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## Supreme Court Decision: Copyright Infringement of Geese in Reeds Sculpture

It is very common for copyright owners to take action against those who are violating their rights by creating or distributing pirated works. In almost all cases, though, prosecutions of violators are carried out by companies, as opposed to individual artists, who are seemingly left powerless to pursue legal action. But a recent ruling by the Supreme Court of Thailand provides a reminder that individual artists can and should enforce their rights. In August 2013, the Supreme Court rendered a judgment in favor of an individual artist, Ms. Impala Lechner, in a copyright infringement action against an owner of a foundry in Thailand.

### Infringement of *Geese in Reeds*

Born in Munich, Germany, Ms. Lechner studied the art of sculpture at the International School of Metis Art in the United States, before becoming a bronze artist. Ms. Lechner created a bronze sculpture called *Geese in Reeds*, which she made in Germany from 1994 to 1995 and which was first published in 1997.

In 2001, Ms. Lechner became aware of a suspected pirated sculpture of the *Geese in Reeds* in the catalogue of a German gallery. The suspect goods were found in art galleries in the United States from 2002 to 2003. All evidence led to the fact that the infringing sculptures came from a Thai company, Siam Handicraft Group, belonging to a Thai citizen. Ms. Lechner initiated an investigation in Thailand through a private investigation company, in order to identify the source of the pirated sculptures and ultimately take legal action.

On July 30, 2003, the Thai police conducted a raid action against a factory of Siam Handicraft Co., Ltd. A total of 59 completed *Geese in Reeds* sculptures, along with incomplete sculptures, were found and seized. The police also seized a CD-ROM containing the catalogue of the infringing products. The wife of the company's owner was present at the scene and admitted to being an owner of the factory.

### Trial at IP&IT Court

In June 2004, the Public Prosecutor filed a criminal complaint with the Central Intellectual Property and International Trade Court (IP&IT Court) against the woman who was present at the factory, as the defendant. Ms. Lechner, through Tilleke & Gibbins, then filed a motion to join the suit as a co-plaintiff. The defendant denied all allegations, claiming that the seized goods, called *Ducks in Reeds*, originated and were designed in-house.

After many years of waiting, on April 21, 2008, the IP&IT Court rendered a judgment dismissing the case. The

Court recognized that the *Geese in Reeds* sculpture was a copyright work created by Ms. Lechner using her originality, skill, labor, and judgment and was thus protectable as a copyright work under Thai law. The Court, however, found that there was insufficient evidence to sentence the defendant under the Copyright Act B.E. 2537.

According to the judgment, in order for any person to violate the Copyright Act Sections 27 and 31 and be subject to criminal prosecution under Sections 69 and 70, he or she must have acted intentionally with the knowledge that the sculpture was a work made by infringing on the copyright of others. In this case, the crucial question was whether or not the defendant knew or could have known of such infringement. The evidence brought before the Court by the plaintiff, however, only related to Siam Handicraft and its owner (the defendant's husband), without any evidence directly relating to the defendant, other than the defendant's marriage to Siam Handicraft's owner, as well as their joint ownership of a house and the factory where the pirated works were found.

Additionally, the purpose of the factory was to produce works made for hire; therefore, this indicated that the defendant must have produced the sculpture according to the order of a hirer. If so, it would be the hirer, not the defendant, who would have had knowledge of the infringement. Ms. Lechner, in her testimony, also said that she had neither brought the sculpture *Geese in Reeds* to sell in Thailand, nor authorized any representatives to sell the sculpture, nor advertised the work within the Kingdom. As a result, the defendant did not know or could not have known of the sculpture. Also, the availability of Ms. Lechner's website only proved that Thai people had access to the information; it did not lead to the conclusion that the defendant must have known of the sculpture merely by such availability.



Ms. Lechner's *Geese in Reeds*  
fine bronze sculpture

Infringing products found  
at the raid scene

The Court held that it was reasonable to conclude that the defendant believed that the sculpture was a work that the hirer properly obtained without infringing on any person's copyright. Furthermore, even if the defendant's sculpture was made by infringing on a copyright work, liability for the infringement would rest with the hirer, not the defendant. Based on this, the Court concluded that the plaintiffs did not sufficiently prove beyond a reasonable doubt that the defendant knew or could have known of such infringement. Because such knowledge constitutes one of the elements to be considered as infringement, the case was dismissed.

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### Appeal to Supreme Court

Ms. Lechner appealed this judgment to the Supreme Court, arguing that the defendant was a primary infringer, as the infringing products were found at her factory. Therefore, she ought to be liable for the infringing activities. The plaintiff also requested the Supreme Court to reconsider the fact on the bad-faith intention of the defendant based on the evidence previously presented by the plaintiff during the trial.

