

# Sentencing Disparity and its Potential Impact on Criminal Cases of Copyright and Trademark Infringement in Thailand: Need for New Provisions and New Approach on Sentencing Guidelines

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This article considers the problem of sentencing disparity in Thailand which could have potential impact on criminal cases of copyright and trademark infringement. At present, the Thai Courts rely on sentencing guidelines to prevent sentencing disparity, but different Courts in different parts of Thailand have formulated and used different sentencing guidelines, so the guidelines produced by different Courts have different standard of sentencing. This could result in a wide disparity in the sentences that the Courts impose on the infringers who commit the same offence, so this article proposes that the relevant provisions and the uniform national sentencing guideline like that of the US approach should be developed and introduced into the Thai legal system, so that the judges overseeing the criminal cases in the Intellectual Property and International Trade Courts, the Court of Appeal for Specialized Cases and the Supreme Court of Thailand could rely on such provisions and uniform national sentencing guidelines to prevent sentencing disparity.

**Keywords:** Sentencing Disparity, Criminal Cases, Copyright Infringement, Trademark Infringement, Sentencing Guidelines, Sentencing Commission, Guidelines Manual

The term “sentencing disparity” can be defined as a form of unequal treatment that is often unfair and disadvantaging in consequence.<sup>1</sup> It exists when judges impose different sentences on two offenders who committed the same offence, or when judges impose identical sentences on two offenders who committed different offences, or when the sentence depends on the judges who impose it or the jurisdiction of the Court in which it is imposed.<sup>2</sup> Sentencing disparity is an obstacle to achieving the purpose of sentencing which is to provide the just punishment for the offence, and in order to meet such propose, it is necessary to establish practices that will provide certainty and fairness, and to avoid sentencing disparity among defendants who have been found guilty of same criminal offence.<sup>3</sup>

In order to prevent the problem of sentencing disparity, the courts in Thailand formulated different sentencing guidelines known as “Yee-Tok”, but these sentencing guidelines cannot fully ensure the just punishment. This article examines the problem of sentencing disparity in Thailand and then reveals the inadequacy of the current approach on sentencing

guidelines of the Thai Courts. It illustrates that the problem of sentencing disparity in Thailand could have the potential impact on criminal cases of copyright and trademark infringement. The US approach seems to offer the solution to the problem of sentencing disparity in Thailand and the future direction and the lessons arising from this study could benefit other countries.

## Recognizing the Problems in Thailand

In order to solve the problem of sentencing disparity, the Courts in Thailand formulated sentencing guidelines. For the status of sentencing guidelines, Supakit Yampracha who is Deputy Secretary-General of the Office of the Judiciary, explained that the sentencing guidelines of the Thai Courts are not law and have no legal mandate which is why judges never refer to it in the written judgement. Without such legal mandate, sentencing guidelines are formulated in each court and are regarded as an informal rule to help the judges exercise their sentencing discretion and ensure consistency in sentencing. However, even though the sentencing guidelines are made for judges, they do not refer to them in their written judgements or decisions.<sup>4</sup> The only available record which referred

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to the existence of sentencing guidelines was the Supreme Court Decision No.1304/2500 (1957) in which the Court held that simply complying with the standard range of penalties recommended by the sentencing guideline of the Court without paying attention to the circumstances of the case would result in injustice and could lead to an unjust decision which was not fair or was not done according to the legal standards.<sup>5</sup>

Although, there is no legal requirement or statutory obligation for judges to comply with sentencing guidelines and no legal right for offenders to be sentenced in compliance with sentencing guidelines, these sentencing guidelines seem to have a similar effect to formal laws made by the legislature since most judges appear to comply with sentencing guidelines of their courts.<sup>4</sup> The reason for complying with sentencing guidelines is because it is part of judicial custom and also most sentencing guidelines provide that departure from them requires a consultation with the Chief Judge, and departure from sentencing guidelines without such consultation would be perceived by the Chief Judges as a sign of corrupt practice.<sup>4</sup> In order to avoid the risk of being accused of corruption, the judges would consult with the Chief Judge before departing from sentencing guidelines.

### **Different Sentencing Guidelines for Different Courts**

The Courts of Justice System in respect of criminal cases in Thailand can be classified into three levels consisting of the Courts of First Instance, the Courts of Appeal and the Supreme Court.<sup>6</sup> First, the Courts of First Instance are categorized as the General Courts and the Specialized Courts. The General Courts are ordinary Courts such as Criminal Courts and Provincial Courts which have authorities to adjudicate criminal cases, while the Specialized Courts including the Intellectual Property and International Trade Court were established to ensure that specific legal problems will be solved by appropriate judges. Second, the Courts of Appeal in Thailand consist of the Court of Appeal, Regional Courts of Appeal and the Court of Appeal for Specialized Cases. In this instance, the Court of Appeal handles an appeal against a decision or order of Criminal Courts, while the Regional Courts of Appeal handles an appeal against a decision or order of the other Courts of First Instance located within their regions. In addition, the

Court of Appeal for Specialized Cases handles an appeal against a decision or order of the specialized Courts including the Intellectual Property and International Trade Court. Finally, the Supreme Court is the highest Court of Justice in Thailand, and it acts as the final Court in all criminal cases.<sup>6</sup> Each of these Courts formulated and used different sentencing guidelines, so although these sentencing guidelines seem to have similar effect to formal laws, they cannot fully solve such problem of sentencing disparity.

