

THAILAND

Border Measures and the Draft Customs Act

Intellectual property owners receive significant benefits from the border measures that are carried out by Customs officers in Thailand. More than a million pieces of counterfeit products are stopped from entering and being distributed in the local Thai market each year, and these same products are also prevented from being transshipped to other countries. The foremost pieces of legislation that allow the Thai Customs Department, which falls under the authority of the Ministry of Finance, to proceed with these important border measures are the Customs Act B.E. 2469 (1926), amended by Customs Act (No. 20) B.E. 2548 (2005), and the Export and Import Act B.E. 2522 (1979).

Regulatory Framework

Section 27 of the Customs Act bars import or export of any uncustomed, restricted, or prohibited goods. Section 5 of the Export and Import Act gives the Ministry of Commerce, with the approval of the Council of Ministers, the power to publish notifications in the *Government Gazette* to prescribe any goods as goods banned from exportation or importation.

The Notification of the Ministry of Commerce governing Exportation and Importation of Goods B.E. 2530 (1987) prohibits export or import of goods infringing trademark and stipulates the requirements that the right owner has to fulfill to have Customs monitor and seize the fake goods.

Apart from the Customs Act and the Export and Import Act mentioned above, Thailand implemented (i) the Memorandum of Understanding on the



These counterfeit packages of edible products, on display at Tilleke & Gibbins' museum of counterfeit goods, differ only slightly from the genuine packages.

Cooperation of the Relevant Government Agencies and the Private Sector to Prevent and Suppress the Smuggling of Infringing Products and (ii) the Memorandum of Understanding on the Cooperation for the Prevention and Suppression of Pirate Products, on September 12, 2003. These MOUs state the functions and scope of Customs actions and include many items, such as the procedure to be followed by IPR owners when Customs seizes goods, the procedure to be followed by Customs when any suspected IP-infringing products are found, etc.

Customs Procedures

Border measures are only available for pirated copyright and counterfeit trademark goods because these are defined as prohibited products under the Customs Act. Unfortunately, such measures cannot be taken against parallel imported goods. Parallel imported goods are considered legitimate products and it is not possible to take any actions to prevent their import.

When Customs suspects that a shipment may have been smuggled, it shall request the IPR owner inspect the goods. In order to detain the suspected products, the IPR owner shall file a request to the Customs Department for the detainment of the goods for 10 days. The IPR owner shall be required to post a security deposit with Customs and to guarantee in writing that they will assume responsible for possible damages resulting from the detainment. This is in compliance with the TRIPS agreement, of which Thailand is a member.

The scope of border measures should cover goods infringing IP rights where the infringement can be proved. While this should, in theory, be applicable to patent-infringing products, there is no clear definition as to whether patented products can be protected under Section 27 of the Customs Act. In addition, there is no explicit section stating that the goods bearing a trademark registered in a foreign jurisdiction can be protected under this Act.

Draft Customs Act

The current Customs Act has been in effect since 1926, which means that Customs authorities in Thailand have been relying on this statute for 83 years. In order to improve Customs procedures and deal with the current situation faced by Customs officials, a new Customs Act is now being drafted



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by the Customs Department. The definition portion of the bill, Section 6, clearly states the meaning of "intellectual property infringing goods" and no longer relies on the designation of "prohibited goods," as stated in the current legislation. These goods include (i) goods that infringe other parties' registered trademarks, both inside and outside of Thailand, (ii) copyright-infringing goods, and (iii) goods that infringe other IP rights for which the law provides such protection. Section 147 of this draft allows the Customs authorities to inspect and search the goods in vessels for up to 72 hours if the officers are suspicious that the goods are infringing IP rights, without the need for a warrant. Section 161 of the bill states that the penalty for importing and exporting IP-infringing goods is imprisonment for a period not exceeding 10 years or a fine equal to five times of the duty-paid value of the goods, or both imprisonment and fine.

After this draft has been implemented, it is expected that the procedures for taking actions against IP-infringing products will be smoother and clearer, without the argument on what can and cannot be seized. This will also help to clarify the scope of actions that can be taken in suppressing the fake products in Thailand.

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