

**Supreme Court of the Kingdom of Thailand**

**S.C. 6938/2011**

**Public Prosecutor v. Smith Kolkit, et al.**

**Court** : Supreme Court

**Case** : Criminal

**Date of Judgment** : August 9, 2011

**Plaintiff** : Public Prosecutor of the Office of the Attorney General

**Defendants** : Smith Kolkit (1<sup>st</sup>)  
Prapaporn Wisetsiri (2<sup>nd</sup>)

**Concept** : Copyright infringement

**Statues** : The Copyright Act B.E. 2537 (1994) sections 31, 70  
The Act of the Establishment of the Intellectual Property and  
International Trade Court and the Procedure for Intellectual  
Property and International Trade B.E. 2539 (1996) sections 26,  
45  
The Criminal Code section 56  
The Criminal Procedure Code sections 158 (5), 195

**Panel of Justices**

Somkuan Wichienwan, Aram Senamontri, Tanasit Nilkamhaeng

**Case Background**

The plaintiff accused the defendants of copyright infringement of the musical and cinematographic works of Catalyst Alliance (Thailand) Company Limited, the injured person, by selling, offering for sale, or possessing for sale to the public 25 DVDs which the defendants knew that they were the illegal copies of the copyright works of the injured person, for profit and without the consent of the injured person.

The defendants pleaded guilty.

### **Procedural History**

The Central Intellectual Property and International Trade Court found the defendants guilty of copyright infringement against sections 31 and 70 paragraph two of the Copyright Act B.E. 2537 (1994) but the court suspended the determination of the sentence for one year by virtue of section 56 of the Criminal Code.

The plaintiff appealed to the Supreme Court.

The Intellectual Property and International Trade Division of the Supreme Court dismissed the case.

### **Issue**

Does the plaintiff's indictment contain all the acts alleged to have been committed by the defendants against section 31 of the Copyright Act B.E. 2537 (1994)?

### **Rationale**

The elements of the offense of selling, offering for sale, or possessing for sale to the public a work made by infringing the copyright of another person against section 31(1) and section 70 paragraph two of the Copyright Act B.E. 2537 (1994) comprises the action of selling, offering for sale, or possessing for sale; and a work made by infringing the copyright

of another person. The copyright work of another person, the object of the infringement, must be a work of authorship which acquired a copyright in accordance with the criteria prescribed in the Act and such work must still be within the term of copyright protection, because copyright is a right to which the owner shall be entitled for only a limit of time. After the term of protection ends, the copyright work shall become a public domain. Hence, whether a copyright work was within the term of protection by the time it was infringed is a material element of the offense. In order to determine the term of protection, the time when the work was first published is to be taken into account. In this regards, the last paragraph of section 19 of the Act stipulates that *“in the case of the author being a juristic person, copyright subsists for fifty years as from the authorship; provided that if the work is published during such period, the copyright continues to subsist for fifty years as from the first publication.”* However, the plaintiff did not describe in the indictment as to when the injured person had first published its copyright works in dispute. The plaintiff’s indictment therefore did not contain all the acts alleged to have been committed by the defendants against section 31 of the Copyright Act B.E. 2537 (1994) which renders the indictment unlawful according to section 26 of the Act of the Establishment of the Intellectual Property and International Trade Court and the Procedure for Intellectual Property and International Trade B.E. 2539 (1996) and section 158(5) of the Criminal Procedure Code. 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 by either of the parties, according to section 45 of the Act of the Establishment of the Intellectual Property and International Trade Court and the Procedure for Intellectual Property and International Trade B.E. 2539 (1996) and section 195 paragraph two of the Criminal Procedure Code. The charge against the defendants shall be dismissed.

**Keyword** term of protection, first publish, element of offense

**Summarized and translated by** Non Tuntapong

**Edited by Kamonchanok Katinasamit**