

THE IMPROPRIETY OF CRIMINAL SANCTIONS UNDER THE THAI COPYRIGHT LAW

Apirat Kraisiridej*
อภิรัตน์ ไกรศิริเดช

บทคัดย่อ

ในปัจจุบัน พระราชบัญญัติลิขสิทธิ์ พ.ศ. 2537 ได้กำหนดโทษในทางอาญาเพื่อลงโทษผู้กระทำความผิดสำหรับการกระทำความผิดเป็นการละเมิดลิขสิทธิ์ทั้งในทางเพื่อการค้าและมีใช้เพื่อการค้า ดังที่ได้บัญญัติไว้ในมาตรา 69-70 แห่งพระราชบัญญัติลิขสิทธิ์ พ.ศ. 2537 ซึ่งเกินกว่าพันธกรณีที่ประเทศไทยจะต้องปฏิบัติตามที่ได้ระบุไว้ในบทบัญญัติข้อ 61 แห่งความตกลงทริปส์ (TRIPs Agreement) ซึ่งกำหนดให้ประเทศภาคีกำหนดโทษในทางอาญาสำหรับการละเมิดลิขสิทธิ์ในทางเพื่อการค้าเท่านั้น โทษในทางอาญาดังกล่าวได้ทำให้เกิดปัญหาในทางปฏิบัติมากมาย อาทิ เช่น เจ้าของลิขสิทธิ์อาจใช้โทษในทางอาญาเป็นเครื่องมือในการรีดไถผู้ละเมิดลิขสิทธิ์ในทางมิใช่เพื่อการค้าจ่ายเงินให้กับเจ้าของลิขสิทธิ์เพื่อแลกกับการไม่ดำเนินคดีในทางอาญา นอกจากนั้นแล้วมาตรา 76 แห่งพระราชบัญญัติลิขสิทธิ์ยังบัญญัติให้จ่ายค่าปรับที่ได้ชำระตามคำพิพากษาแก่เจ้าของลิขสิทธิ์ หรือสิทธิของนักแสดงกึ่งหนึ่ง อันเป็นการกระตุ้นให้เจ้าของลิขสิทธิ์ดำเนินคดีอาญาแก่ผู้ละเมิดลิขสิทธิ์ เพราะค่าปรับกึ่งหนึ่งที่จะได้รับนั้นอาจเป็นจำนวนมากกว่าความเสียหายที่แท้จริงก็เป็นได้ จึงทำให้เกิดการวิจารณ์กันอย่างหลากหลายว่าโทษที่บังคับใช้อยู่ในปัจจุบันนั้นเหมาะสมหรือไม่ บทความนี้จึงได้วิเคราะห์ถึงความไม่เหมาะสมของโทษดังกล่าวโดยใช้ทฤษฎีทางอาญา บทบัญญัติแห่งกฎหมายระหว่างประเทศในเรื่องสิทธิมนุษยชน การวิเคราะห์ในเชิงเศรษฐกิจของโทษอาญาในกฎหมายลิขสิทธิ์

คำสำคัญ : ลิขสิทธิ์โทษทางอาญา

*บทความนี้เรียบเรียงมาจากวิทยานิพนธ์ เรื่อง The Impropriety of Criminal Sanctions under the Thai Copyright Law ตามหลักสูตรปริญญานิติศาสตรมหาบัณฑิต คณะนิติศาสตร์ มหาวิทยาลัยอัสสัมชัญ, 2556.

ABSTRACT

Presently, the Copyright Act B.E. 2537 has imposed criminal sanctions to both of the commercial and non-commercial purposes infringements as stated in sections 69-70 of such Act; which have exceeded the obligation under Article 61 of the TRIPs Agreement that requires the state members to provide criminal penalties to be applied at least in cases of copyright piracy on a commercial scale. This has created many drawbacks in the copyright protection system. For example, the criminal penalties may be used by the copyright owners as tools to threaten the infringers to pay them money. Moreover, section 76 of the Copyright Act B.E. 2537 states that “One half of the fine paid in accordance with the judgment shall be paid to the owner of copyright or performer's rights...” has encouraged the copyright owners to prosecute criminal cases against the infringers; as the amount of fines they may receive might exceed the amount of actual losses they suffer. As a result, the criminal sanctions under the Thai copyright law are said to be over-criminalized to protect the rights of the owners. Therefore, this article shall assess the impropriety of the current criminal sanctions based on the principles of crimes, the human right claims, and the economic analysis of criminal copyright law.

Keywords: copyright, criminal sanction

Introduction

Thailand has become one of the WTO members since January 1995.¹ This has placed an obligation for Thailand to implement the TRIPS Agreement into its own law in order to provide a minimum standard of protection for IPRs². One requirement under the TRIPS Agreement is that of the imposition of the criminal penalties; in which Article 61 states that:

“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...*”³

It can be seen that Article 61 of the TRIPS Agreement only places a minimum standard of criminal penalties to only be applied in cases of copyright piracy on a commercial scale. This means that the member countries could also apply criminal penalties to other cases such as non-commercial scale infringements rather than what is stated in Article 61.

In order for Thailand to comply with such obligation, criminal sanctions have been imposed under the Copyright Act B.E. 2537; which may be found in sections 69-77 of such Act. However, in this article, I would like to merely focus on the criminal sanctions which are imposed to the primary and secondary infringing conducts which are as of the followings:

Section 69: *Any person who infringes the copyright or the performer's rights according to Section 27, Section 28, Section 29, Section 30 or Section 52 shall be liable to a fine from twenty thousand Baht up to two hundred thousand Baht.*

¹World Trade Organization, “Member Information: Thailand and the WTO,” at http://www.wto.org/english/thewto_e/countries_e/thailand_e.htm, (last visited 16 March 2014).

² World Trade Organization, “**Thailand's economic success set to continue as exports keep growing,**” (1 December 1995), at http://www.wto.org/english/tratop_e/tpr_e/tp21_e.htm, (last visited 16 March 2014)

³ Ibid.

