

THE REDEFINITION OF “PUBLICATION” IN THAI COPYRIGHT LAW:
ANALYSIS AND POTENTIAL CONSEQUENCES

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Abstract

This article examines the proposed redefinition of “publication” in Thai copyright law, which aims to include internet publishing and shift from “the consent of the author” to “the consent of the copyright owner.” The article employed scenarios and examples to illustrate the practical implications of the proposed changes. It also explores the concept of “country of origin” in copyright law and its relevance to the proposed redefinition.

The article briefly provides background on the existing definition of “publication” in the Berne Convention and Thai copyright law. It briefly analyzes the three criteria for publication under the Berne Convention: distribution of copies, satisfying reasonable public requirements, and the consent of the author.

The analysis finds that the proposed redefinition could have significant implications. While it might modernize the copyright law for the digital age, it could potentially grant more rights to other Berne parties than Thailand would receive from joining the WIPO Performances and Phonograms Treaty. The article highlights challenges in applying traditional publication criteria to digital content, particularly regarding “reasonable availability” and “consent.” It identifies a potential deviation from the Berne Convention in shifting from “the consent of the author” to “the consent of the copyright owner.”

This article concludes by recommending careful refinement of the proposed redefinition, suggesting specific language changes, and encouraging policymakers to consider stakeholder concerns despite the previously held public hearing by the Thai Department of Intellectual Property. The article also recommends consultation with the World Intellectual Property Organization to ensure international acceptability of any changes.

Keywords: Publication, Internet Publishing, Reasonable Availability

Section 1: Overview

This concise article is primarily intended for readers who are well-versed in copyright law, such as intellectual property experts and researchers. This article may also be valuable to policymakers considering the proposed redefinition. However, familiarity with the Berne Convention and other international copyright agreements is expected.¹

As it is known, the Thai Government (via the Department of Intellectual Property, the Commerce Ministry) is in the process of proposing a draft law to amend Thailand's Copyright Act, B.E. 2537 (1994), as amended (the Current Act). The draft also includes a redefinition of the term "publication" (hereinafter to be referred to as the proposed redefinition) to cover "internet publishing."

This draft law uses "internet publishing" without defining it, raising questions about its scope, particularly in relation to "online publishing." While often used interchangeably, some argue that "online publishing" encompasses a wide range of digital distribution

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Due to limited access to information on internet publishing and copyright law, I could not delve deeper into this specific matter within the scope of this work. Readers seeking a more comprehensive understanding of this topic are encouraged to conduct further research.

¹ Readers interested in learning more about the Berne Convention, the WIPO Treaties, and the TRIPs Agreement may find the following documents helpful: World Intellectual Property Organization (WIPO), Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971) [Geneva: 1978, WIPO Publication No. 615 (E); ISBN 92-805-0002-3] (hereinafter referred to as "*Guide to the Berne Convention*," available at <https://www.wipo.int/edocs/pubdocs/en/copyright/615/wipo_pub_615> accessed 22 April 2024;

Chapter1: The WIPO Treaties, by Brigitte Lindner, available at: <https://www.elgaronline.com/display/edcoll/9781786439192/10_chapter1.xhtml>, accessed 30 July 2024;

Blakeney, M. (1996). Trade related aspects of intellectual property rights: A concise guide to the TRIPs agreement. Sweet & Maxwell;

Taubman, A., Wager, H., & Watal J. (Eds.). (2020). A handbook on the WTO TRIPS agreement. Cambridge University Pr.

methods. However, there is no widely accepted standard differentiating these terms internationally.

This ambiguity in terminology could have significant implications for interpreting and applying the proposed changes. For example, it is unclear whether publishing content on platforms like Mesh networks, which are decentralized and do not rely on traditional internet infrastructure, would be considered “internet publishing.” Online publishing often occurs on the World Wide Web (WWW)², it may also be carried out on other online platforms. Mesh networks, for instance, are peer-to-peer networks where devices communicate directly with each other rather than through a central server. This distinction raises questions about the scope of “internet publishing” and whether it encompasses all forms of online publishing.³

For the purpose of this article writing, the author holds that the scope of the term “online publishing” is broader than that of “internet publishing” to ensure that digital distribution methods other than the internet will not be left out. Following this, when the term “online publishing” appears in the parts coming from the author, its scope is broader than that of “internet.” Because of this, towards the end of this article, this author humbly suggests to policymakers to consider using “online publishing” (or other term with a broader scope) instead of “internet publishing.”

Throughout, when and where possible, this article will explore potential impacts of this lack of clear definition and consider how it might affect the implementation of the new copyright provisions.

A mention should be made here that, as seen below, the current definition of “publication” is in line with that of the term “publication” under the Berne Convention, Article 3 (3).

Table 1. Comparison of “Publication” Definitions in the Berne Convention and the Current Thai Copyright Act

The Berne Convention, Article 3 (3)	The Current Act, Section 4
“The expression ‘published works’ means works published with <i>the consent of their authors</i> , whatever may be <i>the means of manufacture of the copies</i> , provided that <i>the availability of such copies has been such as to satisfy the reasonable requirements of the public</i> , having regard to the nature of the work. The performance of	“... ‘publication’ means the distribution of duplicated copies of a work in whatever form or character, with the consent of the author where such copies are available to the public with a reasonable quantity having regard to the nature of the work; provided that the performance or play of a dramatic work, a musical work or a cinematographic

² See <<https://www.encyclopedia.com/environment/encyclopedias-almanacs-transcripts-and-maps/line-publishing>> accessed 28 May 2024.

³ The writing of this paragraph has been partially and limitedly assisted by Claude 3.5 Sonnet.

a dramatic, dramatico-musical, cinematographic or musical work, the public recitation of a literary work, the communication by wire or the broadcasting of literary or artistic works, the exhibition of a work of art and the construction of a work of architecture shall not constitute publication.” ^{4, 5} (italics added)	work, the lecture or the recitation of a literary work, the sound and video broadcasting of a work, the exhibition of an artistic work and the construction of a work of architecture shall not constitute publication.” ⁶
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The article examines the proposed redefinition of the term “publication”⁷ in the Current Act. This redefinition aims to account for internet publishing.⁸ To enable readers to

⁴ These provisions have been taken from <<https://www.wipo.int/wipolex/en/text/283698>> accessed 1 April 2024.

The wording in Article 3 (3) has been a part of the Berne Convention since the adoption of the Stockholm revision in 1967 and has remained unchanged ever since.

⁵ For the Thai version of this definition, see below.

⁶ ‘Copyrights Act B.E. 2537 (1994), Amended by Copyright Act (No.2) B.E. 2558 (2015), Copyright Act (No.3) B.E. 2558 (2015) and Copyright Act (No.4) B.E. 2561 (2018)’ (The Department of Intellectual Property) <https://www.ipthailand.go.th/images/3534/2564/Copyright/Copyright_Act_ENG.pdf> accessed 22 April 2024. This translation will be referred to as “the DIP’s translation.”

