาล ในการขายกับคู่ค้า ที่ต้องจ่ายราคาไฟฟ้า
ประเภทที่จะจ่ายเป็นเงิน คุณภาพ 2548 (Piyasasti Amaranand, “Electricity liberalization: may it be accomplished” in, Energy For Environment Foundation, Direction of Electricity Industry: Watchful issues (2005)).
Section 4: This Act shall not apply to the act of:

1. ...

2. State enterprises under the law on budgetary procedure which do not compete with private sectors;

3. ...

However, as a consequence, the problem of interpretation and giving definition may arise because it is difficult to clearly indicate whether a state enterprise compete with private sectors or not. In this case, it is suggested that a committee may be appointed in order to consider the matter on a case-by-case basis.

Regarding the rule to investigate whether a state enterprise competes with the private sector or not. It is suggested to consider the followings factors:

1. Objectives

The objectives of operation of the state enterprise in question should be considered whether it aims to trade so as to obtain benefit as a reward for its goods or service. If its objectives are so discussed, such state enterprise is explicitly a player exploiting mechanism of market; demand, supply, pricing. Therefore, if there is any other competitor in the same market, all competitors should be treated under the same rule without any exemptions.

2. The number of provider

It should be considered whether the goods or services of the state enterprise in question is produced or serviced by such state enterprise as a sole operator or not. This is to say there is no other entity producing or providing the same product or service than such state enterprise. If there is any other entity providing the identical products or services, it means there is a possibility that competition exists in a market.

The following sequence is to investigate whether there is competition in the market or not. For this issue, the Pluralist School suggested that the method of empirical research should be applied to investigate the competition in a market rather than economics theories. The idea was given with a root belief that imperfectly competitive market exists in the real situation especially when market becomes oligopoly. Therefore, even though there are a few competitors, the market should be introduced competition as much as possible, or what the Pluralist named “Workable Competition.”

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30 Thanitkul, supra note 24, at 54.
32 Id. at 54.
- The natural monopoly should not be governed by competition law but should be regulated by special law instead.

As discussed earlier that this idea is accepted by the Japanese competition law. Regarding this model, special law is required together with an entity to regulate the market in order to guarantee fair competition in such market.

Notable Legal Aspects for the Liberalization of the Electricity Market in Thailand

Because the law is one of the most important factors rendering free and fair competition to the electricity market, the followings are suggested aspects to be taken into consideration so as to develop electricity liberalization in Thailand.

**Competition in Generation**

The situation of electricity generation in Thailand at the moment is likely to increase in the number of electricity generators. The projects of IPP, SPP and VSPP are continuously increasing. However, as discussed earlier that Electricity Generating Authority of Thailand Act B.E. 2511 gives power to EGAT, as the main body responsible for providing electricity to the distributing phase, MEA and PEA, to end users, therefore, other generators have to sell their generated electricity to EGAT if they want to trade their electricity. Moreover, to introduce competition in generation phase can be a measure to decrease burden of government in light of cost and also may attract investment from keen investors.

**Third Party Access**

The principle of “third party access” is important for the transmission phase in order that the electricity generators can access to the grid line. This shall be useful for opening wholesale and retail markets. The main body to enforce this doctrine is the regulatory body, for example Ofgem of UK, which should be an independent body.

Regarding Thai electricity market, the author is of the opinion that the government, namely EGAT, should continually govern the transmission phase. The transmission phrase should not be opened in light of ownership because it is very important for electricity system. However, ownership is separated from regulative power. At present, EGAT is generators, owner of transmission system and also regulatory body simultaneously. In this issue, the author is of the opinion that the regulative power should be granted to the Energy Regulatory Commission.
Encouragement of Renewable Energy

It is important for the world today to protect environment. Renewable energy of which the sources are wind, sunlight, tides, rain and geothermal heat is considered clean energy and naturally replenished. Therefore, encouragement of renewable energy is supported through law and legal measures in many countries at the moment. For example, Power Purchase Agreement with generators of renewable energy is supported, as well as Energy Taxation which is revised in the EU at the moment.33

Energy Security

It is undeniable that energy is one of the most factor driving human life and economy. Recently, energy security has moved up the public policy agenda into the first priority of problems to be addressed by governments. The term ‘Energy Security’ may be referred to as the ability of the energy industries, fundamentally in gas and electricity, to provide their respective service throughout a territory to a high standard and at a reasonable cost in a competitive, fully liberalized market.34 In this regards, laws and regulatory measures are part of effective measures to address this problem.

In the EU, the Electricity Security Directive35 was enacted to address this problem. The directive defines security of supply as 'the ability of an electricity system to supply final customers with electricity, as provided for under this Directive.' The goal of this directive is to safeguard the security in order to ensure the proper functioning of the internal market for electricity and also to ensure an adequate level of generation capacity, an adequate balance between supply and demand, and an appropriate level of interconnection between Member States for the development of the internal market.36 Furthermore, the directive also intended to establish a framework which allows Member States to define transparent, stable, and non-discriminatory policies on security of supply for electricity compatible with the requirements of a competitive internal market for electricity.37

Conclusion

As electricity industry in Thailand is mainly operated by state enterprises, namely EGAT, MEA, and PEA, such state enterprises are subject to the exemption provided by Section 4 of the Trade Competition Act B.E. 2542 whereby granting them dominant position

33 A proposal for a Directive amending Directive 2003/96 restructuring the Community framework for the taxation of energy products and electricity has been expected. The dated anticipated for entry into force of the revised directive is 1st January 2013.
34 See Cameron, supra note 7, at 518.
37 Cameron, supra note 7, at 528.
in the market. This situation leads to efforts to amend the Section 4 of the Act in order that the exemption can be removed. Nonetheless, after having considered the impact of the amendment of the Trade Competition Act to the economy of the country as a whole, the author is of the opinion that merely the amendment of Section 4 of the Trade Competition Act B.E. 2542 may not generate competitive market in electricity industry as there must be other factors to consider since electricity is a sensitive issue which can affect the economy and well-being of the people. On the other hand, the amendment shall affect other public services leading to insecurity of economy of the country on the whole. By the reason that Thailand is a developing country, several public services are presently operated by state enterprises, the exemption provided by Section 4 has its underlying reason aiming at public interest. Therefore, amending the said section without preparation of state enterprise in every sector may cause problems to public services, welfare of living, and economy of the country.

For electricity industry, since it is one of the most important infrastructure driving economic activities of the country, it is suggested that liberalization of electricity market should be progressively undertaken. Plans and transitional schemes are encouraged to be taken into consideration together with appropriate market design considering the economy of Thailand as a whole. At the beginning, it is suggested that competition in electricity generating activity should be established. The reason is merely EGAT alone cannot generate adequate power to meet the demand of electricity which is continuously increasing, therefore, in order to support EGAT, IPPs, SPPs, and VSPPs should be encourage to participate and compete in this level. The author seconds the idea that EGAT should continue to be the single buyer of electricity power and the owner of the transmission infrastructure because this can ensure other generators that the power generated by them will be bought. In this regard, EGAT should lower its activity of generation but take full responsibility in transmission phase instead. As a result, the generation phase shall be left to those IPPs, SPPs and VSPPs which are private sectors leading to the circumstances that the competition in the generation activity will be evident and subsequently the Trade Competition Act can apply without amendment. As another option, instead of amending Section 4 of the Trade Competition Act B.E. 2542, the Electricity Generating Authority of Thailand Act B.E. 2511 should be taken into consideration. In this case, the power and duties of EGAT may be decreased and specifically empower other entities. This scheme has accomplished by the United Kingdom as reflected in the Electricity Act of 1989.

Lastly, to achieve the competitive market of electricity in Thailand, laws and regulations are considered significant legal instruments managing competitive energy market. The explicit policy of national and agency levels is needed as well as cooperation between authorities assigned by the law to control and ensure the best efficiency of competition. Furthermore, since it is undeniable that electricity is nowadays indispensable, it is important to encourage research and development of laws addressing electricity market and also other energy laws in order to enhance and rationalize the energy market of the country.
Orphan Works: Problem and Solutions*

Introduction

It is undeniable that copyrighted works have taken critical roles in our lives and society for a very long time. They are of considerable advantage to society because they helpfully grow human's intelligence and emotional quotient, as well as encourage society's development. As the world becomes more engaged in an information-based society, the value of communicative expression, particularly regarding copyrightable subject matter, becomes increasingly and significantly important and there is no sign that people will cease to produce more works in the future.

To produce a creative and original work, an author invests creativity and interest in the work - the labors of mind, effort, time and sometimes money. The outcome, even intangible, is as much a man's own as the wheat he cultivates, or the flocks he rears,¹ an author of a work should be able to reap the fruits of his or her intellectual creativity. Copyright was initiated whereby a bundle of exclusive, yet time-limited rights, subsisting in a work, are granted to the author or the copyright owner. However, to make the most benefit from these copyrighted works, they must be made accessible to the public in one way or another. Normally, people may use them either by obtaining licenses directly from the owners or by way of copyright exceptions and limitations provided by law.

In case permission is required, a would-be user will seek the copyright owner and ask him or her for a license through a negotiation of terms and conditions. Some deals may be successfully concluded; some deals may not. Noticeably, copyrighted works extensively appear in our daily life.

* This article is summarized and rearranged from the thesis “Orphan Works: Problem and Solutions”, The Master of Business Laws (English Program), Faculty of Law, Thammasat University, 2011.

1 Woodb. & M. 53, 3 West. L. J. 151, 7F.Cas. 197, No. 3662, 2 Robb. Pat. Cas. 303, Merw. Pat. Inv. 414
and can be found in diverse forms wherever we are. It is not surprising if some works are left orphan where copyright owners cannot be identified or located even after a diligent search. Orphan works become a problem when people wish to use them but will never be able to obtain the owner's authorization because of low identifiability or locateability even subsequent to a reasonable due diligence. Despite being orphan, value and benefits of the orphan works persist and are economically and educationally attractive.

Insofar as the copyright law is in full operation to protect copyrightable works, the orphan status of works can be problematic. The problem, however, has not been formally enumerated at an international level. No mechanism has been implemented in international conventions or agreements. Even so, the orphan works problem increasingly and momentously garners global attention. Some countries have devoted their attempts to address the problem for conducting years by research and discussions among governmental and private sectors, proposing new draft laws as well as enacting particular provisions as amendments to copyright laws, in the hope to have orphan works utilized to an advantage.

This article is divided into five main parts. The first part will study the nature and consequences of the orphan works problem to better comprehend the issue. The second part will focus on foreign orphan works schemes by analyzing three different existing/proposed solutions of three countries, i.e. Canada, Denmark and the United States of America, so as to provide a basis for plausible recommendations to Thai law. The third part will discuss the orphan works situation in Thailand. The fourth part will discuss proposed appropriate solutions, both non-legislative and legislative, to Thai copyright system. The final part is a conclusion.

1. Nature and Consequences of the Orphan Works Problem

The term "orphan work" is defined in various papers. Though those definitions do not use identical wordings, they convey the same meaning: a term of a copyrighted work where the copyright owner cannot be identified or located by someone who wants to make use of the work in a manner that requires the copyright owner's permission.²

It is worth highlighting the realm of the problem here that an orphan works situation does not include circumstances where the copyright owner can be and/or is contacted but permission for potential use is not granted, either because the owner does not respond to the request, denies the request, or requires a license fee or other condition

that is not acceptable to the would-be user. These situations indicate that the copyright owner is identifiable and locatable. The only problem left there between the parties is about negotiation. If the deal cannot be concluded, no one or nothing else can help. Where a copyright owner is identifiable and locatable, it would be unsound and improper to interfere with the enjoyment of his or her exclusive rights whether to set out the terms upon the permission or even to refuse the deal. This is, therefore, not an orphan works problem and not within the scope of this article.

From its definition, an orphan work is just an ordinary copyrighted works with additional conditions with respect to the existence of an owner. If a copyright owner becomes unidentifiable or unlocatable, a work in question turns into an orphan work. A copyright owner cannot be identified or located in several situations. Firstly, it is possible that there is neither author's name or address nor indication about copyright ownership on a work. Secondly, though the creator or original copyright owner can be identified, there could be events that a would-be user does not have enough information to locate him/her because of, for example, change of address with no record of the new address. Changes discussed herein may include death or dissolution of the copyright owner where it is difficult or even impossible to identify or locate an heir of such owner. Dissolution of a business entity is regarded as a frustrated change in circumstance. Finally, even with sufficient information to identify and locate the creator or original Copyright owner, there may be little or no way to identify and/or locate the current owner of the copyright because of a change or transfer of copyright ownership, if not recorded.

In an orphan works situation, there would be some significant consequences to take into account. To begin with, the would-be users face uncertainty in exploiting the work. It is impossible to realize if the copyright owner would permit the intended act or what conditions that would be imposed on the restricted act if permitted. The risk of being sued in an infringement case is sufficient to scare away any would-be users and make them promptly cease their projects.

Some would-be users might view, however, that they had already carried out a diligent search with their best efforts in identifying and locating the copyright owners. It is then fair enough to use their works even without their permission. Or, they might think that after a very delicate search as much as practicable, a contingent lawsuit is far remote from his or her potential exploitation. The uses of orphan works arise without consent and the orphan works problem heightens a possibility of copyright infringement.

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4 Brianna, supra note 3, at 1.

5 It must be noted that this problem is not the case where the would-be users or potential infringers decide in the first place to infringe the copyright of orphan works.
The situation is exacerbated if the would-be users or potential infringers not only just use the orphan works without permission, but also refer them to be their own works. In an orphan works situation, the would-be users might think that it is unlikely that the copyright owners would reappear because of their very diligent search and interpret it as an opportunity, on a basis of bad faith, to falsely claim those orphan works as their own and seek to gain money from that exploitation.

Such use would be unfortunate and inconsistent with the purpose of copyright laws. If the orphan works are ignored, in terms of economics, it leads to the stage that the economy is not stimulated as it could be. The situation of orphan works also discourages creativity; no derivative works are created. A productive and beneficial use of the work is impeded and, consequently, the progress of science and useful arts is not encouraged and promoted. In terms of social and cultural rationale, orphan works that could serve a valuable social or cultural purpose would be abandoned and disappear because no use or adaptation can be legally made. The works would eventually be forgotten and vanish. The most heard economic argument is that an orphan work's economic value is close to nothing and thus use should be permitted.

2. Orphan Works Situation in Foreign Countries

In general, there are various solutions for the orphan works problem but the three distinguished approaches that receive the most attention in the copyright world are (i) a compulsory licensing system, (ii) an extended collective licensing system, and (iii) a limitation on remedies approach.

2.1 Canada: Compulsory License

Canada is one of those states that have an orphan works regime in force and, it seems to be most advance and practical in response to the orphan works problem. The system in Canada employs a compulsory licensing system, in which the copyright owner is deemed to have involuntarily given permission to potential uses through the Copyright Board of Canada. A non-exclusive license is given for use of works, performance, sound recordings and communication signals that are published or fixed, as the case may be, when the copyright owner is known but cannot be located.

Under the Canadian compulsory licensing system, a would-be user who has already utilized a diligent effort but eventually cannot locate the copyright owner of an orphan work, may complete and submit an application for potential use of such orphan

6 Gompel, supra note 3, at 3-7 (suggesting 6 solutions (i) rights management information, (ii) extended collective licensing, (iii) indemnity or security, (iv) license to use an orphan work, (v) limitations on remedy rule, and (vi) exception or limitation).
7 Copyright Act of Canada, s 77.
work to the Copyright Board of Canada. The Copyright Board of Canada then examines the application and, if satisfied, issues a license for use of such orphan work provided that the applicant shall pay royalties as determined to a copyright collective society that would normally represent the unlocatable copyright owner. The copyright collective society is allowed to dispose of the royalties as it sees fit for the general benefit of its members as long as it undertakes to reimburse the copyright owner, if he or she surfaces. If the copyright owner subsequently surfaces, he or she may collect the royalties fixed in the license and paid to the collective society within five years from the expiry of license term. Without the claim, the collective society will be released from its undertaking of reimbursement.

The most attractive characteristic under this system is that it offers legal exploitation of orphan works. While the system attempts to shelter the rights of the copyright owner, even unlocatable, by providing royalties from intended exploitation, being a legal right provided by statute helps safeguard the user of orphan works against civil and criminal liabilities of copyright infringement. The flexible case-by-case basis is also interesting because each work independently requires different degrees of searching. One may need more or less than another. Moreover, it helps scanning out any sham search of opportunistic users. Since the system was introduced in 1990, there were 252 licenses issued for uses of orphan works,9 some applications were abandoned and withdrawn because with the help of the Copyright Board or the licensing society the copyright owner was located. Only eight applications were formally denied.10

The Canadian system, nevertheless, is criticized because the process to obtain a license is expensive and the result is so unpredictable that it may block some applications of intended uses.

2.2 Denmark: Extended Collective License

Another alternative solution is the system of “extended collective licensing” which has been incorporated in legislation of the Nordic countries - consisting of Denmark, Finland, Iceland, Norway and Sweden - in the early 1960s.11 Denmark also introduced its extended collective scheme in the 1970s.

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8 Unlocatable Copyright Owners Brochure, available at http://www.cb-cda.gc.ca/unlocatable-introuvables/brochre1-e.html. See also McDonald, supra note 3, at 158.
9 Information as of 31 March 2011.
10 Jeremy De Beer and Mario Bouchard, Canada’s “Orphan Works” Regime: Unlocatable Copyright Owners and the Copyright Board 3 (2009). See also Unlocatable Copyright Owners Brochure, supra note 9 (providing all issued and denied applications).
11 Terese Foged, How Internet Radio Plays in Accordance with U.S. and Danish (EU) Copyright Laws 32 (2002). Such kind of license has been also recognized in the EU Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission.
Basically, the classic/traditional collective management system managed by collective management organizations ("CMOs") is accounted for on a voluntary basis of which the owners of rights have given the mandate to CMOs to represent them following an "opt-in" formula. Often, it is impossible for a CMO to acquire a mandate to represent all owners of rights. The copyright law therefore extends the traditional collective management system to include other non-represented copyright owners of the same type of works in a repertoire of a respective CMO—a legal extension of the repertoire. If they do not exclude themselves, it means that it follows an "opt-out" formula. On the other hand, it is contemplated that the non-represented copyright owners are implicitly compelled to have permitted use of their works. This system is thus called a hybrid between compulsory licenses (on the non-represented part) and traditional collective licenses (on the represented part).

With the function of this system, unidentifiable and unlocatable copyright owners are also included in the CMOs' repertoire where would-be users may contact and negotiate for approval to use orphan works, irrespective of how difficult a search for the unlocatable copyright owners may be. So long as they do not opt out of the system, a CMO of all similarly-situated copyright owners may manage all rights and approve licenses on behalf of similarly-situated absent copyright owners. The copyright owners who resurface after their works were used may collect the royalties paid for use of their works by making a claim directly to the respective CMO. If the reappearing owner does not wish to participate in the extended collective licensing regime, he or she may choose to opt out of the system.

The Danish system considerably facilitates the clearance of rights because a user is entitled to obtain a legitimate license to use all works in the same nature. Nonetheless, to successfully protect the rights of unidentifiable and unlocatable copyright owners while to facilitate the intended users, the CMOs must have proficiency and skill in dealing with the specified type of work through negotiating a contract, collecting paid royalties and distributing the same properly and professionally. However, the opt-out principle may seem unattractive because it creates burdens on non-represented copyright owners to come forward to exclude themselves from the repertoires of collective management organizations. Rather than being of advantage, the Danish system would be troublesome in countries with an underdeveloped collective licensing system.

13 Copyright Act of Denmark, s 50-51.
14 Thomas Riis and Jens Schovsbo, Extended Collective Licenses and the Nordic Experience—It’s a Hybrid but is it a VOLVO or a Lemon?, 33 Colum. J.L. & Arts 471, 471 (2010).
15 Brianna, supra note 4, at 41-42.
2.3 The United States of America: Limitation on Remedies

Though the first bill of the Orphan Works Act of 2006 did not pass,\(^{16}\) the 2008 bills that were introduced later - H.R. 5889 and S. 2913, which were similar but not identical, inherited the same approach as in the 2006 version with more details.\(^{17}\) However, they did not pass when the 110\(^{th}\) Congress ended in January 2009.

Unlike the two approaches discussed above, the essence of the bills lay down a solution after exploitation has taken place by alleviating the risk in using the orphan works by limiting remedies in which the copyright owner resurfaces and commences an action of infringement.\(^{18}\) It means that the committed exploitation still constitutes an infringement of copyright. To use an orphan work, though as an infringing activity, with the entitlement to benefit from the approach, the infringer must have already used a "reasonably diligent effort" that constituted a "qualifying search", in good faith, to locate and identify the owner of the infringed copyright but was unable to locate and identify an owner of the infringed copyright. The purpose of this requirement is to ensure that the works in question are truly orphaned.

The copyright owner who comes forward after the infringing act has been done can only file a lawsuit against the infringer according to the normal litigation process. In case of a qualifying search, the damages will be limited to "reasonable compensation" to the owner, which is an amount on which a willing buyer and willing seller in the positions of the infringer and the owner of the infringed copyright would have agreed with respect to the use of the work immediately before the infringement began. In some cases the infringer may not be required to pay reasonable compensation for the use of the infringed work if the infringement was performed without any purpose of direct or indirect commercial advantage and the infringer promptly ceased the infringing activity. In addition, the infringer, if qualifying conditions require, may not be subject to any injunctive relief but may be able to continue preparing or using the new work so long as the infringer pays "reasonable compensation" to be agreed upon with the copyright owner or determined by the court and reasonably attributes to such copyright owner if requested by the owner.

Even if the US approach provides access to orphan works through limitation on remedies, it is criticized in many aspects. Because the committed exploitation still constitutes a copyright infringement, whether a would-be user will finally be entitled to benefit from the approach is likely and sufficiently to prevent potential use of orphan works. Besides, the reappearing copyright owner needs to commence a lawsuit for compensation where the outcome may not worth all expenses incurred.

\(^{16}\) Available at http://www.orphanworks.net/News/News.html.

\(^{17}\) Jane C. Ginsburg, *The US Experience with Copyright Formalities: A Love/Hate Relationship*, 33 Colum. J.L. & Arts 1, 6 (2010).

3. The Orphan Works Situation in Thailand

In Thailand, the orphan works problem has never been officially discussed and there has never been a case instituted in the court. Yet, this does not mean that the problem does not exist. People in various areas of work, such as government officials, private organizations, museums, movie directors, and computer programmers, revealed that it does not only forestall use and development of copyrighted works whether commercially and non-commercially, but also improperly contributes to infringement of copyright. Some decide to stop their potential exploitations of orphan works when the copyright owners cannot be identified or located while some decide to take a risk and go ahead with infringing use of orphan works.

Digitization of works, such as normal course of practice of digital libraries and museums, is also hindered by the orphan status of copyrighted works. As a result, the goal to preserve and publish cultural and educational works cannot be reached. Particularly in the age of developing information technology while public awareness of copyright protection has gradually increased in Thailand, more cases of orphan works is mushroom and that become an immense obstacle against cultural preservation, scientific and educational development, and social progress.

Furthermore, the orphan works problem will be a big obstacle to successfully achieve the creative economy plan, which is a master plan of the Thai government to stimulate Thai economy. Despite the fact that copyrighted works are increasingly produced, consumed and become a vitally potential driver in the creative economy, the orphan status seriously retards the development progress of economic growth.

Awareness and appropriate solutions are, therefore, inevitably and urgently required. Thai copyright laws, however, have no particular provisions in this regard. It is advisable to propose some non-legislative and legislative solutions to efficiently address the problem of orphan works.

It is worth noting that since the copyright law has to maintain a balance between copyright owners' and users' interests, the suggested mechanisms must therefore vindicate the right of copyright owners while make orphan works available to the public with a safe harbor for users.

4. Proposed Solutions

As it is said that "one is to make the existing system better by helping users and owners to get together while the other objective is to create a safe valve for users that genuinely cannot find an owner so that they can use a work ...", both non-legislative solutions and new legislative mechanism to achieve the first and the latter, respectively, are recommended.

4.1 Non-legislative Solutions

The first non-legislative mechanism is the Copyright Office's campaign in encouraging people to prevent copyrighted works from becoming orphaned. In so doing, they should be educated about the concept of orphan works and its problem and guided to preclude a possibility of the orphan status by (i) providing copyright owner's information, which can be done in the form of copyright notice comprising the copyright symbol (©), name, address and the date of creation or first publication; (ii) specifying author's identity, which is to clear the moral right of authorship; (iii) inserting printmaker's and publisher's information, which is demanded by law for printed materials and that would more or less help locate the copyright owner; and (iv) making themselves available for locating by would-be users, which may be done by recording a work with the Copyright Office. This guideline may be in the forms of leaflets available for any people, whether relates to copyright-based industries or not, and banner posted on the website of the Copyright Office.

The second scheme is to promote participation of the current voluntary recodaration system of the Copyright Office. The system contributes to agreement between copyright owners and users. If recorded by an owner, a would-be user will be able to easily locate him or her and negotiate for authorization to exploit a copyrighted work. Besides, the characteristics of the Thai recodaration system encourage more participation for the following reasons: (i) the system is available for recodaration of any types of copyrighted works, (ii) no recodaration fee is required, (iii) the deposit requirement helps avoid a work from being mistakenly orphaned, (iv) the application can be made by hand, post or by even electronic method, (v) no examination of validity of copyright will take place, (vi) the requirement to record previous or subsequent transfer or licensing or change of information maintains the copyright owner reachable, and (vii) A search facility is available at the website of the Copyright Office. The Office may include these supportive characteristics in the guideline proposed above.

4.2 Legislative Solution

While the above-advised solutions attempt to prevent more orphan works, the legislative approach focuses to directly address the problem of existing orphan works. A study on copyright legal practice of foreign countries reveals three attractive solutions. After thoroughly considering all three schemes with legal and cultural backgrounds of Thailand and Thai people, the most appropriate and systemic mechanism, from the authors' point of view, is the compulsory licensing system in which the Copyright Office may consider giving a license to exploit an orphan work after an applicant has conducted a diligent search but cannot locate the copyright owner and file an application. In return, the applicant must pay a royalty as determined in the license provided that the copyright owner
can come forward and collect such sum. In the attempt to develop legislative mechanism, the following criteria are recommended herebelow:

(i) All types of copyrightable works under the Thai Copyright Act should be eligible for the orphan works regime. There should be no requirement for publication of the work in question. Both published and unpublished orphan works should be also eligible for the compulsory licensing approach.

(ii) Prior to application for a license, a would-be user must already have conducted a search with reasonable efforts to identify or locate the copyright owner in order to prove that a work in question is genuinely orphaned. The standard of search should be interpreted and considered by the Copyright Office on a case-by-case basis. The Copyright Office, however, should suggest some guidelines to constitute a reasonable search provided that those must not be deemed as minimum mandatory methods or a complete reasonable search.

(iii) A would-be user must be required to file an application form for the license coupled with all evidences proving that a thorough search has already been carried out and describing other necessary information collected from the search.

(iv) The most vital issue of this approach is that the user is granted a legitimate right to exploit an orphan work. Upon satisfaction with the evidences, the Copyright Office shall issue a statutory, non-exclusive and non-transferable license in which the intended exploitation can be lawfully completed. Yet, exploitation of the work outside the scope of license require additional independent licenses whereby a user has to start over from the beginning of the whole process.

(v) The Copyright Office may impose any appropriate terms and conditions on the issued license. Most importantly, the applicant must be required to pay royalties to the Copyright Office provided that such payment shall be treated as a prerequisite to the validity of license. The Copyright Office may dispose the royalties paid by the applicant for public interest as it sees fit but it must undertake to compensate the reappearing copyright owner within a period of time specified by law. The applicant must also be requested to attribute to the copyright owner and the author, if known, and maintain a notice illustrating that the work is subject to an orphan work license. Other conditions should be at the sole discretion of the Copyright Office from case by case.

(vi) If the copyright owner resurfaces within a period of time determined by the proposed provision, he or she shall be able to claim entitlement on the royalties paid by the user. In case of default in payment, the copyright owner should
be entitled to commence a legal action against the Copyright Office for collection of royalties.

Since the exploitation of orphan work in accordance with the license issued by the Copyright Office is lawful, it does not constitute an infringement of copyright and, consequently, the copyright owner shall not be entitled to sue the user for copyright infringement.

5. Conclusion

Observation of situations in both foreign countries and Thailand illustrate that the orphan works problem really exists. It is further confirmed that the problem has become increasingly pervasive in many countries. Where copyrighted works are inevitably important to the society, works should be prevented from becoming orphaned as well as possible lawful exploitations are advised.

With above-advised non-legislative and legislative solutions, orphan works will be reduced and the orphan works problem is effectively addressed. While the copyright owners can enjoy their economic privileges, orphan works are effectively made accessible to the public, which will be of considerably advantageous to progressive development of people and Thai society at large.
Tax Depreciation for SMEs*

Introduction

After Tom Yum Kung Crisis during B.E. 2540 (1997), the rise of SMEs has emphasized what the real backbone of Thai’s economy is and magnificently helped excel the economic recovery after the crisis.¹ This steadily strengthens the economic growth, dynamism, innovation and flexibility in consonant with the concept of sufficiency economy. SMEs prominently generate employment to the local area along with help distribute the revenue, particularly in developing countries and accommodate the operational flexibility and competitiveness to the fluctuated economy. Despite many salient features, SMEs incur the adversities and limited capacity induced by intrinsic and extrinsic factors resulted from small capital and short of liquidity which lead to the problem of inadequate technologies, poor market competitiveness, lack of skilled workers, inefficient management, etc.² Hence, the particular role of public sectors to diminish the disadvantage environment for SMEs is indispensable.

