

**Copyright and educational exceptions in
Thailand: A comparative study**

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Abstract

The thesis starts in Chapter 1 by providing the background to the development of the Thai copyright exceptions and the prospective Thai-US Free Trade Area (FTA) Agreements. In Chapter 2, I identify three major problems which arise from the inappropriate and unclear educational exceptions of the Thai CA 1994. The first problem is that the copyright law and its exceptions cannot effectively protect the economic interest of copyright owners but rather reduce the effectiveness of the copyright protection regime in Thailand as a result of three factors: the unclear educational exceptions; the problematic approaches to the copyright exceptions of the Thai IP Court; and the lack of a copyright collecting society (CCS) and a licensing scheme system in the Thai education sector. The second problem is that the Thai educational exceptions do not properly protect the moral right to be recognized as the author of the work in both the general and digital contexts. Finally, they do not support the long-distance education and lifelong learning policy of the Thai government as well as preventing educational institutions, teachers and students from the benefit of new digital technologies.

The thesis recommends that the following tasks be carried out in order to solve the above problems. First, reforms must be made to the educational exceptions in the Thai CA 1994 in order to make them more restrictive and limited than at present. For instance, a clear limitation, a prohibition on multiple reproductions, and a requirement of sufficient acknowledgment must be inserted into the educational exceptions of the Thai CA 1994. Second, I recommend the introduction of digital copyright provisions on Technological Protection Measures (TPMs) and Electronic Rights Management Information (RMIs) into the Thai copyright system. This is necessary in order to ensure that educational materials can be made readily available online for distance education purposes with appropriate protection. These can also protect the economic interests of copyright owners in the digital environment by ensuring that only authorised persons access educational materials, not the public in general. Nevertheless, it is also necessary to ensure that non-infringing uses for educational purposes provided in the copyright exceptions of the Thai CA 1994 will be exempted from the violation of the prospective TPM and RMI provisions. Third, I argue that legislative reform to the educational exceptions and the introduction of the TPM and RMI provisions alone cannot completely solve the problem because the increased numbers of copyright infringements in the Thai education sector result from both the unclear exceptions and the lack of a CCS. Thus, the reforms of the exceptions and the introduction of new law must be carried out together with the establishment of the CCS and a licensing scheme system in the Thai education sector. Nevertheless, the establishment of the CCS without any legal controls upon its activities would result in further problems, so I contend that such establishment must be done together with the introduction of a regulation and a governmental body to prevent the CCS from abusing its licensing scheme or its powers in an anticompetitive way. Finally, the thesis points out several useful lessons arising from the study of the Thai copyright exceptions which could benefit global copyright protection and other countries.

I have sought to state the law as it stood at the end of September 2010.

Declaration

Pursuant to Regulation 2.5 of the University of Edinburgh Postgraduate Assessment Regulations for Research Degrees: Academic Year 2009/10, I hereby certify that unless otherwise mentioned by quotation or reference, this thesis has been entirely and solely composed by me, is my own work, and has not been published or submitted for any other degree or professional qualification.

Noppanun Supasiripongchai

Date: 30 September 2010

Citation system of the thesis

The thesis uses shortened citations in footnotes, giving just the author, year and the page numbers if available (since many online sources or materials do not give page numbers). Also, the abbreviation is used in the footnotes for law reports, draft of the law and other materials. A full citation or detail of materials (such as name of reports or books, name of journals, name of publishers, place of publishing, Uniform Resource Locator (URL) where online materials or reports can be accessible and so on) together with their abbreviations, which are used in the footnotes is provided in the Bibliography section of the thesis.

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Abbreviations

CA 1994	The Thai Copyright Act 1994
CCS	Copyright Collecting Society
CDPA	Copyright Design and Patents Act of the UK
DIP	The department of Intellectual Property in Thailand
DMCA	Digital Millennium Copyright Act of the US
EU	European Union
FTA	Free Trade Agreement
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
GSP	Generalized System of Preference
Copyright Directive	Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society
IP Court	The Intellectual Property and International Trade Court in Thailand
PDP Directive	The Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data
RMIs	Electronic Right Management Information Systems
Three-step test	The test that imposes constraints on the exceptions or limitations under national copyright laws
TPMs	Technological Protection Measures
TRIPs	Agreement on trade-related aspects of intellectual property rights
UK	United Kingdom of Great Britain and Northern Ireland
UK IPO	United Kingdom Intellectual Property Office
USA	United States of America

USCO	United States Copyright Office
USTR	Office of the United States Trade Representative
WCT	WIPO Copyright Treaty
WIPO	World Intellectual Property Organization
WPPT	WIPO Performances and Phonograms Treaty
WTO	World Trade Organization

Chapter 1

Introduction

Copyright exceptions are one of the problematic areas in the Thai Copyright Act 1994 (henceforth Thai CA 1994) because many provisions in this area are unclear and uncertain. Further, some of the provisions seem to impair the incentive for creativity and economic interests of copyright owners. Also, the current educational exceptions are outdated and need to be developed because they cannot properly protect copyright in the digital environment. The reason why these educational exceptions cannot apply in the digital environment and do not support the use of digital technologies is because they were enacted at a time when such technology was not available or not widely accessible for educational purposes. Thus, its scope was defined in the context of the educational environments that existed at that time.

The exceptions to an infringement of copyright are regulated in sections 32 to 43 of the Thai CA 1994. These copyright exceptions can be classified into three categories. The first category is the general conditions or the two pre-conditions in section 32 paragraph 1, which provides that an act against a copyright work of another person which does not conflict with a normal exploitation of the copyright work and does not unreasonably prejudice the legitimate right of the owner of copyright shall not be deemed an infringement of copyright. The second category is the exceptions in the list of permitted acts in section 32 paragraph 2, which consists of eight permitted purposes or uses that can be applied to all types of works: exceptions for research and study; private use; criticism and review; reporting current events; use in judicial or administrative proceedings; reproduction by teachers for

instruction purposes; reproduction by educational institutions; and use in assignments or examinations. The third category is the specific exceptions in sections 33 to 43, which can only apply to specific types of use or certain purposes: exceptions for use as reference; for use by librarians; for use of a computer program; for use of dramatic and musical works; for use of artistic works; for use of architectural works; for use of cinematographic work; and for government use.

However, the thesis will not consider all copyright exceptions but only those relating to education. Thus, the scope of the thesis will be limited to the following exceptions:

- First, the general conditions or two preconditions in section 32 paragraph 1.
- Second, four exceptions from the list of permitted acts in section 32 paragraph 2 which are: exceptions for research and study in paragraph 2(1), for teaching purpose in paragraph 2(6), for reproduction by educational institution in paragraph 2(7), for use in assignment or examination in paragraph 2(8).
- Third, two specific exceptions which are related to education are the exceptions for use as reference in section 33 and exceptions for library use in section 34.

The main objects of the thesis are: 1) To identify the problems with the educational exceptions under the Thai CA 1994 and demonstrate that these exceptions need to be developed; 2) To suggest and recommend about what should

be changed and developed in order to solve the problems and achieve better protection for copyright owners in the Thai education sector.

In Chapter 1, I provide an introduction which explains the structure of the thesis as well as the necessary background to the research questions. This involves looking at the role of copyright exceptions in maintaining the balance between the economic interest of copyright owners and the public interest, starting with provisions in the Berne Convention, the TRIPs Agreement, and the WIPO Copyright Treaty. Then, I develop the policy objectives which aim at solving the problems in Thailand. This Chapter also explains about the development of copyright law and the exceptions in Thailand, while at the same time demonstrating that the educational exceptions in Thailand are closely related to the UK copyright law in terms of their historical development. It also identifies some features of the UK copyright law which still appear in the Thai copyright system. It provides background about the prospective Thailand-US Free Trade Agreement (FTA), explaining what FTAs are, those that already exist, and why Thailand is under pressure from the US to enter one. This chapter investigates several reports on the Thailand-US FTA and then argues that since the Thai government has a strong desire to sign the FTA with the US in order to gain huge economic advantages from it, it is unavoidable for Thailand to improve its copyright law and the exceptions to meet the new standard under the prospective FTA.¹ It is clear that after the prospective FTA with the US is reached, the development of the Thai copyright law and its exceptions will be highly influenced by the US copyright law because most of the US FTAs contain copyright provisions with strict standards modelled after the US Copyright Act, especially

¹ TDRI Report on the impacts of Thailand-US FTA 2003; and OSMEP Report on the impacts of Thailand-US FTA 2005.

those provisions relating to the technological protection measures (TPMs) and rights management information systems (RMIs). Therefore, if the UK experience on copyright exception is related to Thailand in terms of historical development, the experience of the US on copyright exceptions is a relevant exemplar for Thailand in terms of the future development of copyright law. This is also the reason why the thesis looks at the experiences of the USA and the UK with copyright law and exceptions in a search for solutions which can be applied to solve the problems in Thailand.

In Chapter 2, I begin by looking at the three major problems in the Thai education sector which arise from the inappropriate and unclear educational exceptions under the Thai CA 1994. The first problem is that the copyright law and its exceptions cannot effectively protect the economic interests of copyright owners and provide incentive for creativity. In this aspect, I identify three factors which make the Thai copyright law and its exceptions ineffective in protecting the economic interests of copyright owners: 1) the unclear educational exceptions; 2) the problematic approach of the Thai Court; and 3) the lack of a Copyright Collecting Society (CCS). Then, I look at a second problem, that the educational exceptions under the Thai CA 1994 do not support the moral right of the author to be identified as the creator of the work under Article 6bis of the Berne Convention since they allow the reproduction of copyright materials to be done without giving a sufficient acknowledgement of the author and the work. For the third problem, I demonstrate that the educational exceptions are an obstacle to the development of lifelong learning and long-distance education in Thailand as well as preventing the use of digital technology in the Thai educational sector. This is because they only allow the

distribution of the educational materials by teachers and educational institution to be done in a class or in an educational institution, so they cannot cover the situation where the institutions distribute such materials to long-distance learning students via electronic means outside the institutions.

After I identify the problems which arise from the educational exceptions under the Thai CA 1994, I contend in Chapter 3 that in order to solve these problems, it is necessary to make the exceptions more restrictive and limited than at present. Several changes need to be made to the exceptions in the Thai CA 1994 in order to make them more restrictive. First, the two conditions in section 32 paragraph 1, which come from the three-step test in Article 13 of the TRIPs Agreement and Article 9(2) of the Berne Convention, should not be applied as a general exception and should be removed from the law, because this is the cause of ambiguity and uncertainty about the exceptions as a whole. Second, a clear limitation on the amount of reproductions and a clear prohibition on multiple reproductions should be inserted into the educational exceptions in the list of permitted acts and the specific exception for library use. Also, some educational exceptions need to be reformed because they allow the reproduction of educational materials by the users to be done without giving proper acknowledgement of the author or the work. Importantly, the exception for educational institutions which does not allow reproduction by teachers and educational institutions to be made and distributed outside the class or educational institution need to be reformed in order to support the policy of long-distance education and lifelong learning of the Thai government.

In Chapter 4, I argue that the introduction of digital copyright provisions such as the TPM rules is very necessary in order to guarantee that the educational

materials can be made readily available online for distance education purposes with appropriate protection. This chapter indicates that TPMs are useful in protecting copyright works in the digital environment in terms of preventing unauthorized access to the works, so it is necessary to have the provisions which can protect TPMs from an act of circumvention. However, there is a concern that the TPM provisions seem to undermine non-infringing uses under copyright exceptions by preventing the application of the copyright exceptions. Thus, this chapter investigates the impacts of the TPM provisions contained in the US FTAs, US DMCA, and UK CDPA on non-infringing uses under copyright exceptions. In order to prevent such impact, exceptions to these TPM provisions are very important because they can ensure that any non-infringing uses for educational purposes under copyright exceptions will be exempted from the violation of the TPM provisions. In this aspect, I contend that the appropriate model for digital copyright protection must enable the copyright exceptions in the education area to develop alongside the exceptions to the prospective TPM provisions.

In Chapter 5, I consider issues relating to the RMIs. Unlike the TPM provisions, the RMI provisions do not have problems with non-infringing uses under copyright exceptions because they only focus on the information that identifies the works and copyright owners, so the users can use copyright works for educational purpose under copyright exceptions without any problem as long as they leave the RMI or any digital information intact on the works that they use. This Chapter indicates that the RMIs are very important in supporting the protection of moral rights and also tracking down the infringers in the digital environment. This is because RMIs contain information about the copyright owners and works which is

very necessary for distributing the works in the digital environment. Thus, in order to protect the moral right in both hard-copy and digital context effectively, the insertion of the requirement of sufficient acknowledgement into the educational exception recommended in Chapter 3 must be carried out together with the introduction of the provisions on the protection of the RMIs. I also contend that although the standard of the RMI provisions contained in the US FTAs is lower than that of the US DMCA, it seems to meet the minimum standard of the RMI protection under the WCT. However, even though the provisions in FTAs have already met such minimum standards, I still recommend in this Chapter that some changes can be made to such provisions in order to allow them to function more effectively.

In Chapter 6, I argue that the reform of the exceptions alone cannot completely solve the problem because the Thai IP Court indicated in many decisions on copyright exceptions that the increased numbers of copyright infringements in the Thai education sector result from both the unclear exceptions and the lack of a copyright collecting society (CCS) in this area.² The Court observed that the absence of the CCS in the Thai education sector makes it very difficult for users and photocopy shops to obtain licences for the use of educational materials, so they have no choice but to reproduce the materials without prior permission from the copyright owners.³ This Chapter demonstrates that in order to solve these problems, the exceptions need to be reformed alongside the establishment of a CCS. The Thai government should follow the UK approach which indicates that the exceptions will not apply if a licensing scheme from the CCS is available, while the educational exceptions should be designed to encourage the copyright owners to participate in

² The IP&IT Court Decision No. 784/2542 (1999) and the IP&IT Court Decision No. 785/2542 (1999).

³ Ibid.

the CCS and its licensing schemes. However, I also contend that there is the need for a regulatory and governmental body to prevent the CCS from abusing its licensing scheme or its powers in an anti-competitive way.

In Chapter 7, I conclude all lessons from the study of the Thai copyright exceptions in the thesis which could be useful for global copyright protection and the development of national copyright protection in other countries. For example, one of the lessons is that the legislative change to copyright exceptions alone may not be enough to solve the problem in one country, especially when the causes of the problem are linked to several factors. So in order to solve such problem, more than one method in addition to legislative changes might be needed. Also, some useful lessons from the study of the TPMs and RMIs and the lesson about the implementation of the three-step test will be discussed. Finally, I also consider the question of whether or not the role of copyright exceptions is likely to change in the future and what future trends are likely to be for the role of educational exceptions in Thailand.

1.1) The role of copyright exceptions and the policy objectives

Although copyright law grants an exclusive right for copyright owners, it also provides the exceptions to the exclusive rights for users to access and use copyright works in certain circumstances. In this aspect, Walker identifies the role of copyright exceptions in balancing private and public interests as a means to promote innovative societies.⁴ He observes that the primary justification for granting limited property rights in the form of copyright is that such privilege will benefit the society as a

⁴ Walker 2001, at 9 -10.

whole by promoting innovation and creation.⁵ The copyright system at both international and domestic levels has therefore sought to strike a delicate balance between maintaining the incentive for creativity by protecting the economic interest of copyright owners and protecting the public interest in access to the materials and information.⁶ In this aspect, the exceptions to the exclusive rights will play an important role in protecting the public interest by allowing the public to access or use copyright works in certain circumstances without paying remuneration fees and without infringing the exclusive rights of the owners.⁷ Without the copyright exceptions, it would be practically inconvenient for the users to obtain copyright materials because they may have to ask for permission and pay for using materials in every case regardless of whether the amounts of use are large or small. In this aspect, the copyright exceptions help the public to eliminate the transaction costs such as licensing fees or remuneration fees because if the purpose of such uses falls under the certain circumstances of the exceptions, then the reproductions for such purpose can be done without paying royalty fees. Thus, the notion of balancing the interest between the copyright owners and the public cannot function or operate in practice without copyright exceptions as a tool in protecting the public interests.

The notion of balancing the interest between copyright owners and the public has long been recognized at both international and domestic levels. Most international copyright treaties contain provisions which aim at balancing these interests. For instance, the notion of balancing can be seen clearly in Article 9 (1) and (2) of the Berne Convention. Article 9(1) strengthens the exclusive right of authors by providing that authors of literary and artistic works shall have the exclusive right

⁵ Walker 2001, at 9 -10.

⁶ Ibid.

⁷ Okediji 2000, at 84.

of authorizing the reproduction of these works in any manner, while Article 9(2) favour the public interest by allowing the member countries to create the exceptions to the reproduction right in their domestic law. It is believed that a common concern over public interest in the widest dissemination of information served as the rationale behind the exceptions in Article 9 and the copyright exceptions are a tool to maintain the balance between private interest and public interest.⁸

However, it is important to note that although Article 9 (2) of the Berne Convention allows the member countries to create the exceptions in their domestic law as a tool to maintain the balance, it also contains the conditions known as the three-step test which exerts direct control over copyright exceptions under national copyright laws or imposes constraints within which national legislation may provide for exceptions.⁹ In this vein, Article 9(2) requires that the exceptions to the right of reproduction in the countries of the Union must: (1) be limited to certain special cases; (2) not conflict with a normal exploitation of the work; and (3) not unreasonably prejudice the legitimate interests of the author.¹⁰ This means that national legislators must ensure that the exceptions under national copyright laws comply with the test. If the national legislators fail to ensure compliance with the test, then such exception might be subject to a challenge from other countries in the WTO Dispute settlement proceeding. For example, in the WTO Panel decision WT/DS106, an Irish collecting society filed an objection to the European Commission directed against the exceptions in section 110(5) of the US Copyright

⁸ Okediji 2000, at 84.

⁹ Senftleben 2004, at 82, 118.

¹⁰ Article 9(2) of the Berne Convention.

Act.¹¹ After commencing a comprehensive investigation of the legal situation in the USA, the Commission filed WTO dispute settlement proceedings against the US for breach of the Berne Convention and the TRIPS Agreement on behalf of their member states and contended that two exceptions in section 110(5) of the US Copyright Act, which permit the playing of radio and television music in public places without the payment of a royalty fee under certain conditions, were inconsistent with US obligations under the Berne Convention and TRIPS.

In the WTO dispute settlement proceedings, the Panel examined whether the ‘homestyle’ exception in sub-paragraph (a) and the ‘business’ exception in sub-paragraph (b) of section 110(5) of the US Copyright Act satisfy the three-step test.¹² It found that the ‘homestyle’ exception met the requirements of the test, but the ‘business’ exception, which allows the amplification of music broadcasts without an authorization and a payment of a royalty fee by food service and drinking establishments and by retail establishments, did not meet the requirements of the test. So the Panel recommended that the US bring its law into conformity with the three-step test. The three-step test and this WTO Panel decision are very relevant for Thailand because the second and third criteria of the test were incorporated into section 32 paragraph 1 of the Thai CA 1994 as preconditions for specific exceptions and the exceptions in the list of permitted acts. Also, the WTO Panel decision contains an interpretation of the three-step test which is viewed by many countries as a guideline on how to apply the test, so I will discuss the issues relating to the three-step test and the WTO Panel decision WT/DS106 in more detail in Chapter 2 and 3 of the thesis.

¹¹ The WTO Panel Decision No. WT/DS160 (2000); See also WTO Panel Report on section 110(5) of the US Copyright Act (2000) (WT/DS160/R), Part I and II.

¹² Ibid.

The goal of maintaining the balance between these groups of interest in Article 9 of the Berne Convention and the three-step test were later incorporated into the TRIPs Agreement through Article 9 (1) of the TRIPs which requires its members to comply with Articles 1 through 21 of the Berne Convention (1971). In other words, the notion in Article 9 of the Berne Convention was incorporated into the TRIPs Agreement by reference and as a result, the members of TRIPs must also comply with Article 9 of Berne Convention. The notion of balance through copyright exceptions and the three-step test was not only incorporated into the TRIPs by reference but also embodied in Article 13 of the TRIPs Agreement. In this instance, in its Article 13 TRIPs repeats the words of Article 9(2) of the Berne Convention and allows the members of the Agreement to create exceptions to the exclusive rights provided under the TRIPs but is also subject to the direct control of the three-step test in Article 13.¹³ Further, the World Trade Organization (WTO) stated that the TRIPs Agreement also aims to strike an appropriate balance by recognizing in its Article 7 that the protection of intellectual property should contribute to the promotion of technological innovation, the transfer and dissemination of technology, the mutual advantage of users and producers of technological knowledge and in a manner conducive to social and economic welfare and to a balance of rights and obligations.¹⁴ It emphasizes that finding a balance in the protection of copyright

¹³ Article 13 of the TRIPs Agreement also contains the three-step test. It stipulates: ‘Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder’.

¹⁴ WTO Report on pharmaceutical patents and TRIPs Agreement 2010; See also WHO Report on TRIPs Agreement and pharmaceuticals 2000, at 27.

between the short-term interests in maximizing access and the long-term interests in promoting creativity and innovation is the goal of the TRIPs Agreement.¹⁵

Similarly, the objective of maintaining a balance in Article 9 of the Berne Convention and the three-step test were also incorporated into the WIPO Copyright Treaty (WCT) by reference. Pursuant to Article 1 of the WCT, the contracting parties must comply with Article 1 to 21 of the Berne Convention. Like the TRIPs Agreement, the WCT does not only require its contracting parties to comply with Article 9 of the Berne Convention by reference but also repeats the words of Article 9(2) again in its Article 10 which provides that contracting parties may, in their national legislation, provide for exceptions to the rights granted to authors of the works under this Treaty but such exceptions are also subject to the control of the three-step test embodied in Article 10.¹⁶ Moreover, the preamble of the WCT makes it clear that the Contracting Parties must recognize: ‘The need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention’.¹⁷

Although most international copyright treaties allow their contracting countries to have different copyright exceptions in their national copyright laws in order to maintain their own unique balance, the problem is that such balance between protecting the economic interest of copyright owners in order to encourage incentives for creativity and serving public interest in the dissemination of knowledge through

¹⁵ WHO Report on TRIPs Agreement and pharmaceuticals 2000, at 27; See also WTO Report on pharmaceutical patents and TRIPs Agreement 2010.

¹⁶ Article 10 of the WIPO Copyright Treaty also contains the three-step test. It stipulates: ‘Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author’.

¹⁷ The preamble of the WIPO Copyright Treaty.

the copyright exceptions cannot be achieved easily.¹⁸ This is because the appropriate point of the balance can be different in each country, dependent on each country's underlying philosophy and objectives for copyright protection.¹⁹ Guibault explains that the copyright exceptions should reflect the need of society to use a work against the protection on the economic interest of copyright owners but this weighing process often leads to different results in each country because the potential conflict between the interests of copyright owners and the public interest can take place at different levels and grounds in each country.²⁰ The different balance between each country lies in the legislator's assessment of the importance of a particular exception for society in relation to the need to provide for the payment of an equitable remuneration to the copyright owners in order to maintain incentives for creativity.²¹ The outcome of this evaluation will most often determine the form of the exception.

Nevertheless, many scholars believe that copyright exceptions should be based on a public policy objective and the needs of the public. For example, Reinbothe suggests that copyright exceptions should be based on a public policy objective such as public education, public security, and so on.²² Ricketson emphasizes that some clear reason of public policy is necessary to consider an exception a special case.²³ Likewise, Senftleben stated that exceptions should be based on a specific policy objective such as public education.²⁴ Burrell and Coleman give an example of the need for the public to have the exception for educational institutions and the libraries on the basis that libraries have an essential role in the

¹⁸ Senftleben 2004, at 145.

¹⁹ Okediji 2000, at 79.

²⁰ Guibault 2002, at 27.

²¹ Ibid.

²² Reinbothe 2002, at 124.

²³ Ricketson 1987, at 482.

²⁴ Senftleben 2004, at 145.

dissemination and preservation of knowledge and culture for the public, while educational institutions have an important role in providing the public with opportunities for learning and developing their knowledge actively; so there is a justification for providing them with special treatment under the copyright exceptions.²⁵ It can be assumed that the copyright exceptions are designed either to resolve potential conflict of interests between copyright owners and users from within the copyright system or to implement a particular aspect of public policy.²⁶ This means that the decision to set limits to the exclusive right of copyright owners through the exceptions must be based on clear policy reasons or the needs of the public, such as promoting education and the dissemination of knowledge and information among members of society at large.²⁷

Similarly, the UK Intellectual Property Office (IPO) observed in its 2007 report on ‘proposed changes to copyright exceptions’ that in determining the appropriate balance between exclusive rights and exceptions, it is a basic principle of copyright policy that the result should be in the public interest.²⁸ In determining what is in the public interest, the government must balance a number of policy goals, including educational, economic, social and legal objectives with the incentives for creativity and the economic interest of copyright owners.²⁹ The incentives for creativity and the economic interest of copyright owners are important factors because the economic rationale for copyright protection is to generate a sufficient level of creative works and thus copyright provides exclusive rights for copyright owners in order to incentivise the production or investment in creative works that

²⁵ Burrell and Coleman 2005, at 137, 139.

²⁶ Guibault 2002, at 27.

²⁷ Senftleben 2004, at 139, 152 and 267; See also Guibault 2002, at 73.

²⁸ UK IPO Report on proposed changes to copyright exceptions 2007.

²⁹ Ibid.

society wants and needs.³⁰ Without appropriate copyright protection for copyright owners, competitors would be able to offer the same goods for a lower cost because they would not have incurred the initial cost of creation and this would discourage investment in creative activity.³¹ As a result of this, the total amount of creativity in society would be less than what would be socially desirable. Since the protection of the exclusive rights can potentially impose undue costs to the public or users, copyright law normally provides the exceptions to exclusive rights of copyright owners in order to safeguard the public interests by preventing such undue costs on the users.³² This means that the copyright exception must effectively safeguard the public interest and at the same time must be designed in a way that ensures a socially desirable level of creative output.

These above reasons indicate that maintaining the incentives for creativity by protecting the economic interests of copyright owners and protecting other social values or policy goals including education are equally important, so the proposed changes or law reforms recommended in this thesis will be based on the concept that the economic interests of copyright owners must be protected effectively in order to maintain the necessary incentives for creativity and at the same time the public interest in education. Currently, neither can be achieved under the Thai CA 1994 because the educational exceptions and the approach of the Thai Court do not seem to provide proper protection for the economic interests of copyright owners and cannot ensure a socially desirable level of creative output in Thailand. This is because they allow reproduction of entire textbooks and multiple reproductions by the students to be done under the exceptions regardless of whether such textbooks

³⁰ UK IPO Report on proposed changes to copyright exceptions 2007.

³¹ Ibid.

³² Ibid.

can be obtained in the market place. Also the scope of the exceptions under the Thai CA 1994 is unclear, so the copyright law cannot effectively protect the economic interests of copyright owners in the Thai education sector. (The details about the problems of copyright exceptions in Thailand will be discussed in Chapter 2). If this approach continues, it will reduce the effectiveness of the Thai copyright law. In order to maintain a socially desirable level of creative output and increase the effectiveness of the Thai copyright law, the thesis sets out as a first policy objective improvement of the copyright exceptions under the Thai CA 1994 in order to ensure that the copyright owners can get an effective economic return from their investment. Once the economic interests of copyright owners are secured under the copyright law, this will encourage greater creativity and innovation in the Thai education sector.

The second policy objective is that since the incentives for creativity of copyright owners do not consist only of economic incentives but also include other incentives such as prestige, reputation and creative desire, it is necessary to ensure that educational exceptions and other recommendations under the proposed changes of the thesis support the moral right to be acknowledged as the creator of the works. This is because moral rights are not only explicitly to protect the author but also for the purpose of encouraging greater creativity which will benefit the public and educational market in the end.³³ Currently, the educational exceptions under the Thai CA 1994 do not support the moral right to be acknowledged as the creator of the works (the details about the problems of moral rights and the exceptions will be discussed in Chapter 2). Thus, the proposed changes to the exceptions must ensure

³³ Suhl 2002, at 1214.

that the incentives of academic prestige and reputation will not be undermined by the exceptions' failure to require sufficient acknowledgement. At the same time, another proposed change which the thesis recommends is the introduction of provisions on the protection of right management information systems (RMIs) to help protect the moral right to be recognized as the creator of the work in the digital environment. (The issues relating to RMIs will be discussed in Chapter 5).

The final policy objective is to ensure that the proposed change to the educational exceptions recommended in the thesis will support the long-distance learning education and lifelong learning policies of the Thai government, while at the same time enabling educational exceptions to cope with technological changes and the way in which works are used. This policy aims at solving the problem of the current exceptions, which do not support the long-distance education and lifelong learning policy of the Thai government. The current exceptions also deny educational institutions, teachers, and students the full benefit of new digital technology by in effect forbidding distribution of copyright materials by digital means. Thus, while the first and second policy objectives are aimed at developing educational exceptions to secure economic interests and the moral rights of the copyright owners in order to encourage further creativity in Thai society, the third policy objective is aimed at ensuring that copyright law and its exceptions will facilitate access to and use of copyright materials for long-distance and lifelong learning as well as allowing educational institutions, teachers and students to benefit from digital technology. The details on the proposed changes to the educational exceptions under the Thai CA 1994 will be discussed in Chapter 3 of the thesis.

1.2) The development of copyright law and the exceptions in Thailand

The development of the copyright law and exceptions in Thailand is closely related to the copyright law of the UK because the Thai government in the past used the UK copyright laws as a model for the Thai copyright laws. Especially, the copyright exceptions in Thailand at the early stage of their development (1931 to 1978) come from the UK Copyright Acts. Thus, the study of the UK experiences on copyright exceptions in the education sector might offer the solution to the Thai problems in this area.

Copyright exceptions did not appear in Thailand at the early stages of the copyright system. The first copyright law was known as the Royal Announcement of the Vachirayan Library 1892, which did not provide for any exception to an infringement of copyright. Interestingly, this announcement had not been influenced by either international copyright laws or the copyright law of the UK. This seems to be different from the second copyright law which was known as the Ownership of Authors Act 1901 and was followed by the Amendment of Ownership of Authors Act 1914. In this aspect, although the 1901 Act did not contain any exception to an infringement of copyright, it was highly influenced by the Statute of Anne 1709 and the Literary Copyright Act 1842 of the UK which was in force at that time.

For example, the term of protection in section 5 of the Thai Act was the same as section III of the Literary Copyright Act 1842, which provided that the copyright in a book as a property of such author should endure for the natural life of the author and for the further term of seven years commencing at the time of his death. Likewise, the Thai Ownership Act also required the copyright owners of the books to send copies of such books to the Vachirayan Library. This requirement came from

section VIII of the Literary Copyright Act 1842 and section IV of the Statute of Anne 1709, which also required the copyright owners of the books to send copies of such books to some specific libraries. Similarly, the registration of copyright which appeared in section 10 of the Thai Ownership Act came from section II of the Statute of Anne 1709 and section XI of the Literary Copyright Act 1842. Although the Ownership of Authors Act 1901 was amended by the Amendment of Ownership of Authors Act 1914, such amendment did not insert any copyright exceptions into the Act. The lack of the copyright exceptions in Thailand at that time seems to be because both the Statute of Anne 1709 and the Literary Copyright Act 1842 also provided no exceptions for users.

The concept of fair dealing has however long been a part of copyright in the UK. The concept was developed by the courts through case law and the earliest cases on fair dealing can be found in 1740.³⁴ Such concept was not incorporated into the relevant copyright legislation until the twentieth century.³⁵ The UK Courts did not use the term ‘fair dealing’ in their initial decisions but rather preferred the term ‘fair use’.³⁶ The term ‘fair dealing’ was created by the UK Parliament, which brought the concept of fair dealing in the decisions of the UK Courts into the scope of the copyright legislation.³⁷ This means that the legislation simply reflected the current state of the law in relation to fair dealing at that time.³⁸ As Burrell notes, the Minister responsible for the Bill which was later become the Copyright Act 1911 (hereinafter

³⁴ The earliest cases on fair dealing are *Read v. Hodges* (1740) Bro. P.C. 138 and *Gyles v. Wilcox* (1740) 2 Atk. 141; 26 E.R. 489.

³⁵ DeZwart 2007, at 61.

³⁶ See for example, *Wilkins v. Aikin* (1810) 17 Ves. Jun. 422; 34 E.R. 163; *Lewis v. Fullarton* (1839) 2 Beav. 6; 48 E.R. 1080; and *Jarrold v. Houlston* (1857) 3 K. & J. 708; 69 E.R. 1294. See also DeZwart 2007, at 61.

³⁷ Sims 2010, at 192.

³⁸ *Ibid.*

the UK CA 1911) stated: ‘All we propose to do is to declare that for the future the principle on fair dealing which the courts have established is the law of the code...All that is done here is to make a plain declaration of what the law is and to put all copyright works under the same wording’.³⁹ Thus, the fair dealing exceptions made their first statutory appearance in the UK CA 1911, which can be considered as the first Copyright Act of the UK which provided statutory exceptions to infringement of copyright, known as ‘fair dealing’.⁴⁰

Copyright exceptions appear for the first time in Thailand in 1931. The Act for the Protection of Literary and Artistic Works 1931 was the first copyright law in Thailand that contained exception provisions making clear which action could be exempted from infringement of copyright. The exceptions in the 1931 Act were regulated in section 20. Since the exception in section 2(1) of the UK CA 1911 was used as a model for the exception in section 20 of the Thai 1931 Act, there were many similarities between them. For example, the first paragraph of section 20 stated, in exactly the same language as the first paragraph of section 2(1) of the UK CA 1911, that ‘Copyright in a work shall be deemed to be infringed by any person who, without the consent of the owner of the copyright, does anything the sole right to do which is by this Act conferred on the owner of the copyright: Provided that the following acts shall not constitute the infringement of a copyright’.⁴¹ Further, section 20(2) prescribed exactly the same words as section 2(1)(iii) of the UK CA 1911, that ‘the making or publishing of paintings, drawings, engravings, or photographs of a work of sculpture or artistic craftsmanship, if permanently situated in a public place,

³⁹ Burrell 2001, at 368.

⁴⁰ DeZwart 2007, at 61; D’Agostino 2008, at 337.

⁴¹ Section 20 of the Act for the Protection of Literary and Artistic Works 1931.

or building, or the making or publishing of paintings, drawings, engravings, or photographs of any architectural work of art' should not constitute infringement of copyright.⁴²

Importantly, the fair dealing provision was also inserted into section 20(1) of the 1931 Act. Pursuant to section 20(1), 'any fair dealing with any work for the purpose of private study, research, criticism, review or newspaper summary' should not constitute infringement of copyright.⁴³ It was the first time that the use of copyright works for the purpose of research and study was recognized as a permitted act under the Thai copyright law. This section used the same language as its model in section 2(1)(i) of the UK CA 1911. Nevertheless, it is important to note that this section was the only fair dealing provision which ever appeared in the history of the Thai copyright law because, after the replacement of the 1931 Act by the Copyright Act 1978, the term 'fair dealing' never appeared in the Thai copyright system again, including in the current CA 1994. Although there was no clear reason why the term 'fair dealing' was removed from the Thai copyright law, the initial incorporation of the fair dealing provisions into the 1931 Act illustrated that Thai copyright exceptions were strongly influenced and closely related to the UK copyright law.

The 1931 Act was replaced by the Copyright Act 1978 which was the first copyright law in Thailand to contain specific exceptions applying to specific types of copyright works as well as providing the exceptions under the list of permitted acts in section 30 which apply to all types of works. Although the term 'fair dealing' did not appear in the 1978 Act, it is clear that the UK approach to the exceptions still had

⁴² Section 20(2) of the Act for the Protection of Literary and Artistic Works 1931.

⁴³ Section 20(1) of the Act for the Protection of Literary and Artistic Works 1931.

some influence on the exceptions in the 1978 Act. This is because some features of the UK fair dealing approach can be seen clearly in both the CA 1978 and the current CA 1994. In this vein, the UK ‘fair dealing’ approach is different from the US ‘fair use’ approach because it provides a larger number of specific exceptions and limits copyright protection by using an exhaustive list of specifically defined exceptions.⁴⁴ The fair dealing approach allows copyright works to be used for a limited range of purposes and any other purposes of the use that have not been approved by the provisions will not come under the protection of the fair dealing, regardless of how fair they are.⁴⁵ In contrast, the US ‘fair use’ approach provides a small number of generally worded exceptions or criteria in section 107 of the US Copyright Act 1976.⁴⁶ If these general criteria are satisfied, the use of such copyright works will be considered as fair. This means that the US approach is not limited to any specific list of purposes like that of the UK because such use is permitted so long as the four criteria under section 107 are met in light of a non-exhaustive list of specifically defined exceptions.⁴⁷

The CA 1978 clearly followed the UK fair dealing approach because it was the first copyright law which provided the exceptions under the list of the permitted acts which generally applied to all types of copyright works. For example, section 30 of the CA 1978 provides that an act in relation to a copyright work will not constitute an infringement of copyright if it has any one of the following purposes as its object:

‘(1) research or study;

⁴⁴ Burrell 2001, at 361.

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ Ng 1997, at 188.

- (2) use for one's own benefit or use for one's own benefit and for the benefit of members of his family, or relatives and friends;
- (3) criticisms, comment or review of the work accompanied by an acknowledgement of the ownership of the copyright in such work;
-
- (8) utilising the work as a part of the examination questions and answers.⁴⁸

This list of permitted acts in section 30 was later used as a model for the exceptions in the list of permitted acts in section 32 paragraph 2 of the Thai CA 1994. It is undeniable that the CA 1978 contained the exclusive list of permitted acts which is a main characteristic of the UK fair dealing approach and this makes it different from the broad criteria of the US fair use approach.

The second feature of the UK fair dealing approach which appeared in the Thai CA 1978 was the introduction of specific exceptions in sections 31 to 41 of the CA 1978. This only applied to specific types of work and to certain purposes of use. These specific exceptions were the exceptions for use as reference; for library use; for use of audio-visual and cinematographic works; for use of an artistic work; for use of architectural works; for government use. It is important to note that the specific exceptions did not appear in the UK CA 1911 but they appear for the first time in section 6 to 9 of the UK Copyright Act 1956. Although the specific exceptions under the 1978 Act were not delicate or elaborate like those in the UK CA 1956, the concept of specific exceptions which apply to specific types of works and certain purposes of uses in the UK CA 1956 was incorporated into the Thai copyright system for the first time in 1978.

⁴⁸ Section 30 of the Thai CA 1978.

Although the 1978 Act was later replaced by the Thai CA 1994 (which had been changed and developed in order to comply with the TRIPs Agreement), the specific exceptions and the exceptions in the list of permitted acts in the CA 1978 were inserted into the CA 1994 with little change. Thus, many exceptions in the Thai CA 1994 still provide requirements similar to those of the CA 1978. In other words, the exceptions in the Thai CA 1994 still follow the UK approach by maintaining the exceptions in the list of the permitted acts.⁴⁹ Nevertheless, it is important to note that there are two main differences between the exceptions in the Thai CA 1994 and those of the Thai CA 1978. The first difference is that section 30 of the Thai CA 1978 did not have the two conditions from the Berne three-step test; but the CA 1994 incorporated the second and third conditions of the test from Article 9 of the Berne Convention and Article 13 of the TRIPs Agreement into section 32 paragraph 1 of the CA 1994, which provides that an act against a copyright work of another person which does not conflict with a normal exploitation of the copyright work by the owner of copyright and does not unreasonably prejudice the legitimate interest of the copyright owners will not be considered as an infringement of copyright. The issue relating to these two conditions of section 32 paragraph 1 will be discussed in the next Chapter.

The second difference from the Thai CA 1978 is that the requirement that ‘the act is not for profit’ was incorporated into the educational exceptions in the list of permitted acts.⁵⁰ This makes the educational exceptions in the list of permitted acts more rigid and thus provides better protection for copyright owners. This is very different from the list of permitted acts in section 30 of the CA 1978, which did not

⁴⁹ Section 32 paragraph 2 and specific exceptions in section 33 to 43 of the Thai CA 1994.

⁵⁰ Section 32 paragraph 2 of the Thai CA 1994.

impose the conditions that such uses for permitted purposes must not be for profit. For example, section 30(1) of the 1978 Act laid down that the use of copyright works for the purpose of ‘research or study’ did not infringe copyright regardless of whether such use is for profit or not. In contrast, section 32 paragraph 2(1) of the CA 1994 uses the phrase ‘research or study of the work which is not for profit’. The condition of ‘not for profit’ was also incorporated into the exception for use in instruction in section 32 paragraph 2(6) and the exception for educational institution in section 32 paragraph 2(7) of the Thai CA 1994. It is clear that the educational exceptions in the Thai CA 1994 are more restrictive than those of the 1978 Act because in order to be exempted under the exceptions in the list of permitted acts under the Thai CA 1994, the educational uses must both satisfy the requirement of non-profit as well as the two preconditions in section 32 paragraph 1. Nevertheless, the approach to exceptions in the CA 1994 still follows the UK fair dealing approach inasmuch as it also relies on the list of permitted acts in section 32 paragraph 2 and specific exceptions in section 32 to 43 rather than on any general criteria like the US fair use approach.

1.3) The prospective Thailand-US FTA Agreement

A Free Trade Agreement (FTA) is a trade treaty between two or more countries to establish a free trade area in which they agree to reduce or completely remove most or all tariffs, quotas, special fees and taxes, and other barriers to trade between the entities.⁵¹ Usually these FTAs are between two countries and are meant to allow faster and more business between the two countries which should benefit

⁵¹ Bartels and Ortino 2006, at 219-222; See also OSMEP Report on the impacts of Thailand-US FTA 2005; and TDRI Report on the impacts of Thailand-US FTA 2003.

both.⁵² Currently, the US has FTAs in force with 17 countries, which are: Australia, Bahrain, Canada, Chile, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Israel, Jordan, Mexico, Morocco, Nicaragua, Oman, Peru and Singapore.⁵³ The Thai Government has already signed FTAs with several countries such as Australia, New Zealand, India, Japan and Peru but some are still in negotiation process such as the FTA with Bahrain and US.⁵⁴ However, the FTA which Thailand is going to sign with the US seems to be different from any previous FTAs with other countries. This is because previous FTAs do not require Thailand to change its existing laws and regulations in order to accommodate the Agreement. For instance, under the Thailand-Australia FTA agreement, the Thai government did not initiate any legislative and regulatory amendments but instead set up procedures to accommodate Australian investors and companies under the FTA agreement. Similarly, under the Thailand-Japan FTA agreement, the Thai Government will not enact or modify laws but will instead formulate some internal guidelines and regulations in order to comply with the Agreement.

This is different from the US FTA model which normally requires accession to several copyright agreements and leads later to a new copyright law or amendment to copyright law of the trading partner.⁵⁵ For instance, the US FTAs with Australia⁵⁶, Singapore⁵⁷, Bahrain⁵⁸, and Morocco⁵⁹ identically require the contracting countries to ratify or accede to the WIPO Copyright Treaty (WCT) 1996 if they have not already done so. Therefore, it is likely that the prospective FTA with the US will require

⁵² Bartels and Ortino 2006, at 219-222.

⁵³ USTR Information on US FTAs by countries 2010.

⁵⁴ DTN Information on FTAs 2010.

⁵⁵ Chile-US FTA and Singapore-US FTAs.

⁵⁶ Article 17.1 of the Australia-US FTA.

⁵⁷ Article 16.1 of the Singapore-US FTA.

⁵⁸ Article 14.1 of the Bahrain-US FTA.

⁵⁹ Article 15.1 of the Morocco-US FTA.

Thailand to ratify or accede to this treaty and such accession would require increasing the level of copyright protection above that currently provided by the Thai CA 1994.

Importantly, the US FTA is unlike other previous FTAs of Thailand because it contains a high standard of copyright protection going beyond the minimum standards prescribed under the TRIPs Agreement. Thus, signing a FTA under which copyright protection of a higher level than that of the TRIPs Agreement is agreed means that Thailand will have to improve its copyright law to meet the standard under the prospective FTA. This can be seen from examination of previous FTAs agreed by the USA with other countries. For example, the term of copyright protection under the Singapore, Chile and Australia FTA provisions has been identical: copyright should subsist for the life of the author plus seventy years. This is longer than the term of protection under the TRIPs Agreement, which provides a minimum term of protection of life of the author plus fifty years.

In practice, the USA normally uses the previous FTAs as a model for later one while still in the negotiation process.⁶⁰ For example, the FTA that the US has negotiated with Jordan will serve as a model for other FTAs such as Chile and Singapore.⁶¹ This also applies to Thailand. It is believed that the Singapore FTA could be used as a model for Thailand since the USTR proclaimed: 'The leading edge US-Singapore Free Trade Agreement (FTA) is the first US FTA with an Asian nation and will serve as the foundation for other possible FTAs in Southeast Asia under President Bush's Enterprise for ASEAN Initiative (EAI)'.⁶² It is not hard to predict that the similar copyright provisions contained in the previous US FTAs with

⁶⁰ Arnold 2006, at 3.

⁶¹ Endeshaw 2006, at 379.

⁶² USTR Announcement on Singapore FTA 2009.

Singapore, Chile and Australia which is modelled after the provision in the US copyright law will be included in the prospective Thailand-US FTA and it is unlikely that the US will change its position.

It is clear that the US legal approach will play an important role in the future development of the Thai copyright law through the prospective Thailand-US FTA, particularly in the area of digital copyright protection. The US FTAs do not only focus on increasing the standard of copyright protection in hard-copy but also aim at improving digital copyright protection by requiring US trading partners to provide adequate protection for the technological protection measures (TPMs) that prevent unauthorized access to digital copyright materials as well as prohibiting the removal or alteration of the electronic right management information (RMIs) attached to digital copyright materials. In this aspect, the copyright provisions contained in the US FTAs, especially those related to TPM and RMI provisions, are modelled after the Digital Millennium Copyright Act (DMCA) 2000. Specifically, the important parts of the TPM provisions in the US FTAs come from section 1201 of the DMCA, which prohibits the act of circumvention of TPMs as well as the manufacture and distribution of devices which are mainly designed to circumvent TPMs. Similar provisions to section 1201 of the US DMCA can be seen clearly in Article 17.7(5) of the Chile FTA, Article 17.4(7) of the Australia FTA, Article 14.4(7) of the Bahrain FTA, Article 15.5(8) of the Morocco FTA, and Article 16.4(7) of the Singapore FTA, all of which require the contracting countries to provide adequate legal protection against acts or devices that circumvent TPMs.

Further, the US FTAs contain provisions which allow the trading partners to have exceptions to the TPMs protection, which are also modelled after the DMCA.

In this respect, although the language in the exceptions to the TPM provisions in the DMCA and in each FTA is slightly different, these provisions seem to follow a similar structure. First, they allow the exception for particular classes of works to be created under the rule-making proceeding. Second, they allow trading partners to have several specific exceptions to the TPM provisions such as the exceptions for non-profit library and educational institutions; for reverse engineering; for encryption research; for preventing the access of minors to inappropriate online content; for the protection of personal privacy; for security testing; and for law enforcement. Moreover, each FTA contains provisions which make the violation of the TPM and RMI provisions a crime as well as providing civil remedies. Similar provisions can also be found in the DMCA, which provides for civil actions to enforce for the violations of the TPM and RMI provisions, including injunctive and monetary relief in section 1203 and criminal penalties for the violation in section 1204. These DMCA provisions are likely to appear in the prospective Thailand-US FTA.

Since both the WCT and the copyright provisions in the US FTAs have higher standards of protection than those of the TRIPs Agreement, the FTA will normally require a new law or amendment to the domestic copyright law of the US trading partner. For instance, Chile, Singapore and Australia also need to introduce a new law or amend their copyright law in order to fulfil their obligation under the FTA with the US. In the case of Thailand, the copyright law and its exceptions have not kept up with new technology and the prospective FTA will add much in this area; so amendment to the Thai CA 1994 seems to be unavoidable, especially in the area of digital copyright protection. The issue of the TPMs and RMIs which have not been addressed under the CA 1994 will have to be faced if Thailand signs the FTA

with the US and also additional changes would be required for compliance with the WCT.

Nevertheless, although the copyright provisions in the prospective FTAs would require Thailand to increase its standard of copyright protection, it is likely that Thailand will accept the higher standard in the prospective FTAs because of two factors. The first factor is the pressure from section 301 of the US Omnibus Trade Act. The US amended its US Omnibus Trade Act to connect trade and copyright together under section 301, which allows the US to use unilateral pressure in developing countries to demand the increase of copyright protection and prevent unauthorized reproduction of the copyright products.⁶³ Recently, the US put more pressure on Thailand through section 301 and demands for the improvement of copyright protection. In practice, section 301 requires the Office of the US Trade Representative (USTR) to identify foreign countries that do not provide adequate copyright protection for the US's citizens and then place them in either the Priority Foreign Countries (PFC) list, the Priority Watch List (PWL), the Watch List (WL), or the section 306 Monitoring list, depending on their level of inadequate copyright protection.⁶⁴ If such countries do not improve their copyright protection, then it could result in a sanction under section 301, such as cutting off the import privileges under the Generalized System of Preferences (GSP).

In the past, the Thai government always accepted the US requests because it did not want to lose any advantages in access to the US market. Thus it attempted to improve the protection of copyright in order to reduce the pressure from the US. For

⁶³ USTR Report on background of section 301 2005.

⁶⁴ USTR Report on section 301 2007; See also USTR Report on background of section 301 2005.

example, unilateral pressure under section 301 was used on Thailand before the promulgation of the Thai CA 1994. At that time Thailand was the only country in the Association of Southeast Asian Nations (ASEAN) to be included in the Priority Watch List of the US for possible sanctions under section 301.⁶⁵ The US claimed that the Thai CA 1978 was unclear about the issue of computer programs and requested a Copyright Act which expressly protected computer programs. After that it included Thailand in the Priority Watch List and then cut off the Thai import privileges under the Generalized System of Preferences (GSP) as well as threatening to impose further import restrictions and sanctions under section 301.⁶⁶ This pressure led to the enactment of the Thai CA 1994 which provides better protection for all copyright works, especially computer programs. After that the US stopped all sanctions under section 301 and took Thailand out of its Priority Watch List (PWL), placing it in the Watch List (WL).

Recently, the USTR reconsidered Thailand as a country that needs to improve its copyright protection and included Thailand in the Priority Watching List (PWL) again. This could lead to possible sanctions under section 301 in the future. If such sanctions are imposed on Thailand, it would affect the Thai economy since the US is Thailand's largest export market. It is likely that the Thai government will increase the standard of copyright protection in order to avoid such pressure and sanction under section 301 from the US and maintain its benefit in access to the US's market. This pressure is the most important reason why the Thai government is pushing the development of copyright protection quite hard.

⁶⁵ Antons 1991, at 83.

⁶⁶ Ibid.

The second factor is the desire of the Thai government to gain huge benefits from the prospective FTA with the US. Although the Thai government fully realizes that the prospective Thailand-US FTA will surely require Thailand to introduce a new law or make an amendment to its copyright law and exceptions with strict monitoring from the US, it still has a strong desire to sign the FTA with the US because it stands to gain huge benefits in term of market access and other economic advantages. The reports on the impact of the prospective Thailand-US FTA from both the Thailand Development Research Institute (TDRI) and the Office of Small and Medium Enterprises Promotion (OSMEP), which are part of the Thai government agencies, also recognize these problems.⁶⁷ For instance, the OSMEP noted that the FTA contains detailed provisions on the substantive law and enforcement of copyright protection, which are modelled upon US domestic laws and thus aim at upgrading the level of copyright protection in Thailand to be similar to that provided by US legislation.⁶⁸ Similarly, the TDRI observed that the US standard is one of the highest in the world for copyright protection, so if Thailand adopts the US standard in the prospective FTA, it will surely require the Thai government to make several amendments and reforms to certain provisions in the current Thai CA 1994.⁶⁹ Importantly, both TDRI and OSMEP believe that Thailand is not ready for the new standard of copyright protection in the US FTA yet, because

⁶⁷ OSMEP Report on the impacts of Thailand-US FTA 2005; See also TDRI Report on the impacts of Thailand-US FTA 2003.

⁶⁸ OSMEP Report on the impacts of Thailand-US FTA 2005, at 5.

⁶⁹ TDRI Report on the impacts of Thailand-US FTA 2003, at 101.

the current legal system is already over-burdened and can hardly accommodate new obligations.⁷⁰

Nevertheless, these reports in the end support the decision of the Thai government to sign the FTA with the US. Most of the reasons supporting the FTA with the US in these reports seem to be purely based on the economic benefits that Thailand will gain from the prospective FTA. For instance, both reports explain that the US is one of the world's largest importers, so it is a major export destination for Thailand. Presently, the export value from Thailand to the US amounts to around \$13.6 billion per annum, which constitutes about 20 percent of total Thai exported goods as well as the highest share of Thailand's exports.⁷¹ The TDRI observed that the prospective FTA would increase Thai exports by about 3.46 percent and sectors that are likely to benefit from the FTA include agricultural products, processed food, textiles and automobiles.⁷² Specifically, the agricultural sector would benefit by around 2.25 percent, followed by the industry sector at around 1.70 percent and the service sector by around 0.85 percent.⁷³ It also believes that the prospective FTA would generate a real GDP growth of 1.34 percent for Thailand and would have a larger impact for Thailand than for the US because Thailand imports from the US only account for around 0.75 % of total US exports per annum.⁷⁴

The FTA will increase trade between the US and Thailand by a full five percent and it will be a driving force in the development and growth of the Thai

⁷⁰ TDRI Report on the impacts of Thailand-US FTA 2003, at 101; See also OSMEP Report on the impacts of Thailand-US FTA 2005, at 5.

⁷¹ OSMEP Report on the impacts of Thailand-US FTA 2005, at 1; See also TDRI Report on the impacts of Thailand-US FTA 2003, at 19.

⁷² TDRI Report on the impacts of Thailand-US FTA 2003, at 1.

⁷³ Ibid at 31.

⁷⁴ Ibid at 19.

economy as a whole.⁷⁵ In this vein, the potential benefits to Thailand are likely to arise from more direct investment and export-originated foreign investment, because the FTA will encourage foreign investors to make investments in the country. This should enable the economy of the country to grow more rapidly in both the short and long term, since Foreign Direct Investment (FDI) has always been one of its key growth engines.⁷⁶ Further, the FTA will create greater and intensified competition in the Thai service sectors. For instance, liberalization in the telecommunication market would help lower service prices in Thailand to be in line with other Asian countries.⁷⁷ Importantly, the FTA will also help to modernize and spread higher levels of technology, know-how, and labour and management skills, which are necessary for the Thai economy to move ahead and escape the competition from lower-wage countries such as China, Vietnam and Laos.⁷⁸ As a result, the adoption of new technology would enhance productivity and stimulate innovation in Thailand.

Likewise, the OSMEP in Thailand indicates that export products from Thailand, such as processed food, prepared fish, vegetables, fruits, sport shoes, children clothes, suits and other textile products, rubber or plastic shoes, furniture, and light trucks, are likely to enjoy the reduction of US tariffs under the prospective FTA.⁷⁹ In addition, the OSMEP outlines that the FTA with the US will create great benefits and opportunities for Thailand in many aspects.⁸⁰ For example, the FTA will

⁷⁵ TDRI Report on the impacts of Thailand-US FTA 2003, at 19.

⁷⁶ Ibid.

⁷⁷ Ibid at 2 and 33.

⁷⁸ Ibid at 33.

⁷⁹ OSMEP Report on the impacts of Thailand-US FTA 2005, at 2.

⁸⁰ Ibid at 11.

enable Thai professional workers to access the US labour market more easily.⁸¹ The OSMEP believes that the adoption of a new standard of IP rights protection under the FTA could induce much more foreign investment. Consumers and SME entrepreneurs would benefit from greater competition, resulting in improvement in the quality of service and lower prices.⁸² Liberalization of the service sectors under the FTA, especially telecommunications, banking and finance and express mail delivery, are likely to benefit SMEs and consumers in Thailand.⁸³

Reports from the US and other international organizations also support the decision of the Thai government to sign the FTA with the US. For instance, the Institute for International Economics (IIE) in the US has released a report on the impacts of US-ASEAN FTAs which confirms that in most cases the FTAs would benefit all the countries involved.⁸⁴ The IIE indicates that the prospective Thailand-US FTA would increase trade volume between Thailand and the US by 118 percent, so Thai and US exporters will benefit equally from it.⁸⁵ However, the IIE believes that the benefits to Thai exporters would be greater if the US achieves FTAs with every ASEAN countries because intra-ASEAN trades will also increase by exactly the same 118 percentage points.⁸⁶

Similarly, the US Congressional Research Service Report (CRSR) 2006 also said that by eliminating US tariff and non-tariff barriers to Thai exports, the FTA could help to increase the competitiveness and market share of Thai products in the

⁸¹ The OSMEP indicates that the Thai professional workers would be able to access the US labour market more easily if the Thai government can successfully negotiate a H-1B Visa quota as that achieved by Chile and Singapore.

⁸² OSMEP Report on the impacts of Thailand-US FTA 2005, at 6.

⁸³ Ibid at 6.

⁸⁴ IIE Report on US FTAs with ASEAN 2003.

⁸⁵ Ibid.

⁸⁶ Ibid.

US market.⁸⁷ In addition, the CRSR also observes that Thailand would not want to be excluded from FTA benefits that the US has negotiated with other countries. The CRSR especially refers to the potential of an FTA to increase US investment in Thailand.⁸⁸ These reports illustrate that the various economic interests from the prospective FTA, such as reducing tariffs and increasing trade and investment, are the main incentive for Thailand to sign the FTA with the US.

Both the pressure from section 301 and the desire to sign the FTA are important factors which explain why Thailand is going to improve its standard of copyright protection. Especially, the FTA is the significant factor making the US approach to copyright protection very relevant for the future development of Thai copyright law. Although six rounds of the Thailand-US FTA negotiations have taken place, the FTA is still not yet concluded. However, the Thai government has already started reforming its IP system and preparing for entry into the FTA with the US in order to gain more economic benefits. For example, the Thai government attempts to change and reform the patent system in Thailand in order to make it compatible with the system under the Patent Cooperation Treaty (PCT). This is because Thailand is not a signatory country to the PCT but the government believes that the FTA will surely require Thailand to ratify the PCT. Similarly, the department of Intellectual Property (DIP) in Thailand has announced on its website that Thailand is going to join the PCT and some other IP treaties such the WCT and WPPT, even before the completion of the FTA negotiations with the US.⁸⁹ The IIPA of the US also observed that since the WCT and WPPT issues are under consideration by the Council of State

⁸⁷ USCRS Report on Thailand-US FTA Negotiations 2006, at 2; See also Collins-Chase 2008, at 774.

⁸⁸ USCRS Report on Thailand-US FTA Negotiations 2006, at 2-3.

⁸⁹ DIP Thailand Announcement 2009.

in Thailand, it is expected that elements of these treaties will be incorporated into Thai copyright law before the Thai government ratifies them.⁹⁰ It will be a while before the accession to the PCT, the WCT and other IP treaties can take place in Thailand because some preparation for these new standards also takes time. Not only does the Thai government propose to reform its IP regime but it also prepares to improve and change laws and regulations in other areas before signing the FTA with the US. For example, the Thai government is ready to develop the Thai stock exchange system in order to make it compatible with the US system. It also seeks to change its law of investment in order to allow foreign companies to own land in the country.

The position of the Thai Government is not different from other developing countries which agree to provide stronger copyright protection as contained in the US FTAs in exchange for more economic advantages, investment and greater access to US markets.⁹¹ Bartels observes that developing countries will continue to negotiate FTAs with the US because in many cases, such a trade off – IPRs in exchange for market access – is not included nefariously by the larger trading nation but is instead a conscious choice of the developing nation.⁹² For example, Chile also signed the FTA with the US in order to further its economic interests by negotiating away IP rights for greater access to the US market; the Chile government also expected that the FTA with the US would bring in massive multinational corporations furthering their own economic interests in Chile.⁹³ Since the Thai government holds the same position as the Chile government, it is unavoidable for

⁹⁰ IIPA Report on Copyright Protection in Thailand 2009.

⁹¹ Fischer 2006, at 132.

⁹² Bartels and Ortino 2006, at 221.

⁹³ Fischer 2006, at 133.

Thailand to be influenced by the US legal approach on copyright protection through the prospective FTA in the future.

Chapter 2

The problems of the educational exceptions in Thailand

This chapter will consider how the Thai copyright exceptions are operated, identifying the major problems which arise from their unclarity under the Thai CA 1994. There are several major problems in relation to educational exceptions which the thesis attempts to solve. Firstly, section 2.1 indicates the problem that the current copyright law and its exceptions cannot effectively protect the economic interests of copyright owners. Section 2.2 identifies the second problem: the educational exceptions do not recognize the moral right of the copyright owners or authors to be acknowledged as the creator of the works since they allow the reproduction of educational materials by teachers, students, and educational institutions to be made without sufficient acknowledgement. Section 2.3 illustrates the final problem, that the educational exceptions for the reproduction by the educational institutions and teachers do not support long distance learning education and cannot apply in the digital environment.

2.1) The impact of the unclear exceptions on the economic interest of copyright owners

The situation of copyright infringement in the Thai education sector which results from inappropriate educational exceptions in the CA 1994 does not seem to improve in the past decade. This problem was acknowledged in several reports of the International Intellectual Property Alliance (IIPA) of the US. It is necessary to mention the IIPA because the IIPA works with the US Trade Representative (USTR) and other US government agencies in formulating the annual Special 301 reports on whether acts, policies or practices of any foreign country deny adequate and effective

protection of copyright.⁹⁴ These reports of the IIPA analyzed legal and enforcement deficiencies and highlighted the problems and recommended corrective actions in 48 countries including Thailand. Since the number of copyright infringements in Thailand seems to grow rapidly, the IIPA has reported the situation of copyright infringement in Thailand to the USTR every year from 2001 until now through ‘the annual Special 301 reviews on copyright protection and enforcement in Thailand’, which can lead to the sanction or the removal of the Generalized System of Preference (GSP) that affords duty-free entry to many imported goods from Thailand.