Kraison Somjuntra, who is the Deputy Chief Justice in Thailand, observed that sentencing disparity occurs because different Courts in different parts of Thailand had formulated different sentencing guidelines.<sup>7</sup> Similarly, Supakit Yampracha indicated that there is no uniform national sentencing guideline to be used for all Courts, so each Court has different sentencing guidelines. In this vein, each Court of First Instance has its own sentencing guidelines, and it also has different sentencing guidelines from the Courts of Appeal and the Supreme Court. The judges of the Courts of First Instance must adhere to the sentencing guidelines of their own Courts, while the judges of the Courts of Appeal and the Supreme Court must also comply with the sentencing guidelines of their Courts.<sup>4</sup> The fact that the sentence imposed by the Court of First Instance is different from the one recommended by the sentencing guideline of the Court of Appeal warrants the amendment of the sentence, and this is not because the sentencing guideline of the Court of First Instance is wrong, but it is because the Court of Appeal is obligated to adhere to its own sentencing guideline. He concluded that the current approach on sentencing guidelines of the Thai Court can help the judges to achieve consistency in sentencing outcomes within the same Court, but it cannot achieve the consistency in sentencing outcomes across all Courts or across the country.<sup>4</sup>

### **Confidentiality of Sentencing Guidelines**

The details of sentencing guidelines of the Thai Courts cannot be disclosed, so the public has no opportunity to discuss the details of these sentencing guidelines. Kraison Somjuntra and other scholars pointed out that the public does not have access to the sentencing guidelines of the Thai Court and the Thai judges are prohibited from disclosing the details of these sentencing guidelines, so it is impossible for the

public to discuss about the appropriateness of these guidelines openly.<sup>8</sup> Supakit Yampracha observed that the confidentiality of sentencing guidelines makes it impossible to examine the actual extent of the differences in sentencing outcome recommended by different sentencing guidelines of different Courts in Thailand. He also observed that the main argument against the idea of disclosing details of sentencing guidelines is that it would be dangerous to Thai society because the rich defendant could manipulate the facts of the case to benefit from sentencing guidelines. However, he opposed this argument and contended that underlying this argument is the realization of the social inequality in Thailand and this is not a strong justification for keeping the details of sentencing guidelines from the public since the public has the right to know the details of sentencing guidelines.<sup>4</sup> He was of the view that the practice of keeping the details of sentencing guidelines confidential seems to be contrary to the principle of transparency and accountability in sentencing which requires that the decisions and actions of the Court must be transparent and open to public scrutiny, so the reform of the Thai sentencing system should aim to be more publicly accountable.<sup>9</sup>

### **Other Problems with Sentencing Guidelines**

There are also other factors which make the sentencing guidelines of the Thai Courts ineffective. Kraison Somjuntra indicated that some sentencing guidelines are outdated and cannot deal with the current situation or new problems, while the Thai Courts often adhered to such unclear sentencing guidelines without being active in searching for relevant facts, history and characteristics of the defendant, and without considering the punishment theories that might be applied to such sentences. Even though the Thai Courts in several cases considered the fact of the case, intention of defendant, and purpose of law in order to determine the sentences to be imposed, they did not consider the punishment theories to justify punishment on the basis of facts.<sup>7</sup>

Similarly, Utid Suparp, who is the Presiding Justice of the Court of Appeal in Thailand, pointed out that the variety of personal characteristics of individual judges, such as personality, habits, knowledge or education, experience and belief can influence the way of thinking, attitude, view point, rationale and discretion on the determination of the penalty rate in sentencing.<sup>10</sup> He believed that sentencing disparity

occurs because the judges do not consider several factors such as nature and type of offense, history and characteristics of defendants, and relevant principles in sentencing. He observed that although the Thai Courts have attempted to prevent the disparity of sentencing by using the sentencing guidelines, they cannot fully assist the Thai Courts in ensuring that sentencing is suitable for individual offender since such sentencing guidelines are inflexibility and not very detailed. In order to solve this problem, he suggested that the Thai Court should take into account the punishment theories such as the retributive theory, the rehabilitative theory and the preventive theory, while the sentencing guidelines should allow the combined application of these punishment theories. In his opinion, the proposed sentencing guideline should contain: (i) the retributive theory which should be primarily applied to all serious offences; (ii) the rehabilitative theory which should be primarily applied to minor or petty offences; and (iii) the preventive theory which should be primarily applied to recidivism.<sup>10</sup>

This view is supported by Mohd Imran who suggested that sentencing guidelines should contain the following theories: (i) the retributive theory which ensures that the punishment must be appropriate for the offence committed or must be in proportion to the seriousness of the offence committed; (ii) the rehabilitative theory which ensures that the objective of punishment is to improve or reform the offender as a person, so that he may become a normal law-abiding member of the society once again (Under the rehabilitative theory, the offenders must be educated and taught some arts or industrial skills during the period of their imprisonment, so that they may be able to start their life again after their release from prison); and (iii) the preventive theory which ensures that the objective of the punishment is to set an example to others and to prevent the offenders from harming anyone in the society through legal measures such as imprisonment.<sup>11</sup> These punishment theories are very important in the sentencing process and could ensure that the imposed penalty is appropriate to each offence and offender, so it is necessary to have the appropriate provisions and sentencing guidelines which could enable the individual judges to rationalize the fact of the case and the punishment theories in their exercise of discretion on sentencing.