As a consequence, the government responds to the frustration by many measures including tax incentives which are the legal environment of business exclusively authorized by the state. Notwithstanding the purpose of collecting revenue, tax instrument is the dominant fiscal instrument for the government to stimulate the investment and foster the economic growth in many countries. The accelerated depreciation, which is designed to allow SMEs to depreciate the capital costs over shorter time period relative to the

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¹ This article is summarized and rearranged from the thesis “Tax Depreciation for SMEs” the requirements for the degree of Master of Laws in Business Laws (English Program), Faculty of Law, Thammasat University, 2011.

estimate economic useful life of the asset, is considerably a significant tax incentive which helps push SMEs into tax loss position. Since company income tax is conventionally collected from the profits of the enterprise, this incentive increases the amount of deductible expense which has to offset with the assessable income for calculating profits of the company and provides magnificent contribution in responding to the genuine financial status of the SMEs as well as granting the financial support by accommodating less amount of tax burden to SMEs, especially during the start-up phase.

In different contexts of countries, various ranges of depreciation for tax purpose regulations are one of the landmark tax policies which can apparently reflect an investment supported by the public sector of each country. Remarkably, the United States which has responded to the significance of the small business during the late 2000s, Great Recession in 2007,\(^3\) by increasing the depreciation for tax purpose for small business by virtue of Section 179 of the Internal Revenue Code. This is regarded as the best tax incentive concerning small business depreciation deduction for promoting the investment in capital investment. Consonantly, Australian tax laws contain certain salient features regarding the eligibility criteria of SMEs that can enjoy the small business tax concessions and anti-avoidance rules for preventing the abuse of small business entity for the concessions and accommodate preferential treatments for capital allowance for small business entities.

Nevertheless, the definition of SME in Thailand, which is the entrance of the incentives, encourages the abusive practice to illegitimately gain benefits from preferential tax concessions intentionally given to SMEs on the ground that the current Thai SMEs laws significantly lack of the anti-avoidance rules. Furthermore, the study on the depreciation for tax purpose for SMEs in Thailand has been limitedly explored. Henceforth, this paper will be focusing on the analysis and cooperative study of tax depreciation policy for SMEs in various selected countries, especially the United States and Australia in analyzing and comparative study.

**Toward the Relevant Definition of SMEs**

Generally, there are two parameters to justify the definition of SMEs i.e. quantitative parameter and qualitative parameter. Firstly, the quantitative approach contains the statistical criteria justified by the number of employees or the amount of assets or the turnover as such, while, the qualitative approach focuses on the economic variables of the enterprise, for instance, the independency of the enterprise, the organizational structure, the involvement of the owner, etc. The quantitative approach consists of the statistical

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\(^3\) an economic recession which began in the United States in December 2007, also known as the Hamburger Crisis caused by the sub-prime mortgage and the falling of the housing prices which spread globally, especially the industrialize world.
criteria, while, the qualitative approach puts the lime light on the economic variables of the enterprises and plays the significant role as the anti-avoidance rules. From an overview, most countries prescribe the definition of SMEs with quantitative approach, by selecting one or combining two of elements together, while some countries incorporate the qualitative approach into the SME's definition, for example, The United States and Australia. Nonetheless, each criteria has the advantages and disadvantages which the policymaker should take into consideration as follows;⁴

1. The Number of Employees

This criteria has been used widely by most of the countries to justify what constitutes the definition of SMEs. The headcount staff refers to the full-time employees which the amount of minimum hours required by the relevant national law governing contracts of employment, including the owners of the enterprise, managers, employees and other subordinates but excluding the part-time workers, the apprentices or vocational training students and seasonal staffs. Nonetheless, it is confirmed opinion among the Wall Street analysts about the notion that the more employees an enterprise has the larger it would be is inaccurate. Some enterprises may need less employees in one sector comparing to others but are still deemed as large enterprises in that sector.⁵ Furthermore, some enterprises may abuse the preferential treatments which are intended to provide to SMEs by hiring unstated number of full-time employees despite its size is too large to be categorized as SMEs definition which is based by the number of employees. Additionally, this employment-base definition disregards the labor efficiency because having more employees does not mean all the workers are efficient.

2. The Value of Fixed Assets

The value of fixed assets criteria is usually used in combination with the number-of-employee criteria. Generally, what constitutes the fixed asset is based on an accounting point of view. Fixed assets are basically referred to long-term assets owned by a firm and used to produce the income or carry on the operation. They are not expected to be sold or converted into cash during the normal cause of business in sooner than one year time, or one accounting period, for instance, land, building, machinery, equipments, leasehold improvement and as such.⁶ Nevertheless, there are disadvantages that the value of fixed assets defined by currency is critically affected by the inflation and the true value of the

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asset is hard to evaluate. Some assets such as computers and mainframe-terminal network are by nature depreciated quickly. Some enterprises with small amount of fixes assets may be SMEs for a year, and will not be SMEs in the next year due to the increase of fixed assets, then, return to SMEs in the upcoming year regardless the true value of fixed assets in reality. In this light, the value of fixed assets may decline in the direction that is not relevant to the increase of the revenues and employment and this criteria does not regard the capital efficiency. Furthermore, some SMEs hardly have an accurate evaluation of their assets and some illegitimately minimize the value of their fixed assets in order to be fall within the definition of SMEs. Additionally, fixed assets are not normally used as the single criteria to provide the definition of SMEs because it is difficult for some enterprises to accurately estimate the value of fixed assets and some enterprises are reluctant to reveal the information concerning these assets to public.\footnote{Gibson, supra note 5, at 12.}

3. The Volume of Turnover

The turnover criteria refers to the value of sale, gross receipt or output per establishment which is basically evaluated by the amount of income the enterprise received from its sales and services. This criteria is accustomed to the entrepreneur and easy to identified on the ground that the turnover is measured in the form of money, particularly for the small businesses in developing countries which usually promote their business by the ability of growth in sale and market share. Incidentally, similar to the disadvantages incurred by the fix assets-base criteria, the amount of turnover defined by currency is significantly affected by inflation which is inconsistent with the fluctuation of economy.\footnote{Id. at 12.} Some enterprises with small amount of turnover may be SMEs for a year, and will not be SMEs in the next year due to receiving large amount of turnover, then, return to SMEs in the upcoming year regardless the spending power and the true value of money in the hand. However, the idea of applying indexation rate of turnover to overcome the problem of overlapping is unlikely on the ground that the flexibility principle harshly contrasts with the certainty of law and the certainty of law should prevail.

The above analysis firmly indicates that each quantitative parameter incurs its own disadvantages of which have to be taken into account. Because of the adverse experiences in providing a single and constant definition for all small business sectors, many countries utilize different criteria to provide the definitions of SMEs depending on the nature, characteristic and scope of the small business sector. Such definitions play significant role on the ground that they help excel the effectiveness of specific measures to advocate the growth of small business sector.
In The United States, the small business size standards are relied on an industry-by-industry basis in order to respond to different characteristics of each industry. In general, by virtue of Small Business Act, small business is defined by The Office of Advocacy of the United State as "an independent business having fewer than 500 employees for manufacturing businesses and less than $7 million in annual receipts for most nonmanufacturing businesses." These thresholds include the amount of employees and annual receipt of affiliates which are the entities or individuals that have substantive power to control the business, regardless such power will be exercised or not. Generally, 50 percents or more ownership will be counted as the power of control, except in certain circumstances. In this light, it is apparently that the United States also adopt the qualitative parameter altogether with the quantitative parameter whereby taking into account of stock ownership, stock options, convertible securities, and agreement to merge, common management, identity of interest between individuals or businesses, including family members and contractual relationships or economic dependency.9

On the contrary to the situation of small business in Australia, which has successfully established the single definition for small business in pursuant to enjoying preferential tax concessions, in light of Small Business Entities (SBE) regime, small business entity according to Subdivision 328-C of Income Tax Assessment Act 1997, refers to the individual, partnership, company or trusts which:

- carries on business activity for all or part of income year, and
- has less than A$2 million aggregated turnover

This definition has been proposed to standardize the eligibility criteria for small business tax concessions in pursuant to reducing the compliance cost. Other than utilizing the turnover-base definition as the criteria to define the small business, Australia has apparently adopted the independency of the enterprise as a qualitative parameter to play the salient role as anti-avoidance provision to stop larger business cleaving their activities to illegitimately access to small business concessions.10 In this regard, the aggregated turnover is individual taxpayer, partnership, company or trusts' annual turnover plus the annual turnovers of any businesses taxpayer are connected with or affiliate with. An affiliate refers to any individual or company which in relation to their business affairs, acts or could reasonably be expected to act in accordance with taxpayer's directions or wishes, or in concert with taxpayer, whereas, an entity is connected with another entity when either entity controls the other, or both entity are controlled by the same third entity. The connected entity criteria to work out if such entity is connected with taxpayer are various

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and based upon different types of entities i.e. control of company, control of partnership, control of trust (other than discretionary trust) and control of discretionary trust.

Generally, Australia establishes the threshold of aggregation rule at 40% stakes for most of the entities. Taxpayer controls the company provided that he, his affiliate or he together with his affiliate has an interest or control percentage in the company at least 40%. This is counted by the possession of share and other equity interests, the voting power in the company, right to acquire at least 40% of any income or capital distributed by the company. For partnership, taxpayer controls the partnership when he, his affiliate or he together with his affiliate owns the right to acquire partnership’s net income or capital at least 40%. Moreover, there is the indirect control test which plays the significant role as an anti-avoidance rules by evaluating on throughout business structure between taxpayer and other interposed entities. Taxpayer will be treated as controlling the third entity when he directly controls the second entity and the second entity either directly or indirectly controls the third one.11

In Thailand, the definition of SMEs is based on the authorized organization and the purpose of use, including diverse definitions of SMEs within tax aspect. For the depreciation, for tax purpose, SMEs in this regard refers to “The juristic company or partnership whose fixed assets excluding land is not more than two hundred million baht and has hired labor of not more than two hundred persons.” This definition is in consonant with general definition prescribed by the Ministry Regulation in conjunction with the Small and Medium Enterprises Promotion Act, B.E. 2543 (2000).

Incidentally, comparing to the definition of small business in the United States and Australia, it is apparently that the definition of SMEs in Thailand is silent in qualitative parameter. Even though there are not many countries that have adopted qualitative parameter, lacking of qualitative parameter will raise the issue of tax avoidance and abusive of preferential tax regime through controlling or dominating SMEs by large company which is not eligible for such tax concessions. Other than the imperfection of each criteria itself, whichever criteria is adopted as the definition of SMEs, taxpayer can commit tax avoidance if there is the quantitative parameter without the qualitative parameter. Thus, it is significant that the definition of SMEs should cover both quantitative and qualitative parameter.

Of all the group, Australia is only the country which has successfully launched the universal definition of SMEs for tax concessions and provided the anti-avoidance rules specifically for tax purpose in Subdivision 328-C of the Income Tax Assessment Act 1997 (ITAA 1997). Furthermore, the categories of the control test based on various types of the enterprise in Australian law are considerably similar to tax unit prescribed in Section

39 of the Revenue Code concerning the definition of company and juristic partnership subjected to pay corporate income tax. Thus, this would be the most compatible to adopt the Australian concept and apply as anti-avoidance rules in Thailand.

In this regard, the aggregation rules can be applied to all the quantitative criteria, regardless the existing criteria, i.e. the number of employees and the value of fixed assets, or the amount of turnover (as the case may be). However, in pursuance to incorporating these rules in Thailand, some adjustments are indispensable on the ground that the definition of SMEs in Thailand does not include trust, regardless the discretionary trust and the trust other than the discretionary trust. Furthermore, in Australia, each partner of the partnership is considered to be an individual taxpayer and has to pay tax on the shares of partnership’s net income, therefore, partnership in Australia cannot be any affiliate for this purpose. Nevertheless, in Thailand, general partnership is one of the personal income tax unit apart from an individual, whereas, the juristic partnership is another corporate tax unit subjected to the corporate income tax. Thus, the general and juristic partnership can be constituted as an affiliate by applying the aggregation rules when such general and juristic partnership, in relation to their business affairs, act or could reasonably be expected to act in accordance with taxpayer’s directions or wishes, or, in concert with taxpayer.

Additionally, in the case of joint venture, although by nature and characteristic, joint venture is larger than SMEs, it is one of company tax unit according to Section 39 of the Revenue Code and it is possible that some small businesses will be the part of joint venture. Hence, the distribution of income or capital derived from incorporating joint venture should be included in the aggregation rules. In this sense, despite the intrinsic imperfection of the income aspect, the definition of SMEs by turnover which can access to the volume of revenue the company is the most compatible criteria to prevent the enterprise to go around the definition of SMEs. Moreover, the application of the aggregation rule in Thailand should include individual taxpayer in order to cover throughout the extents. Hence, the proposed definition of SMEs should take into account of the aggregated number of employees or the value of fixed assets, or the annual turnover (as the case may be) of that individual taxpayer, partnership, company’s number of employee or

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12 Section 39 of the Internal Revenue Code of Thailand stipulates the corporate income tax entity that

[J]uristic company or partnership means a juristic company or partnership organized under the Thai or foreign law, and shall include- (1) A business operating in a commercial or profitable manner by a foreign government, organization of a foreign government or any other juristic person established under a foreign law; (2) A joint venture, operating in a commercial or profitable manner, between a company or juristic partnership on one hand and companies, juristic partnerships, individuals, non-juristic body of persons, ordinary partnerships (3) A foundation or association carrying on revenue generating business, but does not include the foundation or association as prescribed by the Minister in accordance with Section 47(7) (b); (4) Any juristic person as prescribed by the Director-General with an approval of the Minister and published in the Government Gazette.
the amount of fixed assets, or the annual turnover (as the case may be) plus the number of employees or the value of fixed assets, or the annual turnover (as the case may be) of any businesses taxpayer are connected with or affiliated with.

Depreciation for SMEs

The depreciation for tax purpose incentive is the prime instrument to stimulate the enterprise to purchase necessary equipments in order to generate the assessable income of business which is liable to income tax on the ground that the capital assets, subjected to the depreciation deduction allowance, are the fundamental and indispensable component to carry on business. Hence, depreciation for tax purpose on the capital assets is the entrance of the firm establishment of enterprise which significantly enhances direct effect to the income tax rate reduction since the depreciation deduction allowance is recognized as the expenses of the enterprise. The more depreciation allowance, the higher expense can be subtracted with the assessable income and the lower amount of tax incurred. Furthermore, the remaining profit after-taxed which is directly distributed to the investors may be eligible for venture capital gain incentive. Thus, by granting the depreciation for tax purpose as an investment incentive, the whole stimulus packages will be advocated from the investment in SMEs at the fundamental part of the enterprise.

1. Initial Depreciation Allowance

In the United States, Section 179 of the Internal Revenue Code intends to stimulate the economy through small businesses in the United States on the notion that business favors to buy more assets in such tax years instead of waiting, provided that they are allowed to write off the entire equipment purchase price at the year of acquisition. This provision, as amended by The Small Business Jobs and Credit Act of 2010 (HR 5297), allows the business to immediately write off deduction to $ 500,000 with the capital expenditure phase-out threshold exceeding $ 2 million for the tax year 2010 and 2011. This means the enterprise that purchases sufficient amount of annual property in conformity with the law can, instead of depreciating such property over the economic useful life, opt to fully and immediately write off as expense of the capital cost of assets.

In Australia, in order to deal with the worldwide economic downturn and encourage the investment in capital assets, the small business tax break is granted by virtue of Tax Laws Amendment (Small Business and General Business Tax Break) Act 2009 by allowing small business entity to deduct the certain new investment in the qualified tangible capital assets at the rate of 50% of the cost basis before allocating such assets to small business pools provided that;¹³

The enterprise is constituted as small business entity for the income year that taxpayer 'commit to the investment', put asset to use or claim tax break.

Asset is committed to investment between 13th December 2008 and 31st December 2009.

Asset is first used or have installed and ready for use, or modified or improved (in the case of improvement of the existing capital assets), on or before 31st December 2010.

The A$ 1,000 new investment threshold for small business entity is satisfied

Assets must be used principally in Australia for the principal purpose of carrying on a business.

Comparing to Thailand, in pursuant to developing the depreciation for tax purpose to play the dominant role to encourage the establishment of the firm as SMEs, the existing initial allowance for SMEs granted under the Royal Decree issued under the Revenue Code governing Deduction of Wear and Tear and Depreciation of Assets (No. 145) B.E. 2527, is afforded to some qualified assets as follows;

- 40 % of the cost value for the machinery and equipment
- 40 % of the cost value for the computer hardware and software (and then the remaining value will be depreciated within 3 accounting period)
- 25 % of the cost value for factory buildings
- 100 % of the cost value for any other assets according to Section 4 of the Royal Decree No. 145, by nature liable to wear and tear or depreciation excluding land and stock-in-trade provided that such asset is purchased and placed in service from 7 August B.E. 2551- 31 December B.E. 2553 and the accumulated depreciation allowance exceeding 500,000 Bath, on the condition that the eligible enterprise has to purchase or receive the title of the qualified property in order to actively use in his business.

Accordingly, the depreciation for tax purpose for small business in Australia is similar to Thailand by affording in two steps. Australia grants the temporary investment allowance and simplified depreciation rules, likewise, Thailand accommodates the initial allowance depreciation and the standard depreciation under The Royal Decree No. 145. Nevertheless, the United States' law provides the stimulation of SMEs through three steps. Firstly, Section 179 depreciation deduction (in conjunction with the additional Act) allows the enterprise to immediately write off the capital cost purchased and placed in service in the prescribed tax year as the expenses. Secondly, the special depreciation allows the enterprise to further immediate write off 100 % of the adjusted value of the certain qualified properties which is prominently stimulated by the government. And, lastly, the standard MARCS depreciation still applies to the remaining cost of assets.
Considering the range of qualified assets which small business can enjoy, it is apparently that range of the depreciation rate of eligible assets for the initial depreciation under the laws of the United State and Australia are higher than the case of Thailand. The temporary investment allowance in Australia is commonly available to depreciating assets under the simplified depreciating rules according to Subdivision 328-D which is already utilized by small business. In the United State, the bonus depreciation is generally provided to the eligible properties for Modified Accelerated Cost Recovery System (MACRS) with a recovery period of twenty years or less (including the cell phones, tractor units for over-the road use, computers, computer peripheral equipment, office furniture and fixtures and all properties which does not assigned in another class). In Thailand, however, any other assets by nature liable to wear and tear or depreciation, according to Section 4 of the Royal Decree No. 145 does not include the machinery and equipments and computer hardware and software. They are separately subjected to the lower depreciation rates.

From the overview, the rate of initial depreciation allowance in Thailand and United State is quite similar at the rate of 100 % of the cost basis. Nevertheless, in the United State the special depreciation or the bonus depreciation allows the enterprise to further immediate write-off 100 % of the adjusted value of the wider range of qualified properties which exceeds from Section 179, while, in Thailand, any other assets by nature liable to wear and tear or depreciation according to Section 4 of the Royal Decree No. 145 does not include the machinery and equipments and computer hardware and software which are considerable the prominent income-producing capital assets. This does not help to solve the hardship in accessing the inventive step of technologies, especially in manufacturing sector since the inventory and machine used in SMEs mostly aged from 10-20 year which is apparently old and reparation cost attributes the additional cost in manufacturing.\(^\text{14}\) Moreover, the treatment of newly acquired machinery and equipments and computer hardware and software are subjected to be depreciated at the rate of 40 % of the cost value in the first year of acquisition while the temporary investment allowance for small business in Australia is at the rate of 50 % of the cost value. Thus, the concept of depreciation for tax purpose under the United States law and Australian law are more systematic and more attractive for SMEs than Thai law.

In this regard, the experience of the United States, which is deemed as the most attractive initial depreciation deduction for tax purpose for small business, is a considerably interesting method which may be adapted and applied as the guideline to provide more attractive depreciation for tax purpose as an investment incentive for SMEs in Thailand, especially when the government plans to encourage the investment to stimulate the economy and strengthens SMEs in Thailand at the same time. Nevertheless, under the current law, the initial allowance under Thai law does not sufficiently cover some

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assets which can potentially be stimulated to provide the positive spill over to the overall cluster, while, the 100 % write-off depreciation deduction of any other assets according to Section 4 Novem of the Royal Decree No. 145, phased out after 31 December B.E. 2553, afforded the supportive measure only to the general extent of assets which might not specific enough to function as the development tool for SMEs. Hence, in order to strengthen SMEs in Thailand and follow the notion of the sufficiency economy, Thailand should adopt the United States’ concept which pursues more attractiveness and adapts to be implemented on some qualified assets or some particular business sectors. The idea of business cluster listed in the Federation of Thai Industry or the further research provided by the Institute for Small and Medium Enterprise Development can be applied as a guideline to define which cluster or which part of the cluster potentially generate the significant rise to Thai’s economy.

2. Pooling System

In Australia, small business entities can utilize the simplified depreciation rules as the preferential tax regime for depreciating capital assets. Most tangible depreciating assets, that do not fall within the treatment of low-cost assets by costing more than A$ 1,000, will be allocated into the appropriate pools and treated as single depreciating asset, either general small business pool or long-life small business pool depending on the effective life. The depreciating assets with the effective life less than 25 years will be added to the general small business pool which will be deducted at the pool rate of 30 %, while, the depreciating assets with the effective life more than 25 years will be included to the general small business pool and will be deducted at the pool rate of 5 %.15

Nevertheless, in Thailand, the standard depreciation is similar to the United States that each asset will be depreciated separately, pooling system is granted to small business entity in light of the simplified depreciation rules in Australia meanwhile the large company is obliged to calculate and recognize the depreciation deduction of each asset separately.

Comparing among three countries, the Australian system allows different properties with same tax depreciation rate to be treated as if they were single property and is considerably regarded as the easier way for business to keep record in pursuant to reducing the compliance cost. Furthermore, in the circumstance where the property is sold or exchanged, the remuneration from selling or exchange of assets received by taxpayer will not immediately regarded as the assessable income but subtracted from the pool value. This will defer the amount of tax from assessable income that small business and only result in the form of lost of depreciation allowance in the pools provided that the pools value exceeds the remuneration arising from sale or exchange of capital asset.16 Hence, the pooling systems

of Australia which pursues more tax preferential for standard depreciation rule is the interesting method that can be adopted by Thailand to promoting SMEs.

3. Low-Value Assets

In Australia, small business entities can immediately write off the whole depreciating value of such low-cost assets, which costs less than A$ 1,000 at the year the small business start to use or install it ready to use for taxable purpose, in the income year the assets is first used or installed ready to use. The cost of the low-cost assets subjected to be written off will be fully diminished and not allocated to any pools.17

In the United State, the low-value assets can be immediately written off by virtue of Section 179 of the Internal Revenue Code on the ground that this section allows business purchasing capital assets in the amount as prescribed in the provision to select fully and immediately write-off the expense of the capital cost of assets at the year such assets acquired and placed in service, in lieu of deprecating such property over the economic useful life. Furthermore, this section sets forth only the cap or the maximum amount of purchase of the capital assets but does not stipulate the minimum amount of purchase. Even though the dollar limitation and the reduction of limitation may be decreased or increased depending on the economic circumstances and the enactment of specific Acts, taxpayer can enjoy the availability of this section every year in the various amount of purchase. Therefore, the low-value capital assets in the United Stated can be naturally written off in at the year of acquisition.

Comparing to Thailand, The Royal Decree issued under the Revenue Code governing Deduction of Wear and Tear and Depreciation of Assets (No. 145), B.E. 2527, (1984) does not stipulate any treatment of low-value assets. Therefore, where tax law is silent, the accounting principle will be applied. Nevertheless, the Revenue Department disregards the material principle, which the capital expenditure resulting in very little amount of money can be pooled and treated as the revenue expenditure that is subjected to write off immediately. In this regard, the value of the low cost assets in Thai tax aspect by Private Rulings of the Revenue Department will be constituted as the undetectable expense under Section 56 term (5) of the Revenue Code i.e. the capital expenditure, however, the cost basis of the low-value assets can be pooled together and depreciated over the times. This is not in consonant with the accounting principle and too burdensome for taxpayer.

In practice, because the Private Ruling of the Revenue Department is not the law, some enterprises follow the accounting principle whereby establishing distinctive amount of purchase of capital assets which are regarded as low-cost assets for such enterprises, for instance, the capital expenditure less than 500 Baht or 1,000 Baht and immediately write off as the revenue expenditure. Nevertheless, this practice lacks of certainty in the

17 Woellner, supra note 15, at 829.
amount of low value-asset and solely relies on the discretion of the tax assessment officer. Thus, Thailand should adopt the concept of Australian law for establishing cap in the treatment of the low-value assets.

**Conclusion and Suggestions**

In order to solving the adversities and stimulating SMEs in Thailand, this study recommends Thailand amend its law as follows:

1. Thailand should amend the definition of SMEs by utilizing the turnover-base definition in lieu of the combination of labor aspect and the value of fixed assets and should incorporate the qualitative parameter i.e. the independent of the enterprise by adopting and applying Australian's aggregation rules. Nevertheless, such aggregation rules need to count the partnership as the affiliate and the benefits derived from taxpayer joining a joint venture should be included.

2. For the development of SMEs through initial depreciation allowance, the government may alternatively and flexibly enact tax depreciation provision on more categories of assets and expand the amount of the initial deduction allowance the enterprise can write off in the Royal Decree depending on the economic circumstances by adopting concept of the United States which is regarded as the most attractive initial depreciation deduction for tax purpose. This measured is suggested to be the short term plan to temporarily stimulate the economy or fix the clusters to develop the competitive advantage of some specific industries, while the qualified assets for the supporting specific industries need further research.

3. In pursuant to reducing the compliance cost and the burden of keeping record incurred by SMEs, this study suggests that, to be implemented as the standard depreciation of capital assets particularly for SMEs, Thailand should adopt pooling systems of Australia which allocates the capital assets to the appropriate pools and treats as single-asset instead of calculating the depreciation deduction of each asset separately.

4. For the treatment of low-value assets, Thailand should adopt the concept of Australian law by clearly prescribing cap in the treatment of the low-value assets and solve the problem of uncertainty.
Civil Liability for Secondary Infringement of Copyright*

Introduction

Copyright is a set of exclusive rights granted to a person who creates a work which is protected by copyright law. A copyright owner can exploit their work within the exclusive right granted by law. The purpose of copyright law is to promote the progress of useful arts and science by protecting the exclusive rights of authors and inventors to benefit from their works of authorship. The only intention of existence of copyright is to ensure creation and availability of copyright works. In achieving that purpose, copyright is create to be granted to authors as a motivation to create new work. Hence, copyright law does not give exclusive rights to those people who generate new creations as a reward, rather in accordance with the element and concept of copyright law.¹

As our world develops, copyright owners are faced with copyright infringement all the time. At present, this problem is seems to be growing faster. In the past few decades, copyright law in many countries has been aware of problems of secondary infringement of copyright that is increasingly important and comes to the forefront in the area of intellectual property rights. Nowadays, the biggest problem for copyright and other intellectual property rights is that people do not respect the rights of the copyright owner. They only respond to their own requirements and lack any consideration of the exclusive rights of the copyright owner, they exercised copyright work without permission from owner. This problem

* This article is summarized and rearranged from the thesis “Civil liability for Secondary Infringement of Copyright” the requirements for the degree of Master of Laws in Business Laws (English Program), Faculty of Law, Thammasat University, 2011.

has caused enormous damage not only to the copyright owners, but also to domestic and international economic systems.²

Copyright infringement is not only committed by direct infringers but also including an infringement committed by a person who carries out such an infringement indirectly. An indirect infringer conducts an infringing action by assisting, contributing, facilitating, or inducing other person to carry out direct infringement action, so-called secondary infringement. Copyright infringement is not only injurious to the interest of the author, but also those of the general public; especially, secondary infringement where the defendant has not personally infringed copyrights directly but still infringed copyright by means.³

Secondary infringement is one of the most important issues that many countries are faced with. This article studies infringement study in comparative approach to compare the civil liability for secondary infringement in three countries namely United States, United Kingdom, and Japan on the one hand and Thailand on the other for deeply understanding the elements, natures, problems and also for seeking the solutions to secondary infringement in each country.

The purpose of the civil action for secondary infringement is derived from the original goal of copyright protection that the copyright is a private right of copyright owner. When someone exploits the right of owner illegally such person should be response for injury and damages from infringing activity. Since, the copyright owner has spent their time, money and ideas to create his work he should receive in return the compensation rather than see the infringer criminally punished.

Since the existing Thai Copyright Act B.E. 2537 expressly imposes liability on the secondary infringement only for the conduct as specified in Section 31. From the author’s perspective, it is necessary to amend our Thai Copyright laws Section 31 in order to impose liability on secondary infringers who are not currently specified in this Section such as anyone who, although does not directly commit a copyright infringement, materially contributes to, facilitates, induces or otherwise responsible for directly infringing acts carried out by another party. Such amendment will make the Act more effective to deter copyright infringement in Thailand. Besides this, this article tends to support the principle of private right of copyright regime and encourages the rights of the owner to bring their cases into civil enforcement against all kinds of secondary infringer.

