

THAILAND, FREE TRADE AND ITS COPYRIGHT LAW OBLIGATIONS

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ABSTRACT

Thailand joined the General Agreement on Tariffs and Trade (GATT) in 1992 and was a founding member of the World Trade Organization (WTO). This bound Thailand, which was still very much a developing country, to the new world order seemingly dictated by the USA. Clearly Thailand entered with its eyes open to the difficulties but reasoned that the advantages of membership of the WTO far exceeded the disadvantages. WTO membership brought with it many additional obligations including the need to accede to additional agreements within the WTO framework. The most difficult areas that Thailand has had to negotiate with its trading partners have been in relation to copyright and intellectual property rights. Differences with the USA have been such that Thailand has been unable to finalize negotiations for an FTA. This has not been such a sensitive issue with its other trading partners with whom Thailand has been able to successfully negotiate. The paper outlines the issues associated with WTO membership, free trade and copyright. It then describes Thailand's response in terms of the Copyright Act B.E.2537 (AD 1994). It then focusses on the remedies that are available under the Act. In Thailand the liability of copyright infringement is 'strict liability' as Thai law believes that damages occur when the copyright breach happens even if the owner did not intend to use the copyright for commercial benefit at that stage.

Key words: Copyright, Thailand, Creative works, Free Trade Agreements.

Introduction

Thailand joined the General Agreement on Tariffs and Trade (GATT) in 1992 and was a founding member of the World Trade Organization (WTO). This bound Thailand, which was still very much a developing country, to the new world order seemingly dictated by the USA. Clearly Thailand entered with its eyes open to the difficulties but reasoned that the advantages of membership of the WTO far exceeded the disadvantages. WTO membership brought with it many additional obligations including the need to accede to additional agreements within the WTO framework. The most difficult areas that Thailand has had to negotiate with its trading partners have been in relation to copyright and intellectual property rights. Differences with the USA have been such that Thailand has been unable to finalize negotiations for an FTA. This has not been such a sensitive issue with its other trading partners with whom Thailand has been able to successfully negotiate.

The Thai Copyright Act B.E. 2537 (AD 1994) plays the key role in protecting the ideas of a creator of works. The Act itself is quite robust. If a criticism had to be levelled it would be against the enforcement regime. This article focusses on the contents of the Act and not on the manner in which it is enforced. .

Thai Legal Concept of Copyright

Intellectual property (IP) has a value and a price that a person can seek to exploit for its benefit. Just like other areas of intellectual property, Copyright Law protects creative rights in a similar manner to the protection of physical property. There are two main bases to protect copyright works. First is a commercial reason. A creator should have rights to collect commercial benefit for its own works. Second is a moral reason. The creator must have a right to defend its own works from a person who tries to take an unlawful benefit from a work.

However, the law does not provide absolute protection for copyright works in every circumstance. The Copyright Act tries to keep a balance between public interest and the copyright owner under the principle of 'fair use'.

Infringement of copyright is the abuse of the commercial rights of a person. Whenever a person uses a work for which it has no rights over the copyright work to reproduce, modify or publish a work, an infringement of copyright has occurred. Infringement of copyright results in a civil penalty. Its penalty is under a special law rather than under general tort law. As stated the infringement of copyright results in a commercial benefit that is different from other tort. The infringement of copyright focuses on the wrongful actor. This is similar to what applies in other jurisdictions. For instance, the Australian Copyright Act 1968 (Cwlth) provides civil and criminal sanctions to protect copyright (Australian High Tech Crime Centre, 2005).

Rights of Copyright Owners under the Thai Act

The copyright owners have rights over the copyright as clarified below.

Reproduction under the Copyright Act is any action taking a copy of the key concept and figure of a copyright work or from advertising (Copyright Act B.E. 2537 (AD 1994), s4). For a computer program, reproduction is copying the key material of any process. In this case the person is violating the owner's copyright by using the material, even though that person has made no changes to the original.

To modify a copyright work includes re-production by changing the form or adjusting the key figure of copyright work. Under this action, the modified work is the concept or the idea of the original work. The law protects the owner so it can modify its own work.

Publishing under Section 4 is the showing of the copyright work to people. Even if a show was released in private hall, the law assumes it was released in the public arena. However, showing a work in the family is not considered to be part of publishing. To sum up, publishing means to reveal or distribute work to people. This is one of the rights over which the copyright owner can take action.

In Thailand Court Case Number 466/2478 (B.E.2478 (AD 1935)) the defendant made a new book by copying from another book resulting in a work that was the same as the original book. The Court found the defendant guilty of violating copyright under the Statutes Protecting the Literary and Visual Arts B.E. 2474 (AD 1931) (the previous copyright law before Copyright Act B.E.2521 (AD 1978)) under the Civil Code but not guilty of copying under the Criminal Code (see, for instance, Promhitorn & Promhitorn, 1984, p.141).