### **Potential Impact on Criminal Cases of Copyright and Trademark Infringement**

The problem of sentencing disparity in the Thai criminal justice system could have the potential impact on criminal cases of copyright and trademark infringement. This is because both the Copyright Act B.E. 2537 (1994) (CA 1994) and the Trademark Act B.E. 2534 (1991) (TA 1991) of Thailand contain the criminal infringement provisions. For example, Section 27 of the CA 1994 stipulates that the reproduction, adaptation or communication to public of a copyright work without the authorization of the copyright owner shall be deemed an infringement of copyright.<sup>12</sup> Section 69 of the CA 1994 prescribed that a person who infringes the copyright according to Section 27 shall be inflicted with a fine from twenty thousand Baht up to two hundred thousand Baht.<sup>13</sup> If the offence is committed with the commercial purpose, the offender shall be inflicted with imprisonment for a term from six months up to four years or a fine from one hundred thousand Baht up to eight hundred thousand Baht or both.<sup>14</sup> Moreover, Section 28/1 of the CA 1994 provides that the reproduction by recording sounds or images or both sounds and images from a cinematographic work in a movie theatre, whether in whole or in part, without the authorization of the copyright owner, during its showing in the movie theatre shall be deemed an infringement of copyright.<sup>15</sup> Section 69/1 ensures that a person who commits an infringement of copyright as stipulated in Section 28/1 shall be inflicted with imprisonment for a term from six months up to four years or a fine from one hundred thousand Baht up to eight hundred thousand Baht or both.<sup>16</sup> Further, Section 31 of the CA 1994 stipulates that a person who knows or should have known that a work is made by infringing the copyright of another person and commits any of the following acts against the work for profit shall be deemed an infringement of copyright: (i) selling, offering for sale, renting, or offering for rent; (ii) communication to public; (iii) distribution in the manner which may cause damage to the copyright owner; (iv) self-importation or importation by order into Thailand.<sup>17</sup> Section 70 ensures that a person who commits a copyright infringement according to Section 31 shall be inflicted with a fine from ten thousand Baht up to one hundred thousand Bath, but if such offence is committed with the commercial purpose, then the offender shall be inflicted with imprisonment for a term from three

months up to two years or a fine from fifty thousand Baht up to forty hundred thousand Baht or both.<sup>18</sup>

Likewise, Section 108 of the TA 1991 provides that any person who counterfeits a trademark registered in Thailand by another person must be inflicted with imprisonment for a term not exceeding four years or a fine not exceeding four hundred thousand baht or both<sup>19</sup>, while Section 109 indicates that any person who imitates a trademark registered by the other person in Thailand in order to mislead the public into believing that it is the trademark of such other person must be liable to imprisonment for a term not exceeding two years or a fine not exceeding two hundred thousand baht or both.<sup>20</sup> Section 110(1) of the TA 1991 prescribes that any person who imports, distributes, offers for distribution or has in possession for distribution goods bearing a counterfeit trademark under Section 108 or an imitated trademark under Section 109 must be liable to the penalties provided in those sections.<sup>21</sup> Section 109/1 provides that any person who uses the packaging or utensil bearing a trademark of another person that is registered in Thailand with his goods or other persons' goods to mislead the public to believe that the goods belong to the trademark owner, must be liable to imprisonment for a term not exceeding four years or a fine not exceeding four hundred thousand baht or both.<sup>22</sup> Further, Section 111 indicates that any person who represents a trademark as registered in Thailand and in fact it is not registered, or who has in possession for distribution or distributes the goods bearing a trademark which he knows to be falsely represented, must be liable to imprisonment for a term not exceeding one year or fine of not exceeding twenty thousand baht or both.<sup>23</sup> The determination of the penalty rate in sentencing for the violation of these criminal infringement provisions in both the CA 1994 and the TA 1991 could face with the problem of sentencing disparity where different judges deal with a similar case, and one judge give a very harsh sentence, while another judge only give a much lesser sentence.<sup>24</sup>

In addition, such sentencing disparity is likely to occur in criminal cases of copyright and trademark infringement because all Courts, which have the authority to adjudicate these cases, have formulated and used different sentencing guidelines. In criminal cases of copyright and trademark infringement, the process of the Thai Court System can be classified into three levels consisting of the Intellectual Property

and International Trade Courts, the Court of Appeal for Specialized Cases, and the Supreme Court (Fig. 1).

The Intellectual Property and International Trade Courts was established by the Act for the Establishment of and Procedure for Intellectual Property and International Trade Court B.E. 2539 (1996) (AEPIPITC 1996) which was amended by the Act for the Establishment of and Procedure for Intellectual Property and International Trade Court (No.2) B.E. 2558 (2015)(AEPIPITC (No.2) 2015). Section 3 of the AEPIPITC 1996 provides that the term “Intellectual Property and International Trade Courts” (IPIT Courts) means the Central Intellectual Property and International Trade Court (Central IPIT Court) and Regional Intellectual Property and International Trade Courts (Regional IPIT Court).<sup>25</sup> The term “Intellectual property and international trade cases” (IPIT cases) is defined as civil cases and criminal cases under the jurisdiction of the IPIT Courts.<sup>25</sup> Also, Section 7(1) of the AEPIPITC 1996 stipulates that the IPIT Courts have jurisdiction over criminal cases regarding trademarks, copyrights and patents.<sup>26</sup>

The AEPIPITC 1996 ensures that all intellectual property cases will be solved by appropriate judges who are the experts in the field of intellectual property,<sup>27</sup> so the judges in the Criminal Court or other Courts could not serve in the IPIT Courts. In

this instance, the judges of the IPIT Court consist of the career judges who possess competent knowledge of the matters relating to intellectual property law and the associate judges who are the experts on intellectual property and are recruited separately to work together with career judges in determining the IPIT cases.<sup>28</sup> Both career judges and associate judges will be appointed by the King and also the number of career judges and associate judges in the IPIT Court will be determined by the Judicial Administration Commission.<sup>29</sup>

The AEPIPITC 1996 indicated that the Central IPIT Court has jurisdiction throughout Bangkok Metropolis and five provinces such as Samut Prakarn, Samut Sakorn, Nakorn Pathom, Nonthaburi and Pathum Thani Provinces.<sup>30</sup> However, it also stipulated that the IPIT cases which arise outside the jurisdiction of the Central IPIT Court may be filed with the Central IPIT Court, but this still depends on the discretion of the Central IPIT Court to determine whether or not it would reject such cases.<sup>30</sup> It clearly states that the establishment of a Regional IPIT Court must be made by an Act which shall also specify its jurisdiction and location.<sup>31</sup> The parties in a case which is pending in a Regional IPIT Court may agree to file a petition with such Court to transfer the case to the Central IPIT Court for adjudication, provided that such Court cannot grant the request without prior consent of the Central IPIT Court.<sup>32</sup> However, at present, the Regional IPIT Court has not been established yet, so the Central IPIT Court has jurisdiction throughout Thailand.<sup>33</sup> This is because Section 47 of the AEPIPITC 1996 indicates that during the period when a Regional IPIT Court has not been opened in the areas, the Central IPIT Court shall have jurisdiction in such areas.<sup>34</sup> It further stated that in criminal cases, the plaintiff or the public prosecutor may file a charge with the Provincial Court where the offence was committed or was alleged, or believed to be committed, or where the defendant is domiciled or arrested or where the enquiry officer interrogated the defendant, as the case may be.<sup>34</sup> Then, the Provincial Court must notify the Central IPIT Court of the matter and after the Central IPIT Court has accepted the case for adjudication, it may conduct the preliminary examination, the hearing and issues judgment at the relevant Provincial Court or at the Central IPIT Court, as may be appropriate.<sup>34</sup> If it is necessary, the Central IPIT Court may request the Provincial Court where the plaintiff has filed the statement of claim or any other Provincial Courts to conduct any proceeding