Copyright Infringement

Copyright protection need not be creative, innovative or novelty. The author only creates the works himself and does not copy from existing copyrighted work. The copyright owner has the rights to exploit his work exclusively. In other words, only the owner of the work has the right to grant anyone else permission to use the works, or in fixed means, other than the exclusions granted by Fair Use, that is use without permission of the copyright owner. Copyright infringement can be classified into two types, primary infringement and secondary infringement.

Primary infringement or direct infringement occurs when others exercises the exclusive rights granted by laws at first hand, without any permission of the copyright owner such as copying, performing, adapting, broadcasting or commercializing a work. It follows that in a copyright infringement action, if an infringer has had no opportunity to copy, he will not be liable for his action. Therefore, if an infringer did have the opportunity to copy and the infringer’s work is similar to the claimant’s work, then it will be inferred that such person has copied such work.4

Secondary infringement or indirect infringement occurs when other persons, although not committing an infringement by themselves, induces, assists, causes or materially contributes to the infringing conduct of another.5 For example, Jim does not copy a pirate CD himself, but he sells, imports or provides a space for selling such products, and obtains direct profits from infringement, Jim shall be held liable as an secondary infringer.

Although liability for the primary infringement is imposed on a strict liability ground, where the person is held liable for actually committing the act of infringement themselves whilst liability for indirect infringement require some facts that show a secondary infringer’s intent, knowledge or control with respects to the direct infringement.6

At present, secondary infringement occurs in various types of illegal act, for example, landlord liability where a space or place that a direct infringer can carry out a primary infringement is provided, service provider’s liability which is rapidly spreading on the Internet network, dance hall operator’s liability where dance halls operator or club owners hire a singer or band to perform in their club which includes concert halls, restaurants and other similar places, and such performance uses infringing songs or music. So, indirect infringement is all around, it is important to prevent this kind of infringement effectively because indirect infringement means not only that the copyright owner loses, but also the practice destroys the economic system of intellectual property as a whole.

4 http://www.quizlaw.com/copyrights/what_is_direct_infringement_1.php
5 http://itlaw.wikia.com/wiki/Contributory_copyright_infringement
Secondary Infringement in Foreign Countries

Firstly, The Copyright Act of United States does not specifically provide a definition for acts committed by other persons separately from the direct infringer, but the court has developed principles from case decisions as to who may be deemed liable for secondary infringement. Secondly, the Copyright, Designs and Patent Act 1988 of the United Kingdom provides that secondary infringement occurs when a person commits an act knowing or having reasons to believe that this act is infringing the owner’s copyright. An infringement takes place when such act is done on the whole or a substantial part of the copyright without permission of the copyright owner. Finally, although, Japan copyright Act does not expressly provides the basic principle of secondary infringement in the statute, Japan derives secondary infringement doctrines from court decision as well as in the US to cope with this kind of infringement.

Based on the scope of secondary infringement found in U.S. and U.K. law, the meaning of secondary infringement can be defined as a person who supports, induces, assists, contributes, participates, benefits or is otherwise responsible for such conduct carried out by the primary infringer.

Secondary Infringement under U.S. Law

In the United States, the secondary infringement doctrines have arisen from court decisions, since secondary infringement has become a significant problem in the copyright area and has affected global markets. The court has constituted theories and principles for indirect infringement, whereby a person who contributes materials for direct infringement infringes on performance, or assists any financial entity to carry out such infringement as vicarious infringement. Liability for indirect infringement generally requires a third party’s intention to be shown, along with knowledge or control with respect to the direct infringement. From increasing numbers of indirect infringement cases, the U.S. Court has developed new theories from landmark secondary infringement cases, such as MGM v. Grokster, which gave rise to one of the newest doctrines namely inducement infringement.

Contributory infringement, on the other hand is another doctrine developed by the U.S. court to hold a person indirectly liable for the infringing act of another person. Contributory infringement means the act of participating in, or contributing to, the infringing acts of another person. Contributory infringement doctrines for secondary infringement under U.S. copyright area must demonstrate two main elements. First, it must be shown that the infringer (or defendant) had knowledge of infringement of the direct infringe

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7 Eleni Papacharalambous, General Overview of Copyright, Papacharalambous & Angelides Law.
performance. Second, the defendant must “materially contribute” -actual assistance or inducement - to the direct infringement.\textsuperscript{10}

The term ‘Knowledge’ can be categorized into two kinds namely actual knowledge and constructive knowledge. To start expanding knowledge in contributory infringement liability, it is necessary to have a mental state requirement. When someone intends to commit a wrongful act, it is also fair to hold responsible those who know of the wrongful act and also do something to facilitate it.\textsuperscript{11}

The Court ruled from the Screen Gems\textsuperscript{12} case that the defendants could be held liable for contributory copyright infringement by showing that they “had knowledge, or reason to know” of the infringement.\textsuperscript{13} As a result of the Gershwin case and Screen Gems case, the U.S. Court decided that constructive knowledge of direct infringement is sufficient for liability for contributory activity in such a case, actual knowledge is not necessary to be inferred.

The term ‘Materially Contribute’ is similar to the standard knowledge, in that the infringer must supply the infringing items or components of the infringing items, to be provided and added to the infringing material.\textsuperscript{14}

The latest landmark case namely Betamax or Sony Corp. of America v. Universal City Studios, Inc.\textsuperscript{15} is a clear example for examining the scope of the term “materially contribute.” In the case, the Court ruled that Sony did not supply equipment to persons that it knew were involving in continuing infringement of the copyright.\textsuperscript{16} In addition, the court held that the sale of copying equipment would not constitute contributory copyright infringement, if such equipment was widely used for general purposes or for non-infringing purposes. The manufacturers of the video cassette recorders were not in a position to control the use of copyright work by their purchase.\textsuperscript{17} Meanwhile, the Court’s ruling to reverse the Ninth Circuit in favor of Sony hinged on the possibility that the technology in question had significant non-infringing uses and that the plaintiffs were unable to prove otherwise.\textsuperscript{18}

\textsuperscript{12} See Screen Gems, 256 F. Supp. at 405, evidence was sufficient to show that radio stations had either actual or constructive knowledge of direct infringement.
\textsuperscript{13} Adams, supra note 6.
\textsuperscript{14} Bartholomew and Mcardle, supra note 11, at 10.
\textsuperscript{15} Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984)
\textsuperscript{16} Adams, supra note 6, at 44.
\textsuperscript{17} Sony v. Universal, supra note 15.
\textsuperscript{18} Id.
Liability is likewise imposed under the doctrine of vicarious copyright infringement, and is based on an extension of the agency principle of *respondeat superior.* The concept of vicarious liability was developed in the Court as a result of the agency principles of *respondeat superior.* Vicarious liability for copyright infringement, however, differs from respondeat superior of the tort doctrine in the senses that the tort doctrine extends vicarious liability beyond the employer and employee relationship while enterprise liability is shared. Consequently, vicarious liability for copyright infringement requires two elements (1) the right and ability to supervise or control the infringing activity and (2) the right to receive a direct financial benefit from the infringing activity. The two main factors of vicarious liability were derived from *Shapiro, Bernstein & Co. v. H.L. Green Co.*, in which the Supreme Court said that the department store committed vicarious liability for copyright infringement of record sales concessionaires.

The Court explained in the same case that when the right and ability to supervise joins with an obvious and direct financial interest in the performance of copyrighted materials, the purposes of copyright law might be best effectuated by the imposition of liability upon the beneficiary of that exploitation. Due to an increase in new types of secondary infringement, the U.S. Court shall consider broadening secondary liability through cost-benefit analysis, multi-factor balancing tests, or simply basing it on technical designs or business.

Vicarious infringement in such as a dance hall must satisfy two factors of vicarious principle. First, the dance hall operator meets the first factor of the test regarding supervision, since they control the premises where the infringing performance occurred, and can exercise control to prevent such an infringement on the premises. Second, the dance hall must also meet the second factor of the test, that it obtains a direct financial, as a payment, benefit from their customers paying to hear the infringing performance. In such a case, it should be held that the dance hall obtained profit from such infringing performance directly. For example, *Dreamland Ball Room, Inc. v. Shapiro, Bernstein & Co.*, was the case where vicarious liability was found when dance hall owners allowed the unauthorized performance of musical works by the bands they hired, even when the owners had no knowledge of the infringements and had even expressly warned the bands not to perform copyrighted works without a license from the copyright owners.

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20 Adams, *supra* note 6, at 37.
24 *Id.*
25 *Dreamland Ball Room, Inc. v. Shapiro, Bernstein & Co.*, 36 F. 2d 354 (7th Cir. 1929).
With the developing of new Internet networks like Peer-to-Peer (P2P)\textsuperscript{26} file sharing, the two existing doctrines of contributory infringement and vicarious infringement were found to be not enough. After the \textit{MGM v. Grokster case},\textsuperscript{27} the U.S. Court came up with a third theory of secondary infringement, \textit{"Inducement liability"}, where the court held that \textit{"the infringer induced} direct infringement by distributing a device with the object of promoting its use to infringe copyright, as shown by a clear expression or other affirmative steps taken to support infringement."\textsuperscript{28} Unlike contributory infringement, the secondary infringer here must intend to induce infringement for their own benefit and take affirmative steps to support infringement.

In this case, the court concluded that there was considerable evidence of intention to induce copyright infringement. The court was willing to accept the evidence in the record that \textit{"the vast majority of users download"} are acts of infringement and that \textit{"the probable scope of copyright infringement is staggering. The key fact was that, in the court's view, the defendants were not merely passive recipients of information from the plaintiffs about such infringing use."}\textsuperscript{29} For the point of \textit{knowledge}, knowledge itself is not convincing that secondary liability exits. In this case, Justice Souter explained that \textit{"mere knowledge of infringing potential or of actual infringing users would not be enough to subject a distributor to liability"} and \textit{"in order to find secondary liability by way of inducement, there must be 'purposeful, culpable expression and conduct' for such liability."}\textsuperscript{30}

\textbf{Secondary Infringement under U.K. Law}

Secondary infringement in the United Kingdom concerns with dealing with or facilitating the manufacture of infringing copies such as copies which have been made

\textsuperscript{26} Peer-to-peer (P2P) \textquotesingle computing or networking is a distributed application architecture that partitions tasks or work loads between peers. Peers are equally privileged, equipotent participants in the application. They are said to form a peer-to-peer network of nodes. Peers make a portion of their resources, such as processing power, disk storage or network bandwidth, directly available to other network participants, without the need for central coordination by servers or stable hosts. Peers are both suppliers and consumers of resources, in contrast to the traditional client-server model where only servers supply, and clients consume. The peer-to-peer application structure was popularized by file sharing systems like Napster. The peer-to-peer computing paradigm has inspired new structures and philosophies in other areas of human interaction." (http://en.wikipedia.org/wiki/Peer-to-peer).

\textsuperscript{27} MGM v. Grokster, supra note 8. The defendants engineered their P2P software avoid contributory and vicarious liability by removing centralized listing that would meet the knowledge requirement. However, the court created inducement liability and held him liable.

\textsuperscript{28} Id.

\textsuperscript{29} Laura A. Heyman, \textit{"Inducement as contributory copyright infringement"}, IIC Law Review Vol. 37 1/2006.

without the copyright owner’s permission. It also covers those who provide the premises or apparatus for infringing activity.\(^{31}\)

The Copyright Designs and Patent Act provides for secondary infringement in Sections 22 to Section 26. Secondary liability for secondary copyright infringement is the term used to describe the liability that applies to someone other than a primary infringer of copyright. In other words, a primary infringer is someone who exercises any of the exclusive rights of a copyright owner without permission or authorization. It is necessary for all forms of secondary infringement that the person knows, or has reason to believe, that the ‘infringing circumstances’ (e.g. that article is an infringing copy or can be used to make infringing copies) means that the person had “noticed of the facts that such act would indicate to a reasonable man that a breach of copyright was being committed”.

In the United Kingdom, the key factor to secondary infringement is ‘insistence to control’ direct infringement. The liability of the defendant for the control of the use of the copyright work by the direct infringer also plays a vital role in secondary liability of copyright regime. However, this Article is obliged to focus on secondary infringement that the CDPA has stated provisions regarding in Section 25 in Permitting Use of Premises and Section 26 in Provision of Apparatus.

Section 25 of CDPA which illustrates that a person who does not perform a directly infringing performance, but allows or permits anyone to use his premise (property) for an infringing performance shall be held liable as a secondary infringer, whether such a person has knowledge of the infringing performance or not. According to Section 26, this Section provides that an infringer does not need to “know” or “have reason to know” that they are dealing with an infringement performance, merely having a reason to believe such performance that they would be associated with the infringement activity, it enough to be held liable as a secondary infringer.

**Secondary Infringement under Japanese Law**

Although there is no statute establishing the rule or principle of secondary infringement in Japan and also the current Japanese Copyright Act has not contained provisions regarding indirect infringement of copyrights. Thus, Japanese Courts has to apply related statutes, regulations and court decisions which are deemed appropriate to deal with indirect infringement of copyrights.

In 1988, the Supreme Court of Japan re-organized its former rules by establishing Japanese vicarious infringement rule, which was derived from court decisions. For example, the *File Rogue* case\(^{32}\), or so-called *Japanese Napster* case\(^{33}\), this is the landmark case of

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\(^{32}\) Tokyo District Court Heisei 14(Wa) 4249; High Court of Tokyo Heisei 16(Ne) 446.

Japanese vicarious liability. The Tokyo district Court provided four factors to be considered as a secondary infringer for a service provider as the following:\textsuperscript{34}

- Direct infringement by end-users;
- The substance and the nature of the act
- The degree or amount of supervision and control by the provider over the user's transmission of such work;
- The profit that provider gained from the infringing act

In this case, the \textit{File Rogue} pattern of fact appears to be similar to the \textit{Napster} case in the United States. The court had to determine whether the defendant infringed the neighboring rights of the plaintiffs by making mp3 files automatically searchable, visible and exchangeable in the sense of contributory infringement.\textsuperscript{35}

The Tokyo High Court held that only the possibility of illegal use of an information distribution is not enough to impose liability on the service provider. The Court gives that "beyond such mere possibility of the illegal use, if the service provider by its nature, induces a categorical infringement of copyright with concrete possibility, and if the Defendant induces infringement by providing the service with acknowledgement of such nature, controls the infringement by its own acts, and thus should be deemed as a direct infringer".\textsuperscript{36}

In the term of degree of supervision and control by a service provider against transmission of the work, the Tokyo High Court considered these following factors as essential to download the copyright software in order to share files that the defendant provided an explanation of their sharing method to its users.\textsuperscript{37} In the term of profit as to whether a provider gained a financial benefit from a copyright infringement activity, the provider's intention should be consider at this point. The Tokyo Court held that if the defendant is planning to charge fees in the future and also the service provider gains financial profit from advertisements.

In conclusion, although there is no provision of secondary infringement in Japanese copyright law, Japan has not missed out in this deficiency. There have been some significant legislative changes which derived from court decisions establishing adequate principle to cope with secondary infringement problems in Japan which become a vital role for all copyright work involved with development and networking technology.

\textsuperscript{34} Id.
\textsuperscript{35} Id.
\textsuperscript{36} Id.
\textsuperscript{37} Id.
Secondary Infringement under Thai Law

The Thai Copyright Act B.E. 2537 provides a provision of secondary infringement only in Section 31 which is based on the strict liability principle. This Section imposes liability merely on a person who committed infringing activities under (1)-(4) of Section 31\textsuperscript{38} namely selling, letting, communicating to public, distributing and self-importing to the Kingdom. Therefore, the problem may occurs when other conduct of secondary infringing action which are not specified in Section 31 occur in the future. So, the subsequent question is that whether Section 31 is sufficient for various types of secondary Infringement?

(a) **Infringing action falling inside the scope specified in Section 31 of the Thai Copyright Act B.E. 2537**

As above mentioned, when someone commits infringing action as Section 31 provided, i.e. selling, occupying for sale, offering for sale, letting, offering for lease, communication to public, or distribution in the manner of infringement which may cause damage to the copyright owner, such person shall be held liable for indirect infringement.\textsuperscript{39} Meanwhile, a person who conducts activities specified in Section 31 such as person shall be deemed as a secondary infringer.

(b) **Infringing action falling outside the scope specified in Section 31 of the Thai Copyright Act B.E. 2537**

The problem may occurs when an infringer commits infringing action which fall outside the scope specified in Section 31 (1)-(4) such as landlord liability, Internet service providers, dance hall operator liability and other indirect infringing activities. Although, those conduct are fall within the scope of indirect infringement, Section 31 cannot apply with those types of conduct because Section 31 cannot enforce covering those types of infringing activities such as landlord liability, dance hall operator liability, service provider liability, publisher liability, and otherwise conduct which fall outside the scope of Section 31. Therefore, Section 31 of the Thai Copyright Act B.E. 2537 cannot cope with these kinds of secondary infringement conducts, directly. In practice, the Court has to apply tort law principle with these conducts i.e. Section 420, Section 432, and other related section of Thai Civil and Commercial Code. Consequently, there are some difficulties to apply existing the Thai Civil and Commercial Code or the Thai copyright Act B.E. 2537. Moreover, even though general tort law can be applied to these conduct in certain circumstances,

\textsuperscript{38} Thai Copyright Act B.E. 2537, 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.

\textsuperscript{39} Thai Copyright Act B.E. 2537, Section 31.
the tort principles are not directly designed for copyright infringement activities. Therefore, complications might occur.

Since, secondary infringement provision in Thai Copyright Law is based on a strict liability principle which the responsibility for an injury that can be imposed on the wrongdoer without proof of carelessness or fault or liability does not depend on actual negligence or intent to harm, but it is based on the breach of absolute duty to make something safe.\textsuperscript{40} This term is the legal responsibility for damages or injury, even if the person found strictly liable was not at fault or negligent. Strict liability has been applied to certain activities in tort. In the term of copyright infringement liability, infringer has to hold liable under the principle of automatic responsibility without having to prove negligence or intention. Whilst, liability under general tort law principle have to prove that infringer committed such an infringement with negligently or willfully.\textsuperscript{41}

\textit{'Double Standard'} of secondary infringement in Thailand comes from the limited scope of actions provided in Section 31 of the Thai Copyright Act, this has separated secondary infringers into two main groups. First, there is a group of infringers who commit infringing action falling within the scope specified in Section 31. For this group of infringer, Section 31 of the copyright law can be applied. The second group includes all infringers who commit infringing actions falling outside the scope specified in the Section 31. The court cannot apply Section 31 directly to impose liability on this group of infringer because of the lack of appropriate statute. In practice, the court has to apply the tort law principle to this group. However, there are many difficulties when applying tort law principles to cope with secondary infringement action. Furthermore, general tort law such as joint tortfeasor doctrines was not designed for indirect infringement issues. Even secondary infringement liability is quite similar to tort liability in the general aspect, but there are still some different key points between tort liability and secondary liability which arise from different purposes of law.

According to Section 420 of Thai CCC, the plaintiff or the copyright owner has to prove negligent or willful conduct of the infringer who committed the illegal act regarding secondary infringement while Section 31 of Thai Copyright Act, the plaintiff does not need to prove the defendant’s intention as Section 420 requires. The plaintiff only proves that the defendant or infringer knows or has a reasonable ground to know of his illegal act. It is enough to impose liability on such person due to the theory of strict liability which consider only the damage and result from such an infringing act.

\textsuperscript{40} Garner, \textit{supra} note 9, at 934.
\textsuperscript{41} รูป ศุภจิต, ดีเริ่มกฎหมายว่าด้วยสรรพสิ่ง, สำนักพิมพ์จุฬาลงกรณ์มหาวิทยาลัย 2553 หน้า 13 (Susom Supanit, \textit{Law of Tort}, Chulalongkorn University Press, 2010, p. 13).
Conclusion and Suggestions

From the above analysis, it is clear that the current Thai Copyright Act B.E. 2537 is insufficient to impose liability on secondary infringement conducts which are not specified in Section 31. Much vagueness needs to be revised in order to bring clarity to activities which are not specified in Section 31. The law should be amended by addressing the following issues;

1. Section 31 of Thai Copyright Act B.E. 2537 should be amended and a new principle for secondary infringement should be developed based on other countries jurisdiction’ experience and study of their implications for the Thai Copyright law such as contributory, vicarious, inducement infringement principles from the United States.

2. Also, the new draft copyright law\(^2\) should be revised because Section 31/1 and Section 31/2 of the new draft are too specific. It imposes liability only on a person specified in Section 31/1 and Section 31/2. The same problem will occur over and over again. For example, if a new conduct of secondary infringement emerges in the future, Thai copyright law has to be amended repeatedly to cope with such a new conduct.

3. The new draft copyright law should lay provision of secondary infringement with broadened scope of infringing conducts to deal with further conduct of secondary infringement such as \textit{whoever support, assist, provide or facilitate any material, space, premise or any other same conduct for an direct infringer to carry out such an infringement.}

4. In practice, some copyright owner make double damages by suing both direct infringers and secondary infringers to gain double damages which is still a problem in the Thai Court. Therefore, legislators should be add a provision of efficient remedies that set out reasonable compensations for copyright owners who have lost and suffered from such infringement to avoid double damages problem. The author suggests that there should be provision like, \textit{an author could seek civil damages to the amount of their actual value, or statutory damages per infringing work.}

\(^2\) The new draft copyright, Section 31/1 “whoever buys pirate goods; computer software, sound audio, audiovisual aids or movies who 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…”

Section 31/2

\[A]\text{ny person who allows other persons to use the building or area, by know or should have known that tenants using the building or spaces for any copyright infringe activities by copying, producing, selling, possessing for sale, offering for sale, leasing or offering for lease. Such person must be held liable for wrongful activities under this Act.}

“Provisions of the first paragraph shall also apply to the Internet Service Providers.”
5. The Department of Intellectual Property of Thailand (DIP) should encourage copyright owners who have lost and suffered from infringement to bring their case into civil action for civil enforcement which will be more adequate for the right of owner than criminal sanctions. Now, the DIP is merely focusing on criminal enforcement rather than civil enforcement. However, criminal enforcement is a duty of state involved with many departments of government which consume time, officers and government expenses, following the process of criminal enforcement and also the wrongdoers who are arrested by police or government officers are likely to be only retail stores or employees and not the big players, which is not the best solution to solve copyright infringement problems.

In other words, they are personally liable for criminal offences of the company. This is difference from civil procedure where that the relevant individual can be classified as a “joint tortfeasor”, which is rare. Besides, in civil proceedings, infringers cannot conceal behind the protection of a limited company.

6. In the long run, ‘conscious awareness’ is the best solution to decrease copyright infringement problems in Thailand permanently by motivates people to think about the disadvantages of supporting counterfeiting goods or pirating items.
Future of CDM Investment

Introduction

In 1990 the Intergovernmental Panel on Climate Change (IPCC) published its First Assessment Report on the global climate system, confirmed that climate change was a threat and called for an international treaty to address the problem.¹ It, hence, served as the inauguration for comprehensive UN General Assembly negotiation.² These efforts resulted in the birth of the United Nations Framework Convention on Climate Change (UNFCCC), followed by the Kyoto Protocol.

The Kyoto Protocol features the principle of common but differentiated responsibilities and respective capabilities (CBDR). In general, the principle of CBDR implies that developed countries would have to take a lead in cutting greenhouse gases (GHG) emissions with their binding commitments. The Kyoto Protocol sets legally binding targets for 37 industrialized countries and the European community (Annex I countries) to reduce GHG emissions to an average of five percent against 1990 levels over the five-year period 2008-2012.³ While there is no binding obligation for developing countries (Non-Annex I countries) to reduce emission. Developing countries who ratify to the Kyoto Protocol may participate in this action on a voluntary basis.

The Kyoto Protocol allows private entities to participate in the GHG emission mitigation effort through its flexible mechanism called “the Clean Development Mechanism (CDM).”⁴ CDM is anticipated to play a significant role, since it is not only promising to economically reduce GHG emission, but also reduce economic gaps between developed and

³ http://unfccc.int/kyoto_protocol/items/2830.php.
⁴ Morgan, supra note 2.
developing nations. Through CDM, both private and/or public entities are eligible to participate in the climate change mitigation effort. The CDM incentivizes Western capital market to invest in emerging market and developing countries receive ‘clean technology’ in exchange beside the additional return on project that reduce emission of GHG. Between 2001, which was the first year CDM projects could be registered, and 2012, the end of the Kyoto Protocol commitment period, the CDM is expected to produce some 1.5 billion tons of carbon dioxide equivalents (CO₂e) in emission reductions.

However, there are no further provisions in the Kyoto Protocol that elaborate on the process of hedging CDM risk—especially after the expiration of the first commitment period of the Kyoto Protocol in year 2012. This makes the international law-making process on the framework to reduce greenhouse gases vulnerable to political horse-trading, particular, after the COP 16 in Cancun. The decision on the negotiation of the second commitment period of the Kyoto Protocol explicitly states that ‘nothing in this decision shall prejudge prospects for, or the content of, a legally-binding outcome in the future.’ However, the legal form of a final deal that may establish a wider comprehensive framework to tackle climate change remains an open question. This uncertainty has a direct impact on CDM investment which is dropping year by year. Depending on the progress made in the government could take ‘the policy or measures necessary’ to promote the Kyoto Protocol’s effective implementation. This could, for example, include a decision to extend the first commitment period, or a request or recommendation to this effect.

1. The Clean Development Mechanism and Its Implementation in Thailand

CDM is one of the three flexible mechanisms established under the Kyoto Protocol. Under Article 12 of the Kyoto Protocol, its two basic objectives are defined. The first objective is to assist developing countries in achieving sustainable development, and the second is to assist Annex I Parties in achieving compliance with their quantified emission limitation and reduction commitment in a more cost-effective manner. Hence, drawn from its objectives, the CDM allows developed countries listed in Annex I of the United Nations Framework Convention on Climate Change (UNFCCC) to invest in GHG emission reduction projects in non-Annex I countries and to claim the resulting Certified

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5 Ryuji Matsumashi, Hidetaka Shinozaki, and Yoshikuni Yoshida, A study on measure to active CDM taking project risks into consideration, EIA07-006 (2007).
7 Morgan, supra note 2.
Emission Reductions (CERs)\textsuperscript{10} to assist them in compliance with their binding GHG emission reduction commitments under the Protocol. At the same time, it is intended to contribute to sustainable development in the host developing countries. Ideally, it will encourage additional capital flows into developing countries, accelerate technology transfer, and enable developing countries to leapfrog to cleaner technologies.\textsuperscript{11}

To participate in a CDM project, a country must first be a Party to Kyoto Protocol and have designated a national authority for the CDM.\textsuperscript{12} Regardless of its type, to qualify as a CDM Project activity and receive CERs, a project must satisfy the criteria set out under Article 12 of the Kyoto Protocol, the Marrakech Accords and other decisions of the Conference of Parties/Meeting of Parties and the CDM Executive Board. Specifically:

(a) the project activity must be undertaken in a non-Annex I country (i.e. a developing country) that is a Party to the Kyoto Protocol;

(b) the participation of all participants must be voluntary and approved by the Party authorizing their participation (the Host Country or any Annex I Party involved in the project);

(c) the project activity must be of a type that results in emission reductions by producing real, measurable and long-term benefits related to the mitigation of climate change;

(d) the emission reductions must be additional to any emission reductions that would occur in the absence of the certified project activity; and

(e) the project activity must contribute to the goal of national sustainable development for the Host Country

(f) Funding for CDM projects from any Annex I Parties must not result in the diversion of official development assistance.

At present (as of March, 2011) there are 2,923 CDM projects registered with the CDM Executive Board. Among the CDM host countries around the world, China is, of all time, the largest in number of projects—1,283 projects have been registered, accounting for 43.85 %, followed by 629 project from India and Brazil in the third place—188 projects. The largest CDM investors from Annex I countries are the United Kingdom of Great Britain and Northern Ireland—984 projects, Switzerland comes in the second place with 647 projects and followed by Japan, 381 projects. Energy industry gains the largest

\textsuperscript{10} The Marrakech rules explicitly define CERs as: "a unit issued pursuant to Article 12 and requirements thereunder, as well as the relevant provisions in the annex to decision -/CMP.1 (Article 12), and is equal to one metric tonne of carbon dioxide equivalent, calculated using global warming potentials defined by decision 2/CP.3 or as subsequently revised in accordance with Article 5."


\textsuperscript{12} Kyoto Protocol, \textit{supra} note 6, art. XII.
portion on registered projects—2,261 projects account for 65.37%. The expected annual CERs in total are 453,635,950 tCO$_2$e. China is expected to deliver CER into the market for 287,177,983 tCO$_2$e.$^{13}$

Thailand is certainly one of the developing countries with a large potential for GHG emissions reduction. In terms of investment climate, it has drawn considerable attention from prospective CDM investors, considering its relatively friendly investment policies.$^{14}$ The CDM Investment climate index (CDM ICI) measures the investment climate for CDM projects in Thailand as a “Good climate” with 83.2 point from 100, ranked number 4 in Asia (Malaysia, Korea and PR China respectively placed above).$^{15}$ As a non-Annex I Party to the Convention and the Kyoto Protocol, Thailand promotes the CDM implementation under the Kyoto Protocol in order to encourage clean and environmental friendly technologies for greenhouse gas reduction in the country, as well as to promote the country’s capability by developing sustainable business practices. Thailand, to this end, has imposed its national policies and measures to reduce GHG emission. Both national and local plans and strategies have been developed to support climate change activities including CDM—considered, however, to the principle of ‘common but differentiated responsibility’ and equity.

