

Topic 4: Enforcement of Copyright under Cambodian Law

Professor Dr. KHAW Lake Tee, Faculty of Law, University of Malaya

1 INTRODUCTION

Copyright is that branch of intellectual property law that protects creations of the mind. It confers upon the owner of the copyright in the work the exclusive right to control the doing of various acts with respect to his work. It also confers upon the copyright owner to enforce these rights when they are violated without his authority.

The unauthorized doing of any of such acts entitles the copyright owner to institute legal action against the person who has committed such acts, whether to prohibit the person from continuing with his activities or to sue for damages, or both. Apart from civil remedies, most copyright statutes also impose criminal sanctions particularly with respect to commercial activities associated with copyright infringement. Administrative measures in the form of border measures to prohibit importation of infringing or illegal copies may also be used to enforce copyright.

This paper discusses the enforcement of copyright under the Cambodian Law on Copyright and Related Rights of March 5, 2003 in two parts. Part I discusses the provisions relating to the rights and enforcement of those rights, while Part II focuses on what needs to be proved in order to obtain redress for the infringement of copyright.

2 RIGHTS OF COPYRIGHT OWNERS AND AUTHORS

Under the Cambodian law on Copyright and Related Rights, provisions are made to protect works of authors of created and cultural products as well as for the protection of performers, phonograms and broadcasting organizations.

According to Article 18 of the Cambodian law on Copyright and Related Rights,¹ the author of a work enjoys exclusive rights with respect to his work, which shall be enforceable against all persons. These rights include both moral rights (Article 20) and economic rights (Article 21).

The moral rights enjoyed by the author are as follows: the right of disclosure, the right of paternity and the right of integrity. These rights are perpetual, inalienable, “undistrainable” and “imprescriptible”.

Economic rights are concerned exclusively with activities that are associated with the economic exploitation of a copyright work. Hence, the author of a work enjoys the right to authorize the reproduction, communication to the public and the creation of derivative works, such as translation, adaptations of his work, the first distribution of his work, public performance of his work, public display of his work, and broadcasting of his work. There is also the right to control the rental of audiovisual works, works embodied in a phonogram, a computer program, a database or a musical work in the form of musical notation.

3 REMEDIES

The Cambodian Law on Copyright and Related Rights allows for civil remedies, criminal sanctions and administrative measures in cases of infringement of copyright and related rights.

3.1 Civil Remedies

Article 57 entitles the copyright owner whose rights are infringed to file a petition to the court to stop the person from violating his rights and to obtain redress in the form of damages. In cases where the infringement is imminent, the copyright owner may also obtain an order to prohibit the defendant from violating his right.

Apart from compensation, the copyright owner may also seek a return of any benefits derived from the infringing act as well as a delivery up of any disputed equipment or material.

The court may order the confiscation, destruction of equipment or materials being produced or used. Within 30 days of such seizure, the owner of the seized property may petition for the release, and the court may so order in the absence of any cause to the contrary.

The court has the authority to order all provisional measures necessary to ensure the conservation of evidence, such as illegal copies.

As a safeguard, the plaintiff is responsible to the defendant for any injury if the petition to the court for any of the above remedies is proved to be unfounded by the court.

¹ In respect of the rights of performers, see Articles 41-43, phonogram producers, Articles 44-45, video producers, Articles 46 and broadcasting organizations, Articles 47-48.

3.2 Administrative or Border Measures

The copyright owner may petition to the customs to retain illegal copies at the borders. However, the copyright owner must provide evidence to the customs within 10 working days a court order to retain the illegal copies under Article 59 and a petition to the court.

These border measures must be supplemented by the Law on Marks, Trade Name and Acts of Unfair Competition.

3.3 Criminal Sanctions

Most jurisdictions make provisions for the imposition of criminal sanctions on certain activities that are related to copyright infringement. In most cases, such prohibited activities are commercial in nature, such as making, selling, importing or distributing illegal copies.

Interestingly, under the Cambodian Law on Copyright and Related Rights, there is no requirement of any commercial element in activities constituting criminal offences. According to Article 64, it is a criminal offence to produce, reproduce, perform or communicate to the public a copyright work without the authority of the copyright owner. It is also an offence to import or export illegal copies.

