

The Implementation of Anti-Circumvention Legislations in Thai Copyright System

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Abstract—The WIPO copyright treaty (WCT) was established by the World Intellectual Property Organisation (WIPO). This agreement required the contracting nations to provide adequate protection to technological measures to prevent massive copyright infringement in the internet system. Thailand had to implement the anti-circumvention rules into domestic legislation to comply with this international obligation. The purpose of this paper is to critically discuss the legislative standard under the WCT. It also aims to examine the legal development of technological protection measures in Thailand and demonstrate that the scope of prohibitions under the copyright Act 2022 (NO.5) is similar to the Digital Millennium Copyright Act 1998 (DMCA) of the United States (US). It could be found that the anti-circumvention laws of Thailand prohibit the circumvention of access-control technologies, and the regulation on trafficking circumvention devices has been added to the latest version of the Thai Copyright Act. These legislative evolutions have revealed the attempt to reinforce the legal protection of technological measures and copyright holders in order to be in line with global practices. However, the amendment has problems concerning the legal definitions of effective technological measure and the prohibited act of circumvention. The vagueness might affect the scope of protection and the boundary of prohibition. With this aspect, the DMCA will be evaluated and compared to gain guidelines for interpretation and enforcement in Thailand. The lessons and experiences learned from this study might be useful to correct the flaws or at least clarify the ambiguities embodied in Thai copyright legislation.

Keywords—Legal Development Technological Protection Measure, prohibition, circumvention, Thailand.

I. INTRODUCTION

IN the age of digitalisation, works are commonly reproduced and widely disseminated through the internet. This can seriously endanger to the economic interests of copyright holders [1]. Technological measures such as cryptography, encryption and password are effective mechanisms preventing online copyright infringement. Nevertheless, these technologies are often defeated by hackers, and so it is important to establish technological protection measures or anti-circumvention rules to prohibit the violation of technological measures, and safeguard the electronic works [2]. The WCT was governed by the WIPO, it is the first international legislation that mandates the member states to provide adequate protection and remedies against the circumvention of the technological measures. This treaty contains board and general provisions without further guidance regarding the legal definition and level of protection required for the technological measures. It allows multiple interpretations for the member states to implement the anti-

circumvention rules compatible with their domestic needs [3]. Thailand has the instrument of accession to be a party of the WCT, and officially became member number 113 on October 13, 2022 [4]. Therefore, the Thai parliament attempted to implement these regulations into the Copyright Act in the manner that conforms with international standards. The purpose of this paper is to address the development of anti-circumvention obligations in Thailand. Copyright Act Number (NO.) 2 of Buddhist Era (B.E.) 2558 (2015) is the initial piece of domestic law that incorporates these provisions. Nonetheless, there are a number of problems in connection to the legal definitions and inadequate protection to copyright works available on the internet. It prohibited only the direct act of circumvention, but the anti-trafficking circumvention devices did not exist in Copyright Act (No.2) 2015 [5]. With this regard, the legislative amendment was finally taken place in Thailand, and it was officially promulgated in February 2022. It is arguable that this new version highly resembles to the DMCA of US, which provides the protection against the circumvention of access-control measures, and includes anti-trafficking of services or devices used for circumvention. Even though the Copyright Act 2022 has been reinforced by prohibiting the manufacturing, offering, disseminating the circumvention tools, the vagueness of “effective technological measure” and “circumvention” remains unsolved. These issues would directly affect the scope of protection, prohibition and enforcement. In this vein, this paper will identify the meaning of these legal terms by analysing and comparing with the DMCA to gain the definitions and explanations to clarify the difficulties. By evaluating how technological protection measures are adopted in the US law would be useful to create the certainties, and generate the models for legal interpretation and implementation in Thailand. It is hopeful that these legislative experiences would be used as an example for other developing countries to improve their regulations.

II. RESEARCH METHODOLOGIES

This article seeks to review the evolution of anti-circumvention rules in Thailand, and identifies the legal ambiguities existing in the new version of these regulations. In this vein, the doctrinal legal research and comparative methodology are adopted to investigate the proper legislative models and solutions for technological protection measure under the Thai Copyright Act. The doctrinal research is primary employed to study laws, legislative interpretations, statutory

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intents, legal reasoning and concepts of anti-circumvention regulation from various reliable sources [6]. This paper will mainly rely on primary materials, which include relevant international treaty and national legislations [7]. The secondary materials are used to gain critical reviews, legal explanations and comments, these would base on books, journals, articles, parliament meeting reports, parliament debates [8]. Moreover, comparative method is applied to learn the similarities and differences between specific legislations. It contributes better understanding on implementing, interpreting and enforcing of Thai law and other jurisdictions [9]. To reach these objectives, it would be useful to examine the DMCA, because it provides the precise explanations on “effective technological measure” and “circumvention”, this jurisdiction could prevent piracy and protect the interests of the copyright holder in the digital era [10]. Therefore, the US law will be mainly compared to demonstrate that the new version of Thai law follows the law of the US. The models for legal definitions and interpretation will be gained from this comparison. Additionally, the comparative approach is considered as an instrument to unify the law [9]. It would help to harmonize Thai legislations with the WCT, which is obliged for ratifying this international treaty. With this regard, the doctrinal legal research and comparative methodology would help to understand the laws, illuminate the unclear legal wording, and improve Thai law to reach the global standard.