In order to implement CDM projects, Thailand must first comply with a number of basic participation requirements set out in the CDM Rules, and in particular in COP/MOP decision 3/CMP.1 Modalities and procedures for a clean development mechanism as defined in Article 12 of the Kyoto Protocol (CDM Modalities).$^{16}$ Thailand is required under the CDM Modalities to “designate a national authority for the CDM”, known as Designated National Authorities or DNAs, to play a vital role in the implementation of CDM projects, most importantly by assessing and approving proposed CDM projects.$^{17}$ As a host of CDM, Thailand is also required to establish CDM approval procedures incorporating sustainable development criteria, by which it can independently assess and approve proposed projects, and issuing Letter of Approval (LoA). Since there is no restriction or requirement by international CDM Rules on the project approval criteria adopted by Host Countries, Thailand therefore has the ability to define its own approval procedures and sustainable development criteria, and Thai DNA is responsible for this task.$^{18}$

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$^{13}$ [http://cdm.unfccc.int](http://cdm.unfccc.int)

$^{14}$ IGES, 2006.

$^{15}$ DEG - Deutsche Investitions - und Entwicklungsgesellschaft mbH, CDM Market Brief, (2010).


$^{17}$ Id.

$^{18}$ Id.
Subject to these requirements, the Royal Thai Government made a remarkable milestone in 2007 for passing two fundamental laws on institutional arrangement. Firstly, the Regulation of the Prime Minister’s Office on Climate Change B.E. 2550 (2007) established the National Committee on Climate Change Policy. Secondly, the Royal Decree on Establishment of the Thailand Greenhouse Gas Management Organization (Public Organization) B.E. 2550 (2007) established the Thailand Greenhouse Gas Management Organization, or TGO, to play its important role as an implementing agency on GHG mitigation in Thailand, particularly as the Designated National Authority for CDM (DNA-CDM) office in Thailand. Establishment of TGO streamlines the approval procedure and thus making Thailand more attractive host country for CDM. This office also provide more services on promoting low carbon activities; investment and marketing on GHG emission reductions; establishing GHG information centre; providing capacity development and outreach for CDM stakeholders.

Thailand is positioning itself to maximize its participation in the CDM and to become a regional leader in the global carbon market of which CDM is a part. In the past (2005-2006), compared with the previous lengthy CDM approval procedure that each project would have to be approved by the cabinet on a case-by-case basis, however, the new approval procedure with the TGO from 2007 has proven ability to cut a shorter time for CDM approval in Thailand, which make the country become more attractive for CDM investment. It is now ranking number 10 in CDM top ten host countries chart having its CDM project registered with CDM EB, followed to China (1,289), India (631), Brazil (188), Mexico (125), Malaysia (90), Indonesia (62), Vietnam (55), Republic of Korea (53), Philippines (50), and Thailand (44) (as of March, 2011).

2. Post-2012 uncertainty

The first commitment period of Kyoto Protocol will end in December 2012 and consequently the CDM project developer whose project registration is pending may bear risks such as significant change in CDM requirements. Changes in the CDM process after 2012 may also impact on the registered CDM project in some ways. The greatest concern for the investor is that there would be no more CDM project after year 2012. The lack of long-term signals from regulators and policy makers has denied market players long-sought visibility, causing them to be more conservative. The obvious evidence demonstrated by the World Bank in its “State and Trends of the Carbon Market” reported that up to US$...

\[20\] Nantiyu Tangwisutijit, Carbon Credits: Public benefit or Private profit?: Experience with CDM Biomass Projects in Thailand, (September 2009).
144 billion were invested in the carbon market in 2009, however, the amount of direct investment in CDM projects fell by 59% to $2.7 billion in 2009—the second year in a row that investment has declined. In 2008, CDM investment had fallen to $6.5 billion, a 12.3% year-on-year drop. Such a fall in investment was to be expected as 2012 draws nearer and no international climate deal for beyond has been agreed.23

The controversy over whether the Kyoto Protocol should extend its second commitment period has drawn significant attention from carbon investors since the future of their investment benefit may lie upon the market mechanism provided by the Kyoto Protocol. Hence, the post-2012 negotiation has its main objective to impose the second commitment period after year 2012. However, most of developed countries do not want to continue their second commitment period and propose a new Protocol including the commitment from the U.S. and those developing countries having a high rate of GHG emission for instance China and India—China in fact, has recently surpassed the United States as a largest emitter of GHG in the world.24 According to this proposal the allocation of GHG emission reduction commitment will be imposed to the main GHG emitter countries. This proposal however is not accepted by most developing countries.

Japan25, Canada26, Russia27, Australia28, and New Zealand29 presented their stances either on ‘not associate itself in setting the second commitment period;’ or ‘conditionally to be part of the Kyoto Protocol’s second commitment period only if it is a part of a wider agreement covering all major emitters.’ The EU, stated that it is open to a second commitment period, however it called for a roadmap for a legally binding instrument for all Parties (industrialized and developing countries) under the Convention. Whereas, developing countries strongly against those positions and stated that there must be ambitious quantified emission reductions for Annex I Parties for the second and subsequent commitment periods under the Kyoto Protocol. The Group of 7730

25 Statement by Japan at the high-level segment of COP17/CMP7 (December 9, 2010).
26 Statement by Canada at the high-level segment of COP17/CMP7 (December 7, 2011).
27 Statement of the Advisor to the President of the Russian Federation, Special Representative of the President of the Russian Federation on Climate Change, Mr. Alexander Bedritskiy, to the 17th Meeting of the Parties to the Kyoto Protocol, (December 8, 2011).
28 Statement by Australia at the high-level segment of COP17/CMP7 (December 7, 2011).
29 Statement by New Zealand at the high-level segment of COP17/CMP7 (December 7, 2011).
30 The Group of 77 (G-77) was established on 15 June 1964 by seventy-seven developing countries signatories of the “Joint Declaration of the Seventy-Seven Countries” issued at the end of the first session of the United Nations Conference on Trade and Development (UNCTAD) in Geneva. It provides the means for the countries of the South to articulate and promote their collective economic interests and enhance their joint negotiating capacity on all major international economic issues within the United Nations system, and promote South-South cooperation for development. See: http://www.g77.org/doc/.
and China proposed the second commitment period from year 2013-2017 and call for a 25-40 GHG emission reduction commitments by the developed countries.\textsuperscript{31} While "BASIC countries" - consisting of Brazil, South Africa, India and China—insisted that the burden of emission reduction must reflect the equity,\textsuperscript{32} historical responsibility and a right to the development by developing countries.

As for Thailand, it affirmed its stance that the Kyoto Protocol must have the second commitment period for Annex I Parties under the Kyoto Protocol, and with the opposition on imposing a legally binding obligation to developing.\textsuperscript{33}

3. The Debate on Next Global Climate Regime

Based on countries’ proposal, the possible result of the post 2012 negotiation may be presented in either of these:

(1) The continuation of the Kyoto Protocol with the amendments;
(2) The new agreement and new mechanism;
(3) The new agreement plus the existing Kyoto’s mechanism; or

These four assumptions could be grouped into two aspects.

First, the continuation of the Kyoto Protocol, this scenario would allow the carbon market mechanism to continue its work and the demand for the carbon credit would largely depend on countries’ GHG emission mitigation commitment under the Kyoto Protocol. The possible situation which may occur according to this assumption are that the EU will continue its emission trading system until 2020, and increase the coverage of sectors under the scheme to international aviation and maritime. While, Canada, Japan and Australia will develop their own carbon trading system. Selling carbon credit into these markets, hence, will be challenging by the new regional trading systems rules governing the import of carbon credits and different prices. Sellers will need to determine which markets they can access and which market offers the most beneficial sales prospects.\textsuperscript{34}

Second, the operation of new agreement, this scenario would be ‘no binding commitment’ for developed countries on GHG emission reduction until 2020. This would

\textsuperscript{31} Statement on behalf of The Group of 77 and China by H.E. Mr. Abdulrahman Fadel Al-Eryni, Head of delegation of The Republic of Yemen, at The Joint High-level segment of The sixteenth session of The Conference of the Parties of The Climate Change Convention and sixth session of the Conference of the Parties serving as a meeting of the Parties to the Kyoto Protocol (COP16/ Cmp6), Cancun, Mexico, (7 December 2010).
\textsuperscript{32} Equity is how to assign the tasks between annex I and non annex I in a fair manner.
\textsuperscript{34} Id.
mean that the US and other major emitters, including in developing countries (China, India, and Brazil) make a substantial commitment to mitigate their GHG emission. However the mitigating action would come voluntarily depending on the Copenhagen/Cancun pledges.35

The post 2012 instrument may also introduce the new market mechanisms which are to be achieved - in part - through the progressive implementation of improved carbon-market mechanism in the form of existing Kyoto Protocol mechanisms (JI, CDM and ET) alongside possible new mechanism. The negotiations of the new market mechanisms may include Sectoral Crediting Mechanism and Sectoral Trading Mechanism.

In summary, the future of the Kyoto Protocol in post 2012 would have an impact on the carbon market more likely on its structure. The market mechanism may change its face; however, the demand of the carbon credit still exist though difficult to forecast at this moment.

CER from the CDM project is a premium type of carbon credit in terms of verification standard quality; hence, it will be welcomed to most carbon trading markets. Nevertheless, it is very difficult to predict the CERs price in post 2012 period until the negotiation results come out with a clearer picture, particularly on the developed countries’ commitments that place a large impact on the demand side of carbon market. The swing factors of the future regime of carbon trading are (1) the US involvement (2) the operation of new market based mechanism and (3) the willingness of the countries to meet their own pledges. Note that the continuation of voluntary carbon markets that are not linked to outcomes of political negotiations will be another source of carbon credit demand and thus provide an alternative outlet for high quality carbon credits from around the world.

4. Recommendations for post-2012 Risk Mitigation in Thailand

The uncertainty of the post Kyoto Protocol and the global economic downturn have a significant effect on CDM project in Thailand as same as they do in other countries. The number of CDM project approval in Thailand by year 2010 was 24 (as of 1 October 2010), decreased almost 50 % from year 2009 which had the number of 41 projects. It is likely to keep on this trend, if the investors cannot gain confidence for the future regime and there is no measure yet to deal with this event. The Government of Thailand thus needs to take this issue into consideration in order to impose policy or measure necessary for it to entice more GHG mitigation investment and achieve its emission reduction efforts.

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The CDM risks in post-2012 are in the global context, which are quite externally and uncontrollably, however the government could consider options in lowering CDM investment risks as follows:

**Option 1: Government Purchase of GHG Emission Reduction**

The government should decide to deliver its policy establishing a facility to purchase greenhouse gas emission reduction credits from CDM project. This policy would show that the government seriously takes an active step in order to cope with climate change and promote CDM within the country. This policy is, hence, likely to encourage more green investment—the CDM, in Thailand since it offers the project developer the possibility to offer their CER units acquired from CDM projects to the Thai Government and moreover the purchase rate of CER price could be determined—can be implied that the project developer gain more confidence to invest in CDM project in Thailand. At present, trading of CERs in Thailand is normally made bilateral between the project developer, (Thai national) and Annex I investor (CERs buyer) through the ERPA or joint venture agreement. Trading CERs in international carbon market is not so common to the Thai project developer. Procurement of CER by the government would, in some way, help them to open a new channel for selling their carbon credit. However, a direct sale of CERs suits the Unilateral CDM Model which occurs where the project is developed and managed by the Host Country project developer without the assistance or involvement of any Annex I project participant.

This option, however, is hard to practice since the government budget to buy CER would come from the national budget which means the tax of the Thai citizen. To spend certain amount of national budget on specific beneficial group—CDM developers, would create uneasy situation to the government and it is not the sustainable solution to help those investors and project developers to have their strong ground on the carbon market.

**Option 2: Carbon Fund**

The government should encourage and support the private sector to establish domestic Carbon Fund to support their CDM project investment. Since, most of CDM projects in Thailand are small scale, it may be less attractive to the investor and finance institutes to make an investment or grant the loan because of the following reasons;

- There is a general lack of confidence among financial institutions in technologies involving renewable energy. This is partly because they are unfamiliar with the technologies, and partly because of concerns related to the availability of feedstock supply/resources such as biomass, wind, sunlight and river water. This makes them too cautious in lending to these kinds of projects.
• Financial institutions do not normally maintain among its staff people who have enough background and expertise to evaluate small-scale renewable energy and energy efficiency projects. This leads to reluctance in even starting to consider doing a due diligence exercise on these type of projects.

• The classic complaint of lenders when dealing with these projects is that it takes about the same efforts to evaluate a small project as a big one. Thus, if a project does not reach a certain critical mass in terms of project cost, lenders are not willing to take the project into its portfolio of possible lending candidate.36

By this option, the Fund it is not expected to take in a majority share in the project, providing equity in exchange of a right to buy all or a portion of the CERs generated by the project at a pre-determined price is a realistic approach for the fund to take. It would provide a low interest rate loans for CDM projects and in return this transaction would be in exchange of a right to buy all or a portion of the CERs generated by the project at a pre-determined price. Moreover the CDM fund could also be used to provide guarantees for the loans of the project. However the amounts could be capped so that the fund is not exposed beyond the CER value committed by the project to the fund.37

According to the Securities and Exchange Commission’s decision, the carbon fund in Thailand could be established in a form of mutual fund. The funds can be invested in equity and debt instruments of CDM projects as well as the certified emission reduction (CER) from the CDM projects and others - loan, loan guarantee and machinery leasing. However, only institutional investors and individuals with high risk appetites can invest in the fund.38

This option enterprises participating in the Fund would not only build up their good public image for social responsibility, but also accumulate potential investment opportunities. They can also enjoying tax exemption for the funds invested to the Fund and improving their competitiveness in the future’s carbon market through capacity-building. The small amount of CERs from small scale CDM projects would be collected by the Funds and sold in the international market in a larger portion. This option is more sustainable than the first option that the help depends on the Government’s hand.

**Option 3: Domestic Emission Trading Scheme**

Initiate domestic emission trading scheme (ETS) could be one potential option to be considered by the Thai Government to boost the demand of CER. The reason why the Government of Thailand should initiate such domestic ETS are laid down below;

37 *Id.* at pp. 45-46.
• To support the carbon credit generated from the CDM project.

• To encourage private sector to participate more in the GHG emission reduction action with market intensive.

• Pre-compliance action, in cases where Thailand, in the future, has its GHG emission mitigation obligation according to the international agreement, domestic emission trading scheme would be the main driving force in order to meet the target and the allowance from those projects can be counted as the country GHG mitigation inventory.

• It can be one mechanism leading Thailand to achieving low carbon society.

The choice of the ETS including:

(1) The mandatory ETS: can be created by imposing the policy and a law capping the GHG emission or setting target of emission reduction from each business sector or by individual business entity—these schemes reward innovation, efficiency, and early action and provide strict environmental accountability without inhibiting economic growth.\(^39\) The choice depends on the readiness of the business sector. The allowance of emission or the carbon credit can be traded between private sectors to complete their obligation and can be sold to the government as a guarantee incentive. As an intermediary, the government in this case may sell these credits to international carbon market such as EU ETS which is expected to be expanded even if post-2012 regime fails to set any binding target. However to make this strategy efficiently work, the sanction for those who are unlikely to comply should be introduced.

(2) The voluntary ETS: can be emerged by the government policy, but the participation of the business sector is on a voluntary basis and no penalty imposed. It enlists entities to voluntarily reduce emissions through internal actions or through the purchase of offsets or allowances. While neither strictly an offset program nor a cap and trade system, they do provide a framework for the development of offset markets and methodologies.\(^40\) The Government in this case is the major carbon credit buyer—this would ensure the investors that their emission reduction effort turn into money. However, the credit is also tradable among the participants for its CSR strategy.

(3) The mix scheme: between mandatory and voluntary could be the flexible option concerning the different capacity of the Parties. The large emitter section should consider being put in the compliance market while the smaller is allowing to voluntary participate.\(^41\)

\(^39\) http://www.epa.gov/capandtrade/.

\(^40\) http://www.co2offsetresearch.org/policy/MandatoryVsVoluntary.html.

\(^41\) Niramol Suthammagit, (2009).
Recognizing that Thailand is a developing country, the growth of its industrial sector is needed as part of national development plan. Forcing private entities to cap their emission reduction or setting its emission reduction target may put a great difficulty to increase their productivity. As a result, those private sectors may have a strong oppose on such policy. On the other hand, if the Thai government introduces a voluntary emission reduction scheme, participation from the private sector is more likely. Since this scheme offers a win-win situation—no benefit loss plus earning incentive from the emission trading. Thus it might start voluntary ETS rather than directly get involve with mandatory ETS.

In addition, it is essential that proper market scheme has been chosen according to Thai context; whether Thailand ETS will base on the "cap and trade system" or it will run according to the "project-based emission trading scheme." The cap and trade system would put a price on carbon dioxide emissions by auctioning off permits to emit the gas. The "cap" would work by setting a maximum amount of carbon to be emitted and the "trade" would allow the carbon emitters to freely trade carbon permits amongst themselves. While the "project-based emission trading scheme," the GHG trade occurs between an entity regulated by a GHG emissions target and another with no emissions target. The project generates "offsets" that can be used by a firm. Those offsets will be used rather than requiring a firm, for example, to meet its emissions target solely through changes in its own activities, the firm can purchase credits from other sources which have reduced emissions at a lower cost.\(^{42}\)

5. Conclusions

Up until present, the mutual agreements between Parties on the further commitments in post-2012 regime are still not concluded yet even though the AWG-KP was requested by the Parties to complete its work as early as possible to avoid the possible gap between the first and the second commitment periods. It is recognized that the political clarity on the future of the Kyoto Protocol, particularly on the question of a second commitment period, is needed since the end of the first commitment period is approaching. It would be timely for Parties to consider how to achieve this. Yet the current lack of certainty beyond 2012 is already evident in the CDM carbon market, reflected in the lower forward prices for CDM offset credits, CERs, for delivery in 2012.

In this meantime, the governments of CDM host countries need to hang on to the negotiation process and the outcome of the working group and prepare all possible measures to secure those invested projects and to attract the new CDM projects into the countries. As for Thailand, establish a carbon fund by private sector supported by the government is recommended as an immediate action to support CDM investment in

Thailand and perhaps for further mitigation actions in the future. Since the fund would not only be a source for financial but it would also benefit to all participants. Moreover, the option of establishing a domestic voluntary ETS should be considered as an advance step for Thailand to be in the ready position for the upcoming obligation which may come along with the new agreement or by international trade pressure.

However, establishment of the domestic carbon market within Thailand is a difficult, time-consuming and expensive task due to the lack of institutional capacity on carbon market establishment at the national level at the moment. The carbon market may successfully operate somewhere the earliest in the next 3-5 years. In addition, regardless of the type of the ETS, the effective carbon market must be supported by an appropriate legal framework. However at present there is no law in Thailand specially governing carbon trading. Hence legal requirements for a successful carbon trading scheme in Thailand needs to be installed as soon as the scheme has been chosen. It is recommended that a domestic market must be compatible with the international legal framework and emerging international, regional and domestic carbon trading systems.
Legal Control of Game Centers and Internet Cafés *

This article discusses the problems relating to game and internet café businesses in Thailand and how they should be resolved. It is commonly known that game and internet café businesses in Thailand have broad adverse effects on Thai youths, and this is why Thai laws have been put in place to control the negative influence of such businesses. However, the application of the recently enacted Motion Picture and Video Act B.E. 2551 (2008) (hereinafter “the B.E. 2551 Act”), has proven to be troublesome for many business operators. During the drafting process, it was clear that the B.E. 2551 Act was primarily aimed at regulating the film industry rather than the game and internet café businesses. In this light, it is foreseeable and yet understandable that some provisions of the B.E. 2551 Act fail to effectively control the said businesses.

In this article, the term “internet café business” or “internet café operator” means a place which only offers internet services with no game playing services, whereas the terms “game café business”, “game café operator” and “game and internet café business” interchangeably refer to a place which provides both services.

One of the adverse effects of the game café businesses is game addiction in youths. Excessive game playing not only causes exhaustion and distraction which would ultimately lead to bad academic performance, but it also significantly increases the crime rate. Many youths who are addicted to games tend to have aggressive behavior in comparison to youths who do not play games. However, one of the benefits is that game cafés can help family cut back costs. Youths are able to play the latest game versions in game cafés, without having to buy them at an expensive price to play at home. In addition, most computer games require high-specification computers.

* This article is summarized and rearranged from the thesis “Legal Control of Game Centers and Internet Cafés,” The Master of Business Laws (English Program), Faculty of Law, Thammasat University, 2011.
In contrast to game café business, the benefit of an internet café business is that youths can access websites to search for assignment materials for educational purposes. Another benefit would be that internet café businesses always buy the most updated machines. Thus, people who cannot afford to buy their own computer will have the opportunity to use the internet at the internet café. Nevertheless, without the proper measure controlling those businesses, it would incite the internet users especially underage children to access into the improper contents contained in websites that offer free access to all users.

Therefore, internet services seem to have less negative impacts than game services. From past to present, game playing by youth tends to be overlooked by the operators. While the concern of game and internet cafés’ operators is high profits and returns, they often disregard the effects of game playing and internet usage on the behaviors of younger customers. Owners are usually concerned with the satisfaction of youngsters. Therefore, they want to make sure that they can provide the newest and most updated games to the customers as they have to compete with other operators. Consequently, access to improper websites or games with violent or obscene contents is unavoidable. At the same time some parents may not even be aware of this fact. This situation certainly calls for a higher scrutiny and stricter regulations of game and internet café businesses in many countries, including Thailand.

1. Legal Control of Game and Internet Café Businesses in Foreign Countries

A number of game and internet café businesses is found in China and Vietnam. In China, the “Regulations on the Administration of Business Sites for Internet Access Services” (hereinafter called “the ChineseRAB”) have entered into force since November 15th, 2002, stipulated as such under Article 37. The internet café businesses are regulated by the Ministry of Culture. Many provisions of the ChineseRAB are similar to the Thai regulations with regards to age control, operating hours, and safety control. People under 18 years old are prohibited to enter Chinese game and internet cafés. These businesses can open as early as 8.00 A.M. and close at midnight at the latest. In addition, the Chinese operators must comply with many security controls. For example, prohibitions on the storage of any inflammable products, the locking of exit doors or windows during business hours are in place. Furthermore, Chinese game and internet café businesses must pay attention to the suitability of the location of their game and internet cafés. Article 9 provides that the location must be at least 200 meters away from the campus of any secondary or elementary school or in any residential buildings (yards).

In Vietnam, the “Promulgating Stipulations on the Management, Provision, and Use of Internet Services at Retail Locations in Hanoi City”, Decision No. 15 by the Hanoi People’s Committee (hereinafter called the “Vietnamese Decision No. 15”) took effect May 7th, 2010. It directly deals with game and internet café businesses. One of the regulations states that online games shall not operate after 10.00 P.M. The registered service location must be at least 200 meters away from the entrance of any school (from kindergarten to high school). Although zoning measures are common in Vietnam and China, it is apparent that the regulations enforced in Vietnam extend only to the school areas but not to residential buildings like those enforced in China. As a result, in Vietnam, zoning covers smaller areas. In contrast, Thailand so far still has no provision for the zoning of game and internet café businesses at all.

2. Legal Control of Game and Internet Café Businesses in Thailand

The Control of Business Relating to Tape Cassette and Television Material Act B.E. 2530 (1987) (hereinafter called the “B.E. 2530 Act”) was enacted to regulate game and internet café businesses. Ministerial Regulations were issued under the B.E. 2530 Act. When new technologies in games and internet expanded and grew larger in scope, the B.E. 2530 Act was revoked by the B.E. 2551 Act. The current B.E. 2551 Act has been in force since June 2nd, 2008. Many regulations have been issued to control over the operators of game and internet café businesses. Although game and internet café can open 24 hours a day, the age of users is limited according to the Ministerial Regulation published in the Government Gazette, Volume 126 Part 72 Kor, dated September 29th, B.E. 2552. The entry time for youths depends on the day and the academic calendar. Users who are 5 years old are allowed to enter between 2 P.M. and 8 P.M. from Monday to Friday. Users under 15 years of age are allowed to enter between 10 A.M. and 8 P.M. on public holidays or at the end of the semester. Users who are between 15 years old and 18 years old are allowed to enter between 2 P.M. and 10 P.M. from Monday to Friday. They can enter on public holidays or at the end of the semester between 10 A.M. and 10 P.M. All youths can play longer on their day off and at the end of the semester.

3 http://www.trendingtech.info/technology/now-vietnam-restricted-access-online-game/.
5 พระราชบัญญัติงบก. การจัดการและบริการการท่องเที่ยว พ.ศ. 2530 แก้ไขโดย สำนักงานคณะกรรมการกฤษฎีกา. (The Control of Business Relating to Tape Cassette and Television Material Act B.E. 2530 (1987) translated by Office of the Council of State (Krisdika)).
3. Problems and Solutions Relating to Game Centers and Internet Cafés in Thailand

The legal control measure in Thailand attempts to stop a negative impact resulting from the game centers and internet café businesses. However, it lacks certain definitions to cope with the present technology. Moreover, the application of the B.E. 2551 Act in practice causes uncertainties to the game and internet café operators, e.g., the unclear definition of "game café and internet café", "video clip", and classification of game rating. In other words, there is no effective legal control over game contents and there is no game rating. Moreover, operators can freely establish the game and internet café businesses without concerns regarding appropriate location.

3.1 Definition of Game Café Business and Internet Café Business

Given that there are no clear definitions of "game café business" or "internet café business" provided in the B.E. 2551 Act, their meanings have been subject to different interpretations. For example, in applying Section 4 "Videos," it is very important to have provisions distinguishing between the two businesses. Either game café business or internet café business has different registration procedures governed by the Ministry of Culture.

In order to set up an internet café business, an operator must apply for a commercial license with the Ministry of Commerce; the internet café operator is not further required to obtain a license from the Ministry of Culture. Moreover, in compliance with the B.E. 2551 Act, an internet café operator does not need authorization from an officer. After having received the said commercial license from the Ministry of Commerce, the internet café business can immediately start to operate its business.

Unlike the internet café business, the game café business operator is required, in addition, to apply for a commercial license from the Ministry of Commerce. In doing so, the operator must fill out an application form and submit the required documents to the Ministry of Culture. After receiving an approval and permission from the Ministry of Culture, the game café business operator can run the business through the obtained game café license.

Because of the lack of definitions of game and internet café business, "videos" under Section 4 can be interpreted in 2 ways, namely the narrow and the broad meaning, accordingly. Under the broad meaning, an internet café operator is interpreted as the game café operator or business. Any person who runs the game café business is required to obtain an operating license under Section 53. On the other hand, when "videos" is given a broad definition, internet café operators may be subject to fine if they run the business

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6 This term hereinafter refers to the "Videos" ( /////// ) under the Motion Picture and Video Act B.E. 2551 (2008). According to Section 4, "Videos" means materials on which pictures or pictures over sound are recorded that can be shown as continually moving pictures, in the form of games, karaoke with pictures, or other forms as stipulated by Ministerial Regulations.
without permission according to Section 53. To avoid being fined, internet café operators are obliged to register as game café businesses and will have to be responsible for license fees and compliance with other relevant processes. These cause the combination of two different services: the internet access service and game service. Internet café can serve for educational purposes rather than game service. When the two services are provided in one café, it is difficult to control game activities and to impose zoning measures.

As there is no definition of “videos” under Section 4, it is important to have provisions that make a distinction between the two businesses. As stated in the previous paragraph, game café operator or game café business can be interpreted differently. Most internet café operators have been fined because of the broad interpretation of “videos”.

The narrow meaning of a game café business suggests a place which aims at providing games or karaoke services, while, the broad meaning refers to a place where games are available on computer hard disks. These games may be downloaded by a customer or installed by the operator himself. If a business is considered to be a game café business, the operator is required to apply for an operating license according to Section 53. Moreover, if any person runs a game business without a license, i.e., in violation of Section 53, he or she shall be fined according to Section 82. The main objective of a game café operator is to provide computer games. As it is very hard to monitor the activities of the customers in an internet café, the operators of internet café run a high risk of violating Sections 53 and 82.

In the author’s opinion, under the B.E. 2551 Act as it stands, the determination of the meaning of a game and internet café business should depend on the sole understanding and intention of the operator. If the operator has clear intention to provide game services to customers, his business will be considered to be a game café business. This also includes the service of installing, updating and advertising new games. Users can play massively multiplayer online role-playing game (MMORPG)\(^7\) without having to install game software by themselves.

On the other hand, the main purpose of an internet café is to provide internet access services to customers allowing them to surf through websites, check e-mails, chat and download software. As an example, internet café can be found at tourist guest houses. Most tourists often use the internet to send e-mail back home. If the guest downloads a game or software, it is considered to be a part of such internet service. Internet café businesses do not mainly serve games. The internet café operator is just a person who provides the tools to access the internet.

However, if one focuses on the intention of the operators and relevant circumstances, these interpretations are still not comprehensive enough. Therefore, it is suggested that the current B.E. 2551 Act be amended as follows:

\(^7\) http://en.wikipedia.org/wiki/Massively_multiplexed_web_role-playing_game.
An internet café business means a business that provides internet without gaming service. No games shall be allowed to be played at the internet café. Such business shall serve only internet-related activities such as access to websites, e-mails, chats, etc. Internet café operator has duties to warn and deny his service to any person playing massively multiplayer online role-playing game (MMORPG) such as “World of Warcraft, Ragnarok, Grand Theft Auto” and so on.