Further, the IIPA also worked with the US government on the IPR provisions of all the recent FTA Agreements, including IPR chapters that contain significant obligations about copyright protection.⁹⁵ This means that the IIPA has an important role not only in formulating the annual Special 301 reports for the USTR but also in creating the copyright provisions in the US FTAs, including the prospective Thailand-US FTA. Hence, the problems about the copyright exceptions in Thailand which are acknowledged in the IIPA are relevant for the thesis to take into consideration.

The IIPA highlighted that the problem of multiple reproductions and photocopying of entire textbooks in Thailand is centred around commercial copy shops near schools or university campuses which offer photocopy services for the students who order the shop to make copies of entire books or copy chapter-by-

⁹⁴ IIPA Fact Sheet 2009.

⁹⁵ Ibid.

chapter routinely.⁹⁶ Research conducted by the US publishing industry illustrates the severity of this problem in Thailand. For instance, an investigator from the publishing industry who visited a copy shop inside the Medical Faculty of the Chulalongkorn University in Bangkok found a list of fourteen popular medical books complete with prices of each available for made-to-order sale in photocopied form.⁹⁷ Interestingly, the statistic indicates that around 60% of all students obtain illegally photocopied versions of the textbooks for schools and universities from commercial copy shops just like the shop at the Chulalongkorn University.⁹⁸ The university campuses where photocopying of the entire textbooks seems to be particularly prevalent include Chulalongkorn University, Assumption University, Sripatum University, and Mahanakorn University.⁹⁹

These photocopying activities not only hurt the publishers of professional and academic textbooks in Thailand severely but also harm the market for US published materials in the country.¹⁰⁰ The DIP indicated that most copyright violations in the education sector take place during the beginning of an academic year.¹⁰¹ Importantly, the statistic illustrated that around 60% of students in Bangkok copy entire books and if these students were to buy the average number of books per year (estimated to be between 10-15 books), it would result to around 180,000-270,000 displaced sales to students.¹⁰² Thus, the publishing industry lost around 180,000-270,000 genuine book sales per annum in Bangkok alone due to this problem. This numbers do not include

⁹⁶ IIPA Report on IP practices in Thailand 2001.

⁹⁷ IIPA Report on Copyright Protection in Thailand 2005.

⁹⁸ Ibid.

⁹⁹ IIPA Report on Copyright Protection in Thailand 2005; See also IIPA Report on Copyright Protection in Thailand 2007.

¹⁰⁰ IIPA Report on Copyright Protection in Thailand 2004.

¹⁰¹ DIP Report on the Implementation of IP rights in Thailand 2007; See also DIP Report on the Implementation of IP rights in Thailand 2009-2010.

¹⁰² IIPA Report on Copyright Protection in Thailand 2006.

the copying carried out by teachers. The US is especially concerned about this problem because many textbooks from US publishers have been reproduced in the form of photocopies of textbooks around schools and university campus in Thailand.¹⁰³ The IIPA indicated that the numbers of copyright infringement in the Thai education sector remained quite high and were generally above average for the Asia region.¹⁰⁴

The educational exceptions are also a cause of these problems because as will be shown below they make it more difficult to enforce the copyright law and protect the economic interests of copyright owners in practice. In this vein, the Thai copyright law and its exceptions cannot effectively protect the economic interest of copyright owners because of three factors: 1) the unclarity and ambiguity of the educational exceptions under the Thai CA 1994; 2) the current approach of the Thai Court to the exceptions has weakened the copyright protection regime in the sector; 3) the lack of a copyright collecting society in the sector which makes it more difficult for the users to obtain a licence for the uses of copyright works. These three factors not only make copyright protection and its exceptions ineffective in safeguarding the economic interests of copyright owners but also undermine the goal of copyright law, which is to encourage greater creativity.

2.1.1) The ambiguity of the educational exceptions under the Thai CA 1994

The first factor which makes the protection of economic interests of copyright owners ineffective is that the educational exceptions in the CA 1994 are ambiguous

¹⁰³ IIPA Report on the Proposed US-Thailand FTA 2004.

¹⁰⁴ IIPA Report on Copyright Protection in Thailand 2009.

and unclear. One of the main problems comes from the two conditions in section 32 paragraph 1 which is the mainspring of the whole body of exceptions under the CA 1994. Paragraph 1 says that an act against a copyright work of the copyright owner should not be regarded as infringement of copyright if two conditions are met. The first condition is that the action or reproduction must not conflict with a normal exploitation of the copyright work by the copyright owner, while the second condition is that the action or reproduction must not unreasonably prejudice the legitimate right of the copyright owner. These two conditions are very important because all educational exceptions in the list of permitted acts in section 32 paragraph 2 (such as the exceptions for research and study in paragraph 2(1); for teaching in paragraph 2(6); for educational institutions in paragraph 2(7); and for use in examinations in paragraph 2(8); as well as the specific exception for use as reference in section 33 and for library use in section 34) require the two conditions to be satisfied together with other additional conditions in order in order to be exempted from copyright infringement under these sections.

For example, paragraph 2 of section 32 stipulates: ‘subject to paragraph one, any act against the copyright work in paragraph one is not deemed an infringement of copyright; provided that the act is one of the following: (1) research or study of the work which is not for profit...’.¹⁰⁵ The term ‘subject to paragraph one’ requires that the two preconditions in paragraph 1 are to be satisfied together with the additional condition that such uses must be for the purpose of research or study which is not for profit in order to be exempted. The term ‘subject to paragraph one’ also applies to the rest of the educational exceptions in the list of permitted acts in

¹⁰⁵ Paragraph 2 of Section 32 of the Thai CA 1994.

section 32 paragraph 2. Similarly, most specific exceptions in the CA 1994 require the two conditions in section 32 paragraph 1 to be satisfied together with other additional conditions in order for the acts to be exempted under these specific exceptions. For instance, section 34 provides that ‘a reproduction of a copyright work by a librarian...is not deemed an infringement of copyright; provided that the purpose of such reproduction is not for profit and Section 32 paragraph one is complied with...’.¹⁰⁶ Similar language requiring the two conditions in section 32 paragraph 1 to be satisfied together with the additional conditions can also be found in exception for use as reference in section 33 as well. Therefore, if the two conditions of section 32 paragraph 1 are unclear, this will normally affect the operation of the specific exceptions which rely on them.

Before 1999, there was a debate on the issue of whether section 32 paragraph 1 should be regarded as a mere preamble or as enforceable pre-conditions. This issue was solved by several decisions of the Supreme Court and the IP Court, which held that these two conditions are enforceable preconditions and not a mere preamble. For example, in the Supreme Court Decision No. 1908/2546¹⁰⁷, the defendant copied around 30 out of 150 pages of the plaintiff’s literary work, put them into his book, and published them for commercial purposes. The defendant claimed that his action could be exempted from copyright infringement by relying on the exception for the use as reference in section 33 and the exceptions in the list of permitted acts in section 32 paragraph 2. The court held that in order to be exempted under the exceptions in the list of permitted acts or specific exception, such use must also

¹⁰⁶ Section 34 of the Thai CA 1994.

¹⁰⁷ The Supreme Court Decision No. 1908/2546 (2003).

satisfy both the two conditions in section 32 paragraph 1 as well as other additional conditions in those exceptions.

The court observed in the first paragraph of the decision that three conditions must be satisfied in this case. First, the purpose of use must fall into one of the eight categories of the exceptions in the list of permitted acts in section 32 paragraph 2 or such use must fall under use as reference in section 33. Second, the use of the copyright work must not conflict with a normal exploitation of the copyright work and third, such use must not unreasonably prejudice the legitimate rights of the copyright owner. This approach of the court is consistent with the wording of section 32 paragraph 2 and section 33 which clearly require the two conditions in section 32 paragraph 1 to be satisfied together with other conditions in the provisions.

The court in this case was of the view that the defendant's action did not fall into any of the exceptions in the list of the permitted acts in section 32 paragraph 2 and also did not fall under the specific exception for use as reference in section 33 (which allows the reasonable recitation, quotation, or reference from a copyright work with an acknowledgement of the ownership of copyright in such work to be exempted from infringement of copyright). The court offered two important reasons for its conclusion. First, the defendant had copied a substantial part of the original work: the amount of the copying was about 30 out of 150 pages of the original work which was a very large amount. Second, despite referring to the plaintiff and his works in the bibliography of his book, the defendant did not give any reference or acknowledgement to the plaintiff in any other part of the book; especially there was no reference or acknowledgement in those 30 pages which were taken from the plaintiff's book. Thus, it was impossible for readers to know which part of the

defendant's book was written by the plaintiff. The court held that referring to the plaintiff and his book in the bibliography only is not sufficient to be regarded as an acknowledgement of the ownership of copyright in original work.

After analyzing the conditions in section 33, the court further stated that the publication and sale of the defendant's books did not satisfy the two conditions in section 32 paragraph 1 because such publication and sale of the defendant's book obstructed the ordinary profit-seeking of the copyright owners and adversely affected the legitimate right of the copyright owner in an excessive manner. This is because the defendant's book was sold in the same market channels to the same group of consumers as the plaintiff's book. Hence, the publication and sale of the defendant's books are clearly in competition with the plaintiff's book. The court, therefore, concluded that the defendant's act cannot be exempted from the infringement of copyright under section 33.

This decision implied that the two conditions of section 32 paragraph 1 are not mere preamble but rather enforceable preconditions of the exceptions. Thus, if the two conditions are unclear and ambiguous, it could result in uncertain scope of the exceptions and infringement which makes it more difficult to enforce the copyright law. It is also important to mention the IP Court Decision No. 784/2542¹⁰⁸ and the IP Court Decision no. 785/2542¹⁰⁹ where the court outlined several problems in relation to the two conditions in section 32 paragraph 1. In the decision no. 784/2542, the three American publishers, McGraw-Hill, Prentice-Hall and

¹⁰⁸ The IP&IT Court Decision No. 784/2542 (1999) (the parties appealed to the Supreme Court and the decision was overturned by the Supreme Court in the Supreme Court Decision No. 5843/2543).

¹⁰⁹ The IP&IT Court Decision No. 785/2542 (1999) (the parties appealed to the Supreme Court and the decision was affirmed by the Supreme Court in the Supreme Court Supreme Court Decision No. 1772/2543).

International Thomson Publishing, were joint plaintiffs with the public prosecutor. The plaintiffs claimed that the defendant, who ran a shop offering a photocopy service, infringed their copyrights on the textbooks and requested a heavy penalty to be imposed on the defendant for infringing copyright. The defendant admitted unauthorized reproduction but relied on the exception for research and study in section 32 paragraph 2(1) as an agent of the students who were using the materials purely for private research and study without making profit from them.

The court held that in order to be exempted under the exception for research and study, the defendant must prove several matters to the satisfaction of the court. First, his act must not conflict with the normal exploitation of the work; second, it must not unreasonably prejudice the legitimate right of the copyright owners in an excessive manner. Third, his act must be for the purpose of carrying out research or study of the work and finally, not for the purpose of profit-seeking. In other words, the IP Court confirmed that the two conditions of section 32 paragraph 1 are not a mere preamble but enforceable preconditions.

The court indicated that, in order to determine whether such reproduction in this case is in conflict with normal exploitation and unreasonably prejudicial to the legitimate right of the copyright owner, it is necessary to consider circumstances case by case, which involves looking into the factors of quality and quantity. In determining the issue of whether the quantity of duplication in this case is a reasonable amount, the court acknowledged the difficulty in interpreting the two conditions because the lack of guidelines for reproduction of educational materials in Thailand. In this instance, the exception allows the reproduction of copyright works for research or study which is not for profit, provided that the two conditions in

section 32 paragraph 1 are satisfied; but it does not have a clear limitation as to the amount of reproduction and does not prohibit multiple reproductions of copyright materials.

Under this provision, the students are allowed to photocopy or reproduce the whole or a part of copyright materials for the purposes of research and study which is not for profit, as long as such reproduction does not conflict with a normal exploitation of the copyright work and not unreasonably prejudicial to the legitimate right of the copyright owner. The difficulty lies in the question of what amount of reproduction could be considered as 'not in conflict with a normal exploitation of the copyright work' and 'not unreasonably prejudicial to the legitimate right of the copyright owner'. Similarly, the exception applying to teaching and educational institutions also does not have a clear limitation as to the amount allowed to be reproduced and does not prohibit multiple reproductions of copyright materials. There is no judicial decision where the Thai court indicated that multiple reproductions of copyright materials by educational institutions and teachers are in conflict with a normal exploitation of the copyright work and unreasonably prejudicial to the legitimate right of the copyright owner. In other words, the court implied that there is a problem about the duplicate quantity in Thailand because it is hard to determine what amount of copying could be justified under the exception for research and study. In practice, the interpretation of these phrases seems to be difficult for users because there is no formal guideline to help them to determine what amount of reproduction could be justified under the exception for research and study. It depends on the assessment of the Thai court to determine case by case whether the amounts reproduced are in conflict with normal exploitation and

unreasonably prejudicial to the legitimate right of the copyright owner. With such unclear provision and the lack of guidelines, it is very hard for users or even government officers to know how much of a copyright work can be legally reproduced for research and study.

The court observed that the user may reproduce the works for the purpose of research or study under the exceptions without having to obtain permission from the copyright owners. In such case the printing organizations or copyright collecting societies (CCS) in other countries will solve the problem of duplicate quantity by fixing an appropriate figure in the duplication through the guideline; for example, one article from a journal or one chapter from a book, or no more than 10% of the whole. However, since there is no guideline or any agreement on the amount of duplication between publishers and users in Thailand, the court suggested that a clear guideline or agreement to define a certain amount of the duplication is needed but such guideline must not affect the high-level education of the nation and the development of the country, particularly where the price of books is not reasonably relative to the population's income. It is important to note that there was no guideline in Thailand when this decision was issued by the IP Court in 1999 since guidelines for education use were released by the DIP and distributed to students, lecturers and the general public for the first time only in 2007.¹¹⁰ Thus, the nature of the problem relating to guidelines seems to be different from the time when this decision was issued, so the recommendations made by the IP Court in this decision can no longer solve the current problem. In this vein, the main problem when this decision was issued was the lack of a guideline for educational use, but the problem now is that the

¹¹⁰ DIP Report on the Implementation of IP rights in Thailand 2007; See also DIP Report on the Implementation of IP rights in Thailand 2009-2010.

guidelines of the DIP are not widely recognized or used by the interested parties in the Thai education sector such as copyright owners, users, libraries and educational institutions because they cannot reflect the interest of these parties. The issues of the guidelines will be discussed in Chapter 3.

Although these decisions acknowledged the problem about the difficulty in interpreting the two conditions and the lack of guidelines, they did not clarify the meaning of the two conditions in section 32 paragraph 1. Also, they did not consider or answer the question of whether the two conditions in section 32 paragraph 1 can be applied as a general exception on its own. Thus, this issue is still under debate in Thailand. The court in these decisions only said that the two conditions are enforceable conditions but did not state that these two conditions must only be applied together with other specific exceptions and cannot be applied alone as a general exception. In most cases, it is unusual to find the defendant who chooses to rely purely on the two conditions in section 32 paragraph 1 because they do not know whether the two conditions can be applied as a general exception or not. With such doubts, most defendants would normally prefer to rely on the exceptions in the list of permitted acts in section 32 paragraph 2 or specific exceptions in section 33 to 43, which normally require such use to comply with the two conditions together with other additional conditions. Currently, there is no judicial decision where the court has determined on this issue yet. This ambiguity and unclear scope of the exceptions makes it more difficult to enforce the copyright law and protect copyright works in the Thai education sector, especially where copyright materials are made available in the mass education market. Thus, these unclear exceptions need to be clarified in order to ensure that the scope of copyright exceptions and infringement are clear and

certain. Such changes and clarifications of these provisions are necessary in order to ensure that the copyright owners can get an economic return on their investment. The issue of whether or not the two conditions in section 32 paragraph 1 should be enforced alone as a general exception will be further discussed in Chapter 3.

This seems to be consistent with the recommendation of the IIPA, which stated that the unclear educational exceptions in section 32 of the CA 1994 are the main problem hindering enforcement of copyright protection in Thailand.¹¹¹ The report observed that the educational exceptions in section 32 of the CA 1994 are very poorly drafted and defined so they contain some gaps which can be interpreted to allow the photocopying of entire textbooks or substantial portions to be done freely.¹¹² Also, the provision does not expressly provide a clear limitation as to the amount of reproduction or clear prohibition on multiple reproductions and does not make clear that photocopy shops that make photocopies of published materials or hand over photocopied materials to students can be held liable for copyright infringement.¹¹³ Hence, it requested that this loophole should be closed and suggested that the Thai copyright law should be amended in order to safeguard the economic interests of copyright and prohibit a photocopy shop from providing and selling photocopies of the entire textbooks or substantial portions of the works to the students.¹¹⁴

¹¹¹ IIPA Report on Copyright Protection in Thailand 2009.

¹¹² IIPA Report on Copyright Protection in Thailand 2007; See also IIPA Report on Copyright Protection in Thailand 2006.

¹¹³ IIPA Report on the Proposed US-Thailand FTA 2004.

¹¹⁴ IIPA Report on Copyright Protection in Thailand 2004; See also IIPA Report on Copyright Protection in Thailand 2005; and IIPA Report on Copyright Protection in Thailand 2009.

It is important to note that the specific exception for the reproduction by librarians in section 34 also has similar problems to other educational exceptions under the CA 1994 which are subject to the two conditions in section 32 paragraph 1. In this aspect, the exception for reproduction by libraries in section 34(2) permits the librarian to reproduce part of a copyright work for another person for the purpose of research and study, provided that such reproductions is not for profit and section 32 paragraph 1 is complied with. Since the exception is also subject to the two conditions in section 32 paragraph 1, the unclarity and ambiguity of the two conditions also affect this exception as well. In this instance, this exception does not have a clear limitation as to the permissible amount of reproduction by librarian because it is unclear when and to what extent the reproduction by libraries can be considered as ‘conflict with a normal exploitation of the copyright work’ and ‘unreasonably prejudicial to the legitimate right of the copyright owner’. Also, the language of the provision does not prohibit the librarian from making multiple and systematic reproduction for the students. Also there is no judicial decision of the Thai courts on this exception making this matter clear.

Although the exception in section 34 clearly prohibits the librarian from reproducing the whole work for the users by stating that the librarian can reproduce only part of copyright materials for the purpose of research and study of the users, the term ‘part of copyright work’ does not prevent the librarian from making multiple copies of the part. This means that the librarian can make multiple copies of the part of the same materials for the purpose of research and study of the students. Moreover, this exception allows the library to reproduce copyright materials without taking into account whether such copies are available in the market and could be

obtained at a reasonable price or not. Thus, even if the copies are available in the market at a reasonable price, the library can still make copies of part of the work for the users. This is different from the US copyright law which requires the library to check whether or not such books are available in the market at a reasonable price before reproducing them. Thus, the exception for libraries in section 34 does not properly safeguard the economic interest of copyright owners, and it needs to be amended and developed. The proposed changes to the exception for libraries will be discussed in Chapter 3 of the thesis together with the proposed changes to other educational exceptions.

2.1.2) Problematic approaches to the exceptions by the Thai IP Court

The second factor which makes it more difficult to safeguard the economic interests of copyright owners had also been created by the IP Court in decision no. 784/2542 (part of this decision was discussed in the previous section). In this vein, not only did the court in this decision not clarify the meaning of the two conditions but it also created the approach which seems to weaken the effectiveness of copyright protection in the Thai education sector. In this vein, although the court found that the works reproduced by the defendant were for classroom use and the defendant received instruction from students taking the course to compile a ‘course pack’ consisting of excerpts ranging from 15% - 30% of five copyright textbooks, it was of the view that by allowing students to duplicate only one article from an entire journal or one chapter from a book would result in a misunderstanding or non-understanding of the thoughts or philosophy in the book.¹¹⁵ Then, the court emphasized the fact that the work reproduced is used in classes of the university

¹¹⁵ Sumawong 1999, at 37.

which have around 16,000 students but the university's library has approximately 20 copies of the said works and a student can only borrow the original copy for 7 days. Since the numbers of books available in the library do not match with the numbers and the needs of 16,000 students, the court held that reproduction of the books is necessary for the students. It observed that if any student reproduces some parts of the book which a teacher specifies for study in class, it is considered a justifiable use of work within the exception for research and study under section 32 paragraph 2(1) of the CA 1994. Also, it believed that when every student does the same thing, all students should be granted exemption from the copyright infringement.

In order to support its reasoning, the Thai court referred to the US decision in the *Princeton University Press* case¹¹⁶, where the US Court of Appeal states:

‘...the strict interpretation of fair use by the majority judges might result in the obstruction of educational progress in the US. The economic rights enjoyed by the creator under copyright law shall be secondary to the main purpose of copyright law, that is, to encourage creative thinking in general.’¹¹⁷

The Thai court contended that requiring students to buy every book in classes or subscribe to every journal without reasonable exceptions provided by copyright law would obstruct the progress of education and science in Thai society.¹¹⁸ The court attempted to protect the public interest in the field of research and education so it held that the users or students should be able to reproduce copyright materials where prices of books had no relation to population income and affected the high level education of the country.

¹¹⁶ *Princeton University Press v. Michigan Document Services Inc*, 99 F. 3d 1381 (6th Cir 1996). The detail of this case will be discussed in Chapter 6.

¹¹⁷ The IP&IT Court Decision No. 784/2542 (1999).

¹¹⁸ *Ibid.*

Although this approach may be useful to the public, it would have undermined the economic interest of the copyright owners and creativity in the education sector in the long run. This approach of the Thai court focuses only on the interest of the users in education and does not take into account the necessary incentives for creativity, the economic interest of the copyright owners and the publishing industry which must be balanced with the public interest in education. It clearly impairs the economic interests of copyright owners and incentive for creativity by stating that if the numbers of the text books in the library are not available to match with the numbers and the needs of students, or if the price of books is too great or not reasonable, then such reproduction of copyright materials by the students can be exempted under the exceptions for research and study. This approach seems to allow multiple reproductions to be done if the materials are not available in the library for the large numbers of students, regardless of whether such textbooks are available for the students to obtain in the market place.

This approach clearly illustrates that the Thai court does not take account of the fact that the publishers and those in the education sector depend on each other, and that damage to the interests of copyright owners and publishing industry would result in damage to the education sector in the end. This concept is recognized in the *Universities UK* decision¹¹⁹, where the UK Copyright Tribunal noted that it is necessary to maintain the balance between the interests of copyright owners (including the publishing industry) and the interests of education, because these two groups depend on each other. The publishing industry depends on academic authors for its raw materials and a healthy publishing industry is particularly important to

¹¹⁹ *Universities U.K. v. Copyright Licensing Agency Ltd* [2002] RPC 639.

those in education.¹²⁰ The Tribunal emphasizes that a broad generalized approach on exceptions would be damaging to the publishing industry, and in consequence damaging to education.¹²¹ It is clear that the current approach of the Thai court does not recognize the relationship between the public interest and the interests of copyright owners or the publishing industry, since it clearly opposes the restrictive interpretation of copyright exceptions and takes a broad approach in interpreting the exception in favour of the students only. The IIPA of the US also agreed with this view by stating that section 32 of the Thai CA 1994 creates an unclear and overly-broad exception which has been broadly interpreted by the Thai courts to allow unauthorized photocopying of entire textbooks or substantial portions of published materials as long as the copy is made for educational purposes.¹²²

Further, the Thai Court in this case also created another problem in interpreting the term ‘not for profit’ as follows:

‘When looked in the view of business mechanics and division of work, each student, instead of copying one copy each, may need to hire someone else to copy instead. The person hired or acting on their behalf may provide service by means of trade, by collecting fees, copying and paper expenses. In this case, even though photocopy shops copy for commercial purpose or profit, but such performance is a direct consequence of the use of labour, machine and equipment of shop, i.e., man, photocopying machines and paper. Photocopy shop did not seek profit from the copyright infringement of others, but is a performance under an employment agreement between the student and the shop. Shops are regarded as tools or representatives in making photocopies for student. The

¹²⁰ *Universities U.K. v. Copyright Licensing Agency Ltd* [2002] RPC 639.

¹²¹ *Ibid.*

¹²² IIPA Report on Copyright Protection in Thailand 2005; See also IIPA Report on Copyright Protection in Thailand 2007; and IIPA Report on Copyright Protection in Thailand 2006.

exception to the copyright infringement used with the student shall also apply to the shops.¹²³

At the price of 0.60 Baht per page, the court did not find that profit was derived from infringement of copyright. Thus, the photocopy shops who were copying entire textbooks for the students were successful in arguing that they could not be held liable for copyright infringement because they are not engaged in illegal copying but rather simply providing a photocopy service to the students. This decision illustrates that if the photocopy shop was acting on behalf of the students or by order of the student, then the exceptions from copyright infringement given to the students can also be extended to the photocopy shop as well. Nevertheless, the evidence must be shown to the court that such action was done by the orders of the students or on behalf of the student. If the photocopy shop can prove that there is an order from the students, then the profit granted from photocopying the work will not be considered as profit from infringing another's copyright but will be the profits in exchange for the use of human labour instead.

However, it is important to note that the IP court decision no. 784/2542 was reversed by the Supreme Court in the Supreme Court Decision no. 5843/2543.¹²⁴ The Supreme Court pointed out that the defendant reproduced many copies of the copyright materials and kept them at his store which was close to the university where the classes using the textbooks took place. This fact illustrated that the defendant was likely to have chances to sell those copies to the students who enrolled in the course that required using those copies. Also, the Supreme Court found that the defendant made a confession when he was arrested by police and during the

¹²³ The IP&IT Court Decision No. 784/2542 (1999).

¹²⁴ The Supreme Court Decision No. 5843/2543 (2000).

process of interrogation that he reproduced the copyright works of others for the purpose of sale. And the police found the evidence of 43 copies of photocopied work in the shop of the defendant. After considering this evidence, the court held that it was reasonable to believe that the defendant reproduced the copyright works for purpose of sale and seeking benefits from selling those copies for his own business.

The Supreme Court outlined that the circumstances of this case cannot be regarded as copying for hire by the students for the purpose of research and study because there was no witness or evidence from the defendant to prove that he merely photocopied because of the orders of students.¹²⁵ Hence, the defendant photocopied copyright works, not for giving a photocopying service as he claimed, but for commercial purposes and seeking profit from the copyright work, which infringed the right of the copyright owner and was not within the exception under the Thai CA 1994.¹²⁶ The Supreme Court declared the defendant guilty and overruled the judgement of the IP Court.

It is clear that the Supreme Court in no. 5843/2543 made different finding of facts from the IP Court, so the Supreme Court did not reverse the reasoning in the previous decision of the IP Court which allows the reproduction to be exempted under the exceptions as long as the defendant has the order forms.¹²⁷ This is because the IP Court might go too far in extending the exception to copyright infringement without adequate ground in the facts.¹²⁸ Nevertheless, if the defendant in this case can provide clear evidence that he photocopied the copyright works under an order

¹²⁵ Pinyosinwat 2002, at 600.

¹²⁶ Ibid at 601.

¹²⁷ Ibid.

¹²⁸ Ibid.

from the students, he can claim that he only gives photocopying service to students and thus, his action does not infringe copyright. However, the defence lawyer in this case provided only the defendant's testimony and did not prove any other defence evidence.¹²⁹ This is the reason why the Supreme Court held that the defendant is guilty. The Supreme Court clearly emphasized the fact that the defendant made a confession that he is guilty in the process of arrest and interrogation, while the IP court gave this little weight.¹³⁰

Although the IP Court decision no. 784/2542 was overruled by the Supreme Court, it raised several important issues such as the lack of the CCS in the Thai education sector and the two inappropriate approaches which undermine the effectiveness of the copyright protection regime in the Thai education sector. The same problems have also been acknowledged by the IP Court in the decision no. 785/2542.¹³¹ This case has similar facts to the IP Court decision no. 784/2542 discussed above. The defendant also operated a photocopy shop by providing general photocopy services to the public. The plaintiff claimed the defendant infringed copyright by photocopying excerpts extracted from textbooks for which the plaintiffs held the copyrights. Those excerpts were selected by the professor for a class in the nearby university. The main difference is that the court in this decision found the defendant prepared the photocopy in advance, while the amount of seized

¹²⁹ Pinyosinwat 2002, at 601.

¹³⁰ Ibid.

¹³¹ The IP&IT Court Decision No. 785/2542 (the parties appealed to the Supreme Court and the decision was affirmed by the Supreme Court in the Supreme Court Supreme Court Decision No. 1772/2543).

photocopies in this decision was much larger than that of the decision no. 784/2542.¹³²

However, the court decision no. 785/2542 also referred to the reasoning in the previous IP Court decision no. 784/2542. Then, it stated that the decision no. 785/2542 is different from the previous decision no. 784/2542 because the defendant in this decision could not prove to the satisfaction of the court that copying of the plaintiff's copyright work was done under the order forms or the employment contract between the student and the photocopy shop. Therefore, the defendant in this case could not rely on the student's exceptions because he could not prove that the students ordered him to make a copy of copyright materials. The court held that the defendant copied the copyright work under his own initiative without instruction or order from the student. The defendant prepared all photocopies of the copyright works in advance and then promptly sold them. Hence, the defendant could not claim the defence under the exception for research and study because the defendant's act was for commercial purposes and not for the purpose of education or research. Also, since the court found that the amount of seized photocopies in this case was quite large, it held that the defendant unreasonably disturbed the right of the copyright owner to utilize the copyright work to gain benefit in the ordinary manner.¹³³ Hence, the IP Court declared that the act of the defendant was copyright infringement for profit-seeking purposes. Although the court declared the defendant guilty, it only imposed a lenient fine because it believed that the defendant's act was committed to facilitate the students and for profit in a reasonable manner.

¹³² Pinyosinwat 2002, at 599.

¹³³ The IP&IT Court Decision No. 785/2542 (1999).

The parties disagreed with the IP Court decision and appealed to the Supreme Court. The Supreme Court Decision no. 1772/2543 (2000) affirmed the decision of the IP Court. It was confirmed that copying documents in accordance with the order or the instruction of students or teachers for the purpose of research and study without the purpose of making profits could be exempted from infringement of copyright under section 32 paragraph 2(1). If the defendant acted on behalf of students who were eligible to raise the exception of copyright infringement, the defendant would have been eligible for the exception of copyright infringement in the same manner as the student. However, the defendant's shortcut of copying the copyright work in advance under his own initiative and then selling those copies to the students without a prior order from them meant that he could not claim the copyright exception for research and study.

It is undeniable that this problematic approach of the Thai courts has weakened the copyright protection regime in the Thai education sector and impaired the economic interests of copyright owners. The photocopy shops rely on a 'made to order' basis through the order form in order to avoid the infringement of copyright. In this aspect, the photocopy shops attempt to use this approach of the IP Court to their benefit by requesting all students and their customers who want to photocopy the books to fill in the order forms or the employment contracts provided by the photocopy shops. As a result, they can use these order forms as evidence to prove that such reproduction is done by the orders of the students or on behalf of the student so that the profit granted from photocopying the work will not be considered as profit from infringing copyright but as profits in exchange for the use of human labour instead.

The IIPA of the US has also complained about this problematic approach in several of its reports. In this vein, it stated that although the Supreme Courts and the IP Courts have held in several decisions that the preparation of the photocopied textbooks in advance for selling to the students is considered as copyright infringement and cannot be exempted under the exception, the investigators from the publishing industry found that photocopy shops not only copy any book upon demand but also around 60% of them were found to hold pre-copied books in advance.¹³⁴ Nevertheless, this means that around 40% of the photocopy shops will not keep infringing materials in stock or reproduce such materials in advance but will only make copies after orders are received from students.¹³⁵ This method of a ‘made to order’ system, in which requested copies are made and immediately distributed, can help to avoid the risk of infringing copyright in accordance with the approach of the Thai IP Court to exceptions. Therefore, the IIPA requested the Thai government to solve this problem since the photocopy shops have learned to avoid stockpiling of infringing textbooks by moving to a ‘made to order’ system.¹³⁶

The IIPA also indicated that this approach is problematic because it sets no limitation on the scope of permissible reproduction under the educational exceptions since the court held firmly that receipts showing copies made on order or on behalf of students would entitle the defendant to avail himself of the defence under the educational exception.¹³⁷ This means that the reproduction of entire textbooks or multiple reproductions can be done under the exceptions as long as the defendant has

¹³⁴ IIPA Report on Copyright Protection in Thailand 2005.

¹³⁵ IIPA Report on Copyright Protection in Thailand 2009; See also IIPA Report on Copyright Protection in Thailand 2005.

¹³⁶ IIPA Report on Copyright Protection in Thailand 2004.

¹³⁷ IIPA Report on Copyright Protection in Thailand 2005; See also IIPA Report on Copyright Protection in Thailand 2004.

receipts showing that copies were made on the order of the students. If such an approach to the exception continues, it will hinder the publishers' efforts to protect their copyrights as well as increase the level of copyright infringement in the Thai education sector.¹³⁸

The IIPA believes further that the growth of copyright infringement in the Thai education sector results from the problematic approach.¹³⁹ For instance, the photocopying of educational materials is widely supported by lecturers as a result of a broad misinterpretation about the scope of permissible reproduction under the educational exceptions.¹⁴⁰ Especially, section 32 paragraph 2(6) of the Thai CA 1994 which allows the teachers to reproduce educational materials for teaching purposes has been completely misinterpreted by the teachers and universities in Thailand as allowing the reproduction of entire books and their distribution to the students.¹⁴¹ The studies indicate that many lecturers or instructors often use university facilities to reproduce copyright works for their students and also frequently provide the students' reading lists to photocopy shops so that those shops can anticipate demand and prepare the photocopies of the books for the students in accordance with the reading lists.¹⁴² In some cases, the lecturers even place the orders for the students' copies themselves and send someone to collect them. For instance, the statistics indicated that over two-thirds of students at Chulalongkorn University received photocopied textbooks from their lecturers.¹⁴³

¹³⁸ IIPA Report on Copyright Protection in Thailand 2008.

¹³⁹ IIPA Report on Copyright Protection in Thailand 2006.

¹⁴⁰ IIPA Report on Copyright Protection in Thailand 2004.

¹⁴¹ Ibid.

¹⁴² IIPA Report on Copyright Protection in Thailand 2005; See also IIPA Report on Copyright Protection in Thailand 2004.

¹⁴³ IIPA Report on Copyright Protection in Thailand 2004.

Importantly, the IIPA emphasized that the two conditions in section 32 paragraph 1 have been interpreted by the Thai courts in a way incompatible with international norms and standards regarding permissible uses of copyright materials. So if Thai copyright law continues to permit what these judges say it does, Thailand will remain in violation of its international obligations under the Berne Convention and the TRIPs Agreement.¹⁴⁴ The IIPA stated that in order to comply with the three-step test in the Berne Convention and the TRIPs Agreement, such exceptions need to be clarified by confirming that, contrary to some interpretations by the Thai courts, the exceptions are not applied to permit wholesale copying of academic materials or textbooks without payment of royalty fees to the copyright owners, or to allow students, teachers, or photocopy shops or anyone else acting on their behalf to reproduce copyright works in a way that impinges on the exclusive rights of the copyright owners under international law.¹⁴⁵ It also suggests that Thailand should take steps to narrow the relevant provisions to ensure compliance with international norms.¹⁴⁶

Similarly, some copyright associations in the US such as the Association of American Publishers (AAP) also indicated in their joint petition to the Office of the US Trade Representative (USTR) that the results of the decisions of the Thai IP Court are unsatisfactory because they allow wholesale photocopying carried out by the photocopy shops at the direction of students to fall entirely within the exception

¹⁴⁴ IIPA Report on Copyright Protection in Thailand 2008; See also IIPA Report on Copyright Protection in Thailand 2005; IIPA Report on Copyright Protection in Thailand 2006; and IIPA Report on Copyright Protection in Thailand 2007.

¹⁴⁵ IIPA Report on Copyright Protection in Thailand 2005; See also IIPA Report on Copyright Protection in Thailand 2009.

¹⁴⁶ IIPA Report on Copyright Protection in Thailand 2009.

for non-profit ‘research and study’ purposes.¹⁴⁷ These associations observed that although both cases had been appealed to the Thai Supreme Court, it does not help to solve the problem because the Supreme Court decisions seem to leave open the possibility that if prior requests by the students were documented, a photocopy shop engaged in photocopying of copyright materials would be able to claim the benefit of the exception for the reproduction for non-profit ‘research and study’ purposes.¹⁴⁸ This is because the decision of the Supreme Court was based on a finding that the defendant had failed to demonstrate that the unauthorized copies seized by the police had been made at the specific request of students so there is still a possibility that if there is clear evidence that prior requests or orders were made by the students, then the photocopy shops might be able to benefit from the exception. Hence, these decisions of the Supreme Court do not disapprove the lower court’s reading of the law but even encourage commercial piracy of textbooks.¹⁴⁹ These associations indicated that such an approach to the interpretation of the educational exceptions would undermine the economic interests of copyright owners and concluded that legislative changes are needed in order to clarify some ambiguities in the educational exceptions in the Thai CA 1994 and also the inappropriate approach in the two decisions should be solved.¹⁵⁰

2.1.3) The lack of a copyright collecting society (CCS)

The third factor which makes it more difficult to protect the economic interests of copyright owners is the lack of a copyright collecting society (CCS) in the Thai education sector. This problem was acknowledged by the Thai Court in both

¹⁴⁷ IIPA Report on IP practices in Thailand 2001.

¹⁴⁸ Ibid.

¹⁴⁹ Ibid.

¹⁵⁰ Ibid.

the IP Court Decision no. 784/2542¹⁵¹ and the IP Court Decision no. 785/2542.¹⁵² The IP Court in Decision no. 784/2542 stated that the copyright system normally allows individuals or other representative organizations such as libraries or photocopy shops who want to use copyright works for a non-profit educational purpose to apply for permission from the copyright owners to duplicate part of the work and then pay royalty fees. Libraries or photocopy shops as representatives of the user must apply for permission to duplicate part of the work for a non-profit educational purpose and then pay royalty fees to the copyright owners. However, the problem for Thailand is that there is no CCS in the Thai education sector. The IP Court outlined the problem about the lack of a CCS in the Thai educational sector and suggested the establishment of a CCS as follows:

‘...it does not appear that the printing house who is the copyright owner in this case has appointed a representative for granting of permission to use right in Thailand. If students, teachers or photocopy shops which are representatives of such persons in Thailand must request permission from the copyright owner for a justified duplication, it does not appear how such persons or organizations must proceed.’¹⁵³

Similarly, the IP Court in Decision no. 785/2542¹⁵⁴ also acknowledged the lack of the CCS in the Thai education sector and held that although the plaintiff requested the court to impose severe penalties (imprisonment and heavy fine) on the defendant by claiming that the defendant’s act adversely affected the economy and international trade relations, it would not impose severe penalties on the defendant for the following reason:

¹⁵¹ The IP&IT Court Decision No. 784/2542 (1999).

¹⁵² The IP&IT Court Decision No. 785/2542 (1999).

¹⁵³ The IP & IT Court Decision No. 784/2542 (1999).

¹⁵⁴ The IP&IT Court Decision No. 785/2542 (1999).

‘...the publisher who is the copyright owner in this case has never appointed a representative for the purpose of licensing persons in Thailand to utilize the copyright work. If students, teachers or photocopy shops who are representatives of those persons in Thailand want to apply for a licence from the copyright owner so that they can make copies of the work legally, such persons or organization would not know how to apply for such licence.’¹⁵⁵

The court was of the view that the injured party should take partial responsibility for the copyright infringement in this case. The court suggested that the users (defendant) and the publishers (the injured party) should set up ‘a Royal Collecting Organization for various kinds of literary work which are used in teaching and studying’.¹⁵⁶

These two cases clearly illustrate the problem caused by the lack of a CCS to collect royalty fees for reproduction of the copyright works in the Thai education sector. Without the CCS in the Thai education sector, the damage to the economic interest of copyright owners seems to be more severe. Because it is difficult for the users to obtain permission from the copyright owner, they may have no choice but to reproduce the copyright materials without prior permission from the copyright owner. It is also undeniable that the increased numbers of copyright infringements in the education sector result from the difficulty in obtaining permission and the lack of a CCS and licensing scheme system. The introduction of such a system into the Thai education sector is necessary in order to solve the problem. The issues relating to the need for a CCS in the Thai education sector will be discussed in more detail in Chapter 6.

¹⁵⁵ The IP&IT Court Decision No. 785/2542 (1999).

¹⁵⁶ Ibid.

2.2) Exceptions and moral rights

Although the moral right of the author to be identified as the creator of the work under Article 6bis of the Berne Convention is specifically recognized and implemented in section 18 of the Thai CA 1994, the majority of the educational exceptions (especially those in the list of permitted acts in section 32 paragraph 2) do not support this right of the author because they do not require that such reproduction of the work under the exceptions must be accompanied by a sufficient acknowledgement of the author and the work. For example, the exception for research and study in section 32 paragraph 2(1) allows users to reproduce copyright works for non-commercial research and study, but without requiring sufficient acknowledgement of the author. Likewise, the exception for teaching in section 32 paragraph 2(6) allows the reproduction, adaptation, exhibition or display of a work by a teacher for the benefit of his teaching, but again without sufficient acknowledgement being necessary. Similarly, the exception for educational institutions in section 32 paragraph 2(7) permits educational institutions to reproduce copyright materials for distributing or selling to students in class or in an educational institution without any requirement of sufficient acknowledgment. Also, the use of copyright works as part of questions and answers in an examination can be done under section 32 paragraph 2(8) without sufficient acknowledgement of the author.

The only educational exception which requires the reproduction to be done with sufficient acknowledgement is the specific exception for 'use as reference' in section 33. The problem is that this exception operates independently and separately from other educational exceptions. Pursuant to section 33, a reasonable recitation, quotation, copy, emulation or reference from a copyright work with an

acknowledgement of the ownership of copyright in such work will not be deemed an infringement of copyright provided the two conditions in section 32 paragraph 1 are also complied with. But this exception does not mean that all users of educational materials are required to provide sufficient acknowledgement as to the original work and its author. It only means that the users can benefit from this exception as long as they reproduce such works with sufficient acknowledgement. In other words, the user who does not provide sufficient acknowledgement as to the author or the original works will lose only the right to benefit from this specific exception but will still have the right to claim under other educational exceptions which do not require sufficient acknowledgement.

The lack of a condition of sufficient acknowledgement in the majority of the educational exceptions indicates that the current provisions do not respond to the nature of the use of research materials. The condition of sufficient acknowledgement is based on the fact that research and educational materials normally owe their existence to what has gone before; indeed the authors of these types of works often use some idea or knowledge from the previous works in order to build or create a new one.¹⁵⁷ The condition of sufficient acknowledgement therefore seems to be necessary so that the person receiving a copy of the work could have notice of the earlier creator's identity. In order to ensure that moral rights of the copyright owners will be recognized by the educational exceptions under the CA 1994, amendment to these exceptions seems to be unavoidable.

The moral right under the Thai CA 1994 not only limits to the right of the author to be identified as such through direct quotation but also includes the right to

¹⁵⁷ Bently 2009, at 199; See also Lehr 1994, at 446.

prohibit any person from distorting, shortening, adapting or doing anything against the work to the extent that such act would cause damage to the reputation or dignity of the author. However, it is clear that the moral right problem in Thailand is about a person taking copyright materials of others and then publishing them as his or her own work without providing sufficient acknowledgment of the original author and work. The IIPA also recognized this as a major problem and stated that the educational exceptions under the Thai CA 1994 allow lecturers and educational institutions to include significant excerpts from English-language textbooks in their own materials without giving proper acknowledgement of the authors and their works.¹⁵⁸ In this vein, translations, adaptations and compilations of copyright materials made without permission or sufficient acknowledgement which involve both entire books and substantial portions of books have increased dramatically during the past few years.¹⁵⁹ These reports indicate that many lecturers in Thailand make direct translations of entire foreign copyright works and then market them as their own publications.¹⁶⁰ Some lecturers take a chapter from each of several different foreign textbooks on the same topic and then translate the chapters and compile them into a new set of materials or course packs for sale or distribution to students as their ‘Thai’ original textbooks without permission or sufficient acknowledgement.¹⁶¹ Some directly use the foreign materials without any translations as their own materials, especially those who teach English as a foreign language (TOEFL) in Thailand. For example, lecturers take questions from IELTS or TOEFL practice books or other English practice books and then compile them into

¹⁵⁸ IIPA Report on the Proposed US-Thailand FTA 2004.

¹⁵⁹ IIPA Report on Copyright Protection in Thailand 2009.

¹⁶⁰ Ibid.

¹⁶¹ IIPA Report on Copyright Protection in Thailand 2005.

their own course packs or publication.¹⁶² In 2006, the IIPA found that several lecturers at two universities had used their names on a direct translation of a foreign copyright work without permission or sufficient acknowledgement and no actions had been taken to prevent such practices.¹⁶³

The cause of this problem is that the educational exceptions in section 32 of the Thai CA 1994 do not contain the requirement of sufficient acknowledgement along with the lack of a CCS in the Thai education sector to provide licences for those who wish to translate English-language textbooks into Thai for publication. With the gap in the educational exceptions and the lack of a CCS, lecturers can routinely include significant excerpts from English-language textbooks in their own materials without giving proper credit or acknowledgement. Thus, the IIPA demanded that the Thai Government modernize or improve the educational exceptions and also establish a CCS in the Thai education sector in order to allow those who wish to translate English-language materials to obtain the appropriate licenses for such production.¹⁶⁴

Most reports from the IIPA argued that this problem must be solved as soon as possible because it inflicts significant damage not only on the educational market and economic interest of copyright owners in Thailand but also on moral rights and the incentive for creativity of the authors who are supposed to be acknowledged as creators of the works.¹⁶⁵ In this vein, the lack of a requirement of sufficient acknowledgement in the educational exceptions can also undermine economic

¹⁶² IIPA Report on Copyright Protection in Thailand 2009.

¹⁶³ IIPA Report on Copyright Protection in Thailand 2006.

¹⁶⁴ IIPA Report on Copyright Protection in Thailand 2005.

¹⁶⁵ IIPA Report on the Proposed US-Thailand FTA 2004.

incentives for production and other incentives such as those of academic prestige or reputation.¹⁶⁶ Without the exceptions supporting moral rights to be acknowledged as the authors of the works, academic authors who create work in order to gain prestige or reputation in the education sector may lose motivations and incentives for creativity. Thus, the exception supporting the moral rights is not only aimed at protecting authors but also at promoting greater creativity to benefit the educational market and the public in the end.¹⁶⁷ Chapter 3 of the thesis will discuss the proposed changes in relation to the requirement of sufficient acknowledgement together with other proposed changes to educational exceptions.

2.3) Exceptions and long-distance education

Many universities in Thailand have embraced digital technology as a way of enhancing the learning environment for students including the use of secure networks. This has created large numbers of long-distance learning students who access educational materials away from the class and educational institution at a place and time of their own choosing. The Thai Government considers that access to educational material is an important element in promoting lifelong learning and long-distance learning education, by creating more opportunities to learn and develop beyond the formal school environment.¹⁶⁸ However, concern has been expressed that the Thai copyright law and its exceptions seem to restrict the full exploitation of this potential lifelong education and long-distance learning.

Although the current educational exceptions under the Thai CA 1994 normally cover reproduction in hard-copies by the teacher and educational

¹⁶⁶ Suhl 2002, at 1214.

¹⁶⁷ Ibid.

¹⁶⁸ Section 8 of the National Education Act 1999 (Thailand).

institution, they do not support long-distance education where the students are supplied with the course materials at home. This is because they only allow the reproductions to be distributed in a class or in an educational institution.¹⁶⁹ With this current approach, the exception can only benefit on-campus students but cannot extend to cover students not on the premises of the institution. Since reproduction and distribution outside the institution are not allowed under the exception, it is impossible for the educational institutions to provide or distribute materials to long-distance learning students without infringing copyright. Hence, the exception has clearly become an obstacle to long-distance learning students. The exception not only disadvantages long-distance learning students but also adversely impacts on students with disabilities, who may study from remote locations as well.

The policy of the Thai Government promotes long-distance learning education in order to solve the problems of overpopulation in the capital of Bangkok. Recently, the Thai Government encouraged people from the countryside to participate in long-distance education or to study in the schools or universities located in their provinces instead of living and studying in Bangkok. This is because the size of the population in Bangkok has dramatically increased in the past decade as people from the countryside permanently migrate to the city. The Government believes that people come to study in Bangkok and then after they graduate, do not go back to their provinces. Long-distance education seems to be one of the methods to prevent people from moving in this way. Recently, most educational institutions respond to government policy by offering long-distance learning courses and programs. With the consequent rapid growth of long-distance education in Thailand,

¹⁶⁹ See for example section 32 paragraph 2(7) of the Thai CA 1994.

changes or amendments to the copyright exceptions in order to allow long-distance learning students to access and obtain educational materials outside the classroom or premises of educational institutions is unavoidable.

By preventing reproduction and distribution outside educational institutions, the exception also proves to be incompatible with the policy of lifelong education under the National Education Act 1999, which is the first comprehensive educational law in Thailand. This law is aimed at developing the full potential of the Thai people through imparting knowledge in areas such as politics, democratic governance, human rights, local knowledge, environmental preservation, self-reliance, creativity, and self-learning on a continual basis.¹⁷⁰ Importantly, the Act clearly stipulated in section 8 that educational provision is based on the following principles: 1) lifelong education for all; 2) all segments of society participating in the provision of education; and 3) continuous development of the bodies of knowledge and learning processes.¹⁷¹ The Thai Government considers access to educational materials as an important element in promoting lifelong learning for all and also in creating the opportunity for all segments of society to learn and develop their knowledge beyond the formal school and university environment.

The exceptions thus not only prove an obstacle for the lifelong learning policy of the Thai Government but also prevent educational institutions, teachers and students benefiting from new digital technology by not permitting educational institutions to send copyright materials to distance learning students by electronic means. For example, the exception does not cover the situation where the educational institution makes copies or materials available via secure networks or where it sends

¹⁷⁰ Section 7 of the National Education Act 1999 (Thailand).

¹⁷¹ Section 8 of the National Education Act 1999 (Thailand).

such materials to students by email. Hence, this exception is too limited for the digital age, where information and learning process are no longer confined to classrooms or educational institutions but can be shared over the Internet or secure networks.

The exception was enacted at a time when digital technology was not available or widely accessible for educational purposes. Thus, its scope was defined in the context of the educational environments that existed at that time which focused on enabling teachers and educational institutions to prepare and distribute extracts from copyright works in hard-copies. Consequently, this exception cannot deal with the current situation where educational institutions in Thailand make increasing use of digital technology in teaching long-distance learning students and where education and learning processes are no longer limited to studying in classrooms or educational institutions. This means that legitimate uses or activities in the Thai education sector are infringement when they should not be. For example, some courses in my university in Thailand are partly carried out online so the educational institutions and lecturers often put educational materials online along with recording of lectures for the students to download without realizing that these activities cannot be justified under the exceptions for educational institutions.

Importantly, the non-application of the exception also means that the educational institutions, teachers, and students may need to obtain a licence for using such materials. In practice, the situation would be inconvenient or worse, because there is no CCS to offer a licence for the use of educational materials. In the long run, the non-application of this exception in the digital environment will eventually affect the academic activities of educational institutions, teachers and students

because they do not know whether their digital uses of copyright materials will lead to copyright infringement claims. The fear of copyright infringement may therefore stop educational institutions, teachers and students from carrying out such activities which would, however, be legal if the exception applied. With digital technologies becoming more widely available, it is unavoidable for Thailand to make this exception more suitable for the digital age by allowing educational institutions and teachers to provide materials for students via electronic means.

It is important to note that if the educational exception is extended in this way, then the need for the protection of the technological protection measures (TPMs) and the rights management information (RMIs) will become more important than ever. This is because many educational institutions in Thailand rely on digital security systems that effectively control access to copyright materials to ensure that only students can obtain and access to educational materials in the digital environment and also to track down infringers. Without the security system, anyone can access the copyright materials and distribute them freely and thus destroy the copyright owner's other markets. However, since there is no provision on the protection of the TPMs and RMIs in the Thai CA 1994, the alteration or removal of the RMIs in educational materials and the circumvention of TPMs can be done freely in Thailand. Thus, in order to ensure that the economic interests of copyright owners in the online environment are properly protected, it is necessary for the Thai government to regulate the protection of TPMs and RMIs.

This is also supported by the IIPA which indicated in several of its reports that the amount of digital copyright infringement in Thailand has increased rapidly with the growth of Internet usage in Thailand. The IIPA reports suggest that the Thai

CA 1994 is in need of updating because it cannot deal with issues such as those related to TPMs and RMIs.¹⁷² Thus, the IIPA recommended that the Thai Government modernize its copyright law and enact provisions on the protection of TPMs and RMIs.¹⁷³ It encouraged the Thai Government to join the WIPO Copyright Treaty (WCT) and implement the provisions of the treaty as the standard for digital copyright protection in Thailand, since it contains provisions prohibiting circumvention of TPMs and unlawful tampering with RMIs.¹⁷⁴ Similarly, several US copyright associations also suggested that Thai copyright law needs to modernize in order to adapt to the digital environment, requesting the Thai Government to ratify the WCT and implement its TPM and RMI provisions.¹⁷⁵ Such requests also seem to be consistent with all US FTAs because the protection of the TPMs and RMIs is also a key obligation under the prospective Thailand-US FTA. The FTA contains the provision requiring the contracting states to ratify the WCT and this obligation will ensure that Thailand's Copyright Act reaches the level of digital copyright protection afforded by the WCT.¹⁷⁶ The issues relating to the TPMs and RMIs will be further discussed in Chapter 4 and 5.

¹⁷² IIPA Report on the Proposed US-Thailand FTA 2004; See also IIPA Report on Copyright Protection in Thailand 2009.

¹⁷³ IIPA Report on Copyright Protection in Thailand 2009; See also IIPA Report on the Proposed US-Thailand FTA 2004.

¹⁷⁴ IIPA Report on Copyright Protection in Thailand 2008; See also IIPA Report on Copyright Protection in Thailand 2009.

¹⁷⁵ IIPA Report on IP practices in Thailand 2001; See also IIPA Report on withdrawal of GSP against Thailand 2003.

¹⁷⁶ IIPA Report on Copyright Protection in Thailand 2006; See also IIPA Report on Copyright Protection in Thailand 2007.

2.4) The current approach in Thailand and its problems with the three-step test

In the previous section, I have mentioned that several reports indicated that if Thailand continues to use its current legal approach to the copyright exceptions, it will have a problem about whether the exceptions under the CA 1994 comply with the three-step test. In this section, I will consider why the current legal approach to the exceptions in Thailand will have this problem. The current approach to copyright exceptions seems to have no problem in satisfying the requirement of ‘certain special cases’ because the exceptions of the CA 1994 is based on a list of permitted acts which only allow certain purposes or uses to be exempted and also contains the specific exceptions which only apply to certain types of works and certain purposes of use. Importantly, it is still unclear whether or not the two conditions in section 32 paragraph 1 can be applied as a general exception like fair use. Presently, the Thai Court only allows the two conditions to apply as pre-conditions together with other additional conditions in the exceptions in the list of permitted acts in section 32 paragraph 2 and the specific exceptions in section 33, 34, 35, 36, and 43. Therefore, the exception in the Thai copyright law is still limited to certain special cases. The issues of whether or not the two conditions in section 32 paragraph 1 should be applied as a general exception and, if they can be applied as a general exception, whether they will satisfy the requirement of certain special cases will be discussed in Chapter 3.

However, it is clear that the current legal approach to the copyright exceptions in Thailand is unlikely to pass the second and third criteria of the three-step test. By allowing the wholesale reproduction of entire textbooks and multiple

reproductions to be carried out under the exception for educational purposes can be considered as in conflict with the normal exploitation of the work which should not be permitted under the exceptions at all. Senftleben asserts that a conflict with normal exploitation arises where multiple reproductions or systematic reproductions are made and also where copies are made of entire works.¹⁷⁷ He points out a practical example of photocopying, which cannot be permitted if it consists of reproducing a very large number of copies because that conflicts with a normal exploitation of the work.¹⁷⁸ But if a small number of copies is made, photocopying may be permitted without payment, especially for educational purposes.¹⁷⁹ The key point is that if such photocopying or reproduction is likely to compete with the original works and the authors of relevant works are deprived of a typical major source of income, then it is conflict with a normal exploitation of the works and cannot be permitted.¹⁸⁰ It is quite clear that the approach to the copyright exceptions in Thailand, which allows multiple reproductions and the reproduction of entire textbooks, also deprives a typical major source of income of the authors and competes with the original works in the same educational market, so it clearly conflicts with a normal exploitation of the works.

The current approach to copyright exceptions also does not meet the third condition of the three-step test, which requires that the national copyright exception must not unreasonably prejudice the legitimate interest of copyright owners. In this aspect, this requirement seeks to safeguard the author's interest in the right of

¹⁷⁷ Senftleben 2004, at 94.

¹⁷⁸ Ibid at 52.

¹⁷⁹ Ibid.

¹⁸⁰ Ibid at 70, 162 and 197.

reproduction and other legitimate interests that authors might have.¹⁸¹ The term ‘interest’ also encompasses the possibility of depriving an author of economic value from a work. The prejudice can be regarded as unreasonable if such amount of reproduction under the exception is inappropriate or unfair because of excessiveness in amount or degree.¹⁸² However, the harm flowing from an exception can be reduced to a reasonable level if the payment of equitable remuneration is made to the copyright owners.¹⁸³ This means that unreasonable prejudice to the interest of copyright owners can be avoided if the payment of equitable remuneration or fair compensation has been made to the copyright owners. In case of photocopies, there would be no unreasonable prejudice to the legitimate interest of the author if adequate remuneration is paid, so the establishment of the CCS and its licensing scheme system, which can ensure that copyright owners receive the payment of equitable remuneration, will help to avoid an unreasonable prejudice to be caused.¹⁸⁴ Nevertheless, in the case of Thailand it is clear that the exception allows the photocopying or reproduction of entire books and multiple reproductions without the payment of equitable remuneration to copyright owners. Since there is no CCS or licensing scheme system in the Thai education sector, it is difficult for the copyright owners to collect remuneration from the users and photocopy shops, so the exception of the CA 1994 cannot avoid unreasonable prejudice to the interest of copyright owners and thus, does not satisfy the third requirement.

In fact if the exception cannot pass the second criterion, there is no need to consider the question of whether or not the exception causes unreasonable prejudice

¹⁸¹ Senftleben 2004, at 215.

¹⁸² Ibid at 235.

¹⁸³ Ibid at 217-218.

¹⁸⁴ Ibid at 130.

to the legitimate interest of copyright owners. Senftleben explains that if a conflict with a normal exploitation arises, it means that the test procedure automatically comes to an end; the exception does not comply with the three-step test and thus, cannot be permitted regardless of whether or not equitable remuneration is paid.¹⁸⁵ This is because the payment of equitable remuneration has no influence on the decision of whether or not an exception conflicts with a normal exploitation since only an unreasonable prejudice to legitimate interest can be prevented in this manner.¹⁸⁶ Therefore, in the case of Thailand, the current approach to copyright exceptions has failed to satisfy the three-step test since it cannot pass the second criterion. The issue of whether or not the proposed changes recommended in this thesis can satisfy the three-step test will be discussed in Chapter 3.

¹⁸⁵ Senftleben 2004, at 131.

¹⁸⁶ *Ibid.*

Chapter 3

The educational exceptions

In the previous Chapter, I indicated that the educational exceptions under the Thai CA 1994 do not provide proper protection for the economic interests of copyright owners. In this Chapter, I recommend that in order to solve the major problems mentioned in Chapter 2, it is necessary to reform the educational exceptions in the Thai CA 1994 generally by making them more restrictive and limited than at the present. Several changes need to be made to the provisions in order to achieve this goal. Firstly, section 3.1 recommends that the Thai Government needs to clarify that the two conditions in section 32 paragraph 1, which come from the Berne three-step test, should not be applied as a general exception and should be removed as such from the provisions, since they are the cause of ambiguity and uncertainty in all the educational exceptions.

Second, I have already mentioned in Chapter 2 that the exceptions applying to libraries, educational institutions, teaching, research and study under the Thai CA 1994 need to be reformed because they allow reproductions of educational materials by the users without a clear limitation as to the amount of reproduction and without prohibition on multiple reproductions. Thus, I recommend in section 3.2 of this Chapter that a clear limitation as to the amount of reproduction and a clear prohibition on multiple reproductions should be inserted into the educational exceptions in the list of permitted acts and the specific exception for libraries. This involves looking at the educational exceptions in the UK and US copyright laws, which provide a clear limitation as to the amount of reproduction. This section also recommends that the guidelines for education which reflect the interests of copyright

owners and other groups of interests in the Thai education sector need to be reformulated in order to help users, students, and other relevant parties to determine the appropriate amount of reproduction under copyright exceptions.

Third, since the exceptions applying to libraries, educational institutions, teaching, research and study under the Thai CA 1994 allow the reproduction of educational materials without sufficient acknowledgement of the copyright owners, section 3.3 recommends that the requirement of sufficient acknowledgement should be inserted into the Act in order to promote the protection of moral rights. Finally, section 3.4 recommends that the exceptions applying to teaching and educational institutions, which do not allow reproductions by teachers and educational institutions to be made and distributed outside the class or the educational institution, need to be reformed in order to make them more effective in supporting the policy of long-distance education and lifelong learning in Thailand.

3.1) Whether section 32 paragraph 1 should be applied as general exception?