The owner has a right to seek benefit by allowing a copyright work or a copy of copyright work to be leased. The leasing of copyright works without permission is prohibited by law. Copyright material not only applies to the genuine copyright works but also includes copies of copyright works (Thai Copyright Act B.E. 2537 (AD 1994) s15(3)).

The copyright owner has the right to allow other people to use copyright works for a price and has the right to request compensation for such use. Normally it will be made in a contract called a 'Licensing Agreement'. The law describes the rights the copyright owner has to permit others to use copyright work legally (Thai Copyright Act B.E. 2537 (AD 1994) s15(5)). Under the same Section the owner also has rights to allow others to re-produce copyright work under certain conditions. One such condition allows a time frame for the reproduction of copyright work. However, the law does not allow a condition that aims to restrict competition in business or results in unfair trade practices.

Infringement of Copyright Works

- **Infringement of Copyright Works in General Copyright Works**

If a person reproduces or modifies and publishes a work without permission, the law states that such a person infringes the copyright of the creator (Copyright Act B.E. 2537 (AD 1994), s27). The intent of the law is to protect basic copyright works such as literary works, theatre art, music works and art objects but excludes computer programs. Section 27(3) prohibits the reproduction of copyright works without permission from the copyright owner. To reproduce means copying or undertaking any other action that uses an important key concept or figure in part or in whole of the copyright works.

Under the law it is irrelevant whether the copy is a copy from an original work or from advertising. A reproduction is any work that reproduces the key essential concept of that copyright work. In other word, the quantity of the reproduced work is not important but the key is whether or not the copy reproduces the essential concept of copyright work. The law also prohibits a person from 'modifying' copyright works (Copyright Act B.E. 2537 (AD 1994), s27(4)). To change the form, adjust, correct or model the concept or figure of a copyright work partly or indirect copying is included under the description of modify.

All of this assumes an infringement of copyright works.

According to the law, publishing is taking copyright works to show in public (Copyright Act B.E. 2537 (AD 1994), s4(15)). For example, Case Number 480/2510 (B.E.2510, AD 1967) was tried under the Statutes Protecting the Literary and Visual Arts B.E. 2474 (A.D. 1931) in which Section 4 'music' means musical tone or lyric, the music can have a lyric or not. The plaintiff was a music tone maker and another person wrote the lyrics and transferred the rights to reproduce the lyrics to the plaintiff. Therefore the plaintiff had copyright over both the music's tone and lyric. It meant the plaintiff had rights to prohibit anybody from showing the song in public and also had the rights to prohibit anyone from reproducing the tones and lyric for distribution. The defendant sold the lyric without permission from the copyright owner and therefore it infringed the copyright work. Similarly, if the defendant sold the notes of the song it would also infringe the copyright (see, for instance, Promhitorn & Promhitorn, 1984, p.143).

However under Thai Copyright law, the copyright owner is not the only person who has rights to distribute the copyright works. If another person is lawfully allowed to reproduce the copyright work, the copyright owner has no rights to control the copyright protection. In this case, the other person is protected under the 'proprietor rights principle'. The actions of a person who has lawful rights on copyright or proprietor is not infringement of copyright (Copyright Act B.E. 2537 (AD 1994), ss15,16).

- **Infringement of Copyright Works in Audio, Visual, Film and Sound Recording**

Under the Act, if a person reproduces copyright works, publishes, or leases copyright works or copies copyright works without permission from copyright owner, this action is an infringement of a copyright work (Copyright Act B.E. 2537 (AD 1994), s28).

Section 28 aims to protect sound and visual works. Reproduction and publishing are the same principles as described in Section 27 of the Act as explained above.

In terms of copyright work, as well as the copying and leasing of copyright works, if the copyright owner contributes the copyright work to the public domain, the owner no longer has rights over such copyright work. Again this is similar to the case in other jurisdictions. In a United States Circuit Court decision, the judgment stated that it is "well settled that rights gained under the [United States] Copyright Act may be abandoned" provided the abandonment is manifested by "an overt act indicating an intention to abandon that right" (Kozinski, 1998, p. 6).

- **Infringement of Copyright Works in Audio and Visual Publishing**

Section 29 states that partly or wholly making the audio visual, film and sound recording and partly or wholly publishing the item; re-broadcasting in whole or in part of copyright works; or publishing by collecting money or other commerce benefit without permission of the copyright owner are infringements under the Act.

The key point of the law is whether or not the person is collecting a commercial benefit. If the fact shows that a person collects or has a commercial benefit from the broadcasting, he/she has been infringing the law. The law under Section 29 is consistent with Article 13 of the Rome Convention (1961).

