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Application of Strict Liability to Intellectual Property Infringement in Thailand

The Doctrine of Strict Liability is the rule compelling a wrongdoer for legal responsibility for the damage incurred by an injured person without the need to prove the wrongdoer's intention to cause, or negligence resulting in, the injury. The doctrine is commonly known to be applied in many countries to product liability, hazardous activities, and certain offenses including intellectual property infringement. In the United States, for instance, infringement of patent, trademark, and copyright is a strict liability tort by which the owner of the intellectual property is only required to establish: (1) that the ownership of the intellectual property, such as copyright, is valid, and (2) that there was infringement of that copyright by the alleged infringer. [*North Coast Indus. v. Jason Maxwell, Inc.*, 972 F.2d 1031, 1033 (9th Cir.1992).] It is not necessary for the proprietor to prove the intention or negligence of the infringer to conduct the infringement. This also is the case in the United Kingdom, where strict liability is applied to intellectual property infringement. [*Claydon Architectural Metalwork Ltd v. DJ Higgins & Sons Ltd*, [1997] F.S.R. 475.] Does this application of the Doctrine of Strict Liability to intellectual property infringement extend to Thailand? This column explores the scope of strict liability and its applicability to intellectual property infringement in Thailand.

Standard of Liability

Let us first consider the standard of liability in a tortious act. General tort is with-fault liability: The law requires the injurer's intention or negligence in the action causing damage in order for the Court to hold the defendant liable for compensation. In Thailand, this standard is constituted by Civil and Commercial Code Section 420. "A person who, willfully or negligently, unlawfully injures the life, body, health, liberty property, or any right of another person, is said to commit a wrongful act and is bound to make compensation therefor." Under this provision, the defendant must be found willingly or negligently to have committed the wrongful act.

Conversely, strict liability is without-fault liability: The law does not require the injurer's intention or negligence in the action causing damage in order for the Court to hold the defendant liable for compensation. There are some examples of the application of strict liability in Thailand, such as Civil Commercial Code Section 437, paragraph 1:

A person is responsible for injury caused by any conveyance propelled by mechanism which is in his possession or control, unless he proves that the injury results from force majeure or fault of the injured person.

The product liability law also clearly states that product liability offenses involve strict liability:

All business operators must jointly be liable to the injured party for an injury occurred

from unsafe goods, and such goods have been sold to the consumers, irrespective of whether or not such injury may occur from deliberate action or negligence of the business operator. [Unsafe Goods Liability Act 2007, Section 5.]

However, unlike the product liability law, no statutes relating to intellectual property in Thailand explicitly establish that intellectual property infringement is a strict liability tort.

Application of the Doctrine to Intellectual Property Infringement

Although there is no specific provision on the application of strict liability, by interpretation of the provisions on intellectual property infringement, it can be interpreted that the Doctrine of Strict Liability exists and is applied to intellectual property infringement in Thailand. The best way to explicate this probability is to compare Copyright Act 1994, Section 27:

Any of the following acts against a copyright work under this Act performed without permission in accordance with Section 15(5) shall be deemed an infringement of copyright: (1) reproduction or adaptation; (2) communication to the public.

with Copyright Act 1994, Section 31:

Whoever 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 to infringe the copyright: (1) selling, holding for sale, offering for sale, letting, offering for lease, selling by hire purchase or offering for hire

purchase; (2) communication to the public; (3) distribution in a manner which may cause damage to the owner of copyright; (4) self-importation or importation on order into the Kingdom.

The Copyright Act 1994 Section 27 sets forth the direct infringement of copyright, while Section 31 lays out indirect infringement of copyright. The significant element of these sections which helps us to identify whether strict liability is applied to copyright infringement is that while Section 31 requires the constructive knowledge of the alleged infringer that the work is made by infringing copyright to establish indirect infringement, Section 27 does not require the knowledge of the alleged infringer to establish direct infringement. From the interpretation of these sections, we can conclude that direct infringement of a copyrighted work is a strict liability offense.

The interpretation that direct infringement does not require knowledge also is recognized by Thai courts, which have consequently applied strict liability to direct infringement of copyright. In Supreme Court Judgment 436/2534, the Court clearly distinguished the differences between direct and indirect infringement. The Court's finding in the case was that the defendant was liable for direct infringement because the provision of the Copyright Act on direct infringement does not concern whether or not the defendant has the intention to commit the act. [Jarun Pakdeethanakul, "Intellectual Property Law in Thai Court," *Dulapaha Journal*, Volume 6 Year 40 (November-December 1993) 12-13.]