III. THE TREATY OR INTERNATIONAL APPROACH

The WCT requires the contracting members to establish adequate legal protection against the violation of effective technological measures. These technologies are employed by authors to safeguard their rights under the WCT or the Berne Convention, and restrict any acts to their works which are not permitted by the authors or law [11]. According to the language of the WCT, this obligation contains the general wording, and leaves some freedom to contracting parties to implement the policies and regulations in compatible with domestic contexts [12]. This paper would provide the ongoing discussions concerning the legal structure of anti-circumvention rules under the WCT that might be implemented in difference countries. First, article 11 of the WCT obliges the members to provide legal safeguard to effective technological measures, but it does not define the term “effective”. Many legal commentators interpreted that the effective technical device should be able to properly resist the intentional circumvention. It should not be accidentally destroyed or too easy to violate [13]. Additionally, the WCT contains unclear provision on the nature of technological measure gaining legislative protection. There are two types of technology used to protect the digital materials, which include access controls and right controls. The access controls are normally used to restrict the users from unauthorised access, view, listen and comprehend the electronic works [14]. Another type of technological measure is use-controls or right-controls measure. This device is commonly used to prevent the infringing of exclusive rights of copyright holder. The right-control mechanisms might protect the digital works against copying and redistributing through the internet

system [2]. It could be concluded that the WCT introduce very broad provision on the nature of technological measure enjoying the protection under anti-circumvention rules [12]. It allows the members to determine the type of technologies to be protected by the law.

Furthermore, the WCT contains unclear provision regarding the scope of prohibited act, this treaty did not provide any guidance on whether this regulation covers the act of circumvention or also the trafficking circumvention devices (preparatory acts) in order to provide the adequate protection to technological measure [12]. It is obvious that the WCT bans the act of removing, bypassing, destroying or deactivating technological measure. However, the prohibition on manufacturing and distributing circumvention devices seems to be more effective than regulating only individual acts of circumvention. Lacking of the necessary tools, there is a very small number of users who have the technical capability to overcome the protective technologies [10]. It is important to note that this provision might undermine non-infringing uses of digital materials because the circumvention devices and services might be entirely banned from the market. These necessary tools would be no longer available for educational activities and other non-infringing purposes [12]. With this aspect, the anti-circumvention rules under the WCT remain debatable in difference countries. It also poses the significant challenges for domestic legislators to implement the anti-circumvention law in the manner that effectively safeguards the digital works and copyright holders, as well as preserving the interest of the public [3].

IV. THE ANTI-CIRCUMVENTION LEGISLATION UNDER THE COPYRIGHT ACT (NO. 2), B. E.2558 (2015) OF THAILAND

To comply with the development of information technology and tackle the wide spread copyright infringement in digital era, Thailand had to revise the domestic legislation to deal with these issues. The Copyright Act (NO. 2) of B.E. 2558 (2015) initially introduced the anti-circumvention rules in Thailand. This version provided the definition for “technological measure” as technology designed to control reproduction of or restrict access to the copyright work or a recording of a performance. Such technology is effectively used to protect against unauthorized access to or copy of a copyright work or recording of a performance. It also defined the term “circumvention” as any act that make technological measures ineffective [15].

With regard to the nature of technological measure protected by the laws, these provisions clearly encompass the access controls and copy controls. However, the exclusive rights under copyright law include the right to duplicate, sell, adapt and communicate the works to the public. Therefore, these definitions seem to be problematic by limiting the protection to copy controls, which do not cover the other exclusive right of copyright holders. These provisions are probably interpreted to safeguard merely the technical devices used to restrict access and control copying the copyright works, but those preventing other uses are not fallen within the scope of protection. It could not sufficiency protect the wider exclusive rights and financial

interest of copyright holders [16]. Therefore, it is arguable that the definitions of technological protection are unlikely to be entirely clear and accurate.