Note should be taken that there is an English translation of the Copyright Act, B.E. 2537 (1994) done by Ms. Vipatboon Klaosontorn pursuant to a contract for the Office of the Council of State of Thailand’s Law for ASEAN project. Her translation reads:

“‘Publication’ means the distribution of replicated copies of a work in whichever form or nature with the author’s consent, where such replicated copies are made available to the public in a reasonable quantity according to the nature of the work but this shall not include a performance or the making available of a dramatic work, a musical work, or a cinematographic work, a recitation or a lecture of a literary work, sound and visual image broadcasting of any work, the exhibition of an artistic work and the construction of an architectural work.”

This translation is available at <<https://ocs.go.th/760368ef-ba84-417f-b791-4061907423dd>> accessed 5 August 2024. However, for relatively easy access, the DIP’s translation is used in this article.

⁷ This proposed new definition will be referred hereafter to as the “proposed redefinition.”

⁸ For further reading on internet publishing, consider these resources:

Chris Dombkowski, ‘Simultaneous Internet Publication and the Berne Convention’ (2012) 29 Santa Clara High Tech. L.J. 643 <https://law.scu.edu/scheduled_classes/internet-law-2/> accessed 22 April 2024;

Deborah R. Gerhardt, ‘Copyright Publication on the Internet’ <<https://offices.depaul.edu/secretary/policies-procedures/policies/Documents/Copyright%20and%20Fair%20Use.pdf>> accessed 22 April 2024.

follow the examination relatively easier, this article provides background on existing definitions, motivations for the proposed change, analysis of the proposed redefinition's implications, and recommendations for refinement.⁹

The Thai version of the current definition of “publication” and that the proposed redefinition:

Table 2. Current and Proposed Redefinition of “Publication” in Thai Copyright Act
(Thai version)

The Copyright Act, B.E. 2537 (1994), Section 4 (the current definition) (Column 1)	The proposed redefinition (Column 2)
“‘การโฆษณา’ หมายความว่า การนำเสนอของงาน ไม่ว่าในรูปหรือลักษณะอย่างใด ที่ทำขึ้นโดยความ ยินยอมของผู้สร้างสรรค์ออกจำหน่าย โดยสำเนา จำลองนั้นมีปรากฏต่อสาธารณชนเป็นจำนวนมาก พอสมควรตามสภาพของงานนั้น แต่ทั้งนี้ ไม่ หมายความรวมถึงการแสดงหรือการทำให้ปรากฏซึ่ง นาฏกรรม ดนตรีกรรม หรือภาพยนตร์ การบรรยาย หรือการปาฐกถาซึ่งวรรณกรรม การแพร่เสียงแพร่ ภาพเกี่ยวกับงานใด การนำศิลปกรรมออกแสดงและ การก่อสร้างงานสถาปัตยกรรม” ¹⁰	“‘การโฆษณา’ หมายความว่า การนำเสนอของงานที่ ทำขึ้นในรูปหรือลักษณะอย่างใดออกเสนอต่อ สาธารณชน ไม่ว่าโดยวิธีใด ๆ รวมถึงการนำออก เสนอต่อสาธารณชนโดยผ่านทางอินเทอร์เน็ต โดย สำเนานั้นมีปรากฏต่อสาธารณชนเป็นจำนวนมาก พอสมควรตามสภาพของงานนั้น ทั้งนี้ โดยความ ยินยอมของเจ้าของลิขสิทธิ์ แต่ไม่หมายความรวมถึง การแสดงหรือการทำให้ปรากฏซึ่งนาฏกรรม ดนตรี กรรม หรือภาพยนตร์ การบรรยายหรือการปาฐกถา ซึ่งวรรณกรรม การแพร่เสียงแพร่ภาพเกี่ยวกับงานใด การนำศิลปกรรมออกแสดงและการก่อสร้างงาน สถาปัตยกรรม” (italics added)

Table 3. Unofficial English Translation of the Proposed Redefinition of “Publication”

“Publication” means distributing copies of the work ¹¹ to the public, in any form or means, including <i>making copies of the work available over the Internet</i> , with consent of the <i>copyright owner</i> , provided that the availability of such copies satisfies the reasonable requirements of the public, considering the nature of the work. The following activities do not constitute publication: performance of a dramatic, musical, or cinematographic work; public lecture or recitation of a literary work; broadcasting of any work; exhibition of a work of art; and the construction of a work of architecture. ¹² (italics added)
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⁹ This author wrote this paragraph with the help of the Claude tool.

¹⁰ Government Gazette Vol. 111, Part 59 a, Page 4, dated 21 December 2537 (1994).

¹¹ While “making copies of work available” could encompass internet publishing, to avoid confusion with the same phrase used in the Act’s draft, we will stick with the current wording.

¹² This translation is based on an adjusted version of the DIP’s translation.

While this article primarily addresses the definition of “publication,” it's also relevant to consider the concepts of “first publication” and “simultaneous publication.” These can be seen as subsets of the broader concept of “publication.” The article discusses the scenarios determining whether a work's copyright protection arises from “first publication” or “simultaneous publication” which is crucial, as the latter involves multiple countries. This distinction leads to identifying “the country of origin,” defined as the country whose copyright law offers the shortest term of protection. This definition is significant for determining, among other things, the duration of copyright protection. The article also includes examples and scenarios to explain the terms under discussion.

This article leans towards analyzing the present situation rather than encouraging or discouraging the inclusion of internet publishing. The justification for this approach is that it is intended to be read and considered by stakeholders, including policymakers who will deliberate on the proposed redefinition of “publication.”

This article is divided into eight sections: Section 1: Overview, Section 2: Background, Section 3: The Country of Origin in Copyright Law, Section 4: “First Publication” and “Simultaneous Publication,” Section 5: Publication, Section 6: Some Scenarios Regarding the Redefinition, Section 7: Potential Unintended Consequences of the Proposed Redefinition & Possible Solutions, and Section 8: Conclusion. Notably, Section 5, which can be the central point of this article because it discusses criteria for “publication,” is subdivided into three sub-sections: 5.1: 1st Criterion: Does “Publication” Require Tangible Copies?, 5.2: 2nd Criterion: Reasonable Public Requirements, and 5.3: 3rd Criterion: “Consent of the Copyright Owner” or “Consent of the Author.”

Notably, the inclusions of the Thai language are for the convenience of the readers interested in knowing the original or Thai version. The repeated quotations of some provisions (either existing ones or proposed) appearing in this article are for readers' convenience as well.

Section 2: Background

Thailand is a party to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971),¹³ the 1996 WIPO Copyright Treaty (WCT),¹⁴ and the TRIPs Agreement (amended text),¹⁵ and plans to join the WIPO Performances and Phonograms Treaty (WPPT).¹⁶ Consequently, the Thai Ministry of Commerce's Department of Intellectual

¹³ See, among others, the 1971 revision of the Berne Convention, available at <https://www.keionline.org/sites/default/files/1971_revision_of_Berne.pdf> accessed 21 April 2024.