It should also be noted that it is not a criminal offence to distribute illegal copies under Cambodian law. The offences relate only the production, reproduction, performance or communication to the public of the copies of the work. This means that a person caught selling illegal copies is not liable for infringement of copyright nor can be charged for a criminal offence unless it can be proved that he has made those copies himself. Similarly, a person may be caught for exporting or importing illegal copies but not for distributing such copies.

Interestingly, unlike most jurisdictions, it is not an infringement of copyright in a work to distribute illegal copies of a work. The distribution right that is granted under Cambodian law is restricted to the distribution of the original copy or copies that have not been distributed. That is to say, once the copyright owner has consented to the distribution of a copy of his work, he has no more right to control its subsequent distribution, whether by way of sale or other forms of distribution. Accordingly, he has no right to bring any civil action against any person selling or distributing illegal copies of his work.

The position of the phonogram producer and broadcasting organization would appear to be different. Under Article 45 there is a right to control the sale and subsequent distribution of phonograms on the part of the phonogram producer. There is a similar right on the part of a broadcasting organization with respect to the reproduction of any of its broadcast. Such right would extend to the sale or distribution of illegal copies.

The criminal offences are punishable by imprisonment or fines or both, with double punishment for recidivism. The penalties imposed for the proscribed activities, however, vary. For the offence of production or reproduction, infringement is punishable by 6 to 12 months of imprisonment and or to a fine of 5 to 25 million Riels. In the case of the importation or exportation of infringing copies, the offender may be punished with imprisonment of 6-12 months and or a fine of 2 to 10 million Riels. The punishment for performance or communication to the public is 1 to 3 months of imprisonment and a fine of 1 to 5 million Riels.

The Cambodian Copyright Law has provisions against the circumvention of technological protection measures and the removal of copyright management information. Any attempts to circumvent such protection measures or remove such information attract penal sanctions. It is noteworthy, however, that such activities do not give rise to any civil cause of action on the part of the copyright owner.

As in the case of civil infringement of copyright, the Court may order confiscation of revenue, materials, equipment or destruction in cases where copyright offences have been committed.

4 ENFORCEMENT OF COPYRIGHT AND RELATED RIGHTS – MATTERS TO BE CONSIDERED

Copyright is basically a bundle of rights. All the economic rights vested in the copyright owner are capable of being transferred or licensed for exploitation. Any transfer to be of any legal effect must be in the form of a written contract which may limit the transfer to a specified right, and for a certain period and to a certain geographical location only.

For instance, the copyright owner of a comics book may retain all the rights in the copyright in the comics book in Cambodia but transfer or license the reproduction or translation rights to another person for countries outside Cambodia for the

duration of the copyright or for a certain period of time.

As rights can be transferred wholly or partly and for the whole or part of the duration of the copyright and with respect to specific geographical location (Article 35), there may be more than one rights holder for a copyright work. For the purpose of instituting legal action, it is therefore important to determine the following matters:

- 1) What right has been infringed, eg, is it the reproduction right or the public performance right?
- 2) Who is the owner of that right? This is for the purpose of identifying the right plaintiff.
- 3) Whether the plaintiff is the rights holder in Cambodia.
- 4) Whether the duration of copyright is still subsisting in Cambodia.
- 5) Whether it is the correct defendant.

5 CONCLUSION

Cambodia became a member of the World Trade Organisation on 13th October 2004. As a member, it has the obligations to comply with the provisions of the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement.²

Hence, like most countries, Cambodian copyright law provides for adequate provisions for the enforcement of copyright. According to the International Intellectual Property Alliance (IIPA), in its recommendations to the US Trade Representative on Cambodia in 2007,

The enforcement provisions, while not perfect, are adequate to combat copyright piracy, including civil and criminal remedies and the confiscation and destruction of infringing equipment and materials.

The problem, if any, lies in the actual enforcement of these provisions.

Two main concerns were highlighted by the IIPA in their 2007 Report on Cambodia. The first was the importation into Cambodia of pirated materials in the form of CDs, DVDs and books from neighbouring and nearby countries or territories. The second was the use of Cambodia as a country of transit for transshipment of pirated products to other neighbouring countries.

There was also the worry that there could be illegal optical disc production in the country. IIPA maintained that given the lack of sizeable demand in terms of its population, even one optical disc plant was sufficient to cause concern. Hence, the copyright owners would like to see the problem tackled before it becomes a major problem. In the opinion of IIPA,

The gap in the legal structure is the absence of a regulation regarding optical disc plants, but the Law on Copyrights should be used to address illegal activities occurring in any locations or plants producing pirated materials.