Since the CA 1994 does not provide any definition related to the two conditions in section 32 paragraph 1, the interpretation and the application of the two conditions are left to the assessment of the court. I have already mentioned in Chapter 2 that although several decisions of the Thai IP Court have indicated that the two conditions form a pre-condition together with the other additional conditions provided by the exceptions in the list of permitted acts and the specific exceptions, the court has remained silent on the question of whether or not the two conditions can be applied in their own right as general exceptions. In this section, I consider the arguments which support the recognition of these two conditions as a general

exception, and then argue that these two conditions should not be applied as general exceptions and should be removed from the educational exception in order to make the provisions more certain and effective in protecting the economic interests of copyright owners.

Subhapholsiri suggests that section 32 paragraph 1 should be enforced alone as a general exception in a limited sense and circumstances.¹⁸⁷ He gives three reasons supporting this argument. First, the wording and context of the section, which is the primary source of interpretation, provide clear conditions to be satisfied and clear results from satisfying these two conditions.¹⁸⁸ In this vein, the language of the section clearly indicates that if uses satisfy the two conditions in section 32 paragraph 1, it will result in an exception to copyright infringement. Therefore, he believes that by reading section 32 paragraph 1 alone, it is understandable that it can be independently applied.

Second, he argues that the recognition of section 32 paragraph 1 as a general exception will help to fill a gap in the copyright exceptions because it is impossible for the exceptions in the list of permitted acts in section 32 paragraph 2 and specific exceptions in section 33 – 43 to cover all types of works and all purposes of appropriate and reasonable use.¹⁸⁹ There are still some types of works and purposes of use which are fair but which are not in the exception provisions in the Thai CA 1994.¹⁹⁰ For example, there is no specific provision under the CA 1994 that can be applied to parody, or to some digital materials; so if the two conditions in section 32

¹⁸⁷ Subhapholsiri 2001, at 234.

¹⁸⁸ *Ibid.*

¹⁸⁹ *Ibid* at 234-236.

¹⁹⁰ *Ibid.*

paragraph 1 can be enforced as the general exception, it can be used to apply to these circumstances.¹⁹¹ Nonetheless, he emphasizes that section 32 paragraph 1 should be applied as a general exception in relatively rare circumstances, only for the purpose of filling a gap in the list of permitted acts in section 32 paragraph 2 and the specific exceptions in section 33 to 43.¹⁹² Section 32 paragraph 1 should not be used as a general exception in any other circumstances. Thus, it is believed that the recognition of section 32 paragraph 1 as a general exception for the purpose of filling gaps in the copyright exceptions can help to protect the public interest, especially where a purpose of use is fair but that use does not fall within the scope of the exceptions in the list of permitted acts and specific exceptions in the Thai CA 1994.

Finally, it is argued that the recognition of section 32 paragraph 1 as a general exception in a limited sense is not in breach of the requirement of ‘certain special cases’ in the three-step test in the Berne Convention and the TRIPs Agreement. In this vein, the three-step test requires first that exceptions have to be limited to ‘certain special cases’; second, the use of a copyright work under an exception must not conflict with the normal exploitation of the work; and finally, such use must not unreasonably prejudice the legitimate interests of the author or right-holder.¹⁹³ The main concern is the question of whether the recognition of the two conditions in section 32 as a general exception is in breach of the requirement of ‘certain special cases’. Subhapholsiri argues that if the two conditions in section 32 paragraph 1 only apply as a general exception in limited circumstances for the purpose of filling the

¹⁹¹ Subhapholsiri 2001, at 234-236.

¹⁹² Ibid.

¹⁹³ The three-step test is also embodied in Article 10 of the WIPO Copyright Treaty which merely repeats the language contained in TRIPs Article 13 and Berne Article 9(2).

gap of copyright exceptions, then it is still confined to ‘certain special cases’.¹⁹⁴ He contends that the application of section 32, paragraph 1 as a general exception in limited circumstances is different from the application of the fair use exception in terms of scope, certainty and flexibility.¹⁹⁵ It is important to note that the general fair use exception in the US copyright system provides broad criteria for determining whether the use is fair and this has resulted in a serious debate as to whether a general fair use exception is compatible with the three-step test.¹⁹⁶ This issue has not yet reached conclusion.

Okediji believes that the fair use doctrine is a broad exception to the rights granted to authors under the Copyright Act so it clearly is not limited to special cases.¹⁹⁷ In this aspect, if section 32 paragraph 1 is broadly applied as a general exception in every circumstance, then it would probably be in breach of the requirement of ‘certain special cases’ in the three-step test. As Ricketson points out, a broad kind of exception would not be justified under the requirement of ‘certain special cases’.¹⁹⁸ Nevertheless, because the recognition of the two conditions as a general exception in the suggested approach is not broadly and widely applied in every circumstance, it is different from the fair use approach because it will only apply in limited circumstances for the purpose of filling gaps. In the circumstances where there is no gap, the exceptions in the list of permitted acts and specific exceptions will be applied normally, so section 32 paragraph 1 is limited to certain special cases. Hence, it is concluded that even if the fair use approach is in breach of

¹⁹⁴ Subhapholsiri 2001, at 235.

¹⁹⁵ Ibid.

¹⁹⁶ Senftleben 2004, at 113.

¹⁹⁷ Okediji 2000, at 94.

¹⁹⁸ Ricketson 1987, at 482.

the three-step test in the TRIPs and Berne Convention, the application of section 32, paragraph 1 as suggested is not.

However, I oppose the above approach and recommend that the two conditions in section 32 paragraph 1 should not be applied alone as general exceptions even in limited circumstances. Instead, they should be removed from the Thai CA 1994 in order to make the educational exception more certain and effective in protecting the economic interests of copyright owners. My position is based on four arguments. First, although the language of section 32 paragraph 1 provides clear conditions to be satisfied and also clear results from satisfying those conditions, the legislators of the Thai CA 1994 had no intention to allow section 32 paragraph 1 to apply as a general exception.¹⁹⁹ In this vein, by considering the wording and context of the exceptions in the list of permitted acts and the specific exceptions as a whole, it is clear that the legislators of the CA 1994 had no intention to allow section 32 paragraph 1 to apply as broad criteria or as a general exception, because these exceptions have incorporated the two conditions in section 32 paragraph 1 as pre-conditions that need to be complied with alongside other additional conditions provided in these exceptions in order to be exempted from copyright infringement.²⁰⁰ Further, there is no need to allow section 32 paragraph 1 to apply alone as a general exception because the exceptions in the list of permitted acts and specific exceptions are already wide enough to cover most issues. Hence, by considering the whole context of the provision on the exceptions in the CA 1994, the two conditions in section 32 paragraph 1 cannot be applied as a general exception but should only be

¹⁹⁹ Subhapholsiri 2001, at 234.

²⁰⁰ Ibid.

applied together with other additional conditions in the exceptions in the list of permitted acts or specific exceptions.

Second, since the two conditions in section 32 paragraph 1 are the same as the second and third conditions of the Berne three-step test, the recognition of section 32 paragraph 1 as a general exception seems to be inconsistent with the object of that test. The three-step test in Article 13 of the TRIPs Agreement and Article 9(2) of the Berne Convention requires that the exceptions to exclusive rights under national copyright laws must be confined to certain special cases while second, such cases must not conflict with a normal exploitation of the work; and third, they must not unreasonably prejudice the legitimate interests of the copyright owners. The object of this three-step test is to limit exceptions in national copyright law by requiring all contracting countries to confine limitations or exceptions. It is clear that the three-step test itself is not a copyright exception. Senftleben observes that the three-step test in Article 9(2) of the Berne Convention and Article 13 of the TRIPs Agreement is not itself a copyright exception but is rather a useful parameter for creating or adopting exceptions to the exclusive right in national copyright law.²⁰¹ He explains that the objective of the three-step test is to exert direct control over copyright exceptions under national copyright laws or to set the limits within which national legislation may provide for exceptions, so national legislators must ensure compliance with the test.²⁰² This direct control function of the three-step test aims at controlling not only new exceptions but also existing exceptions in the field. He asserts that the three-step tests contained in article 9(2) of the Berne Convention, Article 13 of the TRIPs and Article 10 of the WCT are alike because they each

²⁰¹ Senftleben 2004, at 1, 137, 145.

²⁰² Ibid at 82, 118.

concern the delicate balance between the grants and the reservations of copyright law.²⁰³

The main difference is that each controls or governs the exceptions to different types of rights. In principle, Article 13 of the TRIPs and Article 10 of the WCT are only directly applicable and function as the direct control mechanisms if Article 9(2) of the Berne Convention is not applicable.²⁰⁴ For example, if restrictions are imposed on the reproduction right of Article 9(1) of the Berne Convention, then the three-step test in Article 9(2) of the Berne Convention functions as a direct control mechanism.²⁰⁵ But, if it comes to the exceptions to the rental rights in Articles 11 and 14(4) of the TRIPs, then the three-step test in Article 13 of TRIPs will function as the only direct control mechanism because the rental rights introduced in TRIPs are beyond the scope of the Berne Convention.²⁰⁶ Likewise, the three-step test in Article 10 of WCT is the only direct control mechanism which sets limits to potential national exceptions to the right of communication to the public, and since this right is granted in Article 8 of the WCT, no provisions in the Berne Convention are applicable.²⁰⁷ It is clear that these three-step test provisions in TRIPs and WCT are additional safeguards to Article 9 of the Berne Convention, since they exert direct control over the exceptions to the rights which are not covered by the Berne Convention. In practice, exceptions in national copyright laws can be considered as legitimate under Article 9(2) of the Berne Convention and Article 13 of the TRIPs Agreement as long as they satisfy the three-step test.

²⁰³ Senftleben 2004, at 1.

²⁰⁴ Ibid at 121.

²⁰⁵ Ibid at 286.

²⁰⁶ Ibid at 119-120, 286.

²⁰⁷ Ibid at 120, 121, 286.

Nevertheless, the second and third conditions of the three-step test have simply been inserted into section 32 paragraph 1 of the Thai CA 1994 because the legislators wanted to ensure that the Act complied with the Berne Convention and the TRIPs Agreement. This way of implementation cannot be seen in the Copyright Acts of the US and the UK. Interestingly, many scholars seem to oppose this easy method of implementation. For example, Senftleben considers the question of whether or not the three-step test itself should be incorporated into national copyright law and states as follows:

‘...the question can clearly be answered in the negative. The passage of article 5(5) CD²⁰⁸ stating that limitation shall only be applied in certain special cases is a mere reference to international obligation. The three step test must be borne in mind but not be incorporated. As there is no indication that national courts are reluctant to lend weight to the test, it is not necessary to impose the obligation on national legislation to include the three step test in national copyright law...’²⁰⁹

He also contends that the outcome of the incorporation of the three-step test into national copyright law together with literal copies of the types of exceptions listed in Article 5 of the European Copyright Directive 2001 would result in a half-way house between the open US fair use doctrine and the traditional continental European system of more restrictively delineated exceptions.²¹⁰ Therefore, he supports the idea that the courts should be the addressees of the three-step test.²¹¹

Burrell and Coleman also agree with the above argument and states that:

²⁰⁸ This refers to the European Copyright Directive 2001 (The Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society).

²⁰⁹ Senftleben 2004, at 280.

²¹⁰ Ibid at 281.

²¹¹ Ibid.

‘...the question that needs to be addressed is whether the three-step test should also be incorporated into domestic law or whether it should merely be treated as a general statement of principle intended to guide the action of national governments. The UK Government has chosen the latter interpretation, taking the view that the United Kingdom’s existing provisions already satisfy the three-step test. We support this approach and would not wish to see the three-step test incorporated into national law as part of a reformed system of users’ right. As has been seen, the three-step test was never intended to fulfil the function now assigned to it in international instruments relating to copyright and it is too vague and open to too many different interpretations to make it a useful guide for national courts...’²¹²

Therefore, they conclude that the three-step test should be treated as a general statement of principle capable of giving some limited guidance to the court when reviewing national copyright law.²¹³

Apparently, the US and the UK seem to take a different approach from Thailand since they have complied with the three-step test without having its conditions inserted into their Copyright Acts. This seems to be consistent with the object of the three-step test because it realizes that the conditions of the three-step test are not copyright exceptions in themselves but set the boundaries for the exceptions in national copyright laws. Thus, having these two conditions as exceptions in the Copyright Act is already a mistake in implementation since it is inconsistent with the object of the three-step test. Allowing section 32 paragraph 1 to be applied independently as a general exception will make that mistake more severe and clearly go against the object of the three-step test. Senftleben also supports this view by arguing that national legislators are not compelled to insert the conditions of the three-step test into the copyright exceptions because the task of ensuring that

²¹² Burrell and Coleman 2005, at 298.

²¹³ Ibid.

exceptions comply need not necessarily be fulfilled by legislation process only but can also be left to the court.²¹⁴

The third argument is that since the Thai CA 1994 does not define any of the terms in two conditions of section 32 paragraph 1, its recognition as a general exception will be more problematic when the Thai courts attempt to interpret them. This is because the two conditions have the same meaning as the second and third conditions of the three-step test in the Berne Convention and TRIPs, which had already been interpreted in the decisions of the WTO Panel.²¹⁵ In practice, it is not the authority or responsibility of the domestic court to interpret and define the meaning of the three-step test. Such conditions should normally be interpreted by a relevant international body which has authority such as the WTO Panel. Hence, the contracting countries should interpret and apply the three-step test in accordance with the interpretation of the WTO Panel.²¹⁶ I already mentioned in Chapter 1 that the WTO Panel decision WT/DS106 is a decision which directly concerns the three-step test. In this decision the European Commission on the request of an Irish collecting society and on behalf of their member states filed WTO dispute settlement proceeding against the US for breach of the Berne Convention and the TRIPs, arguing that the ‘business’ exception in sub-paragraph (b) of section 110(5) of the US Copyright Act which allows the amplification of music broadcasts without an authorization and a payment of a royalty fee by food service and drinking establishments and by retail establishments did not satisfy with the three-step test in

²¹⁴ Senftleben 2004, at 137, 145.

²¹⁵ The WTO Panel Decision No. WT/DS160 (2000); See also WTO Panel Report on section 110(5) of the US Copyright Act (2000) (WT/DS160/R), Part I and II.

²¹⁶ Ibid.

Article 13 of TRIPs.²¹⁷ The Panel agreed with the European Commission and held that the ‘business’ exception did not meet the requirements under Article 13 because it did not qualify as a ‘certain special case’ since its scope in respect of potential users covered a substantial majority of restaurants: around 70 percent of eating and drinking establishments and 45 percent of retail establishments.²¹⁸ For the second criterion, this exception also conflicts with a normal exploitation of the work since it deprived the copyright owners of musical works of compensation for the use of their work from broadcasts on radio and television. Also, this exception unreasonably prejudiced the legitimate interests of the copyright owners because the statistics indicated that around 45 to 73 percent of the relevant establishments fell within the business exception, so the author’s potential losses of revenue was quite high.²¹⁹ The US had also failed to show that the business exception did not unreasonably prejudice the legitimate interests of the copyright owners, so the business exception was found to be inconsistent with Article 13 of the TRIPs. Thus, the Panel recommended the US to bring its law into conformity with its obligations under international law.

The case illustrates that it is possible for a country to be subject to a challenge in the WTO dispute settlement proceedings if its copyright exception does not comply with the three-step test in Article 13 of the TRIPs agreement. Although a Panel decision only has effect on the parties to the dispute which are obliged to comply with the decision and does not constitute a binding precedent for other WTO Members, it can be viewed by many countries as a guideline to interpret the three-

²¹⁷ The WTO Panel Decision No. WT/DS160 (2000); See also WTO Panel Report on section 110(5) of the US Copyright Act (2000) (WT/DS160/R), Part I and II.

²¹⁸ Ibid.

²¹⁹ Ibid.

step test. Thus, if the Thai court interpreted or defined these two conditions in a way opposite to the WTO Panel decision, such an approach would probably be subject to challenge in further WTO dispute settlement proceedings. In this aspect, if there is clear evidence that the copyright exceptions under the Thai CA 1994 do not comply with the three-step test under Article 13 of the TRIPs Agreement, then it is possible that other WTO members might file dispute settlement proceedings against Thailand as already happened to the US. For example, the European Commission or the US may file WTO dispute settlement proceedings against Thailand at the request of collecting societies, on the basis that the exception in section 32 of the Thai CA 1994 which allows the reproduction of the entire English language materials and multiple reproductions to be done freely in the Thai education sector, does not comply with the three-step test in Article 13 of TRIPs. Interpretation of the two conditions in the opposite direction to the WTO Panel may also lead to other problems. For example, the US uses the inappropriate interpretation on copyright exception of the Thai courts as one of the reasons to put Thailand on the Priority Watching List in 2007. The IIPA, which produced the report on copyright protection in Thailand for the USTR, also referred to the inappropriate interpretations on copyright exception of the Thai court which are contrary to the three-step test as one of the reasons to put Thailand on the Priority Watching List. Even if the Thai courts attempt to interpret these two conditions in exactly the same direction as the WTO Panel, it might not be easy to do so because the key passages in the decision are quite ambiguous and open to more than one interpretation.²²⁰ Hence, the recognition of section 32 paragraph 1 as a general exception will not lead to any good results.

²²⁰ Burrell 2001, at 385.

The final argument is that the recognition of section 32 paragraph 1 as a general exception, even in limited circumstances for the purpose of gap-filling, is in breach of the three-step test. This is because the scope of section 32 paragraph 1 as a general exception even in this way is still very broad and uncertain. So it is not confined to ‘certain special cases’. The requirement is intended to make exceptions more explicit and certain. The WTO Panel observed in the report on section 110(5) of the US Copyright Act that:

‘... in order to demonstrate that an exception is confined to “certain special cases”, as required by Article 13, there is no need to identify explicitly each and every possible situation to which the exception could apply, provided that the scope of the exception is known and particularized. This guarantees a sufficient degree of legal certainty.’²²¹

This statement clearly illustrates that in order to confine an exception to ‘certain special cases’ under Article 13, its scope needs to be clear enough to guarantee a sufficient degree of legal certainty. The WTO Panel emphasized that an exception should be narrow in scope and have an exceptional or distinctive objective.²²² Many scholars also agree with this approach. For instance, Ricketson points out that national copyright law has to contain a sufficient degree of certainty and specification which identifies the cases to be exempted from the rights, while unspecified wholesale exceptions are not permitted.²²³ Ficsor observes that the

²²¹ The WTO Panel Decision No. WT/DS160 (2000), Paragraph 6.108; See also WTO Panel Report on section 110(5) of the US Copyright Act (2000) (WT/DS160/R), Part I and II; Senftleben 2004, at 134; and Burrell 2001, at 385.

²²² The WTO Panel Decision No. WT/DS160 (2000); See also WTO Panel Report on section 110(5) of the US Copyright Act (2000) (WT/DS160/R), Part I and II.

²²³ Ricketson 1987, at 482.

exception must be of limited application and the use to be covered must be specific and narrowly determined.²²⁴

Similarly, Senftleben asserts that an incalculable and unlimited scope of the provisions exempting a wide variety of different uses is impermissible under the requirement of ‘certain special cases’.²²⁵ He explains that the requirement of ‘certain special cases’ aims at diminishing the potential harm flowing from the exceptions in national copyright law by underlining that the scope of the exception must be clear and serve clearly specified purposes, while an exception for no specified purposes must be perceived as impermissible.²²⁶ This means that the privileged special case under the exception must be known so that it becomes foreseeable whether or not such use of a work can be exempted.²²⁷ He is of the view that general exceptions like fair use are incompatible with the condition of ‘certain special cases’ because the requirement of legal certainty laid down in the word ‘certain’ militates against the approval of general exceptions like fair use under the three-step test since it provides such great discretion and flexibility to a court.²²⁸ He concludes that general exceptions like fair use are not qualified as a certain special case because a special case requires that an exception is delineated in order to allow only the use for a specific purpose, and since a general exception is not confined to a specific purpose, it is not a special case and is inconsistent with the three-step test.²²⁹ Therefore, the recognition of section 32 paragraph 1 as a general exception in broad terms will result in uncertainty since the exception can be applied in any circumstances and is

²²⁴ Ficsor 2002, at 516.

²²⁵ Senftleben 2004, at 137.

²²⁶ Ibid at 49, 265 and 267.

²²⁷ Ibid at 137.

²²⁸ Ibid at 162 and 165.

²²⁹ Ibid at 162 and 165.

thus not limited to any certain cases. Even if we apply it in limited circumstances for the purpose of filling a gap where the specific exceptions cannot cover the issues, it is still hard to predict when the exception will apply to the case because the legislation has so many gaps and unclear provisions. With this approach, there could be situations where a court allows a use that would not ordinarily be permitted under the Berne Convention and the TRIPs; so it is clearly not limited to any certain special case.

I conclude that the recognition of section 32 paragraph 1 as a general exception even in limited circumstances will only cause more problems and result in uncertainty about the exceptions as a whole because it is hard to determine a clear scope for their application and the provisions can broadly apply to all uses of copyright works. The concept of the general exception like fair use is intended to ensure flexibility, giving the court freedom to interpret and adapt the criteria in the exceptions to particular situations on a case-by-case basis.²³⁰ Nevertheless, although this concept offers great flexibility to the court, it comes at the expense of or in exchange for certainty because the general exception is normally not limited to specific types of use or any certain special cases but makes any use which the court deems to be fair non-infringing.²³¹ The only certainty involved in construing the general criteria or exception is uncertainty about how a court will ultimately rule because the application of such an approach is wholly a case-by-case determination.²³² This unpredictability of outcome is part of what makes general exceptions troublesome. It is not appropriate for Thailand, so in order to ensure the

²³⁰ US H.R. Report No 94 – 1476 (1976), at 66; See also Ng 1997, at 186; Williams 1991, at 115; and Laddie 1996, at 364.

²³¹ Burrell 2001, at 362.

²³² Okediji 2000, at 94.

certainty of the exceptions in term of their application and scope as a whole, the application of section 32 paragraph 1 as a general exception even in limited circumstances should not be allowed. At the present stage, the two conditions already cause problems of unclarity and uncertainty in the exceptions in Thailand. So if they are allowed to apply as a general exception similar to the fair use approach, it will only cause more problems and make the copyright exceptions even more uncertain.

Also, the concept of a general exception like the US fair use might not be able to operate effectively in a very different legal environment and culture such as in Thailand. This is because the Thai court seems to be more familiar with the fair dealing approach to the exceptions since it was used in Thailand for a long period of time before 1994. So the recognition now of the two conditions as a general exception would be quite alien to the Thai copyright system and would not be a good option for the country. My view is supported by D'Agostino who argues that the general exception like fair use, which allows any type of use to be 'fair' and merely provides factors to assist courts in their decision-making, has weaknesses and cannot simply be transplanted into another jurisdiction.²³³ She asserts that several reports indicate that fair use is 'ill' because such concept is often misguided, and the vast majority of users and those in education sector are fearful and anxious about whether their uses of copyright works are acceptable under the current fair use rules, so they have called on the US Congress to clarify or make fair use rules clearer.²³⁴ Although many solutions have been proposed over the past few years, Congress has resisted changing fair use and also the US courts have failed to clarify the scope of the fair

²³³ D'Agostino 2008, at 309.

²³⁴ D'Agostino 2008, at 351, 352 and 354; See also Carroll 2007 at 1087.

use exception.²³⁵ She believes that the adoption of a general exception like fair use in other countries might engender ‘many fix-it approaches’: some by the courts themselves attempting to impose clear-line rules and others by governmental bodies and private sectors attempting to institute best practice guidelines.²³⁶ Even if such clarification or specific amendments to a general exception like fair use can be carried out in other countries, it may take time before the fix that is sought can be achieved because in order to know the limits or weakness of such provision, it must be tested through the litigation process and thus, it does not appear that such clarity can be attained in the short period of time.²³⁷ Further, importing one legal approach from the US Copyright law into other countries and replacing the existing law will probably cause some confusion. For example, Singapore has adopted the US fair use approach into its copyright system, but it is still called fair dealing and this show a reluctance to embrace fully fair use at the risk of causing undue confusion.²³⁸ Importantly, no US FTA contains or mentions the US fair use approach in their copyright provisions, but all do contain the three-step test provision which stipulates that each party must confine exceptions to exclusive rights to certain special cases which do not conflict with a normal exploration of the works and do not unreasonably prejudice the legitimate interests of the right holder.²³⁹ The note of this provision in the Chile-US FTA makes clear that the provision allows a contracting country to create exceptions that are appropriate in its domestic laws.²⁴⁰

²³⁵ D’Agostino 2008, at 351.

²³⁶ Ibid at 359.

²³⁷ Ibid at 360.

²³⁸ Ibid at 359.

²³⁹ See Article 16.4(10) of the Singapore- US FTA; Article 17.7(3) of the Chile-US FTA; and Article 17.4(10)(a) of the Australia-US FTA.

²⁴⁰ The note of Article 17.7(3) in the Chile-US FTA.

Since the two conditions cause problems of unclarity and uncertainty, I recommend that the two conditions in section 32 paragraph 1 should be removed from the provision in order to ensure the certainty of the copyright exceptions as a whole. Also, such removal of the two conditions would make the educational exceptions in the Thai CA 1994 come closer to the fair dealing approach of the UK in term of certainty. This is because the UK approach restricts the courts' application of the exception to some specific lists of permitted acts. This is different from the US approach, which provides more discretion to the court and is not limited to specific purposes or uses.²⁴¹ The UK courts have held in several decisions that the scope of the fair dealing exceptions extends only to the uses which are fair for the permitted purposes specified in the CDPA 1988 and not uses which might be fair for some other purpose or fair in general.²⁴² Likewise, a similar approach can also be seen in the Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (hereinafter the Copyright Directive), which was enacted to implement the WIPO Copyright Treaty in the European Union.²⁴³ This Copyright Directive was implemented in the UK by the Copyright and Related Rights Regulations 2003 on 31 October 2003 and leads to many changes in the UK CDPA and its exceptions.²⁴⁴ The Copyright Directive also sets out a certain list of the permitted acts for which a member state may provide an exception.²⁴⁵ This means

²⁴¹ Newby 1999, at 1635.

²⁴² *Beloff v. Pressdram Limited and Another* [1973] FSR 33 and *Pro Sieben Media v Carlton UK television* [1997] EMLR 509. 597; See also Burrell 2001, at 362.

²⁴³ Hugenholtz 2000, at 501 -502.

²⁴⁴ Many important changes to UK copyright law were made by the European Copyright Directive and the 2003 Regulations. Since they have introduced a number of new rights related to copyright into the UK CDPA, the scope of the fair dealing exceptions has been extended to cover such dealings with these rights as well.

²⁴⁵ Article 5 of the European Copyright Directive.

that the defendants not only have to prove that their dealing with particular works is fair but also that their actions fall within the meaning of the permitted purposes. The restrictions to specific purposes and the limited discretion of the court under the UK and EU approaches seem to provide the advantage of certainty, which is lacking in the US approach.

Not only does the restrictive approach of the UK provide more certainty but it also causes less damage to the publishing industry than that of broad criteria or general exception. In this vein, the Copyright Tribunal in the case of *Universities U.K. v. CLA*²⁴⁶ gave a reason for denying a broad generalized exception for educational establishments as follows:

‘In declining to create a wide generalised defence for educational establishments the legislature has struck a balance between the interests of copyright owners on the one hand, and the interests of education and scholarship on the other. A healthy publishing industry is important in general, but of particular importance to those in education. Wholesale exemption from the copyright laws for educational establishments would be damaging to the publishing industry, and in consequence damaging to education...’²⁴⁷

The Tribunal emphasized that the publishing industry and academic authors in the education sector depend on each other, since the publishing industry needs academic authors for much of its raw material and the authors need the publishers for distributing their works. So if the publishing industry is damaged by a broad approach to the exception, it could adversely affect education in particular and the public interest in general. Hence, the removal of the two conditions from the

²⁴⁶ *Universities U.K. v. Copyright Licensing Agency Ltd* [2002] RPC 639.

²⁴⁷ *Ibid* at Paragraph 34.

copyright exceptions would also benefit the publishing industry in Thailand more than allowing these two conditions to apply as a general exception.

Also, by removing the two conditions from the copyright exceptions, the scope of the educational exceptions in the Thai CA 1994 would be more certain because the court will determine the question of whether the use is fair in accordance with a certain list of permitted acts and specific exceptions. At the same time, these exceptions will also satisfy the requirement of ‘certain special cases’ in the three-step test because the educational exceptions will only apply if the work is used for one of the approved purposes specified in the list of permitted acts or specific exceptions. Any other type of use will not explicitly come under the protection of these provisions, regardless of how fair they are. With the removal of the two conditions, the operation of the educational exceptions in the Thai CA 1994 will mainly rely on the provisions in the list of permitted acts and specific exceptions rather than on the two conditions in section 32 paragraph 1. This means that the problem of whether these two conditions can be applied as a general exception will be automatically solved by such removal.

3.2) The insertion of the clear limitation as to the amount of reproductions

In this section, I recommend that the removal of the two conditions in section 32 paragraph 1 of the CA 1994 must be done together with the insertion of a clear limitation as to the amount of reproduction and a clear prohibition on multiple reproductions into the educational exceptions in the list of permitted acts in section 32 paragraph 2 and the specific exception for libraries in section 34. Specifically,

such change and insertion must be made to the exception for research and study in section 32 paragraph 2(1); for teaching in section 32 paragraph 2(6); for educational institutions in section 32 paragraph 2(7); for use in examination in section 32 paragraph 2(8); and the specific exception for reproduction by libraries in section 34.

This section of the Chapter involves looking at the UK approach to the exceptions applying to education, library, teaching, research and study. For the US approach, I only consider the exception applying to libraries because as I have already discussed in the previous section the fair use approach relating to research and study does not offer any solution to the problem in Thailand. This section divides into two parts. The first part recommends that a prohibition on multiple reproductions and clear limitation as to the amount of reproduction should be inserted into the exceptions applying to educational institutions, teaching, research and study. The second part focuses on the exception for libraries and suggests that a prohibition on multiple reproductions and a clear limitation as to numbers of reproductions should also be inserted into the exception.

3.2.1) The insertion of clear limitations to the exceptions relating to education

I have already explained in Chapter 2 that the exceptions applying to education, teaching, research and study do not have a clear limitation as to the amount of permissible reproductions. This is because the application of the two conditions in section 32 paragraph 1, which normally apply together with other additional conditions to the exceptions in the list of permitted acts and specific exceptions, results in the ambiguity of the exceptions as a whole. This is because

such application of these conditions raises the question of what amount of reproduction could be considered as ‘not in conflict with a normal exploitation of the copyright work’ and ‘not unreasonably prejudicial to the legitimate right of the copyright owner’. There is no exact meaning of the phrases in the two conditions so it depends on the assessment of the Thai court, determining case by case, whether the amounts reproduced are in conflict with a normal exploitation and unreasonably prejudicial to the legitimate right of the copyright owner.

However, the recent decisions on exceptions of the Thai courts do not seem to help in interpreting or defining the exact meaning of the two conditions. They seem instead to create more misunderstanding about the amount of reproduction under the educational exceptions. This is because none of these judicial decision of the Thai courts indicates that multiple reproductions or the reproduction of the entire materials by the users, educational institutions and teachers are in conflict with a normal exploitation of the copyright work and unreasonably prejudicial to the legitimate right of the copyright owner. On the other hand, the Thai courts in several decisions on copyright exceptions seem to allow users or students to reproduce entire textbooks or make multiple reproductions of copyright materials where the numbers of the textbooks or materials in the library are not available to match the needs and numbers of the students in the institution.²⁴⁸ Hence, the educational exceptions under the Thai CA 1994 are not only a problem in themselves, but also the approach of the Thai courts in several decisions which allow the multiple and systematic reproductions or the reproduction of entire works is also a significant factor undermining the effectiveness of copyright protection in the Thai education sector.

²⁴⁸ The IP&IT Court Decision No. 784/2542 (1999).

The fact that multiple and systematic reproductions of copyright materials or reproduction of entire textbooks by the users, students and librarians can be done under the current educational exceptions, is evidence of inadequate protection for the economic interests of the copyright owners.

Study of UK copyright law seems to provide a solution to the problems in Thailand. The UK approach sets a clear limitation as to the amount of reproduction under educational exceptions as well as excluding multiple reproductions of copyright materials from the scope of copyright exceptions. In this vein, the UK CDPA 1988 provides a number of exceptions to the exclusive rights granted to the copyright owner in order to enable reasonable use to be made of the work freely and without permission. However, the CDPA 1988 restricts the number of the permissible reproductions of copyright materials to a certain amount. For example, section 36 provides that reprographic copies or photocopying of passage from published works may be made by or on behalf of the educational establishment for purpose of non-commercial instruction provided that not more than one percent of any work may be copied in any quarter of the year and it is accompanied by a sufficient acknowledgement.²⁴⁹ Burrell and Coleman observe that an entitlement to copy one percent of a work applies not to any single act of copying but rather to the activities of an entire educational institution in any one quarter, so this means that a university cannot copy more than one percent of a literary work even if different faculties require different parts of the same work.²⁵⁰ However, even the little amount of ‘no more than one percent’ copying is also prohibited if a licence for such copying

²⁴⁹ Section 36 of the UK CDPA 1988; See also Burrell and Coleman 2005, at 128; and Senftleben 2004, at 75.

²⁵⁰ Burrell and Coleman 2005, at 128-129.

is available and that person making a copy knows or should have known of that fact.²⁵¹ It is important to mention a draft amendment to the CDPA 1988 in a UK IPO report of 2009, where the idea of increasing the current 1% limit per quarter to 5% was rejected. The UK IPO was of the view that the UK Copyright Licensing Agency's 5% limit in its current licences clearly represents the upper limit that copyright owners in the UK are prepared to license voluntarily through such schemes and if the draft were to increase the limit within the exception to 5% what has previously been a maximum would be regarded as a minimum.²⁵² Consequently, 5% of the work could then be copied freely in the absence of a license, meaning that the exception could conflict with the normal exploitation of the work and thus, fail the three-step test.²⁵³ Therefore, the UK IPO proposed that the 1% limit in section 36 of the UK CDPA should remain unchanged.²⁵⁴

A similar approach can also be seen in the several UK guidelines which indicate that an individual may photocopy an excerpt from a book of not more than one chapter or 5 percent, whichever is the least, without infringing copyright.²⁵⁵ For example, in order to assist users, the Publishers Association and the Society of Authors indicates in their guidelines that, for the purposes of fair dealing for research and private study only, they would normally regard the following as fair dealing, if in all other aspects the photocopying is within the scope of section 29 of the CDPA 1988: '...photocopying by the reader for his or her own use of: one copy of a

²⁵¹ MacQueen et al., 2007, at 181.

²⁵² UK IPO Report on Proposed Changes to Copyright Exceptions Second Stage 2009, at 15.

²⁵³ Ibid.

²⁵⁴ Ibid.

²⁵⁵ UK IPO Gowers Review 2006.

maximum of a complete single chapter in a book, or one copy of a maximum otherwise of 5% of literary work...'.²⁵⁶

Importantly, the CDPA 1988 clearly indicates that an individual who makes a copy for himself or others who may make a copy for him are subject to certain requirements: such person making the copy must not know or have reason to believe that copies of the same material may be provided to more than one person at the same time for the same purpose.²⁵⁷ This requirement can help to prevent the users from carrying out multiple reproductions of copyright materials. This requirement is quite effective because in most circumstances, researchers and students will only be able to make a single copy for their own research or study, with no copying for wider dissemination. This approach is supported by Senftleben who indicates that this requirement can effectively prevent the making of multiple copies.²⁵⁸ This seems to be consistent with the UK fair dealing exception for research and private study, which only allows a student and a researcher to make a single copy for himself or a single copy for another person but does not cover multiple copying of extracts or articles.²⁵⁹ Senftleben asserts that national copyright legislation should determine how many copies are permissible and whether a work in its entirety or only extracts can be reproduced under the exception.²⁶⁰ Based on all these arguments, it is clear that by following the UK approach and removing the two conditions in section 32 paragraph 1 plus inserting a clear limitation as to the amount of reproduction with a clear prohibition on multiple reproductions, the problems relating to the multiple

²⁵⁶ Guideline of the Publishers Association and the Society of Authors (1965) from Colston 2005, at 359; See also Groves 1997, at 420.

²⁵⁷ UK IPO Report on proposed changes to copyright exceptions 2007.

²⁵⁸ Senftleben 2004, at 75.

²⁵⁹ Ibid.

²⁶⁰ Ibid at 264.

reproduction and the reproduction of the entire textbooks under copyright exceptions in Thailand will be automatically solved and the economic interest of copyright owners can be effectively protected.

The application of the UK approach will also help to limit the ability of the third party or photocopy shops to reproduce copyright materials under copyright exceptions. This can strengthen the copyright protection regime and provide better safeguards for the economic interests of copyright owners in Thailand. In this vein, the UK approach not only sets a clear limitation on the amount of reproduction under the copyright exception but also makes it more difficult for the photocopy shop or the third party, who merely reproduces copyright work for sale to students and researchers for the purpose of their private study, to benefit from the educational exceptions. Normally, the fair dealing exception can be available to others who are not researchers or students, because the CDPA 1988 does not require that the dealing or use which leads to copyright infringement must be undertaken by the researchers or students in order to be justified under the fair dealing exception. This means that it is possible for the students or researchers to employ or ask someone else, such as a research assistant or an agent, to act or photocopy on their behalf. Nevertheless, this possibility is very limited in practice. This is because the *University of London Press* case²⁶¹ clearly indicates that the fair dealing exception for private study will cover only the private study of a person dealing with the copyright works for his own personal purposes and does not extend to third parties who produce copyright

²⁶¹ *University of London Press v. University Tutorial Press* [1916] 2 Ch 601.

materials to the public for the purpose of others' private study or for sale to students.²⁶² As the UK court ruled:

‘It could not be contended that the mere republication of a copyright work was a “fair dealing” because it was intended for purposes of private study; nor, if an author produced a book of questions for the use of students, could another person with impunity republish the book with the answers to the questions. Neither case would, in my judgment, come within the description of “fair dealing”.’²⁶³

The same approach can also be seen in *Sillitoe v. McGraw-Hill Book Company*²⁶⁴, where the defendant contended that the fair dealing exception for private study is not limited to the actual student and if a dealing is fair and for the purposes of private study, then the exception applies whether the private study is one's own or that of someone else. The claim in this case was that the dealing was for the purpose of private study of the examinees and students who would acquire the notes. However, the court referred to the *University of London* case and then rejected the defendants' argument by stating that they could not avail themselves of the fair dealing exceptions for research and private study because they were not engaged in private study or research but were merely facilitating this for others.

The defendant in *McGraw-Hill* also contended that the study notes did not constitute infringements of copyright because there had not been a substantial reproduction of any of the works studied. The court observed that ‘substantiality is a question of fact and degree determined by reference not only to the amount of the work reproduced but also to the importance of the parts reproduced’.²⁶⁵ After reading

²⁶² MacQueen et al., 2007, at 137.

²⁶³ *University of London Press v. University Tutorial Press* [1916] 2 Ch 601.

²⁶⁴ *Sillitoe and Others v. McGraw-Hill Book Company (U.K.) Ltd.* [1983] FSR 545.

²⁶⁵ *Ibid.*

the quoted extracts from the original work, the court found that the notes of the defendant reproduced substantial parts of the original work, so it concluded that the defendants' activities constituted an infringement of copyright. It is clear that taking large extracts from a work and criticising only some of them may be unfair and make the dealing an infringement rather than a permitted act.²⁶⁶ A similar approach can also be found in *Hubbard v. Vosper*²⁶⁷, where the court ruled that reproducing any substantial part in any material form is an infringement unless the criticism was sufficient enough to make the taking of substantial extracts of the copyright materials fair dealing. The court was of the view that although the defendant had taken very substantial parts of the plaintiff's works and put them into his book, the defendant's treatment of them was for the purpose of criticising, so it could amount to fair dealing within the UK copyright law. These cases not only illustrate that the third party who merely reproduces copyright work for sale to students and researchers for purpose of private study could not claim fair dealing but also indicate that if the parts taken are substantial, the defendant will be guilty of infringement of copyright unless he can make the defence that his use of them is fair dealing.

It is important to note that the third party or photocopy shops are also subject to the prohibition on multiple reproductions. Pursuant to section 29(3) of the CDPA 1988, copying by a person other than researchers or students themselves is not fair dealing if the person who makes the copy knows or has reason to believe that it will result in copies of substantially the same material being provided to more than one person at substantially the same time and for substantially the same purpose. In the light of section 29(3)(b), it is likely that lecturers or instructors cannot rely on the fair

²⁶⁶ MacQueen et al., 2007, at 180.

²⁶⁷ *Hubbard v. Vosper* [1972] 2 QB 84.

dealing exception for research and study when they make multiple copies of a copyright work for their students, since the wording of this provision seems to ensure that the reproduction of multiple copies cannot be justified by research and private study exceptions.²⁶⁸ This approach was emphasized again in the *Universities U.K.* case²⁶⁹, where the Copyright Tribunal stated:

‘Materials provided by the staff for distribution to a number of students at more or less the same time would not in general amount to fair dealing because of the exception in section 29(3)(b). If a lecturer were to instruct every member of his class to make copies of the same material, we consider that this too would not be fair dealing.’²⁷⁰

The Tribunal also noted that the mere distribution of a reading list without any advice or instructions to photocopy those materials will not infringe copyright at all. But it does not allow lecturers and instructors to copy on behalf of their students, and also prohibits the making of multiple copies for others. Similarly, the British Academy also makes clear that any commercial copying or multiple copying for students in universities and colleges including course packs are not within the scope of the fair dealing exception for study and thus requires a copyright licence, such as those offered by the Copyright Licensing Agency (CLA) or the publishers.²⁷¹ It also indicates that in order to fall within the scope of the fair dealing exception for private study, such use must be for one’s own study and not that of others, so that producing

²⁶⁸ Bently 2009, at 200.

²⁶⁹ *Universities U.K. v. Copyright Licensing Agency Ltd* [2002] RPC 639.

²⁷⁰ *Ibid* at paragraph 35.

²⁷¹ British Academy Joint Guidelines on Copyright and Academic Research 2008, at 19.

a school study book which has extensive quotations from a novel was not justified under this exception.²⁷²

Further, both the guidelines and the decision of the UK Copyright Tribunal also make clear that the mere reproduction of entire textbooks cannot be justified under copyright exceptions. For example, the guideline published by the British Copyright Council is clear that the copying of whole articles in periodicals or whole books will be unfair.²⁷³ Similarly, the Copyright Tribunal in the *Universities U.K.* decision pointed out:

‘Clearly, a student who takes a photocopy for the purposes of his course of a relevant article, or a relevant short passage from a book is likely to do so in circumstances which amount to fair dealing. At the other extreme, if he were to take a photocopy of a whole textbook, we think that his dealing would not be fair, even if done for the purposes of private study.’²⁷⁴

The Copyright Tribunal emphasized that the fair dealing defence for research and private study is a personal one and will not normally extend to the making of multiple copies for others. This UK approach can be adapted in order to solve another problematic approach of the Thai courts. I have already explained in Chapter 2 that the Thai courts allow photocopy shops or third parties to use order forms as evidence to prove that such reproduction is done by the orders of the students or on behalf of the student, so that the profit granted from photocopying the work will not be considered as profit from infringing the copyright of another but is rather the return in exchange for the use of human labour. In other words, the photocopy shops

²⁷² British Academy Guidelines on Copyright and Academic Research 2006, at 14; See also British Academy Joint Guidelines on Copyright and Academic Research 2008, at 18; and MacQueen et al., 2007, at 169,173.

²⁷³ British Academy Guidelines on Copyright and Academic Research 2006, at 14; See also British Academy Joint Guidelines on Copyright and Academic Research 2008, at 18.

²⁷⁴ *Universities U.K. v. Copyright Licensing Agency Ltd* [2002] RPC 639, Paragraph 34.

that reproduce copyright materials for sale to students can escape from any copyright infringement as long as they have the order form to prove that they were ordered by the students to reproduce such materials. Applying the UK approach in the Thai copyright system can limit the ability of the third parties or photocopy shops in making multiple reproductions or copying of entire textbooks for sale to the students. The Thai Government should follow the UK approach.

3.2.2) The insertion of a clear limitation to the exception for the library

I also recommend that a clear limitation and prohibition on multiple reproductions should be inserted into the exception for libraries in section 34 of the Thai CA 1994. Currently, the Act only provides one exception for libraries in section 34, which allows the librarian to reproduce copyright materials in two aspects. First, section 34(1) confirms that the librarian can reproduce a copyright work for use in the library or another library provided that the purpose of the reproduction is not for profit and section 32 paragraph 1 is complied with. Second, section 34(2) allows the librarian to reproduce part of a copyright work for another person for the purpose of research and study provided that section 32 paragraph 1 is complied with and the purpose of such reproduction is not for profit. This thesis will only focus on section 34(2) because it is closely related to the education sector since it enables a librarian to copy materials for students or users' research and study.

There is no clear limitation as to the numbers of reproductions by librarians and no clear prohibition on multiple reproductions by the librarian in section 34(2). The section allows a reasonable reproduction of part of a work for another person for the benefit of research or study to be done by the librarian but there is no judicial

decision analysing the meaning of the phrase ‘reasonable reproduction of part of a work’ and also no definition of any one of these terms. The question arises of what amount can be considered as ‘reasonable reproduction in part of a work’. Another problem is that section 34 also requires such reproduction by a librarian to comply with the two conditions in section 32 paragraph 1. This means that the main question is to determine whether the amount of reproduction or multiple reproductions by librarian is in conflict with a normal exploitation of the copyright work and whether it would unreasonably prejudice the legitimate interest of the owner of copyright. If so, then it will be prohibited by section 34. However, it is very hard to determine this question because the two conditions in section 32 paragraph 1 are problematic, as previously discussed, so by relying on the two conditions, the exception for libraries in section 34 is faced with the same problems as other educational exceptions in the Thai CA 1994. I have already mentioned in the previous section that there is no definition and judicial decision on the meaning of the two conditions. Also, the Thai courts in different cases have set different standards about the amount of permissible reproduction under the copyright exceptions, so it is difficult to know what amount of reproduction should be considered as unreasonable prejudice to the legitimate interest of the copyright owners or as conflicting with a normal exploitation of the copyright work. As a result of this unclear exception and the resultant lack of clear limitations, copyright materials can be freely reproduced and distributed without the appropriate limitations. This problem illustrates again that the economic interests of copyright owners are not effectively protected by the Thai CA 1994.

Study of the UK and US provisions for libraries seems to provide a solution to the problems in Thailand since both the UK and US approaches on exceptions for

libraries clearly prohibit multiple reproductions as well as providing a clear limitation as to the amount of a reproduction by a librarian. Most exceptions relating to libraries in the UK CDPA 1988 provide a clear limitation as to the amount of reproduction and a clear prohibition on multiple and systematic reproductions. For example, section 43 allows the librarian to make and supply a copy of the whole or part of a unpublished literary, dramatic or musical work from a document in the library without infringing any copyright in the work provided that the prescribed conditions are met.²⁷⁵ This does not apply if that work had been published before the document was deposited in the library or if the copyright owner has prohibited copying of that work and the librarian is aware or ought to be aware of that fact at the time the copy is made.²⁷⁶ This exception requires that copies are supplied only to persons satisfying the librarian that they require them for the purposes of non-commercial research or private study and will not use them for other purposes.²⁷⁷ Also, it also provides a clear limitation as to the amount of reproduction in that no person is furnished with more than one copy of the same material.²⁷⁸

Likewise, section 38 of the UK CDPA 1988 allows the librarian to make and supply a copy of an article in a periodical without infringing any copyright in the works provided that the prescribed conditions are fulfilled.²⁷⁹ These prescribed conditions include that such copies are supplied only to persons satisfying the librarian that they require them for the purposes of research for a non-commercial

²⁷⁵ Section 43(1) of the UK CDPA 1988.

²⁷⁶ Section 43(2) of the UK CDPA 1988.

²⁷⁷ Section 43(3)(a) of the UK CDPA 1988.

²⁷⁸ Section 43(3)(b) of the UK CDPA 1988.

²⁷⁹ Section 38(1) of the UK CDPA 1988.

purpose or private study, and will not use them for any other purpose.²⁸⁰ Importantly, they also require that no person is furnished with more than one copy of the same article or with copies of more than one article contained in the same issue of a periodical.²⁸¹ These conditions must be satisfied in order to be exempted from infringement of copyright under section 38.

Similarly, section 39 allows the librarian to make and supply a copy of a part of published literary, dramatic or musical work other than an article in a periodical without infringing any copyright in the work provided that the prescribed conditions are complied with.²⁸² The prescribed conditions in section 39 are very similar to those in section 38. For instance, section 39(2)(a) also requires that copies are supplied only to persons satisfying the librarian that they require them for the purposes of non-commercial research or private study only.²⁸³ Also, it provides that no person is furnished with more than one copy of the same material or with a copy of more than a reasonable proportion of any work.²⁸⁴

Both section 38 and 39 are subject to section 40 which attempts to ensure that section 38 and 39 will not be used as an instrument to facilitate multiple reproductions.²⁸⁵ For this reason, section 40 places a number of responsibilities on librarians copying works on behalf of a researcher or student. First, it requires that librarians must satisfy themselves that a copy is for research or study and will not be

²⁸⁰ Section 38(2)(a) of the UK CDPA 1988.

²⁸¹ Section 38(2)(b) of the UK CDPA 1988.

²⁸² Section 39(1) of the UK CDPA 1988.

²⁸³ Section 39(2)(a) of the UK CDPA 1988.

²⁸⁴ Section 39(2)(b) of the UK CDPA 1988.

²⁸⁵ Bently 2009, at 211.

used for any other purpose.²⁸⁶ Second, it requires that a copy should be supplied only to a person satisfying the librarian that his requirement is not related to any similar requirement of another person.²⁸⁷ This means that the requirement or request of the students or researchers for a copy is not related to any similar request or requirement of another person and also that only one copy can be provided.²⁸⁸ Requirements will be regarded as similar if they are for copies of substantially the same material at substantially the same time and for substantially the same purpose.²⁸⁹ Also, requirements of persons will be regarded as related if those persons receive instruction to which the material is relevant at the same time and place.²⁹⁰ This requirement will help to guarantee that the librarian will not engage in multiple reproductions because the librarian cannot make a copy for two persons with the same requirement for a copy and also it limits the number of copies to only one.

In most cases, the librarian may require the researchers or students to provide proof of registration on a course of study with an educational institution, while a declaration may need to be signed by the student before a copy of a work can be made for him or her under section 40 of the CDPA 1988.²⁹¹ This declaration signed by the student or user can be used as evidence for librarians who copy a work to avoid potential liability for copyright infringement because the user must also declare that he understands that if the declaration is false, then the copy made by the librarian will be an infringing copy and he will be liable for copyright infringement as if he

²⁸⁶ Section 40 of the CDPA 1988; See also Statutory Instrument 1989 No. 1212.

²⁸⁷ Section 40(1) of the CDPA 1988.

²⁸⁸ Section 40 of the CDPA 1988; See also Statutory Instrument 1989 No. 1212

²⁸⁹ Section 40(2)(a) of the CDPA 1988.

²⁹⁰ Section 40(2)(b) of the CDPA 1988.

²⁹¹ Section 40 of the CDPA 1988 See also Statutory Instrument 1989 No. 1212.

made the copy himself.²⁹² In practice, there is the library declaration form, which will enable individuals to confirm to librarians making copies on their behalf that they meet all requirements before copies are made.²⁹³ The conditions contained in the library declaration forms are set out under regulations and this form is intended to be completed by the user requesting a copy of an article in a periodical or part of published works in which copying covered by section 38 and 39.²⁹⁴ It requires the user to declare: first, he has not previously been supplied with a copy of the same materials by the librarian making that copy or other librarians; second, he must ensure that to his knowledge, there is no other person who he works or studies with who has made or intends to make a request for substantially the same materials for substantially the same purposes at substantially the same time as this request; and third, he will not use such copy except for research for non-commercial purposes or private study and will not supply it to other persons.²⁹⁵ The first two requirements in the library declaration form clearly support the approach recommended in the thesis because it intends to ensure that users cannot ask the librarian to make multiple reproductions of copyright materials for them, while the third condition ensures that the user will not distribute such copy to other persons and will not use it for commercial purposes. These conditions are clearly designed for protecting the economic interests of copyright owners by preventing multiple reproductions of copyright materials and forbidding the distribution of such materials to others since such distribution can cause damage the copyright owner's other markets.

²⁹² Burrell and Coleman 2005, at 146.

²⁹³ UK IPO Report on Proposed Changes to Copyright Exceptions Second Stage 2009, at 34.

²⁹⁴ British Academy Joint Guidelines on Copyright and Academic Research 2008, at 19; See also Burrell and Coleman 2005, at 145-146.

²⁹⁵ Burrell and Coleman 2005, at 146.

Importantly, the UK IPO believed that library declaration forms will help to ensure that the exception satisfies the three-step test because it can safeguard the economic interest of copyright owners by allowing librarians to be in a position to exercise a degree of control over any copying and this can also ensure that librarians themselves do not become liable for copyright infringement.²⁹⁶ Recently, the UK IPO attempted to introduce a new library declaration form with additional sections asking users for the name of the educational institutions of which they are a member and an indication of the relevant course of study or research undertaken.²⁹⁷ This library declaration system should be very useful for Thailand because it not only ensures safeguards for the economic interest of copyright owners but it also protects the librarians against liability for copyright infringement when making a copy for the student. Currently, there is no provision requiring that a declaration must be signed by a student or a person requesting a copy before such copy of a work can be made in the Thai education sector, so there is no measure to safeguard the librarians that they will not be liable when they make copies for others. Thus, I recommend that this system of signed declarations in the UK CDPA 1988 should be inserted into section 34 of the Thai CA 1994 because under the current approach, librarians in Thailand could be faced with an infringement of copyright at any time when they reproduce copyright materials for students. This is because section 34 does not make clear what amount of reproduction should be permissible under the exception for libraries. With the introduction of a signed declaration system, the economic interest of copyright owners can be properly safeguarded and the librarians who copy a work for students can avoid the potential infringement of copyright by relying on the declarations

²⁹⁶ UK IPO Report on Proposed Changes to Copyright Exceptions Second Stage 2009, at 34; See also Burrell and Coleman 2005, at 146.

²⁹⁷ UK IPO Report on Proposed Changes to Copyright Exceptions Second Stage 2009, at 33.

signed by the students or users as evidence. If a person makes a false declaration, that person himself will be liable for infringement of copyright, not the librarian.

The exceptions for libraries in the US Copyright Act 1976 also contain a clear limitation as to the amount of reproduction, along with a clear prohibition on multiple reproductions. In this aspect, section 108(a) makes clear that it is not an infringement of copyright for a library or any of its employees acting within the scope of their employment to reproduce or distribute not more than one copy of a work, provided that the basic conditions are satisfied. In practice, there are several basic conditions which must be satisfied. One is in section 108(g) which provides that such permitted reproduction by a librarian will extend to the isolated and unrelated reproduction of a single copy of the same material on separate occasions.²⁹⁸ However, it does not extend to cases where the librarian has substantial reason to believe that it is engaging in the reproduction of multiple copies of the same material regardless of whether the copies are made on one occasion or over a period of time, and of whether it was intended for separate use by the individual members of a group or aggregate use by one or more individuals.²⁹⁹ For example, if a teacher instructs his class to read an article from a copyright journal, the librarian cannot reproduce copies of the article for all students because such activities would not be permitted under section 108(g).³⁰⁰

Importantly, this section make clear that it does not authorize the librarian to engage in the systematic reproduction of single or multiple copies of copyright

²⁹⁸ Section 108(g) of the US Copyright Act.

²⁹⁹ Section 108(g)(1) of the US Copyright Act.

³⁰⁰ USCO Report on reproduction by educators 2009, at 13.

works.³⁰¹ The statute does not provide a definition of ‘systematic reproduction’ but it was described in the circular 21 of the US Copyright Office as follows:

‘the systematic reproduction or distribution occurs when a library makes copies of such materials available to other libraries or to groups of users under formal or informal arrangements whose purpose or effect is to have the reproducing library serve as their source of such material.’³⁰²

The systematic reproduction of copyright works is different from ‘isolated and unrelated reproduction’ because it can substitute the copies reproduced by the source library for subscriptions or reprints which the receiving libraries or users may have purchased from the publisher or the copyright owners.³⁰³ For example, a library with a collection of law journals informs other libraries that it will make copies of articles from these journals available to them and their users on request and, as a result, the other libraries discontinue purchasing subscriptions to these journals and fulfil their users’ requests for articles by obtaining photocopies from the source library.³⁰⁴ Another example is if several branches of a library agree that one branch will subscribe to law journals instead of each branch purchasing its own subscriptions, and the one subscribing branch will reproduce copies of articles from the publication for users of the other branches.³⁰⁵

These examples above are prohibited by section 108(g), which is designed to prevent the library from producing single copies of the same work on repeated occasions or producing multiple copies, because such reproduction may have significant effect on the market and probably impair the economic interest of copyright owners. This means that the isolated and spontaneous making of a single

³⁰¹ Section 108(g)(2) of the US Copyright Act.

³⁰² USCO Report on reproduction by educators 2009, at 13.

³⁰³ Ibid.

³⁰⁴ Ibid.

³⁰⁵ Ibid.

photocopy by a librarian for its users or another library without any commercial motivation and without any systematic effort to substitute photocopying for subscriptions or purchases can fall within the scope of section 108. But this exception does not extend its scope to cover ‘multiple’ and ‘systematic’ photocopying or reproductions of copyright work as the means to substitute for subscriptions or purchases.³⁰⁶

In addition to the basic conditions in section 108(g), the US Copyright Act also attempts to restrict the ability of the librarian to reproduce copyright materials for users by requiring additional conditions to be satisfied in each subsection. For instance, section 108(d) specifically allows the librarian to reproduce the copyright works where the users or other libraries make their request to the library. However, it only permits the librarian to make a copy of no more than one article or other contribution to a copyright collection or periodical issue, or a copy of a small part of any other copyright work for the users or other libraries. Importantly, such reproduction under section 108(d) can be allowed only if the copy becomes the property of the user and the librarian has had no notice that the copy would be used for any purpose other than private study, scholarship, or research.³⁰⁷ This condition does not require the librarian to investigate the user’s purpose and similarly does not require that such reproduction of the copyright work must be for private study, scholarship, or research. It only requires that the librarian must have no knowledge that the purpose of the user is other than private study, scholarship, or research. This means that the librarian will satisfy this requirement if it has no information about the user’s purpose. In contrast, the UK exception for libraries requires that librarians

³⁰⁶ USCO Report on reproduction by educators 2009, at 19.

³⁰⁷ Section 108(d)(1) and section 108(e)(1) of the US Copyright Act.

must satisfy themselves that a copy is for research or study and will not be used for other purposes. The UK approach seems to be more secure and makes it easier for the librarian to make a decision since it requires users to sign a library declaration forms to agree that they will not use such copy except for research and study for commercial purposes and will not supply it to other persons.³⁰⁸ With this form, librarians in the UK can have information about the user's purposes and can rely on such forms if an action for copyright infringement is brought against them.³⁰⁹

The US approach also allows the librarian to copy an entire work or a substantial part of the work from its collection where the users or other libraries make their request in section 108(e). Nevertheless, this section allows such reproduction to be made only if the copy becomes the property of the user and the librarian has had no notice that the copy would be used for any purpose other than private study, scholarship, or research. Further, section 108(e) has an additional condition that the library must conduct a reasonable investigation to determine that a copy of the copyright work cannot be obtained at a fair price.³¹⁰ The additional condition seems to be reasonable since section 108(e) allows a librarian to copy an entire work. Thus, it imposes more restrictive conditions than section 108(d), which allows the librarian to copy only a short work such as a journal article. This additional condition also appears in section 108(c), which allows the librarian to reproduce published copyright works for preservation purposes. It is important to note that the US Copyright Act provides similar limitations as to the amount of reproduction for published and unpublished works. In this instance, section 108(b)

³⁰⁸ Burrell and Coleman 2005, at 145; See also UK IPO Report on Proposed Changes to Copyright Exceptions Second Stage 2009, at 31-33.

³⁰⁹ Burrell and Coleman 2005, at 145.

³¹⁰ Section 108(e) of the US Copyright Act.

permits the librarian to make three copies of the unpublished work for the purposes of preservation or for deposit for research use, while section 108(c) also allows the librarian to make three copies of a published work for the purpose of replacement of a copy. However, the reproduction of the published works in section 108(c) seems to require the further condition that before the library can make copies of a published work, it must make a reasonable effort to conduct an investigation in order to determine that an unused replacement cannot be obtained at a fair price.³¹¹ The conditions for making preservation copies of unpublished works in section 108(b) seem to be considerably less rigorous than the conditions for published works in section 108(c) because the librarian can make a copy of unpublished works in its collection as long as the copy is solely for preservation. But if the librarian wants to reproduce the published work, it must determine the condition of the original work and then conduct an investigation of the market to confirm that an unused replacement is not available.

Section 108(e) also contains the same concept since it too requires that before the librarian can make the copy for private study, scholarship, or research, it must conduct a reasonable investigation by searching the market for any copy in order to conclude that a copy of the copyright work cannot be obtained at a fair price. Such investigation must look into all commonly-known trade sources in the US and will require resort to the publisher or other copyright owner if the copyright owner can be located.³¹² Since section 108 does not define the meaning of a fair price, the librarian must make the decision on whether such price is fair based on such investigation. Such methods of conducting an investigation into the availability of the works on the

³¹¹ Section 108(c)(1) of the US Copyright Act.