A game café business means a business that provides both network and non-network games, in addition, to internet services. This kind of business shall mainly provide gaming services to customers.

Another suggestion is related to registration. Internet café businesses can run without the permission from the Ministry of Culture, because these businesses do not focus mainly on game services. However, some contents on websites are not really appropriate for youths. As a result, the Ministry of Culture should be able to keep a record of internet cafés. Internet café operators should therefore inform and notify the Ministry of Culture within 30 days after opening their businesses. However, game café businesses are required to obtain a license in accordance with Section 53.

If this successfully solves the problem, the author believes that the number of internet café business would increase because its term would then be clearly defined. In addition, if the definition of internet café business is adopted by law, internet café operators would be more confident in running their businesses without having to worry about being fined.

3.2 Definition of Video Clip, YouTube

Due to the application of the B.E. 2551 Act, the game and internet café operators have also suffered from being fined. A “video clip” has also not been defined in the B.E. 2551 Act. By applying the existing available definitions under the B.E. 2551 Act, “video clips” will fall under one of the two categories: “videos” or “motion pictures.” If video clips are interpreted as “videos”, internet café operators will be fined for not possessing the appropriate license. If video clips on websites are interpreted as “motion pictures”, such video clips are required to be examined and approved by the Motion Pictures and Videos Board (scrutinizing committee). It can be concluded that almost all video clips have not been approved. When customers watch video clips, be it at the internet café or the game café, the operators of the internet café and the game café may equally be fined.

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8 This term hereinafter refers to the “Motion Pictures” (ภาพยนตร์) under the Motion Picture and Video Act B.E. 2551 (2008). According to Section 4, “Motion Pictures” means materials on which pictures or pictures over sound are recorded that can be shown as continually moving pictures, but not including video.
The term “video clips” can be defined as “videos” or “motion pictures” depending on the contents of the video clips. As internet café businesses can run without an operating license which usually needs to be approved by the Ministry of Culture, video clips have been interpreted as “videos” according to Section 4, meaning that, internet café businesses may run the risk of being fined. Because Section 53 stipulates that any person who provides “videos” is required to apply for an operating license. In the same sense, Section 82 further stipulates that a person who provides “videos” without such a license may be fined.

Video clips may also be defined as “motion pictures”. The “motion pictures” shown at public places will have to be subject to censorship and approval by the Review Board according to Section 25. It is impossible for the Board to approve over millions of video clips on the internet even though this process is required under the Act. However, both internet and game cafés allow customers to watch these video clips which have not yet been classified in accordance with Section 26(1) or (2). Consequently, the internet and game cafés are practically violating Section 46. Section 46 stipulates that “motion pictures” screened at a venue where general audiences are admitted shall be under the classification as prescribed in Section 26(1) or 26(2). As a result, both game and internet cafés will be liable to a fine of 20,000 Baht to 100,000 Baht according to Section 80.

To solve this problem, the author recommends that the focus should be on the intention of the operator and other circumstantial evidences. Currently, the problem has occurred because people focus on the content of the video clips rather than the purpose of the service. Video clips are generally provided on the internet and contain contents which make such video clips fall under the “motion pictures” category. The main objective of the internet and game café does not focus on serving “motion pictures”. However, the interpretation could vary, if it is not directly addressed by the law. Therefore, the B.E. 2551 Act should be amended to have a more comprehensive definition with regards to the arguable term of “video clip”.

The meaning of a video clip should be as follows:

1. A video clip is a short part of video where pictures or sound over pictures are recorded. It can be shown as a continually moving picture, but not including “videos” and “motion pictures”;

2. A video clip can be available, for example, on the internet or a non network device or any material such as hard disk or handy drive; and

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9 The Motion Picture and Video Act B.E. 2551 (2008), Section 26: In considering the Motion Pictures according to Section 25, the Review Board shall classify the films as follows:
(1) Films that encourage learning and should be promoted for general viewing;
(2) Films suitable for general audiences;

10 [link](http://www.culture.go.th/movie/html/datatestweb/datanew/ขออนุญาตการให้เช่า.pdf)
(3) A video clip shall not be determined by its contents. A karaoke video clip is not interpreted as “video”. A video clip which contains movies or “motion pictures” is not considered as “motion pictures”.

Video clips should not only be limited on websites as they can also be found on hard disks. Moreover, contents in video clips should not be determined as “videos” or “motions pictures”. Therefore, karaoke should fall under the definition of “video clip” rather than “video”. When a video clip is not “videos”, it should be allowed to be viewed at internet café. Therefore, internet café operators who provide only internet service and not gaming service will no longer have to bear the risk of being fined caused by the ambiguous legal definition.

If the proposed definition of a video clip is adopted, it would be no longer regarded as either “videos” or “motion pictures”. Because under the term “videos”, the law intends to control the game business, while “motion pictures” is aimed for control over movie theaters. A video clip by its nature is different from game and movie, and is usually published through the internet. The consumers can easily access those clips whenever they are online. Controlling of access to that website would cause an undesirable burden for the internet operator. It should, then, be allowed to be played at the game and internet cafés.

3.3 Game Contents and Rating

Legal control does not cover game contents. Useful games include general games, but educational games should be defined as an exception. When games and exempt games are not clearly defined, the internet café operator cannot serve educational games. In addition, as a result, youths will not be able to play useful games at internet cafés which help improve their skills for instance, mathematic and language skills.

In addition, games are not subject to rating classification by operators. As a result, operators can make games available regardless of whether or not they are appropriate to the age of the customers.

(a) Game Contents

According to Section 4 of the B.E. 2551 Act, all games fall under the term “videos”. Although games are classified as “videos”, the Act does not give a clear definition of games. Violent games and useful games are generally determined as games. Useful games should be promoted as exempt games and internet café businesses should be allowed to serve the said games.

It can be summarized that games can only be provided by game café businesses. As a result, games are only available at “video shops” and not at internet. However, educational games should be distinguished from general games. In addition, useful games should be defined as exempt games.
The B.E. 2551 Act plays an important role in controlling the game and internet café businesses. Nevertheless, games and exempt games are not given definition. Legally they are prohibited at internet café businesses, but they are allowed in game café businesses. Internet café operators are not allowed to offer games and exempt games. Therefore, youths cannot play useful games at internet cafés. As a result, educational games should be defined as exempt and allowed to be offered at internet café businesses.

Therefore, games should be given a meaning similar to the definition under the Australian Classification (Publications, Films and Computer Games) Act 1995 (hereinafter called the Australian Act 1995), which reads:\(^{11}\)

\[(1)\] A game is a computer program and any associated data capable of generating a display on a computer monitor, television screen, liquid crystal display or similar medium that allows the playing of an interactive game.

\[(2)\] A computer program, data associated with a computer program or a computer program and any associated data that:

\[(a)\] is capable of generating new elements or additional levels into a game (the original game) that is a computer game under subsection (1); and;

\[(b)\] is contained in a device separate from that containing the original game; is also a game.

\[(3)\] However, a game does not include an advertisement for a publication, film or computer game."

The exempt games should be defined as follows:

An exempt game is part of or is included in computer software as:\(^{12}\)

1. Educational type: Software whose main purpose is for training, instruction or reference, as a manual, a lesson, and encyclopaedia or a guide regardless of its source, government agency or private.

2. Business type: Software for use in the course of a business or trade.

3. Scientific type: Software for use pursuant to a branch of knowledge conducted on objective principles involving the systemized observation of, and experiment with, phenomena.

However, an exempt game shall not contain material that would likely cause the film or computer game to be classified under M (mature) or higher classifications.

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\(^{12}\) *Id.*
Therefore, the Motion Picture and Video Act B.E. 2551 (2008) should be amended to provide a clearer definition of a game and to define the exemption of a game in a similar manner as the Australian Act 1995. The Board and Review Board have the duties to make the decision on games and exempt games. However, for the exempt games, any person, such as producers, game café operators, internet café operators, should be required to go through an application process in order to obtain an exempt game.

(b) Games Rating

Although almost all games are subject to censorship according to Section 47 under the B.E. 2551 Act and with the exception in accordance with Section 48, the Thai regulations do not have rating classification system of games, meaning that youths can access any kind of games regardless of the content and age-appropriateness. In this connection, it is interesting to become aware of the fact that a youth confessed to the police that he imitated a violent game (Grand Theft Auto) by killing the taxi driver. “Grand Theft Auto” passed Thai censorship while it has been banned in Australia. In this sense, games should be subject to rating classification. Moreover, game café businesses need to check the age of the players and strictly comply with rating labels on the games. However, the most effective way to regulate games is to alter game software which is not available via the internet.

The author suggests that game café business contains a classification of game software. In case a game falls under the application of Section 48 or is otherwise exempted, no classification is needed. The author recommends that all games be classified as follows:

(a) G : General
(b) PG : Parental Guidance
(c) M : Mature
(d) MA 15+ : Mature Accompanied
(e) RC : Refused Classification

In accordance with the application of the Australian Act, there should be 6 classifiable elements which are as follows: themes, violence, sex, language, drug use, and nudity. These elements should be taken into account with cumulative effect.

Moreover, an "impact test" should be applied in determining each category of games. In determining the impact of games, one should consider both the treatment of individual classifiable elements and the cumulative effect. The following are the ranking of impact of games:13

(a) G : General : very mild
Presented context of game is very mild.
(b) PG : Parental Guidance : mild
Presented context of game is mild.
(c) M : Mature : moderate
Presented context of game is moderate.
(d) MA 15+ : Mature Accompanied : high
Presented context of game should be determined by context.
(e) RC : Refused Classification : very high
Presented context of game has very high impact on players.

In addition, the impact of games might be stronger, if the games contain: (a) emphasized scene or slow motion; (b) special effects such as sound, color, size of image; (c) repeated scene; or (d) drug use, violence, sexual violence related to incentives or reward.

Presently, a large number of games still need to be classified on age-appropriateness in order to be able to monitor the activities of the players. The author's suggestion is to design a suitable rating system which also takes the age-appropriateness into consideration. However, content on the internet including online games is hard to control and block. Therefore, rating of online games should be done through advertisement campaigns and should have no legal enforcement.

3.4 Zoning as a Possible Solution to Social Problems

Although the Thai government attempts to solve game and internet café business problems, especially among teenagers, by launching rules\textsuperscript{14} such as limited time entry, limited ages, and safety regulations, all these measures are apparently insufficient to improve the situation. Some of the regulations are unclear and cause disputes between business operators and government officials. In addition, the B.E. 2551 Act controls only time and age, but not location. Therefore, game and internet café businesses are not prohibited to locate their business in any certain areas which are considered to be sensitive. They can be found very close to school, thereby influence children indirectly into skipping school, lower academic performance and in more serious cases, committing criminal acts. Whereas China and Vietnam have exercised regulations concerning zoning measures for a long period of time, Thailand does not yet have any similar control measures over these businesses.

\textsuperscript{14} Item 12 of The Ministerial Regulation of the Motion Picture and Video Act B.E. 2551 (2008), Published in the Government Gazette, Volume 126 Part 72 Kor, Dated 29th September B.E. 2552.
According to Article 9 of the ChineseRAB, game and internet café businesses must be located at least 200 meters away from high schools and primary schools or residential buildings. Similarly, Article 4 of the Vietnamese Decision No. 15 stipulates that a service location registered must be at least 200 meters away from the entrance of any schools (from kindergartens to high schools).\(^{15}\)

This article argues that in order to reduce the negative impacts of game and internet cafés towards our society, there should be a clear distinction between game café business and internet café business. The game café should be strictly zoned while internet café businesses should be allowed near schools as their purpose is for educational support provided that they do not offer any gaming services.

Although the zoning regulation could be issued under the Town Planning Act B.E. 2518 (1975)\(^{16}\), it would be more appropriate to address this issue in the B.E. 2551 Act because it directly controls over such businesses. In addition, the problem with the Town Planning Act B.E. 2518 (1975) is that the zoning plans by the Ministerial Regulations are too general and out-dated. Each process consumes a lot of time and it cannot keep pace with the current technology development. Moreover, the committee who drafts the general plan is less familiar with the local areas. According to the Building Control Act B.E. 2522 (1979)\(^{17}\), a local by-law could be enacted by local administrations which acknowledge the problems and areas. A local by-law seems to be suitable for zoning game and internet cafés for each area. However, the Building Control Act B.E. 2522 (1979) aims for a direct control of the building. The zoning regulation could be defined but it is not the main purpose of such Act.

Under the Public Entertainment Place Act B.E. 2504 (1996)\(^{18}\), zoning measures can be considered too strong for game café business because the Act aims to control the business related to public morals. Therefore, the measure provided in the Act have to be able to handle the situation risking moral violation. The game café businesses however, has less impact on such moral concern since they are prohibited to provide alcoholic drinks and cigarettes as stipulated in the B.E. 2551 Act. Since the main objective of the B.E. 2551 Act is to control the game and internet café business, the zoning regulation should be issued under the B.E. 2551 Act. As there are many regulations concerning game and internet café businesses in the B.E. 2551 Act, it is more appropriate to provide zoning regulations in this Act under the control of the Ministry of Culture. The zoning measures should be

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\(^{16}\) พระราชบัญญัติการพัฒนาผังเมือง หรือ พระราชบัญญัติการพัฒนาผังเมือง แปลโดย สานิตย์ว่าการกรมการกุลช่าง. (The Town Planning Act B.E. 2518 (1975) translated by Office of the Council of State (Krisdika)).

\(^{17}\) พระราชบัญญัติควบคุมอาคาร พ.ศ. 2522 แปลโดย สานิตย์ว่าการกรมการกุลช่าง. (The Building Control Act B.E. 2522 (1979) translated by Office of the Council of State (Krisdika)).

\(^{18}\) พระราชบัญญัติสถานบริการ พ.ศ. 2509 แปลโดย สานิตย์ว่าการกรมการกุลช่าง. (The Public Entertainment Place Act B.E. 2504 (1996) translated by Office of the Council of State (Krisdika)).
adopted in Thailand in order to provide comprehensive regulations under the B.E. 2551 Act. However, youths may go beyond these zoning areas. Zoning measure makes it more difficult for them to access these places. Some may even change their mind and choose to do other activities instead of playing games.

Conclusions

To summarize, the problems of legal control toward internet café and game café operators should focus on the intention of the operators and the objective of their businesses. Regarding the legal control of game contents, the B.E. 2551 Act should be amended to include the definitions of games and the exemptions and to classify the game into rated categories. Moreover, there should be a legal control over the location of the game café business.
Carriage of goods both in domestic and across the border may be performed by sea, air, or land or by a combination of any modes of transport. Generally, carriage by a single mode of transport is known as unimodal transport. However, international carriage of goods always involves more than one mode of transport. In terms of terminology, it has been often referred to as “intermodal transport”, “combined transport”, “through transport” or “multimodal transport”. Despite their possible difference in details, these terms share the same basic principle which is the carriage of goods by at least two different modes of transport under one contract of transport from one place in one country at which the goods are taken in charge by the carrier to a place of delivery situated in another country.

Multimodal transport was developed on the concept of containerization. Since 1950’s containers proved to be suitable means for effecting multimodal transport. Consolidation of cargo into containers gave a fillip to multimodal transportation of goods across the globe. Containerization also gave rise to very peculiar legal issues which required separate treatment under the regime of multimodal transport. In terms of rules and regulations, multimodal transport was examined to solve liability and documentation aspects, emphasizing the problem of damage that could not be traced to a particular mode of transport.

With the development of multimodal transport, there are many rules and regulations taking place in order to bring uniformity to transportation. Any regulation attempting to govern several modes of transport must address the problem of deciding the extent to which the underlying rules for the specific mode, wholly or partly, should also govern the multimodal transport itself. The main problem for the regulation of multimodal transport arose from

* This article is summarized and rearranged from the thesis “Legal Problems of the Multimodal Transport Operators,” The Master of Business Laws (English Program), Faculty of Law, Thammasat University, 2011.
deficiencies of international and national regulations of transport law and the proliferation of the law into specific branches. Under international conventions and national laws, each specific mode, air, road, rail, sea, inland waterways, is still subject to a specific legal unimodal regime. These different regimes vary to a considerable degree, particularly for the carriage of goods by sea compared with the carriage of goods by other modes of transport, consequently, the application of statutory rules to each mode during multimodal transit is fragmentary, unpredictable and varying widely in different countries so that the carrier, trucker, shipper may not be covered by the same liability.

At international level, a combined transport document came into use by a number of multimodal transports operators. In 1975, the International Chamber of Commerce (ICC) published the “ICC Uniform Rules for a Combined Transport Document.” The rules were based on the principles contained in the Draft Convention of Combined Transport of Goods and subsequently were adopted by certain steamship conferences and trade associations. However, the adoption of a standard bill has been far from uniform. To date, a through document for the multimodal carriage of goods has not been accorded with formal intergovernmental recognition. UNCTAD set up an Intergovernmental Preparatory Group to prepare a draft convention which was put to discussion in the Diplomatic Draft Conference in Geneva and finally the Convention on International Multimodal Transport of Goods, 1980 was adopted, but so far, the Conventional has not come into force.

At regional level, there are some Regional Agreements such as Mercosur, The Andean Community, ALADI and The Association of South East Asian Nations (ASEAN) that considered the concept of multimodal transport and created Rules and Regulations to apply for their Country Members. Moreover, such concept is also found at national level, many countries have adopted the multimodal transport concepts derived from international agreement and convention and have enacted their own laws. For instance, India has enacted the Multimodal Transport of Goods Act, 1993 with certain modification to suit the unique conditions in India. China also regulates the Regulations and Laws to apply for multimodal transport under its jurisdiction which are the Maritime Code 1993 under Chapter IV, Section 8: Special Provisions Regarding Multimodal Transport Contract, Regulations Governing International Multimodal Transport of Goods by Containers 1997 and the Contract Law, 1999.

Thailand has also adopted the multimodal transport principles based on the ASEAN Framework Agreement, 2005 and enacted the Multimodal Transport Act, B.E. 2548. Prior to the enactment of the Multimodal Transport Act, Thailand had no specific law, which focused on multimodal transport. Instead, multimodal transport disputes were governed by existing Thai laws pertaining to carriage of goods, found in the Thai Civil and Commercial Code, the Carriage of Goods by Sea Act, B.E. 2534 and the State Railways of Thailand Act, B.E. 2494. The Act has created the provision on the control of multimodal transport operation under Chapter 2 by having the operator prohibited from operating
unless he has been registered. The Act also sets down the qualifications regard for becoming a registered multimodal transport operator, the duty after registration, monitoring by the competent officials and punishment. As from the date of enactment of the laws until now, it has been six years. Such provision has raised a controversial discussion whether the provision causes burden to the multimodal transport operator to the extent that it might slow down the multimodal transport operation in Thailand or not.

Chapter 2, hence, prohibits the multimodal transport operator to perform unless he is registered with the competent officials. Therefore, the provision has created the qualification for entering into the multimodal transport business by requiring the multimodal transport operator to be registered and having to meet different qualifications depending on the types of the operators.

In order to enter into the multimodal transport business in the Kingdom of Thailand, the operator shall follow and comply with Chapter 2, namely:

1. Being a registered multimodal transport operator

The Multimodal Transport Act B.E. 2548 prohibits any person from operating multimodal transport unless he is a registered multimodal transport operator and the Act also stipulates the definition of “Multimodal Transport Operator” which means “the multimodal transport operator who has been registered in accordance with Section 41 or Section 48 or has been entered into official record under Section 45.” The provisions also specify the types of the registered multimodal transport operator under Section 39 (1)-(3) which consists of:

(1) A multimodal transport operator registered under Section 41;

(2) A multimodal transport operator registered in a foreign country recognized by Thailand by virtue of treaty or international agreement and who has entered into official record with the Registrar under Section 45; or

(3) A transport operator or multimodal transport operator in a foreign country who has appointed an agent in accordance with Section 48.

2. Having specific characteristics

2.1 The Multimodal Transport Registered under Section 41

The Multimodal Transport Act, B.E. 2548 stipulates the qualifications, principles of registration and the conditions of operation in Section 40, 41 and 43, concluded hereunder;

(1) Being a limited company or public limited company incorporated under Thai laws,

(2) Having the principal office situated in the Kingdom of Thailand.
(3) Having a paid up capital of not less that Eighty Thousand (80,000) Special Drawing Rights.

(4) Holding security for liability under the multimodal transport contract or any other risk incurred from the contracts, filed with the Registrar on the date of registering application which could be in the form of insurance policy or the bank’s letter of guarantee. In case of the registered multimodal transport operator acting on behalf of the multimodal transport operator registered in a foreign country under Section 45 or Section 48, the security shall cover the business which has been conducted by the agent.

2.2 The Multimodal Transport Operator Registered in a Foreign Country and who has entered into official record with the Registration under Section 45

The regulation on the control of multimodal transport operator under this type aims to regulate the multimodal transport operator who has been registered in a foreign country recognized by Thailand by virtue of treaty or international agreement (focusing on the Country Member of ASEAN, however, Thailand has not yet recognized any treaty). Therefore, Section 45 stipulates some different details of how to regulate the operator, apart from a multimodal transport operator registered under Thai Law.

The characteristics and rules of filing an application and conditions for operation under to Section 45 are summarized as follows,

(1) A multimodal transport operator shall be the multimodal transport operator registered in a foreign country recognized by Thailand under treaty or international agreement.

(2) Having the appointed an agent or the set up of a branch office in the Kingdom of Thailand.

In case of having an agent, the agent of the multimodal transport operator shall possess the characteristics under Section 47.

(3) In filing an application for entry into official record, the applicant shall provide evidence of registration in the foreign country recognized by Thailand under treaty or international agreement.

In case of having an agent, the applicant shall provide the evidence of appointment of a Thai multimodal transport operator acting as his agent in Thailand. The said agent shall have its objectives in operating the transport business, or brokerage, agency or commercial brokerage in transport business under Section 47.

In case of no appointment of agency but registering a branch in Thailand, the applicant shall provide evidence of setting up a branch in Thailand.
Since the Multimodal Transport Act was enacted, the author is not aware of any countries that have made such agreements or treaty with Thailand to recognize those foreign multimodal transport operators as being classified under this category.

2.3 The transport operator or multimodal transport operator in a foreign country who has appointed an agent in accordance with Section 48

The multimodal transport operator under Section 39(3) might be a “transport operator” or a “multimodal transport operator” who operates in a foreign country where Thailand has not been recognized by virtue of treaty or international agreement regarding to the multimodal transport operation. Therefore, while the ASEAN Framework Agreement on Multimodal Transport has not come into force, the multimodal transport operator who both operates in ASEAN and foreign country shall be categorized into the type of multimodal transport operator under Section 39(3). If any of them wishes to operate the multimodal transport in Thailand, he shall follow the rule and regulation on registration and appointment of agency in accordance with the rules under Section 48 and the Ministerial Regulations. The characteristics, rules and methods of registration are as follows;

(1) Being a transport operator or a multimodal transport operator in a foreign country.

(2) Having an appointed a Thai multimodal transport operator as its agent in Thailand.

(3) Maintaining security, assets and duty after registration

The Multimodal Transport Act, B.E. 2548 stipulates the regulation on the control of multimodal transport operator registered under Thai law, including duty after being registered, as follows:

1. Once the multimodal transport operator is registered, the multimodal transport operator shall comply with Section 43 which enforces the multimodal transport operator registered under Section 39(1) to maintain the security for his liability under the contract of multimodal transport or for any other risks arising from the contract executed. In case the multimodal transport operator registered under Section 39(1) operates in his capacity as agent under Section 39(2) or (3), he shall maintain security for liability under the contract of multimodal transport or for any other risks under the contract he has entered into including the activities performed as an agent, and maintain the minimum asset of not less than Eighty Thousand (80,000) Special Drawing Right throughout the period of his operation of multimodal transport. Therefore, should the multimodal transport operator has placed the insurance policy or the bank's letter of guarantee as his security of liability, the multimodal transport operator shall renew the contract of insurance or the letter of guarantee throughout the period of contract and shall not decrease the registered capital to be lower than 80,000 SDRs.
2. Comply with the rules stipulated in the registration certificate (if any)

3. Submit the report of operation to the Registrar as per the rules, regulation and for the period specified by the Registrar.

4. Display the registration certificate at a conspicuous place at his principal office and branch (Section 53 and 54)

5. Renew the registration certificate throughout the period of operation, the violation shall be subject to the punishment by fine under Section 70, in case the offender is a juristic person, its managing director, managing partner or any person who is responsible for the action of the juristic person in relation to that matter shall be subject to punishment stipulated for that offence unless he can prove that the act was committed without his knowledge or consent, or that he had taken all reasonable measures to prevent such offence form occurring under Section 77.

6. In case of moving of principal office or branch office or changing of material facts regarding any particular item in the registration certificate, the registered multimodal transport operator shall inform the Registrar of the same within seven days after the day of the change and the Registrar shall note such change on the registration certificate under Section 56.

7. The registered multimodal transport operator who wishes to cease his operation shall notify such intention in writing to the Registrar not less than ninety days before the cessation of operation under Section 61.

As being mentioned above, it can be concluded that the direct effects from Chapter 2 are:

Firstly, the provision creates the conditions of eligibility to operate the business, namely the requirement of registration. Operation of multimodal transport is prohibited unless the operator is a registered multimodal transport operator.\(^1\) To be a registered multimodal transport operator, the operator is required either to be a limited company or public limited company incorporated under the Thai laws and has the principal office situated in the Kingdom of Thailand. In addition, he shall have a paid up capital of not less than eighty thousand (80,000) Special Drawing Rights and have a security for the liabilities under the multimodal transport contract or any other risk arising from the contracts.\(^2\) The multimodal transport operator shall maintain such requirements throughout his operation. The provision directly affects smaller multimodal transport operators in Thailand, in particular the requirement to incorporate a company (if they have not done so), and/or raise their paid up capital. This requirement would result in smaller multimodal transport operators having to increase their capital, or stop causing operation altogether.

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\(^1\) Section 39 of the Multimodal Transport Act, B.E. 2548.

\(^2\) Section 40, 41 and 43 of the Multimodal Transport Act, B.E. 2548.
Secondly, the provision creates the regulation to control not only the operation of the multimodal transport operator but also his financial position by stipulating the qualifications for each type of registration, registration and appointment of an agent, maintenance of security for liabilities of the registered multimodal transport operator\(^3\), the Ministerial Regulation issued in accordance with Section 6 of the Multimodal Transport Act, B.E. 2548 authorizes the Minister of Transport to be in charge of this Act and be empowered to issue Ministerial Regulations to prescribe fees not exceeding the rate provided in the schedule attached to this Act as well as other requirements to be performed in accordance with this Act such as a power to stipulate the amount, type and conditions for maintaining security and asset of the registered multimodal transport operator.

Last but not least, the provision imposes of fine on the multimodal transport operator who violates the law. For example, any juristic person performing multimodal transport without registration shall be subject to punishment by fine from one hundred thousand baht to one million baht. If the contract has already been concluded, additional fine of fifty thousand baht per contract shall be levied. However, the operator is still required to perform his obligations under such contract for the benefits of the party or the consignee. The fine can be levied against the authorized person of a juristic person such as the managing director or responsible person of the multimodal transport operation. Such person shall be liable unless he can prove otherwise or he has exercised necessary precaution to prevent the offence.

From the provisions, the law may appear to be imposing burden on multimodal transport operators. However, the requirements under the Act, such as being a limited company or public limited company and maintaining the assets and security for 80,000 SDRs, are not very burdensome when comparing with the multimodal transport laws in certain foreign countries\(^4\). In addition, as multimodal transport is an international transportation with at least 2 different modes of transport under a single contract, involving at least 2

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\(^3\) Section 39-64 of the Multimodal Transport Act, B.E. 2548.

\(^4\) Under Chapter 2 of the Provision under the Regulations Governing International Multimodal Transport Goods by Containers 1997 relating to the multimodal transport of People's Republic of China

Article 5 states that

[M]ultimodal transport operator for business enterprise shall meet the following conditions:

(A) with the PRC legal entity

(B) has engaged in multimodal transport operations with the corresponding organization, a fixed place of business, the necessary operating facilities and the appropriate professional managers.

(C) the enterprise has more than three years experience of international transport of goods or agency, with appropriate domestic and foreign agents.

(D) of the registered capital of not less than 10 million Yuan, and good credit.

(E) comply with the national laws, regulations and other conditions.
different countries, as well as dealing with a large amount of contract value, consequently, multimodal transport is not only a matter of private interest, but is a matter of public law. Therefore, it is important for the law on multimodal transport to balance between private benefits and public order or public peace. By the nature of multimodal transport, the business has the importance to the extent that the law should prohibit the operation unless, the operator complies with the law. For instance, Under the Multimodal Transportation of Goods Act, 1993 of India, Chapter 2, regarding to the regulation of multimodal transportation, Section 3 states that:

“No person shall carry on or commence the business of Multimodal transportation unless he is registered under this Act; provided that a person carrying on the business of multimodal transportation immediately before the commencement of this Act, may continue to do so for a period of three months from such commencement; and if he has made an application for registration within the said period, till the disposal of such application.”

Consequently, it is necessary to control multimodal transport operator. In addition, the major purpose of controlling the multimodal transport operators is to protect consumers so that the damaged party can recover losses through lawsuit, claim compensation for cargo damages and enforce judgment in that jurisdiction.

