

HOME NEWS & COMMENT

'Paranoia' curtailing needed legal reform

IP infringement hurting IT sector

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Thailand needs intellectual property laws, education and investment promotion if it is to nurture a self-sufficient IT sector, according to Edward Madden, director of the Intellectual Property Department at law firm Tilleke and Gibbins.

If one of the three are missing, he said, the industry will fall over.

Excessive amounts of IP infringement have dramatically affected the image of Thailand as a place to do business in the software sector, he warned.

Madden, who often works closely with the Department of Intellectual Property, says today Thailand is suffering from paranoia, in particular that intellectual property rights are a set of rules to protect foreign interests. He feels this paranoia is curtailing much needed reform of Thailand's legal infrastructure.

"Traditionally the law has always played catch-up with technology. Technology develops and the laws scurry to catch up," he explained. "Countries that succeed are those that have vision and enact laws that are not entirely reactive — technology neutral laws that are designed to attract new innovation rather than defining a box or vessel that will stifle future innovation."

Today, Thai copyright law, patent law and trade secret law are relatively modern and have achieved the minimum requirements of TRIPS (Trade-Related aspects of Intellectual Property rights) but the problem lies with enforcement.

"People who see IP crime as a viable way to conduct a livelihood now see Thailand as a base where they can operate without fear," he said.

While this may seem trivial, in many of the raids he has conducted, the software pirates have links to overseas organised crime that deal in everything from drugs to human trafficking.

The other problem is that in Thailand, copyright infringement cases need to be

taken through the police, and often police officers understand neither technology nor law. When a case does get to court, the glacial speed often means that any compensation is five years down the line, which in the software industry is too late.

Madden also pointed out how the paranoia regarding reverse engineering conventions that would be required in the Thai-US FTA are ill-founded.

Today, with an absence of any reverse engineering legislation, rather than being free, Thai companies attempting any reverse engineering of software could arguably violate copyright law, which basically covers copying, dissemination and modification of IP. This is because the code is not only modified but copied from storage to memory.



Madden

The law in the United States today, on the other hand, specifically allows for reverse engineering where interoperability is needed.

Through the late 80s and 90s, countries such as the US, Europe and Japan gradually relaxed their stance that software patents were bad. In the

70s, software was viewed only as a mathematical algorithm, rather than an innovation, and therefore conventional wisdom said that one cannot patent software as it is simply math. Today, most countries have realised that software is a form innovation and that it should be judged as to its innovative value, not whether it is software or not.

Thailand, however, is in the 21st century — still deciding whether to ban software patents or not. This decision, Madden points out, was made by most other countries two decades ago.

"Singapore saw this, and they removed their ban on software patents," he said, "and today Singapore is becoming a leader in IT and in other knowledge-based industries such as pharmaceuticals."

Today, Thailand is on the US Trade Department's "301 list" of countries with IPR enforcement problems and has been for the past 10 years. If things get worse, it can trigger trade sanctions. Madden explained that 301 comes into play all the time in trade negotiations for access to the US market for Thai companies.

Madden agreed with others that the Data Privacy law needs to be passed for Thailand to be trusted in the international BPO community. More importantly, the EU has a list of safe harbour countries that have adequate data privacy laws and it is only legal to transmit personal data to countries which are on this list of designated safe countries.

Attorney Noppramart Tham-mateeradaycho, who has a special interest in IT laws, said that Thailand should as a priority pass and enforce the Computer Crime law. Currently, computer crimes are very difficult to prosecute as Thai law defines intrusion as entering a building or other form of real estate, and theft as physically removing something. Data theft does not require physical entry and leaves the original data intact. Thus it is neither intrusion nor theft.

She also questioned why the government felt it necessary to issue a royal decree to regulate the Certificate Authorities, an act that would be very rigid and hard to change later. Rather, a simple Ministerial Order would have been more appropriate and more flexible.

"Today, the only agency that uses a CA is customs, and it uses a foreign CA. The industry is still debating if we really need a national root CA. Until that is decided, the government should not set anything in stone," she said.

Noppramart also criticised the National Telecommunications Commission for failing to make decisions and lead the industry. For instance, on the matter of interconnection and access charges the NTC preferred not to get involved and instead threw the problem back at the concession parties to sort out themselves in the courts.

Asked what we have done right she named Nectec as a success story. "Nectec's legal division is the only place you can approach and ask for the big picture regarding Thai IT law. In the past, if you wanted to know about a law, you had to go to each individual Ministry."

She also voiced concern about the universal access law, one of the five cyber-laws drafted by Nectec almost a decade ago and which has now disappeared off the radar. She explained that this law was a result of the 1997 constitution.

Without the 1997 constitution, it remains unclear whether the current draft can pass on its own merits.