

## Chapter 34

### Thailand

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## I. MEDIA LAW

### A. SOURCES

#### § 34:1 Basic principles

The basic principles for establishing laws in Thailand are found in the Constitution of the Kingdom of Thailand, which is based on a modern democratic constitutional monarchy.

Basic principles of Media Law include the right to free expression by individuals and organizations, free speech for all, and the right to freedom of the press, of association, of assembly and petition. Freedom of expression is a universal concept imbedded in the constitutions of many countries and is an indispensable condition of nearly every other form of freedom. However, free speech rights need constant, vigilant protection. What constitutes free speech today may not constitute free speech tomorrow, often depending upon the prevailing set of values and how a particular law is interpreted in the context of the times. Ensuring full freedom of speech and expression requires especially that government officials fully understand that right and correctly interpret any individual expression, whether it be by spoken word or by an outright act. The 2007 Constitution of the Kingdom of Thailand, which abrogated the 1997 Constitution, recognizes freedom of speech, of the press, of association, of assembly and petition.<sup>1</sup>

There are several additional basic and critical principles involving the media, as follows:<sup>2</sup>

- fostering transparency and accountability in governance and society;
- promoting the free flow of news and information through good investigative reporting;

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#### [Section 34:1]

<sup>1</sup>Part 7, Section 45 and Part 11, Section 62.

<sup>2</sup>Internews Network, “Global Issues—Governance and Transparency.” 2007. Available at: <http://www.internews.org/global/gov/default.shtm>.

- promoting e-government, getting government services and information online;
- supporting media watchdogs;
- reforming media laws for a legal environment that supports independent media and upholds journalists' ability to do their jobs;
- advocating for access to information legislation and government documents; and
- access to information and communications technologies, i.e., affordable access to information via the Internet and telecommunications.

However, a number of legal and extra-legal restrictions on freedom of expression have been noted in Thailand. For example, officials interfere with the media by expressing undue or politically motivated criticism of the media. Also, media owners have not always respected the editorial independence of their media outlets and the right of staff to respect their own freedom of expression. In addition, officials sometimes use vague appeals to nationalism, respect for the institution of the monarchy, or national security as a way to influence media content. Violence against media workers can also be a deterrent to freedom of expression, as can the auditing of accounts of critical journalists or by threatening prosecution.<sup>3</sup>

### § 34:2 Constitutional sources

The Constitution of the Kingdom of Thailand guarantees that every person has the liberty to express his or her opinion, make speeches, write, print, publicize, and make expression by other means. Restrictions on those liberties must not be imposed except where a law is specifically enacted for the “purpose of maintaining the security of the State, safeguarding the rights, liberties, dignity, reputation, family or privacy rights of other person, maintaining public order or good morals or preventing the deterioration of the mind or health of the public.”<sup>1</sup>

The Constitution also states that “[f]requencies for radio and television transmission, and other telecommunication

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<sup>3</sup>Article 19 and Forum-Asia Publication, “Freedom of Expression and the Media in Thailand.” December 2005.

#### [Section 34:2]

<sup>1</sup>Constitution of the Kingdom of Thailand, B.E 2550, § 45.

are national assets intended for public benefits.”<sup>2</sup> There must also be “one independent State agency” that will “direct and regulate the activities relating to radio and television transmissions and telecommunication.”<sup>3</sup> In addition, “Staff or employees of any privately-owned newspaper, radio, TV, or other mass media shall be free to present news and express views, within statutory bounds but not dictated by State agencies, State enterprises, or owner of the enterprise providing they do not breach the professional code of conduct.”<sup>4</sup>

The Constitution also protects a family member’s right to reputation, personal information, and a private life. It prohibits spreading or publicizing “news or images which violates or infringes a person’s rights or those of his or her family, including disclosure of personal information without the owner’s consent except in public interest.”<sup>5</sup>

Freedom of communication is protected by Section 36 of the Constitution, which, combined with the protection of freedom of expression of individuals and the mass media in Section 45, indicates a relatively broad protection of speech.<sup>6</sup>

Section 45 provides that “a person shall be free to express his or her views in speech, writing, print, advertising, and other modes of communication.” It also provides that the government will not “ban a newspaper or other mass media from presenting news and information or expressing views in whole or in part,” or “interfere by any means with the freedom of expression to restrict the freedom of the press except by virtue of law.”<sup>7</sup> Censorship of news or articles by officials “before their publication in a newspaper, printed matter, or on the radio and TV” will not happen “except when the country is at war or in a state of armed conflict.”<sup>8</sup> However, this freedom is curtailed when it is deemed necessary “to maintain the stability of the state, to protect the rights and freedoms, honor, reputation and rights of the family or privacy of other individuals, to keep public peace

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<sup>2</sup>Constitution of the Kingdom of Thailand, B.E.2550, § 47.

