

## E-Commerce Abuses and Online Infringements in Thailand

Thailand has a rapidly growing economy and internet penetration is on the rise, although the country still needs legislation to confront the emerging challenges of the internet and e-commerce. The present state of Thai copyright, cyber-squatting and related criminal law makes it clear that much needs to be done to ready the country for this next stage of modernization.



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Since its inception, internet usage has been growing at breakneck speeds. In recent years, the Web has added tens of millions of new websites. In 2004, there were about 605 million internet users worldwide. As recently as April 2006, the number of users jumped to over 1 billion according to Internet World Stats, and the growth rate shows no signs of slowing. In a Click Z survey of users in 10 countries – Australia, Brazil, France, Germany, Italy, Japan, Spain, Switzerland, UK and the US – there was a growth of almost 6.7 million new users in one month, from February to March 2006, or a 2.16% increase. A study by the University of California Center for Communications Policy in 2003 confirmed that the internet outranks all other major forms of media as a source of information in the United States.

Consequently, e-commerce, as a percentage of overall commerce, is also growing at a staggering rate. Worldwide online sales have tripled from US\$3 billion in 1997 to US\$9 billion in 1998. By 2005, online retail sales reportedly hit a staggering \$143.2 billion, a 24.6% increase in sales from 2004. The IT sector generally, and e-commerce in particular, here continued to grow in 2006 as new entrants such as eBay take advantage of Thais' natural inclination toward community-driven marketing and sales.

There is no doubt that Thailand, with its fast-emerging economy, will follow the route of more developed countries in internet use. In 2000, Thailand had approximately 2.3 million internet users. By 2005, the number of users had grown to 8.4 million – a 266.1% increase in five years – although Thailand still has only a 12.7% penetration rate with abundant room to grow. In more industrialized Asian countries like Singapore, Japan and South Korea, the penetration rate approaches more than 67%. Likewise, as usage goes up, e-commerce will inevitably increase.

### Novel Challenges of the Digital World

The internet has no doubt accelerated the information boom. We are now able to collect, process, analyze and store information or data with unprecedented speed, precision and convenience. The era that we live in is called the information age partly because information – in the form of intellectual property (IP) that is protected by trade secrets, trademarks, copyrights and patents – has become a vital part of our economy. However, new technology is exploited by those who

want to use it for their own illicit gains or simply to create havoc. The same technology that allows a computer virus to spread nearly instantaneously through the internet allows a merchant to communicate with thousands of its customers through the click of a mouse. Unfortunately, the law is usually a few years behind the new realities that technology brings. Such is the case in Thailand.

### A Synopsis of Thai E-Commerce Law

In Thailand, there have been relatively few laws passed that are directly tailored to the needs and realities of e-commerce and the internet. For example, of the five recently proposed pieces of legislation relating to e-commerce – the *Electronic Transactions Bill*, *Universal Access Bill*, *Data Protection Law*, *Computer Crime Law* and the *Electronic Fund Transfer Law* – only the *Electronic Transactions Bill* has been passed into law. Moreover, the main purpose of the transactions bill is merely to recognize electronic signatures as being legal so that parties can be bound to commercial transactions on the internet; an important and fundamental law, but far short from being a comprehensive answer to numerous internet problems.

### Success Against Internet Distributors of Fake and Pirated Goods

That is not to say that Thailand has no law to protect against abuses of e-commerce. Fortunately, most illegal activity on the internet

is still covered by the traditional civil and commercial code as well as criminal law, even though the laws were created prior to the explosion of e-commerce. For example, fraud remains fraud; it does not change if the internet is used as a medium. Moreover, if a person illegally sells counterfeit goods, such as clothes, on the internet, that person will be prosecuted for violating Thailand's intellectual property laws. An illustration can be found in sections 27 to 31 of the *Copyright Act B.E. 2537*, which provides protection for audio-visual works, cinematographic works, sound recordings, sound and video broadcasting, and computer programs. Penalties for copyright infringement are found in sections 69 and 70, with penalties ranging from Bt10,000-Bt200,000 (US\$285-US\$5,600), depending on the work infringed, to imprisonment from three months to four years and/or a fine of Bt50,000 Bt800,000, depending on the work infringed, if committed for commercial purposes. Additionally, sections 108 and 109 of the *Trademark Act B.E. 2534* (as amended by the *Trademark Act No. 2 B.E. 2543*) provide protection for trademarks, service marks, certification marks and collective marks. Despite the presence of these laws, there are many instances of persons, Thai and foreign, setting up websites to take advantage of Thailand's perceived lax enforcement of such laws.

But enforcement is improving, as Thai law can be more effective than the laws in many developed countries, when managed properly. On January 29 2004, a series of raids was conducted against a British national and alleged infringer, along with his Thai wife and several British and Ukrainian nationals who allegedly worked together to distribute fake goods internationally out of Pattaya, Thailand, through a network of websites.