On August 6, 2013, the Supreme Court judgment was rendered, overturning the IP&IT Court judgment. The Supreme Court stated that the following facts had already been concluded without any argument from the parties:

- ❑ Ms. Lechner is the proprietor owner of the *Geese in Reeds* copyright work, which was first published on November 15, 1997, in Germany, a member country of the Berne Convention for the Protection of Literary and Artistic Works.
- ❑ Ms. Lechner advertised the work on the Internet and in other media.
- ❑ The defendant was the wife of the managing partner of Siam Handicraft.
- ❑ Siam Handicraft owned the website [www.spsculpture.com](http://www.spsculpture.com), where the *Ducks in Reeds* sculpture was advertised.
- ❑ The police conducted a raid action at the house and factory of the defendant and found 59 duck sculptures, 3 reed sculptures, 2 finished *Ducks in Reeds* sculptures, and 1 CD-ROM containing the image of the *Ducks in Reeds* sculpture. All items were seized as evidence, and criminal charges were filed against the defendant for copyright infringement.

Because the defendant was the wife of the managing partner of Siam Handicraft, the Court concluded that she should also be considered an owner of the factory where the pirated goods were found. According to the business license, the factory engaged in making bronze Buddha statues, which is related to making artistic sculptural works. Although the defendant's business was separate from her husband's business, there was reason to believe that the husband and wife jointly operated their businesses.

The Supreme Court then held that the expression of ideas in the *Ducks in Reeds* sculpture was the same as in the *Geese in Reeds* sculpture. Ms. Lechner proved that she had created her work, while the defendant had not proved her creation of her work. The Court determined that it would be impossible for such similarity to arise coincidentally.

The defendant claimed that she had no intention to imitate Ms. Lechner's work, as the production of the *Ducks in Reeds* sculpture was carried out based on an order from a customer. However, the defendant failed to prove the source of such order. In the absence of such evidence and based on the ownership of the *Geese in Reeds* copyright work, it was clear that the defendant, who was jointly operating her business with her husband, had the intention to adapt Ms. Lechner's copyright works and offer the products for sale.

The Supreme Court therefore ruled that the defendant infringed on Ms. Lechner's copyright work under Section 69 paragraph 2, Section 27(2), Section 70 paragraph 2, and

Section 31(1) of the Copyright Act. A fine of THB 150,000 for adaptation of a copyright work and a fine of THB 150,000 for offering infringing products for sale was imposed, for a total fine of THB 300,000. Half of the fine was to be paid to Ms. Lechner. All of the infringing products were turned over to Ms. Lechner, as the owner of the copyright, while other seized goods (one picture of the *Ducks in Reeds* sculpture and one CD-ROM) were to be kept in court custody for destruction.

### The Importance of Intent

This case is an often-seen example of a defendant in a criminal lawsuit pleading not guilty by reason of lack of intention and knowledge without asserting any supporting argument, information, or evidence. Although the plaintiff bears all responsibility to convince the court that the defendant's actions violate the law, the Supreme Court also takes into consideration the intentions of the defendant by considering all evidence the plaintiff presents, and the trustworthiness of the defendant's proclaimed intention not to commit infringing activities. Therefore, although the defendant in this case raised the defense that her factory produced works on a made-for-hire basis, and that there was no evidence directly linking the defendant to the activities, it was insufficient to prove her innocence in the court's view. She had acted in bad faith. In this case, the individual artist prevailed.

### Lessons Learned

This case provides insight into the importance of thoroughly preparing all aspects of a case before it proceeds and the active role that IP owners can play in the process.

IP owners appreciate the fact that public criminal lawsuits for copyright infringement are available in Thailand. For example, a copyright owner can purely rely on law enforcement agencies (the police and the public prosecutor) to handle enforcement of their rights by allowing these authorities to handle all aspects of the case, from the initial investigation until the judgment is rendered by the court.

But while this approach may be convenient in certain circumstances, IP owners need to recognize that it may not be applicable for all situations, especially when the dispute involves complex factual and legal issues. This case, for example, began with a classic scenario where the infringing goods were found in the market, the source of the infringing goods was identified, and a police raid action took place. As described above, however, beneath the surface the issues were far from straightforward, as the defendant, during the trial, presented a range of new facts regarding her purported role in the infringement and the difficult issue of proving intent.

In order to help avoid such surprises at trial, experienced intellectual property lawyers can contribute significantly in managing case strategy and setting out a detailed plan, as well as developing a systematic approach for the litigation process, to ensure that all of the factual and legal issues are managed effectively. By retaining the right counsel and participating actively in defending their rights, IP owners can increase their likelihood of success in enforcing their rights. This is particularly important in the current IP enforcement environment, where the counterfeit and pirated goods, as well as the infringers who produce and distribute them, are becoming much more sophisticated and complex. 🦋