¹⁴ See <<https://www.wipo.int/wipolex/en/text/295166>> accessed 21 April 2024.

¹⁵ See <https://www.wto.org/english/docs_e/legal_e/31bis_trips_01_e.html> accessed 21 April 2024.

¹⁶ See <https://www.wipo.int/edocs/pubdocs/en/wipo_pub_227.pdf> accessed 24 April 2024.

Property (DIP) has proposed a draft Act on Copyright (No. ...) B.E. ...,¹⁷ which includes redefining “publication” to encompass internet publishing.¹⁸

However, this inclusion may grant more rights than Thailand would receive by joining the WPPT, as it does not currently cover internet publishing.¹⁹ This expansion could potentially adversely affect Thailand’s interests.^{20,21} WPPT, Article 2 (e) states:

“‘publication’ of a fixed performance or a phonogram means the offering of copies of the fixed performance or the phonogram to the public, with the consent of the rightholder, and provided that copies are offered to the public in reasonable quantity;”²²

The Agreed statement concerning Articles 2 (2), 8, 9, 12, and 13 reads:

“As used in these Articles, the expressions ‘copies’ and ‘original and copies,’ being subject to the right of distribution and the right of rental under the said Articles, refer exclusively to fixed copies that can be put into circulation as tangible objects.”²³

It is interesting to point out here that the redefinition uses the phrase “with the consent of the copyright owner” instead of “with the consent of the author.”²⁴

As it is evident in [Table 4](#), below, the Current Act, via Section 8 paragraph one (2), protects both unpublished and published works, defining “publication” in line with the Berne Convention’s meaning, as per Article 3 (3).

¹⁷ See ‘ผลการรับฟังความคิดเห็นร่างพระราชบัญญัติลิขสิทธิ์ (ฉบับที่ ...) พ.ศ. ...’ (กรมทรัพย์สินทางปัญญา กระทรวงพาณิชย์) <https://www.ipthailand.go.th/ร่างกฎหมายที่รับฟังความคิดเห็น/item/notidip_cpr20240327.html> accessed 24 April 2024. This draft may be obtained from the Thai DIP by contacting its office directly.

¹⁸ According to Mr. Puttipat Jiruschana (a DIP staff member), as of 30 July 2024, the draft still is awaiting its submission to the Council of Ministers for its consideration. Thus far, no changes to the draft have been made. Perhaps, appropriate changes will be made when the draft reaches the State Council, some members of which are copyright experts.

¹⁹ See below, particularly Section 5.1 on “1st Criterion: Does ‘Publication’ Require Tangible Copies?”

²⁰ This aligns with the view held by Associate Professor Orabhund Panuspatthna who was a member of the Copyright Law Development Committee.

²¹ For additional discussion on this matter, see Section 7 on “Potential Unintended Consequences of the Proposed Redefinition & Possible Solutions” below.

²² Available at <<https://www.wipo.int/wipolex/en/text/295578>> accessed 30 July 2024.

²³ Available at <<https://www.wipo.int/wipolex/en/text/295578>> accessed 30 July 2024.

²⁴ For further discussion on this, see Section 5.3 below.

Table 4. Comparison of Relevant Provisions in the Berne Convention and the Current Thai Copyright Act

The Berne Convention, Article 3	The Current Act, Section 8, paragraph one
<p>“(1) The protection of this Convention shall apply to:</p> <p>(a) authors who are nationals of one of the countries of the Union, for their works, whether published or not;</p> <p>(b) authors who are not nationals of one of the countries of the Union, for their <i>works first published</i> in one of those countries, or simultaneously in a country outside the Union and in a country of the Union.</p> <p>...</p> <p>(3) The expression ‘published works’ means works published with <i>the consent of their authors</i>, whatever may be <i>the means of manufacture of the copies</i>, provided that <i>the availability of such copies has been such as to satisfy the reasonable requirements of the public</i>, having regard to the nature of the work. The performance of a dramatic, dramatico-musical, cinematographic or musical work, the public recitation of a literary work, the communication by wire or the broadcasting of literary or artistic works, the exhibition of a work of art and the construction of a work of architecture shall not constitute publication.²⁵</p> <p>(4) A work shall be considered as having been <i>published simultaneously</i> in</p>	<p>“The author is the owner of copyright in the work of authorship subject to the following conditions:</p> <p>(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 for the copyright protection of which Thailand is a member, provided that the residence must be at all times or most of the time spent on the creation of the work;</p> <p>(2) In the case of <i>published work</i>, <i>the first publication</i> must be made in Thailand or in a country which is a member of the Convention for 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 a member of the Convention for the copyright protection of which Thailand is a member, if the publication of the said work is <i>subsequently made</i> in Thailand or in a country which is a member of the Convention for the copyright protection of which Thailand is a member <i>within thirty days as from the first publication</i>, or the author has the qualifications as prescribed in (1) at the time of the first publication.” (italics added)²⁷</p>

²⁵ For readers’ convenience, the provision of this Article 3 (3) is included again, despite its earlier appearance in this article.

²⁷ This translation is from the DIP’s translation.

The definition of the term “publication” under Section 4 of the Current Act is similar to that contained in its predecessor (namely, the Copyright Act, B.E. 2521 (1978). An English translation of 1978

several countries if it has been published in two or more countries <i>within thirty days of its first publication.</i> ²⁶ (italics added)	
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The concept of “simultaneous publication,” as explained in Article 3 (4) of the Berne Convention, has been explicitly covered by Thai copyright law since September 28, 1993. On this date, the Royal Decree Prescribing Conditions for the Protection of International Copyright, B.E. 2536 (1993) entered into force. Section 4 of the 1993 Royal Decree stated, in part:

“Simultaneous publication” includes publication of a copyrightable work in a country that is not a party to the Convention for the first time and publishing that work in a country being a party to the Convention within thirty days from the date of the first publication.

This concept now forms part of Section 8 paragraph one (2) of the Current Act, as seen above. The simultaneous publication route allows nationals of non-Berne nations to acquire copyright in Berne parties, sometimes called the “backdoor to Berne.”

The inclusion of “simultaneous publication” demonstrates that Thailand has no intention to utilize Article 6, paragraph (1) of the Berne Convention to restrict protection in the case of works made by nationals of countries that are not parties to the Berne Convention (or non-Union countries). This paragraph stipulates that:

*“(1) Where any country outside the Union fails to protect in an adequate manner the works of authors who are nationals of one of the countries of the Union, the latter country may restrict the protection given to the works of authors who are, at the date of the first publication thereof, nationals of the other country and are not habitually resident in one of the countries of the Union. If the country of first publication avails itself of this right, the other countries of the Union shall not be required to grant to works thus subjected to special treatment a wider protection than that granted to them in the country of first publication.”*²⁸ (italics added)

version may be obtained from Pisawat Sukonthapan, *Research Report on Copyright Laws of the ASEAN Countries: Protection of Foreign Works* (Bangkok, 1985) 199–200. The Office of the Council of State kindly permitted its inclusion in this report. This report will be referred to as “*Copyright Laws of the ASEAN Countries.*”

²⁶ These provisions have been taken from <<https://www.wipo.int/wipolex/en/text/283698>> accessed 1 April 2024.