The suspected ringleader, unfortunately, did not learn his lesson following the first series of raids. He continued to conduct illegal business activities at his residence, and we again raided that residence on July 3 2006. The suspect is being investigated by police as to whether he is a member or an affiliate of an organized criminal gang (the *Bandidos*) based in Pattaya that is believed to be involved in counterfeiting, piracy, land scams, prostitution, gambling and other activities.

So far, criminal trademark charges have been brought against the alleged infringer for a violation of the *Thai TM Act Section 110*, which exposes him to liability for fines up to US\$10,000 and/or jail time of four years. He is presently out on bail of Bt50,000 and is subject to further prosecution following the completion of the police inquiry against him and the handover of his case to the public prosecutor.

It is also possible to escalate the charges against the infringer, in Thailand to include charges based on offenses under revenue and tax avoidance laws as well as immigration and labour laws.

Generally, the police in Thailand have a reputation for taking the path of least resistance, but improvements can be seen in the form of a new generation of well-trained police units. An offender may plead guilty to the trademark infringement charge and opt to pay a fine imposed by the court. For foreigners, however, police may be more motivated to escalate the charges and the Economic Police unit can escalate the charges in such a way as to make the infringer's life very difficult indeed.

One interesting option involves the possibility that criminal charges could also be filed against him in the United States for trademark infringement (within the statute of limitations) for his previous dealings in fake Philip Morris goods over his website. In doing so, there is a precedent that would allow for the infringer's extradition to the United States to face federal trademark infringement charges, with the probability of imprisonment and fine, along with the possibility of asset forfeiture to the extent of his assets in the United States.

The precedent in question involved the May 2003 arrest of a Ukrainian national, Maksym Kovalchuk, in Thailand and his eventual extradition to and imprisonment in the United States for infringing the copyrights of business software products. A resident of the Ukraine, the suspect committed crimes including the pirating of an Autodesk business utility program retailing at US\$3,500, sold on the internet for US\$200. Autodesk is a US-based company and its program is protected by US copyright laws.

The US Department of Justice's newly formed Computer Hacking and Intellectual Property Office sought to prosecute the case. The United States and Ukraine do not have an extradition treaty, so the US authorities could not transfer him to their jurisdiction. However, Department of Justice prosecutors learned that the accused would be traveling to Thailand, which does have an extradition treaty with the United States. This Ukrainian national is now in jail in the United States, having been arrested and extradited from Thailand. The lesson to be learned from this case is that, due to extradition treaties and international cooperation, an infringer can be caught and punished even though the crime was committed in another country.

The same federal prosecutor, Christopher Sonderby from San José, California, who was involved in the extradition and criminal prosecution of the Ukrainian national in the software case is now assigned to the US Embassy in Bangkok as a full-time attaché of the US Department of Justice in charge of transnational intellectual property crimes.

Another successful cooperation took place in August 2004, when a

number of world-renowned brands – including Adidas, Starbucks, Pepsi, Phillip Morris and Playboy – joined forces to execute joint police raids against infringers in Thailand who were manufacturing and selling parody T-shirts commercially. One example of this was the use of Starbucks' famous mermaid logo but with the trademark Starbucks replaced with a lewd parody.

Brand owners are very encouraged by the fact that the Thai Ministry of Justice has created the Department of Special Investigations, staffed with multidisciplinary experts including a unit charged with the investigation of intellectual property crimes in which counterfeit goods are traded with a retail value of Bt500,000 or more. The department has shown a surprising expertise in tracking, arresting and prosecuting offenders who trade fake or pirated goods on the internet.

Despite these successes and new developments in enforcement, loopholes in existing legislation have left some obvious weaknesses in Thai law when it comes to e-commerce and the internet, particularly regarding an expected wave of broadband-enabled downloads of copyrighted materials. Political will is required to keep Thai law abreast of the technical challenges that arise when it comes to the creative use of the internet and computer technology to commit crimes.

#### About the author

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- include a former Judge of the Central Intellectual Property and International Trade Court (IP&IT Court), the current President of the Intellectual Property Association of Thailand, a guest law lecturer with the Faculty of Commerce at Chulalongkorn University, and a retired General of the Bangkok Metropolitan Police Department.

#### OUR RECENT ACHIEVEMENTS

- Lead counsel in defense of Carlsberg A/S in UNCITRAL International Commercial Arbitration involving a US\$500 Million claim for alleged wrongful termination of license agreements.
- Lead external counsel for PReMA, the Pharmaceutical Research and Manufacturing Association in Thailand, advising PReMA on pharmaceutical and US-Thailand Free Trade Agreement legal issues, including patent, data exclusivity and market access issues.
- T&G's specialized high-tech enforcement team continues to be in the forefront of representing software developers, protecting their copyrighted software code through vigorous enforcement actions. To date, settlements in compensation and purchases of licensed software exceeding US\$3 million have been obtained from copyright infringers.

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