*If the offence in paragraph one is committed with **commercial purposes**, the offender shall be liable to imprisonment for a term from six months up to four years or to a fine from one hundred thousand Baht up to eight hundred thousand Baht, or to both.*

Section 70: *Any person who commits a copyright infringement according to Section 31 shall be liable to a fine from ten thousand Baht up to one hundred thousand Baht.*

*If the offence in paragraph one is committed with **commercial purposes**, the offender shall be liable to imprisonment for a term from three months up to two years or to a fine from fifty thousand Baht up to four hundred thousand Baht, or to both.*

From what is above provided, section 69 of the Copyright Act B.E. 2537 states the criminal sanctions for the primary copyright infringements; while section 70 of the same Act provides criminal sanctions for the secondary copyright infringements. However, both of the provisions have inflicted criminal sanctions to non-commercial and commercial purposes infringements; which have exceeded the obligation under the Trips Agreement.

However, there were many criticisms that the criminal sanctions imposed to the non-commercial purpose infringements are not suitable in solving such infringing problems. Instead, they have created many drawbacks in the copyright protection system. For example, the criminal penalties may be used by the copyright owners as tools to threaten the infringers to pay them money. Moreover, section 76 of the Copyright Act B.E. 2537 states that “One half of the fine paid in accordance with the judgment shall be paid to the owner of copyright or performer's rights...” has encouraged the copyright owners to prosecute criminal cases against the infringers; as the amount of fines they may receive might exceed the amount of actual losses they suffer. As a result, the criminal sanctions under the Thai copyright law are said to be over-criminalized to protect the rights of the owners. Therefore, those owners have preferred to use criminal prosecutions for their cases instead of the civil litigations. This is in the opposite direction from most of other countries; which mainly use civil litigations to compensate for the copyright owners’ losses. This can be seen by the

statistics of the Central Intellectual Property and International Trade Court as of the followings⁴:

The statistics of criminal and civil cases of the copyright infringement from B.E. 2551-2555		
Year	Criminal Cases	Civil cases
2555	1,299 (96.22%)	51 (3.77%)
2554	1,377 (96.84%)	45 (3.16%)
2553	1,995 (98.13%)	38 (1.87%)
2552	2,732 (98.13%)	52 (1.86%)
2551	2626 (97.66%)	63 (2.34%)

Hence, in order for the government to find and impose appropriate criminal sanctions to the copyright infringing conducts, many factors shall be taken into their considerations. Specifically, Article 7 and 8 of the TRIPS agreement shall be of their primary concerns; in which Article 7 notes that “protection and enforcement of intellectual property rights should be contributed to the promotion of technological innovation” Meanwhile, this protection must also conducive to the *“social and economic welfare”* In addition, Article 8 also provides that “Members may, in formulating or amending their laws and regulations, adopt measures necessary... to *promote the public interest in sectors of vital importance* to their socio-economic and technological development...” This means that, to criminalize any infringing conduct, it shall not be arbitrarily done without any concern to the objectives defined in the above stated provisions. In addition, please also bear in mind that intellectual property rights are private rights as stated in the preamble of the TRIPS Agreement. Consequently, by imposing criminal penalties to suppress the small- scale infringing conducts, the state has to put a lot of its resources and budgets for the enforcement to protect the private rights of the people not for the public benefits. Hence, the issue is then arisen of whether the enforcement to protect the intellectual

⁴ See The Central Intellectual Property and International Trade Court, at <http://www.ipitc.coj.go.th/info.php?cid=19&pm=19>, (last visited 16 March 2014).

property rights should really be a criminal matter in every case of the infringing conduct? If the conflict is between the private parties, then should civil remedies be used to solve the problem instead of the criminal sanctions?

To answer those questions, this article has divided the assessments into 3 perspectives based on the principles of crimes, the human right claims, and the economic analysis of criminal copyright law.

1. The Assessment According to the Principle of Crimes

In order for the infringers to be inflicted by the criminal sanctions, three of the following elements must be met:

a. Culpability

The term “Culpability” can be defined as “the moral value attributed to a defendant’s state of mind during the commission of a crime”⁵ Under the traditional concept of the criminal law, in order to consider the elements of any wrongful act, it must be consisting of the culpable mental state or what is known as “mens rea”, “criminal intent” or “guilty mind”.⁶ In other words, “no one can be guilty of a crime unless he or she acted with the knowledge of doing something wrong”⁷ The essence of this principle is that the offender must know that his conduct is wrong. Nevertheless, it does not mean that the offender has to know the Penal Code, it requires that he or she knows that there is no right to do such thing – and chooses to commit it anyway.⁸

b. Social Harmfulness

The purpose of every crime is in order to prevent social harm from happening.⁹ Social harmfulness mirrors the degree that a criminal act causes harm; in which is an

⁵ Stuart P. Green, “Why It’s a Crime to Tear the Tag off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses,” The Emory Law Journal 47 (1998): 1548.

⁶ Ibid.

⁷ Freda A. Adler et al., Criminology, 7th ed. (United States: McGraw-Hill, Inc, 2009), p. 209.

⁸ Ibid.

⁹ Ibid., p. 208.

interruption of a person's interest.¹⁰ In contrast with culpability, social harmfulness emphasizes on the act and its consequences not the actor.¹¹ In some cases, the criminal acts are considered being harmful but not wrongful.¹² The example in this case is when a victim gives consent to a commission of a crime.¹³

c. Moral Wrongfulness

The moral wrongfulness refers to as “the violation of a moral norm that occurs when a criminal act is committed”¹⁴ Similar to social harmfulness, it emphasizes on the moral content more than the moral status of the defendant.¹⁵ According to Stuart P. Green¹⁶, he stated that “what makes an act wrongful is some intrinsic violation of a freestanding moral rule or duty, rather than the act's consequences.”¹⁷ Therefore, it was agreeable to treat criminal conduct with punishment when it is morally wrong.¹⁸ In order to consider what should be criminalized, it may depend on community norms or

¹⁰ Joshua Dressler, Understanding Criminal Law, 2nd ed. (LexisNexis, 1995), p. 96.

¹¹ Stuart P. Green, *Ibid.*, p. 1549.

¹² *Ibid.*

¹³ Heidi M. Hurd, “What in the World is Wrong?” Journal of Contemporary Legal Issues 157, 159 (1994): 5.

¹⁴ Stuart P. Green, Lying Cheating and Stealing: A Moral Theory of White-Collar Crime, (United Kingdom: Oxford University Press, 2007), p. 30.

¹⁵ Stuart P. Green, “Why It's a Crime to Tear the Tag off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses,” p. 1551.