<sup>3</sup>Constitution of the Kingdom of Thailand, B.E.2550, § 47.

<sup>4</sup>Constitution of the Kingdom of Thailand, B.E 2550, § 46.

<sup>5</sup>Constitution of the Kingdom of Thailand, B.E.2550, § 35.

<sup>6</sup>Constitution of the Kingdom of Thailand, B.E 2550, § 45.

<sup>7</sup>Constitution of the Kingdom of Thailand, B.E 2550, § 45.

<sup>8</sup>Constitution of the Kingdom of Thailand, B.E 2550, § 45.

and order and good morals, or to prevent or stop deterioration of mental and physical health.”<sup>9</sup>

Section 56 of the Constitution also provides that people have the right “of access to facts or public information in the possession of government agencies, State agencies, State enterprises, or local governments.” Again, the right is abrogated if the “disclosure of such facts and information may jeopardize the security of the State, public safety, or the interests of a person or persons who should be protected.”<sup>10</sup> Persons also have the right to “participate in the procedure of State officials administering the State affairs, which may affect their personal rights and freedoms.”<sup>11</sup> These constitutional provisions create a general right to access to media, and recent efforts to deregulate state-run media and to end both state and private monopolies of the radio, television, and telecommunications sector. These are practical guarantees to ensure that the public has the ability to air their views and even lodge a complaint.

### § 34:3 Codified sources

There are a number of codes in Thailand that govern Media Law. These include the Printing Registration Act,<sup>1</sup> Act Relating to the Conducting of Broadcasting and Television Business,<sup>2</sup> Act on Organization to Assign Radio Frequency and to Regulate Broadcasting and Telecommunication Services,<sup>3</sup> Movie and Video Act,<sup>4</sup> Electronic Transactions Act,<sup>5</sup> Computer-Related Crime Act,<sup>6</sup> Official Information Act,<sup>7</sup> Copyright Act, Optical Disc Act,<sup>8</sup> and certain sections of the

<sup>9</sup>Constitution of the Kingdom of Thailand, B.E 2550, § 45.

<sup>10</sup>Constitution of the Kingdom of Thailand, B.E. 2550, § 55.

<sup>11</sup>Constitution of the Kingdom of Thailand, B.E. 2550, § 57.

#### [Section 34:3]

<sup>1</sup>B.E. 2550.

<sup>2</sup>B.E. 2551.

<sup>3</sup>B.E. 2553.

<sup>4</sup>B.E 2551.

<sup>5</sup>B.E. 2544.

<sup>6</sup>B.E. 2550.

<sup>7</sup>B.E. 2540.

<sup>8</sup>B.E. 2548.

Penal Code.<sup>9</sup> In Thailand, all laws, deriving their basis in principles and ideas in the Constitution, are vetted by the Council of State, which is responsible to the Prime Minister and Council of Ministers.

Printing Registration Act.<sup>10</sup> An antiquated piece of legislation, the 1941 Print Act, was repealed in 2007 by the Printing Registration Act. This Act allows the Commissioner-General of Royal Thai Police to prohibit the importation for distribution of any printed matter, which covers not only articles or books, but also statements considered to be defamatory, insulting or vengeful against His Majesty the King, Her Majesty the Queen, the Heir to the Throne, or the Regent. Any documents which affect the security of the Kingdom, the peace, and order or good morals of the public may be subject to prohibition.<sup>11</sup> Furthermore, this Act provides specific requirements for the licenses of newspaper publishers. Anyone who violates such order of the Commissioner-General is liable to imprisonment up to three years and/or a fine up to Baht 60,000. Overall, this Act appears to provide greater freedom of the press than the 1941 Act.

