

NEW PRODUCT LIABILITY LAW: 3 THINGS IP OWNERS SHOULD KNOW

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Thailand has recently adopted new legislation on product liability. The new law is designed to protect consumers who incur damage from defective products by imposing strict liability on those involved in the production and sale of products. The new Product Liability Act ("Act") was approved by the National Legislative Assembly in December 2007. The Act was published in the Government Gazette on February 20, 2008 and will come into effect on February 20, 2009. Significantly, the Act will not apply retroactively; hence, there can be no liability under the Act for damage or injury caused by products sold prior to the effective date of the Act.

From the perspective of an IP owner who may be manufacturing, selling, importing, or licensing technologies or trademarks to others to produce, import, or sell a product which may potentially cause harm to consumers, there are essentially three key points that must be kept in mind about this new legislation.

First and foremost is whether the IP owner (or its licensee) may be a potential defendant under this new law. Generally speaking, the Act imposes *strict liability* on a business operator involved in the manufacture and sale of a defective product which causes harm to a user. The operator is held liable if the product is defective, regardless of whether the operator was negligent in making the product defective. In other words, the defendant-operator will be liable for the harm resulting from the defective product even if reasonable care has been exercised in making and selling the product.

A potentially liable "operator" includes any producer, outsourcer, or

importer of the defective product, a seller who cannot identify the manufacturer, outsourcer, or importer of the product, and a person using the trade name, trademark, logo, wording, or showing by any means in a manner to cause people to understand that he or she is a producer, an outsourcer, or an importer. Thus, an IP owner involved in the manufacture, distribution, sales, import, or granting of licenses for others to do so, could potentially face liability should the product sold contain a defect which causes damage to users.

The new law refers to three types of product defects: manufacturing defects, design defects, and warning defects (failure to warn). Manufacturing defects occur where a product deviates from its intended design or specifications, while design defects occur when the product design itself renders the product dangerous or unsafe for its intended use. Warning defects refer to situations where directions for use or storage, warnings, or information about the product are not provided or are provided but not reasonably, properly, or clearly, taking into consideration the nature of the product, as well as the ordinary usage and storage that may be expected of the product.

Under strict liability rule, it is sufficient for an injured user to prove that he or she was injured or suffered damage from the operator's defective product while using the product in the way it was intended. In other words, the injured party does not have to establish that the damage is the result of an act of any particular operator involved.

Moreover, product liability cannot be waived or limited by way of contract,

or by any waiver or limitation of liability statement given by the operator.

This raises the second significant point for operators to consider: if an action is filed against an operator, what defenses are available against the product liability claim? The new law provides several defenses for a defendant-operator. The Act expressly states that an operator will not be held liable if the operator can prove that the product is not defective, that the injured party was already aware that it was defective but used it anyway, or that the damage was due to improper use or storage, which was not in accordance with the directions on usage, warnings, or information about the product that the operator correctly, clearly, and reasonably provided. Furthermore, the Act provides defenses for producers of custom-made products and component producers, who generally will not be liable for the damage to consumers if they can prove that the defect is due to the specifications or design of the final product provided to them by the outsourcer or producer, i.e. that there was no manufacturing defect on their part and that they did not expect or should not have expected that the product would be defective. In addition to the foregoing, a defendant-operator may invoke other defenses available under other laws which are applicable in a particular case.

The final point that an operator should keep in mind is that the scope of damages available to an injured party in a

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product liability case is broader than those available in traditional tort or contract claims. Claimable damages under the Act consist of two components, namely, (1) damages for wrongful act as provided in the Civil and Commercial Code, and (2) two additional categories of damages available under the Act. The Act specifically provides that in addition to compensation for a wrongful act pursuant to the Civil and Commercial Code, the court adjudicating product liability actions may also award compensation for mental damages (e.g., anguish, agony, anxiety, fright, grief, humiliation) as a result of damage to body, health, or sanitation of the injured party. In addition, the court

may award punitive damages on top of the actual damages granted. The court has the authority to award punitive damages if it can be shown that that the defendant produced, imported, or sold the product despite being aware that it was defective or was unaware that the product was defective due to gross negligence, or became aware of its defect after production, importation, or sale, but failed to take proper action to prevent such damage, such as by failing to act in recalling a defective product. In such case, the court may award punitive damages in an amount the court may deem appropriate, but no greater than twice the amount of the actual damages.

Considering the new law's scope of application and the enhanced damages

provision, it is strongly recommended that IP owners and licensees take necessary precautions to prepare for implementation of the Act, as well as to protect themselves against potential claims of liability. For example, measures should be taken now to review and reevaluate quality control processes and product design. In addition, IP owners should ensure that warning information is clear and comprehensive and includes notice of all risks involved in the use of the product in order to provide consumers with reasonable notice. Finally, and of additional importance, it is recommended that operators consider and evaluate the need for product liability insurance with their insurance providers. ♦