This finding is supported by another recent case in which the Court also has implicitly determined that strict liability is applied to intellectual property infringement. In Supreme Court Judgment 6572/2550,

the plaintiff, who was the owner of a Thai product patent for a poultry feeder, filed a civil action against the defendants for patent infringement demanding that infringement cease and compensation be paid. Apart from arguing that they did not use the invention under the Thai patent, the defendants argued that the poultry feeder manufactured and distributed by them was under Taiwanese patent and US patent. This implied that they had no intention to infringe the plaintiff's patent. Finding that the defendants infringed the plaintiff's patent, the Court ruled that "although the First Defendant received a US patent and a Taiwanese patent for the poultry feeder they manufactured, this does not mean that the First Defendant's activities were not infringing. Because the Plaintiff had obtained a Thai patent, the Plaintiff shall have the right to enjoy the protection under the Patent Act which shall not be infringed by any persons." [Supreme Court Judgment 6572/2550.] Specifically, this right is provided under the Patent Act 1979 Section 36, paragraph 1:

No other person except the patentee shall have following rights: (1) where the subject matter of a patent is a product, the right to produce, use, sell, have in the possession for sale, after for sale or import the patented product; (2) where the subject matter of a patent is a process, the right to use the patented process, to produce, use, sell, have in the possession for sale, offer for sale or import the product produced by the patented process.

The Supreme Court in this case correctly applied strict liability to patent infringement and only considered the validity of the plaintiff's ownership of the patent and whether the defendants infringed the plaintiff's exclusive rights in the patent by

manufacturing and distributing the poultry feeder. Once the plaintiff had sufficiently proved these elements, the Court held the defendants strictly liable for the infringement regardless of the defendants' successful effort to establish the lack of intention or knowledge of the infringement by asserting the fact that their poultry feeder was manufactured and distributed under the Taiwanese patent and US patent.

Although the aforesaid judgments are not explicit in their wording, these judgments lead us to the understanding that the Thai Supreme Court accepts and applies strict liability to intellectual property infringement. To complicate the matter, however, there is another recent judgment addressing the dispute of trademark infringement which raises some uncertainty on whether strict liability is applied to intellectual property infringement.

In Supreme Court Judgment 5219/2550, the plaintiff filed a civil suit against the defendant for service mark infringement and demanded compensation. The defendant argued that it honestly believed that it had the right to use the service mark under the licensing agreement, although the fact was that the agreement was null and void because it did not comply with the law. The Court considered the facts and found that because the defendant had an honest belief in its right to use the service mark under the agreement, the defendant did not willfully or negligently cause damage to the plaintiff by using the dispute service mark. Thus the defendant was not liable for any damages.

The Supreme Court in this case mistakenly applied the provision on general tort (*i.e.*, Section 420 of the Civil and Commercial Code) to the dispute. As a result of the improper application of this section, the Court consequently established that trademark infringement is with-fault liability which requires the intention of

the defendant in order for the Court to hold the defendant liable. The Court also disregarded the exclusive right of the trademark owner to exploit the benefit from the trademark. [Section 44 of the Trademark Act 1991: “Subject to Sections 27 and 68, a person who is registered as the owner of a trademark shall have the exclusive right to use it for the goods for which it is registered.”] Instead, the Court permitted the unauthorized use of the trademark with the reason—contradicting the Doctrine of Strict Liability—that the defendant lacked the intention to infringe.

Conclusion

Although the application of strict liability to intellectual property infringement is widely accepted in many countries, the Thai intellectual property system is rather unclear

on this issue. The major reason is that, unlike the product liability law, intellectual property law in Thailand lacks a clear legal provision or Court precedent stating that intellectual property infringement is a strict liability offense and intention is not an element to be considered when it comes to determining the infringement. Additionally, the Thai intellectual property law also lacks specific provisions on contributory infringement and vicarious infringement. Thai courts therefore need to rely on the general provisions in the Civil and Commercial Code to fill the gaps. This leads to certain decisions in which Section 420, the general tort provision, is mistakenly applied to intellectual property infringement.

With this uncertainty in the application of strict liability to intellectual property infringement, it would

always be worthwhile for Thai litigators to attempt to prove the intention or the knowledge of the infringer until a specific provision on strict liability in intellectual property infringement is enacted or at least until the Supreme Court hands down a precedent explicitly stating that intellectual property infringement is a strict liability offense.

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