Act on Organization to Assign Radio Frequency and to Regulate Broadcasting and Telecommunication Services. This Act was established because of Section 47 of the 2007 Constitution of the Kingdom of Thailand, which labeled radio frequency waves used in transmitting radio, television, telecommunications, and radio communication as resources of the nation for public benefit. An independent organization would be established to supervise the operation of radio broadcasting, radio/television, and telecommunication businesses. This Act led to the establishment of the National Broadcasting and Telecommunications Commission (NBTC).

The NBTC has the powers and the duties to formulate a Frequency Management Master Plan, Table of Frequency Allocations, Broadcasting Master Plan, Telecommunications Master Plan, Frequency Plan, and Telecommunications Numbering Plan. In addition, it assigns radio frequencies for sound broadcasting, television broadcasting, radio communication, and telecommunication services. The NBTC can also prescribe the characteristics and categories for sound

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<sup>9</sup>Penal Code Amendment, B.E. 2550.

<sup>10</sup>B.E. 2550.

<sup>11</sup>B.E. 2550, § 10.



broadcasting, television broadcasting, and telecommunications services.

The NBTC grants licenses and regulates the use of radio frequencies and radio communication equipment in sound broadcasting, television broadcasting, and telecommunications and radio communication services; and also prescribes the licensing criteria, procedures, conditions, and licensing fees.

It also prescribes the standards and required technical specifications for sound broadcasting, television broadcasting, telecommunications, and radio communication services.

The NBTC has the responsibility to protect the privacy rights and the liberty of the people from being exploited by the operator, and to protect individual rights in relation to privacy and freedom to communicate by means of telecommunications. It also prescribes measures to prevent anticompetitive conduct or unfair competition in regard to sound broadcasting, television broadcasting, and telecommunications services.

Two subcommissions—the National Broadcasting Commission (“NBC”) and the National Telecommunications Commission (“NTC”)—were appointed by the NBTC in 2011. These commissions are responsible for television, sound broadcasting, and telecommunications, and work independently from each other.

Film and Video Act.<sup>12</sup> The 1930 Film Act was replaced by the Film and Video Act, which entered into force on June 2, 2008. Each film to be broadcasted or displayed in theaters in Thailand shall obtain, prior to any broadcast, authorization from the Board of Film and Video Censors. The Board may ban films if its requirements that portions of the film be removed are not met. Reasons for censoring films include violating moral and cultural norms and disturbing the public order and national security. Additionally, the Board shall rate each film by including them in one of the five categories which goes from education to 20 years old and above set up by the Act and described by a ministerial regulation. Prior to this Act, theater owners and broadcasters frequently censored films themselves before submitting them to the Board. A set of ministerial regulations entered into force in 2009, among which is a regulation providing clarification on the rating system in Thailand. For example, a film contain-

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<sup>12</sup>B.E. 2551.

ing unsuitable language should be authorized to be seen by only persons 18 years old and older.<sup>13</sup> Other regulations have provided requirements for selling or renting videos and movies or for operating a business in relation to movies and videos, such as karaoke.

Electronic Transactions Act.<sup>14</sup> This is often referred to as the E-Commerce law. Basically, the Act recognizes that the methods of electronic transactions are greatly different from those of transactions supported by existing laws. Legal recognition of data messages is needed to treat them the same as the messages made or evidenced in writing,<sup>15</sup> and recognition is also needed for methods of dispatch and receipt of data messages. It also recognizes the use of electronic signatures, including admissibility of data messages as evidence,<sup>16</sup> aiming to promote the reliability of electronic transactions to enable them to have the same legal effect as that given to transactions made by traditional means. The amended Act of 2008 extended its protection to electronic stamps or duty stamps, corporate seals, and published electronic data. Electronic stamps are also acceptable as proof of acceptance of an electronic transaction.

Specifically, the Act states that “information shall not be denied legal effect and enforceability solely on the ground that it is in the form of a data message,”<sup>17</sup> and that “an electronic signature is considered to be a reliable electronic signature if it meets certain requirements.” Persons also have the right to “operate service business relating to electronic transaction,” i.e., Internet Service Provider (ISP).<sup>18</sup> A prospective ISP must apply for registration and license with a competent official. If the person operating a service business relating to electronic transactions does not register or obtain a license, there are penalties of imprisonment and fines or both.