However, considering one of the requirements under Chapter 2 which provides for the multimodal transport operator to have a minimum asset of 80,000 SDRs, hence, Having to maintain a minimal security might affect small business sectors, especially, those who operate as agents or brokers. However, comparing to the growth of the multimodal transport business in Thailand, the benefits and advantages in the upcoming future would outweigh the inconveniences and formalities, especially the registration introduced by the law.\(^5\) In practice, the law does not seem to cause any delay in multimodal transport business in Thailand, especially, considering the number of the registered multimodal transport operators in Thailand. In 2007, there were 158 multimodal transport operators registered under Section 39(1) and the member has increased to 254 in 2010.\(^6\) For the record of the registered multimodal transport operators registered under Section 39(3) as being an agent for the principal in a foreign country, the registration started from 2009 with 7 operators and increased to 61 operators in 2010 and as of now there have been 72 operators registered under Section 39(3).\(^7\) The statistics show a growing number of interested operator and do not appear to be put off by the new rules and regulations.

\(^5\) Interview with Miss Supranee Chotmuson, Assistant operation operator, BDP Asia-Pacific Ltd.
Besides the study from the provisions of the laws of Thailand and foreign countries, it is significant to take account of the views of practitioners in this area of practice. From the interviews with government agency and private organization, it can be concluded that they all support the provisions of Chapter 2 of the Act. Even though, Chapter 2 contains some disadvantages such as complex documentation requirements and unpractical provisions, or obstacles. Chapter 2 also contains many advantages. This is because Chapter 2 helps protecting consumers, keeping official records, overseeing the conduct of the multimodal transport operators and helps verifying the multimodal transport operators’ status especially when they operate outside the Kingdom of Thailand. Consequently, Chapter 2 does not seem to have created too high a standard so as to hinder the business or making compliance burdensome.

However, in light of the foreign multimodal transport laws, the regulation of multimodal transport does not classify the types of multimodal transport operators in the same way that Thai law does. According to Section 39, there are three types of multimodal transport operator:

(1) A Thai company operating as a multimodal transport operator;

(2) A multimodal transport operator registered in a foreign country and recognized by Thailand by virtue of a treaty or an international agreement

(3) A multimodal transport operator or any transport operator in a foreign country wishing to operate multimodal transport in Thailand.

As a matter of fact, there are similarities between the multimodal transport operators under Section 39(2) and (3). They both operate in foreign countries. Yet Thai law treats them differently in order to distinguish between those recognized by Thailand by virtue of a treaty and those who are not. A foreign multimodal transport operator needs to clarify himself to the Registrar on which category he belongs to. In the case of a multimodal transport operator registered in a foreign country recognized by Thailand by virtue of a treaty or an international agreement wishing to operate in the Kingdom of Thailand, he needs to file an application for entry into the official record with the Registrar by producing evidence of registration in the foreign country recognized by Thailand by

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8 Under Chapter 2 of the Provision under the Regulations Governing International Multimodal Transport of Goods by Containers 1997 relating to the multimodal transport of People’s Republic of China

Article 7 states that

For the establishment of multimodal transport enterprises should comply with Article 5(a), (b), (d), (e) of this Article, its main investors should have at least three years experience of international transport of goods or agency, there is a corresponding domestic and foreign agents. Approval procedures in accordance with the provision of Article 6.
virtue of a treaty or an international agreement and the appointment of agent or setting up of a branch office in the Kingdom of Thailand. While the rest will fall into the type of operator under Section 39(3) who is required to file an application for registration of appointment of agent with the Registrar by producing evidence of his registration in the foreign country together with evidence of the appointment of a multimodal transport operator registered under Section 39(1) as his agent in the Kingdom of Thailand.

The difference between the process of filing an application for entry into the official record with the Registrar and filing an application for registration under Section 39(2) and Section 39(3) is not only the fee rate but also that an agent representing the multimodal transport operator under Section 39(2) can be either the multimodal transport operator registered under Section 39(1), or a limited company or public limited company incorporated under Thai law with the objective in operating transport business or brokerage, agency or commercial brokerage in transport business, while an agent representing the multimodal transport operator under Section 39(3) can only be a multimodal transport operator under Section 39(1).

Considering the operation of multimodal transportation in the Kingdom of Thailand at the moment, most operators are Thai multimodal transport operators under Section 39(1). In lesser number are agents acting on behalf of foreign multimodal transport operators under Section 39(3). Even though, it is obvious that Thailand’s classification of multimodal transport operators is derived from the ASEAN Framework Agreement on the Multimodal Transport, to promote the business, it was agreed that more options should be given to operators inside ASEAN Countries, according to Section 39(2), currently, Thailand has not decided to recognize any treaty or international agreement; therefore, the multimodal transport operator under Section 39(2) has not been in the system. Nevertheless, it is thought that multimodal transport should be an occupation reserved only for Thai citizens or entitles. Thus, multimodal transport operation in the Kingdom of Thailand can only be performed by a Thai multimodal transport operator under Section 39(1). Even though, the law allows foreign multimodal transport operators to operate in the Kingdom of Thailand, it must do so through an appointed Thai multimodal transport operator, as its agent, according to Section 39(3).

It is the author’s view that multimodal transport law in Thailand should promote global as well as regional operators. Promoting the Member Countries of ASEAN should be the first step from the national level. Nevertheless, it is also important to enhance the effectiveness of the global multimodal transport operation for the benefit of the country’s

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9 Section 45 of the Multimodal Transport Act, B.E. 2548.
10 Section 48 of the Multimodal Transport Act, B.E. 2548.
11 See the Schedule of Fees attached to the Multimodal Transport Act, B.E. 2548.
economy. Nevertheless, Thailand does not seek to give favour to only a group of countries. Therefore the law allows foreign multimodal transport operators under Section 39(3) to enter into the multimodal transport operation by filing an application for entry into the official record and appoint its agent by complying with the requirements of Section 39 (2). It is the author’s view that improving the practical aspects of the law will increase the number of foreign multimodal transport operators and will benefit the economy of our country. It will also create jobs for Thai nations because foreign multimodal transport operator must appoint Thai multimodal transport operator or a limited company or public limited company incorporated under Thai law with the objective in operating transport business or brokerage, agency or commercial brokerage in transport business, to operate in Thailand.

As a result, the author suggests amending Chapter 2 of the Multimodal Transport Act, B.E. 2548, regarding the multimodal transporting operators under Section 39(3), as follows:

1. The multimodal transport operator under Section 39(3) should be able to file an application for entry into the official record with the Registrar.

In order for the multimodal transport operators under Section 39(3) to be subject to the same requirements as the multimodal transport operators under Section 39(2), Paragraph one of Section 48 should be amended as follows:

“A transport operator or multimodal transport operator in a foreign country under Section 39(3) who wishes to operate multimodal transport in the Kingdom of Thailand shall file an application for entry into the official record with the Registrar by producing evidence of his registration in the foreign country together with evidence of the appointment of agent or setting up of a branch office in the Kingdom of Thailand.”

2. The multimodal transport operator under Section 39(3) should be able to appoint an agent in the same way as the multimodal transport operator under Section 39(2). Therefore, Section 47 relating to the agent of the multimodal transport operator registered under Section 39(2) should include the multimodal transport operator registered under Section 39(3) as follows:

“An agent of the multimodal transport operator registered under Section 39(2) and (3) shall possess either of the following characteristics:

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12 Reasons given for enacting the Multimodal Transport Act B.E. 2548 are stated below:

[Whereas] The service has developed from the service of port-to-port or airport-to-airport to the service of door-to-door. The service has expanded its potential to be started from the place of receiving the goods at the place of destination. The modes or vehicles of transport involve with more than one mode and being under one transport contract. Therefore, it shall stipulate the rules of authorization and the regulation of operation to support the multimodal transport operation and to provide convenience to the international business sector which will become higher in competition.
(1) being the multimodal transport operator registered under Section 39(1), or

(2) being a limited company or public limited company incorporated under Thai laws with the objective of operating transport business or brokerage, agency or commercial brokerage in transport business.

The agent in (2) shall maintain security for liabilities of the principal under the contract of multimodal transport or for any other risks arising from the contract."

It is the author’s view that implementing the above suggestion would benefit Thailand’s economy and increase the number of foreign multimodal transport operators in Thailand. It is also believed that it would create jobs for Thai people because foreign multimodal transport operators would have more choices in appointing either Thai multimodal transport operator or a limited company or public limited company incorporated under Thai laws with the objective in operating transport business or brokerage, agency or commercial brokerage in transport business as their agents. The author firmly supports the idea of registration and does not believe that easier access for Thai companies to act as agent will not be used to avoid registration.
Liability for Cloud Computing under Copyright Law*

Introduction

In the millennium era of globalization, it has been in our perception that the Internet has played very significant role in borderless communication. It is said that everyone benefits from the Internet either directly or indirectly. Cloud computing is a term, which directly relates to the development of the Internet, that has emerged for few years and has continued to grow every single day. It can be simply described as the way in which computing resources, both software and hardware, can be accessed over the Internet. Cloud computing is a shift of requirement of software from the traditional way – the need of software to be installed on computer, and is also the shift of hardware – the need of having a data center to store data and process computing task, to the cloud.

To demonstrate, for general users, they are no longer required to possess a word processing application on their computers. Instead, they can use their computers that connected to the Internet and visit Google Docs website\(^1\) to use a word processing application via their web browsers. By using cloud computing, nothing that happens in the cloud is stored on the users’ computers. In this case, the documents that the users created are remotely stored on the cloud (Google Docs’ server) unless the users download them. As to the business sector, the enterprise can now own a virtual server on the cloud. To elaborate, the traditional way would require the business enterprises to host a server to process and store the business data and records on its premises. Certain service models\(^2\) of cloud computing allow the enterprises to hire a virtual server on which they can deploy platform and applications

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* This article is summarized and rearranged from the thesis “Liability for Cloud Computing under Copyright Law,” The Master of Business Laws (English Program), Faculty of Law, Thammasat University.

2 IaaS, infra.
to handle the computing tasks and store the business data. It must be emphasized that cloud computing requires a decent and reliable Internet connection to access the computing resources on the cloud. Cloud computing is a technology that benefits every kind of users of such technology. Moreover, it also benefits to the global in terms of reducing electricity consumption.

Unavoidably, cloud computing posts many concerns to the legal system – the liability for copyright infringement occurring on cloud computing system, the proof of infringement concerning electronic evidence, the jurisdiction of copyright infringement of cloud computing, and the enforcement of liability on a cloud computing service provider. However, this article will only focus on the liability for copyright infringement by a cloud computing service provider.

**Background of Cloud Computing**

The term “cloud computing” is defined by the National Institute of Standards and Technology (NIST) as “a model for enabling convenient, on-demand network access to a shared pool of configurable computing resources (e.g., networks, servers, storages, applications, and services) that can be rapidly provisioned and released with minimal management effort or service provider interaction.”

According to the definition, cloud computing is a model of computing resources which contains the following characteristics; (a) On-demand self service: cloud computing only requires an unilateral provision from a consumer of cloud computing service computing capabilities, such as, server time and network storage. The customer can have access to provision the capabilities of its service without the requirement of having human interaction with the cloud computing service provider. (b) Broad network access: the capability to access cloud computing service provider is broad as the service recipient is able to access his cloud computing service provider via different types of devices and platforms, from a laptop to a sleek smart-phones. (c) Resource pooling: the computing resources of the cloud computing service provider are pooled in order to serve multiple customers using multi-tenant model, with different physical and virtual resources dynamically assigned and reassigned according to the demand of the customers. (d) Rapid elasticity: according to the fact that tremendous computing resources being pooled, cloud computing is said to possess unlimited computing resources. The capabilities of

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3 For the general users, cloud computing enables conveniences. For business sector, cloud computing benefits most in cost saving. For more about benefits of cloud computing see Sorawat Wongkaweepairot, *Liability for Cloud Computing under Copyright Law*, a Thesis for the Degree of Master of Law, Business Law (English Program), Faculty of Law, Thammasat University 2011, pp. 16-21.


5 *Id.*
cloud computing can be rapidly and elastically provisioned in order to serve the need of its customers. (e) Measured service: the cost of cloud computing service is based on a pay-as-you-go basis. The usage of computing resources can be monitored, controlled, and reported providing transparency for both the provider and the consumer of the utilized service.

The service of cloud computing is categorized into three service models\(^6\); (a) Software as a Service (SaaS): SaaS is the most popular and the most common service model. It is a model that allows the service recipients to use the provider’s applications running on its cloud infrastructure. The applications are accessible from various client devices through a thin client interface such as a web browser. One of the obvious and popular examples of this type of service is a web-based e-mail which users can log in to create, send, and save e-mails via internet browser which currently is accessible from variety of devices – from a personal computer to a sleek mobile phone.\(^7\) The user of SaaS does not have any choice of prefer application if the provider does not provide so. (b) Platform as a Service (PaaS): PaaS is a more advance and more complex service model. The user of PaaS has choice to deploy his application onto the cloud or develop specific application using the programming languages and tools supported by the cloud computing service provider. The user of PaaS does not manage or control the underlying infrastructure.\(^8\) (c) Infrastructure as a Service (IaaS): IaaS is the most advanced and most complex service model; it allows the consumer to provision the computing resources of the cloud (processing, storage, networks, etc.). The service recipient is able to deploy and run arbitrary software including specific operating system. However, the service recipient does not have control the underlying cloud infrastructure.

**Legal Problems Regarding Copyright Infringement in Cloud Computing**

It is a fact that violation of copyright on the Internet has been a significant problem. One of the tools that contributes to such violation is the Internet service where the user can easily upload and distribute copies of copyrighted works. According to the characteristics of cloud computing service which allows users to create and/or store their data, a cloud computing service provider is considered an Internet service provider.\(^9\)

\(^6\) *Id.* at 12.

\(^7\) The SaaS includes one of the very famous online applications–Google Docs (www.docs.google.com) containing word processors, spreadsheets, and spreadsheet in which provides Microsoft office like. The users can access to such applications by using their web browsers.

\(^8\) Example of PaaS services–Google App Engine (www.appengine.google.com), Microsoft Windows Azure (www.microsoft.com/windowsazure).

\(^9\) Internet service provider can be categorized into two types–provider of Internet connection, and provider of services on the Internet. Cloud computing is considered the latter type.
Hence, the users who, without authorization from the copyright owner, upload, download, or make available of such work, shall be liable for direct copyright infringement. Apart from the primary infringement directly committed by the user, secondary infringement may be charged against a cloud computing service provider for it provides the system to the users to commit copyright infringement.

Concerning the benefits that cloud computing delivers, if the possible liability for copyright infringement of a cloud computing service provider were not certain, it would obstruct the development and investment in such technology.

**Legal Problems Regarding Copyright Infringement of Cloud Computing in Foreign Countries**

This subtopic will examine the liability for copyright infringement of a cloud computing service provider as the Internet service provider in foreign countries, namely the United States of America and the United Kingdom.

**Liability for copyright infringement of cloud computing service provider under the US law**

There was a concern that the Internet intermediary in the US may be liable for secondary copyright infringement conducted by its users under three concepts of secondary infringement developed by the court judgments - contributory infringement\(^\text{10}\), vicarious infringement\(^\text{11}\), and inducing infringement.\(^\text{12}\) According to the US is a party to the WIPO Copyright Treaty (WCT); it has legislated the Digital Millennium Copyright Act (DMCA) and has included it in the 17 U.S.C. § 512 to govern the liability for copyright infringement of online service provider (OSP)\(^\text{13}\). Such provision aims to exempt the online intermediary including cloud computing service provider from being liable for copyright infringement resulting from the conduct of its users.

\(^{10}\) Contributory infringement requires that the secondary infringer has either actual or constructive knowledge of the direct infringement, and the infringer materially contribute to the infringing activity. See A&M Records v. Napster 239 F. 3d 1004 (9th Cir. 2001); see also Sega Enterprises Ltd. v. Maphia, 948 F. Supp. 923 (N.D. Cal. 1996).

\(^{11}\) Vicarious infringement requires that the secondary infringer has supervision to control its users’ infringing activities, and receives a direct financial benefit from the copyright infringement. See A&M Records v. Napster 239 F. 3d 1004 (9th Cir. 2001).

\(^{12}\) Inducing infringement is a doctrine derived from the case MGM v. Grokster. It requires that the inducing infringer "distribute a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement" see MGM Studios Inc. v. Grokster, Ltd., 380 F. 3d 1154, 1157 (9th Cir. 2004).

\(^{13}\) See § 512(k)(1).
To qualify for any limitations of liabilities under the DMCA, the OSP must meet two general conditions stipulated in § 512(i)(1)\textsuperscript{14}. Firstly, the OSP must adopt and reasonably implemented, and inform subscribers and account holders of the service provider’s system or network of, a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider’s system or network who are repeat infringers. Secondly, the OSP must accommodate and does not interfere with the standard technical measures.\textsuperscript{15}

The provision concerning the liability of cloud computing service provider as an online service provider under is § 512(c) of the 17 U.S.C. § 512(c)\textsuperscript{16} limits the liability for monetary relief of the online service provider who provides “hosting” services by allocating server space to customers or clients who wish to make information available to others. In order to be qualified for § 512(c), the online service provider must meet the following conditions\textsuperscript{17}:

1. The OSP does not have actual knowledge that the material or an activity using the material on the system or network is infringing\textsuperscript{18}

2. If the actual knowledge is absent, the OSP is not aware of facts or circumstances from which infringing activity is apparent\textsuperscript{19};

3. If the OSP acquires such knowledge or awareness, it acts expeditiously to remove or block access to the material;\textsuperscript{20}

\textsuperscript{14} 17 U.S.C. § 512(i)(1):
[A]ccommodation of technology - The limitations on liability establishes by this section shall apply to a service provider only if the service provider - (A) has adopted and reasonably implemented, and informs subscribers and account holders of the service provider’s system or network of, a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider’s system or network who are repeat infringers; and (B) accommodates and does not interfere with standard technical measures.

\textsuperscript{15} See § 512(i)(2).

\textsuperscript{16} 17 U.S.C. § 512(c)(1): In General.
[A] service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider, if the service provider - (A) (i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing; (ii) in the absence of such actual knowledge, is not aware of the facts or circumstances from which infringing activity is apparent; or (iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material; (B) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and (C) upon notification of claimed infringement as described in paragraph (3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be subject of infringing activity.


\textsuperscript{18} 17 U.S.C. § 512(c)(1)(A)(i).

\textsuperscript{19} 17 U.S.C. § 512(c)(1)(A)(ii).

\textsuperscript{20} 17 U.S.C. § 512(c)(1)(A)(ii).
4. The OSP does not receive financial benefit directly attribute to the infringing activity while having the right and ability to control the activity; and

5. The OSP complies with the "notice and take down" provisions of the Copyright Act. The OSP, upon receiving notification, is required to respond expeditiously to remove or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.

In addition to the limitation of liability of the OSP, the DMCA also provides that the OSP must comply with the "notice and take down" provisions. The provisions of notice and take down aim to facilitate the copyright owners in exercising their exclusive rights by providing that the copyright owners are entitled to notify the OSP of the copyright infringement of their works.

The concept of notice and take down requires the OSP to provide a designated agent responsible for receiving notifications of copyright infringement from the copyright owners. In addition, it also requires the OSP to make available to the public of the contact information of such agent through its service and websites. In the case where eligible notification is received, the OSP must acts expeditiously to remove or block access to the infringing material.

Liability for copyright infringement of cloud computing service provider under the UK law

Unlike the US where specific copyright law was legislated, the UK adopted the Directive 2000/31/EC, which is the directive legislated by the Council of Europe concerning the liability of Internet intermediaries, and enacted as the Electronic Commerce (EC Directive) Regulations 2002 to exempt the online intermediaries from liability that may arise from providing online services including liability for copyright infringement of cloud computing. Under the Electronic Commerce Regulations, Regulation 2 defines

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22 See 17 U.S.C. § 512(c)(3) and § 512(c)(2), such provisions impose obligation of the OSP to have its agent for receiving notifications of infringing activity, and allows copyright owners to notify an OSP's agent of allegedly infringing material of the OSP's system.
24 See § 512(c)(2) and § 512(c)(3).
25 § 512(c)(2).
26 See § 512(c)(3).
Internet service provider and cloud computing service provider as “information society service.”

The Regulation that concerns the liability of cloud computing service provider is Regulation 19 providing that the cloud computing service provider that store information provided by a recipient of the service shall not be liable for damages or for any pecuniary remedy or for any criminal sanction resulting from copyright infringement by its users.

In order to enjoy the exemption of liability under Regulation 19, the cloud computing service recipients must not store infringing material under the authority or control of the service provider, and the cloud computing service provider must not have actual knowledge of copyright infringement on its system. In addition, upon obtaining knowledge of copyright infringement on its system, the service provider must act expeditiously to stop the infringing activity.

In order to determine the actual knowledge under Regulation 19, Regulation 22 lays the provision called “notice for purpose of actual knowledge”. Such provision provides that the service provider has actual knowledge when it received a notice of copyright infringement that contains the necessary elements prescribed in Regulation 22(b) from the copyright owner through the contact information that the service provider is required to make available.

Legal Problems Regarding Copyright Infringement of Cloud Computing in Thailand

Thai law is yet silent on the issue of liability for copyright infringement by an Internet service provider, including cloud computing service providers. Hence, a cloud computing service provider might face possible liability for copyright infringement.

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31 The Electronic Commerce (EC Directive) Regulations, Regulation 19: [W]here an information society service is provided which consists of the storage of information provided by a recipient of the service, the service provider (if he otherwise would) shall not be liable for damages or for any other pecuniary remedy or for any criminal sanction as a result of that storage where—(a) the service provider—(i) does not have actual knowledge of unlawful activity or information and, where a claim for damages if made, is not aware of facts or circumstances from which it would have been apparent to the service provider that the activity or information was unlawful; or (ii) upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information, and the recipient of the service was not acting under the authority or the control of the service provider.
Although, as of the date of this article, there has been no case concerning copyright infringement by an Internet service provider or cloud computing service provider brought to Thai court, the study reveals that a cloud computing service provider may face possible liability for secondary copyright infringement conducted by its users. In other words, the cloud computing service provider may be held liable as a secondary infringer for copyright infringement conducted by its users on its system.

The provision concerning secondary infringement in the Copyright Act B.E. 2537 is Section 31.

*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.”*

The scope of secondary infringement under Section 31 is considered narrow. It is limited to specific actions provided in (1) - (4). In addition, such provision specifically requires that the secondary infringer commit any of the acts in (1) - (4) for profit.\(^{36}\)

The author is of an opinion that Section 31 is insufficient to impose liability for secondary infringement on cloud computing service provider. That is because by nature of storing information by the cloud computing users' direction, the cloud computing service provider is not deemed to commit any of the acts prescribed in (1) - (4) of Section 31.\(^{37}\)

However, as copyright infringement is a concept derived from tort law\(^{38}\) and the exclusive rights of the copyright owner are considered “right of another person” under Section 420 of Thai Civil and Commercial Code\(^ {39}\), the concept of copyright infringement

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\(^{36}\) See Supreme Court's Decision No. 10579/2551 (The case reveals no profit that the defendant received from playing MP3 song in the defendant's restaurant).

\(^{37}\) See also พันธุ์สมบัติ ทวารัตน์, ความรับผิดในกรณีละเมิดสิทธิของผู้ให้บริการอินเทอร์เน็ต, วิทยานิพนธ์ระดับบัณฑิต จุฬาลงกรณ์มหาวิทยาลัย 2550, น. 97 (Phansayam Huaykaew, *Liability of Internet Service Provider for Copyright Infringement*, a Thesis for the Degree of Master of Law, Faculty of Law, Chulalongkorn University 2007, p. 97).

\(^{38}\) See Huaykaew, *supra* note 37, at 98 (the copyright infringement in Copyright Act B.E. 2537 is itself a wrongful act under Section 420 of the Civil and Commercial Code).

\(^{39}\) The Civil and Commercial Code, Section 420 “A person who, willfully or negligently, unlawfully injures the life, body, health, liberty, property or any right of another person, is said to commit a wrongful act and is bound to make compensation therefore”, Huaykaew, *supra* note 37, at 98.
can be compared to the concept of a tort commitment against another person’s rights (exclusive rights). In other words, “infringement of copyright is an unlawful act that injures the rights of the copyright owner.” In addition, disregarding the criminal liability under Thai Copyright Act, any act of copyright infringement itself is considered a tort. The concept of joint tortfeasors under Section 432 of the Civil and Commercial Code should be able to appropriately assist the Copyright Act B.E. 2537 to impose the civil liability for secondary copyright infringement on the cloud computing service provider.

To be specific, the concept of assisting person prescribed in paragraph two should be used in such case. The concept of assisting person can be compared to an accessory of criminal offence under Section 86 of the Criminal Code.

In order to hold a person liable for his wrongful act under tort law, it requires that the person willfully commit wrongful act. The willfulness in tort law, unlike the concept of “intention” in criminal law which is used to determine the offence and criminal liability under criminal law, does not determine the limit of injury. To be clear, it is immaterial how much damage is suffered by the injury party, the tortfeasor must liable for any damages resulting from his willful act. To be deemed willfulness of an actor, the actor must know that there will be injury resulting from his act. When applying the principle of accessory to the case of copyright infringement on cloud computing, the most important issue that must be focused on is the willfulness of the supporter (the accessory). The cloud computing service provider is deemed to have willfulness when it knows that copyright infringement occurs on its system and that there will be injury suffered by the copyright owner resulting from such infringing activity. In other words, if the cloud computing knows about the infringement on its system either by itself or by receiving the notification of copyright infringement from the copyright owner and fails


41 The Civil and Commercial Code, Section 432: If several persons by a joint wrongful act cause damage to another person, they are jointly bound to make compensation for the damage. The same applies if, among several joint doers of an act, the one who caused the damage cannot be ascertained.

Persons who instigate or assist in a wrongful act are deemed to be joint actors. As between themselves the persons jointly bound to make compensation are liable in equal shares unless, under the circumstances, the Court otherwise decides.

42 Huaykaew, supra note 37, at 98.


44 The Civil and Commercial Code, Section 420.

to take any appropriate action against such infringement, the cloud computing service provider should be liable as assisting person of the copyright infringement conducted by its users on its server under Section 432 of the Civil and Commercial Code and shall be liable thereof.

However, according to the concern of potential liability of Internet service provider, and the policy to promote its use, the legislative assembly have attempted to amend the provision regarding exemptions of copyright infringement in Part 6 of the Copyright Act B.E. 2537 by including said provisions to exempt liability of the Internet service provider in Section 32/1 and Section 32/2.

**Draft Copyright Act**

Section 32/1 "The following acts of reproduction of a copyright work by virtue of this Act shall not be deemed copyright infringement.

(1) reproduction resulting from digital transmission of copyright work, or reproduction resulting from rendering copyright work in electronic form to be perceived.

(2) by a person authorized by the copyright owner to digitally transmit or render the copyright work in electronic form to be perceived; and

(3) resulting from the ordinary course of operation of the device, ultimately delete such copyrighted work permanently that such work cannot be used except as in (1) and (2)"

Section 32/2 "The act against a copyright work by virtue of this Act of the Internet service provider, if the service provider does not control, initiate, or command the said act, such act shall not be deemed copyright infringement.

"Internet service provider" means

(1) Internet service provider providing data transmission through access points specified by the users, without modification of data transmitting between the sender and the receiver.

(2) Internet service provider providing Internet access to the public, or any other services by any other means of providing access to Internet services.

The criteria and condition of an action which shall not be considered as infringement of copyright stipulated in paragraph one shall be in accordance with the Ministerial Regulations"

According to the draft amendment, Section 32/1 deals with the exemption of copyright infringement of right to reproduce resulting from the ordinary course of surfing on the Internet by the users where temporary copies of data is continuously reproduced.
as long as the users browse the websites.\textsuperscript{46} In addition, it also deals with the reproduction occurring from data transmission of data by the users. If the users are authorized by the copyright owner, such provision exempts them from liability for direct copyright infringement.

Section 32/2 specifically deals with the exemption of copyright infringement by the service provider. The author has taken notes that Section 32/2, except the broad definition of Internet service provider, is written ambiguously as may be commented as follows;

Firstly, it lacks specific exemptions from specific liabilities like those provided in the DMCA and the Electronic Commerce (EC Directive) Regulations. The DMCA provides exemptions of liabilities on transitory communications\textsuperscript{47}, system caching\textsuperscript{48}, information residing on systems or network at the direction of users\textsuperscript{49}, and information location tools\textsuperscript{50}, while the Electronic Commerce (EC Directive) Regulations provides exemptions of liabilities on mere conduit\textsuperscript{51}, caching\textsuperscript{52}, and hosting\textsuperscript{53}. Moreover, the copyright act of the UK, the CDPA, was also amended by including Section 28A\textsuperscript{54} to exempt the temporary reproduction of copyrighted work.

Secondly, it lacks mechanism for the copyright owner to exercise his exclusive rights to control the infringing activities of the Internet service provider on the system – the “notice and takedown” as provided in the DMCA, or the “notice for purposes of actual knowledge” as stipulated the Electronic Commerce (EC Directive) Regulations. The DMCA of the US imposes the duty on the service provider to provide its designated agent with the contact information available to receive notifications of copyright infringement on its server\textsuperscript{55}. As soon as the Internet service provider receives the notification that comprises all the required elements, the service provider must expeditiously take action to stop the infringing act or it will not enjoy the exemption under the DMCA. As to the UK, the Electronic Commerce (EC Directive) Regulations also imposes the duty for the Internet service provider to make available to the users of its service of its contact information.

