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Software Protection in Thailand

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What is the legal definition of software, and to which category of objects of rights and obligations does it belong?

In Thailand, the principal source of law relating to copyright is the Copyright Act B.E. 2537 (1994) (the Copyright Act).

The Copyright Act defines software (referred to as a "computer program") as "a set of instructions or anything which is used with a computer to make the computer work or to generate a result no matter what the computer language is." Software is protected in the same category as literary works. Thus, the foremost protection afforded by the Copyright Act is the protection of the source code.

As a signatory to the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention) since 1931 and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) since 1995, Thailand honors its obligation to protect foreign copyright. The copyrighted work of a creator from a member country of both the Berne Convention and TRIPs enjoys protection under the Copyright Act.

What conditions must be met for software to be protected by law?

Generally, a work that is capable of being copyrighted under the Copyright Act must contain four elements:

- an expression of ideas;
- an expression in a recognized work;
- originality; and
- legality.

Computer programs are recognized and protected as literary works. In order for a computer program to be protected under the Copyright Act, the computer program must be the result of a creative expression of the ideas of the author, and such expression of ideas must be sufficiently original. The Copyright Act only protects expressions of ideas, not the ideas themselves. However, the required level of originality or creativity is minimal. The copyright protection is automatic upon the creation of the work of the author. Copyright registration is not required to enforce a copyright.

What rights related to software are protected by law?

Exclusive rights

A copyright owner is entitled to a set of exclusive rights. Generally, the copyright owner may exclude others from:

- reproducing or adapting the work;
- communicating the work to the public;
- leasing the original or copies;
- giving benefits accruing from the copyright to other persons; and
- licensing the rights in any of the first three points above with or without conditions, provided any conditions do not unfairly restrict competition.

Moral rights

The Copyright Act recognizes moral rights covering the right of authorship and the right of integrity. The author of the copyrighted work is entitled to identify himself or herself as the author and to prohibit the assignee or any other person from distorting, shortening, adapting, or doing anything to the work, to the extent that such an act would cause damage to the reputation or dignity of the author. After the author's death, the heir of the author is entitled to bring suit for the enforcement of this right through the term of copyright protection, unless otherwise agreed in writing.

Who is the original "bearer" of these rights in the case of (i) ordered work that is provided by an individual-author

If the author is specifically commissioned to create a work, the employer is the original bearer of the copyright of the work, unless otherwise agreed by the author and the employer. However, the moral rights remain with the author, unless otherwise agreed in writing by the author and the employer.

Who is the original "bearer" of these rights in the case of (ii) ordered work that is provided by a software house

The Copyright Act does not distinguish between a software house and an individual-author. If a commissioned work is provided either by a software house or by an individual-author, the employer is the original bearer of the copyright of the work, unless otherwise agreed by both parties.

Who is the original "bearer" of these rights in the case of (iii) software programmed by an employee

The employee is the original bearer of the copyright of the work. However, the employer is entitled to publish the work in accordance with the purpose of the hire of service.

Are such rights transferable? Are there any limitations to such transfer?

The exclusive rights as described in reply to question 3 in a copyrightable work can be assigned, and there are no limitations to such assignment. The copyright owner may assign the whole or

part of his or her copyright to another person for a limited period of time or for the entire term of copyright protection. The assignment must be made in a written agreement signed by both parties.

Are there any other ways (apart from the transfer of the rights) of providing a third person with these rights or their derivates? Can the original author impose his own limitations on users? Is the author obliged to publish his/her work? Under what circumstances?

A third party can obtain a license from the copyright owner for the right to reproduce, adapt, communicate, or rent the original or copies of a computer program. The copyright owner has the right to decide how to limit the use of the work, but limitations on users that are restrictive of fair competition are prohibited under the Copyright Act. A license may be granted as an exclusive license or a non-exclusive license. If the original author is not the copyright owner as well, he or she has no exclusive rights to the work and, therefore, cannot impose limitations on users. The moral rights remain with the author and cannot be granted by the copyright owner to a third party.

A work is published by the distribution of copies of the work, regardless of its form or character, by making copies available to the public in reasonable quantities, having due regard for the nature of the work. The author is not obligated to publish his or her work to obtain copyright protection.

The publication of the work has the effect of determining the commencement date of the term of protection. Generally, copyright protection continues throughout the life of the author plus a further 50 years after the author's death. However, if the author dies before the publication of the work, the copyright will be for a period of 50 years from the date of its first publication. If the author of a work is a juristic person (a legal person), the copyright is protected for a period of 50 years from the date of its creation; if the work is published during this period, the copyright is for a period of 50 years from the date of its publication.