¹⁶ Stuart P. Green is the professor of law at Rutgers University-Newark specialized in criminal law. He is a founding co-editor of Criminal Law and Criminal Justice Books.

¹⁷ Stuart P. Green, *Ibid*, p. 1551.

¹⁸ Heidi Hurd, “What In the World Is Wrong?,” *Contemporary Legal Issues* (1994): 157, concluding that conducts which are morally wrong should be prohibited as the objective of every law is “to perfect our compliance with the demands of morality.”

principles extracted from the concept of what is right and good.¹⁹ It was believed that “Criminals deserve punishment because they violate norms established by society.”²⁰ Under this principle, criminal sanctions would still be applied even if it could not prevent future harm.²¹

Consequently, when the state would like to inflict criminal sanctions on the copyright infringers, all of the three elements must also be met. Therefore, the copyright infringing conducts shall be assessed to such elements. In this case, a culpable state of mind is included in the moral wrongfulness issue. In other words, a person is said to be culpable when he or she decided to commit a wrongful conduct. The analysis of harm and moral wrongfulness of copyright infringement is as of the followings:

1.1 The Harm Principle

The justifications to apply criminal sanctions to harmful conducts are when (1) there is an injury to a person.²² (2) Such injury affects a societal interest²³ or (3) it directly injures the government policy; in this case is the national policy of intellectual property.²⁴ Moreover, the criminal sanctions can be applied only when other methods of deterring the conducts are not sufficient to do so.

1.1.1 The Harm to the Copyright Owner

¹⁹ Peter Arenella, “Convicting the Morally Blameless: Reassessing the Relationship between Legal and Moral Accountability,” UCLA Law Review 39 (1992): 1522-23.

²⁰ Kent Greenawalt, “Punishment,” Encyclopedia of Crime and Justice 4 (United States: The Free Press, 1983): 1338.

²¹ Immanuel Kant, Metaphysics of Morals, (United Kingdom: Cambridge University Press, 1991), p. 142.

²² Geraldine Szott Moohr, “The Crime of Copyright Infringement: An Inquiry Based on Morality, Harm, and Criminal Theory,” Boston University Law Review 83 (2003): 27.

²³ Ibid.

²⁴ Ibid.

It is inevitable to say that the act of infringement harms the copyright owners in some ways. However, the question still remains of how to measure the harm as loss to the copyright owners. For example, there is estimation from the Institute for Policy Innovation of the United States that there is \$12.5 billion loss every year resulting from the global music piracy.²⁵ However, please be reminded that people who infringe on the right of the copyright owner by downloading music from the internet illegally; are not necessary the same group of people who intended to purchase the music at first.²⁶ Therefore, by including the losses deriving from their losses in purchase could not really indicate the harm received by the copyright owners.²⁷ In addition, when the products of the copyright holders are copied; they do not suffer similar losses as in the case of shop owners who would have to bear a direct loss from the event of theft.²⁸ This means that the loss of the copyright owners could not really be calculated into accurate numbers. Nevertheless, despite the vagueness in measuring the exact number of loss that the copyright holders encountered, it is accepted that there are wide ranges of loss that they suffer from different groups of infringers.

First, the harm which causes by the copyright owners' competitors and those who intended to conduct the infringements for commercial gain are considered being significant losses to copyright owners as they lost their market positions.²⁹ This could create such an unfair competition and thus a competitive harm to them.³⁰ In addition, a direct linkage between the economic gains of the competitors and loss of the owners can be seen and estimated.³¹ Consequently, applying the criminal sanctions to

²⁵ At <http://www.riaa.com/faq.php>; (last visited 15 November 2013).

²⁶ Miriam Bitton, "Rethinking the anti-counterfeiting trade agreement's criminal copyright enforcement measures," *The Journal and Criminal Law & Criminology* 102 (2012): 72.

²⁷ Ibid.

²⁸ Ibid.

²⁹ Geraldine Szott Moohr, Boston University Law Review, p. 31.

³⁰ See *International News Service v. Associated Press*, 248 U.S. 215 (1918)

³¹ Ibid.

this type of infringement seems to constitute the purpose of the copyright law; which aims to protect the owners from unfair competitions.³²

On the other hand, the harm causes by noncompetitive individual infringers can be assessed differently. As stated earlier, people who infringe the right of the owners for their personal uses are not necessary the same group of people who would purchase the products in the first place. Therefore, the harm causes by them are not easily identified. And even if we accept that there are such losses, the injury created by each of the individual is very slight comparing with the sum of revenues or the total lost in profits.³³ Moreover, each of the individual's harm does not exactly affect the community's interest as a whole. Even though what remains in the issue is the accumulative harm caused by many individuals altogether³⁴, but applying criminal sanctions to each of the individual for his or her slightly harmful conduct does not seem to fit with the principle of criminalization.

In addition, sections 69 and 70 of the Copyright Act B.E. 2537 also set the minimum amount of fines that the infringers are required to pay; which are twenty thousand Baht for the primary infringements and ten thousand Baht for the secondary infringements. In some cases, such penalties may not be proportionate to acts of infringements; which cause very slight or no harm to the owners. For example, if a person makes a copy of a copyrighted book just for himself, and he has no intention in buying it, may be subjected to pay fine in the amount of 20,000 Baht. It can be seen that his act of infringement does not exactly contribute to the copyright owner's loss of profit, but he is required to pay at least the minimum amount of fine of twenty thousand Baht. Therefore such punishment may not be proportionate to the harm caused by the infringing act. Besides, the Court cannot suspend the punishment of fine as the suspension of punishment under section 56 of the Penal Code of Thailand is only applied to cases of imprisonment.

³² Geraldine Szott Moohr, op. cit., p. 31

³³ See Richard L. Florida, The Rise of the Creative Class: And How It's Transforming Work, Leisure, Community and Everyday Life, (2002), p. 46, Table 3.1.

³⁴ Geraldine Szott Moohr, op. cit., p. 32.

Furthermore, section 76 of the Copyright Act B.E. 2537 which provides that “one half of the fine paid in accordance with the judgment shall be paid to the owner of copyright” This means that those owners are entitled to receive at least ten thousand Baht for the primary infringements; and five thousand Baht for the secondary infringement. In some cases, such amount of payments may far more exceed the amount of their losses. As a consequence, those copyright owners are encouraged to prosecute criminal cases instead of the civil ones.

