

**Supreme Court of the Kingdom of Thailand**

**S.C. 10673/2010**

**Public Prosecutor v. Thanchanok Rattनाविबुलकुल**

**Court** : Supreme Court

**Case** : Criminal

**Date of Judgment** : November 16, 2010

**Plaintiff** : Public Prosecutor

**Defendant** : Thanchanok Rattनाविबुलकुल

**Concepts** : Copyright Infringement, Illegal Video Shop Operation

**Statutes** : Copyright Act B.E. 2537 (1994)  
Film and Video Act B.E.2551 (2008)

**Panel of Justices**

Maitree Sriarun , Aram Senamontri, Somkuan Wichienwan

**Case Background**

The plaintiff alleged that the injured person was the copyright owner of literary works of computer programs; Spider-Man 3 the Game and Spider-Man Games. The defendant operated a video shop titled Ice Games as a business and gained benefits therefrom without having obtained a license from the Registrar. The defendant infringed the copyright work of the injured person by installing two DVDs of Spider-Man 3 the Game and Spider-Man Games, containing the recorded sound and images, into a game player and connecting to a television through an electric wire in order to let, offer for lease, or communicate to public, while the defendant knew or should have known that such work was the infringement of the copyright work of the

injured person. The defendant intended to make profit or commercial gain from such operation without consent of the injured person.

The defendant pleaded guilty.

### **Procedural History**

The Central Intellectual Property and International Trade Court found the defendant guilty of copyright infringement against section 31(1)(2) and section 70 paragraph two of the Copyright Act B.E. 2537 (1994) but suspended the punishment for one year by virtue of section 56 of the Criminal Code. As for the charge under the section 53 and section 82 of the Film and Video Act B.E. 2551 (2008), the plaintiff only described in the indictment that the defendant operated a video shop but failed to describe the details of the forfeited goods in order to manifest that they fell under the definition of “*video*” under section 4 of the Act, therefore, the indictment was unlawful and the charge of operating a video shop without a license shall be dismissed.

The plaintiff appealed to the Supreme Court.

The Intellectual Property and International Trade Division of the Supreme Court reversed the lower court’s judgment that the defendant was guilty of operating a video shop without a license under section 53 paragraph one and section 82 of the Film and Video Act B.E. 2551 (2008) and shall be fined 50,000 baht, and the charge of copyright infringement shall be dismissed.

### **Issue**

Does the plaintiff’s indictment contain all elements of the offense under section 53 of the Film and Video Act B.E. 2551 (2008)?

### **Rationales**

According to the Film and Video Act B.E. 2551 (2008), section 53 paragraph one stipulates that *“any person shall be prohibited from establishing or operating a video shop as a business or to gain benefits in return unless having obtained a license from the Registrar.”* Section 4 stipulates that *“video”* means *“a recording of visual images or visual images and sounds which can be continuously shown as moving pictures in the form of games...”* and that *“video shop”* means *“any premise providing tools or equipment as well as facilities for exhibiting, displaying or watching a video.”*

The plaintiff described in (1) of the indictment that the defendant operated a video shop titled Ice Games as a business and gained benefits therefrom without having obtained a license from the Registrar and described in (2) of the indictment, which referred to the same act, that the defendant installed two DVDs of Spider-Man 3 the Game and Spider-Man Games, containing the recorded sound and images, into a game player and connected to a television through an electric wire in order offer game rental to customers. When the defendant was arrested, the police forfeited a PlayStation 2 game player, a color television, a joystick, an AV cable, electric wire, and the DVDs, which were tools, equipment, and facilities for offering computer games rental.

Taking into account all facts presented, it can be concluded that the defendant operated a video shop titled Ice Games which offered game rental for customers through displaying devices. The forfeited computer games DVDs were therefore a recording of visual images and sounds which can be displayed continuously by PlayStation 2 game player and television, which were considered as *videos* under section 4 of the Film and Video Act B.E. 2551 (2008). The indictment therefore contains all the acts alleged to have been committed by the defendant, all the

facts and particulars regarding the time and place of such acts, and the persons or articles concerned which were reasonably sufficient to give the defendant a clear understanding of the charge. Moreover, the indictment contains the plaintiff's request that the court punish the defendant according to sections 4, 53, 82 of the Film and Video Act B.E. 2551 (2008) to which the defendant pleaded guilty and did not appear to be misled. The indictment is therefore deemed to contain all elements of the offense according to section 26 of the Act on the Establishment of and Procedure for Intellectual property and International Trade Court B.E. 2539 and section 158(5) of the Criminal Code.

Nevertheless, as for the charge of copyright infringement for commercial purpose under section 31(1)(2) of the Copyright Act B.E. 2537 (1994), one of the core elements of the offense is that the infringed work must be a copyright work under the Act. In this regards, section 8 sets out that *“the author of a work is the owner of copyright in the work of authorship subject to the two conditions; (1) in the case of unpublished work, the author must be a Thai national or reside in Thailand or be a national of or reside in a country which is a member of the Convention on the protection of copyright of which Thailand is a member provided that the residence must be at all time or most of the time spent on the creation of the work (2) in the case of published work, the first publication must be made in Thailand or in a country which is member of the Convention on the copyright protection of which Thailand is a member, or in the case the first publication is made outside Thailand or in a country which is not member of the Convention on the copyright protection of which Thailand is a member, if the publication of the said work is subsequently made in Thailand or in a country which is member of the Convention on the copyright protection of which*

*Thailand is a member within thirty days as from the first publication, or the author has the qualifications as prescribed in (1) at the time of the first publication.”*

As the facts in the indictment appeared that the injured person is a resident of the United States of America and has first published the computer games programs in dispute in 2003 and 2006, however, the plaintiff did not describe in the indictment that the United States of America was member of the Convention on copyright Protection of which Thailand was member which is a material fact and one of the elements of the offense. The indictment is therefore deemed to be unlawful. Even though the defendant has pleaded guilty, the court could not convict the defendant of such offense. This issue is a legal problem concerning public order which may be taken up by the Intellectual Property and International Trade Division of the Supreme Court, even though it has not been raised in the Court of First Instance.

**Key words** element of the offense, copyright infringement

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