Copyright in a work that is created in the course of employment, instruction, or control subsists for 50 years from authorship, with the provision that if the work is published during such a period, the copyright subsists for 50 years from its first publication.

Are source/object codes considered to be a part of a work of software? How is a derivative work (localisations, compilations of source code, decompilations of object code) assessed by law (i.e. is it deemed to be a part of the original work or a new work, are they connected in any way)?

Source code/object codes are fundamentally recognized with respect to the protection of software/computer programs as prescribed by the Copyright Act. The ideas, procedures, processes, systems, methods of use, operations, concepts, principles, discoveries, and scientific or mathematical theories are strictly not capable of being copyrighted at present. Basically, the protection of source code/object codes in Thailand is similar to the protection of books or other printed matter (i.e., literary works).

Although the Copyright Act does not explicitly cover the ownership of a derivative work, software derived or developed from an original source code owned by another person could be considered a reproduction or adaptation, which requires the permission of the copyright owner. By consent of the copyright owner, theoretically, such a derivative work would be considered as being part of the original work rather than a complete new work.

In the case of a work being, by its nature, a collection or compilation of works (or source codes), the developer will need consent from the owner of the copyright works prior to creating a collection or compilation of data or source codes, whether in machine-readable form or communicated with the aid of a machine or other device. As a consequence, a person who creates such a collection or compilation by selecting or arranging the works in such a way that the compilation is not an imitation of the work of another, shall be entitled to the copyright in the collected or compiled work.

Changes and modifications of the software – are the rights of the author with respect to the integrity of software protected? Are there any statutory licenses enabling the software to be changed and modified by the user (i.e. may a user modify or decompile software, if it is necessary to preserve its functionality by virtue of law; or only if source code is provided; or only upon an explicit license)?

Software is infringed if the infringing activity involves the reproduction or adaptation of a substantial part of the original work without the creation of a new work. Changes and modifications cannot, therefore, reproduce or adapt a substantial part of the software, unless the changes and modifications qualify as a new work. If the source code or a substantial part thereof has been copied and used in the changes or modifications, then it is likely that the original work has been infringed. The following pieces of legislation on infringement, rights of the author, permitted acts, and licensing are relevant here.

Infringement and rights of the author

Section 11 of the Copyright Act provides that copyright in a work that is an adaptation of a copyright work under the Act, made with the consent of the owner of copyright, shall vest in the person who makes such an adaptation, but without prejudice to the owner of the copyright in the work created by the original author whose work has been adapted.

Under Section 18, the author of a copyrighted work under the Copyright Act shall be entitled to identify himself or herself as the author and to prohibit an assignee or any other person from distorting, shortening, adapting, or doing anything detrimental to the work to the extent that such an act would cause damage to the reputation or dignity of the author.

Permitted acts in relation to software

Under Section 35, an act against a computer program that is a copyrighted work, where the adaptation of the computer program is necessary for its use, shall not be deemed to be an infringement of copyright, provided that the purpose is not for profit and the work is used:

- in research or study;
- for the benefit of the owner;

- in comment, criticism, or introduction of the work with an acknowledgment of the ownership;
- in the reporting of news;
- for making back-up copies of a computer program in a reasonable quantity by a person who has lawfully bought or obtained the program; or
- in judicial proceedings.

Licensing

Copyright in software is capable of being licensed and assigned. Licenses that unfairly restrict competition are unlawful under the Copyright (Licenses) Regulation 1997. Examples of unfair licensing restrictions according to the Regulation are:

- a condition binding the licensee to use other copyrighted works of the copyright owner with remuneration for such use, unless it is necessary to use those copyrighted works together or to connect a technology work system or to make the copies of the work to the standards as set by the copyright owner;
- a condition prohibiting the licensee from using a copyrighted work of another person, unless it is necessary to lay down such a condition to ensure that the utilization of the licensed work will generate a result as set by specified objectives or goals, or to connect to a technology work system.

How are collective works regulated and how is the employee, as an author, treated by the law?

The Copyright Act does not contain explicit provisions concerning contributions to collective works by joint creators. However, the Copyright Act states that the protection of joint authorship exists for the lifetimes of the joint creators and shall continue to exist for a period of 50 years from the death of the last surviving joint creator.