²⁸ This provision has been taken from <https://www.wipo.int/wipolex/en/text/283698#P119_19081> accessed 14 April 2024.

However, if Thailand expands the definition of “publication” to include internet publishing in the future, it may consider using Article 6 (1) to protect its interests.²⁹ For the provision of Article 6 (1) of the Berne Convention, see above.

It is noteworthy that due to comments from the Copyright Coalition Thailand’s online discussion on April 29, 2024, the DIP is likely to change “internet publishing” to “online publishing.” Some discussants believe that the latter term is broader than the former.

Section 3: The Country of Origin in Copyright Law³⁰

Having examined the brief background related to the “publication” (including its existing definition and the concept of “simultaneous publication” in the previous sections), we now turn our attention to the concept of ‘the country of origin’ in copyright law and its implications for the proposed changes to the Current Act. This section explores how this concept interacts with the proposed redefinition of ‘publication’ to include internet publishing, and analyzes the potential impacts in the context of international copyright conventions.

The concept of “the country of origin” plays a crucial role in determining the term of copyright protection when a work is published simultaneously in multiple countries. According to Article 5 (4) of the Berne Convention (1971), the country of origin is defined as the country whose legislation grants the shortest term of protection.

Historically, Thai legislation has recognized the importance of this concept. The first Thai law to address the country of origin, the 1931 Act on Protection of Literary and Artistic Works, aligned closely with the Berne Convention, identifying the country of origin as the one offering the shortest term of protection in cases of simultaneous publication. This principle was last included in the Royal Decree Prescribing Conditions for the Protection of International Copyright, B.E. 2536 (1993).³¹

Despite its previous inclusion, the Current Act does not mention the country of origin. This omission poses potential challenges for Thai courts when dealing with international copyright cases. However, these challenges may be mitigated by relying on Section 25 of the Current Act, which stipulates that copyright protection lasts until the last day of the calendar year in which the copyright term expires if the exact expiration date is uncertain.

²⁹ See Section 8 of this article.

³⁰ This author wrote this section with the help of the ChatGPT-4 tool.

³¹ This Royal Decree replaced the Royal Decree Prescribing Conditions for the Protection of International Copyright, B.E. 2526 (1983).

Section 4: “First Publication” and “Simultaneous Publication”

The examples below illustrate these types of publication under Section 8, paragraph two (2) of the Current Act.

Example 1: First Publication occurs in Thailand

Jane Doe writes a novel, prints 1,000 copies, and sells them in Bangkok. This distribution should meet the publication criteria since Jane distributed these tangible³² copies willingly, and the number should be reasonable given the work's nature. Thus, the work is considered a published work in Thailand, granting copyright protection as the first publication.

Example 2: Simultaneous Publication (first publication occurs in a country that is not a party to the Berne Convention but within 30 days in a Berne party)

John Doe, a national from a non-Berne Convention country, writes a novel and prints 2,000 copies. He initially sells them in his home country on March 15, 2024, and a week later in Japan, a Berne Convention member. The novel meets publication criteria because John distributed the copies willingly in both countries, satisfying the necessary volume and nature requirements. The novel's first publication occurs in his home country, with a simultaneous publication in Japan, qualifying for copyright protection under Section 8, paragraph one (2).

Example 3: Simultaneous Publication (*Supreme Court Decision No. 896/2534*)³³

In 1991, the Thai Supreme Court rendered its judgment - *Supreme Court Decision No. 896/2534*. The Court dealt with the problem pertaining to whether the disputed movies in the case constituted published works under the Thai Copyright Act, B.E. 2521 (1978).

Allegedly, the plaintiff (a legal entity established under the law of the United States) produced the movies titled “King David” and “Star Trek III.” The plaintiff claimed that it had acquired Thai copyright in each of the movies via simultaneous publication. The movies were first shown in the United States of America and simultaneously shown in Canada, which is a party to the Berne Convention, to which Thailand is also a party. The plaintiff referred to the Thai Copyright Act, B.E. 2521 (1978), along with the Royal Decree Prescribing Conditions for the Protection of International Copyright, B.E. 2526 (1983).³⁴ The Supreme Court

³² Note that some writers use “physical” to refer to what others might call “tangible.”

³³ Although Supreme Court Decision No. 896/2534 was made under the 1978 Copyright Act and the 1983 Royal Decree, it remains relevant for illustrating “simultaneous publication” here since the relevant provisions are very similar to the current ones.

³⁴ Section 4 of the 1983 Royal Decree read:

“Any work in which international copyright subsists shall enjoy protection by virtue of the law on copyright under the following conditions ... (2) such work must be in accordance with the conditions and procedure provided by the law on copyright of the country of origin.”

considered these two documents to reach its ruling. The most pertinent provisions were those contained in the last paragraph of Section 6 of the 1978 Copyright Act.

The last paragraph of Section 6 of the 1978 Copyright Act stated as follows:

“The publication under paragraph one (1) and (2) means a disposition of the duplicated copies of a work, regardless of its form or character, with the consent of the author, by making duplicated copies available to a reasonable number of the public having due regard to the nature of the work, *but does not include a performance or display of dramatic, musical, or cinematographic works, lecturing or delivering a speech on literary work, sound and video broadcasting about any work, exhibition of artistic work or construction of a work of architecture.*”³⁵ (italics added)

The Supreme Court opined that the plaintiff merely performed both disputed movies in Canada and held that the publication of each of the movies did not constitute “publication” pursuant to the last paragraph of Section 6 of the 1978 Copyright Act.

It should be noted that the plaintiff probably lost because its works were within the activities excluded from the definition of “publication” under the last paragraph of Section 6 of the 1978 Copyright Act, as quoted above.

Section 5: Publication

It is likely that the drafters of Article 3 (3) intended to leave it to adjudicators in Berne parties to determine whether each of the following criteria (under the definition of “publication”) is met, based on the evidence presented to them by relevant stakeholders: (1) copies of the work are made available for distribution; (2) the availability of such copies must satisfy the reasonable requirements of the public, having regard to the nature of the work; and (3) consent of the author.³⁶

As will be discussed below, prior to the digital age, determining whether these criteria (the first and second ones, in particular) were met was more straightforward than in today's digital landscape.

Section 5.1: 1st Criterion: Does “Publication” Require Tangible Copies?

The Berne Convention implies a need for tangible copies in publication, as evidenced by phrases such as “the means of manufacture of the copies.” Thai copyright

This translation is from *Copyright Laws of the ASEAN Countries*, 209.

³⁵ This translation is from *Copyright Laws of the ASEAN Countries*, 199–200.