³¹² USCO Report on reproduction by educators 2009, at 16.

market at a reasonable price cannot be found in the Thai CA 1994. The UK IPO also support this feature in its report on draft amendment by stating that such copying can only be carried out if it is not practicable to purchase a copy in the market and it believed that this feature will help to prevent the proposed exception from interfering with the normal exploitation of the work.³¹³ Thus, this method which is the main feature of the US approach should be inserted into the exception for libraries in Thailand. It will help to solve the problematic approach of the Thai courts which seems to favour the interests of users more than the economic interests of copyright owners by allowing the reproduction of the entire textbooks without taking into account of the availability of the books in the market.

In brief, these examples illustrate that both UK and US approaches provide a clear limitation as to the amount of reproduction by librarian and a clear prohibition on multiple reproductions. They also provide the idea about how to set a clear limitation on the amount of reproduction and a clear prohibition of systematic and multiple reproductions in section 34. The insertion of such limitations and prohibitions would make the exception for libraries more certain, which would be better than relying on the two conditions in section 32 paragraph 1. Also, the introduction of the method of conducting an investigation into the availability of the works on the market from the US approach to the exception for libraries in section 34 will help to safeguard the economic interests of copyright owners, while the introduction of the signed declaration system from the UK approach will help to protect the librarian from potential infringement of copyright.

³¹³ UK IPO Report on Proposed Changes to Copyright Exceptions Second Stage 2009, at 40.

3.2.3) The need for guidelines

It is true that the guideline for educational use is not the law, so it does not have binding effect on the people and cannot prohibit users from reproducing the works in ways that exceed permissible amounts, or prohibit multiple reproductions. However, the guideline is very useful because it provides the users with some certainty that if they reproduce the works within the permissible amounts indicated, then they are unlikely to infringe copyright in the works or get into trouble with the copyright owners. D'Agostino notes that the conflicts over the unclear scope of the copyright exceptions can be solved by the formulation of guidelines because they can help to clarify and make the exceptions more certain.³¹⁴ Similarly, Guibault explains that guidelines for educational uses have succeeded in providing educators and users with some certainty as to what is acceptable under the copyright exceptions while preventing copying where permission could reasonably be requested and where the market or the value of the works is likely to be affected.³¹⁵ Likewise, Burrell and Coleman state that a guideline is an important instrument which provides users, educational institutions and libraries with a degree of certainty.³¹⁶ For instance, the Agreement on Guidelines for Classroom Copying in Not-for-Profit Educational Institutions with Respect to Books and Periodicals, which is the most important guideline in the US, also aims at providing some degree of certainty for users by setting a minimum standards for educational use.³¹⁷ They believe that the guideline for education use should not be copied from other countries, but should be

³¹⁴ D'Agostino 2008, at 355.

³¹⁵ Guibault 2002, at 72.

³¹⁶ Burrell and Coleman 2005, at 268.

³¹⁷ Ibid.

formulated by the interested parties in that country.³¹⁸ They also explain that although it is possible to copy the guideline of the US and then use it in the UK, this might not bring the desired result because the guideline was reached after negotiations between interested parties over a number of year, so it has broad support from interested parties which cannot be easily imitated or replicated in a short time.³¹⁹ This position is also supported by the UK IPO which states that guidelines should be formulated in consultation with copyright owners where appropriate, while universities and libraries are best placed to issue their own guidelines.³²⁰ The UK IPO also believes that the amount of a work that can be reproduced under the exceptions needs to be indicated in the guideline.³²¹ In this aspect, it is clear that the guideline is not a law, so it cannot prohibit the users from doing illegal reproductions of copyright works but it can help to provide some degree of certainty for the users about what acts are permissible under the copyright exceptions of the Thai CA 1994 and how to avoid copyright infringement charges.

In the UK and US, guidelines are commonly issued by the CCS or universities advising the students on the extent to which they can make copies of materials for research and private study purposes. The situation in Thailand seems to be different because there is no CCS in the Thai education sector; the educational institutions also cannot issue guidelines because the exceptions are unclear, so no one knows the exact amount permitted under the copyright exceptions. The Department of Intellectual Property (DIP) attempted to solve this problem by formulating a guideline for education which fixes the amount of permissible reproduction of

³¹⁸ Burrell and Coleman 2005, at 268.

³¹⁹ Burrell and Coleman 2005, at 268-269: See also D'Agostino 2008, at 350.

³²⁰ UK IPO Report on Proposed Changes to Copyright Exceptions Second Stage 2009, at 32.

³²¹ Ibid.

copyright materials.³²² Then, the guidelines were distributed to students, lecturers and the general public in 2007, intended to serve as a manual for the users of copyright works by reducing the risk of copyright infringement in books and other copyright works.³²³ However, the guideline is still problematic and not popular among the public because it was formulated purely by the DIP without the participation of affected parties such as users, copyright owners and publishers. Presently, the current copyright guideline provided by the DIP does not seem to satisfy all suggestions in the previous section and does not create much certainty for the users. It does not clearly prohibit the reproduction of entire textbooks or multiple reproductions. Hence, the IIPA requested in several of its reports that the affected parties such as the US publishers which have more experience in creating similar guidelines for other countries should be permitted to participate in the formation of such guidelines.³²⁴ The main reason for the request to participate is because the decisions of the Thai courts regarding the scope of allowable reproduction can be easily misinterpreted in the process of formulating guidelines; so the IIPA wanted the guideline to make clear that wholesale reproduction of academic materials without permission and payment is impermissible.³²⁵

It is undeniable that the guideline is widely recognized because it was created and based on aggregation and compromising between the copyright owners and other interest groups. Thus, it is necessary for the Thai Government and the DIP to ensure that their guideline relating to education area reflects the interests of copyright owner

³²² DIP Report on the Implementation of IP rights in Thailand 2007; See also DIP Report on the Implementation of IP rights in Thailand 2009-2010.

³²³ DIP Report on the Implementation of IP rights in Thailand 2009-2010; See also DIP Report on the Implementation of IP rights in Thailand 2007.

³²⁴ IIPA Report on Copyright Protection in Thailand 2008; See also IIPA Report on Copyright Protection in Thailand 2009.

³²⁵ IIPA Report on Copyright Protection in Thailand 2009.

and the users' interests. Since the current guideline of the DIP does not cover reproduction by libraries and educational institutions, I recommend that such guidelines should explain not only what issues need to be considered when a student reproduces copyright materials but also what should be considered when an educational institution distributes copyright materials outside its classroom or premises or when a librarian makes copies on behalf of users or students for the purpose of research and study. This will also help to solve the problem about how much of a work can be reproduced by educational institutions, teachers, and librarians and will at the same time provide great assistance for all users. Thus, the formulation of guidelines which reflect the interests of the copyright owner and other groups of interests in the Thai educational sector must be done alongside the changes and improvements of the educational exceptions in the Thai CA 1994.

3.3) The insertion of the requirement of 'sufficient acknowledgement'

I have already explained in Chapter 2 that the educational exceptions in the Thai CA 1994 provide a specific exception for 'use as reference' in section 33 but the operation of this section in practice is clearly separate from other educational exceptions. This means that if a defendant reproduces copyright materials with sufficient acknowledgement of the creators of the works, then he can rely on the specific exception for 'use as reference' in section 33. Nevertheless, if he reproduces such works without making any sufficient acknowledgement to the creator of the works, then he cannot rely on the specific exception for 'use as reference' although he can still rely on other educational exceptions in the list of permitted acts in section 32 paragraph 2. This is because most copyright exceptions in the list of permitted

acts in section 32 paragraph 2 in the Thai CA 1994 do not contain the requirement of sufficient acknowledgement.

In order to solve the problem of moral rights in Thailand, I recommend that the requirement of sufficient acknowledgement be inserted into the educational exceptions in the list of permitted acts in section 32 paragraph 2. Inserting the requirement of sufficient acknowledgement into the educational exceptions in the list of permitted acts in section 32 paragraph 2 would allow these exceptions to support the protection of the moral right to be identified as the creator of the works. This should be better for the protection of moral right than relying on the specific exception for ‘use as reference’ in section 33 alone. The Thai Government should follow the UK approach because many educational exceptions under the CDPA 1988 require ‘sufficient acknowledgement’ as one of the conditions. For instance, the fair dealing exception for research in section 29(1) requires the defendant to satisfy four conditions before relying on the fair dealing exception for research.³²⁶ First, such dealing must relate to literary, dramatic, musical or artistic work and second, such use of works must be for the purposes of non-commercial research. Third, the dealing must be fair and finally, the author and his work must be sufficiently acknowledged by the defendant in order to be exempted under the fair dealing exception. Without sufficient acknowledgement, the defendant cannot benefit from the fair dealing exception for the purpose of non-commercial research. The condition of sufficient acknowledgement is based on the fact that academic authors often rely

³²⁶ Section 29(1) of the CDPA 1988 stipulates: ‘Fair dealing with a literary, dramatic, musical or artistic work for the purposes of research for a non-commercial purpose does not infringe any copyright in the work provided that it is accompanied by a sufficient acknowledgement’.

on previous works in order to create a new one.³²⁷ Nevertheless, this condition of sufficient acknowledgement, which normally applies to quotation, can be dispensed with under section 29(1B) which stipulates that no acknowledgement is required in connection with fair dealing for non-commercial research where it is impossible for reasons of practicality or other reasons.

The exception for use for instruction in section 32(1) of the UK CDPA 1988 also requires the satisfaction of a condition of sufficient acknowledgment to be exempted under this exception. Such copying or use of a literary, dramatic, musical or artistic work in the course of instruction or in preparation for instruction must satisfy four conditions. First, such copying must be done by a person giving or receiving instruction and second, such instruction must be for non-commercial purposes. Third, copying must not be done by means of a reprographic process, for example, not by photocopying.³²⁸ Finally, copying or use of the copyright works in the course of instruction must be accompanied by a sufficient acknowledgement in order to be exempted. This exception can be applied to both published and unpublished works.³²⁹ Thus, both the teacher and students can benefit greatly from this exception as long as such copying is done by a person giving or receiving instruction with a sufficient acknowledgement.

³²⁷ Bently 2009, at 199.

³²⁸ The term 'reprographic process' in the third requirement of section 32 is defined by section 178 as a process for making facsimile copies or a process involving the use of an appliance for making multiple copies and it includes any copying by electronic means in case of a work held in electronic form but does not include the making of a film or sound recording. This means that instructor can copy original works as long as such copying is not by means of a reprographic process. For this reason, photocopying, scanner, making facsimile copies through facsimile machines, printouts of electronic materials or electronic copies of original materials cannot be justified under specific exception for purpose of instruction under section 32(1) since these acts fall under the definition of 'reprographic process'. See section 32(1) of the UK CDPA 1988 and also Bently 2009, at 211-212.

³²⁹ Bently 2009, at 212.

Another exception for the ‘use for instruction’ purpose in section 32(2A) which focuses on a literary, dramatic, musical or artistic work made available to the public also contains the condition of sufficient acknowledgment as in section 32(1). A work will be considered as having been made available to the public if it has been made available by any means, including the issue of copies to the public; communicating the work to the public; making the work available by an electronic retrieval system; performing, exhibiting, or showing the work in public and lending of copies of the work to the public.³³⁰

In order to be exempted from infringement of copyright under section 32(2A), copying in the course of instruction or of preparation for instruction must satisfy four conditions. First, such copying is fair dealing with the work and second, copying must be done by a person giving or receiving instruction. Third, the copying must be accompanied by a sufficient acknowledgement and, finally, the copying must not be done by means of a reprographic process. The exception for instruction in section 32(2A) is different from section 32(1) because section 32(2A) requires that such copies must be fair dealing with the work but does not require that such instruction must be for non-commercial purposes. Nevertheless, both section 32(1) and (2A) have some similarities since they do not allow a reprographic process to be used and both require that such copying be done by a person giving or receiving instruction with sufficient acknowledgement as requirement.

The use of copyright materials for assignments or examination is also allowed under the exception for use in examination in section 32(3) but again such use must be accompanied by a sufficient acknowledgement in order to be exempted. This

³³⁰ Section 30(1A) of the UK CDPA 1988.

exception guarantees that anything done for the purpose of an examination by way of setting the questions, communicating the questions to the candidates or answering the questions will not infringe copyright in such works provided that there is a sufficient acknowledgement.³³¹ However, Burrell and Coleman found that there is one problem with the requirement of sufficient acknowledgement in this exception because it prevents examiners from testing whether students are able to identify the source of a quote.³³² They observe that although there is a safeguard in section 32(3A) which indicates that sufficient acknowledgement can be dispensed with where it would be impossible for practical or other reasons, such safeguard does not provide much assistance because it is highly unlikely that it would be sufficient enough to bring a case within the category of when it would be impossible to provide an acknowledgement.³³³ This problem might also occur in Thailand, so the insertion of the requirement of sufficient acknowledgement into the exception for examinations in section 32 paragraph 2(8) of the Thai CA 1994 must be done together with the introduction of a better safeguard provision than that of the UK. Such safeguard provisions should indicate that no acknowledgement is required where the examination aims at testing whether students are able to identify the source of a material. Without such a safeguard, it is likely that the requirement of sufficient acknowledgement, which is going to be inserted into the exception for examination in section 32 paragraph 2(8), might cause problems in the Thai education sector as already happens in the UK.

³³¹ Section 32(4) indicated that the exception for the use of examination under section 32(3) does not extend to the making of a reprographic copy of a musical work for use by an examination candidate in performing the work. This means that reprographic copying for purpose of examination is generally allowed except in the case of making of a reprographic copy of a musical work.

³³² Burrell and Coleman 2005, at 123.

³³³ Ibid.

The exception in anthologies for educational uses in section 33(1) allows the inclusion in a collection of a short passage from a published literary or dramatic work to be exempted from copyright infringement, provided that the following conditions are met. The first condition is that such collection is intended for use in educational establishments and must be described in its title and in any advertisements issued by or on behalf of the publisher. Second, the inclusion must consist mainly of material in which no copyright subsists. This means that only inclusion or collection of works which were out of copyright can benefit from this exception: for example, out-of-copyright poetry.³³⁴ Third, such inclusion in section 33(1) should not involve more than two excerpts from copyright works by the same author in collections published by the same publisher over any period of five years.³³⁵ Finally, the collection must be accompanied by a sufficient acknowledgement in order to be exempted under this exception. Similar conditions of 'sufficient acknowledgement' can be found in the exception for recording by educational establishment in section 35 and exception for reprographic copying by educational establishment in section 36, which will be considered in more detail in Chapter 6 below.

The requirement of sufficient acknowledgement in these exceptions must be considered in parallel with the definition of the term 'sufficient acknowledgement' in section 178 of the UK CDPA 1988. This section defines the term 'sufficient acknowledgement' as an acknowledgement identifying the work in question by its

³³⁴ Laddie 2000, at 765.

³³⁵ Section 33(2) of the UK CDPA 1988; See section 33(3)(a): The term 'excerpts from works by the same author' includes excerpts from works by him in collaboration with another.

title or other description and identifying the author.³³⁶ The UK Court of Appeal in the *Pro Sieben* case ruled that the definition of ‘sufficient acknowledgment’ requires the author to be identified before certain fair dealing defences are available and in absent of that identification the relevant fair dealing defences do not apply.³³⁷ Thus, in order to satisfy the requirement of sufficient acknowledgment, the defendants must prove to the court that they have identified both the copyright work and the author of that work. Nevertheless, the court made it clear that the author can also be identified by name, pseudonym, a photograph or any other means, which can convey to the relevant audience that the identified person is the author.³³⁸ This definition requires only that the author must be identified, not the copyright owner if different.³³⁹ Importantly, although the definition in section 178 requires that the acknowledgment must identify the work by its title or other description and identify the author, it also stipulates that there is no need to identify the author where the work is published anonymously and in the case of an unpublished work, where it is not possible for a person to ascertain the identity of the author by reasonable inquiry.

Most copyright exceptions under the CDPA 1988 allow reproduction only if such copies are accompanied by a sufficient acknowledgement.³⁴⁰ These provisions clearly illustrate that the UK exceptions recognize the moral right of the author to be identified as the creator more than those of the Thai law. The problem that the educational exceptions in the Thai CA 1994 do not support the protection of moral rights to be recognized as the author of the work can be automatically solved by inserting the requirement of ‘sufficient acknowledgement’ into the educational

³³⁶ Section 178 of the UK CDPA 1988.

³³⁷ *Pro Sieben Media v Carlton UK Television* [1997] EMLR 509. 597

³³⁸ *Ibid.*

³³⁹ Bently 2009, at 200.

³⁴⁰ UK IPO Report on proposed changes to copyright exceptions 2007.

exceptions in list of permitted acts in section 32 paragraph 2. However, in order to allow the condition of sufficient acknowledgement to apply and function effectively, it is also necessary for the Thai Government to follow the UK approach by formulating the definition of the term ‘sufficient acknowledgement’ and then inserting it into section 4 of the CA 1994, which provides the definitions for copyright terms and phrases in the Thai CA 1994.

However, one difficulty in applying the UK approach is that the fair dealing for private study under the UK CDPA does not require the condition of sufficient acknowledgement to be satisfied, while the fair dealing for research will only apply where there is ‘sufficient acknowledgement’. Therefore, the question raises of whether Thailand should insert the requirement of sufficient acknowledgement into both research and private study, or follow the UK approach by inserting such requirement into research only. Currently, the exception for research and study in section 32 paragraph 2(1) of the Thai CA 1994 is the same as the old UK provision before the implementation of the Copyright Directive in 2003. This old UK approach also linked the term ‘research’ and ‘study’ together in the same subsection with the same requirement. This is different from the current provisions of the UK where fair dealing for research was incorporated into a different subsection from the exception for private study.

I recommend that Thailand should follow the UK approach by inserting the requirement of ‘sufficient acknowledgement’ into the exception for research, but not that for private study. This means that Thailand will have to reform its exceptions by creating the exception for research with the requirement of ‘sufficient acknowledgement’ in another subsection separated from the exception for private

study. The main reason why the requirement of ‘sufficient acknowledgement’ should not be inserted in the exception for private study is because the exception for private study is of particular importance to students undertaking education in schools and universities, so it would be practically inconvenient for them to make sufficient acknowledgement every time they were studying and learning in order to improve or acquire knowledge. Importantly, even if students want to make sufficient acknowledgement of the authors and the works every time when they were studying, it does not appear how they make such sufficient acknowledgement while engaging in private study and to whom it is being made. Also, I have already discussed in Chapter 2 that the problem of moral rights in Thailand is centred on Thai researchers, lecturers, or academic scholars who simply took large parts of the copyright works from various academic textbooks and then compiled them together as their own research or books without providing sufficient acknowledgment as to the authors or the original works.

The study of the UK fair dealing exception for research seems to offer the solution to this problem in Thailand because the fair dealing exception for research is intended to be available for justifying the reproduction and public distribution or communication of copyright materials.³⁴¹ This is because the fair dealing for research is based on the idea that research is necessary for the creation of the new works and the condition of ‘sufficient acknowledgement’ is based on the fact that research materials including books, papers or articles are often circulated or published.³⁴² The British Academy points that with the sufficient acknowledgement required by section 29(1), the fair dealing exception for research can cover quotation from research

³⁴¹ Bently 2009, at 199; See also UK IPO Report on proposed changes to copyright exceptions 2007.

³⁴² Bently 2009, at 199-200.

materials with appropriate citation in the publication of the researcher's results.³⁴³ Also, the use of the phrase with regard to the research exception must at least imply that the fair dealing for research can cover quotation from research materials in the publication of the researcher's results because only then it is possible to make acknowledgement meaningfully.³⁴⁴ If Thailand follows the UK approach, it means that researchers or lecturers who took the materials from several textbooks of other authors and compiled them together as their own research materials without providing appropriate citation or reference to the original sources can no longer rely on the exception for research in section 32 paragraph 2(1) of the CA 1994. This approach will also help to improve the protection of moral rights in Thailand.

Although this proposed change can reduce the possibility of misuse of the exception for research and study by ensuring that the use for research purposes must always satisfy the condition of 'sufficient acknowledgement' in order to benefit from the exception for research, it may not be able to solve the problem entirely. This is because researchers can still rely on the unclear distinction between research and study. For example, they may argue that although such use cannot fall within the scope of the exception for research because no sufficient acknowledgment has been made, it may still fall within exception for private study, which does not require sufficient acknowledgement. Therefore, since the insertion of the requirement of 'sufficient acknowledgment' under the proposed exception is only limited to 'research', it would be necessary for Thailand to find some way of distinguishing this from the 'private study' to which it would not apply, or to set a clear boundary

³⁴³ MacQueen et al., 2007, at 169.

³⁴⁴ MacQueen et al., 2007, at 169; See also British Academy Guidelines on Copyright and Academic Research 2006, at 13, 14; and British Academy Joint Guidelines on Copyright and Academic Research 2008, at 18.

between them. But, this is not an easy task to achieve because even in the UK where the CDPA has long provided the fair dealing exception for research purposes, there is still no statutory definition of research and also no judicial justification or decision on the exact distinction between the term ‘research’ and ‘private study’. The UK courts have found it unnecessary to distinguish or discuss them in detail but are likely to give both a fairly wide interpretation.³⁴⁵ This is the same as the Thai courts which have never distinguished between ‘research’ and ‘study’ in any decision. The reason for not doing so is because both terms are in the same subsection and thus, have the same requirements provided in section 32 paragraph 2(1) of the CA 1994, so there is no need for a Thai court to distinguish the difference between them.

In order to distinguish both terms, it is necessary to consider law reports and academic opinions on this issue. For instance, the British Academy states that the distinction between research and private study is not always clear, but at least one distinction implicit in the present law is that research envisages an end result or a production embodying the results of the research, regardless of whether it is published or not.³⁴⁶ It explains that research is a process of search or investigation undertaken to discover facts and reach new conclusions by the critical study of a subject or as a systematic investigation into and study of materials, while study is about ‘the application of the mind to the acquisition of knowledge, or reading a book or text or other document with close attention’.³⁴⁷ Many scholars also attempted to distinguish the terms. For example, Bently described the difference between these

³⁴⁵ British Academy Guidelines on Copyright and Academic Research 2006, at 13; See also British Academy Review on Copyright and Research 2006, at 9.

³⁴⁶ British Academy Report on Proposed Changes to Copyright Exceptions 2008, at 2.

³⁴⁷ British Academy Guidelines on Copyright and Academic Research 2006, at 13; See also British Academy Review on Copyright and Research 2006, at 9.

two concepts that research is seen as a process which is intended to lead towards a particular result, conclusion, decision, or answer to a problems, whereas study might be for the user's own benefit.³⁴⁸ Also, a major distinction between the exceptions is that study must be private but research may not be.³⁴⁹ In brief, these statements illustrate that research is mainly different from study because it must have the end result or conclusion which involves the production of new ideas and may not need to be private, whereas private study might represent only the consideration and acquisition of existing knowledge and needs to be private.

Although many scholars have theoretically made clear the difference between research and private study, a clear boundary between the two terms may not be achieved easily in practice. The difficulty in distinguishing the two terms is that private study in the sense of simply considering material may at some points mature into research if the study is being carried out on the material and results in some new idea or product at the end.³⁵⁰ The UK IPO also recognized this difficulty when considering the question of whether or not clear boundaries needed to be set between research and private study.³⁵¹ It stated that 'no attempt should be made to distinguish between them' because 'there was considered to be an overlap between informal and formal education and one may lead to the other'.³⁵² It concludes that 'we do not believe it is practical to treat research and private study separately' because 'the responses generally confirmed the difficulties of trying to distinguish between the two activities, and that in practice there is no specific boundary which delineates

³⁴⁸ Bently 2009, at 198.

³⁴⁹ Ibid.

³⁵⁰ British Academy Report on Proposed Changes to Copyright Exceptions 2008, at 4.

³⁵¹ UK IPO Report on Proposed Changes to Copyright Exceptions Second Stage 2009, at 29.

³⁵² Ibid.

them’.³⁵³ Since the boundary between the two terms is still unclear in practice and problems might originate from the lack of such a clear line between these terms, I recommend that the effect of such problem be narrowed down by providing a guideline which indicates what should be considered as ‘research’ and what should be considered as ‘private study’. Such guideline can at least give the users a general idea about the difference between both terms as in the Guideline of the British Academy. For example, the guideline should clearly explain that ‘private study’ will only cover ‘private uses’ of copyright materials for acquiring knowledge and understanding for one’s own benefit but ‘research’ will cover the use of copyright materials for making arguments or producing end results regardless of whether such use is private or not. The issue relating to the guideline can be found in section 3.2.3 above.

3.4) The proposed changes to the exceptions for educational institutions

While the exception for research and study in section 32 paragraph 2(1) of the Thai CA 1994 guarantees what can be done by the students and individuals, the exception for educational institutions in section 32 paragraph 2(7) will make clear what can be used by education institutions for the purposes of providing instruction. I have already explained in Chapter 2 that the exception for educational institutions in section 32 paragraph 2(7) of the CA 1994 (which allows the educational institutions and teachers to reproduce, adapt in part of a work, abridge or make a summary of copyright materials and then distribute or sell them to students in a class or in an

³⁵³ UK IPO Report on Proposed Changes to Copyright Exceptions Second Stage 2009, at 29, 31.

educational institution without infringing copyright provided that the act is not for profit), needs to be amended and developed.

Since the scope of the current exception for educational institutions is too narrow in the digital age and does not support long-distance education, I recommend that the following changes must be made to the exception for educational institutions and teachers in section 32 paragraph 2(7) of the Thai CA 1994. First, such exception should be defined by intent, category of use and activity, but not by the location of the educational institution. The scope of this exception should be expanded to cover the activities of long-distance education. With this expansion, the exception will enable long-distance learning students not located in an educational institution to obtain or access educational materials outside classrooms or the premises of educational institutions as well as allowing educational institutions to distribute materials to them online without infringing copyright in such materials. In other words, such change does not only allow distance learning students to access and use materials more conveniently but also removes the risk of copyright infringement for educational institutions and teachers who provide and distribute educational materials to their students.

Such change not only benefits the students who are in the long-distance education program but also those who suffer from disabilities that prevent them from attending classes or the educational institutions. Importantly, the people who work from remote locations and those who require flexibility because of work or family commitments can also benefit greatly from the expansion of this exception. Nevertheless, the main objective of this change is to provide the same opportunity for distance learning students to receive all necessary materials for their education.

Such change is not only consistent with the policy of the Thai Government on promoting long-distance education but also supports the policy of promoting lifelong learning under the National Education Act 1994 of Thailand by encouraging the development of opportunities to learn beyond the formal school and university environment.

Second, removing the limitation of location from this exception and allowing the educational institution and teacher to distribute materials outside the class or the institution, can ensure that regardless of their locations educational institutions, teachers and students are able to take more advantage of new digital technology than at present. With this change, the scope of the exception in section 32 paragraph 2(7) not only extends to cover the distribution of materials by normal means such as posting them to the student's address but also permits educational institutions or teachers to distribute academic materials by digital and electronic means outside the institution as well. This change will enable teachers, schools and universities in Thailand to make use of digital technologies and ensure that the students will have more alternative ways to obtain lessons and materials in many different forms through digital technologies.

However, it is necessary to ensure that such change will only have a limited impact on the incentives for creativity and the economic interests of copyright owners. Thus, I recommend that the change to the exception for educational institutions in section 32 paragraph 2(7) must be done together with the following tasks. First, the Thai Government should apply the UK approach to the exception, which indicates that exceptions for educational institution can apply only where there is no relevant licensing scheme in place. Several exceptions for educational

institutions under the CDPA 1988 clearly indicate that copying is not authorised by the exception if licences are available authorising the copying in question and the person making the copies knew or ought to have been aware of that fact.³⁵⁴ For example, section 35 of the CDPA provides an exception for educational institutions to record broadcasts for educational purposes without infringing copyright but the exception does not apply if a licensing scheme certified by the Secretary of State is in operation. In practice, this exception is rarely applied to the case because the CCSs such as the Educational Recording Agency (ERA) and the Open University operate a scheme in relation to recording broadcasts in the UK.³⁵⁵ Similarly, the exception for reprographic copying of educational materials by educational institutions in section 36 will not apply if there is a licensing scheme in place but this exception is also rarely applied in the UK because the Copyright Licensing Agency (CLA) will normally provide a blanket licensing scheme for reprographic works which cover photocopying of educational materials for the educational institutions in the UK.³⁵⁶ The UK IPO still maintain this approach in the extended exceptions for educational establishment in the UK draft amendment which are intended to reflect the increasing use of digital technology for students and at the same time to facilitate long-distance learning.³⁵⁷ In this aspect, the UK draft amendments also make clear that the extended exception for educational establishments only apply if there are no relevant licensing schemes in place, and this means that the extended exceptions would operate subject to such licensing schemes.³⁵⁸

³⁵⁴ Section 35(2) and 36(3) of the UK CDPA 1988.

³⁵⁵ UK IPO Gowers Review 2006.

³⁵⁶ See further Chapter 6, below.

³⁵⁷ UK IPO Report on Proposed Changes to Copyright Exceptions Second Stage 2009, at 2-3.

³⁵⁸ Ibid at 3-4 and 12.

By applying this UK approach, educational institutions and teachers in Thailand would be able to reproduce and distribute educational materials without paying royalty fees under the scope of the proposed exception to the extent that there is no licensing arrangement in operation. This approach will help to protect the economic interest of copyright owners more effectively because the copyright owners will not lose any of their economic interests from the exception as long as there is a licensing scheme in operation. One benefit from this approach is that if the copyright owners or the CCS do not offer any licensing scheme, then the proposed exception will allow the educational institutions to reproduce the materials for the students without the need to obtain the permission or licence provided, that other conditions in the proposed exception are satisfied. This allows educational institutions to reproduce and distribute materials under the exception without worrying about copyright infringement and also makes it quicker and easier for teachers and students to access and use the materials provided by the educational institution. In other words, if the copyright owners do not want to lose any economic advantages, they have to provide a licence for the users so that the exceptions will not be able to apply. With this approach, the proposed exceptions will have no impact on the incentives for creativity and the economic interests of copyright owners.

Second, since there is no CCS or other equivalent organizations to offer licensing schemes in the Thai education sector yet, the UK approach on the exception currently cannot effectively apply in Thailand. So if the Thai Government wants to apply this approach, it is necessary to establish the CCS which can function as a representative of the copyright owners to provide all required licences in the

Thai educational sector. This is consistent with the recommendation of the IIPA which suggests that the Thai Government modernizes its copyright law and at the same time establishes the CCS system to manage copyright and collect the royalty fees on behalf of the copyright owners in the Thai education sector.³⁵⁹ With the prospective CCS and licensing scheme system in place, the educational institutions in Thailand will have to pay the licence fees for distance learning students to access required materials for their study; but if the prospective CCS does not make any licensing scheme available, then the exception will apply. However, even if the prospective CCS provides a licensing scheme that permits the distribution of such materials by digital means outside the institutions in Thailand, the extension of the exception to cover the distribution of such materials outside the educational institution is still necessary because the distribution of any works that are not covered by the licensing scheme would still be an infringement of the copyright that subsists in those works. In this aspect, such expansion would safeguard the educational institutions who distribute such materials to their students outside classrooms or institutions from the fear of committing an infringing act. The issues relating to the establishment of the CCS in the Thai education sector will be discussed further in Chapter 6 which emphasizes my argument that law reform on educational exceptions must be done together with the establishment of a CCS in the Thai education sector.

Third, if section 32 paragraph 2(7) is expanded to cover the activities of long-distance education and allow the distribution of educational materials via digital or electronic means, it is necessary to ensure that access to copyright materials provided by educational institutions should not be widely available to the public in general.

³⁵⁹ IIPA Report on Copyright Protection in Thailand 2009; See also IIPA Report on Copyright Protection in Thailand 2005.

This task is necessary in order to ensure that the proposed change to the exception will not cause damage to the economic interest of copyright owners. Without controlling access to such materials, the copyright owners may lose future revenue if copies taken for research or study purposes are disseminated more widely. Hence, I recommend that the proposed change to the exception should also place a limit on who could access such materials.

One possibility might be to restrict the expanded exception to the people who are registered and teaching or studying at an educational institution. For example, the ability to access materials made or distributed by educational institutions under the proposed exception could be limited to teachers, researchers and students who are registered with an educational institution, or who are taking specific courses, or other authorized persons directly connected with the activities of the educational institutions. The application of this approach can be seen in some provisions of the UK CDPA 1988. For example, section 34 provides an exception for performance of a work by a teacher and students.³⁶⁰ This exception allows the performance of a literary, dramatic or musical work by teachers and students in the course of the activities of an educational institution or by other persons directly connected with the activities of the institution. The term ‘other persons’ in this section may include a parent, class room assistant or other categories of person permitted to access materials.³⁶¹ The same approach can be adapted into the exception for educational institutions in section 32 paragraph 2(7) of the Thai CA 1994. For instance, the proposed exception may require that only teachers at the educational institution or students who are registered with such institutions are allowed to use or view such

³⁶⁰ Section 34 of the UK CDPA 1988, See also UK IPO Report on proposed changes to copyright exceptions 2007.

³⁶¹ UK IPO Report on proposed changes to copyright exceptions 2007.

materials. Alternatively, persons must be authorised users of an institution before they are allowed to use or view such materials.

The UK IPO also considered the question of who should be permitted to view or access materials provided by the educational institutions in its report containing the draft amendments to the exceptions in the CDPA, but it opposed the idea of using section 34 of the CDPA which refers to teachers and students at an educational establishment and other persons directly connected with the activities of the establishment, as a model for an expanded exception.³⁶² It was of the view that the wording of section 34 is not appropriate for use in circumstances where distance learning is engaged, so it proposes that distributions of the materials should only be received by an ‘authorised person’, such being considered to be teachers, students and other persons authorised by the educational institution.³⁶³ This is because the draft intends to apply only to students, researchers or other authorised persons that are linked to an educational institution or are undertaking a course of study or research at that institution.³⁶⁴ The term ‘authorised person’ will also include teaching support staff and other persons whose role is to assist the teacher and individual students during lessons such as classroom assistants and learning support assistants.³⁶⁵

Since the approach in the UK IPO draft can cover teaching support staff and other authorized persons, it is quite useful for long-distance learning students who are located outside the premises of the institution in Thailand because it is reasonable to expect that the long-distance students may, in some circumstances, require

³⁶² UK IPO Report on Proposed Changes to Copyright Exceptions Second Stage 2009, at 19.

³⁶³ Ibid at 18.

³⁶⁴ Ibid at 2-3.

³⁶⁵ Ibid at 19, 32.

assistance in understanding or analysing the materials which has been transmitted from the institutions.³⁶⁶ The approach in the draft can assist an authorised student in this way, while at the same time ensuring that third parties and unauthorised persons cannot access copyright materials. Therefore, although the wording in section 34 of the CDPA can also be adapted into the exception for educational institutions in section 32 paragraph 2(7) of the Thai CA 1994 in order to limit the persons who can access materials provided by the educational institution, the wording in the draft amendment is more suitable and should be used as a model for Thailand. This is because the phrase ‘authorised person’ seems to be more flexible and broader than the term ‘teacher’ or ‘student’. Such an approach seems to be consistent with the reality where a person who is neither student or lecturer, may require access to materials. For example, a guest expert or a visitor from other countries who is invited to give a special talk in the university may also need access to some materials before speaking. The approach in the draft amendment will give the educational institution a freedom to determine who should be authorised and allowed to access their materials. Also, imposing restrictions on who can make copies or access materials provided by educational institution under the proposed exception can minimise the risk of misuse and any losses to copyright owners.

Fourth, such expansion of the exception to cover the distribution of educational materials through digital means must be done together with the establishment of a secure environment. This is because it is practically difficult to control access to or distribution of materials via electronic means outside the institution; so the establishment of such a system would be to ensure that only

³⁶⁶ UK IPO Report on Proposed Changes to Copyright Exceptions Second Stage 2009, at 19.

students, teachers, or authorized persons of such institution can access materials. Such measures help to guarantee that the proposed changes or amendments to the exception for educational institutions will not affect the economic interests and legitimate rights of copyright owners.

Under this approach, the distribution of works via digital means under the proposed exception should only be permitted if security measures or secure networks are in place. For example, educational institutions can make copies of works available for students or authorised persons to view or download without infringing copyright in such works, provided that such materials are placed on secure networks which require passwords or security codes from students before access can be granted. This can be achieved by stipulating that access to such materials via networks or the internet at a time individually chosen by the teachers or students must be password-protected. The distribution of materials by an educational institution without security measures or beyond a secure environment needs to be clearly prohibited in order to safeguard the economic interests of copyright owners. For example, if a student who receives a copy of a work from the institution via email or who downloads such copy from the secure networks of an educational institution onto a personal computer then sends such materials to a third party, such activity should be considered as copyright infringement. This might be achieved by requiring the educational institution to take steps necessary to ensure that the students or authorized persons who receive copies of copyright works from institutions via emails will not distribute such copies to the third party or unauthorized persons outside educational institutions.

A similar approach also appears in the draft amendment of the UK IPO which indicates that some form of security measure should be in place in order for the exception to apply but did not want to impose conditions inhibiting educational institutions from being able to offer distance learning opportunities to their students.³⁶⁷ Nevertheless, it recognises that sufficient safeguards must be in place to protect the interests of copyright owners, so it proposes in the draft amendments that educational institutions must use ‘all reasonable steps’ to ensure that only authorised persons may access material.³⁶⁸ This is also another alternative model for Thailand to ensure that such a secure environment is established before the materials can be made available online. This model is quite appropriate for Thailand because it does not impose too much burden or responsibility upon educational institutions since they are only required to take ‘all reasonable steps’ to ensure that the security is maintained but not any specific method.³⁶⁹ This means that while institutions have responsibility to maintain the security, the draft leaves much room to determine what should be considered as reasonable steps. The UK IPO was of the view that the amended exception should not be overly prescriptive and should be drafted in a way which is technology neutral.³⁷⁰ Therefore, specific methods ensuring that the institution will maintain the security are not prescribed in the UK draft amendment.

Importantly, the UK IPO asserts that onward communication beyond a secure environment should be prevented, but any further transmission of the material by the students to a third party will not be sanctioned under the draft amendment because it will be the responsibility of the educational institutions to use ‘all reasonable steps’

³⁶⁷ UK IPO Report on Proposed Changes to Copyright Exceptions Second Stage 2009, at 16-17.

³⁶⁸ Ibid.

³⁶⁹ Ibid at 17.

³⁷⁰ Ibid.

to ensure that only ‘authorised persons’ can access the material.³⁷¹ The UK IPO is of the view that sanctioning distribution outside secure networks controlled by educational institutions could have a negative effect on the ability of the copyright owners to reap appropriate rewards for their copyright work, and is thus likely to fall outside the requirements of the three-step test.³⁷² Therefore, the exception in the draft does not authorise either sanctioning distribution outside secure networks or onward distribution of material to those outside the controlled networks.

The approach recommended in the draft amendment is appropriate for Thailand since it allows the educational institution to determine what should be considered ‘all reasonable steps’ to maintain security and prevent the onward distribution or publication. Therefore, each institution can take different kinds of measures dependent on their resources and ability to employ experts and operate systems. This approach should minimise the potential risks of unauthorised use and give some assurance to copyright owners. The institutions will take all necessary steps to ensure that only teachers, students or other authorized users can access materials via the secure network and also be responsible for ensuring that such persons who receive such materials from educational institution via emails or use a password to access such materials will not be allowed to send the materials or communicate such passwords to third parties or other unauthorised persons. If there is a clear breach of the security system or secure networks, the educational institution should take the necessary action. This may lead to an additional cost for educational institutions in Thailand, but such costs seem to be affordable, especially for public universities who receive large funding from the Thai Government and income from

³⁷¹ UK IPO Report on Proposed Changes to Copyright Exceptions Second Stage 2009, at 18, 31.

³⁷² Ibid at 18.

the tuition fees of the students every year. Also, most universities in Thailand have already established secure networks which normally require their students to provide passwords given by the universities in order to access course materials and download them. Hence, it will not be difficult for the institutions to take the necessary steps to ensure that the distribution of works is done under security measures or via secure networks.

Nevertheless, it is undeniable that by extending the exception to allow educational institutions to make copyright materials available electronically, such materials will become more vulnerable to unauthorised copying and copyright infringement. Thus, security systems or technological protection measures (TPMs) and the rights management information system (RMIs) will become more important than ever. This is because educational institutions and copyright owners must rely on TPMs to prevent access to copyright materials in the digital environment and also on RMIs to track down infringers. Hence, in order to ensure that economic interests of copyright owners can be effectively protected in the digital environment, TPMs and RMIs must also be protected by copyright law.

Although most educational institutions in Thailand already provide secure networks or security systems such as TPMs with passwords and security codes for students and teachers to use before access to materials can be granted, there is no provision under the Thai CA 1994 that prevents the circumvention of these security systems or TPMs and also no provision prohibiting the removal or alteration of the RMIs attached to copyright works. This means that it is currently not illegal for infringers to circumvent TPMs. Hence, in order to allow the security system such as TPMs and RMIs to function effectively, I suggest that the amendment to the

educational exceptions must be done together with the introduction of the provisions to prohibit the act of circumvention of TPMs and prevent the removal or alteration of RMIs. The issues relating to TPMs and RMIs will be discussed more fully in Chapter 4 and 5.

Finally, it is also necessary to consider whether or not the proposed change to the exception for educational institution in section 32 paragraph 2(7) of the Thai CA 1994 complies with the Berne three-step test. This is because the proposed change to this exception is different from other proposed changes recommended in the previous sections of this Chapter since it is the only one that recommends extension of the scope of the exception, while the other proposed changes in the previous sections only focussed on imposing more restrictions to the current exceptions in order to provide better safeguards for the economic interests of copyright owners.

It is submitted that the proposed change to the exception for educational institution meets all requirements of the three-step test. The current provision in section 32 paragraph 2(7) of the Thai CA 1994 is clearly confined to a certain special case because it only allows the reproduction and distribution of materials by educational institution to be done ‘in a class or in an educational institution provided that the act is not for profit’.³⁷³ In contrast, the proposed change to this section extends its scope only to cover the distribution of materials by educational institutions outside classrooms and the premises of the institution for the purpose of distance learning education. This is still limited to a certain special case for various reasons. First, it only applies to educational institutions, not libraries or other organizations. Second, it only allows educational institutions to distribute copyright

³⁷³ Section 32 paragraph 2(7) of the Thai CA 1994.

materials for educational purposes. Third, such distribution by the institutions must only be via a secure network or environment. Fourth, since the requirement of ‘not-for-profit’ still remains in the proposed exception in paragraph 2(7), it means the proposed exception will only apply where the distribution outside the premises of the educational institution is not for profit. Importantly, only a limited number of beneficiaries of the proposed exceptions can be clearly identified. In this vein, only teachers, on-campus and long-distance students and other authorised persons, who are members of the institutions or directly related to the institutions, will benefit from the proposed exception. Therefore, it is clear that the proposed change to the exception in paragraph 2(7) satisfies the requirement of a certain special case since it only applies in narrow and in clearly defined cases.

Next, the proposed change to the exception in section 32 paragraph 2(7) does not impinge on the normal exploitation of works because it applies narrowly and restrictively. Senftleben states that the exception for educational institutions will not be in conflict with normal exploitation of the work if it applies narrowly and restrictively.³⁷⁴ He explains that under international copyright law a conflict with a normal exploitation arises if the authors are deprived of the economic interests in an actual or potential market, which constitutes a major source of income.³⁷⁵ For determining these major sources of income, the overall commercialization of works of relevant category in the same market channel must be considered.³⁷⁶ In this sense, he is of the view that the reproduction made by educational institutions for educational purposes can hardly be regarded as a potential major source of royalty

³⁷⁴ Senftleben 2004, at 268.

³⁷⁵ Ibid.

³⁷⁶ Ibid.

revenue because the circle of beneficiaries of the exception are drawn sufficiently narrowly, so that the exception does not encroach upon a potential typical major source of income or the economic core of the overall commercialization of affected works and thus, does not conflict with normal exploitation.³⁷⁷ It is clear the proposed exception only allows educational institutions to provide and distribute the materials to their students and authorised persons, so the individuals, who are not students or authorised persons of the institutions, will still have to purchase copies of such materials from the markets. The users would not be permitted to distribute copies widely because the proposed exception requires the institutions to take steps necessary to ensure that security is maintained and materials not distributed to unauthorised third parties outside the secure networks of the institutions. It is clear that the circle of beneficiaries of the proposed exception is drawn narrowly, so major sources of income are still untouched and there is no conflict with normal exploitation.

However, it is undeniable that the copyright works which are made available for students by educational institutions under the proposed exceptions might have some impact on normal exploitations of the works. Cornish observes that if the publishers are in the position to limit or reduce the quantity of copyright works that the public wants, then they will be able to increase their prices to the level that the purchasers are willing to pay.³⁷⁸ On the contrary, if the public can obtain the same materials which can be treated as a substitute from other sources or competitors, then the publishers will not be able to raise their prices since it would drive their

³⁷⁷ Senftleben 2004, at 269, 273.

³⁷⁸ Cornish and Llewelyn 2007, at 38 and 39.

customers to go and obtain such materials from cheaper sources.³⁷⁹ Allowing educational institutions to make copyright materials available for the students under the proposed exception can potentially conflict with normal exploitations of the works since the students do not need to buy copies of the works and thus, publishers cannot sell their books or increase their prices. In order to avoid the conflict with normal exploitation, educational institutions and libraries must pay royalty fees through licensing scheme systems for multiple uses of copyright works by their students and therefore, the proposed exception only applies in situation where there is no licensing scheme in operation. The thesis also recommends the establishment of the CCS and licensing scheme system into the Thai educational sector as part of the solution to solve the problems. With all these safeguards, the proposed exception will not act as an alternative means of acquiring works in totality since the circumstances in which copies of materials can be made under the proposed exception are very specific. Therefore, it will operate in a way that does not conflict with the normal exploitation of the work.

Finally, the proposed exception would not unreasonably prejudice the legitimate interests of the copyright owners because it only applies where there is no licensing scheme in place and after the establishment of the CCS in Thailand. This CCS will allow the copyright owners to license their works more effectively and thus get better economic returns from their investment than at present. Senftleben observes that the payment of equitable remuneration serves as a means to prevent unreasonable prejudice to the legitimate interest of copyright owners from

³⁷⁹ Cornish and Llewelyn 2007, at 38.

occurring.³⁸⁰ In the case of photocopies, there would be no unreasonable prejudice to the legitimate interest of the author if adequate remuneration is paid.³⁸¹ He indicates that the establishment of the CCS and its licensing scheme can help to ensure that the copyright owners receive the payment of equitable remuneration or fair compensation.³⁸² Therefore, the approach recommended here will help to reduce the chance for the proposed exception to cause unreasonable prejudice to the interest of copyright owners.

Further, the previous section also recommends that a clear limitation as to the amount of reproduction and the clear prohibition on multiple reproductions must be inserted into all exceptions in section 32 paragraph 2 including the exception for educational institutions, so this will provide another safeguard to ensure that the proposed exception only allows for limited copying to be made and distributed by the institutions. The individuals who can benefit from the materials provided by the institutions under the proposed exception will normally have some links to formal education or a course which they are enrolled in the institutions. These methods in the proposed exception are consistent with the recommendation of the British Academy indicating that the ways to prevent the expanded exception for educational institutions from damaging the economic interest of copyright owners include confining the benefit of the expanded exception to those working in academic institutions or studying on courses or programmes leading to formal qualifications, or limiting the amount of the work that can be copied under the exception.³⁸³

³⁸⁰ Senftleben 2004, at 226, 239, 274.

³⁸¹ Ibid at 130.

³⁸² Ibid at 274 and 277.

³⁸³ British Academy Report on Proposed Changes to Copyright Exceptions 2008, at 3.

However, the proposed exception can still satisfy the third criteria even if remuneration is not paid. The UK IPO indicates that ‘if the exception is narrowly drafted, and therefore does not unduly prejudice rights holders, remuneration would not be necessary’.³⁸⁴ Since the scope of the proposed exception is quite limited, it can help the proposed exception to satisfy the second as well as the third criteria. Importantly, the proposed exception also has a beneficial effect for the author. In this vein, the proposed exception would allow individuals to access materials more easily by permitting the institution to make the works available online outside its premises which is currently prohibited under the current exception. This increases the chance that the authors or creators of new works will be acknowledged by users and as a result increases their reputation and income later on. Therefore, it is unlikely that the proposed exception will unreasonably prejudice the legitimate interests of the copyright owners.

³⁸⁴ UK IPO Report on Proposed Changes to Copyright Exceptions Second Stage 2009, at 31.

Chapter 4

Digital copyright protection I: TPMs

The issue of digital copyright protection is closely related to legal provisions on technological protection measures (TPMs) since they are very important for copyright owners in protecting their works in the digital environment. Most developed countries such as the UK and US have introduced a provision to prohibit the act of circumvention of TPMs. However, as already noted, there is no provision under the Thai CA 1994 doing the same thing, since at the time the Act was made digital technologies were not widely used in the Thai education sector. Currently, the only exception that seems to be capable of dealing with digital issues is the specific exception for the use of computer programs in section 35, which did not appear in the CA 1978 but has been inserted into the current Act. However, this exception does not mention the issues relating to TPMs and can only cover the works that fall within the definition of ‘computer program’ (which is ‘instructions, set of instructions or anything which are used with a computer so as to make the computer work or to generate a result no matter what the computer language is’).³⁸⁵ Other digital issues including the TPMs (which cannot fit within the scope of the definition) cannot be justified under this exception. In this instance, TPMs cannot fall within the scope of the definition of ‘computer program’ because these technologies have nothing to do with the function which makes the computer work; the computer can still work properly without the TPM. Without the provisions on the protection of the TPMs, it is not illegal for infringers in Thailand to circumvent the TPMs that effectively

³⁸⁵ Section 4 of the Thai CA 1994.

control access to copyright works. This also encourages copyright infringement in the online environment.

All this are going to be changed in the future, however, since the Thai Government is considering signing the prospective FTA with the US and joining the WIPO Copyright Treaty (WCT). Both FTA and the WCT contain provisions on the protection of TPMs which will have to be implemented after the treaties are signed. Also, I have already mentioned in Chapters 2 and 3 that the amendment to the educational exceptions must be done together with the introduction of the provisions on the protection of the TPMs. The TPM provisions are very necessary in order to guarantee that educational materials can be made readily available online for distance education purposes with appropriate protection. If the educational exceptions are extended to allow educational institutions and teachers to make copyright materials available online, the TPMs that effectively control access to copyright materials in the digital environment will become more important than ever. In this vein, TPMs can be used by the educational institutions or copyright owners to control about who could access educational materials. In other words, it allows the educational institutions and copyright owners to ensure that only the students or those who get prior permission or pay royalty fees can access educational materials. Without TPMs, copyright materials will become more vulnerable to unauthorised copying and everybody can access such materials and distribute them freely, so destroying the copyright owner's other markets and at the same time making it easier to infringe copyright in the digital environment. This would eventually cause severe damage to the economic interests of copyright owners. With TPMs in place, copyright materials can be properly protected in the digital environment and will not be widely

disseminated to all or the public in general without any restriction so the copyright owners can effectively get an economic return from their investment in the digital environment. Hence, the provisions on the protection of TPMs are quite necessary for digital copyright protection in the Thai education sector.

This chapter considers TPM issues and is divided into three sections. Section 4.1 outlines the possible impacts which may result from the implementation of the TPMs provisions contained in the prospective Thailand-US FTA by looking at the experiences of the US and the UK with the TPM provisions. This is because the same impacts which have already occurred in the US and UK could probably occur in Thailand. The experience of the US is especially relevant for Thailand since the TPM provisions in all previous US FTAs have an identical standard which is modelled after the US DMCA. Section 4.2 considers the exceptions to the protection of the TPMs under the US FTAs in order to illustrate that these TPM exceptions are not enough to prevent impact on non-infringing uses under copyright exceptions. In section 4.3, I examine what should be the appropriate legal approach on the TPM protection in Thailand and make a recommendation that the Thai Government must ensure that all non-infringing activities permitted under the copyright exceptions of the Thai CA 1994 should also be exempted under the TPM exceptions. In other words, the TPM provisions and exceptions should develop alongside the non-infringing uses under the copyright exceptions. In this section, the legal models and recommendations about the TPM provisions from the Department of Intellectual Property (DIP) and the Thailand Development Research Institute (TDRI) will be considered.

4.1) The TPM provision and its possible impact on non-infringing uses

This section demonstrates that the approach to the TPM provisions in most US FTAs could undermine non-infringing uses permitted under the current educational exceptions in the Thai CA 1994. However, before identifying the possible impacts of the TPM provisions in the US FTAs on non-infringing uses which are likely to occur in Thailand, it is necessary to examine and consider the provisions on the protection of TPMs in the recent US FTAs, which are likely to be used as a model for the prospective Thailand-US FTA. This involves looking at the TPM provisions in the WIPO Copyright Treaty (WCT) because the prospective FTA which the Thai Government is going to sign with the US is likely to require Thailand to ratify the WCT. The TPM provisions in the US DMCA are also considered in order to demonstrate that the TPM provisions in the FTAs have been highly influenced by the US DMCA.

Both section 1201 of the US DMCA and the TPM provisions in the FTAs prohibit the circumvention of TPMs in two ways. First, they prohibit the circumvention of any TPM that effectively controls access to copyright works in digital form (such is also known as anti-circumvention provision). In this vein, all TPM provisions in the US FTAs are very similar, indeed nearly identical to each other. They require the contracting states to provide an adequate protection and effective legal remedies against the circumvention of effective TPMs that copyright owners use in connection with the exercise of their rights and that restrict unauthorized acts in respect of their copyright works.³⁸⁶ In this instance, contracting states must provide that any person who knowingly or having reasonable ground to

³⁸⁶ Article 16.4(7)(a) of the Singapore-US FTA; Article 17.7(5) of the Chile-US FTA; and Article 17.3(7)(a) of the Australia-US FTA.

know, circumvents any effective TPM that controls access to a protected work without authority shall be liable. Also any person other than a non-profit library, archive, educational institution, or public non-commercial broadcasting entity that is found to have engaged wilfully and for purposes of commercial advantage or private financial gain in such activities shall be guilty of a criminal offence.³⁸⁷ The term ‘effective technological measures’ is defined in these FTAs as any technology, device or component that controls access to copyright works in the normal course of its operation.³⁸⁸ Fink described TPMs as devices and software developed to prevent unauthorized copying of digital works.³⁸⁹

The term ‘circumvention’ was defined by Hiaring as disabling copy-protection mechanisms or any activity that makes circumvention possible, including the sale of devices that can be used to circumvent.³⁹⁰ In brief, the acts of circumvention of an access control may include descrambling a scrambled work, decrypting an encrypted work or avoiding, bypassing, removing, deactivating, or impairing a TPM without the authority of the copyright owner. This means that these TPM provisions only concern the act of passing the barrier of the locked program and the TPM that effectively controls access itself, but does not concern either the copyright infringement that might occur once the protected material has been accessed or any unauthorized contact with the protected material.³⁹¹

³⁸⁷ Article 16.4(7)(a)(i) of the Singapore-US FTA; Article 17.7(5)(a) of the Chile-US FTA; and Article 17.3(7)(a)(i) of the Australia-US FTA.

³⁸⁸ Article 16.4(7)(b) of the Singapore-US FTA; Article 17.7(5)(f) of the Chile-US FTA; and Article 17.3(7)(b) of the Australia-US FTA.

³⁸⁹ World Bank Group Report on US FTAs 2005, at 4.

³⁹⁰ Hiaring 2005, at 176.

³⁹¹ Besek 2004, at 390.

Second, the US FTAs and the US DMCA prohibit the manufacture or the distribution of any device, which is primarily used to circumvent a TPM that effectively controls access to a work (such provision is also known as the anti-trafficking provision). In this vein, all US FTAs require a party to provide for the liability of any person who manufactures, imports, distributes, offers to the public, provides or traffics in devices, products, or components or offers to the public or provides services which are promoted, advertised, or marketed for the purpose of circumvention of any effective TPMs, or which have only a limited commercially significant purpose or use other than to circumvent any effective TPMs, or which are primarily designed, produced, or performed for the purpose of enabling or facilitating the circumvention of any effective TPMs.³⁹² Also, any person other than a non-profit library, archive, educational institution, or public non-commercial broadcasting entity that is found to have engaged wilfully and for purposes of commercial advantage or private financial gain in such activities will be guilty of a criminal offence. These provisions clearly resemble section 1201(a)(2) of the US DMCA which prohibits the devices and services that circumvent a TPM or that are primarily designed or produced to circumvent or have only limited commercially significant purpose or use other than to circumvent, or are marketed for use in circumventing effectively controls access to copyright works.³⁹³

It is important to note that the TPM provisions in the WCT are more flexible than those in the US DMCA and FTAs. The WCT also requires contracting countries

³⁹² Article 16.4(7)(a)(ii) of the Singapore-US FTA; Article 17.7(5)(b) of the Chile-US FTA; and Article 17.3(7)(a)(ii) of the Australia-US FTA.

³⁹³ Article 1201(A)(2) of the US DMCA.

to provide adequate legal protection against circumvention³⁹⁴ but such provision leaves much room for Thailand to define the content and scope of the new form of protection subject to the minimum standards set forth in the WCT. This is different from the TPM provisions under the FTAs, which seem to be stronger and not to provide much freedom for contracting countries to create the appropriate protection for the TPMs along with the exceptions. For instance, the WCT does not make clear whether or not activities such as the manufacture and trafficking of circumvention devices should be prohibited by domestic copyright laws or, if such activities should be prohibited, how a prohibition should be laid down.³⁹⁵ Thus, contracting countries have more room to design the protection as well as the exception. In contrast, the DMCA went far beyond the requirements under the WCT regarding the regulation of circumvention of TPMs. It has the anti-trafficking provisions in section 1201(a)(2) which aims at prohibiting the manufacture and distribution of devices which are mainly designed to circumvent.³⁹⁶ Similar anti-trafficking provisions modelled after section 1201(a)(2) of the DMCA also appear in the TPM provisions in most US FTAs.³⁹⁷ It is therefore likely that the prospective Thailand-US FTA will state that Thailand must provide adequate protections against actions or devices that circumvent the TPMs as well.

In the US, the TPM provisions seem to cause adverse impact on non-infringing uses permitted under the copyright exceptions. This is because the US

³⁹⁴ Article 11 of the WCT.

³⁹⁵ Article 1201(A)(2) of the US DMCA.

³⁹⁶ Samuelson 1999, at 519.

³⁹⁷ For example, Article 15.5(8)(a)(ii) of the Morocco FTA; Article 14.4(7)(a)(ii) of the Bahrain FTA; Article 15.5(7)(a)(ii) of the Central American FTA (CAFTA); Article 16.4(7)(a)(ii) of the Singapore FTA; Article 17.4(7)(a)(ii) of the Australia FTA; Article 17.7(5)(b) of the Chile FTA; Article 15.4(7)(a)(ii) of the Oman FTA; and Article 16.7(4)(a)(ii) of the Peru FTA contain the same details as section 1021(a)(2) of the DMCA.

approach to the TPMs in both the FTAs and the DMCA is unlikely to allow the copyright exceptions to apply in the context of TPM so can potentially undermine non-infringing uses under copyright exceptions. In this instance, the US courts in several decisions have made clear that the DMCA provision is independent from a copyright infringement claim so the copyright exceptions are not relevant to a claim under the DMCA. For instance, in *RealNetworks*³⁹⁸, the plaintiff claimed that the defendant had violated section 1201 of the DMCA and sought a preliminary injunction against the defendant to prevent him from distributing his products. The defendant's Streambox VCR incorporated the plaintiff's authentication sequence known as 'secret handshake' which allowed the defendant's product to disguise itself as a RealPlayer of the plaintiff and then tricked the RealServer to send files as well as ignoring the copy controls, allowing consumers who purchased the defendant's Streambox VCR to access the digital content licensed for the RealPlayer without any copy restrictions.

The defendant contended that its VCR product did not violate section 1201 because it allowed the consumers to make fair use copies of files distributed via the RealServer. However, the court rejected the defendant's claim, stating that the claim under the DMCA was independent from a copyright infringement claim, and also held that fair use exceptions were not relevant to a claim under the DMCA. Then, the court held that the defendant's VCR that allowed the consumers to copy the digital content by bypassing the security instruments of the plaintiff was a circumvention device. It met the conditions under section 1201(a)(2) because a part of the defendant's VCR was primarily designed to circumvent the access control and copy

³⁹⁸ *RealNetworks, Inc. v. Streambox, Inc.*, No. C99-2070P, 2000 U.S. Dist. LEXIS 1889 (W.D. Wash. Jan. 18, 2000).

protection measures provided by the plaintiff's system. Also the defendant's VCR had no significant commercial purpose other than to enable users to access and record the protected content by circumventing the authentication procedure and avoiding the copy control. Hence, the court granted a preliminary injunction against further distribution of the defendant's Streambox VCR.

The court in *Reimerdes*³⁹⁹ took a similar position. In this case, the plaintiffs distributed many of their works for home use on digital versatile disks (DVDs), which contained copies of the copyright works in digital form. They protected those works from copying by using an encryption system called CSS, which worked by allowing the DVD to be viewed only on players and computer drives equipped with licensed technology that permitted the devices to decrypt and play but not to copy the content of the works. However, computer hackers developed a computer program called DeCSS that circumvented the CSS protection system and allowed the work and its content to be copied and played on devices that lacked the licensed decryption technology. In other words, DeCSS could crack the copy-protection on DVDs and allow the users to view or copy the content of the DVDs without paying licensing fees. The defendants made DeCSS readily available to users by posting it on their Internet websites. As a result, the plaintiffs brought this action under the DMCA against the distribution of DeCSS, aiming at preventing the defendants from posting DeCSS and from including hyperlinks to other web-sites that made DeCSS available.