Turning to the prohibited acts, section 53/4 mandated that the act of circumvention or services accommodating the violation of technological measure with intention or reasonable ground to know that such act may enable copyright infringement, would be deemed violation of technological measure [15]. Based on this section, it penalized only the infringer who know or has the reasonable ground to know that the circumvention may lead to copyright infringement [16]. Moreover, the parliament of Thailand decided to adopt the minimal provisions to technological protection measures by banning only the act of circumvention, but the anti-trafficking circumvention device did not exist. It seems to be the major problem of technological protection measures under The Copyright Act (NO. 2) B.E. 2558, and made these regulations inadequate to safeguard the digital works and copyright holders [5]. The lacking of the anti-trafficking circumvention devices and services would result in unrestricted hacking tools, they might be widely available for the users to violate the technological measure, and accomplish the copyright infringement. These made the anti-circumvention rules in Thailand become meaningless, and could not provide the effective protection to copyright holders [5].

V. THE COMPARATIVE APPROACH BETWEEN THE ANTI-CIRCUMVENTION LAWS UNDER THAI COPYRIGHT ACT (NO.5) B.E. 2565 (2022) OF THAILAND AND THE DMCA

Due to several problems of The Copyright Act (NO. 2) B.E. 2558 (2015), it was amended and replaced by The Copyright Act (NO. 5) B.E. 2565 (2022). The new version was officially announced on 23rd February 2022, and it shall come into force after 180 days from the date announced in the Government Gazette. It is arguable that the amendment is more stringent than the previous version, and it is highly similar to the DMCA of the US as in the following discussions.

The definition of technological measure was revised to be technology used to protect the rights of copyright holders or the rights of performers under the Copyright Act. It would include technology used to control access to copyright works or recordings of performances effectively [17]. Compared to the previous version, the protection provided to access controls remains untouched. The major change is the term “copy controls”, which was replaced by “right controls”. The new definition allows the broader protection to technological measure to cover not only the copy controls, but also include technical device employed to protect all exclusive rights of the copyright holder. The amendment made the anti-circumvention law of Thailand compatible with the copyright principle and global practice.

However, the new law remains silent on the significant word “effective or effectively”, which directly affects the criterion of effectiveness, the scope of legal protection and the boundary of prohibition against the act of circumvention [3]. The users are unlikely to know whether or not the technological measures fall within the ambit of legal protection, and they would be at risk to be liable for their act of circumvention. Nonetheless, the

precise illustration could be learned from the DMCA, Article 1201(3)(B) stated that a technological measure would effectively control access to the work if the application of process, information, or a treatment with the authority of the copyright holder are required in the ordinary course of its operation in order to allow the user to access to the work [18]. It is arguable that the definition of effective technological measure under the DMCA is explicit, and enables the detailed guideline for interpretation. At least, it provides the explanation or sample concerning how the technological measure shall operate in order to be deemed effective [3], [10]. Hence, it is important to add the definition of effective or effectively to the Thai Copyright Act to clearly identify the qualities of technological measure by adopting the model of US law. It would help the legislators, courts, practitioners to understand about the type and qualification of technology protected by anti-circumvention regulation. The definition would explain the technical term, which enables the user to comprehend about the qualification of technological measures falling within the scope of legal protection. As a result, the users will recognise that they are prohibited to circumvent these technological measures in order to avoid the legal liability.

With regard to the prohibition on individual acts of circumvention, article 53/4 of Copyright Act (No. 5) B.E. 2565 (2022) defines the circumvention as any action that makes the access control measures ineffective shall be deemed a violation of technological measures [17]. It is interesting to note that the current version of technological protection measures in Thailand is modelled by the DMCA of US in term of the level of protection [19]. Unlike the boundary of prohibition under previous provisions, the amendment forbids merely the circumvention of access-control measures, but the circumvention of right-control measure is no longer illegal as long as the circumventor does not violate technological measure to use the copyright works for infringing purposes. Generally, this provision allows the users to destroy the right-control measures to copy or communicate the works under the exceptions. However, if users circumvent technological measure used to protect the rights of copyright holder without any privileges, they would not be liable for circumvention violation, but they will be punished for copyright infringement [10].

There is some vagueness regarding the prohibited act of circumvention under the current version of anti-circumvention laws in Thailand. The language of regulation on an individual act of circumvention is very general without any further clarification and guidance for construal, it seems to be incomprehensible for all stakeholders. It is likely to be difficult for Thai people to know whether or not their activities are unlawful, and lead to the legal liability. It would create the uncertainty on interpretation and enforcement in Thailand. In contrast, the legal definition on prohibited act of circumvention under the DMCA is more precise, the US law explains the word circumventing technological measure as decrypting an encrypted material, or descrambling a scrambled content, or other act that avoid, destroy bypass, deactivate, impair or remove, a technological measure without the copyright holder's

permission [18]. The illustration could indicate the forms of actions that are prohibited by these legislations. With this aspect, the definition and explanation on circumventing technological measure under the DMCA should be used as a model for Thailand. It would help to clarify the prohibited activities, and enable the users to beware their engagement with technological measures. This legal model might provide the guideline for interpretation and implementation of technological protection measure in Thailand.