³⁶ The writing of this paragraph has been partially and limitedly assisted by Claude 3.5 Sonnet.

laws appear to follow this approach. The *Guide to the Berne Convention*,³⁷ in Clause 3.9, clarifies that publication involves tangible copies. Clause 3.9 reads:

“The paragraph specifically names certain acts which do not constitute publication, namely performance, public recitation, communication by wire, broadcasting, exhibition of a work of art, the construction of a work of architecture. These produce only a fleeting impression of the work, whereas publication involves the distribution of material things (books, discs, films, etc.). For a work to be published there must exist something tangible embodying it, as is clear from the mention, in this paragraph, of *the means of manufacture of the copies*, and these tangible things must, in principle, be something one can hold in one's hand.”³⁸ (italics added)

Despite the enduring language of the Berne Convention, no amendments have explicitly recognized internet publishing as a form of publication since its adoption.³⁹ An attempt to update the definition at the 1996 Diplomatic Conference which adopted the WCT and the WPPT was unsuccessful. The WCT and WPPT continue to refer to tangible copies, as evidenced by their Agreed Statements.

The Agreed Statements concerning WIPO Performances and Phonograms Treaty adopted by the Diplomatic Conference on December 20, 1996, reads, in part, that “Concerning Articles 2 (e)⁴⁰ ... As used in these Articles, the expressions ‘copies’ and ‘original and copies’, being subject to the right of distribution and the right of rental under the said

³⁷ While this *Guide to the Berne Convention* is not an official interpretation of the Berne Convention, it can be considered reasonably persuasive. The guide was authored by Mr. Claude Masoyé, a prominent French copyright expert internationally known for his eminent work with the World Intellectual Property Organization (WIPO). Mr. Masoyé held the position of the Director of the Copyright and Public Information Department at the International Bureau of WIPO. Furthermore, the *Guide to the Berne Convention* provides explanations regarding the nature, aims, and scope of the Convention, which should help readers better understand and interpret its provisions.

³⁸ *Guide to the Berne Convention*, 28.

The second sentence of this Clause 3.9 helps to explain why certain acts are excluded from the definition of “publication.”

³⁹ The text of the 1979 version is available at ‘The Berne Convention revisions for limitations and exceptions to copyright’ (Knowledge Ecology International) <<https://www.keionline.org/copyright/berne-convention-exceptions-revisions>> accessed 8 April 2024.

The wording of Article 3 (3) and (4) in the Berne Convention remains unchanged from the 1967 revision through the 1971 version and the 1979 amendment.

⁴⁰ Article 2 (e) reads: “ ‘publication’ of a fixed performance or a phonogram means the offering of copies of the fixed performance or the phonogram to the public, with the consent of the rightholder, and provided that copies are offered to the public in reasonable quantity” available at <<https://www.wipo.int/wipolex/en/text/295578>>, accessed 30 July 2024.

Articles, refer exclusively to fixed copies that can be put into circulation as tangible objects.”⁴¹ The Agreed Statements concerning WIPO Copyright Treaty adopted by the Diplomatic Conference on December 20, 1996 reads, in part, “Concerning Articles 6⁴² ... As used in these Articles, the expressions ‘copies’ and ‘original and copies,’ being subject to the right of distribution and the right of rental under the said Articles, refer exclusively to fixed copies that can be put into circulation as tangible objects.”⁴³

The ambiguity allows for varying interpretations by Contracting Parties, particularly regarding whether online publications qualify under national copyright laws. The exclusion of digital formats in the definition of publication points to a significant gap in international copyright norms, reflecting the complex evolution of digital media and the law.

The Need to Modernize Thai Copyright Law: From Tangible Copies to the Digital Age!

As already mentioned, the DIP is in the process of proposing a draft law intended to amend the Current Act. Probably, with the intent to ensure that the Current Act is current with technological advancements and evolving social conditions,⁴⁴ the DIP has decided to propose to refine the term “publication.” For the text of the proposed redefinition and its unofficial English translation, see Table 2, Column 2, and Table 3, above. The drafters of the redefinition (probably, the DIP staff in charge of the drafting) believed and hoped, among other things, that the redefinition would provide certainty that the term of copyright protection commences when the relevant work is uploaded to the internet. However, no further details on this belief were provided.⁴⁵

The proposed redefinition has caused this author to explore its advantages (a probable step to make Thai copyright law ready for the 21st century technology) and disadvantages. The latter may be in the form of unintended consequences that may ensue. If possible, attempts will be made to refine the proposed redefinition in the hope that uncertainties or confusion that may arise will be avoided or reduced.

⁴¹ Available at <https://wipolex-res.wipo.int/edocs/lexdocs/treaties/en/wppt/trt_wppt_002en.html> accessed 31 July 2024.

⁴² Article 6 of the WCT reads, in part, as follows: “(1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their works through sale or other transfer of ownership.” Available at <<https://www.wipo.int/wipolex/en/text/295166>>, accessed 31 July 2024.

⁴³ Available at <https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fwww.wipo.int%2Ffedocs%2Fmdocs%2Fdiplconf%2Fen%2Fcrnr_dc%2Fcrnr_dc_96.doc&wdOrigin=BROWSELINK> accessed 30 July 2024.

⁴⁴ As per DIP’s document titled “*Summary of Key Points of the Draft Copyright Act (No. ...) B.E. ...*”, [Bangkok: DIP/MOC, Legal Division; March 2024] 1.

⁴⁵ See DIP’s document titled “*Summary of Key Points of the Draft Copyright Act (No. ...) B.E. ...*,” 1.

Section 5.2: 2nd Criterion: Provided that the Availability of Such Copies Must Satisfy the Reasonable Requirements of the Public, Considering the Nature of the Work

The provision on “published work” or “publication,” particularly the second criterion, in both the Berne Convention and the Current Act, reflects a flexible approach by its drafters. This flexibility is evident in the wording chosen, which accommodates various types of works and their corresponding requirements for public availability. Instead of specifying a fixed number of copies, Article 3 (3) of the Berne Convention uses the phrase “the availability of such copies has been such as to satisfy the reasonable requirements of the public, having regard to the nature of the work.” This approach allows for adaptability across different types of works.⁴⁶

Furthermore, this flexibility enables courts to determine what constitutes “publication” on a case-by-case basis. However, it still requires courts to consider whether the availability of copies satisfies the reasonable requirements of the public, taking into account of the nature of the work. This crucial requirement is embodied in the second criterion of the definition.

The explanations in Clauses 3.6 and 3.7 of the *Guide to the Berne Convention* below should support the above argument. They state:

“3.6 ... A more elastic formula was therefore adopted: the availability of the copies must be such as to satisfy the reasonable requirements of the public. But this wording does not go so far as to allow abuse: it is not enough to show, in the window of a single bookshop, a dozen copies of a book which has enjoyed massive success in some other country outside the Union. Again, a single copy of a cinematographic work sent to a festival to be shown before a restricted audience does not meet the conditions. In neither case are the reasonable requirements of the public satisfied.

