

Combating IP infringement in Thailand: posed amendments

The sale of pirated products and counterfeit goods via the internet is a significant problem in Thailand, so much so that the Thai government is set on clarifying the current legislation and increasing the power of rights holders with new provisions within the Draft Copyright Act. Nuttaphol Arammuang, Attorney-at-Law at Tilleke & Gibbins, discusses the current Computer Crimes Act and pending Copyright Act.

The Thai government is searching for new solutions to battle intellectual property infringement on the internet, both utilising existing laws and enacting new legislation. To this end, the Cabinet recently approved a draft of the proposed amendment of the Copyright Act which provides additional measures to copyright owners in combating online piracy.

The existing legal framework

Since existing IP laws in Thailand do not explicitly sanction the sale of counterfeit goods online, IP owners have, up until now, been unable to take aggressive action against these online sellers. In practice, IP owners have tried to tackle this type of infringement by conducting investigations to uncover the source of the fake goods, followed by raid actions under the current Trademark Act B.E. 2534, the Copyright Act B.E. 2537, and the Patent Act B.E. 2522.

This approach, however, is increasingly hampered by the fact that online traders do not typically store their goods on their premises. Instead, traders purchase the counterfeit products from sellers after receiving purchase orders from their customers.

The Computer Crimes Act

The Computer Crimes Act B.E.

2550 was enacted to provide legal sanctions against wrongful access to or 'hacking into' computer data. In searching for solutions to battle IP infringement online, recent meetings between government officials and members of the private sector have resulted in an innovative approach that relies on the existing Computer Crimes Act.

In the absence of specific legislation to address these activities, the DIP has suggested to IP owners that they may be able to enforce their rights by applying Sections 14 and 20 of the Computer Crimes Act.

Section 14

Whoever commits the following offences shall be liable for imprisonment for a term not exceeding five years, or a fine not exceeding THB 100,000, or both:

(1) Entering wholly or partially spurious computer data or false computer data into a computer system, in a manner that is likely to cause injury.

Section 20

In the case where the commission of an offence under this Act involves the distribution of computer data that may affect the security of the Kingdom, as prescribed in Book II, Title I or Title I/I of the Penal Code, which may be inconsistent with public order or good morals, the competent official may apply for a motion to the court to order that the distribution of such computer data be blocked.

In 2011, these sections were applied to a case related to food and medical products before Thailand's Criminal Court. In Red Case Sor. 33/2554, the defendant advertised the sale of food, medicine, and medical equipment using information that was deceptive to consumers. The court deemed this act an offence under

Section 14(1) of the Computer Crimes Act, issuing an order to block the distribution activities undertaken by the website.

As this judgement shows, Sections 14 and 20 grant the court the authority to block the distribution of forged computer data or false computer data upon the request of an officer, if the court finds that such content may be inconsistent with public order or good morals. Unfortunately, the Computer Crimes Act is not clear in defining whether offering counterfeit goods for sale on a website can be considered 'forged computer data.' Although some government officials claim that this law sets out the right to take action against websites that offer fake goods for sale online, others opine that fake goods offered on a website cannot be deemed 'forged computer data.'

In seeking a solution to this problem, representatives from the Ministry of Information and Communication Technology (MICT), the DIP, and the private sector met in March 2012. The Director-General of the DIP stated that she encouraged IP representatives or IP owners to submit a formal letter to the MICT requesting to shut down these websites under Section 14. When an IP owner proceeds with a formal letter, this will provide a test case to determine whether Section 14 of the Computer Crimes Act can be used to shut down websites that offer fake goods for sale.

In light of these developments, a new procedure was proposed during the meetings. If all parties implement the new procedure, it could enable IP owners to shut down websites selling counterfeit or pirated goods in as little as two weeks. Clearly, this would be a major development for long-suffering IP owners who have battled online piracy for years.

Proposed amendment

In addition to the potential actions under the current Computer Crimes Act, IP owners can also look forward to new enforcement options under upcoming amendments to Thailand's copyright law.

On 9 October 2012, the Cabinet approved a proposed amendment of the Copyright Act (Draft Act), which had been presented for approval by the Council of State. The Draft Act provides additional provisions for the current Copyright Act, such as protecting information rights management and technological measures and empowering the court to order a person who infringes on a copyright or performers rights to pay damages in a higher amount, not to exceed double the amount. Among other things, the Draft Act provides additional measures for copyright owners to combat online piracy through the court system.

The Draft Act defines 'service provider' in the same terms as the Computer Crimes Act. According to the law, the term 'service provider' means: 1. A person who provides services to others regarding the provision of access to the internet or any other connectivity through a computer system, whether such services are provided in their own name or in the name or for the benefit of other persons. 2. A person who provides computer data storage services for others.

The Draft Act enables a copyright owner to file a motion requesting the court to order a service provider to suspend the alleged infringing act or temporarily remove the work allegedly made by copyright infringement from the system of the service provider.

Section 32/3 paragraph 1

In the case where there is evidence to believe that there is copyright

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infringement in a computer system of a service provider, the copyright owner may petition the court for cessation of such infringement.

This type of petition needs to clearly set forth specific information and evidence, as well as the relief requested. Once the court receives a petition, the court shall make inquiries. If the court views that it is appropriate to be permitted as requested, the court shall order the service provider to suspend the alleged infringing act or temporarily remove the work allegedly made by copyright infringement from the service provider's computer system, for a period of time specified by the court. The court order will be enforced immediately, and the service provider will be notified. In this case, the copyright owner has an obligation to initiate a lawsuit against the infringer within a period of time ordered by the court.

The Draft Act also prescribes exceptions for service providers who can prove that they did not have direct control of their computer system, did not commit the infringement themselves, or did not order anyone to commit the infringement. Also, the service will be free from any liability for the damages caused by complying with the court's order.

Section 32/3 paragraph 5

In the case where the service provider does not control or initiate copyright infringement and infringement of performers' rights in a computer system of the service provider, or cause someone to commit copyright infringement and infringement of performers' rights, and the service provider has complied with the court order under paragraph four, the service provider is not liable for the alleged infringing act that had been committed prior to the court order

and after the court order terminates.

Section 32/3 paragraph 6

The service provider is not liable for any damage caused by any act done in compliance with the court order under paragraph four.

Pursuant to approval by the Cabinet, the Draft Act will be proposed to Parliament, which consists of the House of Representatives and the Senate, for further consideration and approval.

Stringent measures

Although the debate regarding the application of the Computer Crimes Act on IP cases is ongoing and the Draft Copyright Act is still pending, it is evident that the Thai government intends to implement more stringent measures in the near future to inhibit the stream of illicit gains enjoyed by illegal online retailing operations.

At this stage, when an IP owner decides to test the approach proposed by the DIP and a court order is requested, practitioners will eagerly await the outcome for any developments in this area of the law. If the Computer Crimes Act is deemed practicable, it will provide an efficient route for IP owners to shut these websites down, without incurring additional investigation costs.

However, if the court decides that the activities of illegal online retailers specifically, offering counterfeit goods for sale on a website do not constitute 'forged computer data' under Section 14, it will then be necessary for all stakeholders to push ahead with further amendments to existing IP laws.

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