- **Infringement of Copyright Works in a Computer Program**

Even though a computer program is organised in literary work under the Copyright Act, a computer program clearly has special characteristics different from other literary works. Therefore, the law was included as a special section to protect computer programs (Copyright Act B.E. 2537 (AD 1994), s30). Section 30 does not allow a person who is not an owner to reproduce or modify a computer program under the copyright work. It is not allowed to copy by any recorder either part or whole works. Moreover the law also does not allow the modification of a copyright computer program. A computer program under the protection of copyright cannot be published without permission of the copyright owner. This is the same principle as in Section 28. The law states that a person will also infringe the copyright if he/she leases a genuine copyright work without permission of the copyright owner (Copyright Act B.E. 2537 (AD 1994), s30). Section 31 continues by stating an infringement also occurs if a person assists another person to infringe the copyright or expand the copyright infringement that such person has already undertaken to the copyright owner. The key point of this statement is that a person knows or should know the circumstance of copyright work protected by law but continues making benefit from that work by contribution, leasing and publishing or self-importation on order into the Kingdom is infringing the copyright and it causes damage or abuses to the rights of the copyright owner.

Copyright Infringement Exemption

Any use of copyright works will not be considered to be an infringement of copyright if it is for (Thai Copyright Act B.E. 2537 (AD 1994) s32):

- Research or Study;
- Personal and private use. This exemption is widely accepted. Members of Tunis Model Law on Copyright (1976) organized by WIPO and UNESCO provided this exemption too;
- Criticizing or analyzing the work of a creator. If, for example, a copy or reproduction is used to criticize or analyze the works of the copyright owner and the source of the work is acknowledged the law does not consider this to be an infringement of copyright;
- News reports on media provided the source of the information is disclosed;
- Re-production, modification, and use for the court investigation procedures or officers acting in accordance with their duties. This exemption was provided to benefit a court investigation by officer. However, this exemption extends to private purposes also to provide information to be used as evidence in court;
- Professional training. This exemption for reproduction, modification and exhibition is not limited to a school, university or institution but also provides an exemption for training courses; and
- Use by a class or institute without commercial purpose and it is not cause of damage to the copyright owners under the fair use principle. Its use must be appropriate and the number of copies must not be excessive.

These exemptions are similar to those of a number of Common Law Countries such as the United Kingdom (e.g. Copyright, Designs and Patents Act, 1988, Chapter III).

In determining whether the usage confirms to the "fair use" principle a number factors have to be considered. Firstly, it is important to consider the purpose and the character of the use. If, for example, the copyright work is used for a university examination the teachers, students and examination paper printers will not be considered as infringers of copyright. Consideration must also be given to the nature of copyright work; the number of copies used compared to the original copyright works; and the effect of reproduction on the value of the copyright work.

Remedies under the Act

The compensation remedy for infringement of copyright is stated in Section 64. The law gives rights to the court to apply discretion in awarding remedy by way of compensation. The court will consider the gravity of damages and loss of profit. The court may not consider the cost of using a copyright because the law allows the copyright owner a remedy from actual damage and loss of profit.

The lost profit is any benefit due to copyright work that the owner should have obtained if the copyright work was not infringed. In addition the role of the court, if so requested, is to issue orders to prohibit the defendant from continuing to infringe the copyright of the plaintiff. The plaintiff has to make clear to the court about his/her damage from the actions of the defendant if the plaintiff requires the defendant to pay for copyright infringement.

Section 64 also allows damages that cannot be calculated in monetary terms because some of the copyright work can enhance the reputation of the owner. Even though the copyright owner does not create works for commercial benefit, if a person takes the copyright works this results in a potential lost opportunity from the works in future. In conclusion, the owner incurred damages due to the loss of the opportunity to benefit from the copyright work in the future. It is for instance that in the U.K. the court will award damage compensation for using copyright work (Copyright, Designs and Patents Act 1988, Chapter II).

For the damage of reputation the copyright owner has to prove to the court how its reputation was abused.

Before Thailand introduced the Copyright infringement compensation in Section 64, the court used the principle of Section 438 of Civil Code under tort to determine the copyright infringement compensation. This was due to the fact that the court assumed that copyright infringement was a kind of tort. A number of such cases are cited by Promhitorn & Promhitorn (1984). In fact, as mentioned earlier, copyright infringement is different from other torts. Damage occurred from copyright infringement is different from general tort. The damage of copyright infringement involves a commercial loss. Copyright compensation is for a lost benefit while tort is not due just to loss of property but also sometimes considers compensation for pain and suffering. Therefore the court now uses Section 64 of Copyright Act B.E.2537 (AD 1979) to consider the copyright infringement damage compensation.