3.7. The definition ends with the words ‘having regard to the nature of the work’; the purpose is to take account of the differences which exist between works intended to be bought in bookshops, magazines distributed to subscribers and films which, unlike commercial records, are not placed on public sale. It is enough that the latter should be placed by their makers at the disposal of the exhibitors. The copies need not be sold: the

⁴⁶ If understood correctly, the authors Sam Ricketson and Jane C. Ginsburg implicitly view that flexibility exists. See “International Copyright and Neighboring Rights: The Berne Convention and Beyond,” Vol. 1, 2nd Edition, 2006, especially at 6.36. Notably, readers are advised to consult the most recent edition of the book to acquire the authors’ updated views.

availability to the public may be by means of renting or loan, or even the free distribution of copies.”^{47,48}

The application or interpretation of the second criterion in the scenario of conventional publishing (that is not online publishing) should not be very difficult because it concerns something tangible. However, regarding online publishing (including internet publishing), this can differ because there can be situations where tangible copies of the work are not needed. If so, the question arises as to how to determine the level of the availability of the copies. In addition, access to content published online can be open to the public. This access may be free of charge, which could invite a large number of accessors, or require a fee. If the fee is high, chances are that the number of accessors can be low proportionately. Hence, an ensuing question arises, vis-à-vis online publishing cases, as to how to measure the level of availability that satisfies the reasonable requirements of the public. Another question is whether a detailed provision on how to measure the level of availability for online publishing is necessary.

Assuming the policymakers decided to extend publication to cover online publishing (that includes internet publishing), responses to the above inquiries could be as follows.

A detailed provision on how to measure the level of availability for online publishing is probably not necessary to keep the flexibility in place. However, it may be necessary to consider rephrasing the second criterion to read as follows: “provided that the availability of such copies **or access to the content** satisfies the reasonable requirements of the public, considering the nature of the work **and evolving distribution technologies**.”

Table 5. Proposed Rephrasing of the Second Criterion for “Publication”

Thai version	Unofficial English translation
ทั้งนี้ การมีอยู่ของสำเนาเหล่านั้นหรือการเข้าถึงเนื้อหาดังกล่าวตอบสนองความต้องการอันสมเหตุสมผลของสาธารณชน โดยคำนึงถึงสภาพของงานและเทคโนโลยีการเผยแพร่ที่เปลี่ยนแปลงไป	provided that the availability of such copies or access to the content satisfies the reasonable requirements of the public, considering the nature of the work and evolving distribution technologies

⁴⁷ *Guide to the Berne Convention*, 27-28.

⁴⁸ See also *Guide to the Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms*, [WIPO Publication 891, 2004], at BC-3.7 to BC-3.13, where the writer of this guide (Dr. Mihály Ficsor, a renowned expert in copyright law) appears to consider the Berne Convention’s Article 3 (3) to be somewhat flexible, especially regarding the second criterion of the definition.

WIPO Publication 891 is available at <https://www.wipo.int/edocs/pubdocs/en/copyright/891/wipo_pub_891.pdf>accessed 1 August 2024.

As seen from above, the phrase “or access to the content” was added between “such copies” and “satisfies”; and the phrase “and evolving distribution technologies” was added after “the nature of the work.”

While the rephrasing keeps the flexibility of the provision on “publication” for courts to use their discretion, it will better accommodate other forms of publishing (especially online publishing).

Some may worry that courts will either overextend or narrowly apply the flexibility provided by the proposed redefinition. However, in Thailand, the involvement of associate judges with relevant expertise in the Central Intellectual Property and International Trade Court (CIPIT Court)⁴⁹ should help ensure a balanced and informed application of this criterion, making it both acceptable and reasonable.

Section 5.3: 3rd Criterion: “Consent of the Copyright Owner” or “Consent of the Author”

While the Berne Convention, Article 3 (3) uses “consent of the author,” the proposed redefinition uses the phrase “consent of the copyright owner.” This can be problematic. Among the problems is that it can be much more difficult to identify the copyright owner than to identify the author of a work. The following scenario may demonstrate this. John asks Jane, a music composer, to compose a melody for him. Jane composes the melody, making her the composer or author. The question then arises: who owns the copyright in the melody, assuming it is protected by the Current Act? To answer this, we must determine the relationship between John and Jane. Is it a commission of work? If so, Section 10 of the Current Act applies, stating: “Copyright in the work created in the course of commission vests in the commissioner unless the author and the commissioner have agreed otherwise.”⁵⁰ To resolve the ownership question, we must ascertain whether John and Jane have made any agreement, as mentioned in the latter part of Section 10.

Another problem is that the switching from “author’s consent” to “copyright owner’s consent” can lead to an accusation that Thai copyright law does not comply with the Berne Convention. Potential accusers are relevant stakeholders (especially authors in other Berne parties) via their governments.

⁴⁹ Each quorum of the CIPIT Court consists of three judges. Two of them are career judges with expertise in intellectual property or international matters. The third one is an associate judge who is a lay individual with expertise in intellectual property or international matters. See the Act on Establishment of and Procedure for Intellectual Property and International Trade Courts, B.E. 2539 (1996), Sections 12 and 15.

For information on the CIPIT Court, see e.g. Ariyanuntaka, V. (n.d.), ‘Intellectual Property and International Trade Court: A New Dimension for IP Rights Enforcement in Thailand’ <<https://wipolex-res.wipo.int/edocs/lexdocs/laws/en/th/th027en.html>> accessed 12 May 2024.

⁵⁰ This translation is based on an adjusted version of the one provided by the DIP. See the DIP’s translation.

Concerns may arise from individuals, especially those who interpret the law strictly, as to whether “author” refers only to a natural person. Regarding this point, apparently the Berne Convention does not define “author.” This should permit Berne parties to decide whether the term refer to both “natural person” and “legal or juristic person.”⁵¹ As far as Thailand is concerned, a reading of the last paragraph of Section 8 of the Current Act suggests that the Act covers both natural persons and legal persons. This should hold true despite Section 4 of the Current Act defines “author” to read as follows:

Table 6. Current Definition of “Author” and Related Provisions in the Thai Copyright Act

Thai version	Unofficial English translation
มาตรา 4: “ผู้สร้างสรรค์” หมายความว่า ผู้ทำหรือผู้ก่อให้เกิดงานสร้างสรรค์อย่างใดอย่างหนึ่งที่เป็นงานอันมีลิขสิทธิ์ตามพระราชบัญญัตินี้” ⁵²	Section 4: “‘author’ means a person who makes or creates any work, which is a copyright work by virtue of this Act.” ⁵³
มาตรา 8 วรรคท้าย: “ในกรณีที่ผู้สร้างสรรค์ต้องเป็นผู้มีสัญชาติไทย ถ้าผู้สร้างสรรค์เป็นนิติบุคคล นิติบุคคลนั้นต้องเป็นนิติบุคคลที่จัดตั้งขึ้นตามกฎหมายไทย” ⁵⁴	Section 8, last paragraph: “In the case where the author must be a Thai national, if the author is a juristic person, it must be established under the Thai law.” ⁵⁵

However, if there is doubt about the meaning of “author,” the DIP should consult the World Intellectual Property Organization (WIPO) on how other Berne parties interpret the term. WIPO’s response should enable Thai policymakers to take appropriate further steps. Clarifying this issue is crucial, as the time to do so is approaching.