Fig. 1—Process of criminal cases of copyright and trademark infringement in the Thai Court System

which does not amount to making adjudgment on the issue in dispute.<sup>35</sup> In such case, the Provincial Court must apply the procedure for the IPIT cases under the AEPIPITC 1996 to the proceeding in the case<sup>35</sup> and also the Provincial Court has the power to issue a warrant of detention or grant provisional release of the alleged offender or the defendant.<sup>36</sup> This provision of Section 47 should be considered together with Section 8, which indicated that once the IPIT Court is inaugurated, no other Courts of First Instance can accept a case that falls under the jurisdiction of the IPIT Courts for adjudication.<sup>37</sup> Although, Section 8 mentioned the term “the IPIT Courts” which is defined by Section 3 to include Central IPIT Court and Regional IPIT Court, Section 47 allows the Central IPIT Court alone to have jurisdiction throughout Thailand by relying on the Provincial Courts to conduct any proceeding which does not amount to making adjudgment on the issue during the period when the Regional IPIT Courts have not been established. The IPIT Courts can be regarded as the Courts of First Instance under the Law Governing the Organization of Courts of Justice.<sup>38</sup>

Pursuant to Section 38 of AEPIPITC 1996, an appeal against any decision or order of the IPIT Courts must be submitted to the Court of Appeal for Specialized Cases<sup>39</sup>, which was established under the Establishment of the Court of Appeal for Specialized Cases Act B.E. 2558 (2015) (ECASCA 2015).<sup>40</sup> The ECASCA 2015 is consistent with the AEPIPITC 1996 and AEPIPITC (No.2) 2015 since it also indicates that the Court of Appeal for Specialized Cases shall have jurisdiction over an appeal against a decision or an order of the Specialized Courts.<sup>41</sup> The term “specialized courts” is defined by the ECASCA 2015 to include the IPIT Courts, while the term “specialized cases” is defined to include the IPIT cases.<sup>42</sup> The ECASCA 2015 also established several divisions in the Court of Appeal for Specialized Cases and one of the divisions is the Intellectual Property and International Trade Case Division (IPIT Case Division) which is responsible for adjudicating an appeal against a decision or an order of the IPIT Court.<sup>43</sup> The reason for the establishment of the IPIT Case Division was due to the complexity and special characteristics of intellectual property cases which are different from ordinary civil and criminal cases.<sup>44</sup> The judges in the IPIT Case Division in the Court of Appeal for Specialized Cases have the knowledge and expertise

relating to intellectual property law and are appointed by the King.<sup>45</sup> Importantly, in a case with important issue that should be decided by the decision of a division meeting, the President of the Court of Appeal for Specialized Cases may have such case decided by a division meeting.<sup>41</sup> Such meeting must comprise Vice President of the Court of Appeal for Specialized Cases who is in charge of the IPIT Case Division and all judges in the IPIT Case Division who are on duty. The number of judges attending the meeting must not be less than two-thirds of all judges in the IPIT Case Division, while the decision of the meeting must be reached by majority vote and if the votes are equal, chairperson shall give the casting vote.<sup>46</sup>

Finally, Section 40 of AEPIPITC 1996 prescribed that the appeal against any decision or order of the Court of Appeal for Specialized Cases must be submitted to the Supreme Court of Thailand.<sup>47</sup> The Supreme Court also established several divisions and one of these divisions is the Intellectual Property and International Trade Case Division (IPIT Case Division) and all appeals against a decision or an order of the Court of Appeal for Specialized Cases would be directly submitted to the IPIT Case Division of the Supreme Court, whose decision is final.<sup>48</sup> The reason for the establishment of the IPIT Case Division of the Supreme Court was the same as that of the Court of Appeal for Specialized Cases, which was to deal with the complexity and special characteristics of intellectual property cases that are different from ordinary civil and criminal cases, so the judges in the IPIT Case Division of the Supreme Court also have specific knowledge, expertise, and legal experiences on intellectual property laws.<sup>49</sup>

At present, the IPIT Courts, the Court of Appeal for Specialized Cases and the Supreme Court have formulated and used different sentencing guidelines, so the sentencing guidelines produced by each of these Courts might have different standard of sentencing.<sup>50</sup> This practice can be classified into three circumstances which can lead to the problem of sentencing disparity: (i) the IPIT Courts formulated and used different sentencing guideline from those of the Court of Appeal for Specialized Cases or the Supreme Court; (ii) the Court of Appeal for Specialized Cases formulated and used different sentencing guideline from those of the Supreme Court or the IPIT Courts; (iii) the Supreme Court formulated and used different sentencing guideline from those of the Court of Appeal for Specialized Cases or the IPIT Courts.

Further, the impact of the problem of sentencing disparity might be more severe when the Regional IPIT Courts are established in the future. This is because the prospective Regional IPIT Courts in different parts of Thailand would be likely to formulate their own sentencing guidelines, which would be different from each other and different from that of the Central IPIT Court. When the Central IPIT Court and these prospective Regional IPIT Courts rely on different sentencing guidelines, it would lead to the problem of sentencing disparity since the sentencing guidelines produced by the Central IPIT Court and each of these prospective Regional IPIT Court might have different standard of sentencing.