The example could be found in the Supreme Court decision number 6576/2551. From the fact of the case, the offender went to a theater and used the video camera to videotape the movie called “Train of the Dead”; which was the copyright work of the Pra Nakorn Film Co., Ltd. The company then prosecuted the offender claiming that he infringed the copyright of the owner by reproducing or adapting the substantial part of the movie without the authorization of the company who was the copyright owner. The Supreme Court’s Division for Intellectual Property and International Trade held that the offender committed the crime of infringement under section 28 (1) and 69 paragraph 1 of the Copyright Act B.E. 2537. Therefore, he was required to pay fine in the amount of 20,000 Baht and such punishment could not be suspended according to section 56 of the Penal Code of Thailand. However, the offender confessed; which was for the benefit of the trial. Thus, the penalty should be reduced to one half according to section 78 of the Penal Code of Thailand; and half of the fine shall be paid to the copyright owner according to section 76 of the Copyright Act B.E. 2537.

1.1.2 Harm to the National Copyright Policy

The national copyright policy is to motivate the new creations of expressed works.³⁵ Therefore, if the copyrighted works are subject to use without any authorization or payment; then no one would be encouraged to produce new expression of ideas.³⁶ Adding criminal sanctions to the copyright law may be one of the methods to ensure that such goal would be achieved.

³⁵ Geraldine Szott Moohr, *op. cit.*, p. 32.

³⁶ *Ibid.*

According to the Intellectual Property Strategies of Thailand B.E. 2556-2559³⁷, it is one of the main seven strategies that the government has a duty to promote the creations of intellectual property in order to use such products to compete in the international markets. Therefore, it could be said that the Thai national copyright policy is also aimed to provide incentives for creators to create new expressed works.

However, in the case of non-commercial purpose infringements, only slight harm is caused to the copyright owners. The losses in economic profits of those owners are not significant. Consequently, such infringements are not a cause to demotivate creators to create new expressed works as they may still gain a good amount of profits from their creations. Thus, the national copyright policy of motivating new creations is not affected in this case. It is therefore not necessary to impose criminal penalties to escort the national copyright policy from the harm caused by non-commercial purpose infringements.

In contrast, for the commercial purpose infringements, there could be a significant harm to the copyright owners. The high potential infringers may cause those owners to lose their shares in the markets. If such losses are up to the point where it is not worth in investing their skills judgments and labors to earn profits; then there would not be a motivation for them to create new works. As a result, the commercial purpose infringements may have an important impact on the national copyright policy. The imposition of criminal penalties may help to safeguard such policy of motivating new creative works.

1.2 The Moral Wrongfulness Principle

Another factor in criminalizing a conduct is when it is morally wrongful. In order to assess the moral wrongfulness of the copyright infringing conducts, Trotter Hardy³⁸

³⁷ Department of Intellectual Property, at <http://www.ipthailand.go.th>, (last visited: 16 March 2014).

³⁸ Trotter T. Hardy Jr. is the professor of Law and Associate Dean of Technology, Academic-Post-Secondary, College of William and Mary, School of law specialized in intellectual property law.

has divided the copyright infringers into three types.³⁹ The first type of infringers is those who commit the infringements on a large scale to be able to receive commercial gains from copyrighted works.⁴⁰ People usually view this type of infringement as a moral wrongful conduct.⁴¹ The second type of infringers is people who do not have financial motive in infringing copyright; but commit such conduct on a smaller scale to stimulate learning or creativity.⁴² The society does not have a view that they deserve to be punished by the criminal sanctions.⁴³ The last type of infringers resulted from the emergence of technological advancement. They are people “who have no particular profit motive, but who use the Internet to cause, or to avail themselves of, infringements multiplied on a huge scale.”⁴⁴ Even though, copyright holders suffer harm by such conduct; but the infringers do not receive any commercial gain for it. Therefore, the society also does not view them as deserving criminal penalties.⁴⁵

When applying Trotter Hardy’s assessment to section 69 of the Copyright Act B.E. 2537, it can be seen that the first type of infringers who have commercial motives in committing the acts of infringements constitute the group of people that section 69 paragraph 2 is aimed to inflict criminal penalties upon. People in the society have a common opinion that they are morally wrongful conducts which should be criminalized. Therefore, there is a justification in imposing criminal penalties to this type of wrongful conduct.

For the second type of infringers, which are a group of people who commit the infringing conduct for learning or creativity without the commercial motives; some of the infringing acts may consider being a fair use of the copyright works under section

³⁹ Trotter Hardy, “Criminal Copyright Infringement,” William & Mary Bill of Rights Journal 11 (2002): 305, 326-332.

⁴⁰ Trotter Hardy, *Ibid.*, p. 326-327.

⁴¹ *Ibid.*, p. 327.

⁴² *Ibid.*, p. 326.

⁴³ *Ibid.*, p. 327.

⁴⁴ *Ibid.*, p. 326.

⁴⁵ *Ibid.*, p. 328.

32 of the Copyright Act B.E. 2537. However, if such conducts do not constitute a fair use, then they would constitute a group of infringers who are subjected to criminal penalties under section 69 paragraph 1. Nevertheless, for this type of infringements, people do not have a view that they are morally wrongful conducts. Therefore, criminal penalties as imposed by section 69 paragraph 1 shall not be inflicted upon them.

The last type of infringers is the people who use the internet to cause infringements to multiply on a huge scale. They are considered being a group of people who are subjected to criminal penalties under section 69 paragraph 1. In this case, people in the community also do not have a view that they have evil minds to commit morally wrongful conducts as they do not gain profits for themselves; and therefore criminal sanctions shall not be inflicted upon them; even though copyright owners suffer harm from such conducts.

From all of the above assessment for the moral wrongfulness of the conducts; it can be seen that the infringement acts which are subjected to criminal penalties under section 69 paragraph 1 are said to be lacking the moral wrongfulness content.

Consequently, neither of the harm nor moral wrongfulness principles has suggested that criminal penalties shall be imposed to the non-commercial purpose infringements. This is due to the fact that such acts of infringements only cause slight harms to the copyright owners; and therefore, they are not the factor which would affect the national copyright policy by reducing the incentives of the creators to create more works. Moreover, people in the society do not usually view them as moral wrongful conducts.

