

LIABILITY UNDER COPYRIGHT AND TRADEMARK LAWS

It is widely recognised that juristic persons exist in the legal context only, under which a corporation will be liable for all obligations made in its name. Thus, according to the general principle, the directors of a company will not be held personally liable for acts or obligations undertaken in the name of the company. For example, if the directors sign a contract on behalf of the company to buy a car, the obligation to pay for it lies with the company, and the directors are not obliged to be responsible.

This general principle, however, will not apply in the specific context of Intellectual Property Rights (IPR) infringement. Instead, directors of an infringing company may be held liable for the criminal and/or civil liabilities resulting from the company's infringing acts. This article will focus on the liabilities of directors of an infringing company under Thailand's copyright and trademark laws.

In terms of directors' liability, Section 74 of the Thai Copyright Act is relevant:

Section 74. If a juristic person commits an offence under this Act, all directors or managers of the juristic person shall be considered joint offenders with the juristic person unless they prove that the juristic person has committed the offence without their knowledge or consent.

The implication of this provision is that the directors or managers of the juristic person that commits the piracy of the copyrighted works are preliminarily assumed to be liable for the offence that the juristic person has committed as a joint offender, unless each of the directors can prove otherwise. This clearly means

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that the burden of proof lies with each director of the infringing company to prove that he or she was not aware of the piracy act and that he or she did not consent to the piracy act.

It should also be noted that this provision falls under the "Penalties" section of the legislation. The liability faced by directors is therefore criminal liability: imprisonment of six months to four years or a fine of 100,000 to 800,000 baht or both. Consequently, company directors must be keenly aware of the need to avoid copyright piracy when carrying out their business; otherwise, they may find themselves in jail.

In contrast to the Copyright Act, the Thai Trademark Act treats directors' liability in a somewhat different manner, as laid out in Section 114:

Section 114. In the event an offender liable under this Act is a juristic person, if the offence is committed by an order, an act, a failure to give an order or a failure to act as required by someone's duties as director, manager or holder of any position with responsibility for the operation of such juristic person, that individual shall also be liable to the penalty prescribed for such offence.

While the Copyright Act compels the directors of the infringing company to prove that they are not relevant to the piracy, the Trademark Act compels the

plaintiff or the IPR owner to prove that certain or all the directors of the infringing company ordered or acted in the commission of the offence, or failed to order or act in accordance with their duties in preventing it. Thus, the burden of proof under the Trademark Act shifts from the directors to the plaintiff.

In a 2002 decision, the Supreme Court clarified this burden of proof requirement by stating that "the burden of proof according to Section 114 lies in the plaintiff to prove that the offence committed by [the company] is a result of an order or an act of [the company's directors]".

In other words, if the plaintiff can prove that such infringement is a consequence of the order or the act of a certain director or from the directors' meeting, those directors shall again be liable for both criminal and civil liabilities. The extent of the liability will depend on whether the infringement involves trademark imitation or forgery, with the latter subject to more severe penalty.

The key lessons are that directors must become aware of their possible personal liabilities from the infringing acts of their companies on IPR belonging to other parties, and they should recognise that the general notion of separate liabilities does not apply to this particular case. Directors must take the necessary steps to ensure that their corporations do not and will not engage in copyright piracy or trademark infringement.

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