²The Cambodian Law on Copyright and Related Rights was enacted in 2003. Perhaps in anticipation of its treaty obligations, Article 67 provides that the provisions of any international treaties shall apply to matters dealt with under the Cambodian copyright law. More interestingly, it is provided that in the event of a conflict, the provisions of the international treaties shall prevail.

**National Training Seminar on
Copyright Awareness
8-10 October 2008**

**Enforcement of Copyright
under Cambodian Law**

**Professor Khaw Lake Tee
University of Malaya**


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Roadmap


- Rights of copyright owner under the Cambodian Law on Copyright and Related Rights
- Enforcement of these rights
 - Civil remedies
 - Criminal remedies
 - Administrative or Border Measures
- Matters to be considered in enforcement

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Books, art, dramatic works, computer programs




Audiovisual works, music, phonograms, photographs




Protected Works Article 7


Radio & TV broadcasts




Handicraft, handmade textile



Circus performances



Performers' Right



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Moral Rights

- Right of disclosure – manner and time of disclosure
- Right of paternity
- Right of integrity – to oppose all forms of distortion, mutilation or modification prejudicial to his honour or reputation

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Economic Rights

- Copyright owner has the right to control
 - Reproduction of the work
 - First distribution of the work
 - Creation of derivative works
 - Public performance of work
 - Public display of work
 - Communication to the public
 - Importation of copies of work
 - Broadcasting of the work
- With respect to computer programs, audiovisual works, phonograms, music sheets, database

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ANY VIOLATION **Any Threatened Violation**



Petition to Court

To stop violation and to seek redress

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Criminal Offences

- Under Article 64, it is a criminal offence
 - to produce,
 - To reproduce,
 - To perform or communicate to the public a copyright work
 - To import or export illegal copies

No provision
against distribution
of copies

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- No civil liability nor criminal liability for distributing copies including illegal copies
- HOWEVER...
 - With respect to phonograms and broadcasts
 - Offence to distribute illegal copies

AN OVERSIGHT?

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- Technology protection measure
 - To restrict no of copies being made
 - To impair the quality of the copies made
 - To restrict access

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Types of technological protection measure (TPM) or anti-circumvention devices

- Encryption, that is, process of translating content or message into an encoded format – 1s and 0s – use of keys to encrypt and decrypt
- Scrambling – Content Scrambling System (CSS)
- Sony's Playstation – access code and chip
- Disabling devices
- Use of watermarks (ERM)

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Circumvention Techniques or Devices

- Theoretically, any TPM can be circumvented.
 - Eg: Posting passwords or registration numbers
 - Loading debugger software to trace how decryption takes place and where key is hidden
 - Hacking the system
- Hence, the push for legal protection of TPM

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Circumvention Techniques or Devices (contd)

- Art 62 – production, importation for sale – devices or means to circumvent TPM - illegal
- Also illegal to suppress or modify electronic management information

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Civil Remedies	Criminal Sanctions	Administrative Measures
<ul style="list-style-type: none"> • Damages • Injunction • Delivery up • Confiscation 	<ul style="list-style-type: none"> • Fine or imprisonment • Double penalties for repeated offence • Confiscation • Destruction 	<ul style="list-style-type: none"> • Retention of illegal copies at border

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Matters to be considered

- Copyright – Bundle of Rights
- Capable of being transferred
 - Wholly or partially
 - For the duration of copyright or part of it
 - The whole world or certain countries

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As an illustration ...

Reproduction To A in Malaysia for 20 years	Reproduction To B in Thailand for the duration of copyright
Copyright	
Reproduction Retain by copyright owner in Cambodia	Reproduction Retain by copyright owner in all other countries

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Checklist

- What right has been infringed, eg, is it the reproduction right or the public performance right?
- Who is the owner of that right? This is for the purpose of identifying the right plaintiff.
- Whether the plaintiff is the rights holder in Cambodia.
- Whether the duration of copyright is still subsisting in Cambodia.
- Whether it is the correct defendant.

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Observation

The enforcement provisions, while not perfect, are adequate to combat copyright piracy, including civil and criminal remedies and the confiscation and destruction of infringing equipment and materials

Intellectual Property Alliance (IIPA), in its recommendations to the US Trade Representative on Cambodia in 2007

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Problem is ...

Enforcement

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