

## Supreme Court of the Kingdom of Thailand

S.C. 9602/2011

### Weerasak Khukhanthin v. Pongsaap Public Company Limited, et al.

**Court** : Supreme Court, Thailand

**Case** : Civil

**Date of Judgment** : November 11, 2011

**Plaintiff** : Weerasak Khukhanthin

**Defendants** : Pongsaap Public Company Limited (1<sup>st</sup>)  
Dung Dung Company Limited (2<sup>nd</sup>)  
Nirun Kosaiyakanon (3<sup>rd</sup>)

**Concepts** : Intellectual property, Copyright

**Statute** : Copyright Act B.E. 2537 (1994) sections 4, 27 (1), 31 (1)

**Panel of Justices** :

Prinya Deepadung, Aram Senamontri, Dhajaphan Prabhudhanitisarn

### Case Background

The song “Noom Doi” (A Hill Man) – both lyrics (wording) and music (melody) – had been written by the plaintiff in 1999; while the song “Dek Doi Jai Dee” (A Kind-hearted Hill Boy), which had been written by the third defendant and distributed or made available to the public by the first and second defendants in 2004, was claimed to infringe the copyright of such plaintiff’s work. In response thereto, the first and second

defendants argued that the plaintiff's song had been unsuccessful in popularity and profit, while their rival song with its famous hook wording became a smash hit. The third defendant alleged that he was the co-writer of the plaintiff's song, and that such famous hook wording of both litigants' songs were originated and created by him, and that the plaintiff's song was in fact a copy or modification of the foreign song "Stoney" as sung by the artist "Lobo".

### **Procedural History**

The Central Intellectual Property and International Trade Court held in favor of the plaintiff, and the Supreme Court upheld the lower court's judgment.

### **Issue**

Did the defendants' work infringe that of the plaintiff?

### **Rationale**

According to section 4 of the Copyright Act B.E. 2537 (1994), "musical work" means a work in relation to music intended to be sung or performed, consisting of either melody and wording or melody alone, and including a musical notation or score that is arranged. Therefore, the musical work that is copyrighted must concentrate predominantly on its melody, regardless of wording; i.e. the melody alone is deemed a musical work protected by this Act; while the wording without any melody, albeit intended to be sung or performed, fails to constitute the musical work within the definition under the said Act.

No market values of the musical work are required for copyright protection. On having been originated and created by the songwriter without any unauthorized reproduction or imitation of other copyrighted works, the musical work was protected automatically by the Copyright Act B.E. 2537 (1994), no matter whether it gained in popularity or the copyright therein could be put on sale or not, nor how much did it cost.

Both songs in dispute contained the similar hook – a lyrical phrase that engages or catches the ear of the listener – say, the exact wording “I bring carrots for you” and “your cheeks will become red (orange)” – meaning when you eat the carrots that I gave, you will be so strong and healthy, as evidenced by your cheeks becoming as red (orange) as the color of those carrots.

According to the arguments of the first and second defendants, the hook in the plaintiff’s song was merely an unimportant part because of its unpopularity. However, they both failed to deny that the bars of the musical hook of their song had not been written without any reproduction or imitation, by amending the substantial part, of the hook melody of the plaintiff’s song, as evidenced by the similarity between both songs in the hook wording and melody that was repeated three or four times in order for listeners to memorize the songs. Therefore, such hook wording and melody was held the substantial part of both songs.

Furthermore, although the third defendant accepted that he was the co-writer of the plaintiff’s song, and that the terms “I bring carrots for you” and “your cheeks will become red (orange)” were included in the song by him, it was implied that the third defendant jointly wrote the hook wording only, exclusive of the hook melody. Hence, the whole melody of the plaintiff’s song had been written by the plaintiff alone in 1999 before the third defendant wrote his song in 2004. Such conclusion was evidenced by the third defendant’s answer to the plaint that his argument focused particularly on the hook wording of his song which had been written by him, but neither copied nor imitated the hook wording of the plaintiff’s song. No evidence showed that the hook melody of the plaintiff’s song had also been co-written by the third defendant. Also, no challenge was presented by the third defendant that his whole melody had never been a copy or imitation, by amending the substantial part, of the plaintiff’s whole melody; and that it was different from that of the plaintiff. Accordingly, it was a convincing instance that the plaintiff’s melody and wording

was the prototype being used by the third defendant in his song writing by copying, imitating and amending the plaintiff's musical work, through lack of creating a new work of his own. In fact, the third defendant had requested permission of the plaintiff to use the wording "carrot" only, but had never received permission to make use and amendment of the plaintiff's melody at all. The third defendant who had made such unauthorized copy and amendment of the plaintiff's musical work was therefore held liable for copyright infringement.

According to the third defendant's last argument that the plaintiff's song was a copy or modification of the foreign song "Stoney" as sung by the artist "Lobo", it was finally held that the plaintiff was the lawful owner of his song because no evidence was produced successfully by the third defendant in order to illustrate which melody part of the song "Stoney" had been used, copied or amended by the plaintiff without permission of the "Stoney" songwriter.

The plaintiff's and the third defendant's song was sung by a man and a girl, respectively. According to Thai language and culture, the pronoun "I" (first-person speaker) varies between male and female speaker, i.e. different words are used in order to refer to "I". And so must the male singer and the girl singer be in singing the plaintiff's and the third defendant's song respectively. However, in doing so with respect to the phrase "I bring carrots for you", the third defendant's female vocalist had not sung in her own cultural pronoun "I" but uttered the same pronoun "I" as the plaintiff's male songster did. It was hereby shown that the plaintiff's song had been copied or imitated by the third defendant.

Whereas the three defendants could not rebut otherwise, the facts adduced *ex parte* by the plaintiff were irrefutable that the second defendant was affiliated with the first defendant, both of which had the objectives to manufacture and distribute audio and audio-visual media. According to the three defendants' evidence, the third defendant had been hired

by the first defendant to be its songwriter in 2004 and later wrote the song in dispute, while the plaintiff's song had been made available to the public since 1999 but discontinued in 2002 because of its failure to gain in popularity. This fact confirmed that the first and second defendants had been well aware of both existence and market failure of the plaintiff's song before the hire contract between the third and first defendants was concluded. The first and second defendants had been affiliated with each other and had carried on business together. This was convincing evidence that the sound reason for such hire contract was the first defendant's extensive knowledge of the third defendant's being a co-writer of the plaintiff's song, and the first defendant's desire to get the third defendant to rewrite another rival song – the song in dispute – which was reproduced from the plaintiff's song. After the managing directors of the first and second defendants had derived great satisfaction from listening to the rewritten song and a successful market had been foreseen if the song was recorded, the first defendant promptly made investment in recording the third defendant's new song to be distributed by the second defendant. Such acts as performed by the first and second defendants were deemed to have contributed to the third defendant's committing copyright infringement, by copying and modifying, of the plaintiff's song. It was held that the plaintiff's copyrighted musical work had been infringed by the first and second defendants in collaboration with the third defendant through their unauthorized manners, under sections 27 (1) and 31 (1) of the Copyright Act B.E. 2537 (1994).

**Keywords** copyright, unauthorized manners

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