The Act also establishes the Electronic Transactions Board, the composition of which was slightly changed in the

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<sup>13</sup>Ministerial Regulation on Characteristics of Movies B.E. 2552.

<sup>14</sup>B.E. 2544.

<sup>15</sup>Electronic Transactions Act, B.E. 2544, § 8.

<sup>16</sup>Electronics Transaction Act. B.E. 2544, § 11.

<sup>17</sup>Electronics Transaction Act. B.E. 2544, § 7.

<sup>18</sup>Electronics Transaction Act. B.E. 2544, Chapter 3.

2008 amendment.<sup>19</sup> The Board monitors and supervises the operations of electronic service providers, issues rules relating to electronic signatures, and makes recommendations for policies for promotion and development of electronic transactions, including solving relevant problems and obstacles. The Chief of the Office of the Electronic Transactions Board is a board member and a secretary.

The Thai Government maintains a Web site to promote e-commerce transactions within the country. The Web site, ThaiEcommerce.net, encourages qualified manufacturers to use the Internet as a means of distributing their products to potential customers abroad. The Web site provides their patrons with a convenient e-commerce system that allows them to send orders and make payment over a secure channel. The government monitors the delivery of all products sold via this service and provides the customers with warranties.<sup>20</sup>

A Royal Decree governing the Control and the Supervision of Electronics Payment Service Business was adopted on August 17, 2008 and entered into force on January 14, 2009.<sup>21</sup>

Computer Crime Act.<sup>22</sup> Part I of this new law provides a list of crimes involving computers. These crimes especially relate to individuals who illegally access computer systems that have specific security measures or who intercept computer data of another person or “whoever damages, destroys, alters, modifies, or adds to whole or part of computer data of another person without authorization.”<sup>23</sup> The Act also includes offenses of computer hacking, illegal interception of data, interference with computer systems, computer-related fraud and forgery, online child pornography, and reproduction and distribution of copyright protected material. It also lists crimes that might be committed by Internet Service Providers.<sup>24</sup> Moreover, it establishes punishments with imprisonment terms not exceeding five years and/or fines not exceeding Baht 100,000. The Minister of Information and

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<sup>19</sup>Electronics Transaction Act. B.E. 2544, Chapter 5.

<sup>20</sup>B.E. 2544, § 37(2). And Electronic Commerce, available at: <http://www.american.edu/carmel/jc0650a/Electronic%20Commerce.htm>.

<sup>21</sup>Royal Decree Governing Control and Supervision of Electronics Payment Service Business, B.E. 2551.

<sup>22</sup>Act on Computer Crime, B.E. 2550.

<sup>23</sup>B.E. 2550, Part I, § 5-14.

<sup>24</sup>B.E. 2550, § 15.

Communication Technology (MICT) has responsibility for the execution of the Act.<sup>25</sup>

Part II of the Act establishes Superior Administrative Authority or Police Officials under the Criminal Procedure Code as competent officials who have power to arrest, confine, search, make an inquiry file, and institute a criminal prosecution against an offender.<sup>26</sup>

On August 23, 2007, MICT issued a Notification detailing the data records to be retained as well as explaining which Service Providers are affected. The requirements of this new Notification became universally effective on August 23, 2008. Such Notification provides general guidelines for logging and storing the computer data for at least 90 days.<sup>27</sup>

Official Information Act.<sup>28</sup> Responding especially to Section 58 of the Constitution, the government approved this Act in 1997. It guarantees access to public information for all citizens and sets a code of information practices for the processing of personal information by state agencies. Section 4 of the Act defines personal information as information relating to “the particular private matters” of a person that can be used to identify that person. The agency must ensure that the system is relevant to, and necessary for, the achievement of the objectives of the operation of the state agency; make efforts to collect information directly from the subject; publish material about its use in the Government Gazette; provide for an appropriate security system; notify such person if information is collected about him or her from a third party; not disclose personal information in his or her control to other state agencies or other persons without prior or immediate consent given in writing except in limited circumstances; and provide rights of access, correction, and deletion.<sup>29</sup> An Official Information Board oversees the administration of the Act,<sup>30</sup> while Information Disclosure Tribunals have the “power and duty to consider and decide an appeal against an order prohibiting the disclosure of in-

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<sup>25</sup>B.E. 2550, § 4.

<sup>26</sup>B.E. 2550, § 29.