However in practice, the court can bring Section 439 of Civil Code into its decision making in conjunction with Section 64 of Copyright Act. Under Section 439 the court considers the circumstance and gravity of tort while under Section 64 the court will consider the gravity of damage, lost benefit and necessary expense.

Under Thai copyright regulation, there is not a good faith infringement principle as applies in some countries. This is different from the copyright law of the U.K. and other Common Law countries. In the U.K. if the infringing person can prove that infringes of copyright work was based on good faith (e.g. Copyright, Designs and Patents Act, 1988, s57) the plaintiff has no rights to seek even an actual damage payment. However the law provides a remedy by giving interest due to copyright infringement to the copyright owner instead of actual damage. Therefore, the court will not consider whether a person infringes with good faith, based on innocent use having never known previously such work has protection, or not. In Thailand the liability of copyright infringement is 'strict liability' as Thai law believes that damages occur when the copyright breach happens even if the owner did not intend to use the copyright for commercial benefit at that stage. In other words the creative owner has lost the opportunity to seek to benefit in future from its own work.

Basically, the court will consider the gravity of damages, lost income and necessary expense due to the offence. The copyright owner has rights to have actual damages as the primary remedy.

As previously stated if the law finds that a copyright infringement occurred in Thailand, the regulation assumes strict liability. Beside a compensation measure the law has another remedy as stated in Section 75 of the Act. The copyright infringement products or imported copyright infringement products will be delivered to the copyright owner. For the material and tools that were used to produce infringement copyright materials such as sound recorders and printing machines, the law allows confiscation.

Copyright Law and Free Trade Agreements

Adherence to a robust Copyright Law is becoming a significant component of Free Trade Agreements in which Thailand is a party. Differences with the USA on copyright and intellectual property rights have been such that Thailand has been unable to finalize negotiations for an FTA. This has not been such a sensitive issue with its other trading partners with whom Thailand has been able to successfully negotiate.

Initially, the requirements were fairly benign. For instance, Chapter 13 of the Thailand Australia Free Trade Agreement (2005) requires the parties to "fully respect the provisions of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights [TRIPS] [1994] and any other multilateral agreement relating to intellectual property to which both are parties" (Article 1302); to prevent export of products that violate copyright (Article 1303); to cooperate in enforcement (Article 1304); and to cooperate in areas such as developing education programs on the importance of intellectual property rights and encouraging businesses develop and protect their intellectual property (Article 1305).

By the time of the ASEAN-Australia-New Zealand Free Trade Agreement (AANZFTA) (2009) the contents of its Chapter 13 had become quite comprehensive. The Objectives in Chapter 13 state: "Each Party confirms its commitment to reducing

impediments to trade and investment by promoting deeper economic integration through effective and adequate creation, utilization, protection and enforcement of intellectual property rights, taking into account the different levels of economic development and capacity and differences in national legal systems and the need to maintain an appropriate balance between the rights of intellectual property owners and the legitimate interests of users in subject matter protected by intellectual property rights” (Chapter 13, Article 1). Article 1 is similar to Article 1302 of TAFTA.

A new article (Article 5) on copyright was added. Essentially it requires each party to provide to authors of works the exclusive right over their creative works; to provide criminal proceedings for willful infringements of copyright; and to establish appropriate bodies for the collective management of copyright. Article 6 commits the parties to only use legitimate computer software for its central government and encourage respective regional and local governments to do the same.

The Parties acknowledged “the significant differences in capacity between some Parties in the area of intellectual property” and “each other Party shall, as appropriate, and upon request, endeavour to provide co-operation to that Party to assist in the implementation of” the Intellectual Property Chapter (Article 9). They agreed that any transitional period for implementation of the TRIPS Agreement would still apply (Article 11). Each Party was required to “ensure that its laws and regulations of general application that pertain to the availability, scope, acquisition, enforcement and prevention of the abuse of intellectual property rights are made publicly available in at least the national language of that Party or in the English language” (Article 10). In addition, final judicial decisions and administrative rulings should be made publicly available.

Finally, the Parties agreed to establish a Committee on Intellectual Property to monitor the implementation and administration of Chapter 13 of AANZFTA (Article 13).

This is quite a significant change over a period of around 5 years between the two Free Trade Agreements.

Conclusions

Clearly, all of the parties advocating free trade including Thailand must have a comprehensive Copyright Law that conforms to its WTO obligations and a rigorous enforcement regime to be a party to current and the proposed plurilateral agreements under negotiation. As has been seen from the above discussion Thailand has a robust Copyright Act. The protections are in place and the penalties fairly severe. If there is a deficiency it is in the enforcement regime and not in the Act itself.

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