Section 6: Some Scenarios Regarding the Redefinition

Having examined the key criteria of the proposed redefinition, it is crucial to consider how these would apply in practice. The following scenarios illustrate potential applications and challenges of the new definition (if the proposed redefinition is adopted).

To make it easier for all to follow the discussion that will take place in the latter part of this article, it would be advisable to first try to determine whether any of the following scenarios, circumstances or activities constitutes a published work made over the internet according to the proposed redefinition. Hopefully, this will help to form the wording for

⁵¹ See also *Guide to the Berne Convention* at 1.16.

⁵² Government Gazette Vol. 111, Part 59 a, Page 1, dated 21st December B.E. 2537 (1994).

⁵³ The DIP’s translation.

⁵⁴ Government Gazette Vol. 111, Part 59 a, Page 6, dated 21st December B.E. 2537 (1994).

⁵⁵ The DIP’s translation.

refining the proposed redefinition. Among the scenarios are restricted access content, permission-based content, behind-the-wall content (or copyrighted content with access control), and streamed series that are not available for download and copied on tangible media.

Scenario 1: Joy is a national and lives in a country that is not a party to the Berne Convention – Country A.

Country A is not a member of the TRIPs Agreement either. Joy wrote a short story and uploaded its content on her social media account. The content can be accessed or downloaded from Thailand or any of the other Berne parties. In addition, she has allowed the content to be publicly accessible ever since.

A question is whether Joy’s work constitutes a published work under the proposed definition and took place in Thailand, where the work could be accessed. If so, is it an actual first publication or a simultaneous publication?

Scenario 2: John created a computer application and uploaded it **to** his website. Only paid subscribers are permitted to have access to and use the application. Is John’s application a published work?

As seen above, like the current definition, the proposed new definition still retains the key condition regarding “the availability of such copies must satisfy the reasonable requirements of the public.” This condition may yield a negative answer to the question.

Scenario 3 (fact from *Moberg v. 33T LLC*⁵⁶): If we applied the redefinition of “publication” to the scenario pattern from the case of *Håkan Moberg v. 33T LLC*, *Cedric Leygues*, and *Erwan Leygues* from about 15 years ago, we would consider the following:

In 2004, H. Moberg, a Swedish photographer, published his “Urban Gregorian I-IX” photo series on a German website. From 2007 to 2008, five of these photos appeared without authorization on websites linked to 33T LLC. The issue is whether Moberg’s internet publishing qualifies as “publication” under the proposed redefinition.

Based on the redefinition of “publication,” the internet publishing of Moberg’s photographs would constitute “publication” if the distribution of the photos met the criteria laid out. This includes:

- Distribution of copies to the public: The photographs were made available to the public via various websites, which aligns with the aspect of distribution.
- Form of distribution: The photos were accessible over the Internet, a form mentioned explicitly in the redefinition.

⁵⁶ See *Moberg v. 33T LLC*, 666 F. Supp. 2d 415 (D. Del. 2009) <<https://casetext.com/case/moberg-v-33t-llc>> accessed 22 April 2024.

- Consent of the author: Because Moberg first published his own photographs on a German website, this suggests the existence of consent. This criterion has been met.
- Reasonable requirements of the public: This aspect is more subjective and would depend on the specific circumstances of the case—whether the quantity and manner of availability were reasonable, considering the nature of the photographic work.

In conclusion, since the photographs' internet availability aligns with all aspects of the redefinition of publication, these instances should be recognized as “publication” under the redefinition.

Scenario 4 (fact from *Kernal Records*⁵⁷): If we applied the redefinition of “publication” to the scenario pattern from the case of *Kernal Records* from about 15 years ago, would the following constitute “publication”?

In 2002, G. R. Gallefoss, a citizen of Norway, created “a sound recording of a composition and musical arrangement of *“Acidjazzed Evening”* (AJE). Gallefoss “created AJE on a Commodore 64 computer in the form of a SID file.”⁵⁸ “Gallefoss publication of AJE in an Australian disk magazine called *Vandalism News*, issue 39, in August 2002. The work was not only displayed but was made available for downloading and copying, with Gallefoss' knowledge and approval.”⁵⁹

Based on the information provided and the redefinition of “publication”, Gallefoss's actions would constitute a “publication” of “AJE.” The distribution of AJE in the Australian disk magazine “*Vandalism News*,” where it was made available for downloading and copying, aligns with the definition of “publication” as it involved distributing copies of the work to the public over the Internet with the author's consent. This action should satisfy the requirements as it made copies available to the public, with the necessary consent from the author.

Scenario 5: Net, a legal entity established by the law of Iran (which is not a party to the Berne Convention), operates as an audiovisual streaming service. It exclusively streams its original movies, which are not available for download or on tangible media. Access to

⁵⁷ For further details, see *Kernal Records Oy v. Mosley*, 794 F. Supp. 2d 1355 (S.D. Fla. 2011) <<https://casetext.com/case/kernal-records-oy-v-timbaland>> accessed 22 April 2024; *Kernal Records Oy v. Mosley*, 694 F.3d 1294 (11th Cir. 2012) <<https://casetext.com/case/kernel-records-oy-v-mosley-4>> accessed 22 April 2024.

⁵⁸ *Kernal Records Oy v. Timbaland*, Case No. 09-21597-CIV, as appears in <<https://casetext.com/case/kernal-records-oy-v-timbaland>> accessed 14 August 2024.

⁵⁹ *Kernal Records Oy v. Timbaland*, Case No. 09-21597-CIV, appears in <<https://casetext.com/case/kernal-records-oy-v-timbaland>> accessed 14 August 2024.

Net's movies, including *"Don't U Dare Cheat on Me"* produced in the first quarter of 2024, is restricted to paid subscribers. Although Net began streaming this movie in Iran on April 1, 2024, it is unclear whether this constitutes "publication" in Thailand (a Berne party) under the proposed redefinition of the term. There are potential obstacles to qualifying this as "publication," including restricted access requiring Net's permission [which concerns "copies of the work" and "the availability of such copies must satisfy the reasonable requirements of the public"] and exclusions specified in the proposed redefinition.