\textsuperscript{46} Every time that the users surf on the Internet, the computer of the users must download and reproduce temporary data (cache) in the RAM of the users’ computers in order for the computers to process and display the contents that the users are viewing. However, the data that is reproduced in the RAM only exists for short time and automatically removed after the computer is shut down.

\textsuperscript{47} See 17 U.S.C. § 512(a).
\textsuperscript{48} See 17 U.S.C. § 512(b).
\textsuperscript{49} See 17 U.S.C. § 512(c).
\textsuperscript{50} See 17 U.S.C. § 512(d).
\textsuperscript{52} The Electronic Commerce (EC Directive) Regulations 2002, Regulation 18.
\textsuperscript{54} The CDPA, Section 28A.
\textsuperscript{55} See 17 U.S.C. § 512(c)(2).
that the users can send the notification to inform any unlawful activities on its system.56
However, unlike the DMCA, the notice for purposes of actual knowledge under the
Electronic Commerce (EC Directive) Regulations is used for the benefit of the court to
determine whether the Internet service provider will enjoy its exemptions in specific
cases or not.57

To sum up, there is yet no provision of Thai laws concerning the exemption of
liability of Internet service provider. Cloud computing service provider who is considered
an Internet service provider, also does not enjoy any exemption of liability for infringing
activities occurring on its system. Although there was a concern for this issue and the
amendment of the Copyright Act B.E. 2537 concerning exemptions of liability for
infringement of Internet service provider was drafted, the author finds that it is obviously
ineffective to deal with the complexity of infringing activities occurring on the Internet
and cloud computing in these days.

From the analysis of the draft amendment of the Copyright Act B.E. 2537 concerning
exception of liability of the Internet service provider, it reveals the lack of necessary elements
to appropriately deal with the problem of liability of cloud computing service provider.

In laying provision of exemption of liability for copyright infringement of the
Internet service provider and the cloud computing service provider, the ability of the
copyright owner to control the infringement of his work, the right of the public to access
to the work, and the burden of the Internet service provider to prevent the infringement
on its system must be balanced.

The author is of an opinion that the draft amendment should take into consideration
the DMCA of the US, and the Electronic Commerce (EC Directive) Regulations of the UK
as such law and regulations comprise the mentioned characteristics. To be specific, the
draft amendment should contain the following elements;

(1) It should impose obligation on the cloud computing service provider to make
available its contact information to which the copyright owners are able to
directly and immediately notify if the owners are aware of any infringing
activity of the cloud computing service provider. In addition, the cloud
computing service provider must register such contact information with the
Department of Intellectual Property.

(2) It should provide the exemption from liability for copyright infringement of
cloud computing service provider who stores the data by the direction of its
users on its system under, at least, the following conditions;

a. the cloud computing service provider does not have actual knowledge of
copyright infringement on its system;

b. the cloud computing service provider promptly takes action to stop the infringement on its system upon acknowledgement of infringement;

c. the knowledge of infringement of the cloud computing service provider shall be determined by the acquirement of the eligible notice of infringement from the copyright owner or its authorized person.

(3) It should, at least, provide necessary requirements of notification of infringement of the copyright owner as follows;

a. The notification must contain the full name, citizenship identification number, and residential contact address of the copyright owner or its authorized person;

b. The notification must contain the information of the infringing work and the information of infringement including location of the infringing work, sufficient for the cloud computing service provider to determine the notified infringement and access to such material to delete it.

Conclusion and Recommendations

At the beginning of this article, cloud computing has been introduced and discussed. Cloud computing is not exactly a new technology that Thailand has never experienced. Cloud computing has wide and tremendous benefits to users, business sector, education, and earth. The study reveals that cloud computing posts serious concern to the copyright realm, that is to say, cloud computing can be used as a tool for committing copyright infringement. Thus, the cloud computing service provider may be secondarily liable for copyright infringement conducted by its users on its system. Since cloud computing has provided many advantages to every levels of service recipients, it is necessary that appropriate law be enacted to ensure the cloud computing service provider of its possible liability for copyright infringement in order to support the investment and development of cloud computing in Thailand.

In other countries namely the US and the UK, their copyright legal systems have developed to govern such particular issue by systematically laying provisions of law and regulations to provide exemption of liability for copyright infringement to the Internet service provider including cloud computing service provider if they comply with the law and regulations.

As in Thailand, the study reveals that the current Thai Copyright Act B.E. 2537 is silent on the exemption from liability for copyright infringement of cloud computing service provider. In addition, cloud computing service provider may be held secondarily liable for copyright infringement committed by its users under the Copyright Act B.E. 2537 together with the Civil and Commercial Code. That is because the copyright owner is entitled to
bring civil claim against the infringer of his work, as well as against the person who assist the infringer by providing a system to facilitate infringing activities.

Therefore, the author would like to recommend that the Copyright Act B.E. 2537 be amended by laying provisions of law governing the exemption of liability of the Internet service provider in which the cloud computing service provider is included. The amendment may be based on the concepts safe harbors provisions of the US and the UK that this article has studied as those provisions are considered appropriate and effective.
Legal Entity for Social Enterprise*

Introduction

Due to the belief that current social and environmental problems, including economic recessions, result from the sole maximization of profits for particular groups of people, there has been growing interest in privately-led approaches that use business methods for the specific aim of addressing chronic social and environmental problems. This encouraging development is generally known as social enterprise and social entrepreneurship.¹ Social enterprises are operated as ordinary businesses. Their main revenues come from sale of goods and provision of services, but, unlike ordinary businesses, they aim primarily to further their social purposes, not private profit purposes.² The social enterprise movement has evolved over time. Nowadays, the trend has developed in a more ambitious way; the concept’s goal is to enable people to make a decent living while pursuing a social objective that adds meaning to their lives by working within a single venture (hereinafter referred to as the “Dual Purposes”).³

A legal entity can be functional as a mechanism to accommodate promotion of a social enterprise sector.⁴ It is considered as one of the most

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important considerations in operating social enterprises, because a legal entity refers to the way in which a business is set up and the rules and regulations that govern it. If social enterprises are operated under an inappropriate legal entity, it can lead to future difficulties in their operations. Therefore, people who would like to operate social enterprises have to exercise caution in choosing one legal entity existing under Thai laws which is appropriate to the natures of their social enterprises. However, it is thought that existing legal entities under Thai laws cannot serve the concept of social enterprise appropriately, because there are only two main types of legal entities: (1) a for-profit legal entity, like a limited company, and (2) a nonprofit legal entity, like a foundation or association; meanwhile, social enterprises are considered to be in the middle range between the traditional for-profit entity and nonprofit entity. It is, therefore, proposed that there should a specific legal entity for social enterprises.

The Article will proceed as follows. Part I will introduce the conceptual framework of social enterprise indentifying its definitions. It will also refer to the current situation of social enterprise movement in Thailand. Part II will consider the significance of a legal entity dealing with the social enterprise movement. Additionally, it will provides an analysis of the use of existing legal entities, nonprofit legal entities and for-profit legal entities, under Thai laws to serve the distinctive characteristic of social enterprises and point out advantages and disadvantages of such approach. Then, this part will present the notion of a hybrid legal entity created for being a specific legal entity for social enterprises. Part III will detail two new hybrid legal entities considered as a practical product resulting from the notion of the hybrid legal entity: the community interest company (CIC) and the low-profit limited liability company (L3C). Part IV will examine and evaluate whether Thai laws should adopt the concept of a specific legal entity for social enterprises by analyzing the CIC and L3C as archetypes. Part V concludes the benefits of legislation of a legal entity for social enterprise under Thai law and suggests the adoption of legal measures for Thai laws.

I. Conceptual Framework of Social Enterprise

A. Definition of Social Enterprise

First, it is essential to examine the meaning of “Social Enterprise”. Even if the concept of social enterprise gains global support, its definition continues to expand. It might be concluded that there is a lack of a clear and concise definition for social enterprise.\(^\text{6}\) The term generally refers to the use of some types of commercial activity in support of a


social purpose⁷, a business with more than one bottom line, measuring its performance on more than just profit⁸, or one organized and operated for the dual purposes of engaging in profit-making activity and furthering a social good.⁹ Importantly, social enterprise is considered as an activity, and not an organizational form.¹⁰ Any nonprofit or for-profit organization may engage in the social enterprise activity. In other words, social enterprise activity does not exclusively need to be performed by organizations commonly called “social enterprise.”¹¹

For the specific purposes of this Article, the term “social enterprise” will be used to refer to any commercial activity or venture operated to simultaneously achieve personal wealth and social goals, in consonant with the trend that a social enterprise is inclined to have a dual purpose of engaging in profit-making activity and furthering a social good.¹² The dual purposes must at least be equal or weigh in favor of furthering the social goal. However, the revenue of the venture must not primarily depend on public grants or private donations.¹³ Social enterprises therefore occupy the middle range between the traditional for-profit organization and the traditional nonprofit organization.¹⁴

**B. Current Situations of Social Enterprise in Thailand**

The Thai government has responded to the trend of social enterprise and agreed with the concept that it is an effective tool for solving Thai social problems such as social disparity and poverty.¹⁵ The concrete movement of promoting social enterprises in Thailand was initiated by the result of the cabinet resolution on July 28th, 2010. The resolution approved the Social Enterprises Master Plan 2010-2014 as a fundamental strategy to promote a private sector with a role in reforming the nation especially in the area of reducing the income gap among Thai citizens.¹⁶ The resolution also approved the Office of the Prime

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¹⁰ “Social enterprise is just a generic term used to describe a particular sphere of activity.” Bromberger, supra note 7.
¹¹ JPA Europe Limited, supra note 8.
¹² Timmerman, supra note 3.
¹³ Smiddy, supra note 9.
¹⁴ Id.
¹⁵ CSR และกิจการเพื่อสังคม (Social Enterprise) กับการแก้ปัญหาความยากจนและความเหลื่อมล้ำ, ประชาชาติธุรกิจ (กรุงเทพฯ), 28 ธ.ค. 2553 (CSR & Social Enterprise and Solutions of Poverty and Social Disparity, Prachachart Dharukit (Bangkok), Oct 28, 2010), also available at http://www.prachachart.net/view_news.php?newsid=02sup07281053&sectionid=0218&day=2010-10-28.
Minister Regulation of National Promotion of Social Enterprises 2010 and appointed the Social Enterprise Promotion Commission which has responsibilities for imposing policies, promoting the concept of social enterprise and supporting broad coordination between social enterprises to facilitate social enterprises. By virtue of the regulation, the Thai Social Enterprise Office (TSEO) was therefore established under the Thai Health Promotion Foundation Act, as the executive authority to follow the Social Enterprises Master Plan 2010-2014. According to the survey, many corporations all over Thailand have conducted Corporate Social Responsibility practices (CSR), but 98.5% of all activities are a donation of money and things that cannot sustainably address income disparity and poverty occurring in Thailand. From this viewpoint, CSR seems not to be an effective instrument for solving the problems. On the other hand, while social enterprise is considered as a straightforward instrument to deal with the problems, social enterprises in Thailand are quite small and lack capital and good governance, and consequently cannot generate much positive impact.

II. Legal Entity for Social Enterprise under Thai Laws

“Social Enterprise” is not an accepted legal expression in Thailand; there is no specific law that defines it or gives it a specific legal entity. There is no concept or legal entity that combines the benefits of both the for-profit and nonprofit sector. Instead, social enterprises in Thailand can take a variety of organizational forms. They can be formed as a foundation or even a public limited company. Thus, the founders must carefully consider the current legal environment and existing legal entities before establishing a social enterprise. Under Thai private laws, legal entities are divided into two types: (1) a nonprofit legal entity and (2) a for-profit legal entity. This part will examine the application of each type of a legal entity to the distinctive nature of social enterprises.

A. Using Existing Legal Entities under Thai Laws as Social Enterprise

- Nonprofit Legal Entity

A nonprofit legal entity under Thai laws is represented by a foundation and association. As a general principle of a nonprofit entity, a foundation and an association under Thai laws are subject to the principle of “Non-distribution Constraint” provided

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18 สุทธิศักดิ์ ลิขิตวิวัฒน์, ความรับผิดทางอาญาของนิติบุคคล (พิมพ์ครั้งที่ 1 2553), น. 6-7 (Surasak Likkasitwattanakul, Criminal Obligation of Juristic Person (1st ed. 2010), pp. 6-7).
that a nonprofit organization is prohibited from distributing its net earnings among individuals who supervise the organization. Under Section 110 of the Civil and Commercial Code (CCC), a foundation is prohibited from sharing profit and the same restriction also applies to an association under Section 78 of the CCC. These rules can guarantee that any profit generated by a social enterprise in the form of the two nonprofit legal entities will be used exclusively for social purposes, because the profit cannot be distributed for personal gain, even to its founder. Operators of social enterprises might prefer to use a nonprofit structure to insulate themselves from any possibility of losing a social enterprise status for greater profitability. Additionally, a social enterprise using a foundation or an association form will have competitive advantage, because it can help assure prospective purchasers, consumers and donors, that the enterprise will definitely dedicate its revenue for public benefits.

Another outstanding advantage of choosing a foundation and association is obtaining tax privilege under Thai law. In principle, a foundation or association that carries on revenue generating activities is a taxable entity, because it is deemed to be a company or juristic partnership which is a taxable entity under Section 39(3) of the Thai Revenue Code. However, the Section also provides that the foundation or association as prescribed by the Finance Minister and published in the Royal Gazette in accordance with Section 47(7)(b) is exempt from taxation even it carries on revenue generating activities. Therefore, there are two kinds of a foundation and association in Thai Revenue Code: (1) A foundation and association that is taxable entity and (2) A foundation and association as prescribed by the Finance Minister and published in the Royal Gazette that is exempt from taxation.

However, although a foundation and association can be taxed, the rate of the foundation and association (10 percent of assessable income) is lower than other business entities like a company and juristic partnership (30 percent of assessable income). In addition, there are some types of income that are totally exempt. Under Section 65 Bis (13), registration fees or maintenance fees from members, or cash or assets received as donations or grants are not included in tax calculations. This regulation provides the

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20 The Civil and Commercial Code, Section 110.
21 The Civil and Commercial Code, Section 78.
23 Robert A. Katz & Antony Page, supra note 1, at 72.
24 Id. at 70.
25 The Thai Revenue Code, Section 39(3).
26 Id.
28 Thai Revenue Code, Section 65 Bis.
reason why a foundation and association gain their main income from donations and grants, 
as if they generate revenue through business methods, they might be probably taxed.

As mentioned above, using a foundation and association as a legal form for social 
enterprise has two core advantages over other legal forms: (1) a guarantee of social 
benefits and (2) a tax benefit. They are not, nonetheless, well-suited to operate as a 
business venture, especially when they need outside capital other than donations and 
grants. The restrictions prohibiting sharing profit cause a difficulty to foundations and 
associations in gaining access to capital, because they cannot issue stock to attract 
investments and revenues generated by them must be therefore retained and cannot be 
paid out to investors. Only reasonable compensation can be paid out to individuals 
rendering services. They have to mainly rely on donations and grants to pursue their 
mission. This hinders a social enterprise from expanding its social mission on a larger 
scale and being both self-sufficient and sustainable. Although the law does not inhibit 
foundations and associations from earning profits, it bars them from distributing those 
profits for personal gain. Therefore, it is impossible for foundations and associations to 
perfectly serve the social enterprise movement, especially when entrepreneurs would like 
to pursue the dual purposes of private profits and social benefits.

• For-Profit Legal Entity

Owing to the incapacity of a nonprofit entity to serve the dual purposes resulting 
from the non-distribution constraint, the concept of social enterprise has more recently 
been applied to for-profit ventures with social missions.\(^{29}\) A for-profit legal entity under Thai 
laws is represented by a limited company and registered partnerships. This part will focus 
mainly on the application of a limited company with the concept of social enterprise.

A limited company has ability to gather large amounts of capital, because it can 
issue and sell shares to investors. Accordingly, social entrepreneurs who use a limited 
company as the vehicle for social enterprises can access more resources as well as doing 
business as usual. A social enterprise’s ability to benefit individuals also has important 
outcomes regarding the compensation of social entrepreneurs, since it can produce their 
financial incentives to increase social welfare.\(^{30}\) It is necessary to use a legal mechanism 
to impose social missions on a limited company. Traditional corporate law provides a 
tool for maintaining the balance between earning money and furthering the company’s 
social mission. A company’s document, a memorandum and articles of association, may 
require the company to accommodate the dual purposes.\(^{31}\) Consequently, directors of 
the company will automatically have extended duties to produce social benefits as well 
as private profits.

\(^{29}\) Katz, supra note 1, at 61.

\(^{30}\) Id. at 94.

\(^{31}\) Smiddy, supra note 9, at 10.
Although using a limited company as the vehicle for social enterprises can avoid all of the restrictions of using a foundation and association, there are some problematic issues resulting from such use. As the entity is designed specifically for maximizing profits for its owners, it is obvious that private profit motive will be prioritized over social purposes. This concept is affirmed by Section 1012 of CCC expressly stating that a company or partnership must be established for sharing profits among its shareholders.\textsuperscript{32} This feature might be a main obstacle to the pursuit of social benefits under the form of for-profit legal entities under Thai laws. Even if social objectives are explicitly set in their internal regulations, the objectives for social benefits can be amended or abolished at anytime, owing to the organizational flexibility of the for-profit legal entities. That is to say, there is no guarantee that they will continually pursue their social missions, because they are not bound by any restriction. Besides, a social enterprise in the form of a limited company normally faces a branding problem, because the public cannot know that it conducts businesses for the benefit of the community. Social enterprises in the form of a company will face hardship in raising a profile of social enterprises. They may be able to promote themselves that they are a social enterprise, but this can result in additional costs of operation and it is difficult to convince the public that it is truly a social enterprise, not just a marketing tool to attract consumers. It can be concluded that the use of for-profit legal entities under Thai laws has two potential flaws: (1) difficulty in enforcing social missions and (2) lack of competitive advantage.

\textbf{B. Notion of Hybrid Legal Entity}

Owing to problems of using traditional legal entities resulting from the law that only permits organizations to be either nonprofit or for-profit form as mentioned above, it can be concluded that none of the traditional legal entities permit a personal gain motive and a social benefit motive to co-exist equally in a single venture. Consequently, due to the dissatisfaction with the nature of the two opposite traditional entities, there is a concept of creating a hybrid legal entity to help bridge the gap between for-profit and nonprofit organizations in a single legal entity.\textsuperscript{33} To facilitate the entity's expansion, it is ideally proposed that the form should be able to access outside capital from investors without jeopardizing or compromising social missions of social enterprises.\textsuperscript{34} Nevertheless, there should be sufficient flexibility with regard to management to pursue the dual goals of profit and social benefit within the single venture.\textsuperscript{35} Apart from capital from equity finance, the form should be able to receive foundation grants and tax-deductible contributions.

\textsuperscript{32} โสภณ วัฒนาการ, ค้านธิบาย ชุดต้น บริษัท (พิมพ์ครั้งที่ 10 2548), น. 10 (Sophon Ratanakorn, \textit{Explanation of Partnership and Company} (10th ed. 2005), p. 10).

\textsuperscript{33} สมิดดี้, \textit{supra} note 9, at 14.

\textsuperscript{34} คาทซ์, \textit{supra} note 1, at 92.

\textsuperscript{35} บรอมเบอร์เกอร์, \textit{supra} note 7.
and the form would be required to issue an annual “Social Impact Report” outlining its progress toward achieving its social mission.\textsuperscript{36}

III. Legal Entity for Social Enterprise in Foreign Countries

As a consequence of the notion of a hybrid legal entity for nurturing the growth of social enterprises, the trend has been practically applied in the UK and several states in the US. In these jurisdictions, it was decided that there was a problematic gap between nonprofit and for-profit entities, when they are used as a vehicle for social enterprises, and new legislations were desirable in order to foster the social enterprise sector. In 2005, a new type of company called the “Community Interest Companies” or the “CIC” was created in the UK. A similar legislative step was taken in 2008 in the US when Vermont passed legislation that enabled the creation of new legal entities called the “Low-Profit Limited Liability Companies” or the “L3C”. Subsequently, L3C legislation has either been approved or is being currently considered in many states.

A. Community Interest Companies

The creation of a community interest company in the UK based on the demand to promote a social enterprise. The form was anticipated to improve access to finance, create a strong new brand, be legally protected from conversion into a purely for-profit organization, and retain assets and profits solely for social purposes.\textsuperscript{37} Latterly, the Companies (Audit, Investigations and Community Enterprise) Act 2004 (“CAICE Act”) and the Community Interest Company Regulations Act 2005 (“CIC Regulations”) enabled the creation of a new type of company called the Community Interest Companies (CIC).\textsuperscript{38} Since the community interest company was created in 2005, more than 4650 CICs have been incorporated.\textsuperscript{39}

The CIC relies mainly on company law as the basic framework. The CICs differ from a limited company in three respects.\textsuperscript{40} First, the CICs can only be incorporated if they pass the “community interest test”. The basic test will consider whether a reasonable person might consider that the CIC’s activities are carried on for the benefit of the community. This test will not be generally satisfied if the CIC aims to benefit a particular

\textsuperscript{36} Id.
\textsuperscript{38} The Regulator of Community Interest Companies, “Frequently Asked Question For Funding Organisations”, (2009), also available at http://www.cicregulator.gov.uk/CICleaflets/FAQ%20%20October%202009%20V5.00%20Final.pdf.
\textsuperscript{39} www.cicregulator.gov.uk.
\textsuperscript{40} Timmerman, supra note 3.
group of people, or if it is related to political issues.\textsuperscript{41} Second, there is an “asset lock” to ensure that assets and profit will be reinvested in the CIC or used for social purposes. The asset lock mandates that the payment of dividends to shareholders must be capped under the CIC Regulation. The yearly dividend cap is now set at 20% of the amount paid on the share, and a total dividend of CICs paid to all shareholders per year cannot exceed 35% of the CIC’s distributable profits.\textsuperscript{42} Moreover, even if the CIC is dissolved, all remaining assets after liquidation must be transferred to another CIC, a charity, or a foreign equivalent to a charity upon dissolution.\textsuperscript{43} Third, as part of the CAICE Act, the Community Interest Companies Regulator is created to register the CICs and monitor compliance with the special regulations. The CIC Regulator’s role is only to be a “light-touch regulator” who will only encourage the development of the CIC brand and provide guidance and assistance on matters relating to CICs. However, the regulator has some enforcement power to make sure that the CICs will truly further social purposes.\textsuperscript{44}

**B. Low-Profits Limited Liability Companies**

The L3C takes the limited liability company (LLC) form as its basic framework. It adds special features to harmonize nonprofit and for-profit elements, but retains much of the LLC’s inherently flexible feature.\textsuperscript{45} The L3C legislation was created for the limited purpose of facilitating foundations’ willingness to make program-related investments (PRIs) in for-profit companies. PRIs are governed by Internal Revenue Code (IRC). The investment will be tax-exempt, if it is qualified as prescribed by the Section 4944(c) of jeopardy investments rules.\textsuperscript{46} Therefore, PRIs could be a significant source of investment capital for social enterprises.

Due to the purpose to make it easier and less costly for foundations to determine where they can safely invest with PRIs and simultaneously increase the amount of capital available for social enterprise,\textsuperscript{47} the L3C legislation replicated elements in the PRIs rules prescribed in Internal Revenue Code.\textsuperscript{48} This is for the organizations to be *ipso facto* suitable for PRIs. It is anticipated that a foundation will not be reluctant to invest in the L3Cs, because it is assured that a return for the investment will be tax-exempt.

\footnotesize{\textsuperscript{41} The Regulator of Community Interest Companies, “Information Pack: Community Interest Companies”, 11 (2010), also available at http://www.cicregulator.gov.uk/CICleaflets/CIC%20INFORMATION%20PACK%20V00.02D.pdf.}

\footnotesize{\textsuperscript{42} The Regulator of Community Interest Companies, “Chapter 6: The Asset Lock”, 8 (2009), also available at www.cicregulator.gov.uk/.../11-955-cic-guidance-chapter-6-the-assetlock-pdf.pdf.}

\footnotesize{\textsuperscript{43} Id. at 15.}

\footnotesize{\textsuperscript{44} Id. at 7.}

\footnotesize{\textsuperscript{45} Reiser, supra note 37, at 621.}

\footnotesize{\textsuperscript{46} Internal Revenue Code, § 4944(c).}

\footnotesize{\textsuperscript{47} Doeringer, supra note 6, at 319.}

\footnotesize{\textsuperscript{48} Vermont Statutes, § 3001(27).}
Apart from the benefit from PRIs, the organizational flexibility of a LLC structure also allow for other types of investment. The L3C is able to take advantage of the membership flexibility in order to create a multi-tiered investment strategy, often called a tranched mechanism. The tranche mechanism is a creative way to attract a variety of investors by providing the different rates of returns for different classes of members. Because the L3C can structure tranche investments, some investments, like foundations and socially responsible investors, can receive below market or even zero rates of returns while others, like market-rate investors, can receive market rates of returns. This tranched structure can make the L3C attractive to the variety and number of potential investors in social enterprises.

Another distinctive feature of the L3C is a rule on transferability of the entity's share. The default LLC rule permits members to freely transfer their economic interest at will, but governance rights will not follow this transfer unless the other members agree to admit the transferee to membership. This distinction makes a LLC structure differ from the structure of an ordinary company. Therefore, this default rule is raised as one measure to guarantee that the social missions of social enterprises in form of LLC will not be affected by the change of its members. However, the rule is only a default rule which can be amended anytime, so a membership agreement can easily provide that governance rights will also be transferred when a share is sold. Finally, the rule may not be able to truly secure the social missions.

It can be concluded that except for the requirements for being a valid receiver of PRIs and the distinctive L3C's brand, the L3C is entirely identical to the LLC. The organizational flexibility of the L3C can result in greater ability of the entity to adapt itself to be in accord with the concept of social enterprise; on the other hand, it cannot produce any guarantee that the L3C will continually devote itself to social benefits.

IV. Analysis of Adoption of the CIC & L3C Forms into Thai Laws

After evaluating consequences of creating of the CIC legislation in the UK and the L3C legislation in the US, it is believed that, for Thailand, the CIC model is more viable than the L3C model. The two legislations are very different; the CIC legislation attempt to promote a social enterprise by restricting any possibility that could demolish a distinctive status of social enterprise in order to ensure the public that the entity truly serves social purposes, while the L3C legislation endeavor to promote a social enterprise by increasing

50 Reiser, supra note 37, at 627.
51 Id. at 646.
capability of a social enterprise in gaining access to various sources of capital. Consequently, the CIC legislation places emphasis on providing firm restrictions whilst the L3C legislation focuses on flexibility to help social enterprises design their own rules.

To determine which legislations are more appropriate to be adopted into Thai laws, it is necessary to weigh the benefits between rigidity of the CIC model and flexibility of the L3C model. It is considered as a tradeoff issue for which there will be no totally positive result. To promote a social enterprise, it is thought that the CIC legislation is more effective than the L3C legislation. The rigidity of the CIC form can produce a merit to the brand of social enterprise which can lead to a truly competitive advantage of CICs and an attraction to certain amounts of people who are willing to support the CICs because of their integrity in the concept of social enterprise.

On the other hand, the L3C legislation may produce a vehicle to receive the PRIs from foundations and an opportunity for L3Cs to raise significant amounts of capital from various types of investors, but there is no guarantee that the L3Cs will continue their social missions. Whenever a L3C is not interested in public benefits, it can simply turn itself into a for-profit legal entity and when it is wound up, the remaining assets after liquidation will flow to its members. It can be concluded that except a distinctive brand for social enterprise, the L3C structure is nothing more than an ordinary for-profit entity. This feature also affects the PRI status, because when it ceases social missions, the investments of foundations cannot be counted as the valid PRIs anymore. The foundations can be taxed for such investments, because their PRIs turn into a jeopardized investment. Finally, foundations will be reluctant to invest in the L3Cs. Furthermore, even the L3Cs has the brand of social enterprise, but the brand of the L3C is not valuable, as the brand of the CIC, due to the fact that there is no external enforcement on the L3C. The brand may also create a competitive advantage, but in a long run, when the L3Cs increasingly converted into a for-profit entity and distribute a large amount of profits to its members, the advantage cannot be last long. The public cannot be sure that the L3Cs will continually pursue social purposes.

Therefore, it is more proper for Thai laws to be modeled closely on the UK approach due its clarity and certainty which can facilitate the application of the proposed legislation. To maintain a dignity of a social enterprise sector, it is believed a restrictive regulation is more effective than a loose one. Furthermore, it will be easier for Thai laws to adopt the UK model than the US model, because Thailand has already had a company form while there is no such structure and rule like a LLC and PRIs under Thai laws. The legislation of the new legal entity for social enterprises under Thai laws can replicate aspects of the CIC and make refinements based on concerns learned through several years of application of the legal entity in the UK.

52 Id. at 109.
V. Conclusion and Recommendations

As the analysis mentioned above, it can be concluded that existing legal entities under Thai laws cannot fully accommodate the distinctive characteristics of social enterprises. It is proposed that there should be a creation of a specific legal entity in Thailand in order to respond to the global trend of social enterprise. Appropriate legal measures to create the specific legal entity for social enterprises are proposed as follows:

1. It is proposed that the legal entity for social enterprises should rely on a company law as its basic framework and has additional requirements to be distinguished from an ordinary company. This is because a company legal form under Thai laws enables social enterprises to attract private investment distributes profits to investors. Another advantage of the company form is that it is familiar and well conceived by the business community. It should be noted that only an issue specifically stated otherwise in the new legislation will not be governed by the company law.