The defendants contended that their activities constituted non-infringing use under the copyright exceptions and attempted to establish that the TPM provision

³⁹⁹ *Universal City Studios, Inc. v. Reimerdes (Eric Corley)*, 111 F. Supp.2d 294 (S.D.N.Y. 2000), affirmed in *Universal City Studios, Inc. v. Reimerdes (Eric Corley)*, 273 F.3d 429, 459-60 (2d, Cir. 2001).

prevents non-infringing uses because certain uses which might qualify as fair use under the copyright exceptions would be impossible absent circumvention of the CSS encryption. The court indicated that the main question in this case was whether the possibility of non-infringing uses by a person who gains access to a protected copyright works through a circumvention technology distributed by the defendant could save the defendants from liability under section 1201. Then the court held that although section 107 provides fair use exceptions that allow certain uses of copyright works to be exempt from copyright infringements, they were not relevant to this case because the defendant was not sued for copyright infringement but for offering and providing technology designed to circumvent TPM that controlled access to copyright works and thus violating Section 1201(a)(2) of the DMCA. Although the court acknowledged the possibility that TPMs controlling access to copyright works might undermine copyright exceptions by preventing access even for uses that would be considered fair, it stated that fair use exceptions do not apply to such circumstances and rejected the defendant's claim by stating that the decision not to make fair use a defence to a claim under Section 1201(a) was quite deliberate for several reasons.

First, the court was of the view that the copyright exceptions such as fair use are fully applicable on the condition that such access is authorized, so it cannot apply to the act of the circumvention in the context of the TPM because in such cases, access is not authorized but has been circumvented without permission. Second, the court indicated that the rule-making proceeding instrument, which allows the Librarian of Congress to create new and additional exceptions to the TPM provisions

for a class of work⁴⁰⁰, together with a series of specific exceptions to the prohibition in section 1201(a) are sufficient to solve the problem and reconcile the conflicts between section 1201(a)(1) and copyright exception. Thus, there is no need to allow copyright exceptions and fair uses to apply in the context of TPM. Finally, Congress made clear that section 1201 does not incorporate or intend to allow the application of the fair use exception to a circumvention claim so the court would not oppose itself to Congress's intention and construe the words of the TPM provisions to accomplish a result that Congress rejected. The Congress has the authority to make a decision not to allow a person who wishes to make fair use of encrypted copyright works to have the technical means of doing so. In other words, the court in this case also implied that the TPM provisions in section 1201 are subject only to the exceptions in the DMCA which do not include copyright exceptions and fair uses. Therefore, the defendant's argument on copyright exceptions and fair uses was entirely rejected by the court.

This approach does not only prevent the copyright exceptions from applying in the context of TPMs but also limits the application of the copyright exception to the uses of copyright works in old-fashioned or less convenient ways only. For instance, in *Reimerdes*⁴⁰¹, the defendant appealed to the Second Circuit Court and claimed that section 1201 as applied by the district court eliminated fair use exceptions. The Second Circuit Court rejected this claim and held that there is no authority to support a claim that the Copyright Act or the Constitution guarantees fair use by the optimal means or in the identical format as the original. It stated that fair use has never been held to be a guarantee of access to copyright material in order to

⁴⁰⁰ More details about the exception issued under the rule-making proceeding provisions will be discussed in the next section (4.2.1 The Exceptions issued under the rule-making proceeding).

⁴⁰¹ *Universal City Studios, Inc. v. Reimerdes (Eric Corley)*, 273 F.3d 429, 459-60 (2d, Cir. 2001).

copy it by the user's preferred technique or in the format of the original.⁴⁰² In other words, the court rejected the argument that users have a right to the most technically convenient way to engage in fair use and then upheld the injunction against the defendant's action.

Likewise, in the *Elcom* case⁴⁰³, the defendant argued that the TPM provision in section 1201 eliminated fair use exceptions because it restricted the ability of the users to engage in fair use and to make a copy of copyright works in electronic media for personal non-commercial use. The court followed the approach in the *Reimerdes* decision and then held there is no generally recognized right to make a copy of a protected work, regardless of its format, for personal non-commercial use. Then it came to the same conclusion as the court in the *Reimerdes* decision: that non-infringing uses under the copyright exceptions can still be made in old-fashioned or less convenient ways (such as by hand or by re-typing) rather than in a digital or electronic context (such as by cutting and pasting from existing digital materials) which is technically protected under the DMCA.⁴⁰⁴ The copyright exceptions do not entitle the defendant to obtain the works in the way most convenient for their purposes.

The court in this case made clear that this approach also applies to anti-trafficking provisions in the same way as it applies to anti-circumvention provisions by stating that section 1201 prohibits all circumvention tools, including those that facilitate copyright infringement and those used for circumventing for the purpose of non-infringing uses under the exceptions. The court outlined the reason behind the

⁴⁰² *Universal City Studios, Inc. v. Reimerdes (Eric Corley)*, 273 F.3d 429, 459-60 (2d, Cir. 2001).

⁴⁰³ *United States v. Elcom Ltd. (Elcomsoft Co., Ltd.)*, 203 F. Supp. 2d 1111 (N.D. Cal. 2002).

⁴⁰⁴ *Ibid.*

prohibition: although non-infringing uses of digital works may be made more difficult if tools to circumvent use restrictions cannot be readily obtained, Congress still sought to ban all circumvention tools in order to protect against unlawful piracy, and to promote the development of electronic commerce and the availability of copyright materials on the Internet, because most of the time those tools would be used to infringe a copyright.⁴⁰⁵ Thus, the court concluded that it may not be unlawful to circumvent for the purpose of engaging in fair use but it is unlawful to traffic in tools that allow fair use circumvention so it held in the end that all tools that enable circumvention of use restrictions are banned, not merely those that prohibit infringement. The court therefore gave a summary judgment in favour of the plaintiff.

Similarly, in *321 Studios*⁴⁰⁶, the defendant contended that the distribution of his software did not violate section 1201 because it merely enabled non-infringing uses under copyright exceptions such as fair use, making back-up copies or copying public domain materials. The court held that the plaintiff's software was an effective TPM protected under section 1201 and then rejected the argument of the defendant by relying on the reasoning in *Reimerdes* and *Elcom* that copyright exceptions such as fair use should be applied only in old-fashioned or less convenient ways rather than in the digital context protected by the TPM provisions. Hence, the court concluded that non-infringing use such as fair use of copyright works by customers is not a defence to the defendant's violation of section 1201(b). Hence, it entered a

⁴⁰⁵ *United States v. Elcom Ltd. (Elcomsoft Co., Ltd.)*, 203 F. Supp. 2d 1111 (N.D. Cal. 2002).

⁴⁰⁶ *The 321 Studios v. Metro Goldwyn Mayer Studios*, No. C02-1955 SI, 2004 U.S. Dist. LEXIS 2771 (N.D. Cal. Feb. 19, 2004).

preliminary injunction against the defendant by ordering it to stop further distribution of its software.

In brief, these decisions show that the TPM claim under the DMCA is separate and independent from a copyright infringement claim and that copyright exceptions which are not regulated in the DMCA are not relevant to the TPM claim. Consequently, the only exceptions which are relevant to the consideration of the TPM claim are exceptions provided under the TPM provisions in the DMCA. The US courts further ensure that the same approach also applies to prohibit the circumvention devices that allow for non-infringing uses. This means that the TPM provisions not only eliminate non-infringing uses of technologically protected copyright works but also prohibit devices or technologies which could be used to make non-infringing use of copyright works under the copyright exceptions. The difficulty in reconciling the protection of the TPMs with the copyright exceptions is because the application of many copyright exceptions depends upon the circumstances so that what may be permissible in one situation is an infringement in another. But the TPM technology and circumvention devices cannot distinguish between infringing and non-infringing use since it cannot recognize whether any particular act is allowed or not.⁴⁰⁷ Therefore, any act of circumvention and any device capable of circumventing the TPMs would likely be prohibited by the anti-circumvention and anti-trafficking provisions including those acts and devices circumventing the TPM for non-infringing purposes under copyright exceptions.

⁴⁰⁷ Koelman 2001, at 1-2.

This may lead to a 'pay-per-use' approach which allows copyright owners to have powers to choose whether or not they want users to access their works in electronic forms.⁴⁰⁸ This means that the copyright owners may make works available only to those who are willing to pay for access. Akester agrees that although the TPM provisions under the current approach do not totally deny access to copyright work, they allow the copyright owners to have complete control over the uses of copyright in the digital environment through TPM, which can be used to prevent access to copyright works and to automate the process of licensing works or ensure that licence terms are complied with.⁴⁰⁹ Under such an approach, users may be required to pay licensing fees for every use of the works.⁴¹⁰ For example, the TPM can be in a type of invisible software lock which might allow users to use a work and even download it but then require them to pay up for it.⁴¹¹ In this context, the TPM allows this charging approach even in one-to-one copying which normally falls within the scope of the exceptions. Consequently, TPMs under the present state of the law undermine copyright exceptions because the users have to pay for a small amount of copying which could normally be justified under the copyright exceptions.⁴¹²

Since the TPM provision has potential to restrict the ability of the users to access copyright works and impede the application of copyright exceptions, it can effectively undermine the balance of competing interests guaranteed by the copyright

⁴⁰⁸ Besek 2004, at 429.

⁴⁰⁹ Akester 2006, at 160.

⁴¹⁰ Besek 2004, at 429.

⁴¹¹ Mccullagh 2005, at 3.

⁴¹² Akester 2006, at 163.

exceptions.⁴¹³ This is especially true in the digital environment where the users' ability to benefit from the copyright exceptions afforded by copyright law depends on whether they can get access to the copyright works or not. If the TPM protection under the FTAs and DMCA provides copyright owners with the power to lock up works and make the users unable to access them, then it automatically prevents the users from determining whether they should use copyright works within the boundaries of the copyright exception or not. This will also reduce the chance of the court to decide whether a use is justified under copyright exceptions since the TPMs will give copyright owners the power to preclude the users from exercising their non-infringing uses under copyright exceptions. This argument is supported by the British Library in the UK which indicates that the great majority of the TPMs relating to electronic licences undermined copyright exceptions and access to information in general because they put limits on what users can normally do with materials under copyright exceptions.⁴¹⁴ If this approach continues, non-infringing uses of copyright works under the copyright exceptions will be overruled by the TPM provisions and could probably be excluded and become irrelevant in the digital context. In such a situation, there is a strong possibility that the public interest in access to information and educational material could be undermined.

Interestingly, the report of the Electronic Frontier Foundation (EFF) in the US identifies the 'chilling' effect of the TPM provisions in several aspects which are relevant to Thailand. First, the EFF observed that TPM provisions can be used to restrict the national copyright exceptions upon which educational institutions rely to provide their services and therefore these provisions are likely to obstruct the

⁴¹³ Samuelson 2003, at 149.

⁴¹⁴ UK IPO Gowers Review 2006.

development of education institutions in term of digital books and necessary resources for long-distance learning education.⁴¹⁵ In this vein, the TPM provisions can prevent or restrict educational institutions from copying and sharing out technologically-protected digital materials.⁴¹⁶ For example, although the TPM allows the use of a purchased e-book, it may prevent its re-sale, or loan, or restrict how many times it may be viewed.⁴¹⁷ The TPM backed by anti-circumvention provisions would hamper efforts by national governments to create copyright exceptions to meet domestic needs such as long-distance learning education using the Internet.⁴¹⁸ This impact of the TPM provisions could become an obstacle to the policies promoting the long-distance learning and lifelong learning education in Thailand. These two policies are also a strong policy justification for allowing the circumvention of the TPM for the purpose of non-infringing uses in relation to long-distance education.

Second, the EFF pointed that with widespread use of TPMs for electronic books and scientific journals, TPM regimes would have more potential to restrict access to information essential for education and scientific research.⁴¹⁹ For instance, TPMs such as the Adobe eBook reader give authors the ability to prevent users from electronically copying an insubstantial part of text regardless of whether such copying can be considered as a copyright infringement or non-infringing uses under copyright exceptions.⁴²⁰ As the EFF observed:

‘As information increasingly becomes available only in technologically protected form, fair dealing and personal

⁴¹⁵ EFF Submission on the impact of the TPM regulation 2007.

⁴¹⁶ Ibid.

⁴¹⁷ Ibid.

⁴¹⁸ Ibid.

⁴¹⁹ Ibid.

⁴²⁰ UK IPO Gowers Review 2006.

copying exceptions that previously guaranteed access for students and researchers will be technologically precluded. Students and educators will be banned from circumventing TPMs on technologically-protected digital material that they have purchased. Local technology vendors will be banned from producing and selling technologies and devices that educators need if they are to use copyright exceptions that would otherwise apply to protected digital materials that they have purchased.⁴²¹

Further, the EFF pointed out that both foreign and US scientists have refused to publish research on security technology vulnerabilities or have removed previously published research from the Internet because of the fear of DMCA liability.⁴²² In this vein, many researchers in the US had been threatened with DMCA liability especially in the areas of computer security research.⁴²³ For example, a researcher who wanted to release his research on security vulnerabilities in the CD copy-protection 'rootkit' software on Sony-BMG label music CDs, was afraid to do so because in the past he had been threatened with DMCA liability when he identified security vulnerabilities in a previous version of one of the CD copy protection technologies.⁴²⁴ This affects the users in the end because the security vulnerabilities were not made available or known to the public and consequently, the computers of users were infected for several weeks until another researcher identified and disclosed them.⁴²⁵

D'Agostino observes that there is a clear negative impact of TPMs in the US education sector since smaller schools such as elementary and secondary schools that lack resources and possibly skills are precluded from licensing works if they do not

⁴²¹ EFF Submission on the impact of the TPM regulation 2007.

⁴²² Ibid.

⁴²³ Ibid.

⁴²⁴ Ibid.

⁴²⁵ Ibid.

comply with TPM requirements imposed by copyright owners.⁴²⁶ This means that that works available are used less, and that schools with fewer resources are prevented from accessing the available works.⁴²⁷ She was of the view that the cause of such impact comes from the courts' interpretation of the TPM provisions to exclude copyright exceptions from the claims under the DMCA and this stripped educational users of their shield against copyright infringement liability.⁴²⁸ Nevertheless, the need of TPMs for protecting copyright works in the digital environment is undeniable especially in the education sector, so even though many educators do not like TPMs, they may use them to ensure the integrity of their works and attribution of their efforts, as well as to enforce how their works may be used.⁴²⁹ Also, since educational institutions themselves also concerned with a return on investment, they will endorse TPM systems even though these will limit their ability to access digital copyright works.⁴³⁰

In the UK, similar impacts of the TPMs on the non-infringing uses under copyright exception are also recognised in several reports. For example, the British Academy stated in its report that the TPM can over-ride fair dealing exceptions, making access available only in return for payment, and are therefore locking away valuable materials since it allows copyright owners to inhibit access for the purposes of research in the digital environment even where fair dealing exceptions are applicable.⁴³¹ It believed that the effect of TPMs will undermine the existing copyright exceptions of the CDPA which are constructed to maintain a balance

⁴²⁶ D'Agostino 2008, at 353.

⁴²⁷ Ibid.

⁴²⁸ Ibid at 353, 358.

⁴²⁹ Ibid.

⁴³⁰ Ibid at 353.

⁴³¹ British Academy Review on Copyright and Research 2006, at 15.

between the economic interests of copyright owners and the public interest in the development of research and the creation of new original materials.⁴³² The Academy concluded that since there are no exceptions for legal circumvention where the TPMs prevents fair-dealing use, the problems related to TPMs are likely to have adverse impacts on UK researchers in future decades as increasing amounts of works and research materials are likely to become available only in digital form, so it is important to ensure that academic researchers are able to access such material and make non-infringing uses under copyright exceptions.⁴³³

Similarly, Akester observed that certain permitted acts under the copyright exceptions are being adversely affected by the use of TPMs since the TPMs can be used to limit the ability of users to take advantages of certain copyright exceptions in the UK.⁴³⁴ She indicated that the use of the TPMs in the UK has adverse impact on the beneficiaries of the copyright exceptions such as the British Library, the film lecturers, students, and researchers.⁴³⁵ For example, the British Library revealed the problems that where TPM applied to works in digital format or used to control access and those works becomes obsolete or the relevant manufacturers are not willing to provide updates or have gone out of business, the Library could find itself with digital contents and materials that it is unable to circumvent by law and can no longer access.⁴³⁶ Also, there is a situation where TPM systems limit the period of view, restrict the number of copies that can be made, or where a user is forced to resort to a paper copy of a work in digital format as a result of TPM protection of the digital

⁴³² British Academy Review on Copyright and Research 2006, at 15, 18.

⁴³³ Ibid.

⁴³⁴ Akester 2009, at 99, 100.

⁴³⁵ Ibid at 64.

⁴³⁶ Ibid at 61, 62 and 101.

version of the work.⁴³⁷ This illustrates that the TPM can be used to limit the user's ability to enjoy non-infringing uses under copyright exception.

Further, Akester's study also indicated that the data collection from the film lecturers, students and researchers revealed two problems. First, the TPM protection of cinematographic works is leading to difficulties in extracting portions of those works for educational use and second, those difficulties are triggering isolated acts of self-help for educational purposes.⁴³⁸ She found that although TPM does not allow copying of extracts of films in a digital format, the users can still find non-digital versions of the required materials; but this option can be very expensive and inconvenient as well as time consuming.⁴³⁹ She concluded that the evidence shows that non-infringing uses under copyright exceptions in the UK are being adversely affected by the use of TPMs and this means that the public interest underlying such exception is undermined, so practical solutions are required, especially where beneficiaries of such exceptions is not able to benefit from it or is only able to benefit from it in a limited manner.⁴⁴⁰

The same impacts which have already occurred in the US and UK could probably occur in Thailand. Concern that the TPM provisions in the prospective Thailand-US FTA could potentially prevent legitimate research and education activities, especially in the area of technological research, is also apparent in the report of the Thailand Development Research Institute (TDRI).⁴⁴¹ The TDRI

⁴³⁷ Akester 2009, at 61, 63 and 101.

⁴³⁸ Ibid at 102.

⁴³⁹ Ibid.

⁴⁴⁰ Akester 2009, at 64, 102, 103 and 106; See also IIL Amsterdam Report on the Implementation of the Copyright Directive (2007), at 108; and British Academy Report on Proposed Changes to Copyright Exceptions 2008, at 5.

⁴⁴¹ TDRI Report on the impacts of Thailand-US FTA 2003, at 101.

indicated that there are strong policy justifications in relation to education and research development in Thailand for refusing to allow the TPM provision to prevent research activities that qualify as non-infringing uses for educational purposes. It outlines the Thai Government's policy on copyright: 'the copyright law should allow Thailand to extend its basic and higher education coverage by allowing access to educational materials and information technology'.⁴⁴²

Likewise, the Office of Small and Medium Enterprises Promotion (OSMEP) in Thailand pointed out that if Thailand adopts the TPM provisions under the US FTAs without comparable technological capabilities, it will be deprived of the flexibility and ability to develop research and technology that the US and other developed countries enjoyed at earlier stages of their development.⁴⁴³ Also, it stated that the TPM provisions would be likely to make it more difficult to access information and educational materials in the digital environment because the TPM could deprive users of the ability to use copyright works, by allowing the copyright owners to use a technical device protected by law to control and restrict the ability to access or use copyright works in many different forms such as restricting the scope of uses; imposing conditions of uses such as 'pay-per-use'; or limiting the type of platform on which the copyright works can be used and so on.⁴⁴⁴

Further, the anti-trafficking provision in the prospective Thailand-US FTA would make it harder to access educational materials because it eliminates the ability of the users to enjoy non-infringing uses under copyright exceptions by prohibiting the manufacture or distribution of all the circumvention devices or tools which are

⁴⁴² TDRI Report on the impacts of Thailand-US FTA 2003, at 2.

⁴⁴³ OSMEP Report on the impacts of Thailand-US FTA 2005, at 5.

⁴⁴⁴ Ibid.

created for the purpose of circumventing a TPM or which have no commercially significant purpose other than circumvention.⁴⁴⁵ With this approach, only few (if any) devices will be available to enable permissible uses provided by the copyright exceptions. So most ordinary educators such as teachers and students will not be able to obtain tools or other technical means to circumvent the TPM in order to access educational materials for non-infringing purposes under copyright exceptions in the market. Therefore, such permissible uses provided by the copyright exceptions are meaningless in the TPM context. Hence, both TDRI and OSMEP suggest that if Thailand is going to sign the FTA with the US, there will be a need to postpone the implement of the TPM provisions in order to enjoy fully the early stages of technological development and avoid other impacts of the TPM.⁴⁴⁶

However, I oppose this recommendation of the TDRI and OSMEP because the postponement of the implement of the TPM provisions will only delay the problem occurring when it is a permanent solution for Thailand. The better solution to avoid the possible impact of the TPM provisions on non-infringing uses is to ensure that all such non-infringing and legitimate research activities permitted under copyright exceptions will also be exempted from the violation of the TPM provisions under the exceptions in the TPM provisions. With this solution, the users will not only be able to exercise non-infringing uses under copyright exceptions without violating the TPM provisions, but also the right provided in the TPM provisions will be consistent with the rights granted by copyright exceptions. The way in which the Thai Government chooses to implement its TPM obligations under the prospective

⁴⁴⁵ OSMEP Report on the impacts of Thailand-US FTA 2005, at 5.

⁴⁴⁶ TDRI Report on the impacts of Thailand-US FTA 2003, at 2; and OSMEP Report on the impacts of Thailand-US FTA 2005, at 5.

FTA and the WCT will determine Thai citizens' access to information and educational materials in the digital environment. If the Thai Government implements such provisions without considering the possible impact, the TPM provisions could later become an obstacle for scientific research, national education, and technological innovation. The recommendations on the exceptions to the TPM provisions which can prevent the possible impact on non-infringing uses under the exceptions will be discussed in more detail in section 4.3 below.

4.2) Exceptions to the protection of the TPMs under the US FTAs

This section examines the exceptions under the previous US FTAs which are likely to be used as a model for the prospective Thailand-US FTAs and then shows that although these TPM exceptions are very useful for Thailand, they are not enough to prevent the possible impacts discussed above. In this vein, most US FTAs allow the trading partners to have exceptions to TPM protection, but such exceptions are quite narrow and restricted, in the same way as those in the DMCA. Each exception has its own requirements. Some only apply to the prohibition on circumventing access controls while others can apply to both the prohibition on circumventing access controls and the prohibition on trafficking in circumvention devices. Overall, the FTAs and the DMCA contain one broad exception known as the 'rule-making proceeding' and seven specific exceptions which function together as the exceptions to the TPM provisions.

4.2.1) The exceptions issued under the rule-making proceeding

This section argues that the exception issued under the rule-making proceeding is very useful for Thailand but is not enough to prevent the impact of the

TPM provisions on non-infringing uses under copyright exceptions. The rule-making proceeding can be found in section 1201(a)(1)(B)-(E) of the DMCA, which allows the Librarian of Congress to create a new and additional exception to the TPM provisions for a class of works. Pursuant to section 1201(a)(1)(c), the Librarian has the authority to determine whether the users of any particular class of copyright works are likely to be adversely affected in their ability to make non-infringing uses of those works by the prohibition against circumventing a TPM that controls access. The availability of works in other alternative formats which are not subject to the TPM is also relevant in determining whether the users were adversely affected by the TPM that controls access.⁴⁴⁷ In this instance, the librarian will focus on whether a substantial diminution of the availability of works in the marketplace for non-infringing uses is actually occurring in the market for particular classes of works.⁴⁴⁸ If there is enough evidence that such prohibition would be likely to cause a substantial adverse impact on lawful use of a particular class of works, then the Librarian can make an exception to the prohibition on circumventing access control for that particular class of works.⁴⁴⁹ However, the exceptions which are created under the rule-making proceeding are not permanent and must be made every three years in order to ensure that the exceptions can reflect changes in the marketplace for copyright materials.⁴⁵⁰

Normally, the proposed exceptions under the rule-making proceeding would be rejected if there is no sufficient evidence of the adverse effects of the prohibition on non-infringing uses or the proposed class cannot be properly characterized as a

⁴⁴⁷ US House Committee Report on the Analysis of H.R. 2281 (1998).

⁴⁴⁸ Ibid.

⁴⁴⁹ Section 1201(a)(1)(B) to (E) of the US DMCA.

⁴⁵⁰ Section 1201(a)(1)(c) of the US DMCA.

class of works.⁴⁵¹ The term ‘particular class’ of copyright works should be a focused subset of the broad categories of works of authorship prescribed in the Copyright Act.⁴⁵² This term is quite important because any exception issued under the rule-making proceeding will apply to the particular class of works but not to the TPM that protects them.⁴⁵³ This means that a user could not circumvent the TPM used to protect a class of exempted works in order to access a different class of works that remains subject to the prohibition.⁴⁵⁴

Similar provisions on rule-making proceeding also appear in most of the FTAs. For example, Article 17.7(5)(d)(i) of the Chile-US FTA provides that a party may establish the exceptions when an actual or likely adverse effect on non-infringing uses with respect to a particular class of works or exceptions to copyright with respect to a class of users is demonstrated or recognized through a legislative or administrative proceeding established by law provided that such exception adopted in reliance upon this Article can only have effect for a period of not more than three years from the date of conclusion of such proceeding. Likewise, Article 16.4(7)(f)(iii) of the Singapore-US FTA allows each party to formulate the exception under the rule-making proceeding by stipulating that each party must confine exceptions to the TPM provisions when an actual or likely adverse impact on such non-infringing uses with respect to such particular class of works is credibly demonstrated in a legislative or administrative proceeding, provided that any exception adopted in reliance on this clause will have effect for a period of not more than four years from the date of conclusion of such proceeding. A similar provision

⁴⁵¹ Besek 2004, at 406.

⁴⁵² US Senate Report on DMCA No. 105-190 (1998).

⁴⁵³ US House Committee Report on the Analysis of H.R. 2281 (1998).

⁴⁵⁴ Ibid.

also appears in Article 17.3(7)(a)(viii) of the Australia-US FTA. Interestingly, although most FTAs allow the party to create exceptions under the rule-making proceeding, such exceptions may be in effect for different periods depending on each FTA. For instance, the exceptions issued under rule-making proceeding provisions in the Singapore, Australia, and Dominican Republic-Central America⁴⁵⁵ FTAs can be in effect for a period of not more than four years from the date of conclusion of such proceeding but those issued under the rule-making proceeding provisions in the Chile, Morocco⁴⁵⁶, and Oman⁴⁵⁷ FTAs can only be in effect for a period of not more than three years from the date of conclusion of such proceeding, which is exactly the same period as those in the DMCA.

Besek observes that the rule-making proceeding serves as a useful instrument in two aspects: first, it provides exceptions in circumstances where the TPM becomes an obstacle to non-infringing uses; and second, it acts as a ‘check’ on the copyright owners who know that their works will be subject to exceptions if they do not provide alternative means for exercising non-infringing uses.⁴⁵⁸ Hence, the rule-making proceeding is important in reconciling the conflict between non-infringing uses under the copyright exceptions and the prohibition on the circumvention of the TPMs. For instance, the Librarian of Congress granted one exception in relation to preservation in its rule-making proceeding of 2003, which allowed the circumvention of computer programs and video distributed in formats that have become obsolete and which require the original media or hardware as a condition of access.⁴⁵⁹ This

⁴⁵⁵ Article 15.5(7)(e)(iii) of the Dominican Republic-Central America-US FTA (DR-CAFTA).

⁴⁵⁶ Article 15.5(8)(d)(viii) of the Morocco-US FTA.

⁴⁵⁷ Article 15.4(7)(d)(viii) of Oman-US FTA.

⁴⁵⁸ Besek 2004, at 447.

⁴⁵⁹ USCO Report on exception to the TPM Provision 2003; See also USCO Report on rulemaking proceeding 2003.

exception facilitates preservation activities by libraries as well as reducing the conflict between the interest of copyright owners in protecting TPMs and the interest of the library in preserving and collecting digital works in the US.

Another example where the rule-making proceeding serves as a useful instrument in solving problems is the circumstance where works, computer programs or databases are protected by malfunctioning or damaged TPMs, which deny authorized users access to copyright works. In this vein, it is necessary to make sure that the owners of copies will not be legally precluded from circumvention if a TPM-protected copy does not function properly because of a defect, damage or malfunction. The US Librarian solves this problem in its rule-making proceeding of 2000 by granting an exception for ‘literary works, including computer programs and databases, protected by access control mechanisms that fail to permit access because of malfunction, damage or obsolescence’.⁴⁶⁰ Under this exception, the interest of the copyright owners would still be adequately protected since the user has already paid for access to the copyright work.⁴⁶¹ Without the rule-making proceeding, there would be more trouble for the users because they may have to purchase the copyright works again or lose access entirely since they cannot circumvent the faulty TPM in order to access the work. Thus, a similar rule-making proceeding would be quite useful in safeguarding the non-infringing uses under the current copyright exceptions in Thailand.

However, the rule-making proceeding exception alone is not enough to guarantee non-infringing uses under copyright exceptions because it is very limited

⁴⁶⁰ ALA Report on Anti-Circumvention Provisions 2008.

⁴⁶¹ Besek 2004, at 404.

in terms of its application. In this vein, it allows the Librarian to create new and additional exceptions to the anti-circumvention provisions but it does not apply or affect potential liability under the anti-trafficking provisions.⁴⁶² This approach of the DMCA also appears in most US FTAs. For example, the TPM provisions in the Singapore, Australia, and Chile FTAs also limit the scope of the application of the exceptions issued under the rule-making proceeding to the prohibition on circumventing access controls.⁴⁶³ This means that the party has no authority to permit the creation or distribution of circumvention devices because the exceptions made under rule-making proceedings can only apply to the anti-circumvention provisions but not to the anti-trafficking one. This approach is likely to be inserted into the prospective FTA between Thailand and the US because the USTR has announced in its website that the US intends to use the Singapore-US FTA as a model for Southeast Asia countries including Thailand.⁴⁶⁴

This limitation of the rule-making proceeding is also recognized by the American Foundation for the Blind (AFB). The AFB stated that the TPM provisions in the DMCA have overridden the exception that permits non-profit organizations to create Braille translations of copyright books for blind persons since these provisions make it impossible to use this exception for technologically-protected e-books. In order to preserve the possibility of using the copyright exceptions, the AFB sought three-year circumvention exceptions under the rule-making proceeding from the US

⁴⁶² Besek 2004, at 393.

⁴⁶³ Article 16.4(7)(f)(iii) of the Singapore-US FTA; Article 17.7(5)(e) of the Chile-US FTA; and Article 17.3(7)(f) of the Australia-US FTA.

⁴⁶⁴ USTR Announcement on Singapore FTA 2009.

Librarian of Congress in both 2003 and 2006.⁴⁶⁵ However, any exception granted is at best only a partial solution because it does not extend to the tools and technologies which are necessary for circumvention for this purpose.⁴⁶⁶ This example shows that the solution provided by rule-making proceedings under the current US approach is not enough to solve the current problems resulting from the impact of the TPM provisions.

Another limitation of the rule-making proceeding under the US DMCA and FTAs is that the provision clearly indicates that the proceeding can only exempt classes of works; so it cannot be applied where all types of works suffer from the same problem. For example, in circumstances where all types of works suffer from malfunctioning or damaged TPMs, it is beyond the authority of the Librarian to exempt all of them because the provision clearly indicates that the rule-making proceeding can only exempt classes of works. This example clearly shows that the rule-making proceeding alone is not enough to solve the problem about the TPM protection preventing non-infringing uses under the exceptions. Thus, it is necessary to find some additional method to ensure that non-infringing use under the copyright exceptions will not be undermined by the TPM provisions.

4.2.2) The specific exceptions to the TPM provisions

This section illustrates that the seven specific exceptions in the DMCA and the FTAs are very useful for Thailand; but they are very limited and narrow, so they cannot effectively prevent the impact of the TPM provisions on non-infringing uses. These seven specific exceptions in the Singapore, Chile, and Australia FTAs are

⁴⁶⁵ AFB Submission 2002; See also AFB Submission 2006; and AFB Information on technology issue 2008.

⁴⁶⁶ Ibid.

modelled after those in the US DMCA. These exceptions are: for non-profit library and educational institutions⁴⁶⁷; for reverse engineering⁴⁶⁸; for encryption research⁴⁶⁹; for preventing the access of minors to inappropriate online content⁴⁷⁰; for the protection of personal privacy⁴⁷¹; for security testing⁴⁷²; and for law enforcement.⁴⁷³ However, the thesis only focuses on the first three specific exceptions above which are all related to education, in order to illustrate that the TPM exceptions relating to education are very narrow and not enough to guarantee non-infringing uses under the copyright exceptions of the Thai CA 1994.

The first specific exception is the exception for non-profit libraries and educational institutions, which allows a non-profit library or educational institution gaining access to a commercially exploited copyright work to make a determination of whether they wish to acquire a copy of that work or not.⁴⁷⁴ This exception will not apply to the conduct of a non-profit library or educational institution which is done for the purpose of commercial advantage or financial gain from the violation of the provision on access controls.⁴⁷⁵ There are several limitations to this exception. For example, it can only be used with the anti-circumvention provisions but cannot be

⁴⁶⁷ Section 1201(d) of the US DMCA; Article 16.4(7)(f)(i) of the Singapore-US FTA; Article 17.7(5)(d)(viii) of the Chile-US FTA; and Article 17.4(7)(e)(vii) of the Australia-US FTA.

⁴⁶⁸ Section 1201(f) of the US DMCA; Article 16.4(7)(e)(i) of the Singapore-US FTA; Article 17.7(5)(d)(ii) of the Chile-US FTA; and Article 17.4(7)(e)(i) of the Australia-US FTA.

⁴⁶⁹ Section 1201(g) of the US DMCA; Article 16.4(7)(e)(ii) of the Singapore-US FTA; Article 17.7(5)(d)(iii) of the Chile-US FTA; and Article 17.4(7)(e)(ii) of the Australia-US FTA.

⁴⁷⁰ Section 1201(h) of the US DMCA; Article 16.4(7)(e)(iii) of the Singapore-US FTA; Article 17.7(5)(d)(iv) of the Chile-US FTA; and Article 17.4(7)(e)(iii) of the Australia-US FTA.

⁴⁷¹ Section 1201(h) of the US DMCA; Article 16.4(7)(f)(ii) of the Singapore-US FTA; Article 17.7(5)(d)(vi) of the Chile-US FTA; and Article 17.4(7)(e)(v) of the Australia-US FTA.

⁴⁷² Section 1201(j) of the US DMCA; Article 16.4(7)(e)(iv) of the Singapore-US FTA; Article 17.7(5)(d)(v) of the Chile-US FTA; and Article 17.4(7)(e)(iv) of the Australia-US FTA.

⁴⁷³ Section 1201(e) of the US DMCA; Article 16.4(7)(g) of the Singapore-US FTA; Article 17.7(5)(d)(vii) of the Chile-US FTA; and Article 17.4(7)(e)(vi) of the Australia-US FTA.

⁴⁷⁴ Section 1201(d) of the US DMCA; Article 16.4(7)(f)(i) of the Singapore-US FTA; Article 17.7(5)(d)(viii) of the Chile-US FTA; and Article 17.4(7)(e)(vii) of the Australia-US FTA.

⁴⁷⁵ Section 1201(d)(3) of the US DMCA.

used as a defence to a claim under the anti-trafficking provisions and it clearly prohibits a non-profit library or educational institution from using or providing any technology, product, service, component, or part, which circumvents a TPM.⁴⁷⁶ Also, the application of this exception in practice is quite limited because it cannot be used for any other purposes other than for the sole purpose of making an acquisition decision.⁴⁷⁷ Also, the exception can apply to a copyright work only if an identical copy of that work is not reasonably available in another form;⁴⁷⁸ further, a copyright work to which access has been gained under this exception cannot be retained longer than necessary to make a determination.⁴⁷⁹ Importantly, the exception cannot apply to a non-profit library or educational institution which is not open to the public or is available only to researchers affiliated with that library or institution. So in order for a non-profit library or institution to qualify for this exception, the collections of that library must be open to the public or available not only to researchers affiliated with that library or institution but also to other persons doing research in a specialized field as well.⁴⁸⁰

The scope of the exception in relation to libraries and educational institutions under the copyright exceptions in the Thai CA 1994 has been narrowed down by the TPM exception for non-profit libraries and educational institutions since the TPM approach in FTAs does not allow the copyright exceptions to apply to the TPM claim. This means that the activities of the library and educational institutions relating to digital content can no longer benefit from the broader scope of the

⁴⁷⁶ Section 1201(d)(4) of the US DMCA; Article 16.4(7)(f)(i) of the Singapore-US FTA; Article 17.7(5)(e)(ii) and (iii) of the Chile-US FTA; and Article 17.4(7)(f)(ii) and (iii) of the Australia-US FTA.

⁴⁷⁷ Section 1201(d)(1) of the US DMCA.

⁴⁷⁸ Section 1201(d)(2) of the US DMCA.

⁴⁷⁹ Section 1201(d)(1) of the US DMCA.

⁴⁸⁰ Section 1201(d)(5) of the US DMCA.

copyright exception for libraries in section 34 and for education institutions in section 32 paragraph 2 but will be displaced by the narrower scope of the TPM exceptions. For example, the copyright exception for reproduction by libraries in section 34 allows libraries, regardless of whether they are private or non-profit, to make a determination of whether they wish to acquire a copy of such works for use in the library without the requirement that the collections of the library must be open to the public or not only available to researchers affiliated with that library. With the US approach in the FTAs, this copyright exception for library use will not be able to apply in the TPM and digital context since it only allows the TPM exceptions to apply for the TPM claim. So the TPM exception which does not allow a non-profit library that is not open to the public to benefit from the exception will be applied to non-infringing uses of the library in the digital context. This means that the non-profit library in the educational institutions which does not open to the public but is only available to their researchers and staff affiliated with that institution will not be able to rely on either the TPM exception or the copyright exceptions. Hence, it is clear that the TPM exceptions are not enough to guarantee that non-infringing uses made by library and educational institutions under copyright exceptions will not be undermined.

The second specific exception is the exception for encryption research.⁴⁸¹ This exception allows a person, who has lawfully obtained a copy of a works or who has made a good faith effort to obtain authorization for such activities, to circumvent a TPM for the sole purpose of identifying or analysing flaws and vulnerabilities of

⁴⁸¹ Section 1201(g) of the US DMCA; Article 16.4(7)(e)(ii) of the Singapore-US FTA; Article 17.7(5)(d)(iii) of the Chile-US FTA; and Article 17.4(7)(e)(ii) of the Australia-US FTA.

encryption technologies for scrambling and descrambling of information.⁴⁸² This exception can cover all activities which are conducted to assist in the development of encryption products or to advance the state of knowledge in the field of encryption technology; but it does not apply to the activity which constitutes copyright infringement.⁴⁸³ The exception not only provides a defence to the anti-circumvention provisions but can also be used as a defence to the claim under the anti-trafficking provisions.⁴⁸⁴ Thus, it is not a violation of the anti-trafficking provisions for a person to develop and employ circumvention devices to circumvent a TPM for the sole purpose of that person performing the acts of good faith encryption research.

In practice, several additional factors must be considered in determining whether the defendant is engaged in good faith encryption research under the exception, such as whether the information or results derived from the encryption research are disseminated in a manner designed to advance the knowledge and development of encryption technology or to facilitate infringement; whether the person is engaged in a legitimate course of study in the field of encryption technology; and whether the person provides the copyright owner of the work to which the TPM is applied with notice of the findings and documentation of the research and the time when such notice is provided.⁴⁸⁵ If the defendant does not meet the requirements, then he cannot rely on the defence under this exception.

⁴⁸² Section 1201(g)(1)(B) of the US DMCA defines the term ‘encryption technology’ as ‘the scrambling and descrambling of information using mathematical formulas or algorithms’.

⁴⁸³ Section 1201(g)(1)(A) and (g)(2) of the US DMCA.

⁴⁸⁴ Section 1201(g) of the US DMCA; Article 16.4(7)(e)(ii) and (f) of Singapore-US FTA; Article 17.7(5)(e)(i),(ii) and (iii) of the Chile-US FTA; and Article 17.4(7)(f)(i),(ii) and (iii) of the Australia-US FTA.

⁴⁸⁵ Section 1201(g)(3) of the US DMCA.

For instance, in the *Reimerdes* decision⁴⁸⁶, the defendant claimed that his activities can be justified under the TPM exception for encryption research, which permits circumvention if the person lawfully obtained the encrypted materials and made a good faith effort to obtain authorization before the circumvention.⁴⁸⁷ However, the court held that the defendant's activities did not fall under this exception because there was no evidence to support the claim that the defendant was engaged or involved in any encryption research. The defendant himself did not create DeCSS which was a program that could crack the copy-protection on DVDs and allow the content of the DVDs to be viewed and copied without paying licensing fees; he only offered it on a website to circumvent CSS. Also, there is no evidence that the defendant made any effort either to obtain authorization from the copyright owners or to provide the results of the DeCSS effort to the copyright owners. Hence, the defendant could not claim under the encryption research exception.

The impact of the TPM provisions on encryption research is still a major concern in the US. Thus, the exception for encryption research is the only specific exception under the DMCA which requires the Register of Copyrights and the Assistant Secretary for Communications and Information of the Department of Commerce to report jointly to the Congress on the impact or effect of the prohibition on such research and the development of encryption technology; the effect on the effectiveness of TPMs designed to protect copyright works; and the effect on the

⁴⁸⁶ *Universal City Studios, Inc. v. Reimerdes* (Eric Corley), 111 F. Supp.2d 294 (S.D.N.Y. 2000).

⁴⁸⁷ Section 1201(g)(2) of the US DMCA.

protection of copyright owners against the unauthorized access to their encrypted copyright works.⁴⁸⁸

Nevertheless, the TPM exception for encryption research in the FTAs seems to undermine non-infringing uses under copyright exceptions by narrowing the scope of the non-infringing uses relating to encryption research permitted under copyright exception. In this vein, the TPM exception for encryption research in the FTAs can only apply to non-infringing good faith encryption activities which are carried out by an appropriately qualified researcher who has legally obtained a copy. The term ‘an appropriately qualified researcher’ in the TPM exception for encryption research appears in most US FTAs.⁴⁸⁹ There is no definition of this term but it can be assumed that not all researchers can benefit from this exception. This again makes the scope of the TPM exception for encryption research narrower than that of the copyright exceptions under the Thai CA 1994. In this vein, neither the exception for computer programs in section 35(1) nor the exception for research and study in section 32 paragraph 2(1) of the Thai CA 1994 limit its scope of application to the an appropriately qualified researcher but can be applied to all researchers in general. Since the US approach in the FTAs does not allow the copyright exception to apply in the TPM context, the narrower scope under the TPM exceptions for encryption research will automatically replace the broader scope under the copyright exception when it comes to encryption research in the TPM context.

⁴⁸⁸ Section 1201(g)(5) of the US DMCA.

⁴⁸⁹ See for example Article 16.4(7)(e)(ii) of the Singapore-US FTA and Article 17.4(7)(e)(ii) of the Australia-US FTA.

The third specific exception is the exception for reverse engineering of computer programs.⁴⁹⁰ Reverse engineering is very significant for developing countries because it serves as an important instrument for technology transfer, since the engineers in these countries will try to disassemble the advanced technological products from developed countries in order to learn about them.⁴⁹¹ The TPM exception for reverse engineering allows a person who has lawfully obtained a copy of a computer program to circumvent a TPM that effectively controls access to that program in order to identify and analyze the elements of the program that have not previously been readily available to the person engaging in the circumvention activity for the sole purpose of achieving interoperability of an independently created computer program with other programs.⁴⁹² The term ‘interoperability’ means the ability of computer programs to exchange information and of such programs mutually to use the information which has been exchanged.⁴⁹³ This exception will only apply to the acts of identification and analysis for the purpose of enabling interoperability with other programs which do not constitute copyright infringement. It excuses the conduct that would not be allowed by both anti-circumvention and anti-trafficking provisions, which means it can be applied as a defence to all claims under the TPM provisions.⁴⁹⁴

However, the TPM exception for reverse engineering of computer programs has the same problem as the TPM exception for encryption research because its

⁴⁹⁰ Section 1201(f) of the US DMCA; Article 16.4(7)(e)(i) of the Singapore-US FTA; Article 17.7(5)(d)(ii) of the Chile-US FTA; and Article 17.4(7)(e)(i) of the Australia-US FTA.

⁴⁹¹ Chander 2006, at 210.

⁴⁹² *Ibid.*

⁴⁹³ Section 1201(f)(4) of the US DMCA.

⁴⁹⁴ Section 1201(f) of the US DMCA; Article 16.4(7)(e)(i) and (f) of the Singapore-US FTA; Article 17.7(5)(e)(i),(ii) and (iii) of the Chile-US FTA; and Article 17.4(7)(f)(i),(ii) and (iii) of the Australia-US FTA.

application in practice could undermine the broader scope of non-infringing uses under the copyright exceptions; the scope of the copyright exception relating to reverse engineering could be replaced by the narrower scope of this exception. In the US, the TPM exception for reverse engineering undermines the copyright exception in relation to reverse engineering of computer programs because prior to the DMCA's enactment, the US Court held that reverse engineering to achieve interoperability of computer programs was a fair use under the copyright exception; but after the enactment of the DMCA, the scope of the copyright exception relating to reverse engineering seems to be limited by the term in the TPM exception.⁴⁹⁵ In this instance, the copyright exception relating to reverse engineering is not restricting its further development to any specific term, but the TPM exception for reverse engineering seems to limit its application to specific terms in section 1201(f) of the DMCA.⁴⁹⁶ Thus, Besek recommends that the reverse engineering exception should be amended in order to ensure that it reflects the scope of the copyright exception as it applies in respect of reverse engineering.⁴⁹⁷ Similarly, Chander also observes that the exception for reverse engineering in the FTAs has the same problem as that of the DMCA since the provision also attempts to narrow the possibilities for reverse engineering by limiting the application of such exceptions to reverse engineering for interoperability.⁴⁹⁸

Another limitation in this exception is that it can only benefit a person who undertook the reverse engineering. In this vein, the exception allows the information acquired through reverse engineering to be made available to others only by the

⁴⁹⁵ *Sega Enterprises Ltd. v. Accolade, Inc.*, 977 F.2d 1510 (9th Cir. 1992).

⁴⁹⁶ Besek 2004, at 453.

⁴⁹⁷ Ibid.

⁴⁹⁸ Chander 2006, at 210.

person who undertook the reverse engineering or who acquired the information through reverse engineering. For instance, in the *Reimerdes* decision⁴⁹⁹, the defendant claimed that his actions should be exempted from liability under the TPM exception for reverse engineering because this exception allowed him to circumvent or employ technological means to circumvent TPM in order to achieve interoperability with another computer program, and that section 1201(f)(3) allowed him to make information acquired through such efforts available to others.⁵⁰⁰ Nevertheless, the court rejected the defendant's claim and held that he could not benefit from this exception because section 1201(f)(3) permits information acquired through reverse engineering to be made available to others only by the person who undertook the reverse engineering or who acquired the information through reverse engineering. But the defendant did not do any reverse engineering: he simply took DeCSS from someone else's website and then posted it on his own website.

Further, the information acquired through a reverse engineering process under this exception can be made available to others only if the person provides such information for the sole purpose of enabling interoperability with other programs.⁵⁰¹ For example, in the *Reimerdes* decision⁵⁰², the defendant did not create DeCSS himself and did not post DeCSS solely to achieve interoperability with Linux⁵⁰³ or anything else. The court pointed out that even the creators of DeCSS could not maintain that their sole purpose for creating DeCSS was to create a Linux DVD player or to achieve interoperability with Linux, because DeCSS was developed and

⁴⁹⁹ *Universal City Studios, Inc. v. Reimerdes (Eric Corley)*, 111 F. Supp.2d 294 (S.D.N.Y. 2000).

⁵⁰⁰ Section 1201(f)(3) of the US DMCA.

⁵⁰¹ *Ibid.*

⁵⁰² *Universal City Studios, Inc. v. Reimerdes (Eric Corley)*, 111 F. Supp.2d 294 (S.D.N.Y. 2000).

⁵⁰³ Linux is a computer operating system designed primarily for the personal computer (PC) but can also be used with a wide range of other systems.

runs under Windows. So the creators of DeCSS knew that DeCSS could be used to decrypt and play DVD movies on both Windows and Linux machines. Hence, the creator of DeCSS himself did not develop the DeCSS solely for the purpose of making a Linux DVD player, although indeed developing a Linux-based DVD player was among his other purposes. The court concluded that the reasons for the development of DeCSS were not relevant in this case because the defendant did not create DeCSS himself; it was clear that the defendant offered the DeCSS on its website to circumvent CSS for any other purposes other than the sole purpose of achieving interoperability with Linux so the reverse engineering exception could not apply in this circumstance.

In Thailand, the CA 1994 does not provide a specific exception for reverse engineering but the Department of Intellectual Property (DIP) indicated in its guidelines for the use of computer programs that reverse engineering could be done as long as it satisfied the requirements in the exception for computer programs in section 35 subsection (1) of the CA 1994, which applies to the use of computer programs for research and study in general. Section 35 stipulates that an act in relation to a computer program for the purpose of research or study will not be considered as an infringement of copyright provided that the purpose is not for profit and the two conditions in section 32 paragraph 1 are complied with.⁵⁰⁴ This means that reverse engineering can normally be allowed if its purpose is for research on or study of the computer program and such act is not for profit. The two conditions in section 32 also apply to this exception so such reverse engineering must not conflict

⁵⁰⁴ Section 35(1) of the CA 1994.

with a normal exploitation of the copyright work and must not be unreasonably prejudicial to the legitimate interest of the copyright owners.

The copyright exception for computer programs in section 35 is very broad so it currently covers any activities that qualify as non-infringing uses for purposes of research and study, including reverse engineering of computer programs. Also, the exception does not limit its scope of application to the person who undertook the reverse engineering but applies to all researchers in general. Importantly, the scope of the exception is very broad because the exception in section 35 covers all researches on or studies of the computer program including its reverse engineering. This is different from the TPM exception which attempts to narrow the possibilities by limiting its application to reverse engineering for interoperability with other programs. Since the scope of the TPM exception for reverse engineering under the prospective FTAs is narrower than the scope of the current computer program exception, it is necessary to ensure that the non-infringing activities permitted under the exception for the purpose of research and study of computer programs will not be limited by the application of the TPM provisions and its exception. In other words, non-infringing uses relating to computer program for the purposes other than for reverse engineering for interoperability with other programs should not be prohibited by the TPM provisions.

The narrow scope of the TPM exceptions relating to education in the DMCA and the FTAs would cause a chilling effect on the research and educational activities since the TPM can be used by the copyright owners to prevent access to and use of

copyright works in the digital context.⁵⁰⁵ Hence, although these three specific exceptions are useful for Thailand, they are not enough to cover all non-infringing uses under copyright exceptions and satisfy legitimate research needs. It is likely that additional provisions are needed in order to ensure that non-infringing uses under copyright exceptions will not be prohibited by the TPM provisions. One possible solution is to allow circumvention for non-infringing uses under the copyright exception in the Thai CA 1994 so that the TPM exceptions can develop with those exceptions under the current Thai copyright law.

4.3) What should be the appropriate legal approach for Thailand?

In the previous section, I have indicated that the US approach contained in the FTAs does not allow copyright exceptions to apply in the TPM context since it only allows the TPM exceptions to apply to the TPM claim. Also the TPM exceptions contained in the prospective FTAs are not enough to prevent the possible impact of the TPM provisions, so the current approach contained in the prospective FTA does not provide a solution to the problem. Thus, I will now consider several approaches in order to find the best way to minimise or reduce the adverse impact of the TPM provisions on non-infringing uses under copyright exceptions and at the same time enable the copyright exceptions to develop together with the TPM exceptions.

The first approach is the recommendation of the Thailand Development Research Institute (TDRI) which suggested the introduction of broad criteria or a general exception like fair use into the prospective TPM provisions. The second approach is the recommendation of the DIP which suggested the introduction of

⁵⁰⁵ Besek 2004, at 430.

more specific exceptions into the prospective TPM provisions in addition to the seven specific exceptions. The final approach is the UK approach in section 296ZE of the CDPA and the EU approach in Article 6(4) of the Copyright Directive. The thesis argues against the first and second approaches and suggests that the UK approach is the best solution to prevent the possible impact on non-infringing uses under copyright exception for Thailand.

The recommendation of the TDRI suggested that the general criteria or fair use approach should be included in the TPM provisions if Thailand is going to sign the FTA with the US. As it states:

‘Exceptions based on the concept of “fair-use” should be introduced into the provisions on the protection of technological measures and rights management information to make them compatible with the general copyright principle.’⁵⁰⁶

This approach took the same position as commentators like Samuelson, who contended that a broad fair use or general purpose exception that permits circumventing access controls for legitimate non-infringing uses is needed in the US.⁵⁰⁷ However, I disagree with the recommendation of the TDRI because such a general exception could make the TPM exceptions unclear and uncertain, which would eventually weaken the prospective TPM regime and reduce the effectiveness of the TPM provisions in Thailand.

With the introduction of the general criteria into the prospective TPM provisions, the TPM exceptions are likely to be uncertain because the users cannot know exactly whether or not their purpose for circumventing the TPM could be

⁵⁰⁶ TDRI Report on the impacts of Thailand-US FTA 2003, at 102.

⁵⁰⁷ Samuelson 1999, at 519-523; See also Koelman 2001, at 2.

exempted under the general criteria or fair use. This is because the concept of ‘fair use’ does not provide a list of exceptions but only four broad criteria for the court to interpret case by case.⁵⁰⁸ Such criteria had never appeared in the Thai copyright exceptions before and the Thai courts seem to be more familiar with specific exceptions rather than general criteria. So the interpretation of such criteria could cause more problems and uncertainty in the same way as happens with the interpretation of the two conditions of the copyright exception in section 32 paragraph 1 of the CA 1994. In other words, the same problem which already happens with the interpretation of the two conditions in section 32 would be likely to happen again in the area of the TPM if the Thai Government introduces the general or fair use approach into the prospective TPM provisions.

This also means the introduction of the general criteria or fair use exceptions in the TPM provisions would make the TPM exceptions inconsistent with the first condition of the three-step test, which is intended to make exceptions more explicit and certain by requiring them to be confined to certain special cases. In this vein, the application of the three-step test in relation to the TPM and RMI is permissible under all US FTAs since these FTAs normally contain the test in the copyright section. Several FTAs indicate that each party can confine limitations or exceptions in relation to TPM and RMI provisions to certain special cases which do not conflict with a normal exploitation of the works and do not unreasonably prejudice the

⁵⁰⁸ Pursuant to section 107 of the US Copyright laws, these four criteria include: 1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes; 2) the nature of the copyright work; 3) the amount and substantiality of the portion used in relation to the copyright work as a whole; and 4) the effect of the use upon the potential market for or value of the copyright work.

legitimate interests of the right-holder.⁵⁰⁹ The note of Article 17.7(3) of the Chile-US FTA clearly states that this provision permits a contracting country to create exceptions and limitations that are appropriate in the digital environment in its domestic laws.⁵¹⁰

The three-step test helps to provide some useful parameters for assessment in creating exceptions to the TPM and RMI provisions in order to ensure that they will not destroy non-infringing uses and legitimate exploitation opportunities under the copyright exceptions. Thus, it is necessary to ensure that the TPM exceptions comply with the three-step test, including the first requirement that the exception must be confined to ‘certain special cases’. The introduction of general criteria into the TPM provisions would bring an opposite result because such criteria would make the application of the TPM exceptions uncertain and hard to predict. With this approach, the TPM exceptions are no longer limited to any certain cases because such general exceptions can potentially be applied in most circumstances as long as all criteria are satisfied. Thus, the recommendation of the TDRI which suggests that the general criteria should be included in the prospective TPM provisions is not the best solution for Thailand.

The second approach is suggested by the DIP in Thailand. It recommended the introduction of additional specific exceptions into the prospective TPM provisions in order to prevent the adverse impact of the TPM provisions on non-infringing uses under copyright exceptions. In this vein, the DIP proposed the insertion of six specific exceptions into the prospective TPM provisions in addition

⁵⁰⁹ Article 16.4(10) of the Singapore- US FTA; Article 17.7(3) of the Chile-US FTA; and Article 17.4(10)(a) of the Australia-US FTA.

⁵¹⁰ The note of Article 17.7(3) in the Chile-US FTA.

to the seven specific exceptions which already exist in the copyright provisions of the FTA. However, only two additional exceptions seem to be related to education. In this vein, the proposed provision of the DIP indicated any act of circumvention of the TPMs should not be deemed a violation provided that the act is one of the following:

- '(4) display by a teacher for the benefit of his teaching provided that the act is not for profit;
- (5) use of the work as part of questions and answers in an examination;...'⁵¹¹

The exception for research and study in general does not appear in the proposed TPM exception of the DIP and also the rule-making proceeding exception which appears in most FTAs does not appear in the proposed exceptions either. The DIP seems to focus only on the insertion of the additional specific exceptions and the seven specific exceptions contained in the FTA. In the absence of the exception for research and study and the rule-making proceeding exceptions, these two additional but limited exceptions under subsection (4) and (5) alone are not enough to guarantee that all non-infringing uses for educational purposes under copyright exceptions can be exempted from the violation of the TPM provision.

For example, the exception in subsection (4) only allows a teacher to circumvent the TPM for the benefit of his teaching but does not cover the act of circumvention done by the educational institutions for the non-infringing purposes under the copyright exceptions. Since only teachers who circumvent the TPM for teaching purposes can benefit from this exception, a researcher or a student who wants to circumvent the TPM for the purpose of research and study cannot be justified under this exception. These researchers and students also cannot rely on the

⁵¹¹ Section 53/3 of the Draft amendment to the Thai CA 1994 (2005).

exception in subsection (5) because it only covers the act of circumvention for the purpose of using the work as part of questions and answers in an examination. So the act of circumvention for purpose of research and study in general cannot be justified under the exception. This means that the act of circumvention for educational purposes other than teaching and examination purposes cannot be justified under the TPM exceptions proposed by the DIP. Although it is undeniable that the approach of the DIP seems to be consistent with the requirement of ‘certain special cases’ in the three-step test⁵¹², and is also more certain than the broad criteria or general exceptions recommended by the TDRI, such an approach cannot entirely guarantee that all non-infringing uses for the educational purposes under copyright exceptions will be exempted from the violation of the TPM provision.

Another problem with the recommendation of the DIP is that the two additional specific exceptions can only apply to the anti-circumvention provisions but not to the anti-trafficking provisions. This is because the draft provision does not add any new specific exception into the anti-trafficking provisions so the exception to the latter still remains the same as those that appeared in the DMCA and the US FTAs. This means that the manufacture and distribution of the circumvention devices capable of enabling non-infringing uses for educational purposes under copyright exceptions is prohibited under the DIP approach. Hence, I suggest that the introduction of additional specific exceptions under the DIP approach seems to be adoptable but some changes and improvements need to be made to the draft provision to prevent the impact of the TPM provisions on non-infringing uses under educational exceptions more effectively.

⁵¹² Article 16.4(10) of the Singapore- US FTA; Article 17.7(3) of the Chile-US FTA; and Article 17.4(10)(a) of the Australia-US FTA.

Since the introduction of the additional specific exceptions under the DIP approach is not enough to solve the problem, I propose that this should be done together with the insertion of a provision providing a procedure for notices of complaint like those in section 296ZE of the UK CDPA 1988. This can ensure that users have the means to benefit from copyright exceptions in the TPM context. However, before considering the CDPA procedure, it is necessary to understand Article 6 of the Copyright Directive of the European Union⁵¹³ because section 296ZE is the result of the implementation of the UK obligation in the Directive's Article 6(4). Pursuant to Article 6, member states must provide adequate legal protection against the act of circumvention of any effective technological measures and the manufacture or distribution of circumvention devices or services.⁵¹⁴ The term 'technological measures' is defined by the Copyright Directive as any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts in respect of works, which are not authorized by the copyright owners of any copyright as provided for by law.⁵¹⁵ The phrase 'as provided by law' implies that the circumvention of the TPM will be permitted if the material is subject to an exception to those rights.⁵¹⁶ This is also supported by Recital 33 of the Copyright Directive, which confirms that a use should be considered lawful where it is authorized by the copyright owners or not restricted by law.⁵¹⁷ In this vein, the Copyright Directive seems to support the concept that the public should have the

⁵¹³ The European Union (EU) adopted Directive 2001/29/EC of the European Parliament and of the Council on the harmonization of certain aspects of copyright and related rights in the information society in 2001. The European Copyright Directive also applies to works covered by related or neighbouring rights and database rights. This is different from the US copyright law which applies only to copyright works.

⁵¹⁴ Article 6(1) and (2) of the European Copyright Directive.

⁵¹⁵ Article 6(3) of the European Copyright Directive.

⁵¹⁶ Esler 2003, at 571.

⁵¹⁷ Recital 33 of the European Copyright Directive.

legal right to circumvent TPM in order to exercise a permitted act under the copyright exception even if the copyright owners attempt to prohibit access to such materials digitally.⁵¹⁸ This approach seems to be contrary to the US approach which states that the copyright exceptions cannot apply and are not relevant to the TPM context.

The Copyright Directive recognises that TPMs may be used to prevent non-infringing uses under copyright exceptions; so it allows the TPM exceptions to develop and link together with the copyright exceptions by requiring member states to ensure that TPMs do not preclude a person from making non-infringing uses under copyright exceptions.⁵¹⁹ Pursuant to Article 6(4) of the Copyright Directive, in the absence of voluntary measures taken by copyright owners including agreements between copyright owners and other parties, the EU member states must take appropriate measures to ensure that copyright owners make available to beneficiaries of certain exceptions the means of benefiting from that exception, to the extent necessary to benefit from that exception and where that beneficiary has legal access to the protected work.⁵²⁰ This provision allows member states to legislate the exceptions into their TPM systems only in the absence of voluntary measures taken by copyright owners to accommodate non-infringing uses under the copyright exceptions. This means that the approach in the Copyright Directive will allow copyright owners who use TPMs on copyright works to conclude voluntary agreements concerning the manner in which the means of benefiting from copyright exceptions will be made available to the users with valid access first. If copyright owners fail to take such measures, then the member states are required to take actions

⁵¹⁸ Esler 2003, at 571.