When the work is created by an officer or employee under hire of service, the creator is entitled to the copyright unless otherwise agreed in writing, provided that the employer is entitled to communicate the work to the public in accordance with the purpose of the employment. When the work is commissioned and created by a contractor, the employer is entitled to the copyright, unless otherwise agreed between the parties.

Liability for damages and product liability on the part of an author. Is it possible to limit or exclude liability for damages and/or product liability with respect to software? If so, is it regulated by general law or a special, software-focused, framework?

Thailand has two laws that specifically address product liability: the Unsafe Goods Liability Act B.E. 2551 (2008), also known as the “Product Liability Act”; and the Consumer Case Procedure Act B.E. 2551 (2008), which is a procedural law governing lawsuits between consumers and business operators. Under the Product Liability Act’s strict liability rule, an injured party only needs to prove that he or she was injured or suffered damage from the defective product while using the product in the way it was intended to be used (i.e., there is no need to prove fault or negligence). Product liability cannot be waived or limited by way of contract or by any waiver or limitation of liability statement given by an operator. If the court finds an operator liable, the

scope of damages available to an injured party is broader than that available under traditional tort or contract theories. Importantly, it is the operator (the business operator involved in the manufacture and/or sale of the product) who is liable. This may not necessarily be the author of the copyright work.

An operator will not be liable if it can prove that the product was 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 of the product. The Copyright Act also provides defenses for producers of custom-made products and component producers, who generally will not be liable if they can show that the defect was due to the specifications or design of the final product provided to them by the outsourcer or producer.

The Consumer Case Procedure Act allows consumers to pursue product liability claims against business operators and deals with the procedure rather than any substantive legal issues (the exception being where a seller makes a promise to a consumer but fails to deliver).

How are IT related disputes usually resolved? What is the prevailing (plus what is the recommended) body to solve such disputes? How long does it take?

The Copyright Act provides copyright owners with mechanisms for the enforcement of copyrights by enabling them to instigate both civil and criminal actions. The right holder may institute a civil suit with the Intellectual Property and International Trade Court to seek available remedies. In addition to civil liability, copyright infringement can also result in criminal sanctions; criminal prosecution is an effective mechanism of enforcement in the Thai intellectual property system. The right holder may independently file a criminal action in the competent court or file a complaint with the police regarding the illegal act, authorizing the police to investigate and submit the case to the public prosecutor and then to the court for a decision.

Copyright owners who wish to seek a quick solution may consider alternative mediation methods to settle a dispute before going to trial. Recently, the Office of Settlement and Dispute Prevention of Intellectual Property at Thailand's Department of Intellectual Property (DIP) has been emphasizing the availability and effectiveness of its mediation procedure, which provides a feasible remedy for dealing with intellectual property issues, including the infringement of copyright. The DIP's mediation procedure is very simple. The entire process usually takes only two or three months, and there is no fee for the DIP. If the parties are able to reach an agreement, the Office will prepare a settlement agreement, the contents of which have been agreed to by both parties. After the execution of the agreement, it will be binding upon both parties.

How can a court decision or an arbitral award relating to an IT dispute be enforced; how long does it usually take?

Generally, both a court decision and an arbitral award can be enforced by court order. The prevailing party can enforce the court decision by collaborating with the Legal Execution Department. The appointed officer will carry out the necessary actions in accordance with a writ of execution and provide a further report to the court.

The time frame for executing a court decision or arbitral award may vary. The Legal Execution Department may take one or two months to review the case and appoint the executing officer. The cooperation of the infringer and other parties is also an important factor in the execution process.

In total, what is the average time period from the presentation of a formal petition (to an arbitral/judicial or similar first instance body) until the award of an enforceable decision?

The process of prosecuting a civil action at a court of first instance in a copyright infringement case generally takes approximately 12 to 18 months, depending on the number of scheduled hearing dates and the complexity of the software at issue. Based on the less formal nature of the process, the average time for mediating a dispute may be substantially shorter, with some cases being concluded in as little as two or three months.

This chapter is an excerpt from *Software Protection: A Comparative Perspective*, edited by Josef Donat, Martin Maisner, and Radim Polcak and published by Medien & Recht Publishing. The book was assembled through the collective effort of lawyers from member firms of Multilaw in 24 jurisdictions and the legal experts from the Institute of Law and Technology, Faculty of Law, Masaryk University, in order to provide academics and practitioners in the field of ICT law with basic comparative information on fundamental questions of software protection worldwide.

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