At present, the public does not have access to the sentencing guidelines of the IPIT Courts, the Court of Appeal for Specialized Cases and the Supreme Court of Thailand, while the judges in these Courts are prohibited from disclosing the details of these sentencing guidelines, so it is impossible for the public to discuss about the appropriateness of these guidelines.<sup>8</sup> Hence, this Article contends that the uniform national sentencing guideline should be formulated for the IPIT Courts, the Court of Appeal for Specialized Cases and the Supreme Court. Also, the public should have access to the uniform national sentencing guideline. The recommendations relating to these above issues will be provided in later section.

### **The US Approach**

The uniform federal sentencing guideline was formulated since 1987 and continues to develop in response to growing concerns over sentencing disparity created by judges.<sup>51</sup> The experience of the US should be helpful in development of relevant provisions and new approach on sentencing guidelines to solve the problem of sentencing disparity in Thailand. This approach guarantees that there would be consistency, certainty and fairness in determining the sentence to be imposed. It allows the US Courts to consider the punishment theories together with other relevant factors, while it requires the formulation and application of the uniform national sentencing guideline, which is more flexible than that of Thailand. The US approach relies on several provisions to prevent the problem of sentencing disparity, so these provisions apply to all criminal cases including criminal cases of copyright and trademark infringement. These provisions are: (i) Section 3553 of Title 18 of the US Code; (ii) Section

3742 of Title 18 of the US Code; (iii) Section 991 and Section 994 of Title 28 of the US Code; and (iv) Section 2B5.3 of the Guidelines Manual of the US Sentencing Commission.

#### **Provision in Section 3553 of Title 18 of the US Code**

Section 3553(a) of Title 18 of the US Code provides the factors which must be considered in imposing a sentence. The important part is Section 3553(a)(2) which can be regarded as the purposes of sentencing since Section 991 of Title 28 of the US Code requires the US Sentencing Commission to formulate the sentencing policies and practices for justice system in accordance with the purposes of sentencing as set forth in Section 3553(a)(2) of Title 18 of the US Code.<sup>52</sup> The issue relating to Section 991 of Title 28 of the US Code will be discussed in section.

Pursuant to Section 3553(a)(2), the Court, in determining the sentence to be imposed, must consider:

“(2) the need for the sentence imposed—

- (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
- (B) to afford adequate deterrence to criminal conduct;
- (C) to protect the public from further crimes of the defendant; and
- (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner...”<sup>53</sup>

In order to determine the sentence to be imposed, Section 3553(a)(2) allows the Court to consider relevant punishment theories such as the retributive theory, the rehabilitative theory, and the preventive theory. In this instance, the retributive theory, which emphasizes that the punishment must be in proportion to the seriousness of the offence, is embodied in Sub-section (A) of Section 3553(a)(2) since this subsection requires the Court to consider the need for the sentence imposed to reflect the seriousness of the offense. Likewise, the preventive theory, which provides that the objective of the punishment is to prevent the offenders from harming anyone in the society, is embodied in Sub-section (C) of Section 3553(a)(2) since this subsection requires the Court to consider the need for the sentence imposed to protect the public from further crimes of the defendant. Similarly, the rehabilitative theory which states that the objective of punishment is to improve or reform

the offender, is embodied in Sub-section (D) of Section 3553(a)(2) since this subsection allows the Court to consider the need for the sentence imposed to provide the defendant with needed educational or vocational training. Under the US approach, the Court must take into account these punishment theories when determining the sentence to be imposed. The current approach of Thai Court still lacks clarity on this aspect because there is no provision which requires the Thai Court to consider such punishment theories in determining the sentence, so this provision can be used as a model to solve the problem in Thailand.

In addition to Section 3553(a)(2), the provision of Section 3553(a)(1) requires the Court to consider other factors such as the nature and circumstances of the offence and the history and characteristics of the defendant in determining the sentence to be imposed.<sup>54</sup> Further, Section 3553(a)(3) and (4) require the Court to consider the kinds of sentences available as well as the kinds of sentence and the sentencing range established for the applicable category of offence committed by the applicable category of defendant as set forth in the sentencing guidelines.<sup>55</sup> Importantly, the US approach in Section 3553(a)(6) requires the Court to consider the need to avoid unwarranted sentencing disparity among defendants with similar records who have been found guilty of similar conduct.<sup>56</sup> The US approach in this provision can also play an important role in solving the problem of sentencing disparity in Thailand since it allows the Court to consider the need to avoid unwarranted sentencing disparity. Moreover, Section 3553(b) seems to make the US approach more flexible than that of Thailand when it come to the application of the guidelines for determining the sentence to be imposed. This is because it allows the Court to select a sentence from within the guideline range, and if the Court finds that there is an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration, then it can depart from the guidelines and sentence outside the guideline range, but it must specify reasons for departure.<sup>57</sup>

#### **Provision in Section 3742 of Title 18 of the US Code**

Section 3742 of Title 18 of the US Code ensures the consistency, certainty and fairness in sentencing by requiring the Court of Appeals to examine and determine whether such sentence is outside the guideline range, while it also allows the Court of Appeals to review the reasonableness of sentence

when the Court of the First Instance departs from the guideline range. Also, Section 3742 allows a defendant to file a notice of appeal for review of a final sentence if the sentence is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment than the maximum established in the guideline range.<sup>58</sup> Similarly, it allows the Government to file a notice of appeal for review of a final sentence if the sentence is less than the sentence specified in the applicable guideline range to the extent that the sentence includes a lesser fine or term of imprisonment than the minimum established in the guideline range.<sup>59</sup> Thus, the Court of Appeals has the power to determine whether such sentence is outside the guideline range and if the Court of the First Instance departs from the guideline range, then the Court of Appeals can still review the reasonableness of such departure.<sup>60</sup> Even though the Court of the First Instance sentences within the guideline range, the Court of Appeals can still review the sentence to determine whether such sentence is imposed as a result of an incorrect application of the sentencing guidelines.<sup>60</sup>