<sup>27</sup>Notification of the Ministry of Information and Communications Technology, B.E. 2550.

<sup>28</sup>Official Information Act, B.E. 2540.

<sup>29</sup>Privacy International, available at: <http://www.privacyinternational.org/survey/phr2003/countries/Thailand.htm>.

<sup>30</sup>Official Information Act, B.E. 2540, § 27.

formation, an order dismissing an objection and an order refusing the correction, alternation or deletion of personal information.”<sup>31</sup>

Copyright Act.<sup>32</sup> Copyright law in Thailand generally protects the following eight categories of works: literary, artistic, dramatic, musical, audiovisual, cinematographic, sound and video broadcasting works, and any other works of a literary, scientific, or artistic nature.<sup>33</sup> The above categories effectively cover those works recorded on videocassettes, soundtracks of films, any form of sound recordings, works of craftsmanship, and architectural works and models. Copyright owners do not need to register a copyright for protection, but they may file an application in order to record the copyright.<sup>34</sup>

In addition to copyright protection, the creator is entitled to moral rights, which are the right to be identified as creator of the work and the right to prohibit another person from distorting, abridging, adapting, or doing anything that would cause damage to the creator’s reputation or image.<sup>35</sup>

Copyright protection exists for the life of the author plus an additional 50 years following the death of the author.<sup>36</sup> Copyright protection does not extend to ideas, steps, processes or systems, methods of use or operation, concepts, principles, discoveries, or scientific or mathematical theories.<sup>37</sup> Copyright law does not include the use of research or study (e.g., a work or a computer software program), teaching, examination, personal or family benefit, comment, reporting current events through mass media with acknowledgment of the copyright owner of the work, or for proceedings or consideration of government officials.<sup>38</sup>

There are no specific provisions in copyright and patent laws for information or services transmitted electronically. However, the broad definitions of “artistic” and “audiovisual” works are viewed as giving some protection to content

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<sup>31</sup>B.E. 2540, § 35.

<sup>32</sup>B.E. 2537.

<sup>33</sup>B.E. 2537, § 4.

<sup>34</sup>B.E. 2537.

<sup>35</sup>B.E. 2537, § 18.

<sup>36</sup>B.E. 2537, § 9.

<sup>37</sup>B.E. 2537, § 6.

<sup>38</sup>B.E. 2537, § 32.

providers, whereas trademark statutes apply to all registered work.<sup>39</sup>

The owner of a copyright has the power to file either a criminal or civil complaint in order to enforce his or her copyright. The Copyright Act provides criminal penalties, including fines and imprisonment, for infringement of copyrighted works.<sup>40</sup> Under these provisions, a violation of the owner's rights results in a fine of up to Baht 200,000,<sup>41</sup> and anyone who infringes on those rights for commercial profit or gain is subject to imprisonment of up to two years, with the possible addition of a fine of up to Baht 400,000.<sup>42</sup> Half of these fines are usually paid to the copyright owner.<sup>43</sup> A suit may be filed in Civil Court for compensation for actual, proven damages.

Copyright infringement under the Act arises when a person deliberately acts to infringe directly or indirectly a copyright without permission by copying, modifying, reproducing, adapting, disseminating, or publishing another's work.<sup>44</sup> In the short term, criminal enforcement actions under the Copyright Act should be quite effective, particularly as these actions remove the seized goods from the market. End-user raids, as antipiracy tools, are seen as effective criminal enforcement actions if heavily publicized—such raids are known to create a deterrent effect.

The Department of Intellectual Property (DIP) is the government agency (operating under the Ministry of Commerce) charged with all matters relating to intellectual property, including developing policy and enforcement efforts directed toward the piracy problem. The Central Intellectual Property and International Trade Court (IP & IT Court), established in 1997, has exclusive jurisdiction in both civil and criminal cases involving intellectual property disputes throughout Thailand. A new Draft of the Copyright Act is under consideration.

Optical Disc Act.<sup>45</sup> The Optical Disc Act, enacted and implemented in 2005, was designed to curb the proliferation

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<sup>39</sup>B.E. 2537, § 4.

<sup>40</sup>B.E. 2537, Chapter 8.

<sup>41</sup>B.E. 2537, § 69.

<sup>42</sup>B.E. 2537, § 70.

<sup>43</sup>B.E. 2537, § 76.