Nevertheless, the outcome of the assessment is different in the case of commercial purpose infringing conducts. The harm they cause may place significant effects on the economics of the owners; which create unfair competitions for those owners to lose their positions in the markets. If the losses of profits exceed the costs which they have invested in the works, these would definitely discourage the owners to produce more creations. As a result, the national copyright policy is deteriorated due to such infringements. In addition, the society has a common view that such unfair competitions are moral wrongful conducts. Therefore, from the assessment according to the principle of crimes, it has led to a conclusion that there is a justification in imposing criminal penalties to the commercial purpose infringing conducts.

2. The Assessment According to the Human Right Claim

Presently, the protection of copyright is crucially important that the international instrument has also giving it a precedence that it is one form of human right. From a human right approach, it is an implicit tool in stating a balance between the right of the authors and the benefits of the society.

The first identification in the international instrument can be found in Article 27 of the Universal Declaration of Human Rights which reads:

“(1) Everyone *has the right freely to participate* in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

(2) Everyone *has the right to the protection of the moral and material interests* resulting from any scientific, literary or artistic production of which he is the author.”

According to the Universal Declaration of Human Rights, the protection of rights and claim made under article 27 are regarded to be universal and lie in each person in the virtue of the common humanity.⁴⁶ Consequently, they are very vital norms that the governments are obliged to escort and uphold the rights.⁴⁷ Such obligation is applied to all the governments in the same way that they are supposed to gratify common interest of humanity.⁴⁸ In addition, due to the fact that that it is entitled to be universal, its implementation should be in a way that the most disadvantaged and vulnerable person would receive a benefit from it.⁴⁹ Consequently, the protection must not only serve specific group of people who already acquire privilege positions.⁵⁰ On the other hand, it should be able to benefit everyone beyond the benefits received from the application of

⁴⁶ Paul L.C. Torremans. “Is Copyright a Right?,” Michigan State Law Review 271. (2007): 5.

⁴⁷ Ibid.

⁴⁸ J.W. Nickel, Making Sense of Human Rights: Philosophical Reflections on the Universal Declaration of Human Rights, (United States: University of California Press, 1987), p. 3.

⁵⁰ Paul L.C. Torremans, Ibid., p. 5.

such protection.⁵¹ The example in this case would be better goods and services throughout the nations.⁵² Therefore, it could be said that the purpose behind Article 27 of the Universal Declaration of Human Rights is that there has to be a balance between the rights stated in Article 27 (1) and those expressed in Article 27 (2)⁵³

The second indication in the international instrument can be found in Article 15 of the International Covenant on Economic, Social and Cultural Rights. It is a follow up of the Universal Declaration of Human Rights. Though, it is in the form of a treaty that the contracting parties like Thailand are obliged to implement its provisions.⁵⁴ Article 15 is as stated:

“1. The States Parties to the present Covenant recognize the right of everyone:

- (a) To take part in cultural life;
- (b) To enjoy the benefits of scientific progress and its applications;
- (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.

3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.

4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.”

As it can be seen, the first paragraph of the Covenant has very much depended on Article 27 of the Universal Declaration of Human Rights. For the later paragraphs, it has imposed a series of responsibilities and measures to be taken by the Contracting

⁵¹ Ibid.

⁵² Ibid.

⁵³ Ibid.

⁵⁴ Ibid.

States to protect copyright as a Human Right.⁵⁵ On this matter, the Committee on Economic Social and Cultural Rights, who were considered being the authorized interpreter of the ICESCR, emphasized that “importance of the integration of international human rights norms into the enactment and interpretation of intellectual property law should be in a balanced manner that protects public and private interests in knowledge; without infringing on fundamental human rights.”⁵⁶

From the two provisions provided in the international Human Rights instruments, it can be concluded that their core objective is to emphasize on balancing of rights and interests.⁵⁷ However, there are two dimensions when referring to this balance. The first one is a balance in the copyright itself; between that of the private interests of the copyright owners and public benefits.⁵⁸ For the second dimension, there must also be a balance between copyright and other Human Rights stated in the international instrument⁵⁹ may be assessed that:

2.1 A Balance between Private and Public Interest

On one side of the scale, it is necessary to protect the private interest of the authors. This is in order to motivate authors to create further creations.⁶⁰ The protection is in the form of granting certain amount of exclusive rights relating to the use of his or her work. On the other hand, in order to protect the public interest as a whole, the

⁵⁵ Paul L.C. Torremans, *Ibid.*, p. 5.

⁵⁶ Committee on Economic, Social and Cultural Rights, General Comment No. 3, 5th Session, in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/ GEN/1/ Rev.5, page 18

⁵⁷ Paul L.C. Torremans, *Ibid.*

⁵⁸ J.A.L. Stering, World Copyright Law, (United Kingdom: Sweet & Maxwell, 1998), p. 40.

⁵⁹ Paul L.C. Torremans, *Ibid.*, p. 10.

⁶⁰ *Ibid.*, p. 11.

copyright law must ensure that the public must be able to have access to those copyrighted works to promote progress and improvement.⁶¹

One way of escorting the private interest of the copyright owners, the government has imposed criminal penalties as stated in sections 69 and 70 to combat the acts of infringements in both commercial and non-commercial purposes conducts. Such penalties may create a belief for people in the community that copyright actually belongs to the owner the way tangible property does. The copyright owner has an absolute control over his work and thus, people who access and use the copyright works of the owners are like thieves who steal the properties of others. This is in contradiction with the principle of copyright; which the owners only have limited rights known as “exclusive rights” over their works; in order for the public to access to the ideas behind the copyrighted works to create further creations. As a result, such belief of ownership may hinder people from accessing to the works of others as they believe that such works are the properties of others; which would cause an imbalance between private and public interests.

In addition, when criminal penalties are imposed not in proportion to the wrongful conducts, as assessed above in the case of non-commercial purpose infringements; people may fear that their acts of accessing others’ works may subject them to criminal penalties. As a result, they would refuse to access to the works and the ideas behind them; even if it is legal to do so. This factor also contributes to the imbalance of interests between that of the public and private owners; which contradicts with what the international Human Rights instruments are trying to achieve.