#### **Provision in Sections 991 and 994 of Title 28 of the US Code**

As already discussed in previous section, section 991 of Title 28 of the US Code is consistent with Section 3553(a)(2) of Title 18 of the US Code since it established the US Sentencing Commission as an independent commission which is responsible for formulating the sentencing policies and practices for justice system in accordance with the purposes of sentencing as set forth in Section 3553(a)(2) of Title 18 of the US Code.<sup>61</sup> It also requires the US Sentencing Commission to develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing as set forth in Section 3553(a)(2) of the Title 18 of the US Code.<sup>62</sup> Under this provision, the US Sentencing Commission plays an essential role in ensuring that the Court will consider several punishment theories and other factors in Section 3553(a)(2). Further, Section 991 requires the US Sentencing Commission to provide certainty and fairness in meeting the purposes of sentencing, as well as avoiding unwarranted sentencing disparity among defendants with similar records who have been found guilty of similar criminal conduct, while it must maintain sufficient flexibility to permit individualized sentences when warranted by mitigating or



aggravating factors not taken into account in the establishment of general sentencing practices.<sup>63</sup>

Another important function can be seen clearly in Section 994 of Title 28 of the US Code which allows the US Sentencing Commission to formulate the guideline and distribute it to all Courts of the US who will use it in determining the sentence to be imposed in a criminal case.<sup>64</sup> It clearly indicates that such sentencing guideline must include a determination whether to impose a sentence to a fine, or a term of imprisonment and also a determination as to the appropriate amount of a fine or the appropriate length of a term of imprisonment.<sup>65</sup> Section 994 is also consistent with Section 3553(a)(2) of Title 18 of the US Code since it allows the US Sentencing Commission to formulate general policy statements regarding application of the guideline or any other aspect of sentencing or sentence implementation that in the view of the US Sentencing Commission would further the purposes of sentencing set forth in Section 3553(a)(2) of Title 18 of the US Code.<sup>66</sup> Importantly, Section 994 allows the US Sentencing Commission to make amendments to such guideline, but such amendment must be accompanied by a statement of the reasons and must take effect on a date specified by the US Sentencing Commission.<sup>67</sup>

#### **Provision in Section 2B5.3 of the Guidelines Manual of the US Sentencing Commission**

The Guidelines Manual has been formulated and developed by the US Sentencing Commission. Section 2B5.3 of the Guidelines Manual emphasizes on criminal infringement of copyright and trademark.<sup>68</sup> This provision confines judicial discretion in order to ensure the reasonable uniformity in sentencing, so that there is no wide disparity in the sentences of the Court that impose on the infringers who commit similar offenses.<sup>69</sup> It also ensures the proportionality in sentencing and allows the Courts to impose suitably different sentences on the infringers whose conduct differs in severity.<sup>69</sup>

The Guidelines Manual recognizes 43 base offense levels with their specific sentencing ranges and the more serious types of crime have higher base offense levels, while each type of crimes is assigned a base offense level which is the starting point for determining the seriousness of a particular offense.<sup>70</sup> Section 2B5.3 stipulates that the criminal infringement of copyright or trademark has a base offense level of 8.<sup>71</sup> Sub-section b(1) of Section 2B5.3 provides that if the infringement amount exceeds

2,500 US Dollars, but does not exceed 6,500 US Dollars, the Court shall increase the offence level by one level.<sup>72</sup> It also prescribes that if the infringement amount exceeded 6,500 US dollars, then the Court must increase the offence level by the number of levels from the table in Section 2B1.1 of the Guidelines Manual which is applicable to the case of theft, property destruction, and fraud.<sup>72</sup> The Application Notes of Section 2B5.3 explained that the Guidelines Manual treats copyright and trademark infringement much like theft and fraud, so it ensures that the sentences for defendants convicted of offenses relating to copyright and trademark infringement should reflect the nature and magnitude of the pecuniary harm caused by their crimes, and this is similar to the sentences for theft and fraud offenses.<sup>73</sup> Also, the infringement amount in Sub-section b(1) of Section 2B5.3 serves as a principal factor in determining the offense level for offenses relating to copyright and trademark infringement, which is similar to the loss enhancement in the theft and fraud guideline.<sup>73</sup>

In order to determine the infringement amount under Sub-section b(1) of Section 2B5.3, the Application Note of Section 2B5.3 requires the Court to use the following methods. The first method in Sub-division 2(A) of the Application Note allows the use of retail value of infringed item by indicating that the infringement amount is the retail value of the infringed item, multiplied by the number of infringing items.<sup>74</sup> The Application Note defines the term “infringing item” as the item that violates the copyright or trademark laws, while it defines the term “infringed item” as the copyrighted or trademarked item with respect to which the crime against intellectual property was committed.<sup>75</sup> The use of retail value of infringed item will be applied in several circumstances such as where the retail price of the infringing item is not less than 75% of the retail price of the infringed item; where the retail value of the infringing item is difficult or impossible to determine without unduly complicating or prolonging the sentencing proceeding; where the retail value of the infringed item provides a more accurate assessment of the pecuniary harm to the copyright or trademark owner than does the retail value of the infringing item; or where the offense involves the display, performance, publication, reproduction, or distribution of a work being prepared for commercial distribution and so on.<sup>76</sup>