⁵¹⁹ UK IPO Gowers Review 2006.

⁵²⁰ Article 6(4) of European Copyright Directive.

in order to ensure that the users can benefit from copyright exception or gain lawful access to copyright works.⁵²¹

The Copyright Directive links the TPM provisions to non-infringing uses under copyright exception through Article 6(4) paragraph 1 and 2, which allows the act of circumvention to be done in order to exercise or facilitate non-infringing uses enacted in Article 5. This provides the list of permissible exceptions to copyright infringement in the Copyright Directive.⁵²² In other words, copyright exceptions in Article 5 which are specified in Article 6(4) can be made exceptions to the TPM provision.⁵²³ For example, it allows the specific acts of reproduction by publicly accessible libraries and educational institutions which are not for direct or indirect economic or commercial advantage under copyright exceptions to be exempted from the violation of the TPM.⁵²⁴ Similarly, it allows use for the sole purpose of illustration for teaching or scientific research, provided that the source such as the name of the author is indicated under copyright exceptions to be exempted from the TPM exceptions.⁵²⁵

The approach which allows the copyright exceptions to be linked to TPM provisions can be seen in section 296ZE of the UK CDPA 1988. This section is the result of the implementation of Article 6(4) of the Copyright Directive. Section

⁵²¹ Besek 2004, at 409.

⁵²² Esler 2003, at 574.

⁵²³ The paragraph 1 of Article 6(4) of the Copyright Directive specifically requires the member states to ensure that copyright owners make available the means of benefitting from seven copyright exceptions in Article 5(2)(a), (2)(c), (2)(d), (2)(e), (3)(a), (3)(b) or (3)(e). The paragraph 2 of Article 6(4) allows one exception by requiring the member countries to take such measures in respect of a beneficiary of an exception for private use in Article 5(2)(b). This means that the copyright exceptions in Article 5 which are not specified in Article 6(4) paragraph 1 and 2 cannot be made as the exception to the TPM provision. For instance, the exception for news reporting in Article 5(3)(c) cannot be made as the exception to the TPM provision because it is not listed in Article 6(4) and therefore, a reporter who circumvents the TPM for an important story could be liable even if use of the information was exempted under the copyright exception.

⁵²⁴ Article 5(2)(c) of European Copyright Directive.

⁵²⁵ Article 5(3)(a) of European Copyright Directive.

296ZE provides that where the application of any effective TPM to a copyright work prevents a person from carrying out a permitted act in relation to that work, then that person or a person being a representative of a class of persons prevented from carrying out a permitted act may issue a notice of complaint to the Secretary of State.⁵²⁶ After the receipt of a notice of complaint, the Secretary of State may give the owner of that copyright work such directions as appear to him to be requisite or expedient for the purpose of establishing any voluntary measure or agreement relevant to the copyright work or for the purpose of ensuring that the copyright owners make available to the complainant the means of carrying out the permitted act to the extent necessary to benefit from that permitted act.⁵²⁷ It is a duty of any person to whom a direction is given under this provision to give effect to that direction.⁵²⁸ Such directions may be to establish any voluntary measure or agreement with regard to the copyright works in question, or to ensure that copyright owners or an exclusive licensee make available to the complainant the means of carrying out that permitted act under copyright exception.⁵²⁹

In other words, this approach allows the copyright owners to find a solution to accommodate non-infringing uses under copyright exceptions first. But if copyright owners fail to take such measures to accommodate such non-infringing uses, then the relevant governmental body will take actions to ensure that the users have a mean to benefit from copyright exceptions or gain lawful access to copyright works.⁵³⁰ Since this approach allows the copyright owners to find a solution first, it seems to be consistent with the approach to copyright exceptions described in

⁵²⁶ Section 296ZE(2) of the UK CDPA 1988.

⁵²⁷ Section 296ZE(3)(a) and (b) of the UK CDPA 1988.

⁵²⁸ Section 296ZE(5) of the UK CDPA 1988.

⁵²⁹ MacQueen et al., 2007, at 197; See also MacQueen 2009, at 206.

⁵³⁰ Besek 2004, at 409.

Chapter 2 which suggests that the exception for educational institutions will not apply where there is a relevant licensing scheme in place. In this vein, the approach to educational exceptions aims at encouraging copyright owners to provide licensing schemes for the users; but if the copyright owners fail to provide such a licensing scheme, then the exception for educational institutions will apply in such circumstances.

This approach is not only compatible with the approach to educational exceptions in Chapter 2 but also allows the users to complain to the relevant governmental body if the TPM of the copyright owners technologically interferes with the exercise of non-infringing uses under copyright exceptions, regardless of whether that is under the anti-circumvention or anti-trafficking provisions. Since such provision can be applied to both the anti-circumvention and anti-trafficking provisions, it is better than the approach in the rule-making proceeding in so far as it can only apply to anti-circumvention provisions. This approach will help to reduce the impact of the TPM provisions on non-infringing uses since the TPM exceptions to the anti-trafficking provisions contained in the FTAs are very limited. Like the anti-circumvention provisions, they only allow the use of the devices enabling circumvention of TPMs in limited circumstances which cannot cover all non-infringing use under copyright exceptions. With the approach in section 296ZE CDPA, there is still a possibility that the manufacture and circulation of the circumvention devices capable of enabling non-infringing uses under copyright exception could be allowed. This approach seems to be consistent with the opinion of many commentators who observe that the TPMs together with the restrictions on the circumvention devices not only limit non-infringing uses but also lead to digital

lockup in a society where the users are required to pay each time they view copyright works so they suggest that the solution is to permit circumvention of the TPMs for any non-infringing uses as well as allowing circulation and acquisitions of the devices enabling circumvention of TPMs for non-infringing uses under copyright exceptions.⁵³¹

It is important to note that a significant problem with the complaint procedure of the UK is that it has not been tested yet. Akester points out that although UK users have been prevented and unable to carry out the permitted acts under copyright exceptions as a result of the employment of TPM, they have not used the complaints mechanism.⁵³² Her study indicates that there are still people in the UK who do not know about the complaints mechanism, while some were aware but had not tested it because they were not familiar with it.⁵³³ Some also found it too impractical or onerous to utilise.⁵³⁴ This seems to be consistent with the view of the British Academy which expressed its concern about whether the present 'Notice of Complaint' procedure is an adequate fulfilment of the Copyright Directive's requirements.⁵³⁵ Nevertheless, the UK IPO Report on the second stage of the consultation on copyright exceptions made clear that the current system of submitting a notice of complaint to the Secretary of State in section 296ZE can help to ensure that TPMs do not prevent the operation of certain exceptions, so it does not intend to make any changes to this complaint procedures.⁵³⁶ It was of the view that the EU legislative framework, which promotes the use of voluntary measures to

⁵³¹ Samuelson 1999, at 525-530; See also, Koelman 2001, at 2; and Gasaway 2002, at 1-3.

⁵³² Akester 2009, at 104.

⁵³³ Ibid.

⁵³⁴ Ibid.

⁵³⁵ British Academy Report on Proposed Changes to Copyright Exceptions 2008, at 5.

⁵³⁶ UK IPO Report on Proposed Changes to Copyright Exceptions Second Stage 2009, at 40.

ensure accessibility to certain exceptions, may constrain changes to the current provisions.⁵³⁷ Thus, it concludes that it intends to retain the current system of the notice of complaint procedure.⁵³⁸ Nevertheless, it recognises that the language of the CDPA does not make the complaint procedure as comprehensible as it could be.⁵³⁹ This might be changed after the implementation of a set of web-accessible directions, which will assist complainants and help them to understand the procedure as well as enabling identification of the actions they need to take.⁵⁴⁰ If users believe a formal complaint is necessary, then they can inform the UK IPO in an appropriate manner to allow the complaint to be processed efficiently.⁵⁴¹

Nonetheless, Akester is of the view that although UK IPO has improved the notice of complaint procedures through a model email form available on the IPO website, it may not be enough to solve the problems.⁵⁴² So she recommends two solutions to solve the TPM problems.⁵⁴³ First, the relevant bodies should conduct regular hearings rather than relying on the complaint procedure alone: the US rule-making proceeding seems to be a good model for conducting regular hearings process.⁵⁴⁴ She explains that while the US law also protects TPMs, Congress also set out safe harbour provisions regarding those measures, including a triennial review conducted by the Register's Office in order to ensure that the public have the ability to engage in non-infringing uses under copyright exceptions.⁵⁴⁵ In this aspect, the US Copyright Office will conduct a rule-making proceeding to determine whether

⁵³⁷ UK IPO Report on Proposed Changes to Copyright Exceptions Second Stage 2009, at 4.

⁵³⁸ *Ibid* at 4, 33-34.

⁵³⁹ *Ibid* at 34.

⁵⁴⁰ *Ibid*.

⁵⁴¹ *Ibid*.

⁵⁴² Akester 2009, at 108.

⁵⁴³ *Ibid* at 108-109.

⁵⁴⁴ *Ibid* at 111.

⁵⁴⁵ *Ibid*.

certain classes of works should be exempted from the TPM provisions.⁵⁴⁶ If the ability of a person to make non-infringing uses of that particular class of works is likely to be adversely affected by the TPM prohibition, then the US Librarian of Congress will grant the exceptions to those classes of works but such exceptions are not perpetual and will expire if they are not re-established.⁵⁴⁷ She suggests that EU copyright offices or other appropriate bodies should conduct regular hearings following the US approach in the rule-making proceeding, especially when beneficiaries of the copyright exceptions are found to be adversely affected by TPM in their ability to carry out non-infringing uses under copyright exceptions.⁵⁴⁸ These hearings should take place every three years and the information discovered should be put into the European Commission's report on the application of the Copyright Directive in accordance to the rule in Article 12 of the Directive, which requires the European Commission to submit such a report examining whether acts which are permitted by law are being adversely affected by the use of the TPMs in every three years.⁵⁴⁹

Second, she proposes that the provision should clearly state that where access to works for beneficiaries of copyright exceptions such as libraries, lecturers, students and researchers is not facilitated because of the TPM attached to the works, the provisions of copyright exceptions should prevail over the legal protection of TPMs.⁵⁵⁰ She asserts that this approach would be consistent with the WCT⁵⁵¹ and is in line with the recommendation of the European Commission, which indicates that

⁵⁴⁶ Akester 2009, at 111.

⁵⁴⁷ Ibid.

⁵⁴⁸ Ibid.

⁵⁴⁹ Ibid at 112.

⁵⁵⁰ Ibid at 122 and 107.

⁵⁵¹ Ibid at 124.

only those circumventions of TPMs which constitute an infringement of a right not authorised by law or by the author should be covered.⁵⁵² This will ensure that TPMs would not be protected in the presence of exceptions to copyright. Then, she proposes that Article 6(4) of the Copyright Directive should be amended to set out that where there are no means enabling beneficiaries of copyright exceptions to benefit from them, the protection of privileged exceptions prevails over the protection of TPM regardless of whether or not works are supplied online.⁵⁵³

Akester's recommendations for the EU and UK seem to be consistent with the proposed changes in this Chapter because both also support the use of rule-making proceedings as well as emphasizes that the non-infringing uses under copyright exceptions should not be undermined by the protection of the TPMs but should be exempted from the violation of the TPM provisions. It is likely that the use of the rule-making proceeding in Thailand might come earlier than that of the UK because Thailand will have to implement such provisions after the prospective FTA between Thailand and the US is concluded. With the implementation of these provisions, the relevant governmental bodies in Thailand will have the authority to conduct regular hearings on the problem. This means that the introduction of the complaint procedure into the Thai copyright system, which I previously recommended, would only function as an additional safeguard for non-infringing uses under copyright exception in addition to the provisions on rule-making proceeding and other specific TPM exceptions. Although the complaint procedure has never been used in UK, it is undeniable that such procedure can at least ensure

⁵⁵² Akester 2009, at 123.

⁵⁵³ Akester 2009, at 124; See also UNESCO Report on Copyright Protection and Access to Knowledge 2010, at 16.

that the users will have the means to address their problem especially when the TPMs prevent them from exercising non-infringing uses under copyright exception. Also, it is unlikely that the Thai people will not use the complaint procedure because several annual reports from the DIP in Thailand show many complaints and petitions relating to the copyright issues, such as the misuse of copyright exceptions, practical problems in copyright enforcement, copyright infringement, unfair royalty rates, the unfair collection of royalty fees and so on, have been made and filed with the DIP every year.⁵⁵⁴ But, although the DIP has received many complaints and petitions, it cannot do much to solve the problems because the Thai copyright system does not provide any means to deal with such problems.

Nevertheless, although the proposed change recommends the introduction of both the complaint procedure and rule-making proceeding, it still may not be enough to prevent the impact of the TPM provisions. There is also a need for an ongoing monitoring of the impact of the TPM provisions in Thailand. I suggest that the prospective TPM provisions should include the ongoing monitoring of the impact of the TPM provisions in the Thai education sector. This is because the potential impact of the TPM provisions is still unclear. Even the US and the EU, which have enforced TPM provisions long before Thailand, are also unsure about the impact of the TPM provisions so they too required the ongoing monitoring of such impacts. For example, section 1201(g)(5) of the US DMCA requires the Register of Copyrights and the Assistant Secretary for Communications and Information of the Department of Commerce to report jointly to Congress on the effect of section 1201 on encryption research, technology and encryption measures within one year after the

⁵⁵⁴ DIP Annual Reports 2003 to 2007.

enforcement of the DMCA.⁵⁵⁵ In this aspect, the Report to Congress prepared by the US Copyright Office and the National Telecommunications and Information Administration (NTIA) pursuant to section 1201(g)(5) outlined that every concern expressed about the impact of the TPM provisions in its report was prospective and entirely speculative in nature since some of the exceptions had not fully become operative at the time this report was released.⁵⁵⁶ So it concluded that it is too early to suggest alternative language or legislative recommendations of the DMCA at this time.⁵⁵⁷ Although this report does not seem to be very useful in terms of assessing and identifying the impacts of the TPM provisions, it clearly illustrates that ongoing monitoring of such impact conducted within a one-year period after the enforcement of the provision may not be long enough to identify the actual impact in practice. So, a longer period of time after the enforcement of such provisions might be helpful in identifying the actual impact of such provisions.

Similarly, Article 12(1) of the Copyright Directive emphasizes that the Commission must examine in particular whether Article 6 of the Directive confers a sufficient level of protection and whether acts permitted by law are being adversely affected by the use of TPMs.⁵⁵⁸ It required that forty-two months after the Directive enters into force, and every three years thereafter, the Commission must submit a report on the application of the Directive to the European Parliament and it must examine the application of Articles 5, 6 and 8 in the light of the development of the digital market.⁵⁵⁹ The first report on the application of the Copyright Directive was

⁵⁵⁵ Section 1201(g)(5) of the DMCA.

⁵⁵⁶ Report to Congress: Joint Study of Section 1201(g) of the DMCA (May 2001).

⁵⁵⁷ *Ibid.*

⁵⁵⁸ Article 12(1) of the European Copyright Directive.

⁵⁵⁹ *Ibid.*

released on November 2007.⁵⁶⁰ Although this report does not specifically outline any impact of the TPM provisions on non-infringing uses under copyright exceptions, it indicates that since Article 6(4) leaves a large measure of discretion to member states in selecting appropriate measures to ensure that the TPM provision will not exclude the users from the benefit of copyright exceptions, they seem to take a wide range of different approaches in order to achieve this goal. Most of the member states do not implement the TPM exceptions in Article 6(4) directly but use other methods instead. For instance, Austria, Czech Republic, and the Netherlands leave it up to the executive power to act whenever it becomes necessary while other countries, such as Finland, Denmark, Estonia, Greece, and Hungary, rely on mediation or arbitration proceedings in solving the problem.⁵⁶¹ Some countries, such as Belgium, Germany, Spain, and Ireland, offer recourse to the courts, but others, such as France, rely on specific administrative proceedings with decisions enforceable by means of penalty payments and fines.⁵⁶² Similarly, although the UK approach is the result of the implementation of the obligation under Article 6(4) of the Copyright Directive, it does not directly insert Article 6(4) into the provision but rather relies on the complaints procedure to resolve the impact of the TPMs on non-infringing uses.

In summary, the reform of the educational exceptions and the development of the digital copyright protection relating to TPMs are equally important for Thailand because without the provisions on the protection of the latter, infringers can freely circumvent the TPMs in order to access or use copyright works without paying royalty fees. As a result, copyright owners will have no means of protecting their works in the digital environment. Thus, in order to ensure that educational materials

⁵⁶⁰ CEC Report on the application of the Copyright Directive (2007).

⁵⁶¹ Ibid.

⁵⁶² Ibid.

can be made available online for long-distance purposes with appropriate protection, the introduction of the TPM provisions is very necessary for Thailand. However, it is important to note that there is an ongoing negotiation on the draft of the Anti-Counterfeiting Trade Agreement (ACTA), which might affect my recommendation and the TPM provisions contained in the FTA since the ACTA draft also contains provisions on TPMs.⁵⁶³ In this aspect, the US has been working with several trading partners such as Australia, Canada, the European Union and its 27 member states, Japan, Mexico, Morocco, New Zealand, Singapore, South Korea, and Switzerland, to negotiate a treaty which aims at combating counterfeiting and piracy.⁵⁶⁴ Although Thailand is not a participant in the ACTA negotiation, it is undeniable that the result of the ACTA negotiation may have some impacts on the TPM provisions in the FTA since many of participants in the ACTA negotiations such as Australia, Singapore, and Morocco are countries which have signed FTAs with the US.

The most recent draft of ACTA was released by the US Trade Representative (USTR) on April 2010.⁵⁶⁵ The provision relevant to the issue discussed in this chapter is Article 2.18.5 of the draft, which requires each party to provide adequate legal protection against a violation of a TPM independent of any infringement of copyright.⁵⁶⁶ The draft of Article 2.18.5 contains two legislative options. The first option in this Article provides that each party may adopt exceptions to TPMs so long as they do not significantly impair the adequacy of legal protection of those TPMs or the effectiveness of legal remedies for violations of those TPMs.⁵⁶⁷ If this option is selected to become part of this Article, then it will significantly affect the

⁵⁶³ The Draft of the Anti-Counterfeiting Trade Agreement (April 2010).

⁵⁶⁴ USTR Information on ACTA 2010.

⁵⁶⁵ Ibid.

⁵⁶⁶ Article 2.18.5 of the Draft of the Anti-Counterfeiting Trade Agreement (April 2010).

⁵⁶⁷ Option one in Article 2.18.5 of the Draft of the Anti-Counterfeiting Trade Agreement (April 2010).

recommendation in the thesis which is based on the idea that all non-infringing uses under copyright exceptions should be exempted from the violation of the TPM provisions because this option only allows the exceptions to be adopted to the extent that they do not impair the legal protection of the TPMs.

The second option contained in this Article seems to be more consistent with the approach recommended in the thesis since it provides that each party must provide for measures which would safeguard the benefit of certain exceptions and limitations to copyright in accordance with its legislation.⁵⁶⁸ If this option is chosen as the main text of Article 2.18.5, then the approach in the thesis which supports the idea that all non-infringing uses under copyright exceptions being exempted from the violation of the TPM provisions can be applied easily because this option already requires the party to provide measures to safeguard the benefit of certain exceptions to copyright in accordance with its national legislation. However, it is impossible to continue further discussion about this ACTA draft because the outcome of the negotiations is still unpredictable. On the electronic rights management information (RMIs), the draft of the ACTA also requires each party to provide adequate and effective legal remedies to protect electronic RMIs as well as allowing each party to adopt exceptions to the prohibition against the removal or alteration of RMIs, so long as they do not significantly impair the adequacy of legal protection or effectiveness of legal remedies for violations of those RMIs.⁵⁶⁹ However, this does not have any effect on the RMI provisions or the recommendation related to RMIs in this thesis since the RMI provisions have no conflict with non-infringing uses under copyright exceptions. The issues relating to RMIs will be discussed in the next Chapter.

⁵⁶⁸ Option two in Article 2.18.5 of the Draft of the Anti-Counterfeiting Trade Agreement (April 2010).

⁵⁶⁹ Article 2.18.6 and 2.18.7 of the Draft of the Anti-Counterfeiting Trade Agreement (April 2010).

Chapter 5

Digital copyright protection II: RMIs

The issue of digital copyright protection is also related to the provisions on electronic right management information systems (RMIs). Unlike the TPM provisions, the RMI provisions do not affect or have the problems with non-infringing uses under copyright exceptions since they only focus on information that identifies works and copyright owners. Thus, users can use copyright works for purpose of research and study under copyright exceptions without any problems with the RMI provisions as long as they leave the RMI or any digital information intact on the works that they use. Both the UK and US have introduced a provision to prevent the removal or alteration of RMIs. However, there is no provision under the Thai CA 1994 prohibiting the removal or alteration of the RMIs because at the time the Act was made such technologies were not widely used in the Thai education sector. Hence, it is not yet illegal for infringers in Thailand to remove or alter the RMIs. Nevertheless, all this is going to be changed because the Thai Government is considering signing the prospective FTA with the US and joining the WIPO Copyright Treaty (WCT), both of which contain provisions on the protection of RMIs.

I have already mentioned in Chapters 2 and 3 that the educational exceptions in the Thai CA 1994 do not support the moral right to be recognized as an author of a work under Article 6bis of the Berne Convention since they allow the reproduction and uses of copyright works for educational purposes to be done without sufficient acknowledgment. Hence, in Chapter 3 I recommend insertion of the requirement of sufficient acknowledgement into educational exceptions in the CA 1994. In order to

ensure consistency of approach, I recommend that the insertion of the requirement of sufficient acknowledgement into the educational exceptions recommended in Chapter 3 must be done together with the introduction of the provisions on the protection of RMIs which are also very important in supporting moral rights in the digital context. If the educational exceptions are extended to allow educational institutions and teachers to make copyright materials available online for distance education purposes, the RMIs that can be used to identify copyright owners and track down the infringers in the digital environment will become more important than ever. Harbert believes that the RMI which contains information about copyright owners and the works is very important for distributing works in the digital environment because authors normally rely upon continuing identification in order to build their reputation, careers and income.⁵⁷⁰ Thus, the RMI provision is not only a sufficient source of moral rights but is also an important step towards the recognition of moral rights in the digital environment.⁵⁷¹ With the changes to copyright exceptions and the introduction of the RMI provisions, moral rights to be recognized as a creator of the works can be protected in both hard-copy and digital contexts.

This chapter discusses RMI issues and is divided into three sections. In section 5.1, I consider the definition of RMI and then point out the important function of RMI in protecting moral rights, identifying authors and preventing illegal activities in the digital environment. Section 5.2 examines the standard of the RMI provisions in the US FTAs and illustrates that although the RMI standard in the FTAs is lower than that of the US DMCA, it seems to meet the minimum standard of RMI protection under the WCT. Section 5.3 emphasizes that even though the RMI

⁵⁷⁰ Harbert 2005, at 138.

⁵⁷¹ Schlachter 1997, at 32.

provisions in the FTAs have already met the minimum standard, some changes and clarifications can still be made to such provisions in order to allow them to function more effectively. This section recommends several changes to the provisions in the FTA such as clarifications of the term ‘without authority’, and the insertion of the term ‘electronic RMI’ into the definition of RMI in the FTA.

5.1) The need for the RMI provisions in the digital environment

The electronic rights management information system (RMIs) is formally known as Copyright Management Information (CMI) in the US but in this thesis we call it ‘RMIs’. RMI is information that identifies copyright works, authors and copyright owners but may also include terms and conditions of use associated with the copyright works or the details of a licence already granted, or the information about how a licence can be obtained and what conditions are required.⁵⁷² RMIs may also comprise a hyperlink or link to a central database or websites which contain more information about copyright works, or it might take a form of digital numbers or codes representing information which identify the work, author, copyright owners or information relating to the terms and conditions of use of the work or other subject matter (similar to the ISBN numbers used as the identification system for books).⁵⁷³ Since RMI contains information about copyright works and copyright owners, it is very important for the electronic distribution and the circulating of the works in the digital environment because it facilitates the search for copyright owners and publishers.⁵⁷⁴

⁵⁷² IFPI Report on the protection of RMIs 2003, at 1.

⁵⁷³ Koempel 2005, at 240; See also Nimmer 1999, at 436; CISAC Annual Report 2009; and International DOI Foundation Report on RMIs 1998.

⁵⁷⁴ Gervais 2001, at 87, 89; See also International DOI Foundation Information on DOI system 2010.

RMIs can help copyright owners to protect their exclusive rights and track such illegal activities in the digital environment. Professor MacQueen indicates that RMIs can be ‘tags’ or ‘fingerprints’ included in copies of digital copyright works, enabling them to be traced and identified electronically wherever the work may be in use.⁵⁷⁵ Hence, RMIs can be used to track illegal activities in the digital environment. For example, RMIs such as digital watermarks can be used for evidentiary purposes in order to prove that the copy was derived from an identifiable source rather than being an independent creation, while some RMIs may contain an evidentiary function which aims at proving the alteration of the work, image or other digital content.⁵⁷⁶ Importantly, such illegal activities in relating to the removal and alteration of RMI must be prohibited under the RMI provisions of the Copyright Directive because such activities can undermine the functioning of the European internal market. As Recital 56 states:

‘There is, however, the danger that illegal activities might be carried out in order to remove or alter the electronic copyright-management information attached to it, or otherwise to distribute, import for distribution, broadcast, communicate to the public or make available to the public works or other protected subject-matter from which such information has been removed without authority. In order to avoid fragmented legal approaches that could potentially hinder the functioning of the internal market, there is a need to provide for harmonised legal protection against any of these activities.’⁵⁷⁷

Nevertheless, it is important to note that if such RMIs as watermarks only function as a technique simply affixing the information to the works and providing evidence of alterations but not carrying any identifying information about copyright works, then it could not be protected under the RMI provisions because the RMI only

⁵⁷⁵ MacQueen et al., 2007, at 190; See also MacQueen, 2009, at 205.

⁵⁷⁶ Ourkirk 1999, at 5.

⁵⁷⁷ Recital 56 of the European Copyright Directive.

protects the information about the works, not the technique.⁵⁷⁸ This is because the idea behind protecting the RMI is to protect the information and data itself. The only significant act is the removal or alteration of the identifying information about copyright works. This makes RMI protection different from its TPM counterpart where the technique itself is protected. If the defendant did not remove or alter any information attached to copyright works but only tried to defeat the technique and the protection scheme that affixes such information to digital works, then it would not result in violation of the RMI provision. Hence, RMI such as a watermark which provides evidence of alterations of the works must also include some digital identifying information such as the title of the work, authors, copyright owners, or identifying numbers, in order to be protected under the RMI provisions.⁵⁷⁹

RMI is not only important in protecting exclusive rights of copyright owners and the functioning of the internal market but also necessary in protecting the moral rights of copyright owners. Moral rights are different from exclusive rights which focus on economic advantage of the author, because moral rights aim to protect the dignity of the author even when he is no longer the owner of the copyright. Moral rights generally include the rights of attribution and integrity. Both are recognized under Article 6bis of the Berne Convention, which provides that ‘the author has the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honour or reputation’.⁵⁸⁰ This article has been fully implemented in section 18 of the Thai CA 1994, which provides the protection of

⁵⁷⁸ Grossman 2005, at 366.

⁵⁷⁹ *Kelly v. Arriba Soft Corp.*, 77 F. Supp. 2d 1116 (C.D. Cal 1999).

⁵⁸⁰ Article 6bis of the Berne Convention.

moral rights to all types of copyright works. First, the section recognizes the right of attribution by providing that the author of a copyright work is entitled to identify himself as the author of such copyright works even after the transfer of his exclusive rights in that work to another.⁵⁸¹ The right of attribution is sometime referred to as the right of paternity. This right enables the authors to claim the authorship of their creation and thus oblige others to communicate it under their name. With this right, the author can demand that licensees, assignees and others acknowledge him as the author whenever his works are published or made known to the public. Second, the section recognizes the right of integrity by indicating that the author of a copyright work can prohibit the assignee or any other person from distorting, shortening, adapting or doing anything with the work to the extent that such act would cause damage to the reputation or dignity of the author.⁵⁸² This right entitles authors to oppose any alteration or distortion of their works that prejudices their reputation. With this right, the author can require others to stop such adaptation, distortion or any acts detrimental to his honour or reputation. Section 18 of the Thai CA 1994 also extends the scope of moral right protection after the death of the author by providing that the heir of the author is entitled to enforce moral rights through the entire term of copyright protection.

RMI plays an important role in protecting both the moral right of attribution and the moral right of integrity. For example, the moral right of attribution is protected under the RMI provisions in all US FTAs because by defining the term ‘RMI’ to include the name of the author and the copyright owners, these provisions prohibit the removal of the name of the author and the distribution of copies from

⁵⁸¹ Section 18 of the Thai CA 1994.

⁵⁸² Ibid.

which the author's name have been removed.⁵⁸³ In other words, a right of the author to be named is recognized. Thus, the report of the International Federation of the Phonographic Industry (IFPI) acknowledged that the RMI provision frequently serves as a means of compliance with the moral right of attribution.⁵⁸⁴

Not only does the RMI provision support the moral right of attribution but it also promotes the moral right of integrity in the works against alterations that damage the reputation of the author by ensuring that copies of the work distributed in the digital environment have the same content as the original first publicly released by the author.⁵⁸⁵ In practice, RMIs can be intentionally altered in two ways. The direct way is by changing the text of the information, while the indirect way is by changing the work to which the information applies so that the information no longer accurately describes the work.⁵⁸⁶ These unauthorized alterations to a work's contents can threaten the credibility of both the document and the author's reputation; so the RMI provision is essential in ensuring that information about the works and copyright owners is accurate and reliable.⁵⁸⁷ Importantly, by preventing the distribution of copies from which information has been removed or altered and prohibiting the alteration or removal of the information about the works and copyright owners, the RMI provisions give users confidence in the authenticity of the source of a work and its content.⁵⁸⁸ This is very necessary for the dissemination of the works in the online environment, where the digital content of the works can

⁵⁸³ Ginsburg 2001, at 10.

⁵⁸⁴ IFPI Report on the protection of RMIs 2003, at 1.

⁵⁸⁵ Ginsburg 2001, at 11. See also Dusollier 2003, at 385.

⁵⁸⁶ Section 15(1) of the CA 1994.

⁵⁸⁷ Some commentators suggested that Copyright Office regulations should help to ensure the authenticity of the works by requiring that the RMI must include a statement that the work made available to the public corresponds in content to the work as created and such regulation should require that any subsequent alterations to the work must be disclosed if they are authorized by the copyright owners. See Ginsburg 2001, at 10 and 12.

⁵⁸⁸ IFPI Report on the protection of RMIs 2003, at 1.

easily be changed, mutilated, misappropriated, reproduced and then distributed without the consent of the copyright owner. Without the protection of RMI, the manipulation of information contained in the digital works including the information about the conditions of uses could be done freely and this could lead the users to draw wrong conclusions about permitted uses under licensing agreements.

Nevertheless, although the moral right is recognized by the RMI provisions, its application is not autonomous as ‘a complete and self-supporting moral right’ as per the Berne Convention.⁵⁸⁹ The moral right in the RMI provisions mainly relies and depends on economic right infringement, since most RMI provisions will only apply if the removal or alteration of the RMI facilitates such infringement.⁵⁹⁰ For instance, Article 12 of the WCT requires contracting parties to prohibit unauthorized removal or alteration of RMI when a person knows or has reasonable grounds to know that such removal or alteration will induce, enable, facilitate or conceal an infringement of any right covered by the Treaty or by the Berne Convention.⁵⁹¹ These RMI provisions intend to protect any right covered by the WCT and the Berne Convention, including moral rights, from the removal and alteration of RMI. Similar terms and conditions also appear in Article 7 of the Copyright Directive and the RMI provisions of the US FTAs.⁵⁹² Similarly, section 1202 of the DMCA requires that a person must know or have reasonable grounds to know that his act will induce or

⁵⁸⁹ Dusollier 2003, at 389.

⁵⁹⁰ Ibid.

⁵⁹¹ Article 12 of the WCT.

⁵⁹² Article 7 of the Copyright Directive requires that a person must know or have reasonable grounds to know that such acts facilitate ‘an infringement of any copyright or any rights related to copyright as provided by law or of the sui generis right provided for in Chapter III of Directive 96/9/EC’. Also, most RMI provisions in the US FTAs also require that a person without authority must know or have reasonable grounds to know that such act will facilitate ‘an infringement of any copyright or related right’. (Article 17.4(8)(c) of the Australia-US FTA, Article 16.4(8)(b) of Singapore-US FTA and Article 17.7(6)(b) of the Chile-US FTA).

facilitate ‘an infringement of any right under this title’.⁵⁹³ It is clear that most RMI provisions are tied directly to the existence of a valid right under national copyright laws or international copyright treaties so that they will allow for the removal or alteration of such RMI if the legal protection for such work is non-existent.⁵⁹⁴ Hence, it must be shown to the court that such removal or alteration of the RMI facilitates infringements of copyright or other rights such as moral rights.

If the RMI provision in the US FTAs is implemented in Thailand, this concept will also be applied, which means that such provisions will take effect when there is clear evidence that such removal or alteration of the RMI facilitates infringement of copyright or any other rights under the Thai CA 1994. But, if there is no evidence that such removal or alteration of the RMI facilitates infringement of copyright or any other rights such as moral rights, then there will be no violation of these RMI provisions even if a person wilfully intends to violate moral right principles by removing the RMI identifying the author from the works. Nevertheless, such problems or circumstances could rarely happen in Thailand because the claims for moral right protection in section 18 of the CA 1994 and those of copyright infringement in sections 15 and 27 of the CA 1994 are very broad. So these provisions increase the chance of satisfying the requirement that such act of alteration of RMI must constitute infringement of copyright or other rights under the Copyright Act.

In this aspect, section 15 of the Thai CA 1994 provides that the copyright owner has the exclusive rights of reproduction or adaptation and this section is operated in connection with section 27 which provides that ‘any of the following acts

⁵⁹³ Section 1202(b) of the US DMCA.

⁵⁹⁴ Nimmer 1999, at 436.

against a copyright work without the permission in accordance with Section 15(5) shall be deemed an infringement of copyright: (1) reproduction or adaptation'.⁵⁹⁵ This means that the exclusive right to alteration or adaptation of copyright work resides with the copyright owner since these provisions require the prior permission of the copyright owners before any alteration or adaptation can be done to the copyright works. Such alteration or adaptation of a copyright work could result in copyright infringement under the Thai CA 1994 if the copyright owner did not give prior consent. However, only the copyright owners and their licensees could benefit from the protection under sections 15 and 27; but the authors who already sell their copyright works to others and are no longer copyright owners cannot benefit from these provisions. This means that if the author and the copyright owner are not the same person, then any alteration or adaptation with the prior permission of the latter could not result in copyright infringement under sections 15 and 27. For instance, the author is often not the copyright owner in case of the work created under a commission. Section 10 of the Thai CA 1994 provides: 'copyright in the work created in the course of commission vests upon the employer unless the author and the employer have agreed otherwise'.⁵⁹⁶ In such case, if any alteration is done with the prior permission of the employer who is a copyright owner, then the author cannot rely on copyright infringement provision in sections 15 and 27.

Although alteration with the permission of copyright owners could not result in copyright infringement under sections 15 and 27, the authors can still rely on the moral right provision in section 18. Any alteration or adaptation with the prior permission of copyright owners could still be in breach of the moral right provision

⁵⁹⁵ Section 27(1) of the Thai CA 1994.

⁵⁹⁶ Section 10 of the Thai CA 1994.

in section 18 if it causes damage to the reputation or dignity of the author. This is because section 18 extends the scope of moral rights protection to the period after the transfer of his exclusive rights in that work to another. Consequently, if a person removes RMI such as the author's name from a work, then it will constitute an infringement of moral rights under section 18 and at the same time it will automatically meet the requirement that such act must facilitate an infringement of any rights under the Copyright Act. This also appears in the RMI provisions in most US FTAs even if such act does not facilitate copyright infringement.⁵⁹⁷ Hence, the introduction of the prospective RMI provisions in Thailand will promote the protection of moral rights of attribution and integrity in the digital environment.

5.2) The standard of the RMI provisions

In this section, I point out two important aspects of the RMI provisions in the FTAs. First, the standard of the RMI protection under the US FTAs is lower than the standard of the RMI protection under the US DMCA. Second, although the standard is lower than that of the US DMCA, it is good enough for Thailand because it meets the minimum standard of RMI protection under Article 12 of the WIPO Copyright Treaty (WCT). This standard of RMI protection is relevant for Thailand because all US FTAs require the contracting parties to ratify and implement the WCT as the first international agreement which provided the protection for RMI, aimed at protecting the new technical methods for identification of the work. Importantly, the implementation of the WCT in the US resulted in the DMCA provisions, which were later used as a model for the RMI provisions in most US FTAs.⁵⁹⁸ Similarly, the RMI

⁵⁹⁷ Article 17.4(8)(c) of the Australia-US FTA; Article 16.4(8)(b) of Singapore-US FTA; and Article 17.7(6)(b) of the Chile-US FTA.

⁵⁹⁸ Dusollier 1999, at 299.

provision of the WCT was also embodied in Article 7 of the Copyright Directive and this Directive had been implemented in the UK in section 296ZG of the CDPA 1988. It is likely that the prospective Thailand-US FTA would also require Thailand to ratify the WCT and that the RMI provisions in the prospective Thailand-US FTA are likely to be modelled after one of the previous US FTAs, which come from subsection (b) of section 1202 of the DMCA.

In general, the FTAs divide the RMI prohibition into three parts:

- 1) a person who knowingly removes or alters any RMI should be liable;
- 2) a person who distributes or imports for distribution RMI knowing that the RMI has been removed or altered without authority should be liable;
- 3) a person who distributes to the public, imports for distribution, broadcasts, communicates, or makes available to the public copies of works, knowing that RMI has been removed or altered without authority, should be liable.⁵⁹⁹

In order to be liable under these RMI provisions, a person must act without authority and knowing or having reasonable grounds to know that it would induce, enable, facilitate or conceal copyright infringement.⁶⁰⁰ Although the RMI provisions in most US FTAs were modelled after section 1202 of the DMCA, the standard of the RMI provisions in the FTAs is lower and narrower than that of the DMCA because it only incorporates subsection (b) but not subsection (a) of section 1202. In this vein, the RMI protection in section 1202 of the DMCA contains two important subsections (subsection (a) dealing with false RMIs and subsection (b) dealing with removal or alteration of RMIs).

⁵⁹⁹ Article 17.4(8)(a) of the Australia-US FTA; Article 16.4(8)(a) of Singapore-US FTA; and Article 17.7(6)(a) of the Chile-US FTA.

⁶⁰⁰ Ibid.

Subsection (a) of section 1202 prohibits a person from providing RMI that is false as well as preventing a person from distributing or importing for distribution RMI that is false.⁶⁰¹ In order to be liable under this subsection, such person must act with the intention to induce, enable, facilitate or conceal infringement. This subsection is different from subsection (b) which prohibits the removal or alteration of the RMI without authority in three different ways. First, it prohibits the intentional removal or alteration of RMI such as the creator's name or copyright date from copyright works without the authority of the copyright owner or the law.⁶⁰² Second, it forbids the distribution or importation for distribution of RMI knowing that the RMI has been removed or altered without authority.⁶⁰³ Finally, it prohibits a person from distributing, importing for distribution, or publicly performing works or copies of works knowing that RMI has been removed or altered without authority.⁶⁰⁴ It also emphasizes that liability under this subsection requires that the act of a person must be done with knowledge or with reasonable grounds to know that it will induce or facilitate an infringement.

Since the RMI provisions in the US FTAs are modelled after subsection (b) of section 1202 only, it does not prohibit a person from providing and distributing RMI that is false. This means that the attachment of false information relative to RMI will be in breach of subsection (a) of section 1202 of the DMCA but not be in breach of the RMI provisions in the FTAs. The reason for such a high standard of RMI protection in the US DMCA is because it aims at prohibiting all form of manipulation of RMIs. The International Federation of Phonographic Industries

⁶⁰¹ Section 1202(a)(1) and (2) of the US DMCA.

⁶⁰² Section 1202(b)(1) of the US DMCA.

⁶⁰³ Section 1202(b)(2) of the US DMCA.

⁶⁰⁴ Section 1202(b)(3) of the US DMCA.

(IFPI) in the US observed in its report of 2003 that effective RMI provisions should explicitly mention both ‘the unauthorised removal and alteration of RMI’ as well as ‘the unauthorised addition of information’.⁶⁰⁵ In this vein, the prohibition on the unauthorised addition of information is as important as the prohibition on the unauthorised removal and alteration of RMI, because unauthorised additions could have effect on the copyright owners equivalent to the unauthorised removal and alteration of RMI, since it can mislead the users about the permitted uses and conditions of use as well as discouraging the use of RMI by copyright owners.⁶⁰⁶

However, although the standard of the RMI protection in the FTAs is lower than that of the US DMCA, it seems to be enough because it already meets the minimum standard of the RMI protection under Article 12 of the WCT. For example, the RMI provisions in Article 12 of the WCT do not prohibit the use of false information relative to RMI in the same way as those in the FTAs. Also, the RMI provisions in Article 12 of the WCT provide protection for RMIs in two ways, which also appear in the FTAs. First, they provide protection for RMI against a person, who knowingly and without authority, removes or alters electronic RMI which is associated with a copy of a copyright work or appears in connection with the communication to the public of a copyright work.⁶⁰⁷ This prohibition on the removal and alteration of RMI is very similar to the RMI provisions in the FTAs. Importantly, they contain the same knowledge requirement as the RMI provisions in the FTAs because they also require that in order to be liable under these provisions, a person must know or have reasonable grounds to know that such a removal or alteration of

⁶⁰⁵ IFPI Report on the protection of RMIs 2003, at 2.

⁶⁰⁶ *Ibid.*

⁶⁰⁷ Article 12(1)(i) of the WCT; Section 296ZG(1)(a) and (b) of the CDPA 1988; and Article 7(1) of the European Copyright Directive.

RMI could induce or facilitate an infringement of any copyright or any rights related to copyright as provided by law.⁶⁰⁸ Second, they provide protection for RMI against a person who knowingly and without authority, distributes, imports for distribution or communicates to the public works or copies of works from which electronic RMI has been removed or altered without authority.⁶⁰⁹ In order to be liable under these provisions, a person must know or have reasonable ground to know that such distribution, importation for distribution or communication of works, which the RMI has been removed or altered, would induce or facilitate an infringement of copyright.⁶¹⁰ Importantly, the condition which requires that such RMI must be associated with the copies, or appear in connection with the communication to the public of the work which appears in the definition of the RMI in most US FTAs, also appears in these provisions.⁶¹¹

Nevertheless, these RMI provisions have one thing in common: they do not require the copyright owners to attach RMI to copies of the works. For example, Article 12(2) of the WCT states that RMI means information which identifies the work, the author of the work, or the owner of any right in the work and any numbers or codes that represent such information when any of these items of information is attached to a copy of a work but it does not require that the copyright owners must attach RMI to copies of the works. Similarly, the RMI provisions in all US FTAs state clearly that the provision will not oblige a contracting party to require the owner

⁶⁰⁸ Article 12(1)(i) of the WCT; Section 296ZG(1)(b) of the CDPA 1988; and the final paragraph of Article 7(1) of the European Copyright Directive.

⁶⁰⁹ Article 12(1)(ii) of the WCT; Section 296ZG(2) of the CDPA 1988; and Article 7(1) of the European Copyright Directive.

⁶¹⁰ Article 12(1)(ii) of the WCT; the final paragraph of Section 296ZG(2) of the CDPA 1988; and the final paragraph of Article 7(1) of the European Copyright Directive.

⁶¹¹ Article 17.4(8)(c) of the Australia-US FTA; Article 16.4(8)(b) of Singapore-US FTA; and Article 17.7(6)(b) of the Chile-US FTA.

of any right in the works to attach RMI to copies of the works or to cause RMI to appear in connection with a communication of the work.⁶¹² The WIPO observed that the reason for not creating such an obligation is because it does not want to impose formalities which would impede the enjoyment of rights, and would be against the principle of not requiring formalities for copyright protection.⁶¹³

I would suggest that Thailand follow the standard of RMI protection in the previous FTAs because that already meets the minimum standard under the WCT. If Thailand chooses to follow the US standard in the DMCA by extending the scope of protection to cover a person who provides and distributes the false RMI, it would increase the burden of the enforcement of such provision. The enforcement of the prohibition on the removal or alteration of RMI alone is hard enough for Thailand because the Thai Government does not have enough budget to spend on law enforcement and is currently lacking in expertise on new digital technologies. This is going to be a major problem. One example can be seen from the enforcement of the Computer Crime Act 2007, which appears to be ineffective in practice because the government officer cannot even catch a computer hacker who broke the security protection for the computer database of the Ministry of Information and Communication Technology (MICT) in July 2007.⁶¹⁴ After the incident, the minister of the MICT accepted that the government does not have enough experts and tools to track down computer hackers and also not enough manpower to monitor the security system of the MICT all the time. News about violation of the Computer Crime Act appears in the newspapers regularly and the government is still stuck with finding the

⁶¹² The final paragraph of Article 17.4(8)(c) of the Australia-US FTA; Article 16.4(8)(b) of Singapore-US FTA; and Article 17.7(6)(b) of the Chile-US FTA.

⁶¹³ The Agreed Statement concerning the WIPO Copyright Treaty from Dusollier 2003, at 380.

⁶¹⁴ Treerutkuarkul 2007, at 1-3.

way to enforce this law effectively. Therefore, it is necessary to make sure that the RMI provisions in the prospective FTA will not put more burdens on the Thai Government than necessary to satisfy the standard of RMI protection under the WCT and the average standard under those US FTAs.

5.3) The needs for changes and clarifications of the RMI provisions in the FTA

Although the standard of the RMI protection in the FTAs is good enough for Thailand, some changes and clarifications are still needed in order to allow the RMI provisions to function effectively in practice. Hence, this section recommends that several changes and clarifications should be made to the RMI provisions in the prospective FTA. First, I consider the definition of the RMI in several FTAs and then recommend that the definition of RMI should be changed and clarified in order to ensure that the scope of the RMI provisions is more certain and easier to enforce. Second, I consider the intent and knowledge requirements in section 1202 of the US DMCA and recommend that the intent requirement, which does not appear in the RMI provisions in the FTAs, should be inserted because it can help to narrow the scope of the liability under the RMI provisions. This will make the RMI provision less problematic. Third, I illustrate that the RMI provisions are different from the TPM provisions because they do not have a problem with non-infringing uses under copyright exceptions, and then suggest that the term ‘without authority’ in the RMI provisions in the FTAs should not be interpreted to allow the copyright exceptions to apply in the RMI context because such interpretation would lead to further problems. In this section, I consider the exception to criminal procedures and penalties in the RMI provisions in the FTAs and indicate that this exception is very useful for the

Thai education sector since it can protect the educational institution and non-profit library in Thailand from criminal liability under the RMI provisions, especially at the early stage of the implementation of the FTAs.

5.3.1) Proposed changes to the definition of RMI in the FTA

In order to be liable under the RMI provisions, information which has been removed or altered must fall under the definition of RMI first. In general, most US FTAs seem to define the term RMI in the same way by dividing the concept into three categories: ‘(i) information which identifies a work, performance, or phonogram; the author of the work; the performer of the performance; the producer of the phonogram; or the owner of any right in the work, performance, or phonogram; or (ii) information about the terms and conditions of the use of the work, performance, or phonogram; or (iii) any numbers or codes that represent such information’.⁶¹⁵ A similar definition of RMI can be seen in Article 12(2) of the WCT: ‘information which identifies the work, the author of the work, the owner of any right in the work, or information about the terms and conditions of use of the work, and any numbers or codes that represent such information’.⁶¹⁶

Another similarity is that the second paragraph of the RMI definition in the FTAs requires that in order to be qualified as RMI, any of these items of information should be attached to a copy of the work, performance, or phonogram or appear in connection with the communication or making available of a work, performance, or phonogram to the public.⁶¹⁷ This requirement also appears in the definition of RMI in

⁶¹⁵ The final paragraph of Article 17.4(8)(c) of the Australia-US FTA; Article 16.4(8)(b) of Singapore-US FTA; and Article 17.7(6)(b) of the Chile-US FTA.

⁶¹⁶ Article 12(2) of the WCT.

⁶¹⁷ The final paragraph of Article 17.4(8)(c) of the Australia-US FTA; Article 16.4(8)(b) of Singapore-US FTA; and Article 17.7(6)(b) of the Chile-US FTA.

the WCT which further requires the RMI provision to apply only if ‘any of these items of information is attached to a copy of a work or appears in connection with the communication of a work to the public’.⁶¹⁸ Such requirement also appears in section 1202(c) of the US DMCA which defines the term ‘RMI’ as information conveyed in connection with copies of a work or displays of a work, including in digital form.⁶¹⁹ Hence, all RMI provisions have one thing in common: they will not protect information not considered as RMI and such information is not considered as RMI if a person does not use it in connection with a copyright work. Such information will not be protected by the RMI provisions even though it might be protected under other laws.⁶²⁰

Not only do the definitions of the RMI in the FTAs meet the general standard of the WCT but they also satisfy all recommendations in the IFPI report of 2003, which suggested that the definition must include ‘the required categories of protected information’ such as information on works; information on the identity of the author or copyright owners; or information on the terms and conditions of uses.⁶²¹ Also, the definition should indicate that the information must be attached to a work or appear in connection with any type of use including the communicating or making available to the public.⁶²² Since the RMI definitions in the FTA contain both the required categories of protected information and the requirement that such information must be attached to the work or appear in connection with the use of work, they clearly meet the IFPI’s expected standard. Similarly, Dusollier observes that the scope of

⁶¹⁸ Article 12(2) of the WCT; Similar provision can also be seen in the final paragraph of Article 7(2) of the European Copyright Directive.

⁶¹⁹ Section 1202(c) of the US DMCA.

⁶²⁰ US Senate Report on DMCA No. 105-190 (1998).

⁶²¹ IFPI Report on the protection of RMIs 2003, at 2.

⁶²² Ibid.

these definitions is already broad enough to cover any element identifying the work, the author, copyright owners, the conditions of use and any information about the object, subject, and content of the copyright protection.⁶²³ For example, the phrase ‘terms and conditions of use of the work’ in the definition could include the electronic licences, which have become an essential part of the distribution of the digital copyright works on the internet. The phrase can also cover copyright notices attached to copies of the work or any notice informing the users about their rights, and authorizations or restrictions on use.⁶²⁴ Consequently, the removal or alteration of an electronic licence would result in violation of the RMI provision, as also the distribution of an unauthorized edition or copies of digital works whose licence has been removed or altered.

Nevertheless, although these definitions of RMI in the FTAs meet the standard of the WCT and are already broad enough to cover many types of information on copyright works, there are still some improvements and changes which should be made. Study of the US DMCA gives ideas about how the definition of RMI in the prospective Thailand-US FTA should be improved in order to make the scope of the provision more certain and easier to enforce. In this vein, the definition of RMI in section 1202(c) consists of 8 subsections. Subsection 1 to 6 of section 1202(c) in DMCA contain categories and types of information similar to those in the WCT, but seems to be more specific than any other model since it enumerates an exhaustive list of information to be protected as RMI.⁶²⁵ There are

⁶²³ Dusollier 2003, at 381.

⁶²⁴ Nimmer 1999, at 436; See also Dusollier 2003, at 382.

⁶²⁵ Section 1202(c) of the US DMCA provides that the RMI may constitute any of the following:
1) the information identifying the work including the information in a notice of copyright;
2) the name and other identifying information about that author of the work;

three major differences which make the RMI definition in the DMCA better than any other model.

The first feature is in subsection (7) of section 1202(c) which provides that RMI may constitute identifying numbers or symbols referring to such information or links to such information. Dusollier observes that this subsection, which refers to links to relevant information including hyperlinks as RMI, makes the RMI definition in the DMCA better than those in other models such as the FTAs and WCT.⁶²⁶ He points out that a good construction of the RMI definition should include links, hyperlinks, and any other information that enables, directly or indirectly, the identification of the work, its copyright owner, or the terms of use.⁶²⁷ Thus, I recommend that this feature in subsection (7) of section 1202 (c) of the DMCA should be inserted into the RMI provisions in the prospective FTA in order to ensure that the scope of the RMI provisions can cover links and hyperlinks to relevant information on copyright works as well.

The second feature of the RMI definition in the DMCA which should be inserted in the prospective FTA is in subsection (8) of section 1202(c). This subsection clearly indicates that RMI may include such other information as the Register of Copyrights may prescribe by regulation. This subsection is unique because it empowers the US Copyright Office to prescribe any other information as

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- 3) the name and other identifying information about the copyright owner of the work including the information in a notice of copyright;
 - 4) the name and other identifying information about a performer whose performance is fixed in a work other than an audiovisual work;
 - 5) the name and other identifying information about a writer, performer, or director who is credited in the audiovisual work;
 - 6) terms and conditions for use of the work;
 - 7) identifying numbers or symbols referring to such information or links to such information;
 - 8) such other information as the Register of Copyrights may prescribe by regulation.

See more details in Ourkirk 1999, at 5; and Dusollier 2003, at 384.

⁶²⁶ Dusollier 2003, at 381.

⁶²⁷ Ibid.

RMI by regulation. The provision, which is equivalent to subsection (8), does not appear in the definition of RMI in the WCT or the US FTAs. This function is very useful in term of technological development because it allows the provision to adapt to new RMI technologies in the future. For example, the Register of Copyrights can extend the scope of the RMI provisions to cover new types of identification information or any information which does not get mentioned in the current RMI definition.

However, subsection (8) explicitly excludes information concerning users of works by stipulating that that the Register of Copyrights may not require any information concerning the user of a copyright work unless it is allowed by regulation. This is consistent with the final feature in the first paragraph of section 1202(c), which provides that RMI means any of the following information conveyed in connection with copies of a work including in digital form, ‘except that such term does not include any personally identifying information about a user of a work or of a copy, phonorecord, performance, or display of a work’.⁶²⁸ This means that any information about the use of copyright works or any personally identifying information about a user of a work cannot be considered as RMI and thus, could not be protected under the RMI provisions. For example, watermarks may not qualify as RMI under section 1202 if they include an identifier that links to a specific user or usage information.⁶²⁹

Nevertheless, this useful feature of the DMCA does not appear in the definitions of RMI in the US FTAs such as Singapore, Australia and Chile FTAs. So I recommend that the definition of RMI in the prospective RMI provisions should

⁶²⁸ The first paragraph of Section 1202(C) of the US DMCA.

⁶²⁹ US H.R. Report 105-551 Part 1 (1998).

explicitly exclude any personally identifying information concerning users of works from the scope of the RMI protection in order to protect the privacy interest of the users and consumers. Without this feature, the RMI provisions could potentially undermine individual privacy. As I have mentioned earlier, RMIs help not only in indicating attribution, creation and ownership in copyright works but also in enabling tracing and monitoring of works' usage or information about the users.⁶³⁰ This is based on the ability of RMI to generate and maintain records of consumption behaviour by users.⁶³¹ For example, RMIs can be used to capture a record of what the users actually looked at or copied as well as other information related to users and their identity.⁶³² The information relating to consumption patterns, behaviour and personal preferences of the users which is automatically collected by the technical features of the RMI can be used or sold to someone else.⁶³³ Hence, RMIs could pose an enormous threat to individual privacy and personal data protection.

By emphasizing in the definition that RMI does not include any personally identifying information about a user of a work, the DMCA excludes tracking or usage information from the scope of RMI protection and removes the threat of the RMI to individual privacy.⁶³⁴ This is different from other RMI provisions in the WCT, the Copyright Directive and UK CDPA 1988 which do not exclude information about the usage of copyright works from the definition of RMIs. This does not mean that the privacy and personal information is un-protected in EU and UK. In this aspect, the Copyright Directive also recognized that the RMI could potentially threaten individual privacy and personal data protection, so it refers to the

⁶³⁰ US Senate Report on DMCA No. 105-190 (1998).

⁶³¹ Cohen 1997, at 170.

⁶³² Ibid at 171.

⁶³³ Ibid.

⁶³⁴ US H.R. Report 105-551 Part 1 (1998).

protection of privacy in relation to the RMI in Recital 57. According to this Recital, RMI systems could process personal data about the consumption patterns of protected subject-matter by individuals and allow for tracing of online activity, so it requires that these technical means, in their technical functions, should incorporate privacy safeguards in accordance with the Personal Data Protection Directive (PDP Directive).⁶³⁵ This is also consistent with Article 9 of the Copyright Directive which states that ‘this Directive shall be without prejudice to provisions concerning in particular...data protection and privacy...’.⁶³⁶ Recital 57 and Article 9 make clear that RMI provision must respect the PDP Directive, which protects personal data such as name, address, identification numbers and personal information against unlawful processing.

Pursuant to the PDP Directive, if information is collected without the consent of the users, then it is in breach of the Article 7, which provides that personal data may be processed only if the data subject has unambiguously given his consent.⁶³⁷ This PDP Directive is implemented in the UK as the Data Protection Act (DPA) 1998. Although the PDP Directive and the UK DPA guarantee the right to privacy of users in the online environment, there is nothing in these laws that enables the users to remove RMI even if it is necessary for protecting their personal data or individual privacy. These UK laws could impose some limitations to the RMI provisions in respect of the privacy concern, but it is likely that the RMI system which allows for the tracing of online behaviour and consumption patterns of individuals could still be protected under the RMI provisions.

⁶³⁵ Recital 57 of the Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and the free movement of such data.

⁶³⁶ Article 9 of the European Copyright Directive.

⁶³⁷ Article 7(a) of the PDP Directive.

In contrast, the US has no comprehensive data protection legislation.⁶³⁸ This also causes a problem for the US because the introduction of the PDP Directive has restricted the ability of US organisations to engage in transactions with their European counterparts since it prohibits the transfer of personal data to non-European Union nations that do not meet the European ‘adequacy’ standard for privacy protection.⁶³⁹ Consequently, the US Department of Commerce developed the ‘safe harbour’ system in consultation with the European Commission and this system offers a method by which US organisations can comply with the Directive, approved by the EU in 2000.⁶⁴⁰ However, the decision by US organizations to enter the safe harbour is entirely voluntary and the Department of Commerce maintains a list of the organizations that comply with the safe harbour’s requirements.⁶⁴¹ The situation in Thailand is very similar to the US. Currently, although Thailand has the Official Information Act 1997, it only provides data protection to information or data in the possession of the Thai government authorities.⁶⁴² This means that there is no specific law or regulation on data protection for the private sector.⁶⁴³

However, it is likely that Thailand will follow the EU and UK approaches on data protection. Currently, there is a draft law on ‘Data Protection’ which has already been approved by the Council of State and is being processed in the Thai Parliament.⁶⁴⁴ The Thai Government attempts to introduce this law because Thailand has been faced with numerous data privacy threats such as the sale of personal

⁶³⁸ EC Information on History of Data Protection in the United States 2005; See also US Export Information on Safe Harbour Frameworks 2010.

⁶³⁹ EC Information on History of Data Protection in the United States 2005.

⁶⁴⁰ Ibid.

⁶⁴¹ Ibid.

⁶⁴² Raksirivorakul 2008, at 1.

⁶⁴³ Ibid.

⁶⁴⁴ Ibid.

information to businesses or criminals.⁶⁴⁵ Also, the Thai Government clearly indicated that the lack of a data protection law would make Thailand lose opportunities in international business because multinational companies would be unlikely to send or transfer data if the destination country does not have privacy standards equal to their own.⁶⁴⁶ Importantly, since Thailand is an ASIAN member country, it shares a commitment to harmonize its data protection laws by 2015, so it is expected that law will be passed and eventually come into force in the near future.⁶⁴⁷ This Data Protection Act of Thailand will regulate and cover many data protection issues in the Thai private sector, such as the data gathering and re-use potential of data.

However, although Thailand is going to have a Data Protection Act equivalent to the PDP Directive of the EU and the DPA of UK, I still recommend that it is necessary to ensure that the RMI definition should clearly exclude any personally identifying information concerning users of works from the scope of the RMI protection in order to ensure that the provisions will not be misused in the way that poses a threat to the privacy interest of the users and consumers. This means that the definition of RMI will be an additional safeguard in ensuring that individual privacy will not be undermined by the RMI provisions. This will also make the enforcement of the RMI provisions more certain and easier. Thai officers will not need to look at the prospective Data Protection Act since the definition of the RMI itself makes clear that personal and usage information is not considered as RMI and is thus automatically excluded from the scope of RMI protection. Also, there is no

⁶⁴⁵ Leesanguansuk 2010, at 1.

⁶⁴⁶ Ibid.

⁶⁴⁷ Ibid.

reason to prevent the definition of RMI making clear that personal and usage information is excluded from the scope of RMI protection.

Another issue relating to the definition of RMI which needs to be clarified is the term ‘electronic’. Although the RMI provisions in most US FTAs provide a similar definition for RMI, which seems to meet the standard definition of RMI in the WCT, there is one slight difference that is quite significant when it comes to the interpretation of the scope of the RMI provision.⁶⁴⁸ This is that some FTAs do not use the term ‘electronic’ in the definition of RMI, while others clearly limit the scope of the protection by inserting that term. Article 17.4(8)(c) of the Australia-US FTA Agreement uses the term ‘electronic’ in any category of information in the definition of RMI: for example, the phrases ‘electronic information that identifies a work’; ‘electronic information about the terms and conditions’ and ‘any electronic numbers or codes’.⁶⁴⁹ This is different from the Singapore and Chile FTAs which do not refer to the term ‘electronic’ in the definition of RMI at all. They only use ‘information which identifies a work’; ‘information about the terms and conditions’ and ‘any numbers or codes’.⁶⁵⁰ In this vein, the Australia FTA seems to follow the WCT which contains the term ‘electronic’, but the Singapore and Chile FTAs followed the DMCA which does not mention the term ‘electronic’.