<sup>44</sup>B.E. 2537, §§ 27, 28, 29, 30, and 52.

<sup>45</sup>B.E. 2548.

of manufactured discs (CDs, VCDs, DVDs, CD-ROMs) with unlicensed content. The legislation requires optical disc producers to register before commencing production or acquiring raw materials for the manufacturing process.<sup>46</sup> Producers are required to mark discs with unique identification numbers, enabling the source of optical disc media to be traced.<sup>47</sup> Competent officials have the right to enter manufacturing premises to inspect for compliance with the law. Penalties under the Act include fines of up to Baht 1 million and terms of imprisonment of up to five years.<sup>48</sup>

Penal Code. The Thai Penal Code contains punishments for anyone who produces, trades, or advertises obscene material.<sup>49</sup> The code provides for “imprisonment not exceeding three years or a fine not exceeding six thousand baht or both” for persons who commit the offenses of possessing, producing, trading, distributing, or bringing in, or sending out of the Kingdom obscene material. This may include any “document, drawing, painting, printed matter, picture, poster, symbol, photograph, cinematographic film, audio or video tape.” The same penalties will apply to a person who may not directly trade in obscene material, but who otherwise participates in such trade, distributes or exhibits such materials to the public, or hires out such obscene materials.

#### § 34:4 Case law sources

Thailand is a civil law country. Strict compliance with judicial precedence (i.e., *stare decisis*) is not required, although most courts will take into account the decisions of other courts, especially appellate courts, in interpreting statutes.

However, a landmark court decision against criminal defamation may have a significant impact on the telecommunications sector.<sup>1</sup> The secretary-general of the Campaign for Popular Media Reform, Supinya Klangnarong, was found not guilty over comments made in an interview, published in the Thai Post, to the effect that Shin Corp., then owned by

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<sup>46</sup>B.E. 2548, § 5.

<sup>47</sup>B.E. 2548, § 9.

<sup>48</sup>B.E. 2548, § 29.

<sup>49</sup>B.E. 2548, § 287.

#### [Section 34:4]

<sup>1</sup>Bangkok Criminal Court, No. 3091/2546 (2003). Shin Corp vs. Supinya Klangnarong.

the then-Prime Minister's family, financially benefited from Thaksin Shinawatra's election as prime minister. The court found that because Shin Corp. is a publicly listed company, and because television and telecommunications airwaves are public property, Miss Klangnarong had the right to express an honest opinion made for the benefit of the public, and that the Shin Corp. must be made accountable to the public. The Thai Post was also found not guilty because it had reported Supinya's comments without alterations.

## **B. REGULATORY FRAMEWORK**

### **§ 34:5 For publishing industry**

The Printing Registration Act provides that the Commissioner-General of Royal Thai Police is entitled to ban, confiscate, or destroy any printed materials that are defamatory, insulting, or vengeful against His Majesty the King, Her Majesty the Queen, the Heir to the Throne, or the Regent or which may affect the security of the Kingdom, the public order, or good morals.<sup>1</sup> The Thai press is also subject to defamation laws, which in some cases may effectively prevent the publication of information because of fear of a retaliatory defamation lawsuit, since the civil law in Thailand requires both that the defendant prove that the statement made was true and, occasionally, that the statement was justified in its publication.<sup>2</sup> Publication or communication of information that is likely to impair the reputation of another person or expose them to the contempt of others will open the press to criminal charges. Self-censorship also limits the press.

In addition, the government controls textbook publishing for primary and secondary education. Only textbooks that have been evaluated, approved, and certified by the relevant government agency can be sold to schools and used by students as prescribed textbooks. In most of the schools, the teachers write the textbooks in accordance with the curriculum. The publisher submits completed texts to the Ministry of Education for approval. Once approved, a certificate is issued, and the publisher is required to print that

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#### **[Section 34:5]**

<sup>1</sup>B.E. 2550, § 10.

<sup>2</sup>Civil and Commercial Code, § 423.



certificate at the back of each of the published textbooks. Certificates are good for five years.<sup>3</sup>

### § 34:6 For broadcasting industry

The television and radio broadcast sector in Thailand falls under the control of three major government bodies—the Mass Communications Organization of Thailand (MCOT), the Public Relations Department of Thailand (PRD), and the Royal Thai Army Radio and Television (RTA). These three largest players own more than two-thirds of the airwaves nationwide.<sup>1</sup> The Radio Communication Act provides for the seizure of a television or radio that is deemed contrary to national or public security.<sup>2</sup> In addition, the government can ban any material that it deems to be contradictory to public order or good morals.