The second method in Sub-division 2(B) of the Application Note allows the use of retail value of infringing item by stating that the infringement amount is the retail value of the infringing item, multiplied by the number of infringing items, in any case not covered by the first method in Sub-division 2(A) of the Application Note.<sup>77</sup> It explained that the “retail value” of an infringed item or an infringing item is the retail price of that item in the market in which it is sold.<sup>78</sup> In a case involving a variety of infringing items, the infringement amount is the sum of all calculations made for those items under the first method in Sub-division 2(A) and second method in Sub-division 2(B) of the Application Note.<sup>79</sup> For instance, if the defendant sold both counterfeit videotapes that are identical in quality to the infringed videotapes and inferior counterfeit handbags, the infringement amount is the sum of the infringement amount, for purposes of Sub-section b(1) of Section 2B5.3, is the sum of the infringement amount calculated with respect to the counterfeit videotapes under the first method in Sub-division 2(A) of the Application Note (the quantity of the infringing videotapes multiplied by the retail value of the infringed videotapes) and the infringement amount calculated with respect to the counterfeit handbags under second method in Sub-division 2(B) of the Application Note (the quantity of the infringing handbags multiplied by the retail value of the infringing handbags).<sup>79</sup> However, if the Court cannot determine the number of infringing items, then the Application Note allows the Court to make a reasonable estimate of the infringement amount by using any relevant information, including financial records.<sup>80</sup>

In addition to Sub-section b(1) of Section 2B5.3, the Guidelines Manual also provides for other specific offences on trademark or copyright infringement in Sub-section b(2)-(7) of section 2B5.3 which allows the Court to increase the offence level by certain level. Sub-section b(2) indicates that the Court can increase the offence level by two levels if the offense involves the display, performance, publication, reproduction, or distribution of a work being prepared for commercial distribution.<sup>81</sup> Sub-section b(3) allows the Court to increase the offence level by two levels when the offense involves the manufacture, importation, or uploading of infringing items, or the defendant was convicted under the provision for trafficking in circumvention devices, but if the resulting offence level is still less than level 12, the

Court must increase the offence level to level 12.<sup>82</sup> Sub-section b(4) prescribes that if the offense is not committed for commercial advantage or private financial gain, the Court can decrease the offence level by two levels, but the resulting offence level must be not less than level 8.<sup>83</sup>

Further, Sub-section b(5) allows the Court to increase the offence level by two levels if the offense involved a drug that uses a counterfeit mark on or in connection with the drug.<sup>84</sup> Sub-section b(6) stipulates that if the offense involves the conscious or reckless risk of death or serious bodily injury or it involves the possession of a dangerous weapon including a firearm in connection with the offense, then the Court can increase the offence level by two levels, and if the resulting offence level is still less than level 14, then it must increase to level 14.<sup>85</sup> This subsection would also apply to the case in which the offense involved a counterfeit military good or service the use, malfunction, or failure of which is likely to cause serious bodily injury or death.<sup>86</sup> Finally, Sub-section b(7) states that if the offense involved a counterfeit military good or service the use, malfunction, or failure of which is likely to cause the disclosure of classified information, impairment of combat operations or other significant harm to a combat operation or a member of the Armed Forces, or national security, then the Court can increase the offence level by two levels and if the resulting offence level is still less than level 14, then it must increase to level 14.<sup>87</sup>

Further, Sub-division 5 of the Application Note ensures the flexibility of Section 2B5.3 by prescribing that if the offence level determined under this guideline substantially understates or overstates the seriousness of the offense, a departure from this guideline may be warranted.<sup>88</sup> It also provides a non-exhaustive list of factors that the Court may consider in determining whether such departure may be warranted. These factors are: (i) the offense involves substantial harm to the reputation of the copyright or trademark owner; (ii) the offense is committed in connection with, or in furtherance of, the criminal activities of a national, or international, organized criminal enterprise; (iii) the method used to calculate the infringement amount is based upon a formula or extrapolation that results in an estimated amount that may substantially exceed the actual pecuniary harm to the copyright or trademark owner; and (iv) the offense resulted in death or serious bodily injury.<sup>89</sup>

### Appropriate Approach for Thailand

The problem of sentencing disparity caused by the practice of the Thai courts allows different courts to formulate and use different sentencing guidelines, so the guidelines produced by different courts have different standard of sentencing. This approach applies to all criminal cases including criminal cases of copyright and trademark infringement. In order to solve such problem and ensure the consistency, certainty and fairness in sentencing, this Article proposes that the uniform national sentencing guideline for all criminal cases including the criminal cases of copyright and trademark infringement should be formulated. The US approach which relies on one uniform federal sentencing guideline should be used as a model for Thailand. With this approach, the judges overseeing normal criminal cases in the Courts of the First Instance, the Courts of Appeals and the Supreme Court in Thailand could utilize the same uniform national sentencing guideline. In the criminal cases of copyright and trademark infringement, the judges in the IPIT Courts, the Court of Appeal for Specialized Cases and the Supreme Court of Thailand should also utilize the same uniform national sentencing guideline in determining the sentence to be imposed.

However, it is important to note that the Thai courts at present cannot make the sentencing guidelines more formal by having a national sentencing guideline and disclosing its details because by doing so, it would demonstrate that the Thai Court creates sentencing rules without legal mandate.<sup>4</sup> Thus, this paper suggests that the introduction of the relevant provisions to support the formulation of the uniform national sentencing guideline in Thailand is necessary and the following tasks must be carried out:

(i) The provision on imposition of a sentence which is equivalent to that of Section 3553 of Title 18 of the US Code should be introduced into the Thai legal system in order to ensure that the Court, in determining the sentence to be imposed, will consider the punishment theories and other relevant factors such as the nature and circumstances of the offence, the history and characteristics of the defendant and so on. This should apply to all criminal cases including the criminal cases of copyright and trademark infringement. The proposed provision should provide the clear purposes of sentencing and should allow the Court to consider the need to

avoid sentencing disparity, while it should ensure the flexibility for the Court in the term of application of the uniform national sentencing guideline by allowing the Court to select a sentence from within the guideline range. The proposed provision should clearly indicate that if the Court finds that there is an aggravating or mitigating circumstance, then it can depart from such guideline and sentence outside the guideline range, but it must specify reasons for departure.