Even though it is still unclear why term ‘electronic’ was not inserted into section 1202 and some of the US FTAs in the first place, it is undeniable that the lack results in uncertainty as to whether the RMI provision could apply to non-digital forms of information. Since Congress does not limit coverage to electronic RMI, it

⁶⁴⁸ Article 17.4(8)(c) of the Australia-US FTA; Article 16.4(8)(b) of Singapore-US FTA; and Article 17.7(6)(b) of the Chile-US FTA.

⁶⁴⁹ Ibid.

⁶⁵⁰ Ibid.

makes the scope of the provision hard to predict. The US courts in some decisions have already interpreted the definition of RMI to cover the non-electronic. For example, the court in *McClatchey*⁶⁵¹ stated that the RMI provision could apply to both digital and non-digital forms of information. In this case, the plaintiff took a picture of the United Airlines 93 crash on September 11, 2001 and licensed it for one-use only to news agencies. The defendant took a picture of the plaintiff's photograph and then cropped that picture in order to remove the copyright notice and the plaintiff's name and then distributed the picture to its members. Hence, the plaintiff claimed that the defendant had distributed false RMI and also removed or altered RMI without authority of the copyright owners and thus violated section 1202 (a) and (b) of the DMCA.

The defendant argued that section 1202(a) and (b) of the DMCA is not applicable because the copyright notice of the plaintiff was not in digital form. The court explained that under section 1202, it must determine whether the information allegedly removed 'functioned as a component of an automated copyright protection or management system'.⁶⁵² In this vein, the plaintiff testified that she used the My Advanced Brochures software program on her computer, in a two-step process, to put the title, her name and the copyright notice on all printouts of the photograph. The court was of the view that this technological process came within digital 'copyright management information' as defined in the DMCA. Then, the court referred to the definition of RMI and stated that the term 'RMI' is defined broadly to include any information in the eight categories, not limited to digital form. The court

⁶⁵¹ *McClatchey v. Associated Press (AP)*, No. 3:05-cv-00145-TFM, 2007 WL 776103 (W.D. Pa. Mar. 9, 2007).

⁶⁵² *Ibid.*

held that ‘to avoid rendering those terms superfluous, the statute must also protect non-digital information’.⁶⁵³ The court also found that there was clear evidence that the defendant had the requisite intent to induce copyright infringement because he took a picture of the plaintiff’s photograph and then cropped the image in order to remove the copyright notice and plaintiff’s name before distributing the image to the members. Also there was no clear statement notifying subscribers or members of the defendant that the plaintiff owned the copyright in that image. This appears to be the conduct prohibited by section 1202(b), so the court concluded that the defendant had the requisite intent to induce or facilitate copyright infringement and thus violated section 1202 of the DMCA. This decision makes clear that section 1202 did not only target digital information but also applies to non-digital forms as well. Most US courts have followed this broad approach by interpreting the definition of RMI broadly to cover both digital and non-digital form of information.⁶⁵⁴

In contrast, Article 12 of the WCT and Article 7 of the Copyright Directive require that the RMI has to be in electronic form in order to be protected. Both definition and the list of prohibited activities in Article 7 of the Copyright Directive clearly state that the protection covers only ‘electronic’ RMI. This requirement comes from Article 12(1) and (2) of the WCT, which also prohibit the removal and alteration of ‘any electronic RMI without authority’.⁶⁵⁵ Under this approach, all electronic information is protected but other activities which do not involve electronic information, such as tearing off the title page or the copyright notice of a book or a picture, would not infringe the RMI provisions.

⁶⁵³ *McClatchey v. Associated Press (AP)*, No. 3:05-cv-00145-TFM, 2007 WL 776103 (W.D. Pa. Mar. 9, 2007).

⁶⁵⁴ Dusollier 2003, at 388.

⁶⁵⁵ Article 12 (1) and (2) of the WCT.

It is unclear why the US Congress chose to expand protection beyond electronic RMI because the H.R. reports are silent with respect to the matter, and do not even mention that the WCT limits its application to electronic RMI.⁶⁵⁶ Harbert believes that the limitation to electronic RMI may have slipped under the radar and that even if the term 'electronic' was intentionally removed from the DMCA, there is no reason supporting the removal of the term.⁶⁵⁷ Although the RMI provision does not require that the RMI be in digital form, the protection is intended to protect only such RMI.⁶⁵⁸ The main reason why the RMI provisions focus on the protection of the 'electronic RMI' is because in the digital or online environment, the alteration or removal of RMI could have severe effects with respect to the facilitation of copyright infringement. For instance, some websites like Napster attempted to prevent the trading of copyright files of sound recording but the users intentionally misspelt the names of artists and songs so that the file names would not be blocked or removed by Napster and other users who could guess such common misspellings would easily know how to find and copy them.⁶⁵⁹ This method could be used with movies and software in the electronic environment and would fall under the scope of section 1202(a)(1) because this is the type of behaviour that the section intends to prohibit.⁶⁶⁰ Hence, Harbert suggests that the term 'electronic' should be reinstated into section 1202 in order to limit the application of section 1202 and allow non-electronic forms of RMI to be governed under copyright laws.⁶⁶¹

⁶⁵⁶ US H.R. Report 105-551 Part 1 (1998).

⁶⁵⁷ Harbert 2005, at 135.

⁶⁵⁸ US Senate Report on DMCA No. 105-190 (1998).

⁶⁵⁹ Harbert 2005, at 135.

⁶⁶⁰ Ibid.

⁶⁶¹ Ibid.

In order to ensure that the RMI provision will not apply to non-electronic form of information, I suggest that Thailand should include the term 'electronic' into the definition of RMI in the prospective Thailand-US FTA. This proposed change is acceptable under the standard of RMI protection in the WCT which also uses the term 'electronic RMI' rather than the term 'RMI'. This approach is also acceptable in some of the US FTAs such as the Australia-US one. This approach will also help to reduce the problem of uncertainty of the RMI provision which occurs from the different interpretations such as whether or not the provisions and the definition of the term 'RMI' can be interpreted to covered non-electronic information. Importantly, there is no strong argument supporting the expansion of the scope of the RMI protection to cover non-electronic information. The term 'electronic RMI' is broad enough to cover all RMIs related to the distribution of any copyright works via computers, the Internet and other delivery systems using data or electricity for transmission.⁶⁶²

The question arises of how to deal with the recognition of moral rights in the absence of a *McClatchey*-type case in Thailand. This is because the Court in *McClatchey* held that the RMI provision could apply to both digital and non-digital forms of information and as a result, author information and moral rights can be protected by the RMI provisions in both the digital and non-digital contexts. Thus, without the *McClatchey* case, the RMI provision can only protect moral rights and information about the author which are in digital form. However, this is not a problem for Thailand because unlike the US even if there is no equivalent decision to the *McClatchey* case in Thailand, it does not leave a gap of moral right protection in

⁶⁶² Harbert 2005, at 135.

Thailand. The moral rights provision in Article 18 of the Thai CA 1994 is very broad, so it will provide the protection in non-digital forms. In other words, the moral right provisions under the CA 1994 will deal with the problem of the lack of a *McClatchey*-type case in Thailand.

5.3.2) The need for the inclusion of the intent requirement

I have already mentioned in the previous section that the RMI provisions in Article 12 of the WCT provide protection for RMIs in two ways, as in the US FTAs. First, they provide protection for RMI against a person, who knowingly and without authority, removes or alters RMI⁶⁶³; and second, they provide protection for RMI against a person who knowingly and without authority, distributes, imports for distribution or communicates to the public works or copies of the works from which RMI has been removed or altered.⁶⁶⁴ Both contain the knowledge requirement which requires that in order to be liable under these provisions, a person must know or have reasonable grounds to know that such act could induce or facilitate an infringement of any copyright.⁶⁶⁵ This is the same as the RMI provisions in the FTAs, which also contain a knowledge requirement.⁶⁶⁶ Although this standard of RMI protection in the FTAs seems to meet the standard in the WCT, such provisions can still be improved in order to make the RMI provisions in the FTAs function more effectively. My study of the RMI provisions in the US DMCA suggested that the liability under the RMI provisions in the US FTAs can be narrowed down by inserting the intent

⁶⁶³ Section 296ZG(1)(a) and (b) of the UK CDPA 1988; Article 12(1)(i) of the WCT; and Article 7(1) of the European Copyright Directive.

⁶⁶⁴ Section 296ZG(2) of the UK CDPA 1988; Article 12(1)(ii) of the WCT; and Article 7(1) of the European Copyright Directive.

⁶⁶⁵ Section 296ZG(1)(b) and the final paragraph of section 296ZG(2) of the UK CDPA 1988; Article 12(1)(i) and (ii) of the WCT; and the final paragraph of Article 7(1) of the European Copyright Directive.

⁶⁶⁶ Article 17.4(8)(a) of the Australia-US FTA; Article 16.4(8)(a) of Singapore-US FTA; and Article 17.7(6)(a) of the Chile-US FTA.

requirement in addition to the knowledge requirement into the RMI provisions. This approach will reduce the scope of liability under the RMI provisions because narrower liability means less problems and easier enforcement.

All RMI provisions in the US FTAs are modelled after but slightly different from section 1202(b) of the DMCA because they contain only a knowledge requirement and not the intent requirement.⁶⁶⁷ Section 1202(a) and (b) of DMCA however contain both intent and knowledge requirements. Section 1202(a) use the phrase, ‘no person shall knowingly and with the intent to induce, enable, facilitate, or conceal infringement’.⁶⁶⁸ This intent requirement applies to both subsection (a)(1) (creating or providing false RMI) and subsection (a)(2) (distributing or importing for distribution of false RMI). This is different from subsection (b) of section 1202 of the DMCA which was used as a model for the RMI provisions in all US FTAs and contains the intent requirement only in subsection (b)(1) – ‘intentionally remove or alter any RMI’. This means that the intent requirement does not apply to subsection (b)(2) (distributing or importing for distribution of RMI knowing that the RMI has been removed or altered), or subsection (b)(3) (publicly performing, distributing, or importing for distribution of works or copies of works knowing that RMI has been removed or altered).

According to the H.R. Report of the US Congress, the knowledge requirement functions in combination with the intent requirement in order to limit liability to a person who removes or alter the RMI with intent to induce or facilitate

⁶⁶⁷ Article 17.4(8)(c) of the Australia-US FTA; Article 16.4(8)(b) of Singapore-US FTA; and Article 17.7(6)(b) of the Chile-US FTA.

⁶⁶⁸ Section 1202(a) of the US DMCA.

copyright infringement.⁶⁶⁹ The intent element is focused on how infringement is made and therefore, a person, who knows or has reasonable grounds to know that such removal or alteration of RMI might facilitate infringement, will not be liable unless it has been shown to the court that such a person had the intent to facilitate infringement.⁶⁷⁰ The requirement helps to distinguish intentional from accidental removal or alteration of RMI.⁶⁷¹ For example, if a person makes a backup copy of his favourite album but writes on his copy 'favourite CD Backup' rather than its original title, he is not liable because there is a lack of intent. As Harbert states: 'merely having knowledge that writing false RMI on one's backup CD might somehow facilitate infringement will not expose one to liability, because one has not exhibited an intent to facilitate infringement'.⁶⁷² In contrast, this is different from the WCT and US FTAs which only requires that a defendant must know or have reasonable grounds to know that such acts will facilitate infringement. This means that under the approach in the US FTAs, if a person has knowledge that writing a different title from its original title on a backup copy of his favourite album might facilitate infringement, then he might be liable under the RMI provisions in the FTAs because these provisions only requires the defendant to know or have reasonable ground to know that such acts might facilitate infringement.

In practice, the intent requirement proves very effective in creating a safety zone for users in the US because it is hard to prove that a defendant intends his act to facilitate infringement, while it is much easier to prove that a defendant know or has

⁶⁶⁹ US H.R. Report 105-551 Part 1 (1998).

⁶⁷⁰ Harbert 2005, at 136.

⁶⁷¹ Ibid.

⁶⁷² Ibid at 133-134.

reasonable grounds to know that his act facilitates infringement.⁶⁷³ Hence, plaintiffs often do not claim for the removal or alteration of RMI under section 1202(b)(1). For instance, in the *Kelly* case⁶⁷⁴, the plaintiff claimed that the defendant violated section 1202 by displaying thumbnails of the plaintiff's images without displaying RMIs consisting of standard copyright notices in the surrounding text. Since these notices did not appear in the images themselves, the defendant's search engine did not include them when it indexed the images. Consequently, the images appeared in the defendant's index without the RMI, and any users retrieving the plaintiff's images while using this search engine would not see the RMI. The US court held that section 1202(b)(1) did not apply to this case because the provision only applies to the removal of RMI on a plaintiff's product or original work. The court emphasized that even if section 1202(b)(1) applied, the plaintiff had not offered any evidence showing that the defendant's actions were intentional, rather than merely an unintended side effect of his search engine's operation. Thus, the intent requirement could not be met in this case because the defendant's search engine did not intentionally remove the copyright information and also the search engines displayed the images with a hyperlink to the original website of the plaintiff.

Similarly, in the *Schiffer* case⁶⁷⁵, the defendant falsely named himself as the copyright owner of pictures published in a work entitled '1000 Patterns' and also removed the plaintiff's copyright notices from those pictures. The defendant contended that he did not have the requisite intent necessary for a DMCA violation

⁶⁷³ Harbert 2005, at 136; See also Ginsburg 2000, at 18.

⁶⁷⁴ *Kelly v. Arriba Soft Corp.*, 77 F. Supp. 2d 1116, 1122 (C.D. Cal. 1999), affirmed in part and reversed in part, *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003).

⁶⁷⁵ *Schiffer Publishing, Ltd. v. Chronicle Books, LLC* No. 03-4962, 2004 U.S. Dist. (E.D. Pa. Nov. 12, 2004).

and did not remove any RMI from the plaintiff's photographs. The court denied the plaintiff's claim because it was not shown that the defendant possessed the requisite knowledge or intent as required by section 1202. Significantly, the evidence showed that the defendant knew that the plaintiff had copyright in the book but not in the individual pictures published therein. Hence, the defendant did not have the requisite intent to facilitate copyright infringement. In other words, the court refused to hold the defendant liable under section 1202 because there was no evidence that the defendant knew the plaintiff held copyright to disputed work.

These cases illustrate that although such infringement could be found to exist, the burden of proving that the defendant intends to facilitate infringement is quite hard for the plaintiff.⁶⁷⁶ Thus, the intent restriction helps further to restrict many liability situations that would seem to fall outside the scope of intent requirement. Importantly, such restriction seems to provide some degree of certainty for the users of copyright works in the context of RMI. Harbert states that intent provisions in section 1202 should be maintained because it is an effective tool for promoting certainty for the use of copyright works in the markets.⁶⁷⁷ He explained that if the intent provision excludes acts that fall within socially accepted norms of behaviour from liability and do not involve an attempt to further infringement, then it creates a safety area which helps to promote certainty in the marketplace for the use of copyright works.⁶⁷⁸ He recommended that the intent requirement of section 1202(b)(1) should be extended to the other two subsections of section 1202(b) in

⁶⁷⁶ Ginsburg 2001, at 16.

⁶⁷⁷ Harbert 2005, at 137.

⁶⁷⁸ Ibid.

order to extend additional protections to distributors and ensure some degree of certainty in their marketplace activities.⁶⁷⁹

This recommendation of Harbert can also be applied in the case of Thailand because the insertion of the intent requirement into the prospective RMI provisions would help to narrow down the scope of the RMI provision and make it more certain and therefore, easier to enforce in practice. Since there is no reason why Thai citizens should have broader liability than their US counterparts, I recommend the insertion of the intent requirement in addition to the knowledge one in the prospective RMI provision. This would be useful for Thailand because while the knowledge requirement applies equally to the removal or alteration of RMI as well as the distribution of the copies from which RMI has been altered or removed, the intent requirement provides a further restriction or safeguard to ensure that activities relating to RMI in the Thai education sector will not be subject to legal liability if performed accidentally and innocently.

5.3.3) 'Without authority' and the exceptions

The phrase 'without authority' appears in all RMI provisions in the US FTA, Article 12 of the WCT and section 1202 of the US DMCA. This phrase is quite ambiguous because it raises a question of whose authority is needed to do what would otherwise infringe RMI protection. However, only section 1202 of the US Act makes clear that the term 'without authority' means 'without the authority of the copyright owner or the law'. The provisions in Article 12 of the WCT and the US FTAs do not offer any explanation of the meaning of such phraseology. The main question is whether the term 'without authority' in these provisions refers only to the

⁶⁷⁹ Harbert 2005, at 137.

authority of copyright owners or also includes the authority of the law and so permits uses within copyright exceptions.⁶⁸⁰ There is no clear answer yet, but if only the authority of copyright owners is meant, then the removal or alteration of RMI must always be illegal unless authorized by the copyright owners, regardless of whether the protected work has entered the public domain or is within the scope of the copyright exceptions.⁶⁸¹ If the term ‘without authority’ means without authority of either the copyright owners or the law, the scope of RMI protection would also be limited to copyright provisions such as copyright exceptions. However, Harbert suggests that the context of the definition of RMI in these provisions includes the author of the work and the owner of any right in the work and therefore it could be assumed that a person might need the authority of the author or the holder of any rights that led to the particular distribution or display of the work.⁶⁸²

The main question for Thailand to consider is whether or not the phrase ‘without authority’ in the US FTAs should be interpreted to allow copyright exceptions under the Thai CA 1994 to apply in the context of RMI. The answers to this question can be found in study of the US DMCA. Unlike other RMI provisions, section 1202(b) of the US DMCA clearly provides that no person shall intentionally remove or alter any RMI without the authority of the copyright owner or the law. The term ‘law’ in section 1202(b) does not appear in the WCT or the FTAs, which only contain the phrase ‘without authority’. This means such removal or alteration of RMI by authority of the law could be legally done in the US.⁶⁸³ Although the phrase ‘authority of the law’ is important because it could be interpreted to link with

⁶⁸⁰ Esler 2003, at 572.

⁶⁸¹ Ibid.

⁶⁸² Harbert 2005, at 138.

⁶⁸³ The phrase ‘authority of law’ also does not appear in the European Copyright Directive.

copyright exceptions, its meaning is still unclear since the H.R. reports do not provide any clues as to its intended meaning.⁶⁸⁴ This phrase could be interpreted to allow copyright exceptions to apply in the context of RMI because the permitted act which is allowed under copyright law could be considered as the act done by the ‘authority of the law’. However, there is as yet no case where a court in the US has interpreted the phrase, so it is still unclear whether or not it could be interpreted to bring the copyright exception into the context of RMI.⁶⁸⁵ Nevertheless, if we assume that it could be interpreted to include the copyright exceptions, then removal or alteration of RMI done under the copyright exception would not constitute violation of section 1202.

Nimmer believes that the phrase should not be interpreted to bring the copyright exception into the scope of RMI. He states that although phrase ‘authority of the law’ could be interpreted in the way to enable the copyright exceptions such as fair use to apply in the context of RMI, it could lead to many unanswerable questions. As he puts it:

‘...a new report displays a painting incident to its artist’s obituary. We may assume that the painter’s name will typically be listed in that context, and probably the title as well. But the newspaper or television station running the report may fail to include the name of copyright owner. Does the law as set forth in copyright fair use doctrine vindicate that omission? We may assume for the sake of argument that the display of the copyrighted work itself finds ready shelter under the fair use umbrella. Does that conclusion end the inquiry? Or should there be a further examination focused on whether the decisions to leave out the owner’s name itself qualify as fair? ...Does a different standard apply if the allegation is not deletion of the CMI constituting the owner’s name, but its alteration to list the name of author? Do different standards apply to deletion or alteration not of the owner’s name, but of the work’s title or author’s name, or of the name of a performer? Should section

⁶⁸⁴ Nimmer 2003, at 351.

⁶⁸⁵ Ibid.

1202's reference to "the law" be limited to statutes or other features of the law that themselves affirmatively command materials to be conveyed in a certain format that does not include CMI? If so, what laws fit that paradigm? All these questions – and the hundreds more that will inevitably arise in any real world application of the statute – are left unanswered.⁶⁸⁶

This statement by Nimmer shows that the phrase 'authority of the law' is somewhat problematic in the context of RMI. Importantly, it is clear that the RMI provision in the WCT only contains the phrase 'without authority', not 'without authority of the law', so it does not require the term 'law' to be included. Likewise, the RMI provisions in all previous US FTAs such as those of Australia, Singapore, and Chile only contain the phrase 'without authority'. Hence, without the inclusion of the term 'law', the RMI provision in the prospective Thailand-US FTA would still meet the standard of RMI protection under the WCT. Its inclusion would likely cause more problems and seems to be of no benefit for Thailand.

In order to prevent ambiguity and uncertainty in the RMI provisions, I also suggest that the phrase 'without authority' in the US FTAs should be interpreted in the way which does not allow the copyright exception under the CA 1994 to apply in the context of RMI. Importantly, the RMI provisions in Article 12 of the WCT do not refer to the copyright exceptions and do not contain any exceptions to the RMI provision. As I explained earlier that RMI is not supposed to limit the usefulness of such exceptions since it only focuses on the information that identifies the work and the copyright owners. Users can still use the works for the purpose of research, study or other purposes under copyright exceptions but they must leave the RMI or any digital information intact on the works that they use. In this vein, the RMI provisions

⁶⁸⁶ Nimmer 2003, at 351.

are different from the TPM provisions because they do not have the same problems with non-infringing uses under copyright exceptions.

Nevertheless, the RMI provisions in most FTAs have one exception relating to educational institutions and non-profit libraries: that is, the exceptions to criminal procedures and penalties. Most US FTAs require a contracting party to provide criminal procedures and penalties to apply where any person is found to have engaged wilfully and for purposes of commercial advantage or financial gain in any activities which violate the RMI provisions.⁶⁸⁷ This approach comes from the US DMCA, which provides for civil actions to enforce violations of section 1202, including injunctive relief in section 1203, and at the same time, provides criminal penalties for the violation in section 1204, which under wilful violation of section 1202 could result in penalties of \$500,000 to \$1,000,000 plus 5 to 10 years in prison. However, most FTAs allow the exception to criminal procedures and penalties to be regulated. For example, Article 17.4(8)(a) of the Australia-US FTA allows each party to provide that these criminal procedures and penalties do not apply to a non-profit library, archive, educational institution, or public non-commercial broadcasting entity.⁶⁸⁸

This exception is fairly limited in its scope and application. This approach seems to be consistent with the recommendation of the IIPA, which suggests that any exceptions to the RMI protection should satisfy the requirements in the three-step test.⁶⁸⁹ That recommendation is also consistent with the copyright provisions in all

⁶⁸⁷ Article 17.4(8)(a) of the Australia-US FTA; Article 16.4(8)(a) of Singapore-US FTA; and Article 17.7(6)(a) of the Chile-US FTA.

⁶⁸⁸ Article 17.4(8)(a) of the Australia-US FTA.

⁶⁸⁹ IIPA Report on the Proposed US-Thailand FTA 2004.

US FTAs.⁶⁹⁰ Hence, limiting the application of the exception to certain institutions only satisfies the requirement of being a ‘certain special case’.⁶⁹¹

Not only does this exception satisfy the three-step test, therefore, it is also very useful for Thailand because it can ensure that non-profit libraries and educational institutions will not be affected by the criminal procedure in the RMI provision, especially at the early stage of the implementation of the prospective Thailand-US FTA. The early stage could be more problematic for Thailand because the Thai CA 1994 is not consistent with the current RMI approach in the US FTAs. In this aspect, the RMI provision would potentially have direct impact on the Thai educational sector since most copyright exceptions in the Thai CA 1994 allow the distribution of copyright materials to the student without the requirement of sufficient acknowledgement and where the name of author or work has been removed and altered, as shown in the previous discussion in Chapter 2 and in the section above on RMI and attribution. These copyright exceptions need to be developed and changed in order to make them compatible with the RMI provisions of the future FTA, and I have already made recommendation about how to improve these copyright exceptions in Chapter 2. Nevertheless, before such changes can take place in Thailand, an exception to criminal procedures and penalties contained in the US FTAs will help to ensure that non-profit libraries and educational institutions will not be immediately liable to a criminal prosecution.

⁶⁹⁰ Article 16.4(10) of the Singapore- US FTA; Article 17.7(3) of the Chile-US FTA; and Article 17.4(10) (a) of the Australia-US FTA.

⁶⁹¹ IIPA Report on the Proposed US-Thailand FTA 2004.

Chapter 6

Copyright collecting societies and licensing scheme system

A copyright collecting society (hereinafter 'CCS') is a body created by the copyright law of a state or by private agreements between right-holders under company law so that it can be called a society, organization, association or corporation depending on the system or type of the CCS in each country. Although the CCS can be called by different names in different countries, its functions are always very similar. All CCSs carry on the business of collective administration of copyright for the benefit of copyright owners who appoint it as their agent or otherwise authorize it to act on their behalf in the administration of their rights.⁶⁹² This allows a CCS to enter into licensing agreements with users in order to allow the latter to engage in certain activities that require permission under the copyright legislation. The users are generally commercial entities, governmental agencies or educational institutions such as universities, colleges, schools and so on.

Under the Thai CA 1994, copyright owners have the exclusive rights to reproduce, modify, communicate to the public, rent the original or a copy of the copyright works, and grant licences for the use of their works. Any commercial uses of copyright works require permission from the copyright owners and a licence for such use is usually granted when the users pay a royalty to the copyright owners.⁶⁹³ Copyright owners may authorise the CCS to collect remuneration on their behalf. But the CCSs are not so common in Thailand as elsewhere, and they only exist in the area of musical works.⁶⁹⁴ The system of collection of royalties through the CCS in

⁶⁹² Knopf 2008, at 119.

⁶⁹³ Sitthimongkol 2007, at 75.

⁶⁹⁴ Ibid at 71.

the Thai music area has gone on since 1994 and the numbers of CCSs in this area have been increased from two companies in 1997 to around seventeen at present.⁶⁹⁵ However, no CCS has been established in the Thai education sector yet, so the collection of remuneration in the sector can only be carried out by the individual copyright owners themselves. This means that no blanket licensing system has been used in the Thai education sector. The blanket licence is quite important in the education sector because it allows users to use or gain full access to all works in the entire repertory of the CCS (it normally requires the users to pay an annual fee).⁶⁹⁶ The blanket licence not only saves the users from the paperwork trouble and expense of finding and negotiating licenses with all of the copyright owners but also helps to prevent the users from infringing copyrights of the copyright owners who are members of the CCS.⁶⁹⁷ The lack of a CCS and its licensing scheme seems to be a significant problem because the Thai IP Court has indicated in many decisions on copyright exceptions that the increased numbers of copyright infringements in the Thai education sector and the ineffective protection of copyright result from both the unclear exceptions and the lack of a CCS in this area.⁶⁹⁸ Thus, the reform of the educational exceptions alone cannot completely solve the problem of copyright infringement in the Thai education sector. So I suggest that, in order to solve the problem, not only do the exceptions need to be reformed but also an educational sector CCS needs to be established.

This Chapter divides into two main sections. Section 6.1 indicates that the Thai Government must take the first step to establish a CCS in the Thai education

⁶⁹⁵ Sitthimongkol 2007, at 75.

⁶⁹⁶ Knopf 2008, at 117, 119.

⁶⁹⁷ ASCAP Information on blanket licence 2009.

⁶⁹⁸ The IP&IT Court Decision No. 784/2542 (1999) and the IP&IT Court Decision No. 785/2542 (1999).

sector because such establishment would benefit both users and copyright owners in many different ways. It is also not very likely that the private sector will take the initiative to establish the CCS in the Thai educational sector. The Thai IP courts have encouraged the private sector to establish a CCS to collect the royalty fees in the Thai educational sector in their decisions for a long period of time, but none of the private sector bodies have taken such recommendations seriously. So it is necessary for the Thai Government to take a first step. This section also considers all potential benefits that Thailand might get from the establishment of a CCS in its education sector.

In section 6.2, I recommend that in order to allow the prospective CCS to function effectively, its establishment must be accompanied by the performance of three important tasks. First, the Thai Government must improve the educational exceptions under the Thai CA 1994 in order to support the operation of the CCS. This means the education exceptions should be designed to encourage the copyright owners to participate in the prospective CCS and its licensing schemes, as in the UK. Second, it is necessary to have regulations and a governmental body to control and prevent the CCS from exercising its blanket licensing schemes or its powers in an anticompetitive way. This will involve looking at the practical problems of the CCS in the Thai music area, which currently operate without any legal control, and indicate that the establishment of a CCS without such regulation may cause many problems in the end. This section suggests that the Thai Government should follow the UK approach on controlling the CCS rather than that of the USA. The UK approach seems to be more consistent with the Thai copyright system which currently provides no link between copyright and competition law. Third, I suggest

that in order to maintain the balance of lobbying and bargaining powers between the users and copyright owners, the establishment of the CCS representing the copyright owners in the Thai education sector must be done together with the establishment of organizations or associations representing the users and/or educational institutions.

6.1) The need for a copyright collecting society in the Thai education sector

This section will suggest that the Thai Government should take the first step to establish the CCS in the Thai education sector because the useful functions of the CCS could benefit both the copyright owners and the users in many different ways. Especially, such establishment of the CCS can help to solve the problems mentioned previously in Chapter 2 of the thesis. For instance, it is undeniable that without the CCS system, the copyright would be of little value because the establishment of the CCS and its licensing scheme will help the copyright owners to get better economic return from their investment. Also, it can help to reduce the effect of the non-application of the educational exceptions in the digital environment since the CCS and its licensing scheme will replace the educational exceptions. This is because the Thai Courts have followed the UK approach by holding in several decisions that the exceptions will not apply where there is a licensing scheme available for the users. Importantly, the establishment of the CCS in the Thai education sector would make it easier for long-distance students to access copyright materials.

6.1.1) The benefit of the CCS for users in Thailand

The Thai courts in several decisions on copyright exceptions have recognized the potential benefit of a CCS in helping users to obtain a licence. I have already

discussed in Chapter 2 the Thai IP Court in the IP Court Decision No. 785/2542⁶⁹⁹ which acknowledged that the lack of a CCS and licensing scheme systems in the Thai education sector resulted in an increased quantity of copyright infringement, and suggested that it is necessary to establish ‘a royal collecting organization’ for various kinds of literary work used in teaching and studying.⁷⁰⁰ The request of the IP Court for the establishment of a CCS in the Thai education sector was based on the rationale that this would make it easier and more convenient for users to obtain licences for uses of copyright works. The court found that without a CCS, it is very difficult and inconvenient for users in Thailand to obtain licences because publishers and copyright owners had never appointed any representatives for granting permission to use such works in Thailand.⁷⁰¹ As a result, if a person wants to apply for a licence from the copyright owner in order to make copies legally, it does not appear how he or she should proceed. With such difficulty in obtaining permission from the copyright owner, users have no choice but to reproduce the copyright materials without prior permission from the copyright owner. Consequently, the increased quantity of copyright infringement in the Thai education sector results from difficulty in obtaining permission and the lack of a CCS and licensing scheme systems.

The establishment of a CCS would be a solution to this problem because the fundamental philosophy behind the collective administration of copyright through the CCS is to make it easy to access and more convenient for users who want to use

⁶⁹⁹ The IP&IT Court decision no. 785/2542(1999).

⁷⁰⁰ Ibid.

⁷⁰¹ Ibid.

copyright works in accordance with copyright law.⁷⁰² This useful function of the CCS was acknowledged by the Competition Commission of the UK (then known as the Monopolies and Mergers Commission)⁷⁰³ which stated in a 1988 report that the CCS provides great convenience for the users by guaranteeing the immediate access to copyright works for the users in exchange for the payment of the required royalty fees.⁷⁰⁴

Further, the CCS not only provides great convenience for users but also reduces the costs of obtaining the permissions for the uses of copyright materials. Users can obtain all relevant licences for the use of copyright materials from the CCS without the need to approach and negotiate with each individual copyright owner.⁷⁰⁵ Normally, the process of obtaining the grant of individual licences from the copyright owners is very costly and such costs may often be greater than the actual licence fees paid. This is because users have to go through a step-by-step process, identifying and searching for the copyright owners, negotiating with them and paying the licence fees. For example, prior to the establishment of the Copyright Clearance Center (CCC) in the USA, there were high expenses in obtaining permission for using and photocopying copyright materials such telephone calls, letters, waiting for replies from copyright owners, and being redirected to other copyright owners.⁷⁰⁶ There is also the cost of the user's time. Such expenses were more than the actual value of the copyright material for the particular use requested or the royalty fees that

⁷⁰² Bainbridge 2002, at 82.

⁷⁰³ The Competition Commission (CC) replaced the Monopolies and Mergers Commission (MMC) in 1999. See UKCC Information on the Competition Commission 2010.

⁷⁰⁴ MMC Report on collective licensing 1988, at 7.12.

⁷⁰⁵ Bainbridge 2002, at 82; See also Jehoram 2001, at 135.

⁷⁰⁶ Landry 1996, at 632.

would be charged by the copyright owners for that use.⁷⁰⁷ The CCC changed things and made them easier by aggregating a large volume of pre-authorized and pre-priced materials and at the same time offering a one-stop shop for obtaining copyright permissions from many copyright owners.⁷⁰⁸ Without the establishment of such a CCS in the Thai education sector, users will have to bear with the disproportionate costs of obtaining licences. This will discourage using that particular work or it would result in the illegal use of copyright works without a licence.

The CCS can also offer a more favourable rate of royalty fees for the users. Normally, royalty fees depend on the type of licensing schemes, which could be based on various factors reflecting the value of the works, including the forms of use, whether admission is charged and the overall budget of the user; or it may be set as a percentage of net revenues.⁷⁰⁹ In some types of licensing scheme, the CCS charges royalty fees based on the amount of copying actually done or how frequently works are used, with the royalty rate being higher for the types of licences that charge fees based on the number of copyright works.⁷¹⁰ However, the CCS could also set a price for the use of an entire repertory or portfolio, which is known as a blanket royalty rate.⁷¹¹ This type of licensing scheme requires the users to pay a single price or one remuneration fee to the CCS in exchange for allowing them to access the entire repertory of the CCS.⁷¹² The rate of royalty fees can be calculated on a per capita

⁷⁰⁷ Landry 1996, at 632.

⁷⁰⁸ Ibid.

⁷⁰⁹ Daun 1996, at 238.

⁷¹⁰ Kabat 1998, at 329, at 331; See also Besen 1992, at 393.

⁷¹¹ Merges 1996, at 1310.

⁷¹² Kabat 1998, at 331.

basis which is normally based upon the number of students of the licensee.⁷¹³ This means that the rate does not depend on the number of works that are used or the number of times each work is used; so it is easier for the educational institutions to calculate the estimated expenses and plan for the uses of copyright materials in the future.⁷¹⁴ Thus, the prices under such licences would be cheaper and more acceptable for the users and educational institutions.

6.1.2) The benefit of the CCS for the copyright owners

As I have explained in Chapter 2, the Thai copyright law and its educational exceptions effectively undermine the possibility of economic return for the copyright owners. So I suggest in this section that the establishment of the CCS in the Thai education sector will help the copyright owners to get a better economic return from their investment than at present because the CCS can manage the uses of copyright materials more effectively than the individual copyright owners in many different ways.

First, in practice, when the copyright owners or authors join the CCS as members, they will normally enter into an agreement with the CCS and give the CCS either an assignment of the rights to be administered or a licence to administer these copyrights. This would enable the CCS to represent the copyright owners and issue licences to those who intend to use the copyright works in the repertories of the CCS. After acquiring authorization from the copyright owners, the CCS can negotiate and offer licences to the users in respect of the works without the need for individual consultation with those copyright owners as regards the terms and conditions on

⁷¹³ Spurgeon 1997, at 234.

⁷¹⁴ Besen 1992, at 385.

which licences are to be granted.⁷¹⁵ This means that the CCSs can conclude licensing agreements with the licensees independently or refuse to grant a licence based on their conditions as to payment and uses. In other words, the CCS is the practical means to get an economic return for the investment of the copyright owners.

In the absence of the CCS in the Thai education sector, Thai authors and copyright owners do not have the practical means and ability to license their works effectively to the users and educational institutions across the country. Presently, they have to rely on individual agreements or licences as the main source to protect their rights. Under an individually negotiated licence, a copyright owner would normally grant the licensee the right to certain work for a particular use for a specified period of time in a defined territory.⁷¹⁶ This method is widely practised in the assessment of the right to reproduction of books and educational materials between the authors and publishing companies in Thailand. Under the Thai legal system, the individual licence is a matter of contract law rather than copyright law.

The problem is that the individual licence or contract is not appropriate to apply in the Thai education sector where there are mass uses of copyright materials occurs on a regular basis. The capacity of individual management is quite limited and ineffective so it cannot guarantee a full economic return for copyright owners. Also, the nature of use in education sector is normally one of continuing exploitation, in which the educational institutions have reproduced the copyright materials every semester. The frequency of exploitation in one educational institution would depend on the numbers of its students and academic staff. Normally, there is continuous demand for access to educational copyright materials online in every library of the

⁷¹⁵ Rosenblatt 2000, at 187.

⁷¹⁶ Daun 1996, at 236.

educational institutions across the country. The uses in these circumstances could not be managed and handled by the individual copyright owners through individual licensing agreements. Even though the educational institutions and users want to obtain licences directly from the individual copyright owners, it is still difficult for them to cope with innumerable copyright owners through individual agreements. On the other hand, there are also many Thai copyright owners who wish to receive royalty fees for the use of their works but could not possibly cope with innumerable users through individual management. In practice, the individual copyright owner does not have enough time to deal directly with each individual licensee and even they do have time, individual management can still be extremely costly for them because they do not have expertise and sufficient financial resources to manage the mass uses and exploitations of their works.⁷¹⁷

In this instance, the establishment of a CCS in the Thai education sector can help to extract the full value of copyright works from their mass uses because the CCS can help to control and manage such uses more effectively by acting as an intermediary organization to connect or link individual copyright owners with the users. Jehoram points out that the establishment of the CCS will be needed in circumstances where the rights cannot be enforced by the individual copyright owners or where individual management is inappropriate because of the large numbers of the uses of works.⁷¹⁸ Normally, the administration of the CCS would be preferable when a large group of copyright works is used by a large group of users in many different ways and at different place and times.⁷¹⁹ The application of the CCS

⁷¹⁷ Gillieron 2006, at 947.

⁷¹⁸ Jehoram 2001, at 135.

⁷¹⁹ Spurgeon 1997, at 233.

system is not only appropriate to manage the set of works that is too large for individual administration but is also more effective than individual administration in administering the rights which are quite small and difficult to manage.⁷²⁰ This is because the CCS has greater ability than individual management in maintaining all relevant information, databases and documentation relating to copyright works and the record of their uses along with the contractual details that enable them to license works as well as identify the interested parties in every work at any time.⁷²¹

Second, the CCS can provide an effective system of royalty fees collection, which being far more effective than individual management, can guarantee better economic return for copyright owners. In Thailand, remuneration for the use of musical works can be directly collected from the users by the individual copyright owners but the copyright owners may alternatively authorise a third party such as the CCS to handle the collection of the royalty fees on behalf of the copyright owners. However, the option to use the service of the CCS will currently only be available to the copyright owners of the musical works not to the copyright owners in other types of works including the literary and educational works. Hence, the copyright owners in the area of literary and educational materials have only one option: that is, to collect the royalty fees directly from the users and educational institutions by themselves. In practice, it is nearly impossible for the individual copyright owner to collect the royalty fees from the users and educational institutions across the country by themselves so, although the uses of educational and copyright materials in the Thai education sector have dramatically increased every year, the copyright owners do not benefit from it.

⁷²⁰ Choe 1994, at 982.

⁷²¹ MMC Report on performing rights 1996, at 5.24; See also Schonning 2000, at 968-969.

The establishment of the CCS in this area may help to solve the problem because the main function of the CCS is to collect royalty fees for the uses of copyright materials from the users or the educational institutions and then distribute these fees among the copyright owners. Normally, the CCS will distribute the remunerations collected from the use of educational materials to the authors and copyright owners in accordance with agreements between the parties after deduction of the expenses incurred in the collection of remuneration, administration and so on.⁷²² Although such deduction of the costs is unavoidable in practice, the CCS is still considered as the most effective way to collecting royalty fees and administering copyright because it can effectively reduce and lower the overall costs of administration for the copyright owners. The Report from the Monopolies Commission indicated that management through the CCS is better than individual management because it can keep the administrative costs incurred by the copyright owners at the minimum since they can spread the costs over a large number of copyright owners.⁷²³ Knopf believed that a good CCS will keep its administrative costs as low as possible or at least less than 20 percent of income, with the balance of revenue flowing to its members.⁷²⁴

Third, the CCS can monitor the use of copyright works in both digital and non-digital contexts more effectively than individual management. One of the main functions of the CCS, which is useful in protecting the economic interest of the copyright owners, is the monitoring function of the CCS. In practice, the CCS may monitor the uses of copyright works and then report information on such uses to the

⁷²² Einhorn 2002, at 166; See also Jehoram 2001, at 138.

⁷²³ MMC Report on collective licensing 1988, at 7.12; See also MMC Report on performing rights 1996, at 5.24.

⁷²⁴ Knopf 2008, at 121.

copyright owners who are its members. The Report from the Monopolies Commission indicated that administration by the CCS is generally more effective than individual management. This is because the CCS is in a position to monitor and prevent unauthorised uses of the copyright works on a continuous basis.⁷²⁵ By monitoring such uses, the CCS can ensure that the conditions upon which the licence has been agreed and granted have been fully enforced and there is no breach.⁷²⁶

This function of the CCS is quite necessary for Thailand especially in the area of literary and educational materials, because the publishing companies in Thailand often take advantage of the author or the individual copyright owners by violating the licensing agreement and contract between them. Examples can be seen in several decisions of the Supreme Court. In Supreme Court Decision No. 5456/2549⁷²⁷, the court considered whether a breach of an individual copyright licensing agreement under civil provisions could also constitute the offence of copyright infringement under criminal provisions. In this case, the plaintiff was a famous author who wrote and owns the copyright in a book entitled 'Revolting District Chief'. He licensed the right to publish the book to the defendant, a publisher known as Duangkamol Publishing (2520) Co., Ltd. Under the agreement, the plaintiff only permitted the defendant to make 1,000 copies of the book but the defendant actually made 1,530 copies. This is a common practice by the publishing companies in Thailand. In such a situation, it is hard for the copyright owners to know exactly how many of their books have been published and sold in the market. With this practice, the publishing companies can always gain more profits from the sale of copies exceeding the

⁷²⁵ MMC Report on performing rights 1996, at 5.24.

⁷²⁶ MMC Report on collective licensing 1988, at 7.12.

⁷²⁷ The Supreme Court Decision No. 5456/2549 (2006).

amount agreed in the licence. If the plaintiff in this case did not notice, the defendant would only pay the remuneration fees for the sale of the 1000 copies and ignore the remuneration fees for the extra 530 copies.

The plaintiff in this case wanted to make an example of publishers who often use this method to take advantage of the authors. Thus, the plaintiff decided to file a criminal lawsuit against the defendant for copyright infringement instead of filing a civil lawsuit against the defendant for breach of contract. This was because the plaintiff wanted the defendant to be punished with imprisonment and a heavy fine under the criminal copyright provision of the Thai CA 1994, which provides that copyright infringement is punishable with imprisonment from six months to four years or a fine from 100,000 baht (about 2,000 GBP) to 800,000 baht (about 16,000 GBP) or both imprisonment and fine.⁷²⁸ If the defendant is fined, then half of the fine must be paid to the plaintiff copyright owner.⁷²⁹

The IP Court which acted as the court of first instance for the case found no grounds for a criminal copyright infringement and held the case to be a purely civil one. The plaintiff, dissatisfied with the decision of the IP Court, appealed to the Supreme Court. The Supreme Court held that publishing more copies of the book than agreed upon in the contract or licensing agreement is not only a breach of contract but could also be considered as criminal copyright infringement if the publisher had a criminal intent in doing so. It therefore ordered that the IP Court to conduct a criminal trial.

Although the Supreme Court made clear that a breach of copyright licensing agreement could be considered a criminal copyright infringement, the copyright

⁷²⁸ Section 69 of the Thai CA 1994.

⁷²⁹ Section 76 of the Thai CA 1994.

owners are still at a disadvantage. This is because it is hard for them to check or monitor whether or not the publishing company has published more copies of the book than the amount agreed in the licensing agreement. The technologies related to the monitoring systems and common databases are often expensive and costly to put in place even when they are shared between the members of the CCS; so it is nearly impossible for the individual copyright owner to afford them.⁷³⁰ Also, the technologies related to self-monitoring systems are still facing many problems and therefore, the individual copyright owners cannot totally rely on them. For instance, software programs relating to self-monitoring systems seem to work only within limited database systems and are not readily available on the current market.⁷³¹

I would suggest that the establishment of the CCS in the area of literary and educational materials would reduce the problem because the CCS would have more financial resources and expertise than individual copyright owners. It could afford the significant costs of the installation of these technologies by spreading such expenses among its members and users.⁷³² Thus, it can provide an effective monitoring system helping to prevent the publishing companies from violating copyright licensing agreements or contracts in a way that can hardly be achieved by individual management. Even though the individual copyright owners may have the financial resources to install these technologies, it is unlikely that they will do so. Monitoring technologies are still at the stage of development in Thailand so they are ineffective and the individual copyright owners still lack technical expertise in order to operate and maintain such systems. Also, the benefit gained from having such

⁷³⁰ Gillieron 2006, at 957.

⁷³¹ Choe 1994, at 982.

⁷³² Landry 1996, at 632.

monitoring systems may not cover the costs that the individual copyright owners would have to incur to install such systems and employ technical experts to run them. Hence, if a monitoring system was provided by the CCS in the Thai education sector, it is likely that the individual copyright owners would use this service because it would be cheaper than installing the monitoring system by themselves. This can be seen in the US where the administration fees which copyright owners have to pay to the CCS are much cheaper than the costs of installing the monitoring system and employing technical expertise.⁷³³ Importantly, even though technologies can be used by individuals to track and identify infringers, there is still the need for the CCS to gather all relevant information in order to begin the process of enforcement.⁷³⁴

Further, the CCS can also enforce copyright law against the infringers more effectively than individual copyright owners. The UK report from the Monopolies Commission pointed out that the system of the CCS is better than individual management because it can raise a credible and effective legal threat when copyright is being infringed.⁷³⁵ Many CCSs in the UK and the USA have worked strongly on behalf of copyright owners by taking legal action against infringers in the court.⁷³⁶ Merges has pointed out that copyright owners in the USA join the CCS because the enforcement of copyright by the individuals is ineffective.⁷³⁷ So, even if there is a dispute between the members and the CCS, individual members will not leave the

⁷³³ Gillieron 2006, at 957.

⁷³⁴ Spurgeon 1997, at 240.

⁷³⁵ MMC Report on performing rights 1996, at 5.24.

⁷³⁶ Goldmann 2001, at 429.

⁷³⁷ Merges 1996, at 1311.

CCS because without it, there would be less remuneration for them and the enforcement of their rights would be much harder.⁷³⁸

The reason why most CCSs can enforce copyright more effectively than individual copyright owners is because they have resources and facilities such as finance, expertise and personnel far beyond those of individuals. When users refuse to pay royalty fees and copyright has been infringed, legal action will be seriously taken by the CCS against the infringer. This will make users respect copyright in the particular category represented by the CCS in the future, so not only does it benefit the copyright owners whose rights have been infringed in the past but also all members of the CCS. Currently, copyright owners in the Thai education sector cannot enforce their rights effectively and even the large publishing companies in Thailand still face difficulties in enforcing their rights against countless infringers throughout Thailand. Thus, the establishment of the CCS would provide the copyright owners of educational materials with the practical means to enforce and protect their rights.

6.1.3) The benefit of the licensing scheme system provided by the CCS

As already discussed in Chapter 2, the current educational exceptions under the Thai CA 1994 cannot properly safeguard the economic interest of the copyright owners because they allow multiple reproductions to be done freely and there is no clear limitation as to the amount allowed to be reproduced. Presently, education institutions rely on these exceptions and reproduce copyright materials without paying royalty fees. This approach clearly impairs the economic interest of the

⁷³⁸ Merges 1996, at 1311.

copyright owners. I contend in this section that the establishment of a CCS which offers a blanket licensing scheme will help to solve the problem.

This is because a blanket licensing scheme can apply to multiple reproductions of educational materials by the educational institutions. Blanket licences are used by the CCSs in many developed countries as the main method to administer rights to photocopy or reproduce books, articles and other materials in the education sector because such systems are geared to mass uses of copyright works.⁷³⁹ Importantly, the blanket licence offered by the prospective CCS will solve the problem of the copyright exception in respect of multiple reproductions because it would substitute for or replace the copyright exceptions. Presently, the US court in the *Princeton University Press* case⁷⁴⁰ and the UK courts in the *UK Universities* case⁷⁴¹ strictly followed the statute by ensuring that the copyright exceptions do not apply if there is a CCS and its licensing scheme system in place for collecting remuneration, yet users still reproduce copyright works without paying for remuneration.

In the *Princeton University Press* case⁷⁴², the plaintiff brought a copyright infringement action against a photocopy shop that prepared and sold ‘coursepacks’ to university students without paying royalties or permission fees. The defendant claimed that the preparation of ‘coursepacks’ for university students was fair use. Nonetheless, the court held that the defendant’s copying of excerpts from copyright works in the preparation of ‘coursepacks’ for use by students taking university courses was commercial use and such action diminished the potential market value

⁷³⁹ Daun 1996, at 238.

⁷⁴⁰ *Princeton University Press v. Michigan Document Services Inc.*, 99 F. 3d 1381 (6th Cir 1996).

⁷⁴¹ *Universities U.K. v. Copyright Licensing Agency Ltd* [2002] RPC 639.

⁷⁴² *Princeton University Press v. Michigan Document Services Inc.*, 99 F. 3d 1381 (6th Cir 1996).

of copyright works. Hence, the purpose and character of the use weighed against a finding of fair use in the action brought against the defendant. Even though students used ‘coursepacks’ for non-profit educational purposes, the defendant could not rely on the student’s exceptions. Importantly, the court denied a finding of fair use because the copyright owner had a system in place for collecting economic remuneration for such use; other commercial photocopy shops routinely requested permission to reproduce copyright works, but the defendant himself did not apply for such a licence. Finally, the court was of the view that the sale of photocopied work for academic purposes or wholesale photocopying of journals for archival research did not constitute fair use of the material; further, the defendant gained competitive advantage over other photocopy shops by declining to pay royalties requested by copyright owners. The court in this case emphasized that an existing licensing system will weigh heavily against fair use.

Similarly, the Copyright Tribunal in the *Universities UK* case⁷⁴³ specifically noted that the exception for educational establishments under the CDPA 1988 will not apply if a licensing scheme was available even in the case of the copying of very small amounts of works.⁷⁴⁴ This approach supports the idea that the needs of the educational establishments can only be met by obtaining and paying for licences from CCSs who acts on behalf of publisher and authors.⁷⁴⁵ This is because the Tribunal believed the application of the exception where there is a licensing scheme

⁷⁴³ *Universities U.K. v. Copyright Licensing Agency Ltd* [2002] RPC 639.

⁷⁴⁴ *Ibid.*

⁷⁴⁵ MacQueen et al., 2007, at 181.

available would be damaging to the publishing industry and in consequence damaging to education in the end.⁷⁴⁶

The approach that the copyright exceptions will not apply if a CCS and its licensing scheme system are in place to collect remuneration seems to be accepted by the Thai IP Court. In the IP Court Decision No. 785/2542⁷⁴⁷, the court also referred to the *Princeton University Press* case.⁷⁴⁸ The IP Court took the same approach as the *Princeton* case by considering the question of whether or not the copyright owner has a royalty system in place for collecting economic remuneration for such use. It also requested the copyright owners to take the lead in establishing the CCS for collecting the royalty fees from the users in the Thai education sector by ruling:

‘The copyright owner must establish a royalty system (a compiling system) and provide convenience to those intending to request such permission. If the copyright owner does not establish a royalty system and provide convenience, the copyright works reproduced by the defendant that are for the purpose of study of the students are not be deemed to conflict with the normal exploitation of the copyright owners or to effect the legitimate rights of the owners under section 32 paragraph 1 of the CA 1994.’⁷⁴⁹

Under this approach, the need for the CCS and its licensing scheme system as an instrument to reduce the burden of copyright exceptions seems to be increased because if there is a CCS and its licensing scheme system in place for collecting remuneration but the users still reproduce copyright materials without paying such remuneration, then such reproduction made by the defendant for educational purposes cannot be exempted under copyright exceptions and will be considered as

⁷⁴⁶*Universities U.K. v. Copyright Licensing Agency Ltd* [2002] RPC 639.

⁷⁴⁷The IP&IT Court decision No. 785/2542(1999).

⁷⁴⁸*Princeton University Press v. Michigan Document Services Inc*, 99 F. 3d 1381 (6th Cir 1996).

⁷⁴⁹The IP&IT Court decision No. 785/2542(1999).

an obstruction of the copyright owner in seeking profit or as affecting the lawful rights of the copyright owners. In other words, the court indicated that the exception in section 32 of the Thai CA 1994 will not apply to the case if there is a CCS and its licensing scheme system in place for collecting remuneration. With this approach of the Thai IP Court, the introduction of the CCS and its licensing scheme system in the Thai education sector seems to be unavoidable.

The International Federation of Library Associations and Institutions (IFLA) also supports this approach when indicating in 2004 that licence agreements frequently replace copyright exceptions because some exceptions will not apply where there is a licensing scheme in place.⁷⁵⁰ This means that the introduction of the CCS and its blanket licensing scheme in the Thai education sector would automatically solve some problems even if change has not been made to the copyright exceptions in the Thai CA 1994. This is because if the CCS is established and its blanket scheme operated, then the approach of the IP Court will prevent the educational exceptions in the CA 1994, which currently allow multiple reproductions by education institutions, from applying to the case. In other word, multiple reproductions by the educational institutions would be covered under the scope of the blanket licensing scheme provided by the prospective CCS. This approach will ensure that the economic interest of copyright owners will be effectively secured.

In practice, the students will benefit greatly from this approach because they can use the copyright works without the need to worry whether such uses can be justified under exceptions, since such uses will be covered under blanket licences provided by the CCS and the educational institutions will be responsible for paying

⁷⁵⁰ IFLA Report on exceptions in the digital environment 2004.

the blanket royalty fees to the CCS. The copyright owners will receive the remunerations from the CCS after it collects the fees from the educational institutions. The uses through the blanket licence are quite different from the uses of the works through the copyright exceptions because the uses under the exceptions are free of charge and no one including educational institutions need be charged for such uses. Nevertheless, the blanket licence still benefits the students in the same way as the exceptions because they can freely use the works without the need to worry about paying royalty fees since the educational institutions will pay for them.

The concern that the institutions will pass on the costs of royalty fees through tuition fees of the students will not be a problem for Thailand because tuition fees of the public schools and universities are normally subject to the control of the Thai Government through the Ministry of Education. Likewise, although the private educational institutions in Thailand have more freedom to set the rate of tuition fees for their students, such fees are also subject to the control of the Ministry of Education under the Private School Act 2007.⁷⁵¹ Pursuant to section 7 of the Act, the education minister who is in charge of its enforcement has the power to issue ‘the ministerial regulations prescribing the fees not exceeding the rates in the schedule attached in this Act’.⁷⁵² Thus, it would be difficult for private institutions to pass the costs of royalty fees through the student fees in Thailand since the tuition fees of both public and private educational institutions are subject to the control of the Ministry of Education. The costs of royalty fees should not be much burden for the educational institutions in Thailand because they have sufficient financial resources

⁷⁵¹ The Private School Act B.E. 2550 (2007).

⁷⁵² Section 7 of the Private School Act B.E. 2550 (2007).

to sustain the current level of royalties and subscription for educational materials. This is especially true for the public educational institutions which receive large amounts of funding from the Thai Government in addition to the tuition fees collected from the students. Hence, the educational institutions should be able to bear the royalty fees of the blanket licences.

6.2) What should be the solution for Thailand?

In this section, I make three recommendations which must be done together with the establishment of the CCS in order to allow the prospective CCS to function effectively. Section 6.2.1 suggests that the Thai Government must improve the educational exceptions under the Thai CA 1994 in order to support the operation of the prospective CCS and encourage the copyright owners to participate in the prospective CCS and its licensing scheme, as in the UK. Section 6.2.2 recommends that the establishment of the CCS in the Thai education sector must be carried out together with introduction of regulations and a governmental body to prevent the CCS from abusing its licensing scheme or its powers in an anti-competitive way. Section 6.2.3 proposes that the establishment of the CCS must be done together with the establishment of an organization or association representing the users or educational institutions, to help maintain the balance of lobbying and bargaining powers within the CCS.

6.2.1) The role of the educational exceptions in supporting the CCS

The establishment of the CCS in the Thai education sector may not be enough alone to solve all the problems, because in order to allow the prospective CCS to operate effectively, it is necessary for Thailand to improve the educational

exceptions under the CA 1994. Currently, the Act does not mention CCSs or blanket licensing systems at all. In order to enable a CCS and its licensing systems to function effectively, it is necessary to have exceptions that encourage the copyright owners to participate in the CCS and its licensing scheme, as in the UK. Some of the exceptions for educational establishment under the UK CDPA 1988 are designed to encourage the copyright owners to participate in licensing scheme systems provided by the CCS.⁷⁵³ For instance, the exception for recording by educational establishments in section 35 is also designed to encourage copyright owners to participate in the licensing scheme system of the relevant CCS.⁷⁵⁴ In this vein, the exception allows an educational establishment to make a recording of a broadcast or a copy of a recording for the educational purposes without infringing the copyright in the works provided that the educational purposes are non-commercial and a copy or a recording of a broadcast is accompanied by a sufficient acknowledgement.⁷⁵⁵ However, this section clearly stipulates that if there is a certificated licensing scheme provided by the CCS, then the exception will not apply and the educational establishment has to obtain such licences.⁷⁵⁶ This means that the exception will only apply in the absence of ‘a certificated licensing scheme’. It is important to note that the term ‘certified’ in section 35 means certified by the Secretary of State under section 143 of the CDPA. A licensing scheme is certified if the Secretary of State is satisfied that it enables the works to which it applies to be identified with sufficient

⁷⁵³ Laddie 2000, at 767; See also Suthersanen 2003, at 592.

⁷⁵⁴ Ibid at 767.

⁷⁵⁵ Section 35(1) of the UK CDPA 1988.

⁷⁵⁶ Section 35(2) of the UK CDPA 1988.

certainty and if it sets out clearly the terms on which a licence will be granted as well as clear terms of payment.⁷⁵⁷

Similarly, the exception for reprographic copying by educational establishments in section 36, which allows such an establishment to make reprographic copies of passages from published literary works to be exempted from copyright infringement provided that the instruction is for a non-commercial purpose and is accompanied by a sufficient acknowledgement, also stipulates in subsection (3) that the exception will not apply if licences are available and the person making the copies knew or should have been aware of that fact.⁷⁵⁸ Section 36 has no requirement that the Secretary of State approve the licence before the scheme can be operated. However, it provides additional safeguards for educational institutions in that the terms of a licence granted to an educational establishment authorising the reprographic copying for the purposes of instruction of passages from published works are of no effect if they purport to restrict the proportion of a work which may be copied to less than that which would be permitted under this section.⁷⁵⁹ This means that the amount of materials that can be copied under the licences covering photocopying in educational establishment must be more favourable than the amount of materials that are permitted under this section, which allows ‘not more than one percent’ of any work to be copied.⁷⁶⁰ However, the Secretary of State also have power under section 137 of the CDPA to extend the coverage of educational

⁷⁵⁷ Burrell and Coleman 2005, at 128.

⁷⁵⁸ Section 36 of the UK CDPA 1988.

⁷⁵⁹ Section 36(4) of the UK CDPA 1988.

⁷⁶⁰ Section 36(3) of the UK CDPA; See also Burrell and Coleman 2005, at 129.

reprographic licences and licensing schemes to include works of a description similar to those already covered.⁷⁶¹

It is clear that although sections 35 and 36 of the UK CDPA are designed to ensure that publishers and copyright owners have an incentive to enter into licensing arrangements of the CCS⁷⁶², their functions do not only limit to encouraging the copyright owners to make licence available for the users by participating in the CCS, but also give powers to the Secretary of State and Copyright Tribunal to control and review certain copyright licensing schemes.⁷⁶³ Burrell and Coleman point out that the most important perspective on the exception for the educational establishment and licensing scheme system under the UK CDPA is that they all can be referred to the Copyright Tribunal.⁷⁶⁴ They explain that even if there is a licence in operation so that the exceptions do not apply, interested parties such as educational institutions can still refer it to the Copyright Tribunal for review of the terms if they feel that the proposed terms in the licensing scheme are unreasonable.⁷⁶⁵ These exceptions are the important factors explaining why the operation of the CCS in UK is quite effective. If Thailand is going to establish the CCS and licensing scheme system, this method would be very helpful in encouraging the copyright owner to participate in licensing scheme systems, while at the same time helping to maintain control over the prospective CCS and its licensing scheme in the Thai education sector; so it should be inserted into the Thai CA 1994. The issue of the role of Copyright Tribunal in controlling the CCS will be discussed in the next section.

⁷⁶¹ Burrell and Coleman 2005, at 129.

⁷⁶² Ibid.

⁷⁶³ Ibid at 127, 129.

⁷⁶⁴ Ibid at 129.