The most significant change of anti-circumvention rules in Thailand is the implementation of anti-trafficking devices or preparatory activities. Article 53/6 was inserted to prohibit any service, manufacture, sale or distribution of the devices, products or equipment with knowing or having reasonable grounds to know that the such services, products or equipment primarily intend to make the technological measures ineffective. This section also bans the service or equipment which are promoted as the product or device rendering technological measures ineffective. These acts shall be deemed violation of technological measures [17]. The similarity between the new Copyright Act of Thailand and the DMCA also appears in the preparatory activities. Both of these legislations prohibit the distribution of services and devices rendering either access controls or right controls ineffective. This provision could increase the effectiveness of technological protection measure, because it is easier to discover and preclude a small group of device distributors rather than tracking a large number of individual circumventors who violate technological measure at their home [10]. In addition, outlawing the circumvention services or devices could eliminate the violation of technological measure and prevent the copyright infringement in the digital environment. In the absence of circumvention tools, the vast majority of Thai users do not have the technical skill to deactivate the technological measure by themselves, and less circumvention could be carried out [20]. Nevertheless, it is important to note that this obligation is likely to be a double-edged sword; if this prohibition is not well structured, it seems to be difficult to preserve educational activities and other non-infringing uses [12]. The educational communities and lawful consumers might be excluded from a digital environment as the circumvention tools are no longer available to deactivate technological measure to gain access and use the digital materials. These would potentially hinder the free flow of knowledge and information, which is important for the sustainable development for a developing country as Thailand [19].

VI. DISCUSSION

It is argued that the current anti-circumvention legislation of Thailand resembles that of the DMCA of the US [19]. It is likely to exceed the standard required by the WCT. However, the definitions of significant terms “effective/effectively” and “circumvention” remain unclear. The precise legal definitions under the DMCA should be used as the model to create the certainty on interpretation and enforcement in Thailand. This paper strongly agrees to insert the anti-trafficking circumvention devices to The Copyright Act (NO. 5) B.E. 2565

(2022) to restrict the services and distribution of circumvention technologies. The absence of the hacking device will effectively prevent individuals from violating the technological measure. This would increase the efficiency of encryption technologies which are used to protect the digital works against unauthorised access and reproduction. It is arguable that the prohibition of trafficking circumvention devices is useful help to reduce the copyright infringement in digital environment. Although the circumvention of right controls is not inhibited to enable the users to engage with the works under copyright exceptions, it seems to be difficult for users to enjoy the digital material without the ability to access [14]. Moreover, the circumvention tools and services might be eliminated from the market, because they are mostly regulated by the anti-trafficking circumvention devices provision. Consequently, the non-infringing users and educational communities are potentially precluded from the digital materials. To minimize these adverse impacts, the appropriate exceptions for non-profit libraries, study, research, educational uses and other public policies should be included in the anti-circumvention law of Thailand. These privileges would permit the non-infringing user to enjoy the copyright works available online [19]. As discussed, the anti-circumvention rules and especially the anti-trafficking devices are really new, and have not been well-established in the Thai copyright system. The administrative agencies or procedures should be implemented to systematically monitor the effects of these provisions [3]. The same mechanisms might help the non-infringing users to experience the works under specific exceptions.

VII. CONCLUSION

Based on the development of anti-circumvention rules in Thailand, The Copyright Act (NO. 2) B.E. 2558 (2015) was the first step of this provision. It adopted minimal obligation by prohibiting only the direct act of circumvention. The intention of the circumventor is considered for legal liability. In 2022, the Copyright Act was amended to incorporate stronger protection to technological measure to be in line with the WCT and global practice. The prohibition of circumvention was reinforced by excluding the requirement on intention or knowledge of violator to infringe copyright. The anti-trafficking circumvention devices or preparatory activities were newly added to prohibit the circumvention services and the distribution of circumvention tools. Therefore, the current Copyright Act of Thailand regulates the violation of technological measure employed to control access to copyright works. This version outlaws the manufacturing, distributing, or offering the tools and services that make access-controls ineffective. It also bans the distribution of devices deactivating right-control technologies. The legislative development reflects the improvement and greater standard of copyright protection in Thailand. Nonetheless, there are some difficulties on legal definitions and scope of protection that have to be revised and clarified to create certainty on the implementation. Due to a series of amendments, the interpretation and enforcement of these obligations have not been well-structured. It is necessary to continue to assess the impact of these legislations, the

administrative mechanism or procedure that would play a key role to realise the laws, and maintain the balance of interest between the copyright holders and users in the digital era.

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