Therefore, it can be analyzed that the imposition of criminal penalties to the non-commercial purpose infringements may result in over protection of the private rights. If harsh penalties are applied to small scale acts of infringements, which should actually be a matter of the civil litigations; the fears of criminal penalties would keep people away from accessing to the copyright works causing a reduction in incentives to

⁶¹ United Nations, Economic and Social Council, Commission on Human Rights, Sub-Provisional Agenda, Economic, Social and Cultural Rights- The Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights, Report of the High commissioner, E/CN.4/Sub/2/2001/13, Page 5

produce new creations. Consequently, the protection of the private rights may outweigh the other side of the scale; which is the public interests. Thus, the enactments of criminal penalties to the non-commercial purpose infringements are not in compliance with Article 27 of the Universal Declaration of Human Rights and Article 15 of the International Covenant on Economic, Social and Cultural Rights.

2.2 A Balance between Copyright and other Human Rights

For the balance between copyright and other Human Rights, it was required that the interpretation of Article 15 should be based upon the main objective of promoting and escorting human rights.⁶² This assumption was drawn from the fact that Article 15 has to be read in concurrence with Article 5 of the ICESCR⁶³; which it provides that:

*“Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant.”*⁶⁴

This means that whenever there is a conflict between private benefits of the authors and the public interests arising out of intellectual property, the balance of such interests should not be interpreted in a way that it would cause a detriment to any other Human Rights recognized in the Covenant and any other instruments.⁶⁵

⁶² United Nations, Economic and Social Council, Commission on Human Rights, Sub-Provisional Agenda, Economic, Social and Cultural Rights- The Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights, Report of the High commissioner, E/CN.4/Sub/2/2001/13, Page 5

⁶³ Ibid.

⁶⁴ Ibid.

⁶⁵ See E/C. 12/2000/12, paragraph 31

“The human rights principle of self-determination as enunciated in Article 1 (1) of the Covenant and reflected in the civil and political rights defined in the International Covenant on Civil and Political Rights emphasizes the right of all members of society

The Human Right which the interpretation of a conflict between private and public interests may have a detrimental effect upon is the right to freedom to seek for information and ideas. According to Article 19 (2) of the International Covenant on Civil and Political Rights (ICCPR) which Thailand is one of the member parties; it provides that:

*“Everyone shall have the right to freedom of expression; **this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.**”*

As stated, the imposition of criminal penalties to the copyright law may cause a declination of public accesses to the copyrighted works due to the fears of such penalties. Therefore, when severe criminal penalties are applied to small scale acts of infringements, it would definitely create an imbalance between those two interests; in which it can be interpreted in a way that the interests of the copyright owners are more important than the public access to the works. Thus, such precedence itself limits the public access; which leads to a restriction of freedom for people to seek, receive and impart information and ideas of all kinds as stated in Article 19 of the ICCPR. Consequently, the imbalance of interests from the imposition of inappropriate criminal penalties to the copyright law also causes a detrimental effect in limiting the other Human Right of freedom to seek for information and ideas as it is more restrictive for the public to have access to the copyrighted works.

3. The Assessment According to the Economic Analysis of Criminal Copyright Law

The last dimension that can be used to assess the need in criminalizing the infringing conducts is through the economic perspective of the copyright law. In this case, the rent seeking model shall be introduced to explain the reason why there was a

to participate in a meaningful way in deciding on their governance and their economic, social and cultural development. This translates into a right to societal decision-making on setting priorities for and major decisions regarding the development of intellectual property regimes....”

drive by many interest groups in applying criminal sanctions in order to protect the interests of their works; while the cost – benefit analysis is utilized to see whether there are more benefits than the costs of applying the criminal sanctions to the copyright law.

3.1 The Rent Seeking Model

In order to understand the term “rent seeking”, we must first look at the definition of rent from the economic theory. According to Professor Buchanan⁶⁶, rent can be defined as:

*“.... part of the payment to an owner of resources over and above that which those resources could command in any alternative use. Rent is receipt in excess of opportunity cost.”*⁶⁷ Therefore, the owners of the resources usually engage in rent seeking; in which is another term for profit seeking.⁶⁸

In a regular market structure, the economic rents act as motivators attracting both of the resources owners and entrepreneurs to combine those resources into products.⁶⁹ If they are continuously searching for opportunities to earn economic rent as well as making the most out of the existing opportunities, then the process of resource reallocation would be created. This would bring about a development and growth in the economic system.⁷⁰

However, the economic rents can be reduced when the market is changed to be in accordance with the new emerging opportunities.⁷¹ Suppose, there is no barrier for other entrepreneurs to gain access to the market and sell the same products; which causes

⁶⁶ James McGill Buchanan, Jr. was an economist known for his work on public choice theory. He was a professor at George Mason University.

⁶⁷ James M. Buchanan et al, Toward a Theory of The Rent-Seeking Society, (United States: Texas A & M University 1980), p. 5.

⁶⁸ Ibid.

⁶⁹ Ibid.

⁷⁰ Ibid.

⁷¹ Ibid.

an increase in the outputs and the price to drop.⁷² Consequently, the economic rent of the first entrepreneurs is reduced and distributed to other producers; due to the process of adjustment in the competitive market.⁷³

Nevertheless, such situations could be prevented if there are some forms of restrictions to bar other producers from entering and compete with the first producers.⁷⁴ Then, those first producers could still maintain their economic rents at the optimum level; creating monopoly rents for them. If such monopolies are retained, they are then able to rely on those restrictions to earn the utmost amount of economic rents from their products.⁷⁵ As a result, there is no necessity for them to invest new resources in order to discover new methods of production.⁷⁶

One way of creating restrictions upon entry of other producers is through a copyright protection. In this case, a government grants a monopoly for the first producers in the form of exclusive rights to exclude others from entering and competing with them. From this, they can realize monopoly position in the market and are able to maximize profits from their productions. However, this situation would not create a direct transfer between consumers' loss and producers' gain.⁷⁷ There are eventually some costs that producers have to bear from the unproductive searching for such monopoly.⁷⁸ This creates dead-weight losses; which can be defined as "the net loss of consumer surplus which occurs when rent seeking is successful in transferring consumer

⁷² Ibid.

⁷³ Ibid.

⁷⁴ Lanier Saperstein, "Copyrights, Criminal Sanctions and Economic Rents: Applying the Rent Seeking Model to the Criminal Law Formulation Process," The Journal of Criminal Law & Criminology 87 (1997): 1485.

⁷⁵ Ibid.

⁷⁶ Lanier Saperstein Ibid.

⁷⁷ Ibid., p. 1489.