⁷⁶⁵ Ibid at 127, 128 and 129.

6.2.2) Regulation of the CCS

In this section, I will make two recommendations. First, the establishment of the CCS in the Thai education sector must be done together with the introduction of regulation and an appropriate governmental body to control and prevent the CCS from abusing its power. Without such legal control, the prospective CCS is likely to cause more problems for copyright owners and users such as already happened in the Thai music area (section 6.2.2.1). Second, I will examine both the US and UK approaches to controlling the CCS and recommend that the UK approach seems to be more suitable for Thailand because it relies on the copyright law and a specific governmental body (the Copyright Tribunal) rather than on general competition law and the courts as in the USA (section 6.2.2.2).

6.2.2.1) The need to control the CCS

Presently, no CCS operates in the Thai education sector but there are seventeen CCSs in the Thai music area, which currently operate without any legal control. As a result of the lack of legal control, the CCSs in the Thai music area have caused many problems for copyright owners and users. The problems in the Thai music area might possibly recur in the area of literary and education materials after the establishment of the CCS in the education sector. According to the Department of Intellectual Property (DIP) in Thailand, more than 100 petitions about the collection of royalty fees were submitted through the Office of the Prime Minister, Ombudsman, the Ministry of Commerce, and the DIP.⁷⁶⁶ These petitions requested the introduction of a regulation controlling the CCS in the music area as well as complaining about the unfair collection of royalty fees in this area. For instance,

⁷⁶⁶ DIP Report on copyright fee collection in Thailand 2007.

some users of copyright works in particular musical works, such as karaoke service providers, restaurants and hotels, had complained that the collection of royalty fees was unjust and unfair.⁷⁶⁷ In particular, there were many complaints about the repetition of the collection of royalty fees or the two-tier collection of royalty fees, where the user, who had already paid the royalty fees, had to pay the same fees again for the same use of the same work.⁷⁶⁸ Also, many CCSs in the Thai musical area are notoriously slow and inefficient in distribution of the royalty fees to their members.⁷⁶⁹ Therefore, many copyright owners who are members of some CCS in the music area complained in the petition that they have been taken advantage of by the CCS which has not allocated their royalty fees to them at all or only distributed it in small amounts and without a scheduled timeframe.⁷⁷⁰

Importantly, the DIP indicated that in some circumstance the users would have to pay the royalty fees to more than one CCS each of which claimed to be the rightful representative of the same works and same copyright owners.⁷⁷¹ It is nearly impossible for the users to know whether or not the CCS that has received their royalty payment is in fact the rightful representative or the rightful owner of the works in question. This means that users may pay the royalty fees to parties who do not actually own the copyright so that any royalty fees are wasted. Rightful owners of the work do not receive payment and the users who pay the royalty fees to the CCS which does not own copyright in such work are actually infringing copyright in that work. Even if users are willing to go and check with each CCS, it would be inconvenient for them because it would take time and effort to search and contact all

⁷⁶⁷ DIP Report on copyright fee collection in Thailand 2007.

⁷⁶⁸ Ibid.

⁷⁶⁹ Ibid.

⁷⁷⁰ Ibid.

⁷⁷¹ DIP Information on collecting companies in Thailand 2009.

relevant parties or each of the seventeen CCS in the field. At the end, they may not know the answer since some works are subject to the repetition of royalty fees collection or two-tier collection problem because the copyright owners themselves ask two CCSs to represent the same work.

The DIP attempted to solve this problem by formulating a list of musical works and the CCS which represents each one; but such lists are still far from completion and ineffective.⁷⁷² This is because large numbers of old musical works, which do not appear on the list, are still subject to the repetition of the royalty fees collection or multiple collections. Also, the list is not updated very often so large numbers of new musical works, which are also subject to the repetition of royalty fees collection, have not been placed on the list as well. Since the first list cannot solve the problem, the DIP attempted to create another list of the works that have been claimed by more than one CCS and are subject to the repetition of the royalty fees collection. The purpose of the second list is to inform the users about the possibilities of facing the repetition of the collection or the two-tier collection of royalty fees for the use of the works on this list. Nevertheless, repetition of the royalty fee collections for the same use of the same work still occurs on a regular basis because the list cannot cover all the works that have this problem and it is not updated very often. Thus, there are many new works which have the same problem but have not been placed on the list yet.

As a result, there have been many protests in front of the DIP office for the past few years. Many protesters claimed that the rate of remuneration is unreasonably high and the collection of royalty fees is unfair because they had to pay royalty fees

⁷⁷² DIP Information on collecting companies in Thailand 2009.

for the same pieces of music to more than one CCS, each of which claims to be the representative of the copyright owners.⁷⁷³ The protesters demand legal controls on the operation of the CCS and a fair system of royalty collection which can guarantee that the users would not have to pay multiple royalty fees to several CCSs.⁷⁷⁴ The National Economic and Social Development Board (NESDB) recommended that the Thai Government introduce an effective legal control on CCSs in the music area in order to guarantee that the royalty rates and the collection of royalty fees are fair for users. This is consistent with the opinions of other government agencies and many private organizations such as those associations related to music businesses.

Even if Thailand has only one CCS in the music area (as opposed to the seventeen CCSs now), it is still necessary to have regulation and a governmental body to control the operation of the CCS and prevent it from abusing its power against users. It is possible to have a single CCS to administer a particular category of rights, which means that a CCS is allowed to retain a monopoly position in relation to its specific category or type of copyright works.⁷⁷⁵ In this aspect, the potential problem of having a single CCS administering a certain type of rights in one specific field without legal control is that the possibility of the abuse of the power would be higher than having several CCSs administering such rights in one specific country. Normally, the objection to the single CCS holding excessive monopoly power is that it may result in unfair practices against the users or copyright owners and also in the absence of any alternative CCS and legal control. A single CCS could more easily impose unfair provisions and royalty rates on their users. So

⁷⁷³ Tunsarawuth 2007, at 1.

⁷⁷⁴ Sunthornsingkarn 2009, at 213-218.

⁷⁷⁵ Suthersanen 2003, at 591.

it is necessary to have legal control regardless of whether Thailand has a single CCS or several CCSs operate in one field.

Therefore, I would suggest that if the Thai Government allows the CCS to be established in the education sector, it must also have the means to control the CCS in order to prevent it from abusing its power. Without any legal control, the prospective CCS in the Thai education sector could abuse its power in relation to the rate and the collection of royalty fees. Abuse of power by the CCS in the education sector could have a more severe impact on the public interest in the research development of the country than on that in the music area. The education CCS could normally control the price of the licences and the level of the access to such materials, so it could potentially affect all creativity and research development in Thailand. Thus, most CCSs in the developed countries are subject to continuous control by a relevant governmental body though there is no clear uniformity in the legislative provisions which control these CCSs.⁷⁷⁶

Regulations often prevent any abusive activities of the CCS in respect of fair practices regarding both their members and users.⁷⁷⁷ Importantly, the regulations typically establish an independent or governmental body to control the licensing practices of the CCS with regard to the setting of royalty fees, to prevent the royalty rate set by the CCS being used in an anti-competitive way or in a way that adversely affects the public interest.⁷⁷⁸ For instance, the CCS may exercise its bargaining power in demanding that licensees pay excessive fees for the use of copyright

⁷⁷⁶ Stewart 1989, at 968-985.

⁷⁷⁷ Lingen 1998, at 211 -216.

⁷⁷⁸ Govaere 1996, at 249.

works.⁷⁷⁹ Or, if it has many competitors, it may charge very low royalty fees in order to drive its competitors out of the market; or it may use its dominant position to refuse to supply users without a commercially justifiable reason.⁷⁸⁰ This dominant market position of the CCS can have severe impact on the users especially if they have no alternative provider.⁷⁸¹ In practice, the CCS would be likely to hold a dominant position if it can represent or control a majority of a particular category of rights owners in any particular territory.⁷⁸² This means that if one of many CCSs in the certain field acquires more repertoires of copyright in particular areas, it would be possible for that particular CCS to exercise its power in an anti-competitive way to cause a monopoly situation to exist.

However, even if there is an alternative CCS or other suppliers of licences in the market, such abuse of power regarding the rate of royalty fees by the CCS could probably occur. For example, the CCS in a particular area could still abuse its power through its reciprocal relationships with other CCSs in the field. Such agreements are designed to allow the CCS to make reciprocal use of copyright works by issuing the licences for the works that each of them holds in their own repertoires and catalogues.⁷⁸³ Since they can license copyright works in each other's repertoires through reciprocal agreements, they could easily control the royalty rate which could result in a co-ordinated effort to influence the market.⁷⁸⁴ This means that abuse of the powers exercised by the CCS does not occur only where there is one CCS in the

⁷⁷⁹ Lui 2003, at 73.

⁷⁸⁰ Ibid at 75.

⁷⁸¹ Kretschmer 2002, at 126.

⁷⁸² Garnett 2005, at 1500.

⁷⁸³ Lui 2003, at 68.

⁷⁸⁴ Sripibool 2002, at 46-52.

particular field. This is the reason why laws in many developed countries with different systems of collective administrations have regulated CCSs.⁷⁸⁵

It is undeniable that the CCS would be undesirable in the absence of regulatory and controlling mechanisms to ensure that it does not abuse its monopoly position.⁷⁸⁶ Similarly, the 1988 report from the UK Monopolies Commission indicated that the CCSs are the best mechanism for the licensing of copyright works but only if they are prevented from exercising their monopoly in an unfair manner.⁷⁸⁷ Hence, the establishment of a CCS to administer copyright materials in the Thai education sector must be done together with the introduction of the appropriate provisions and relevant governmental body to controls or provide sufficient accountability in order to prevent the CCS from abusing its power in anti-competitive way against the users.

6.2.2.2) What should be the appropriate approach to controlling the CCS?

In this section, I consider the US and UK approaches on controlling the CCS and suggest that the UK approach on controlling the CCS is more suitable for Thailand. This is because although both the UK and US legal systems allow competition law to apply to the CCS if it acts in an anti-competitive way⁷⁸⁸, the US approach seems to rely heavily on consent decrees under competition law and the court to control the CCS. In contrast, the UK approach has also used competition law in some copyright issues too but in the context of the CCS, it seems to rely heavily

⁷⁸⁵ Dietz 2002, at 900.

⁷⁸⁶ Lui 2003, at 73.

⁷⁸⁷ MMC Report on Collective Licensing 1988, at 7.14.

⁷⁸⁸ Lui 2003, at 82.

on copyright law and a specific governmental body (the Copyright Tribunal) to control the CCS, rather than on general competition law and the court. This makes the UK approach more applicable to the Thai copyright system, which likewise provides no link between the copyright law and competition law.

Although there was a Copyright Royalty Tribunal (CRT) under the US Copyright Act 1976, it did not have the responsibility of controlling the CCS because it was set up to administer copyright compulsory licenses. Hence, the jurisdiction of the CRT was limited to two functions: 1) determining statutory royalty rates for compulsory licenses; and 2) determining or settling disputes concerning the distribution of royalty fees collected for cable television and jukebox performances in respect of those compulsory licenses.⁷⁸⁹ Although the statute provided relatively clear direction for the rate-making activities of the CRT, it gave little indication on how it should distribute royalties.⁷⁹⁰ As a result of this lack of clarity, the activities of the CRT became the subject of controversy; so it was abolished and replaced with Copyright Arbitration Royalty Panels (CARPs), which have the same responsibility as the CRT; that is, to settle disputes and determine the statutory royalty rates regarding compulsory licenses.⁷⁹¹ Hence, the CCS in the US was not subject to the jurisdiction or the control of the CARPs or CRT because the responsibility of these governmental bodies is limited to determining the statutory rates under compulsory licences only.

Since there is no administrative body to control the CCS in the US, the primary control of the CCS has largely relied on consent decrees under competition

⁷⁸⁹ Leaffer 1995, at 237-238.

⁷⁹⁰ Ibid.

⁷⁹¹ Ibid.

law to prohibit unfair practices as well as prevent abuse of power.⁷⁹² Under the US legal system, consent decrees are judicial decrees which express a voluntary agreement between parties in a lawsuit. For instance, an agreement by the defendants indicates that they will stop the activities alleged by the government to be illegal in exchange for an end to the charge. The major consent decree which controls the operation of the CCS in the USA resulted from anti-competitive proceedings brought by the US Department of Justice in 1941 against the American Society of Composers, Authors and Publishers (ASCAP) and the Broadcast Music Incorporated (BMI) which are the first and second largest CCSs in the US music area.⁷⁹³ The Justice Department sued both ASCAP and BMI and alleged that the blanket licences of these CCSs were illegal because they restrained trade in violation of competition law. As a result of this lawsuit, the consent decree was formulated and established the rules to govern the basic licensing practices of the CCS.⁷⁹⁴ This consent decree contains a requirement of equal treatment, which requires the CCS to provide such treatment to all of its members without any discrimination.⁷⁹⁵

However, the main feature of the US consent decree is that it allows the parties who disagree with the rate of royalty fees or the terms of the licences to apply to the Federal District Court for the determination of a reasonable fee.⁷⁹⁶ In such proceedings, the burden of proof falls on the CCS to establish the reasonableness of the royalty fees requested by it. During such proceedings, the licensee has the right to

⁷⁹² Neumann 2001, at 1; See also Frazer 1988, at 1-5; Kennedy 2001, at 11; and High 2001, at 87, 374-385.

⁷⁹³ Dougherty 2006, at 410.

⁷⁹⁴ *United States v. American Society of Composers, Authors and Publishers (ASCAP)*, 1940-1943 Trade Case (CCH) p 56104 at 405 (S.D.N.Y.1941) and *United States v. Broadcast Music Inc. (BMI)*, 1940-1943 Trade Case (CCH) p 56096 (E.D. Wis. 1941).

⁷⁹⁵ Besen 1992, at 389.

⁷⁹⁶ Freegard 1997, at 49.

use works in the repertory of the CCS and the court will determine an interim fee later in the final determinations.⁷⁹⁷ In practice, when there is a dispute between the CCS and licensees about the rate of royalty fees, the court will determine the case by using the fees from the other CCSs which have less bargaining power as a competitive benchmark.⁷⁹⁸ For example, in order to determine whether the rate of royalty fees of ASCAP is reasonable, the court compared the rate to that of the BMI which is a smaller CCS that has less bargaining power in the field.⁷⁹⁹ This is the same method that the Copyright Tribunal in the UK uses in determining whether the rate of royalty is reasonable or not.

The legal challenges to the CCS often come in the form of opposition to the blanket licensing provisions in the consent decrees because these did not eradicate allegations of violations of competition law.⁸⁰⁰ The US courts often have to determine the issue of whether or not a practice of the CCS unreasonably restricts competition because the licensees normally claim that competition law is violated through price fixing and monopolizing or illegally restraining trade through the use of blanket licences.⁸⁰¹ In such a case, a restraint of trade would be considered as reasonable only if its purpose outweighs its anti-competitive effects, so the court would normally consider whether the practice of the CCS in question created a substantial adverse impact on competition.⁸⁰² However, the US courts in several decisions have rejected attempts to challenge consent decrees and found that the licensing practices did not violate competition law because agreements between the

⁷⁹⁷ Freegard 1997, at 49.

⁷⁹⁸ *American Society of Composers, Authors & Publishers (ASCAP) v. Showtime/The Movie Channel, Inc.*, 912 F.2d 563, 572 (2d Cir. 1990).

⁷⁹⁹ *Ibid.*

⁸⁰⁰ Sobel 1983, at 5.

⁸⁰¹ Daun 1996, at 234; See also Sobel 1983, at 7-9.

⁸⁰² *Broadcast Music Inc. v. Columbia Broadcasting System Inc.*, 441 U.S. 1 (1979).

CCS and copyright owners are non-exclusive and also the consent decrees allows the licensees to apply to the court freely for review of the royalty rates at any time.⁸⁰³

It is important to note that although many CCSs such as ASCAP and BMI are subject to a court-administered anti-trust consent decree, some small CCSs such as the Society of European Stage Authors & Composers (SESAC), which is much smaller than ASCAP and BMI, are not subject to the decree.⁸⁰⁴ This is because there is an alternative under the US legal system: the Congress could grant these small CCSs an exception from competition law if there are other mechanisms which can keep the anti-competitive activity of these bodies in check.⁸⁰⁵ Nevertheless, such alternative mechanisms for preventing anti-competitive activities normally operate within the scope of competition law.

It is clear that the US Copyright Act of 1976 has very limited recognition of the role of the CCS and has no systematic regulation for controlling the CCS because there is no administrative body under the copyright law to oversee the license fees set by the CCS. The responsibility of the CARPs is limited to determining the statutory royalty rates regarding compulsory licences only.⁸⁰⁶ The control aspect of the CCS is entirely left over to application of competition rules under the consent decrees resulting from anti-trust proceedings brought against them. This means that if there is a problem relating to the CCS, it will be solved directly by the US court through competition law rather than by a specialist copyright tribunal, and the decisions of

⁸⁰³ *Buffalo Broadcasting Company v. American Society of Composers, Authors and Publishers (ASCAP)*, 744 F.2d 917 (2d Cir. 1984); *The Broadcast Music Inc., v. Columbia Broadcasting System Inc.*, 441 US 1 (1979); and *Columbia Broadcasting System Inc., v. American Society of Composers, Authors and Publishers (ASCAP)*, 620 F.2d 930 (2d Cir. 1980).

⁸⁰⁴ Besen 1992, at 389, 392.

⁸⁰⁵ *Ibid.*

⁸⁰⁶ Dietz 2002, at 898.

the court are subject to the normal appeal processes.⁸⁰⁷ This makes the US approach inapplicable to the Thai copyright system which provides no similar possible link between copyright and competition law. Also, relying on competition law and the courts rather than the Copyright Tribunal would increase the burden upon the Thai courts, which are already overburdened with cases.

Under the Thai copyright system, any anti-competitive matter relating to copyright is not subject to the Thai Competition Act in any case but is only subject to section 15(5) of the Thai CA 1994 which stipulates that if the copyright owners license their rights or the use of their works to another person with conditions, such conditions must not unfairly restrict competition.⁸⁰⁸ Section 15(5) paragraph 2 added that the question of whether such conditions are unfair restrictions of competition must be considered in accordance with the rules and conditions provided in the Ministerial Regulation. Presently, there is a Copyright Licensing Ministerial Regulation 1997 issued under the Thai CA 1994.⁸⁰⁹ The application of these provisions is still problematic because they only limit the licensing of the exclusive rights of: (1) reproduction or adaptation; (2) communication to the public; and (3) 'letting for hire of the original or the copies of a computer program, an audiovisual work, a cinematographic work and a sound recording'.⁸¹⁰ The abuse of copyright law in an anti-competitive way other than in relation to these matters is still possible, particularly if the issue is concerned with digital materials. For example, although these provisions could cover the licensing of the exclusive rights of reproduction in an anti-competitive way, it cannot apply to digital reproduction because the term

⁸⁰⁷ Besen 1992, at 392.

⁸⁰⁸ Section 15(5) paragraph 1 of the Thai CA 1994.

⁸⁰⁹ Ministerial Regulation (1997) Issued under the Thai CA 1994.

⁸¹⁰ Section 15 of the Thai CA 1994.

‘reproduction’ under the Thai CA 1994 does not include digital or electronic reproduction. This means that if the CCS licenses the rights relating to digital reproduction in an anti-competitive way, it will not be subject to the Thai competition law and section 15(5).

The UK approach to controlling the CCS seems more consistent with the Thai copyright system. At the same time through the model provided by section 144(1) of the CDPA it shows the way to close the gap between copyright and competition law in Thailand. The UK CDPA states that the licensing schemes promulgated by the CCS are subject to the control of the Copyright Tribunal, which holds a broader jurisdiction to cover most schemes of copyright licensing.⁸¹¹ Such controls principally allow the users or those who are excluded from being granted licences to challenge the operation and rate of remuneration of such schemes through the Tribunal.⁸¹² The purpose of establishing the Tribunal is to prevent abuse of the powers of the CCS and to determine disputes between the CCS and users, while guaranteeing no unreasonable discrimination between licensees.⁸¹³ The Tribunal has a wide jurisdiction when considering disputes involving an existing scheme; the terms of a licence; licensing conditions; and the expiry of an existing licence. However, it is not a proactive body so it can only respond to applications and references made to it by the parties.

The provision aims at controlling the rate of royalty of the CCS and is intended to guarantee that a CCS cannot abuse its power by unilateral establishment

⁸¹¹ Suthersanen 2003, at 592.

⁸¹² Fry 2002, at 518.

⁸¹³ Section 116 of the UK CDPA 1988; See also Freegard 1997, at 9.

of royalty fees for the uses of works.⁸¹⁴ This is because the rate of royalties issued by the CCS is not fixed by laws but will normally be set by the CCS; so it is important to ensure that the rate of royalty fees does not involve unreasonable discrimination between users.⁸¹⁵ On the matter of discrimination, the Tribunal emphasizes that the CCS cannot differentiate in the rate of fees to licensees because such an approach would likely lead to the possibilities of unfair restrictions and injustice.⁸¹⁶ If users feel that the royalty fees are unreasonable, they can bring a case to the Tribunal for reconsideration.⁸¹⁷ For example, the licensees may ask the tribunal to determine whether the rate of royalty fee was reasonable in comparison to the other rates provided by other CCSs. This is also under the jurisdiction of the Tribunal because section 142 of the CDPA allows it to consider an application to settle the royalty fees or other sum payable in pursuance of section 66⁸¹⁸; such application may be made by the copyright owners or the person claiming to be treated as licensed by the copyright owners.⁸¹⁹ This means that the rate of royalty fees provided by a CCS is normally subject to the control and approval of the Copyright Tribunal. This function is quite useful for Thailand because one of the complaints about the operation of the CCS in the Thai music area is that the rate of royalty fees provided by the CCSs is unreasonably high. So this function can help to protect the interest of the users.

⁸¹⁴ Dietz 2002, at 898.

⁸¹⁵ *Phonographic Performance Limited v. Candy Rock Recording Limited*, [1999] EMLR 155.

⁸¹⁶ *Performing Right Society Ltd. v. The British Entertainment & Dancing Association Ltd.*, [1989], PRT 44/87; See also Freegard 1997, at 53-56.

⁸¹⁷ *Performing Right Society Ltd v Boizot* [1999] EMLR 359.

⁸¹⁸ Section 66 of the UK CDPA stipulates that 'the Secretary of State may by order provide that in such cases as may be specified in the order the lending to the public of copies of literary, dramatic, musical or artistic works, sound recordings or films shall be treated as licensed by the copyright owner subject only to the payment of such reasonable royalty or other payment as may be agreed or determined in default of agreement by the Copyright Tribunal'.

⁸¹⁹ Section 142(1) of the UK CDPA 1988.

It is important to note that the rates of royalty fees in the licensing agreement are practically reviewed by the CCS at the end of the term of the licensing agreement, which is normally three or four years.⁸²⁰ The Tribunal said in several cases that if there is an agreement between the CCS and the licensees, then the former cannot change the fees or rates of royalty fees to collect from the licensees even if the circumstances have changed.⁸²¹ The licensees and the users would benefit from this approach because the new rate would apply to them when continuing the licensing agreement with the CCS; so if they feel uncomfortable with the new rate, they could decide not to continue the licensing agreement with the CCS.

The Tribunal can also exercise its power when users complain that they have been unfairly refused a licence by the CCS or that the CCS has failed to procure licences for them. In this vein, it must exercise its powers by making the decision on the basis of what is reasonable in the circumstances by considering other similar circumstances where the licences have been granted to other persons.⁸²² In order to determine what is reasonable on a reference or application in relation to a licensing scheme, the Tribunal must consider the availability of other existing comparable licensing schemes or the granting of other licences to other persons in similar circumstances as well as considering the terms of those other licences.⁸²³ In some circumstances, it makes a comparison with other schemes or licences granted by the same person in similar circumstances because this can ensure that there is no unreasonable discrimination between licensees under the licensing scheme to which

⁸²⁰ *Phonographic Performance Limited v. Candy Rock Recording Limited*, [1999] EMLR 155.

⁸²¹ *Performing Right Society Ltd. v. The British Entertainment & Dancing Association Ltd.*, [1989], PRT 44/87; See also Freegard 1997, at 53-56.

⁸²² Bainbridge 2002, at 83.

⁸²³ Section 129(a) and (b) of the UK CDPA 1988.

the reference or application is made.⁸²⁴ Normally, the Tribunal makes a decision on a case by case basis and the decision of the Tribunal could still be appealed to the High Court at any point of law arising from a decision.⁸²⁵

Interestingly, the UK approach allows the Copyright Tribunal to act in accordance with the recommendation of the Competition Commission so this method should help to fill the gap between competition and copyright law in Thailand, which I have previously mentioned. The UK Copyright Tribunal has the power to exercise its powers in accordance with the recommendation and references of a report of the Competition Commission. According to section 144(1) of the CDPA, the Tribunal can exercise its power in order to solve the problems specified in a report of the Competition Commission where the CCS has operated against the public interest.⁸²⁶ Such matters specified in reports of the Competition Commissions may include: 1) conditions in licences granted by the CCS restricting the use of the work by the licensees or the right of the copyright owner to grant other licences; or 2) a refusal of a copyright owner to grant licences on reasonable terms.⁸²⁷ In such cases, the Tribunal has the power to cancel or modify those conditions or to provide that licences in respect of the copyright must be made available.

This method is an instrument to control the operation of the CCS through the Competition Commission and the Copyright Tribunal. The relevant governmental bodies have power to request the Competition Commission to examine the practices of the CCS and to ensure that they do not adversely affect the public interest. As Peacock and Ricketts indicate, the present responsibilities of the Competition

⁸²⁴ Final paragraph of Section 129 of the UK CDPA 1988.

⁸²⁵ Section 152 of the UK CDPA 1988; See also Norris 1998, at 207.

⁸²⁶ Section 144(1) of the UK CDPA 1988.

⁸²⁷ Section 144(1) (a) and (b) of the UK CDPA 1988.

Commission (CC) are set out in the Fair Trading Act 1973, the Competition Act 1998, and the Enterprise Act 2002: these statutes allow the relevant regulatory bodies to refer possible licence modifications or certain other matters to the Competition Commission.⁸²⁸ This power of the Competition Commission has been employed to examine the practices of the CCS in several occasions. For instance, in 1988 the Monopolies and Mergers Commission (MMC), the predecessor of the Competition Commission, was asked to report and examine the practices of Phonographic Performance Ltd (PPL), which operated in the area of sound recordings for broadcasting and public performance.⁸²⁹ It investigated on the monopoly position of the PPL and its effect on the radio stations. The Commission found that the monopoly position was created because the PPL held the exclusive right over broadcast recordings, so it made some recommendations in relation to the operation of the PPL and also about how the Tribunal could solve the problem.⁸³⁰

Another occasion when the Commission exercised its powers was in 1996 where it was asked to examine the practices of the Performing Right Society (PRS).⁸³¹ The members of the PRS complained that the body's conduct was unfair to them because they had to assign all their rights to the society under its terms of membership and this meant they had to pay fees to perform their own music at their concerts.⁸³² They also claimed that they were subject to dual deductions because a performance in a foreign jurisdiction would mean deductions to the foreign CCS

⁸²⁸ Peacock and Ricketts 2005, at 3/17, 3/18 and 3/19; See also DTI Guideline on Enterprise Act 2002 (May 2004).

⁸²⁹ MMC Report on collective licensing 1988, at 7.14.

⁸³⁰ Ibid.

⁸³¹ MMC Report on performing rights 1996, at 5.24.

⁸³² Kretschmer 2002, at 131-137.

linked by any reciprocal agreements between the PRS and those foreign CCSs.⁸³³ The Commission found that there was a monopoly situation in favour of the PRS and identified various problems that were against the public interest as well as recommending the solution for the Tribunal to solve these problems.⁸³⁴ These recommendations in the two reports of the MMC were later implemented and used as guidance to improve the operation of the Copyright Tribunal in controlling the CCS.⁸³⁵

These two occasions illustrate that the Competition Commission is used to safeguard the members' rights and control over the CCS. This means that the CCSs in the UK are not only subject to control under the memorandum and rules of the CCS under company law but are also subject to the control of competition regulatory bodies such as the Competition Commission. This method is quite effective and useful for Thailand. Currently, Thailand has an anti-trust regime operated under the Trade Competition Act 1999 and section 6 of this Act established a Trade Competition Commission, which has the power to make recommendation, issue notifications, and give instructions as well as to consider complaints relating to trade competition law and so on.⁸³⁶ However, the power of this commission does not extend to the CCSs and other copyright issues because, as already discussed earlier, the CA 1994 has its own provision to deal with anti-competitive issues relating to copyright and licensing matters in section 15(5), which currently operates together with Ministerial Regulation 1997 issued under the CA 1994. So there is no link between the Trade Competition Commission operated under the Trade Competition

⁸³³ Kretschmer 2002, at 131-137.

⁸³⁴ Ibid.

⁸³⁵ UK IPO Information on Copyright Tribunal 2006.

⁸³⁶ Section 8 of the Thai Trade Competition Act 1999.

Act 1999 and copyright law in Thailand. Also, the Thai CA 1994 contains no equivalent provision to section 144 of the CDPA. The method of section 144 of the CDPA would help to link the copyright system with competition law in Thailand by allowing a tribunal to exercise its power in accordance with the references or recommendation from reports of the Competition Commission. Under this approach, it would be harder for the prospective CCS in the Thai education sector to benefit from the gap between the competition law and copyright law because any copyright matters relating to anti-competitive activities of the CCS, including those digital reproduction issues, could be directed to the Copyright Tribunal through the report of the Competition Commission.

6.2.3) The need for associations representing the users and educational institutions

I recommend that the establishment of the CCS in the Thai education sector be carried out together with the establishment of associations to represent the interest of users and educational institutions. In this vein, it is undeniable that the establishment of the CCS in the Thai education sector would increase the bargaining power of copyright owners because the aggregation of copyright works within a CCS would place them in a stronger position when negotiating terms of licences such as rates of royalties, conditions for the use of works and the term of authorisation on behalf of the copyright owners with the users or educational institutions. In the US, the CCSs are quite powerful, especially when they deal with individual users or a single educational institution which has less bargaining power because the CCS could set its desired licence fee and force the prospective users to take it or leave

it.⁸³⁷ This allows the CCS to extract the entire value from the copyright works in its repertoires because they can deny the users access unless they receive the desired licence fees. This is possible because the rate of royalty fees is not fixed by laws in the US but will normally be set by the CCS. In some circumstances the rate could depend on negotiation and bargaining between the CCS and the organization of the users.⁸³⁸ Therefore, the users or the educational institutions may get reasonable rates or lower rates of royalty fees if they negotiate with the CCS in groups rather than individually. This is because a group of users can threaten to withhold its entire patronage, which could force these CCS to set the royalty fees at reasonable prices.⁸³⁹ Thus, group bargaining between the CCS and the groups of users would help the membership in the CCS to move closer to the efficient level and at the same time make the users realize the need to band together in order to increase their bargaining power.⁸⁴⁰

The establishment of the CCS increases not only the bargaining power of the individual copyright owners in the Thai education sector but also their lobbying power when making submissions in favour of stronger protection under copyright law. For instance, many CCSs in the US have cooperated with each other as alliances to lobby Congress members to pass laws or Acts which provide better protection for their members.⁸⁴¹ This makes the administration of copyright through the CCS better than individual management because self-administration by individuals usually has weak lobbying and bargaining power so even they have enough financial resources and expertise to administer their rights by themselves, they would hardly match the

⁸³⁷ Besen 1992, at 389.

⁸³⁸ Jehoram 2001, at 137; See also Suthersanen 2000, at 16-17; and Arnold 1990, at 76.

⁸³⁹ Besen 1992, at 389.

⁸⁴⁰ Ibid.

⁸⁴¹ Lingen 1998, at 215.

CCS in term of lobbying and bargaining powers.⁸⁴² But, in order to maintain a balance of lobbying and bargaining power between the copyright owners and the users, the establishment of the CCS in the Thai education sector must be done together with the establishment of associations to represent the interest of users and educational institutions. In Thailand, a single university has more bargaining power than individual copyright owners but it may not be able to match the bargaining and lobbying power of the prospective CCS. Currently, individual authors or copyright owners in Thailand would be disadvantaged when facing users such as educational institutions and universities because the copyright exception applying to teaching and educational institutions under the Thai CA 1994 does not have a clear limitation as to the amount of reproduction and does not prohibit multiple reproductions of educational materials. Therefore, the educational institutions, which often have their own internal publishing houses, can rely on this inadequate exception to reproduce the copyright materials through their own publishing houses without paying the royalty fees.

However, after the establishment of the prospective CCS and its licensing system in the Thai education sector, the situation might be changed because a single university may not have enough bargaining and lobbying powers against the prospective CCS. Although the lobbying power of the CCS could be useful for the individual copyright owners, it could become excessive and even threaten the public interest because it is possible for a CCS with even modest funding to achieve enormous public policy and financial victories against users or the overall desires of the general public.⁸⁴³ In the USA, several powerful CCSs can directly or indirectly

⁸⁴² MMC Report on collective licensing 1988, at 7.12.

⁸⁴³ Knopf 2008, at 122.

influence the government's policies and legislation; in the UK the CCSs also act as political lobbyists to make a law in their best interests.⁸⁴⁴ The situation in the Thai education sector may be worse than those of the US and the UK because Thailand does not have any strong organization or associations to represent users or educational institutions. So the establishment of the CCS in this area could have some impact on the users and educational institutions in Thailand.

In this aspect, the situation in the US and UK is quite different from Thailand because they have associations and organizations to represent the educational institutions at national level so the CCS cannot have much advantage in term of bargaining and lobbying power. In the USA, there are many associations representing higher educational institutions, schools and universities.⁸⁴⁵ For instance, the National Association of Independent Colleges and Universities (NAICU) is an organization which represents nearly 1,000 educational institutions in the US on policy issues with the US federal government such as those affecting student aid, taxation and government regulation.⁸⁴⁶ Similarly, the American Association of State Colleges and Universities (AASCU) represents more than 430 public colleges and universities in the USA and its function includes monitoring, analyzing and lobbying on a variety of federal authorization and bills affecting public higher education institutions and their students in the USA.⁸⁴⁷ Likewise, the American Association of Community Colleges is an organization for community colleges at the national level

⁸⁴⁴ Goldmann 2001, at 429.

⁸⁴⁵ IHEP Information on higher educational organizations in the US 2008.

⁸⁴⁶ NAICU Information on its member institutions 2010.

⁸⁴⁷ AASCU Information on its member institutions 2010; and AASCU Information on its policy on federal legislations 2010.

which works closely with the Directors of State Offices to inform about the affect or impact of the policy and regulation on the education sector.⁸⁴⁸

In the UK, there are also several organizations representing the educational institutions, schools and universities. The most important one is known as ‘Universities UK’, which is the major representative body for the higher education sector.⁸⁴⁹ It has around 133 members, who are the executive heads of all the educational institutions, universities and some colleges of higher education in UK.⁸⁵⁰ Universities UK not only represents the interest of universities to Parliament and political parties but also has a special parliamentary unit. This unit has responsibility to monitor the UK Parliament and identify a range of issues relating to the higher education sector and other matters which could affect the member institutions and then provide a report on such issues to its members.⁸⁵¹

The association or organization which represents educational institutions also appears in Scotland and Wales. Universities UK indicates that it works together with Universities Scotland and Higher Education Wales in protecting the interests of universities.⁸⁵² In this vein, Universities Scotland represents only the higher educational institutions in Scotland and has around 20 members which are all the heads of the universities and higher education institutions in Scotland.⁸⁵³ Likewise, Higher Education Wales (HEW) represents the interests of higher education institutions in Wales and its membership encompasses all the heads of the

⁸⁴⁸ AACC Information on its mission 2010.

⁸⁴⁹ UUK Information on role of the UUK 2010.

⁸⁵⁰ UUK Information on its members 2010.

⁸⁵¹ UUK Information on its parliamentary activities 2010; See also UUK Information on its missions 2010.

⁸⁵² Universities Scotland Information on its works and structure 2010; See also Universities Scotland Information on its members 2010.

⁸⁵³ Universities Scotland Information on its members 2010.

universities and higher education institutions in Wales.⁸⁵⁴ The HEW represents the interests of its members to the Welsh Assembly, Parliament, political parties and other European institutions as well as negotiating on behalf of Welsh higher education.⁸⁵⁵

On some occasions, Universities UK may take an active role in protecting the interest of the educational institutions and the users in UK. This can be seen clearly in the *Universities UK* case.⁸⁵⁶ In this case, the Copyright Licensing Agency (CLA) represented the interests of the publishers and the copyright owners who control educational uses of copyright works and it had a blanket licensing agreement with Universities UK. The blanket licensing method employed by the CLA required the university to pay a flat licence rate per full time educational student (FTES) every year and it placed neither limitation on the number of photocopies which might be made nor any restriction on what might be photocopied. The problem occurred when the CLA introduced a supplementary fee or a Course Pack fee in addition to the blanket licence fees because it feared that course packs would replace text books or journal articles. The Course Pack licensing scheme was administered by a sub-division of CLA which is known as the CLA's Rapid Clearance Service (CLARCS). The introduction of a two-tier system increased the cost and expense for the universities so they finally complained to the Copyright Tribunal. The Tribunal was requested to determine what the royalty rate should be and whether there should be a two-tier system which catered for the Course Packs Scheme. The Tribunal stated that the entire system was too complex and ordered that the course pack system be

⁸⁵⁴ UUK Information on Higher Education Wales 2010.

⁸⁵⁵ Ibid.

⁸⁵⁶ *Universities U.K. v. Copyright Licensing Agency Ltd* [2002] RPC 639.

removed and replaced with a single-tier blanket licence scheme. This case illustrated that the organizations represented the users or educational institutions are very important in protecting the interest of the users against the CCS.

Without the association to represent the educational institutions and the users in Thailand, it is hard to maintain the balance of bargaining and lobbying power between copyright owners and users, especially after the establishment of the prospective CCS in the Thai education sector. Therefore, the Thai Government must encourage users and educational institutions to create an organization which is powerful enough to lobby the government and the members of the parliament against the prospective CCS. Also, such an organization could be very helpful when negotiating the term or conditions of licences with the prospective CCS. The establishment of the CCS without any organization representing the interest of the users and educational institutions would bring undesirable results for the Thai education sector. In the worst case scenario, a single university, school or educational institution which does not have strong bargaining and lobbying power may have no choice but to agree with the conditions and terms offered by the CCS. Hence, the establishment of the CCS should be done together with the establishment of the association representing the users and educational institutions.

Chapter 7

Conclusion

There are several lessons resulting from the study of Thai educational exceptions and their problems which could benefit or contribute to the development of copyright protection in other countries as well as global copyright law. One of the most important lessons from Thailand is that a legislative change to copyright law alone may not be enough to solve the problem or improve the effectiveness of a copyright protection regime in one country. The government may need to employ more than legislative change in order to solve such problem. In the case of Thailand, I recommend that in order to ensure that the economic interest of copyright owners and the incentive for creativity will be effectively protected under the Thai CA 1994, the following changes must be carried out. First, the two conditions in section 32 paragraph 1 should be removed from the Thai CA 1994 in order to make the educational exception more certain and effective in protecting the economic interests of copyright owners. Second, a clear limitation as to the amount of reproduction and a clear prohibition on multiple reproductions and the reproduction of entire textbooks must be inserted into the educational exceptions in the list of permitted acts in section 32 paragraph 2 and the exception for the reproduction by libraries in section 34 of the Thai CA 1994. Third, the insertion of conditions of sufficient acknowledgment into the relevant educational exceptions of the Thai CA 1994 is necessary in order to ensure that the moral right to be acknowledged as the author of the work will be protected. But this must be done together with the introduction of the RMI provisions, which can ensure the protection of moral rights in the digital

environment by preventing the removal and alteration of the electronic information such as the name of the authors and the works.

Fourth, the extension of the exception for educational institutions must be done in order to allow the students to take advantages of new digital technologies and enable the exception to cover the activities of the long-distance learning and lifelong learning education. Fifth, a guideline for education which can reflect the interests of all interested parties should be formulated together with the improvements of the educational exceptions. Sixth, it is necessary to introduce the TPM provisions with the appropriate exceptions which can guarantee that all non-infringing uses under copyright exceptions will be exempted from the violation of the TPM provisions. Seventh, the establishment of a CCS in the Thai education sector is also necessary for ensuring that the copyright owners will get a better economic return from their investment through an effective system of royalty collection, while at the same time making it more convenient for the users to obtain licences for the use of educational materials and thus reduce the numbers of copyright infringement which occur as a result of the difficulties in obtaining the licences. Such establishment must be carried out alongside the introduction of the appropriate legal controls to protect the users from any abuse of power by the CCS.

The study of the major problems arising from unclear copyright exceptions in Thailand gives several lessons for global copyright protection. The first lesson is that the uncertainty and unclarity about what copyright law allows under the exception is likely to bring some damage to the economic interests of copyright owners and to incentives for creativity in society, as well as making copyright protection regime ineffective because the infringers and users might rely on such uncertain and unclear

provisions to reproduce copyright works and then escape from copyright infringement liability. In the example of Thailand, the two preconditions for most educational exceptions are unclear and as a result, it is difficult to indicate what amount of reproduction under the copyright exceptions should be considered as in conflict with a normal exploitation of the copyright work and unreasonably prejudicial to the legitimate right of the copyright owner. Therefore, the users rely on such uncertainty and assume that they can reproduce entire books or make multiple reproductions under the exceptions. It is necessary to have a clear picture about what is allowed under exceptions because uncertainty about the exceptions can cause significant problems for those who enforce the law and so allow infringers to escape liability in the end. This problem of unclear exceptions is also one of the factors which makes the copyright law and its exceptions ineffective in protecting the economic interests of copyright owners and leads to an increased quantity of copyright infringements in the Thai education sector.

The second lesson from Thailand is that the insertion of the conditions of the three-step test into the national copyright legislation as a means to comply with Article 9 of the Berne Convention and Article 13 of the TRIPs Agreement and then regard them as copyright exceptions in their own right is not the best mode of implementation because it can lead to more problems. In this instance, the fact is clear that the Thai legislators chose a convenient way to ensure that the CA 1994 fully complied with the obligation under the TRIPs Agreement by simply inserting the second and third conditions of the three-step test into the Act and then regarding them as preconditions to all copyright exceptions. This leads to further problems because the meaning of the two conditions are unclear, so it affects the operation of

other exceptions in the Act, which normally require the two preconditions to be satisfied together without other additional conditions. Also, regarding these conditions of the three-step test as a copyright exception is clearly inconsistent with the objective of the test, which is to impose constraints on the exceptions to exclusive rights in national copyright laws rather than acting as copyright exceptions themselves. This also makes it more difficult for the national courts to interpret the two conditions because these criteria of the three-step test in the Berne Convention and TRIPs have been interpreted by the relevant international bodies such as the WTO Panel. Thus, if the national court interpreted these two conditions in an opposite direction to the provisions of the three-step test and the decisions of the WTO Panel, it might face challenge from other members of the WTO in the WTO dispute settlement proceeding. This already happened to the US in the WTO Panel Decision No WT/DS106, where the US had been challenged by the European Commission because its exceptions in section 110(5) do not comply with the three-step test; so the same situation can probably happen to other countries as well. Therefore, inserting the conditions of the three-step test into the educational exceptions is not the best way or a good example of implementation of Article 13 of TRIPs Agreement for other countries.

The third lesson from Thailand is that when the court does not play its role in clarifying the law and ensuring that the exceptions in the national copyright law comply with the three-step test, then it might become necessary for the government to consider making legislative changes in order to ensure that the economic interests of copyright owners and the incentive for creativity under the copyright protection regime will be protected. In the example of Thailand, it is clear that the court is not

only silent about the issues relating to multiple reproductions and the reproduction of entire books but goes further to create two problematic approaches which weaken copyright protection in the Thai education sector and are clearly inconsistent with the three-step test. The first approach allowed the reproduction of entire textbooks to be done under the exceptions for research and study when the numbers of the textbook in the library are not matched with the numbers and the needs of students, or the price of books is unreasonably expensive. In the second approach, the court interpreted the term 'not for profit' and held that such reproduction by the photocopy shops would not be considered as profit from infringing copyright works of others if done under order forms or employment contracts between the student and photocopy shops. These two approaches allow the students to reproduce the entire textbooks freely under the exceptions since most universities in Thailand do not have enough textbooks to match the number of their students, while the photocopy shops can escape from copyright infringement by relying on order forms from the students as evidence to prove that the profit granted from photocopying the copyright work is not from infringing copyright but is in exchange for the use of human labour instead. These clearly impaired the economic interests of copyright owners severely as well as reducing the effectiveness of the copyright protection regime in Thailand. In such a situation, it is time for law reform.

Other countries can learn from Thailand's experiences that without a clear prohibition on multiple reproductions and clear limitation as to the amount of reproduction, there is a possibility that the court might create some unique approaches inconsistent with the three-step test in order to allow photocopy shops and users to reproduce copyright materials under the exceptions regardless of

whether such reproduction impairs the economic interest of copyright owners. This view is supported by several IIPA reports on the copyright protection in Thailand, which illustrate that the increased quantity of the copyright infringement in the Thai education sector results from the lack of a clear prohibition on the reproduction of entire textbooks and multiple reproductions and the misinterpretation of the three-step test by the Thai courts.⁸⁵⁷ In contrast, the UK approach clearly sets a clear limitation as to the amount of reproduction and a clear prohibition of the multiple reproductions under the exception as well as making clear that the fair dealing exception for private study will only cover the private study of a person dealing with the copyright works for his own personal purpose and does not extend to third parties who produce copyright materials for the purpose of others' private study or for sale to students.⁸⁵⁸

There are two lessons to be learned from the study of guidelines for educational use. First, such guideline is very useful because it ensures some degree of certainty for educational institutions, teachers, librarians and users by providing assistance in determining how much of a work can be reproduced under the copyright exceptions. Second, the guideline should reflect the interests of copyright owners and other interest groups in society. So it should not be formulated by copying or imitating from the guidelines of other countries; all interested parties should be able to participate in its creation. This is because if all such groups are involved, it is likely that they will accept the amount of permissible reproductions and other provisions which they all agreed. In the case of Thailand, the guideline for

⁸⁵⁷ See the IIPA special 301 reports on the copyright protection and enforcement in Thailand year 2005, 2006, 2007, 2008 and 2009.

⁸⁵⁸ MacQueen et al., 2007, at 137.

education use from the Department of Intellectual Property (DIP) is not widely acceptable because the DIP did not allow foreign and national publishers, copyright owners and educational institutions to participate in the process of creating the guideline. So the guideline has little use in practice because it does not reflect the interests involved.

The study of the issues relating to the CCS in Thailand also provides two useful lessons for global copyright protection. First, the lack of a CCS makes it more difficult to protect the economic interests of copyright owners because without the CCS, it is very difficult and inconvenient for users to apply for licences. As a result, users have no choice but to reproduce copyright materials without prior permission from the copyright owner. This also encourages the infringement of copyright. Second, the establishment of a CCS without any legal control may result in further problems as currently happen in the Thai music area. For example, the CCS in the Thai music area abuses its power by setting unfair royalty rates for users. Thus, the establishment of the CCS must go together with some legal measures such as the introduction of a dedicated governmental body and regulations to control the operation of the CCS and the introduction of an association or organization representing the educational institutions and users. This will maintain a balance of lobbying and bargaining powers with the CCS representing copyright owners. The lesson here is clear that the establishment of the CCS is very useful for both users and copyright owners but if introduced without legal control or an association to safeguard the interest of users, it could have some impact on the public and educational institutions in term of the royalty rate and access to copyright materials for educational purposes.

Another lesson from Thailand is that copyright law and its exceptions should support the protection of moral rights in both the digital and the general context. The fact is quite clear that ignoring moral rights not only inflicts damage on the rights of authors supposed to be acknowledged as creators of the works but also damages the educational market and the economic interest of copyright owners.⁸⁵⁹ This is because the problems also undermine incentives for creativity such as academic prestige or reputation. For instance, the educational exceptions under the Thai CA 1994 allow the reproduction and uses of copyright works for educational purposes without a requirement of sufficient acknowledgement. As a result, academic authors who create work in order to gain prestige or reputation in the education sector may lose their motivations and incentives for creativity. Further, the study of the moral rights problems in the thesis indicated that the lack of protection for RMI also affects the protection of moral rights in the digital environment because RMI contains information about copyright owners and their works which is very important for distributing works in the digital environment, searching for copyright owners and tracking the infringers. The RMI provision is not only a sufficient source of moral right but is also an important step towards the recognition of such rights in the digital environment since authors of such works normally rely upon continuing identification in order to build their reputation, careers and income.⁸⁶⁰ In the case of Thailand, there is no provision protecting the RMI under the CA 1994, so the removal or alteration of RMI which is attached to the digital copyright materials is not prohibited. In order to ensure that the moral rights to be acknowledged as an author will be recognized in both digital and analogue context, I recommend that the

⁸⁵⁹ IIPA Report on Copyright Protection in Thailand 2008; See also IIPA Report on the Proposed US-Thailand FTA 2004.

⁸⁶⁰ Harbert 2005, at 138; See also Schlachter 1997, at 32.

insertion of the requirement of sufficient acknowledgement into the educational exceptions in the Thai CA 1994 must be carried out together with the introduction of the provisions on the protection of RMIs. This is because, if the insertion of the requirement of sufficient acknowledgement into the educational exceptions is important for the protection of the moral rights in hard-copies or in a general context, then the RMI provisions are very necessary for the protection of the moral rights of attribution and integrity in the digital environment.

One of the most important lessons in the thesis is that the education and research demand exceptions that can deal with digital issues and at the same time support long-distance learning, lifelong learning and self-learning progress of the individuals by making the works accessible as widely as possible for educational purposes. This means that the exception should ensure that individuals can take full advantage of the new digital technology and at the same time not obstruct the long-distance and lifelong learning education of the individuals. In the case of Thailand, the educational exceptions have failed to achieve both of these objectives because they only allow the distributions of copyright materials by teachers and educational institutions to be done in class or in institution. Not only does the exception become an obstacle for long-distance learning students, but it also prevents educational institutions, teachers and students benefiting from digital technologies. This is because it does not cover the situation where the institution makes copies or materials available via secure networks or where the institution sends such materials to students by email. Such actions cannot be considered as reproduction or distribution in classrooms or in the premises of the institutions under the scope of the exception. At present, the exception is too limited for the digital age, where

information and learning processes are no longer confined to classroom or educational institution but can be shared over the Internet or secure networks.

The lesson here is also that the outdated copyright law can cause adverse impact on long-distance learning education and the use of digital technology in the education sector. Other countries might learn from Thailand that they should be aware of the outdated copyright law and exceptions, which can potentially prevent them from taking advantage of new technology and from access to knowledge and education. Such situation can normally happen to any country where the copyright law and its exception have been enacted at a time when digital technology was not available or widely accessible for educational purposes. In such case, the scope of the exceptions was defined in the context of the educational environments that existed at that time which normally focused on enabling the reproduction of the works in hard-copies. Consequently, such an exception cannot deal with the current situation. With the non-application of the exception, legitimate uses or activities in the digital environment are infringement when they should not be. This will eventually affect the public interest and activities because users do not know whether or not their digital uses of copyright materials will lead to copyright infringement claims. The fear of copyright infringement may therefore stop people from carrying out such activities which would, however, be legal if the exception applied. The non-application of the exception also means that the users may need to obtain a licence for using such materials. In such case, the situation would be worse if such a country does not have a CCS to offer a licence for the use of educational materials.

One good lesson from the study of the exceptions for educational institution is that the extension of the exception for the benefit of those in the education sector

such as educational institutions, teachers, and students are equally important to the protection of the economic interest of copyright owners and the incentives for creativity under the copyright law. Certain limits must be imposed on such exceptions, however, in order to ensure that the expansion of the scope of exception does not interfere with the incentives and legitimate interests that copyright law provides to creators or owners of the copyright works. In the case of Thailand, I recommend that the exception for educational institutions in section 32 paragraph 2(7) of the Thai CA 1994 should be extended to cover the activities of long-distance learning education as well as enabling educational institutions, teachers and students to provide materials for students via electronic means and to take advantage of new digital technology under this exception regardless of their location. However, it is also necessary to ensure that such extension of the exception will not affect the economic interest of copyright owners and the incentive for creativity under the copyright law, so several limits must be imposed on the proposed exception. For instance, the proposed exception for educational institutions will apply only where there is no licensing scheme in place and also such access to or the distribution of works via digital means under the proposed exception should only be permitted if security measures or secure networks are in place and so on.

I also found three important lessons from the study of copyright and TPMs. The first lesson is that the copyright law which is only capable of protecting the educational materials in hard copy alone is not enough to protect the economic interest of copyright owners in the modern world where copyright materials can be easily distributed and made available online in digital form. In the case of Thailand, it is clear that the changes to the copyright exceptions in the Thai CA 1994 alone are

not enough to protect the economic interests of copyright owners in the Thai education sector because such changes cannot prevent the act of circumvention of the TPMs and cannot cover other digital copyright issues. Presently, the current Thai CA 1994 and its exceptions do not mention TPMs, so their circumvention can be done freely. Thus, I recommend that such changes to the exceptions in the Thai CA 1994 must be carried out together with the introduction of the provisions on the protection of the TPMs into the Thai copyright systems in order to ensure that the copyright materials in digital forms will be protected. There would be no point in having TPMs or security system if anyone can circumvent them freely without any restriction or legal control.

The second lesson is that TPMs can be very useful in protecting the economic interest of copyright owners and also in assisting educational institutions to create a secure network by allowing them to control access or to place a limit on who could access materials in the digital environment. But they can pose a real threat to non-infringing uses under the copyright exceptions. Every country should be aware that the impacts of the TPM provisions such as those in the FTAs and the DMCA can potentially undermine non-infringing uses under the copyright exceptions. They do not allow copyright exceptions to apply in the TPM context by making clear that the TPM claim is independent and separate from the copyright infringement claim and that copyright exceptions are not relevant to the TPM claim.⁸⁶¹ This approach not only confirms that copyright exceptions are irrelevant to the TPM claim but also

⁸⁶¹ *RealNetworks, Inc. v. Streambox, Inc.*, No. C99-2070P, 2000 U.S. Dist. LEXIS 1889 (W.D. Wash. Jan. 18, 2000); *Universal City Studios, Inc. v. Reimerdes (Eric Corley)*, 111 F. Supp.2d 294 (S.D.N.Y. 2000), affirmed in *Universal City Studios, Inc. v. Reimerdes (Eric Corley)*, 273 F.3d 429, 459-60 (2d, Cir. 2001); *United States v. Elcom Ltd. (Elcomsoft Co., Ltd.)*, 203 F. Supp. 2d 1111 (N.D. Cal. 2002); *The 321 Studios v. Metro Goldwyn Mayer Studios*, No. C02-1955 SI, 2004 U.S. Dist. LEXIS 2771 (N.D. Cal. Feb. 19, 2004).

makes clear that the TPM claim is subject only to the TPM exceptions provided in the TPM provisions. In other words, it prevents the exercise of non-infringing uses under the copyright exceptions by allowing the copyright owners to use the TPMs to prevent users from access to copyright works or to decide whether or not the users can use works within the copyright exceptions.⁸⁶² Therefore, copyright materials which users can traditionally use for free under the copyright exceptions are now constrained by the TPM provisions. It is likely therefore that the distribution of the copyright work facilitated by the TPMs will be based upon payment for access, so those who cannot afford to pay will be excluded from access.⁸⁶³ With this approach, the copyright exception for non-infringing uses could probably be excluded and become irrelevant in the digital context, so there is a strong possibility that public interest could be undermined in the end.⁸⁶⁴

One last lesson from the study of the TPMs is that the TPMs provisions should not undermine non-infringing use under copyright exceptions and entail complete control for the copyright owners over the dissemination of copyright work, but they should enable the copyright exceptions to develop alongside the TPM exceptions. In this aspect, the exceptions to the TPM provisions should ensure that all non-infringing uses under the copyright exceptions will be exempted from the violation of the TPM provisions. This cannot be achieved easily since the exceptions in the TPM provisions are very narrow in scope. This can be seen clearly in the TPM provisions in the FTAs and the DMCA. In this aspect, although the FTAs contain seven specific TPM exceptions and one broad exception known as the rule-making proceeding which allows the Librarian of Congress to create a new and additional

⁸⁶² Hilty 2005, at 107.

⁸⁶³ Ibid.

⁸⁶⁴ Esler 2003, at 569.

exception to the TPM provisions for a class of works, these are not enough to prevent the impact of the TPM provisions on non-infringing uses under the copyright exceptions, because they are of very limited scope and application.⁸⁶⁵ For instance, the rule-making proceeding exception only allows the Librarian to create new and additional exceptions to the anti-circumvention provisions but does not apply or affect potential liability under the anti-trafficking provisions.⁸⁶⁶ Further, it only exempts classes of works so it cannot be applied where all types of works suffer with the same problem. Similarly, the seven specific exceptions in the FTAs are very useful but also very limited and narrow in their scope and application. In the example of Thailand, the scope of the copyright exceptions relating to libraries and educational institutions in the Thai CA 1994 will also be narrowed down by the TPM exception for non-profit libraries and educational institutions. This is because the TPM approach in the DMCA and the FTAs does not allow the copyright exceptions to apply to the TPM claim. Thus, the activities of the library and educational institutions related to the digital context will no longer benefit from the broader scope of the copyright exception but will be replaced by the narrower TPM exceptions. This proves that the current TPM exceptions are not enough to prevent the impact of the TPM provisions since they cannot cover all non-infringing uses under copyright exceptions. Hence, it is necessary to have TPM exceptions which can guarantee that all non-infringing uses under the copyright exceptions could be exempted from the violation of the TPM provisions.

⁸⁶⁵ The rule-making proceeding exceptions in section 1201(a)(1)(B)-(E) of the US DMCA also appear in the most of the FTAs. See Article 17.7(5)(d)(i) of the Chile-US FTA; Article 16.4(7)(f)(iii) of the Singapore-US FTA; Article 17.3(7)(a)(viii) of the Australia-US FTA; Article 15.5(7)(e)(iii) of the CAFTA-US FTA; Article 15.5(8)(d)(viii) of the Morocco-US FTA; and Article 15.4(7)(d)(viii) of Oman-US FTA.

⁸⁶⁶ Besek 2004, at 393.

In the future, the copyright exceptions will still be important in balancing between the copyright owners and the public but their role might be changed in the digital environment. Presently, copyright law grants exclusive right to copyright owners, while the exceptions play an important role in protecting the interest of the public by allowing the users to use copyright works in certain circumstances without worrying about transaction costs or royalty fees. The exceptions are also useful in eliminating transaction costs because without them, the users will have to obtain a licence for using copyright materials in all circumstances regardless of whatever the amounts of uses they use. However, the role of copyright exception may be changed in the future because the copyright exceptions themselves have their limits. In this instance, the exception which cannot reflect what people actually do or use in practice will not have much value. As Professor MacQueen observes in the future it is likely that individual exceptions allowing for research and study will be of small value if they cannot make materials available in the way that people want to use or apply them where research and study take place in the digital environment.⁸⁶⁷ For example, the exceptions may provide a clear limitation as to the amount of permissible reproduction but if such permissible amount is very small or too limited, then it does not reflect the actual needs of the users. Thus, it has little value in achieving its underlying policy objectives since people cannot benefit from it. There is also the issue relating to the convenience of the users because in practice it is difficult for users to calculate strictly the permissible amount at any time when they are reproducing copyright materials, so it would be more convenient for them to rely

⁸⁶⁷ MacQueen 2009, at 224-225.

upon the CCS which offers the licensing scheme system for them to use such materials.

This is especially true in the digital environment, where the users need to access copyright materials but they will not get it unless they pay for it. As I have already mentioned, in the digital environment, the copyright owners can use TPMs to control whether or not users access their works and in practice, they will make works available only to those who are willing to pay for access. With this power, the ability of the copyright exceptions will be limited in the digital context and thus it is likely that the licensing scheme system will play an important role in this area. Nevertheless, the copyright exceptions are still necessary because there is the need for the exception to apply in certain circumstances such as where there is no licensing scheme in place and where the amount of reproduction is quite minimal or small. In this instance, if the CCS does not make any licensing scheme available for the users, then it would be a wise decision to have the exception to apply in order to ensure that users and students can reproduce or access copyright materials for permitted purposes. Also, there is a need for the exceptions to apply where the amount of the reproduction is small, because if the digital reproduction requires licensing in every case without any exception, it would be practically inconvenient for the users or students to obtain such materials. This means that the copyright exceptions are still necessary but their role will be limited since the use of copyright materials in both the educational sector and the digital environment will increasingly rely upon the licensing scheme system offered by the CCS.

The future trend seems to be consistent with the approach of the UK and US legislations which hold that the copyright exceptions will not apply where there is a

licensing scheme provided by the CCS in place for users. The Thai courts also accept this approach by applying it in several decisions.⁸⁶⁸ This means that the use of copyright materials in the future will be governed by the copyright exceptions and the licensing scheme provided by the CCS. The Thai copyright system is also moving forward to the US and UK approach where the use of copyright material is governed by the copyright exceptions and the blanket licensing scheme from the CCS.⁸⁶⁹ Especially, in the Thai education sector where there are mass uses or continuing exploitation of copyright materials on a regular basis, it is also likely that the prospective CCS and the licensing scheme system will be a key component to regulate and manage the use of copyright works together with the educational exception. This will benefit the users and the copyright owners because the users can access larger quantities of materials with minimum costs and at the same time the interests of copyright owners will be preserved by the CCS which collects remuneration and distributes them to copyright owners.

⁸⁶⁸ The IP&IT Court Decision No. 784/2542 (1999) and the IP&IT Court Decision No. 785/2542 (1999).

⁸⁶⁹ Suthersanen 2003, at 592.

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