2. It is proposed that the legal entity should have a distinctive brand to assist in creating brand awareness, profile and competitive advantage for the legal entity. The name should be able to convey the concept of social enterprise instantly, once people hear it and indicate the nature and objective of the company. Thus, it is proposed that the name for the proposed legal entity should be “Public Interest Company” or “PIC”.

3. It is proposed that to be incorporated as the proposed legal entity, social enterprises must be qualified by the view of reasonable person that they are going to truly conduct activities for social purposes. The determination will mainly rely on social objectives presented by the social enterprises.

4. It is proposed that there should be special restrictions on asset allocation within the proposed legal entity to guarantee that the company will use most of their assets and profits for the community interest. The restrictions should compel the legal entity to adopt model provisions or statutory clauses into its articles of association, because the document is considered as the dominant rule of a company. The issues that should be specially regulated are as follows:
   - There should be a model statutory clause providing that any transaction or transfer of a company’s asset can only be conducted with the full consideration of the company. This is to ensure that the assets will not be transferred at less than market value. However, there might be some exceptions, in case that it is a transaction with other social enterprises in the form of this legal entity, a foundation, an association, or it is made for the benefit of society.
• There should be a model statutory clause providing that the proposed legal entity will not distribute dividends to its shareholders exceeding some specific amounts as provided by the authority.

• There should be a model statutory clause providing that any remaining assets after liquidation will be transferred to other social enterprises in the form of this legal entity, a foundation, an association.

5. It is proposed that the new legal entity should be required to annually deliver a public interest report for public scrutiny to confirm that the entity continues satisfy social purposes. The report should contain details about the social benefits generated by the performance of the company so as to show how the company is operated for social purposes and beneficial to a society.

6. It is proposed that the new legal entity should be allowed to cease its operation only by dissolution or conversion into a foundation to ensure that the social enterprise will not turn into a purely for-profit entity.

7. It is proposed that there should be an independent government office which has specific duties to support and monitor the new legal entity. At present, Thailand has Thai Social Enterprise Office as an office that is responsible for facilitating the growth of social enterprises. If a legislation of the legal entity is enacted, the office can be used as the independent office to supervise the new legal entity and a mechanism to enforce and support the aforementioned proposals.
A Comparative Study of Natural Resource Damage Assessment in USA and Thailand*

Introduction

Natural resource and environmental problems are one of the most serious problems in Thailand which need to be addressed immediately. There are problems of enhancing and protecting our natural resource and environment as well as problems with assigning a monetary value to them when they are damaged or destroyed.

The primary statutory laws that impose civil liability upon parties causing damage to public natural resources are the Enhancement and Conservation of National Environmental Quality Act of 1992, the Hazardous Substance Act of 1992, and Section 119 and Section 119 bis of the Navigation in the Thai Waters Act of 1913. Although these laws impose civil liability upon the party responsible for causing damage to natural resources, there are no provisions providing guidelines or economic methods for the government agencies to assess the resulting value of the damaged resource or to otherwise prove damages recoverable from the responsible party. In fact there are handbooks created by scholars and government agencies which provide some guidelines, but they are neither enforceable nor recognized as a standard in natural resource damage assessment cases. Because of the lack of a universally accepted guideline, the government has had difficulty in proving, and the court has had difficulty in awarding an appropriate amount of damages in natural resource damage cases. As a result, damaged resources have not been quickly restored and the public have not been properly compensated for its loss. In order to find appropriate and practical solutions to these problems, a thorough understanding of natural resource damage assessment (NRDA) is required.

* This article is summarized and rearranged from the thesis “A Comparative Study of Natural Resource Damage Assessment in USA and Thailand,” The Master of Business Laws (English Program), Faculty of Law, Thammasat University.
Additionally, the United States gives a lot of attention to NRDA. The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and the Oil Pollution Act (OPA) are two significant laws dealing with natural resource damage liability in the United States. To better understand NRDA and address the problems with NRDA in Thailand more effectively, a comparative study between U.S. laws and Thai laws is required.

Economic Aspect of Natural Resources

In order to assess natural resource damage, an understanding of the economic aspect of natural resources is required. “Natural resources” are those resources that are provided by nature that can be categorized into increasingly small units and allocated at the margin. For example, barrels of oil, cubic meters of wood, and kilograms of fish. Natural resources can be categorized into renewable resources and exhaustible resources. Natural resources such as oil, minerals, and coal are generally considered as exhaustible resources, whereas living things, such as plants and animals are generally considered as renewable resources. There are also “environmental” natural resources which are the resources provided by nature that are indivisible, for example, an ecosystem, an estuary, the ozone layer, and the lower atmosphere. These cannot be allocated unit by unit as oil can be allocated by barrels. Though environmental natural resources cannot be examined in terms of quantity, their quality can be assessed and evaluated. Some resources may be classified into more than one category.\(^1\)

Natural resources are assets that provide a variety of benefits and services. For instance, forests, fisheries, lands, and water provide raw materials. Trees produce oxygen and wetlands filter rain water before it is stored as groundwater. These resources become assets when people have the right to directly or indirectly access these benefits.\(^2\)

Economic value of a natural resource can be related to its direct use. For example, people are willing to pay for crude oil as much as the energy it creates. The economic value of some natural resources is based on their non-use. That is, some people are willing to pay a certain amount of money for a resource not to be used. Some natural resources have value which is not related to either its use or non-use but relates to the potential to use or access the natural resource in the future.\(^3\)

Therefore, the total economic value of a natural resource consists of three main elements; the use value, the non-use value, and the option (future) value. The use value

2 *Id.*
refers to both direct and indirect use of the natural resource. The non-use value refers to existence, bequest, and altruistic values. And the option value relates to the future value of a resource. All of these must be assessed to determine the total value of a natural resource.

Tools and Techniques in Assessing Natural Resource Damage

In order to measure the total value of a natural resource, an economic method or formula is required. Available economic methods can be categorized into six approaches as follows;

1. The Market-Based Approach

The market price method is used to assess the economic value of natural resources that are bought and sold in commercial markets. This method estimates consumer and producer surplus by using market price and quantity data regarding the environmental goods or services that are bought and sold in commercial markets. The consumer surplus refers to is the benefit enjoyed by consumers for being able to purchase a product at a price that is less than the highest price that they would be willing to pay. Similarly, the producer surplus refers to the benefit enjoyed by producers for selling environmental goods or services at a market price that is higher than the least that they would be willing to sell. The more environmental goods and services generate larger net surplus the more valuable they are.4

In other words, the market price method relies on observing changes in prices for goods or services that are traded in a market, based on a change in environmental quality. It can be said that this method measures the economic value from the marketed goods, based on the quantity people purchase at different prices, and the quantity supplied at different prices. Therefore, this method is suitable for valuing natural resources that direct use benefits are involved.

However, there are some limitations of the market price method due to the fact that this method can be only used to evaluate environmental goods or services that are bought and sold in markets. This method does not typically work well on large scale change affecting the demand and supply of the environmental goods or services since it might not be easy to value.5

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2. The Revealed Preference Approaches

2.1 Hedonic Pricing Method

Hedonic pricing method is used to assess the economic values of environmental aspects that directly affect market prices by using statistical analysis of market prices to infer a price for environmental quality. This method is commonly applied to variations in housing prices that reflect the value of local environmental attributes. Water, noise, and air pollution have a direct impact on property values.\(^6\)

The hedonic pricing method is relatively simple to use since it is based on the market price and easy to measure data. However, applying the hedonic pricing method can be relatively expensive if data must be gathered and compiled. It is quite difficult to find two sites that are identical except for the environmental quality.\(^7\)

2.2 Production Function Method

The method is also known as “valuing the environment as an input”. This method is used to evaluate the economic value of natural resources that contribute to the production as a factor of production of other goods. It can be said that this method specifically focuses on the relationship between environmental attributes and the output level of an economic activity.\(^8\)

Concerning the steps of the production function method, there consist of two major step procedures. The first step is identifying the physical impact of environmental changes on a production activity. The second step is valuing these changes in terms of the corresponding change in the activity’s output.\(^9\)

This method is relatively straightforward. Nevertheless, it is limited to the natural resources that are used as factor of production of goods and services sold in the markets. Since some of the goods and services produced by the environment are not commercially sold in the markets, the production function method may fail to capture the total value of the resource to society.\(^10\)

2.3 Travel Cost Method (TCM)

The travel cost method (TCM) is mostly used to estimate economic use values of natural resources that are used for recreation, such as ecological parks, fishing sites. This


\(^7\) Id.

\(^8\) Cesare Dosi. Environmental values, Valuation Methods, and Natural Disaster Damage Assessment, the UN Economic Commission for Latin America and the Caribbean (2000), p. 13.

\(^9\) Id. at 14.

method is based on the concept that if people travel to a site, then their willingness to pay for visiting this site must be at least as large as the travel cost incurred. In other words, it can be inferred that this method uses costs that people incur to travel to estimate its value. Therefore, the TCM is applicable when travel cost is a major component of total cost of obtaining recreational benefits from such natural resource.\textsuperscript{11}

The TCM is relatively inexpensive when comparing with other methods. However, this method is limited to natural resources that have direct recreational benefits to people and the situations that the measurable travel costs are available to examine. It should be noted that in order to apply the travel cost method, some further information must be gathered, such as number of visits per respondent, travel expenses, the value of time spent travelling, substitute sites that the person might visit instead of this site, other locations visited during the same trip, and the price of visiting substitute sites.\textsuperscript{12}

3. The Stated Preference Approaches

3.1 Contingent Valuation Method (CVM)

Contingent valuation method (CVM) is used to estimate the value of natural resources based on survey research techniques. This method involves directly asking people, in a survey, how much they are willing to pay for the use or conservation of natural resources. In this aspect, this implies that people are not entitled to such natural resource condition; they would be required to pay in order to obtain it. On the other hand, people may be asked for the amount of compensation they would be willing to accept for deterioration in environmental quality. This implies that people should be compensated for the loss of natural resources that they are entitled to.\textsuperscript{13}

Concerning advantages of the CVM, it should be noted that the CVM is quite flexible since it can be used to estimate the economic value of every natural resource. More importantly, the CVM can assign monetary value to non-use value of natural resources. Therefore, this method can be used to evaluate total economic value of natural resources which includes non-use value and option value.\textsuperscript{14}

However, this method also contains disadvantages since the CVM is based on asking people questions, as opposed to observing their actual behaviors. The results from this method may not be accurate due to biases that may appear in the survey. For

\textsuperscript{11} Dennis M. King and Marisa J. Mazzotta, Travel Cost Method, http://www.ecosystemvaluation.org/travel_costs.htm#overview.
\textsuperscript{12} Id.
\textsuperscript{13} Carson, Rebecca M. and Bergstrom, John C., "A Review of Ecosystem Valuation Techniques", Faculty Series 16651, University of Georgia, Department of Agricultural and Applied Economics, p. 4 (2003).
\textsuperscript{14} Dennis M. King and Marisa J. Mazzotta, Contingent Valuation, http://www.ecosystemvaluation.org/contingentvaluation.htm#over.
example, strategic bias may arise when the respondent provides a biased answer in order to achieve a particular outcome.\textsuperscript{15}

\textbf{3.2 Contingent Choice Method}

The contingent choice method is used to estimate value of changes in natural resources by asking respondents to state their preferences between one group of environmental service and another group that offer different prices or cost to the individual. Therefore, this method is commonly used when the officials want to evaluate the outcomes of several policy options.\textsuperscript{16}

Concerning the advantages of the contingent choice method, this method can decrease the biases from the respondents that can arise in the CVM. The contingent choice method presents the respondent with the options, while the CVM presents with the open-ended question by asking the respondents to putting dollar value to natural resources. However, translating the answers in to monetary values is quite complicated and may decrease certainty of the actual value of the resources.\textsuperscript{17}

\textbf{4. The Benefit Transfer Approach}

The benefit transfer method is used to estimate economic values for ecosystem services by transferring available information from study site that has already completed to another site. This method is often applied when it is too expensive to conduct an original valuation or has little time left for the assessment. For example, values of recreational fishing in a particular State may be estimated by applying measures of recreational fishing values from a study conducted in another State. The goal of the Benefit Transfer Method is to estimate the value of natural resources in one context by adapting an estimate of the value from another context. However, this method can only be as accurate as the initial study and requires conditions to be similar at both site contexts. As a result, the Benefit Transfer Approach is commonly used to assess the value of natural resources when government agencies do not have a large budget for conducting the original study at a specific site.\textsuperscript{18}

\textsuperscript{15} Id.


\textsuperscript{17} Dennis M. King and Marisa J. Mazzotta, Contingent Choice Method, http://www.ecosystemvaluation.org/contingent_choice.htm.

\textsuperscript{18} Dennis M. King and Marisa J. Mazzotta, Benefit Transfer, http://www.ecosystemvaluation.org/benefit_transfer.htm#over.
5. The Cost-Based Approach

The cost based method consists of damage cost avoided, replacement cost, and substitute cost methods that are used to estimate values of ecosystem services based on either the costs of avoiding damages due to lost services, the cost of replacing ecosystem services, or the cost of providing substitute services. However, these methods do not provide the strict measures of economic values. Instead, these methods measure the economic value of natural resources based on the assumption that, if people incur costs to avoid damages caused by lost ecosystem services, to replace the services of ecosystems or to provide substitute services, then those services must be worth at least the amount that people spend to avoid the damage or replace the services. Therefore, these methods are appropriate to be applied when damage avoidance or replacement expenditures have actually been, or will actually be, made.\(^{19}\)

However, the assumption that the damaged or lost services of the resources must be worth at least the amount that people spend to avoid the damage or replace the services may or may not be true. The economic evaluation of the costs of producing benefits are usually not accurate as evaluating by measuring the benefits themselves by using the methods that measure from the individuals' willingness to pay.\(^{20}\)

6. The Restoration-Based Approach/Habitat Equivalency Analysis (HEA)

The habitat equivalency analysis (HEA) is not considered as the method in the revealed preference or stated preference approach. The HEA is classified as the restoration-based approach for estimating value of natural resources. The HEA which is a quite new method developed by the National Oceanic and Atmospheric Administration (NOAA) is frequently used by the trustees to assess damages when natural resources are damaged from oil spills and other contaminant-related impacts such as vessel grounding in coral reefs. The HEA does not estimate net economic value of natural resources but determines compensation for the lost services. The compensation in this context refers to the restoration projects providing replacement service which is equivalent to the value of the lost service.

The HEA is commonly applied in NRDA to value the amount of compensatory restoration which is equivalent to the loss of natural resource services due to damage. The loss of natural resources is calculated from the time of damage through the recovery process. The recovery of such resources can be either via natural recovery or active

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\(^{19}\) Dennis M. King and Marisa J. Mazzotta, Damage Cost Avoided, Replacement Cost, and Substitute Cost Methods, http://www.ecosystemvaluation.org/cost_avoided.htm#over.

\(^{20}\) \textit{Id.}
restoration. The goal of this method is to ensure that the quantity of replacement services is equivalent to the quantity of lost services.\textsuperscript{21}

**The Concept of NRDA in USA**

The regulations for NRDA have been promulgated under both the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and the Oil Pollution Act (OPA). These provisions provide guidelines for government official or trustee to find potentially responsible parties, pursue natural resource damage (NRD) claims, clean up and restore damaged natural resources.

Focusing on the concept of NRDA, NRDA is a process in which a natural resource trustee may seek compensation on behalf of the public for damage to natural resources due to the result of oil spills or hazardous substance releases. NRDA was created by the Congress in addition to the process for cleanup of hazardous substance or oil. Concerning the main purpose of NRDA, it was created in order to restore damaged natural resources and the service they provide. The measure of damages under CERCLA and OPA is the cost of restoring damaged natural resources to their baseline condition, compensation for the interim loss of injured resources while pending recovery, and also the reasonable costs of a damage assessment which refers to the amount that may be recovered for the cost of conducting a damage assessment.\textsuperscript{22}

Concerning the trustee’s role, only designated federal trustees, authorized representatives of an affected State, or an affected Indian tribe can act on behalf of the public to recover natural resource damages and to use funds to restore, rehabilitate, or acquire the equivalent of such natural resources.

In NRDA context, the term “restore” can be categorized into two scenarios. Firstly, the term “restore” refers to restoration to baseline which means restoring damaged resources to the condition that the resources would have been in before the release of hazardous substance or discharges of oil. Secondly, the term “restore” refers to compensatory restoration which means restoring the loss of natural resource services that they would have provided to the public during the re-establishment of baseline. This kind of loss is also known as “interim loss”. Furthermore, the trustees have to evaluate damages to the damaged resources by identifying the functions or services that the resources provided. Then, the trustees have to determine the baseline level of the services that the resources


provided. Lastly, the trustees have to quantify the reduction of service levels after the contamination. Thus, the goal of the NRD claim is to make the environment and public whole for damage to natural resources. The public loss can be compensated through the restoration, rehabilitation, replacement, or acquisition of equivalent natural resources and services. Therefore, natural resource damages are not punitive damages since the compensation in NRDA is in the form of restoration, and damages are primarily the cost to conduct the restoration project.

Problems Concerning NRDA in Thailand

Concerning the problem of NRDA in Thailand, there are four major problems under the Thai law that needs to be solved. They are as follows.

1. The Problems Concerning the State as the Injured Party

The Enhancement and Conservation of National Environmental Quality Act of 1992, The Hazardous Substance Act of 1992, and the Navigation in the Thai Waters Act of 1913 do not specifically define the term “state”, nor provide other guidelines as to who is an “injured party” in instances of damaged State-owned or public domain natural resources or what entities have the authority to pursue claims for damages and compensation. Therefore, it is still questionable whether the local administrative organizations have authority to bring a lawsuit and claim damages when natural resources in their area of responsibility are damaged.

Focusing on U.S. law, CERCLA and OPA both specifically authorize federal entities, States, Tribal representatives, and others (such as foreign governments and the EPA) to act on behalf of the public as “Natural Resource Trustees” for the protection of the natural resources under their respective trusteeship. These trustees play an important role in the process of natural resource damage assessment and claims for compensation. Additionally, there may be overlapping trusteeship over natural resources. Federal, State, and tribal trustees may each have a claim with respect to a single NRD incident. Joint pursuit of compensation by multiple trustees, can lead to a more effective, comprehensive and ultimately beneficial result.

The problems concerning the State as the injured party in Thai law can be solved by revising the Determining Plans and Process of Decentralization to Local Government Organization Act of 1999 to explicitly authorize the local administrative organizations (Provincial Administrative Organizations, Municipalities, Tumbon Administrative

Organizations, Bangkok Metropolitan Administration, and the Pattaya City Administration) to bring a lawsuit against responsible parties. There are several reasons why the central government should decentralize its authority and responsibilities regarding natural resource conservation and enhancement. Firstly, "Decentralization" can help to reduce the central government's overall burden. It could lead to more efficient and effective resolution of natural resource matters. Secondly, local administrative organizations are closer to the people than the central government. Thus, local administrative organizations can better provide public service that satisfies the needs of the local people. Finally, natural resources and environmental problems affect the public interest and everyone in society. Public participation and awareness are necessary. Decentralization can help accomplish this. Local administrative organizations should play the primary role in addressing natural resource and environmental problems in their respective area of responsibility. The central government should provide only a supporting role.

However, establishing authority in governmental organizations to claim damages and seek compensation for damaged natural resources is not enough to solve the problem. In order for the local government units to bring a lawsuit against the responsible parties, and conduct NRDA effectively, experts in economics, the environment and law should be added to the structure of the local administrative organizations. This, however, may be difficult since local administrative organization do not have equally capable officials or the budget to allow for the addition of these positions. Support from the central government and coordination between the local government units in conducting NRDA would help overcome these problems. In addition, establishing authority on the part of local governmental units to bring a lawsuit would not divest the central government of its already existing authority to do so. This could create overlapping trusteeship further and result in benefits from cooperating and jointly pursuing claims for damages. Since in some situations there may be more than one government agencies involved in an undertaking, a lead agency should be designated in order to supervise the natural resource damage assessment.

2. The Problems Concerning NRDA Regulations

Thai law does not provide guidelines for government agencies in NRDA cases. In some cases, although the defendants were liable, the Court had difficulty in awarding damages for the injured resource because the injured party did not clearly prove monetary value of the damaged resource.

Focusing on U.S. law, in light of Section 301(c) of CERCLA the President is authorized by law to promulgate regulations for the assessment of damages for injury to, destruction of, or loss of natural resources resulting from a discharge of oil or release of a hazardous substance. This duty was designated to the Department of Interior (DOI). Additionally, the National Oceanic and Atmospheric Administration (NOAA) is authorized
to promulgate NRDA regulations applicable to natural resources damaged by discharged oil. It should be noted that trustees are not obligated to comply with DOI or NOAA NRDA regulations. However, if those regulations are followed, the result is granted “rebuttable presumption” status in all administrative or judicial proceedings. “Rebuttable presumption” means that if trustees perform natural resource damage assessment in compliance with the DOI NRDA regulations, the result from NRDA will be presumed correct. As a result a potentially responsible person would have burden to establish that the assessment of damages was inaccurate.\(^{25}\) The rebuttable presumption “merely operates to shift the burden of production to the opposing party to rebut the presumption, by offering evidence which would support a finding that the presumed fact does not exist.”\(^{26}\) Therefore, the rebuttable presumption does not alter the burden of proof of the plaintiff trustees.\(^{27}\) The NRDA granted rebuttable presumption may be considered as credible evidence in order to convince the court to rule in favor of the plaintiff trustees. However, under the NOAA regulations, in order to take advantage of the rebuttable presumption, trustees have to prove that their damage assessments are reliable and valid for such particular incident.\(^{28}\)

In order to solve the problems concerning the NRDA regulations in Thai law, the Minister of Natural Resources and Environment should be expressly authorized by Sections 96 and 97 of the Enhancement and Conservation of National Environmental Quality Act of 1992, Section 69 of the Hazardous Substance Act of 1992, and the Minister of Transport and Communication should be explicitly authorized under Sections 119 and 119 \(bis\) of the Navigation in the Thai Waters Act of 1913 to promulgate the Ministerial Regulations Concerning NRDA for the State, as the injured party to follow when conducting a NRDA. The Ministerial Regulations Concerning NRDA promulgated by the Minister of Natural Resources and Environment and the Minister of Transport and Communication should stipulate the process of conducting a NRDA, including the economic methods that can be used to assess the actual value of the damaged natural resources. The Ministerial Regulations Concerning NRDA should be the result of debate, analysis and comment by objective experts and scholars in related fields, especially law, economics, and the environment.

3. The Problem Concerning NRDA Methods

Thai law is devoid of specific provisions explaining appropriate methods to complete a NRDA. Though there are handbooks and other available methods their use has been criticized as unfair or inappropriate.

For example, in 2009 a defendant was found liable for cutting down trees in a watershed forest. The court found that this caused damage to public natural resources and also contributed to global warming. The defendant was ordered to pay 1.67 million baht. The amount of damages was calculated by using the economic method created by the Department of National Park, Wildlife, and Plant Conservation. Experts, however, have argued that this method is unaccountable and unfair.

Focusing on U.S. law, there are NRDA regulations promulgated by the DOI and NOAA which provide meaningful guidance on how to assess natural resource damage and also describe a wide array of available tools to evaluate damages. There are various economic methods used to assess natural resources damages that have been affirmed by the courts. For example, In Ohio v. Department of Interior, Exxon Valdez Oil Spilt, United States v. Montrose Chemical Corp, and California v. BP American, the court relied on the valuation approach which assigns monetary value to natural resources in order to assess natural resource damages. On the other hand, in United States v. Fisher, the United States v. Great Lakes Dredge & Dock Co., the Big Creek Fire case, and the United States of America v. Union Pacific Railroad Company, the court relied on the restoration approach, the new approach that determines the compensation based on the restoration project of the injured resource.

In order to combat the problems concerning NRDA methods in Thai law, the Minister of Natural Resources and Environment and the Minister of Transport and Communication should be explicitly authorized by law to promulgate the Ministerial Regulations Concerning NRDA. These Ministerial Regulations should provide a reliable, fair and accountable process of conducting a NRDA and economic methods to assess the value of natural resource damage.

There are four economic methods that should be provided in the Ministerial Regulations Concerning NRDA which are the contingent valuation method (CVM), the travel cost method (TCM), the benefit transfer method, and the habitat equivalency analysis (HEA).

The CVM is categorized as the stated preference approach, CVM can be used to assess natural resource damages in general cases since it is flexible. It can be used to assess the value of any type of natural resource as well as a resource that provides non-use value. The CVM is useful because all the values provided by natural resources, use value, non-use value, and option value are equally important. The total economic value of natural resources cannot be determined without using an economic method that can evaluate all these values, such as the CVM. In addition, the CVM can be modified use in various different scenarios by adjusting the nature of the survey questions. The other methods (TCM, benefit transfer method and HEA) can be used only in specific cases.

The TCM is categorized as the stated preference approach. There may be cases in which the natural resource that is damaged is primarily valuable to people as a recreational site, such as beaches and national parks. To assess the lost use value for recreation provided by the resource, the TCM will be the best method.

The benefit transfer method is proposed as it is the easiest and least time-consuming when compared with the others. It can be used to value both the use and non-use values, including the option value of natural resources. If there is an original study containing information that can be adapted to assess the value of a natural resource in another context, this method would be the most appropriate one to use.

The habitat equivalency analysis (HEA) is categorized as the habitat restoration-based approach. It is suggested because although this method is quite new, it has been widely used by trustees and affirmed by the court. It seems to be a new trend to evaluate natural resource damages by using the HEA. In recent NRD cases in the United States, the HEA was applied by the trustees, especially in cases of vessels grounding and forest fires. Use of the HEA will lead to full compensation for the public if the value of the utility provided by the compensatory restoration project is equivalent to the utility loss from the damaged resource. This will achieve the goal of making the environment and the public whole for damages to natural resources.

However, assigning monetary value to natural resources is quite complicated. An understanding of economics and the environment is required. To understand and apply these economic methods in NRDA, experts in economics, the environment, and law should work closely together in order to find appropriate methods to apply and conduct a NRDA more effectively. To decide on a suitable method for each incident, an analysis and understanding of the particular incident and the type of damaged resource and a thorough understanding of all the available methods is required.

4. The Problems Concerning Obstacles in Judicial Proceedings

The lack of NRDA guidance has caused problems for the government in seeking an appropriate amount of compensation and for the court in determining what is a fair amount of compensation to award. Although there are existing handbooks and models, their fairness, accuracy and accountability are subject to strong and justifiable debate.

Under U.S. law, the provisions used in a NRDA have been accepted as reliable and fair and affirmed by the Court. As such the Court is able to award the proper amount of damages reflecting the actual value of the damaged resource. The public loss in damaged natural resource and environment cases can be properly and immediately compensated. In the United States of America v. Union Pacific Railroad Company, the government used the HEA in arriving at a compensation amount of $121 million. The court held that this
amount was reasonable and the HEA method used in evaluating the damages was legally permissible.  

In order to cope with the problems concerning obstacles in judicial proceedings in the Thai law, the Thai Civil Procedure Code should be revised to include a new provision affirming and adopting the rebuttable presumption. The proposed provision under the Civil Procedure Code should stipulate that when there is a case that natural resources owned by the State or belonging to the public domain are damaged, the damage assessment conducted in compliance with the Ministerial Regulations Concerning NRDA promulgated by the Minister of Natural Resources and Environment or the Minister of Transport and Communication would be presumed correct if the government agencies as the plaintiffs can prove that their damage assessments are reliable and valid for particular incidents. As a result, the defendant would have burden to produce evidence in order to establish that the damage assessment conducted by the plaintiff was inaccurate. If the defendant cannot disprove the damage assessment conducted by the plaintiff, the court would be obliged to award amount of damages calculated from the process and the methods in accordance with the Ministerial Regulations Concerning NRDA. This proposed provision would be considered as a specific law which would be applied to the case when the public natural resources were damaged and there were the Ministerial Regulations Concerning NRDA providing the process and the methods for the government agency as the injured party to use in order to assess the monetary value of the damage resources.

Additionally, in order to deal with natural resource and environmental cases more effectively, the Thai Environmental Procedure Law should be enacted to address all technical aspects of environmental cases. The provision concerning the judicial proceeding in the case that public natural resources were damaged should exist under this law.

Conclusions

In order to combat the problems concerning natural resource damage assessment (NRDA) in Thailand more effectively, Thai laws should adopt the general concept of NRDA from U.S. laws and adjust this concept to be suitable for Thailand. The law should be revised to explicitly authorize the local administrative organizations to bring a lawsuit when natural resources in their area of responsibility are damaged. Additionally, Sections 96 and 97 of the Enhancement and Conservation of National Environmental Quality Act of 1992, Section 69 of the Hazardous Substance Act of 1992, and Sections 119 and 119 bis of the Navigation in the Thai Waters Act of 1913 should be revised to expressly authorize the government agencies concerned to promulgate the Ministerial Regulations Concerning NRDA providing the process of conducting a NRDA and the economic methods

in assessing the value of damaged resources. Besides, the Civil Procedure Code should be amended to oblige the court to follow such damage assessment unless it is reasonably rebutted by the defendant.