⁷⁸ Ibid.

surplus into producer surplus.”⁷⁹ To be specific, resources will be spent until the producers receive the same return as other kinds of investment. In other words, if the producers are able to yield a higher return by investing resources to lobby the government than improving their productions, then they are likely to do so rather than spending new resources into the development of their products.⁸⁰

However, presently, many interest groups have a view that only civil remedies may not be enough in deterring the behaviors of the potential competitors.⁸¹ This is due to the fact that the civil damages that they are obliged to pay may not be sufficient to cover the profits they earn from doing their businesses.⁸² Moreover, presently, the fast growing technology makes it much easier to duplicate and start the businesses at a much lower cost.⁸³ Therefore, after all those payments of civil remedies, the potential competitors can quickly re-enter the market to compete again.⁸⁴

Therefore, in order to fulfill their needs of maximizing their profits, many interest groups have pressured and lobbied the government to impose criminal sanctions to apply to those infringement acts⁸⁵; as a considerable amount of fines and imprisonment may be able to bar them from entering into competitions with those interest groups; who have initially gained their monopoly positions through the protection of copyright law.

From all of the above stated reasons, it can be seen that the imposition of the criminal penalties are due to the pressures and lobbying process of the interest groups in order to secure their monopoly positions. The application of fines and imprisonment

⁷⁹ Lanier Saperstein, *Ibid.*, p. 1507 from the author’s discussion with Professor Patrick Dunleavy, Department of Government, London School of Economics & Political Science (Dec. 1, 1993).

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ *Ibid.*

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

can help them achieving their goal of maximizing their economic rents by barring their competitors to compete in the market. From this, it demonstrates the support of the argument that the imposition of the criminal penalties in the copyright law to protect the private rights of those interest groups; in which it should actually be a matter of civil remedies to cover for such losses.

3.2 The Cost-Benefit Analysis of Imposing Criminal Penalties to the Copyright Law

The cost-benefit analysis can be referred to as a method that is used to compare the pros and the cons of a proposal.⁸⁶ It is used as a tool to determine whether the outcome is worth spending all those resources in such proposal.⁸⁷ In other words, economists apply cost-benefit analysis in order to assess if the social welfare would be better off by implementing the decision.⁸⁸

When applying cost-benefit analysis to the imposition of criminal penalties to copyright law, it means that there is a justification for treating an infringement conduct as a crime; if the whole community is in a better position when treating it as such.⁸⁹ Therefore, the benefits from the prevention of harm that is caused by such conduct shall exceed the costs of punishing and stigmatizing it.⁹⁰ In addition, cost-benefit analysis is especially useful in analyzing the copyright law where community benefit is measured by balancing the rights of the authors and the public access.⁹¹ Consequently, a clear picture of community benefit may be drawn from evaluating cost and benefit of each side of the balance. The application of cost-benefit analysis to the imposition of criminal penalties is as of the followings:

⁸⁶ Geraldine Szott Moohr, “Defining Overcriminalization Through Cost-Benefit Analysis: The Example of Criminal Copyright Laws,” American University Law Review 54 (2005): 785.

⁸⁷ Geraldine Szott Moohr, American University Law Review 54, p. 785.

⁸⁸ Ibid.

⁸⁹ Ibid.

⁹⁰ Ibid.

⁹¹ Ibid.

3.2.1 The Benefits of Criminalizing Copyright Infringement Conducts.

a. The Benefit of Preventing Harm

The copyright infringing conducts could create two types of harms. The first type is harm to the financial status of the copyright owners; while the second type refers to harm imposed to the national policy of motivating new creative efforts. The infringing conducts harm the copyright owners' interests by taking away their exclusive rights as the only distributors of their copyrighted products.⁹²As a result, they tend to receive less income from sales and granting licenses.⁹³Consequently, those creators will be less likely motivated to create new copyrighted works; which could weaken the policy of the copyright law.⁹⁴By criminalizing the infringing conducts would help those owners to gain the maximum amount of profit from their copyrighted works. Thus, they would be encouraged to create new types of creative works.

However, for the cases of non-commercial purpose infringing conducts, they only cause slight or no harm to the copyright owners. Such infringing conducts are therefore not the factor which would demotivate those owners to create further creations. Thus, the national policy of motivating new creative efforts is not affected. By criminalizing conducts which are not harmful to both of the owners and the national copyright policy, the society would not receive any benefit from such prevention of harm.

b. The Educative Benefit

According to Professor Geraldine Szott Moohr⁹⁵'s point of view, criminalizing the infringing conducts may result in an educative benefit for the community.⁹⁶She argued that by putting them in the form of legislative statements, the public would be educated and thus, forming new social norms that infringements are

⁹² Ibid., p. 791.

⁹³ Ibid.

⁹⁴ Geraldine Szott Moohr, American University Law Review 54, p. 791.

⁹⁵ Geraldine Szott Moohr is the professor of law at University of Houston specialized in criminal and employment law.

⁹⁶ Geraldine Szott Moohr, American University Law Review, p. 796.

wrongful conducts. However, there was also a research stating that criminal law is a most effective tool in enforcing the social norm when it has already existed.⁹⁷In this case of copyright, people in the community do not share a social norm that the copyright infringement should be criminalized.⁹⁸Therefore, we may not be able to receive the utmost benefit of educating the public about the copyright infringement.

In cases of the non-commercial purpose infringements; most people in the society do not have a view that they are wrongful conducts which should be criminalized. For example, according to their views, an illegal downloading of a song from the internet is definitely not as wrongful as an event of thief stealing properties from others.

Therefore, when harsh criminal penalties are applied to conducts which the social norms are not yet in place to condemn such conducts; the result of criminalization tends to be in the opposite direction from the educative benefit. When many individuals are committing such lack of moral wrongfulness conducts which each of the individual's act only causes slight or no harm to the copyright owners; other people would learn that they are not bad things to do and feel that such materials are free for the public to use. As a result, they would have less respect for the criminal copyright law. Social norms against the acts of infringements are thus not able to be formed when imposed harsh criminal penalties not in proportionate to the acts of infringements.

3.2.2 The Costs of Criminalizing Copyright Infringement Conduct

a. Costs of Society's Response

The most widely known costs of crime are the costs of society's response.⁹⁹Such costs include the expenses: "on police and other law enforcement

⁹⁷ Paul H. Robinson and John M. Darley, Justice, Liability & Blame, (Westview Press: 1995) p. 1-3.