The streaming of the movie by Net in Iran on April 1, 2024, would not constitute a "publication" under the proposed redefinition, on the following grounds. The definition of "publication" states that it involves "distributing copies of the work to the public, in any form or means, including making copies of the work available over the Internet, with the consent of the copyright owner." In this case, Net is streaming the series exclusively to paid subscribers, which may not satisfy the requirement of distribution "to the public" as it is restricted access. However, the interpretation of "to the public" could potentially differ if the number of subscribers were high (e.g., more than 500 subscribers).⁶⁰

The redefinition further clarifies that for it to be considered publication, "the availability of such copies must satisfy the reasonable requirements of the public, considering the nature of the work." The movie's restricted access to paid subscribers, combined with the lack of download options or availability on tangible media, suggests that it does not meet the "reasonable requirements of the public."

Additionally, the definition explicitly states that "performance of a dramatic, musical, or cinematographic work" does not constitute publication. Since Net is streaming the movie, which can be considered a performance of a cinematographic work, it would not be regarded as a publication under the redefinition.

Section 7: Potential Unintended Consequences of the Proposed Redefinition & Possible Solutions

The proposed redefinition of "publication" to include internet publishing could simplify the process for nationals of non-Berne parties to obtain Thai copyright protection. Uploading content online is inherently faster, cheaper, and less cumbersome compared to distributing tangible copies. This concern aligns with that raised by Associate Professor Orabund Panusapattana who expressed the fear that Thailand would be granting more rights than she receives by joining the WPPT, as internet publishing currently falls outside of the treaty's scope.⁶¹ While this concern is understandable, it is important to note that Thailand, in its alignment with the Berne Convention, already permits a situation that could be seen as

⁶⁰ The writing of this paragraph has been partially and limitedly assisted by Claude 3.5 Sonnet.

⁶¹ See Section 2 on "Background" above.

a backdoor to the Berne system. Therefore, the proposed redefinition does not introduce an entirely new scenario. This loophole exists in the Current Act, specifically Section 8, paragraph one (2). To mitigate these concerns, Thailand could consider applying Article 6, paragraph (1) to limit protections for works from non-Berne countries. Additionally, the widespread adoption of the Berne Convention, especially through the TRIPS Agreement, should help alleviate these concerns.

Section 8: Conclusion

The Current Act lacks provisions regarding “the country of origin,” which could complicate Thai courts’ handling of simultaneous publication cases. Internet publishing is likely to significantly increase the number of countries where simultaneous publication occurs, compared to traditional tangible or physical distribution. However, Section 25 of the Current Act might alleviate these issues.⁶²

The Berne Convention’s widespread adoption, especially via the TRIPS Agreement, standardizes copyright terms to the life of the author plus 50 years, with some extending to 70 years. This uniformity eases the complexities associated with differing copyright durations among Berne parties.

Regarding “publication,” the current definition of “publication” under Thailand’s Copyright Act does not sufficiently encompass internet publishing. Policymakers face a crucial decision on whether to update this definition. There are compelling arguments on both sides: maintaining the existing definition could protect interests, while updating it could align Thailand with evolving digital technologies. If policymakers opt for modernization, refining the redefinition will be essential to clarify which online publications qualify under Thai copyright law.

An interview with some individuals involved in drafting the redefinition⁶³ revealed that the task force in charge agreed not to propose the criteria for what constitutes “reasonable copies” in the digital context. They have opted for allowing stakeholders to present their situation and letting the judiciary decide.⁶⁴ This task force prefers a flexible approach. If the policymakers agree to follow this approach, they are invited to consider the rephrasing of the second criterion as suggested in Section 5.2: “provided that the availability of such copies *or access to the content satisfies* the reasonable requirements of the public, considering the nature of the work *and evolving distribution technologies*.” They (policymakers) are also invited to consider adding the following phrases “*making digital copies or the content of the work available online*” and “*and evolving distribution*

⁶² Section 3 on “The Country of Origin in Copyright Law” earlier discusses the possible role of Section 25 of Current Act.

⁶³ Among them are Mr. Puttipat Jiruschamna and Mr. Gunkawee Sriyudthasak.

⁶⁴ This piece of information was obtained from an online interview that took place on 4 April 2024.

technologies.” This is to ensure that the refined version accommodates digital content. If this suggested refining were accepted, the refined version would read as follows:

Table 7. Suggested Refinement of the Proposed Redefinition of “Publication”

Thai version	Unofficial English translation
<p>“การโฆษณา” หมายถึง การนำสำเนาของงานเสนอต่อสาธารณชน ไม่ว่าในรูปแบบหรือวิธีการใด รวมทั้งการทำให้สำเนาดิจิทัลหรือเนื้อหาของงานสามารถเข้าถึงได้ทางออนไลน์ โดยได้รับความยินยอมจากผู้สร้างสรรค์ ทั้งนี้ การมีอยู่ของสำเนาเหล่านั้นหรือการเข้าถึงเนื้อหาดังกล่าวตอบสนองความต้องการอันสมเหตุสมผลของสาธารณชน โดยคำนึงถึงสภาพของงานและเทคโนโลยีการเผยแพร่ที่เปลี่ยนแปลงไป แต่ไม่หมายความรวมถึงการแสดงหรือการทำให้ปรากฏซึ่งนาฏกรรม ดนตรีกรรม หรือภาพยนตร์ การบรรยายหรือการปาฐกถาซึ่งวรรณกรรม การแพร่เสียงแพร่ภาพเกี่ยวกับงานใด การนำศิลปกรรมออกแสดงและการก่อสร้างงานสถาปัตยกรรม</p>	<p>“Publication” means <i>distributing copies of the work to the public, in any form or means, including making digital copies or the content of the work available online, with the consent of the author, provided that the availability of such copies or access to the content satisfies the reasonable requirements of the public, considering the nature of the work and evolving distribution technologies.</i></p> <p>The following activities do not constitute publication: performance of a dramatic, musical, or cinematographic work; public lecture or recitation of a literary work; broadcasting of any work; exhibition of a work of art; and the construction of a work of architecture.</p>

Moreover, the choice between using “the consent of the author” as per the Berne Convention and “the consent of the copyright owner” could impact compliance with international standards, with the latter potentially raising concerns about non-conformity.

If the policymakers decide to expand the definition of “publication” to include internet publishing, they should consult with stakeholders like authors, composers, and publishers to determine the appropriate scope and terminology, as “internet publishing” is unlikely to adequately cover all digital publishing forms. After determining the appropriate scope, a clear term should be used to encompass the selected types of digital publishing. If not feasible, the term “internet publishing,” “online publishing,” or another chosen term should be clearly defined.

While awaiting a decision on whether to adopt the proposed redefinition, to avoid ambiguity and to ensure that Thai copyright law is internationally acceptable, the DIP should consult WIPO on the redefinition of “publication.” Opinions or guidelines concerning the following should be sought:

- Whether the time for all Berne parties to expand “publication” to cover digital publishing has arrived,
- If digital publishing is or should be included in “publication,” which term should be used to cover all forms of digital publishing,
- Whether copies have to be physical only,
- How to prove satisfying reasonable requirements of the public in the case of digital publishing, and
- Whether the consent must be from the creator of the work or copyright own. Clarifying these issues is crucial, as the time to do so is approaching.