This set of rules and regulations include the following:<sup>3</sup>

- censorship is necessary prior to airing;
- maximum commercial length is 15 seconds;
- average 10 minutes of advertising time per hour;
- submit script and storyboard for precensor at least one day in advance of broadcast; and
- results will only be reported on Tuesday and Thursday—results are not available on the same day of submission.

The government recently announced the creation of a National Committee for Media Oversight to regulate radio, TV, print media, and online content. This new body is meant to bring together representatives from the government and Internet sectors including Google and MSN (Microsoft).<sup>4</sup>

Due to its obligations under the World Trade Organization, Thailand approved a “Master Plan for Telecommunica-

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<sup>3</sup>Consumers International. “Project on Copyright and Access to Knowledge: Country Study-Thailand. 2003.”

**[Section 34:6]**

<sup>1</sup>Broadcasting Industry in Thailand 2005—Market Overview, available at: [http://commercecan.ic.gc.ca/scdt/bizmap/interface2.nsf/vDownload/ISA\\_2325/\\$file/X\\_7410225.DOC](http://commercecan.ic.gc.ca/scdt/bizmap/interface2.nsf/vDownload/ISA_2325/$file/X_7410225.DOC).

<sup>2</sup>B.E. 2498, § 14.

<sup>3</sup>B.E. 2498, § 14.

<sup>4</sup>Reporters Without Borders, “Thailand YouTube Accessible Again,” August 31, 2007.

tions Development” in 1997.<sup>5</sup> This provided for the privatization of the two state-owned telecommunications companies, which at that time had a monopoly over the industry. At the end of 2006, the telecommunications industry had yet to be deregulated.<sup>6</sup> The current Ninth Plan (2002–2006) also recommended a Master Plan for Telecommunications and provided a framework for the “liberalization and privatization of the telecommunications industry, the formation of an independent regulatory body, the privatization of the Telephone Organization of Thailand (TOT) and the Communications Authority of Thailand (CAT) and a conversion of telecommunications concession. It is expected that this liberalization will promote an effective competition that will bring high benefits and efficiency to the national economic system.”<sup>7</sup>

#### § 34:7 For online services

Thailand has been in the process of modernizing its laws with respect to information technology. The National Information Technology Committee (NITC) approved plans in 1998 for a series of information technology laws. Subcommittees under the National Electronics and Computer Technology Centre were established to draft the following bills: E-Commerce Law, Electronic Data Interchange Law, Privacy Data Protection Law, Computer Crime Law, Electronic Digital Signature law, Electronics Fund Transfer Law, and Universal Access Law.<sup>1</sup> The Computer Crime Act was enacted in 2007, and the E-commerce Law with containing a provision for electronic digital signatures was enacted in 2001, while the other bills remain in the legislative process.

#### § 34:8 Regulators and their core competencies

A royal proclamation formally established the National

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<sup>5</sup>World Trade Organization, available at: [http://www.wto.org/english/tratop\\_e/serv\\_e/telecom\\_e/telecom\\_history\\_e.htm#paper](http://www.wto.org/english/tratop_e/serv_e/telecom_e/telecom_history_e.htm#paper).

<sup>6</sup>Srisamorn Phoosuphanusorn, Year-End Economic Review, Changing the Rules, Bangkok Post, December 2006, available at: <http://www.bangkokpost.com/economicreviews.html>.

<sup>7</sup>Settapon Malisuwan, Kulthon Kasemsan, Ussanee Malisuwan and Dulyulak Phuangthong. “A Preliminary Research Model of Thai Mobile Market Structure.” Rangsit University, nd.

#### [Section 34:7]

<sup>1</sup>Privacy International, available at: <http://www.privacyinternational.org/survey/phr2003/countries/Thailand.htm>.

Broadcasting Commission (NBC), and the National Telecommunications Commission (NTC) in 2011. This is Thailand's broadcasting and telecommunications regulator, pursuant to the provisions of the Act on the Organization to Assign Radio Frequency and to Regulate Broadcasting and Telecommunications Services<sup>1</sup> and the Telecommunications Business Act.