- (ii) The provision on review of a sentence which is equivalent to that of Section 3742 of Title 18 of the US Code should be introduced into the Thai legal system. This should apply to all criminal cases including the criminal cases of copyright and trademark infringement. In normal criminal cases, the proposed provision should indicate that the Court of Appeal can examine whether such uniform national sentencing guideline is applied correctly by the Court of the First Instance, while it should stipulate that the Court of Appeal overseeing normal criminal cases has the power to determine whether the sentence of the Court of the First Instance is outside the guideline range. If the Court of the First Instance departs from the guideline range, then such proposed provision should allow the Court of Appeal to review the reasonableness of such departure. Likewise, in criminal cases of copyright and trademark infringement, the proposed provision should indicate that the Court of Appeal for Specialized Cases can examine whether the uniform national sentencing guideline is applied correctly by the IPIT Courts. The proposed provision should clearly state that the Court of Appeal for Specialized Cases can determine whether such sentence of the IPIT Courts is outside the guideline range. If the IPIT Courts depart from the guideline range, then such proposed provision should allow the Court of Appeal for Specialized Cases to review the reasonableness of such departure.
- (iii) The sentencing commission should be established in Thailand. At present, there is no sentencing commission in Thailand, so the introduction of the sentencing commission, which is responsible for formulating the uniform sentencing policies and practices for justice system in Thailand, is necessary. Section 991 of Title 28 of the US Code which provides the detailed provision on the

purposes and establishment of the sentencing commission can be used as a model for the establishment of the sentencing commission in Thailand. The proposed provision should indicate that such sentencing commission has the responsibility to formulate and distribute the uniform national sentencing guideline to all Thai Courts who could use it in determining the sentence to be imposed in all criminal cases including criminal cases of copyright and trademark infringement. In this vein, Section 994 of Title 28 of the US Code which indicates that sentencing commission has the duty to promulgate and distribute the federal sentencing guideline, can be used as a model for Thailand. Also, the proposed provision must ensure that the uniform national sentencing guideline should be available to the public, so that the people can have access to the guideline and can discuss the appropriateness of such guidelines openly. It should also stipulate that the sentencing commission should have the authority to make any amendment or change to its uniform national sentencing guideline especially when such guideline is outdated or cannot deal with new problems or fails to achieve consistency, certainty and fairness in sentencing. This proposed provision should be consistent with the purposes of sentencing set forth in the proposed provision at (i) above.

- (iv) The prospective uniform national sentencing guideline should contain the provisions which can apply to all criminal cases, while it should also provide the specific provisions which can apply to the criminal cases of copyright and trademark infringement. Section 2B5.3 of the US Guidelines Manual is specifically designed to apply in criminal cases of copyright and trademark infringement, so it can be used as a model in developing the specific provision on criminal infringement of copyright or trademark in the uniform national sentencing guideline for Thailand. The US approach in Section 2B5.3 can also help to prevent the problem of sentencing disparity in the circumstance where the trademark or copyright infringement involves other offences. The proposed specific provision in the uniform national sentencing guideline should ensure that criminal infringement of copyright or trademark should be assigned a base offense level and such provision should allow the Court to increase the offence level only in certain

circumstances, while it should provide detailed methods in determining the infringement amount. This should help to confine judicial discretion in sentencing the infringers and ensure the reasonable uniformity in sentencing. This can also prevent a wide disparity in the sentences that the Courts impose on the infringers and ensure that the infringers who commit the same offence in the same manner would be given the same punishment. It should provide the Court with flexibility by prescribing a non-exhaustive list of factors that the Court may consider in determining whether such departure from the uniform national sentencing guideline may be warranted.

### **Conclusion**

The paper contends that the current approach of the Thai Courts which allows different Courts to formulate and use different sentencing guidelines, is inappropriate because the guidelines produced by different Courts have different standard of sentencing. This practice does not only apply to criminal cases in general, but it also applies to criminal cases of copyright and trademark infringement since the IPIT Courts, the Court of Appeal for Specialized Cases and the Supreme Court have also formulated and used different sentencing guidelines. This leads to the problem of sentencing disparity in Thailand. In order to solve such problem, this Article proposes that changes should be made to the current approach of Thai Courts and such proposed changes should be applied to all criminal cases including criminal cases of copyright and trademark infringement.

The US approach which relies on Sections 3553 and 3742 of Title 18 of the US Code, Sections 991 and 994 of Title 28 of the US Code and one uniform federal sentencing guideline should be used as a model for Thailand to solve the problem of sentencing disparity. It also proposes that the relevant provisions and the uniform national sentencing guideline like that of the US approach should be introduced into the Thai legal system. This approach should be applied to all criminal cases including criminal cases of copyright and trademark infringement, so that the judges in the IPIT Courts, the Court of Appeal for Specialized Cases and the Supreme Court of Thailand could rely on the relevant provisions and uniform national sentencing guidelines to prevent sentencing disparity.

For the limitation of research, due to the fact that the details of sentencing guidelines are regarded by

the Thai Courts as official secret, it leads to the problem of having limited access to the information and details of sentencing guidelines of the Thai Courts and this makes it more difficult to compare details of such sentencing guidelines. However, the author still finds the way to obtain necessary information by conducting the research through the use of academic documents written by the Thai judges as the source of information, so finding and recommendations of this research are still reliable despite such limitation.

There are several lessons resulting from this study which could benefit or contribute to the development of the approach on sentencing guidelines in other countries. One of the most important lessons from Thailand is that the use of different sentencing guidelines with different standard of sentencing by the Courts could lead to the problem of sentencing disparity. Other countries can also learn from Thailand's experiences that the practice of keeping the details of sentencing guidelines confidential is contrary to the principle of transparency and accountability in sentencing, so the details of sentencing guidelines should be disclosed to the public.

Future direction continues to be improvements of consistency and transparency in sentencing through the development of relevant legal provisions and revision of sentencing guidelines for criminal cases including criminal cases of copyright and trademark infringement. Also, further research on public knowledge and public opinion of existing and future sentencing guidelines should be conducted in order to better evaluate the effectiveness of such sentencing guidelines.

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