⁹⁸ Geraldine Szott Moohr, American University Law Review, p. 797.

⁹⁹ Jacek Czabanski. Estimates of Cost of Crime: History, Methodologies, and Implications (Springer 2008), p. 16.

agencies, prosecutors, judges (in criminal courts), prisons and other correctional facilities, probation officers, etc...”¹⁰⁰

However, the border lines between the efforts in minimizing crimes and other activities can sometimes be blurred.¹⁰¹ For example, the staff that the movie theater hires has a duty to sell and collect movie tickets, service the customers, while he also has a duty to monitor customers to make sure that there would be no copyright infringement by camcording. Consequently, the budgets that the government spend to enforce the criminal copyright law could only indicate the minimum amount of expenditures that the society put on crime.¹⁰²

In addition, the expenditures in enforcing copyright crimes are actually more than the amount of taxes.¹⁰³ There are also costs in collecting taxes; and may eventually cause more crimes themselves.¹⁰⁴

Furthermore, due to the high standard of proof, the costs of the criminal prosecutions are usually higher than the litigations in civil cases. For example, the high costs in the investigation and finding of evidences in order to meet that standard. Consequently, when it comes to the criminal cases; it means that the state has to hold the burdens for the costs as above stated.

Especially, in case of the criminal prosecutions for non-commercial purpose copyright infringements, in which they do not cause harm to the public order or the national copyright policy; this means that the state has to spend substantial budget merely to protect the private interests of the copyright owners not for the public benefits.

b. Costs of Reduction of Access to Copyrighted Works

As stated, copyright law has its aim to balance the rights of the individuals and the public access. However, the imposition of criminal penalties to copyright law may create the feeling that copyrighted work actually belongs to the

¹⁰⁰ Ibid.

¹⁰¹ Jacek Czabanski, Ibid.

¹⁰² Ibid., p. 17.

¹⁰³ Ibid.

¹⁰⁴ Ibid.

owner the way physical object does.¹⁰⁵ Therefore, by imposing the criminal penalties may be able to encourage new copyrighted works; while reducing the public access to them. This contradicts with the idea of copyright policy which equally emphasizes on the public access to such material.¹⁰⁶ In other words, the imposition of criminal penalties to copyright law may imbalance those two objectives of copyright law.

Specifically, the imposition of criminal penalties to the non-commercial purpose infringing conducts; which means that people may be subjected to such penalties even if the infringements are only for their personal uses. This may reduce motivation for people to access to all kinds of works even in the lawful situations. As a result, fewer ideas would be generate to develop new kinds of creations.

c. Costs of Respect to Criminal Law

If harsh criminal penalties are imposed to conducts which are not viewed as wrongful or harmful, they may lower both of the effectiveness and society's respect to the law.¹⁰⁷ This is due to the fact that people would reject rules which seem to be unfair to certain group of people.¹⁰⁸ In the case of copyright, the social norm against infringing conducts is not yet in place. Most people in the society have a view that the acts of infringement are not as wrongful as other crimes. Consequently, this may provide the opposite effect in a way that it is less likely that people would comply with the law.

The assessment in this case may be divided into two circumstances. The first circumstance is the social norm for the non-commercial purpose infringing conducts. In this case, people in the society certainly do not view them as wrongful conducts which should be criminalized. This is due to the fact that each of the individual infringer's acts only causes slight harm to the copyright owners. Therefore, their economic interests are not much affected by each of the infringer; only accumulative

¹⁰⁵ Stuart Green, "Plagiarism, Norms, and the Limits of Theft Law: Some Observations on the Use of Criminal Sanctions in Enforcing Intellectual Property Rights," *Hastings Law Review* 54 (2002): 167, 215.

¹⁰⁶ Geraldine Szott Moohr, *American University Law Review*, p. 801.

¹⁰⁷ Geraldine Szott Moohr, *American University Law Review*, p. 801.

¹⁰⁸ Geraldine Szott Moohr, *American University Law Review*, p. 803.

harms from this type of conducts that may lead to some losses of profits for the copyright owners. Thus, it is undoubtedly not fair to punish each individual infringer for the accumulated harms caused by many infringers. Consequently, when criminal penalties are imposed to this type of conducts; people would reject such punishments and have less respect for the law.

However, it can be assessed differently in the case of commercial purpose infringing conducts. Copyright owners may lose a lot of profits and their market positions due to such competitive acts of infringements. This creates unfair competitions for those owners who have invested their skills into the copyrighted works. In very large commercial scale infringements, they may place great effects on the economic systems of the countries as they cause large amount of loss profits to the owners. In addition, this type of infringements could lead to other crimes such as money laundering and organized crimes. Hence, it is more likely that people would view them as wrongful conducts which deserve punishments. Thus, the criminal penalties imposed on this type of conducts would not be rejected as they are important tools in deterring the behaviors of the infringers.

In sum, according to the cost-benefit analysis, it can be seen that the costs in imposing criminal penalties to the non-commercial purpose infringements exceed the benefits from doing so. The society as a whole would not receive benefit from the prevention of harm as such conducts are not harmful to both of the copyright owners and national copyright policy. In addition, the educative benefit cannot also be achieved as most of people in the society have a view that it is not fair to inflict criminal penalties to those individual infringers who only cause slight harms. As a consequence, people would have less respect to criminal law. Lastly, there would not be a balance between the private and public interests as the application of excessive criminal penalties to protect the owners would reduce the incentives in accessing to the works to create further creations. Therefore, the assessment has suggested that it is not appropriate for the state to impose criminal penalties to the non-commercial purpose infringements as there are far greater costs than the benefits of such legislation.

Conclusion

Consequently, from the assessments based on the principle of crimes, human right claim and the economic perspective of the copyright law, they have suggested that the imposition of criminal sanctions for the non-commercial purpose infringements are not appropriate and proportionate to solve such infringing problems. On the other hand, there are justifications to inflict criminal sanctions upon the commercial purpose infringers; which are in compliance with the obligation stated in Article 61 of the Trips Agreement. Hence, this may be time for the state legislation to review criminal sanctions provisions under the Copyright Act B.E. 2537; and if they are to be amended, is not it also time to improve our copyright civil litigation system to maintain a balance between private and public interests? The questions are still waiting to be answered.

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