The NBC and NTC are the first independent state regulators in Thailand. Their responsibilities are to regulate all radio, television broadcasting, and telecommunication services respectively in the country, from granting licenses for, and the regulation of, the operations of radio, television broadcasting, and telecommunication services, to setting up a tariff structure and services and protecting individual privacy rights and freedom in communication. In addition, they set measures to prevent monopolization or unfair competition in sound broadcasting, television broadcasting, and telecommunications services. They also monitor and provide advice on the undertaking of sound broadcasting, television broadcasting, and telecommunications services.

#### § 34:9 Public sector in the media industry

Section 47 of the 2007 Thai Constitution states that “frequencies for radio and television transmission, and other telecommunications are national assets which are intended for public benefit.” However, the Government of Thailand's television and radio broadcast sector falls under the regulatory control of a few government agencies, namely, the Mass Communications Organization of Thailand (MCOT), the Public Relations Department of Thailand (PRD), and the Royal Thai Army Radio and Television (RTA). These three agencies own more than two-thirds of the airwaves nationwide.

Radio broadcasting was initiated in 1927 with experiments in radio telephone. Later, an experimental broadcasting service was established. Radio frequencies remain in the hands of numerous government agencies, including the military, state universities, the Office of the National Broadcasting and Telecommunication Commission, the Public Relations Department, and MCOT. These agencies, along with the MCOT, operate several stations directly, while the remaining frequencies are leased out to private content providers.

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[Section 34:8]

<sup>1</sup>B.E. 2543 (2000).

Television broadcasting in Thailand began in 1955 with the enactment of the Thai Radio and Television Broadcasting (RTB) Act, which has since been repealed and replaced by the Act Relating to the Conducting of Broadcasting and Television. The year 1955 also marked the start of the Thai Television Company Television Station, Channel 4. Twenty-two years later, MCOT was established to operate mass media businesses on behalf of the Thai government. The original RTB Act was amended in 1987 to allow television broadcasts to be made to the public through cable and electronic means.

The 1997 Constitution provided for an independent authority, the National Broadcasting Commission (NBC), to regulate the broadcasting industry. Legal disputes surrounding the selection process for NBC commissioners have prevented the NBC from being established. The largest players in the Thai television industry are MCOT, a former state enterprise of which the government still owns 77%, and the Royal Thai Army, which retained ownership of numerous broadcast frequencies, even after the end of military rule in Thailand.

Broadcast media in Thailand has been mainly controlled by the Public Relations Department (PRD) of Thailand and MCOT. PRD was founded in 1933. The media have been operated by a number of private sector companies that entered into joint venture agreements with PRD and MCOT. Both the RTB Act and the MCOT decree separately empowered PRD and MCOT to provide broadcasting services.

Since 1994, pursuant to a ministerial regulation of October 1993, companies in the private sector have had the right to apply for a license to supply cable television. Applications are made for transmission within Bangkok to PRD and transmissions outside Bangkok, to the PRD, or the Regional Public Relations Center. A committee appointed by the Prime Minister considers applications for licenses. Licenses permit the supply of television through fiber optic or electric cable, but not through other means such as wireless transmission.

Media reform is now underway to address social and political challenges. The recent Act on Organization to Assign Radio Frequency and to Regulate Broadcasting and Telecommunication Services, established a National Broadcasting and Telecommunications Commission (NBTC) replacing the NBC. The NBTC is to be established to regulate both

telecommunications and broadcasting. The NBTC is to replace the NBC and should supervise the operations of the broadcasting and telecommunications sectors, as well as the issuance of licenses for the use of broadcasting and telecommunications frequencies. Under this new law, the government no longer has monopoly rights in the broadcast sector. The new law requires that all broadcasters, stations, and operators must have a license from the broadcasting regulator. One of the key reasons for expediting the establishment of the NBTC is to resolve the conflicts surrounding the issuance of 3G licenses.

**§ 34:10 Split of legislative/regulatory authority  
between the federal government and  
individual states**

Thailand is a code country that follows civil law concepts. The Thai Constitution includes a provision that states “Thailand is one and indivisible kingdom.”<sup>1</sup> Even though Thailand is divided into districts and provinces, the power remains with the central government administration. All legislation enacted by the central government is used for all court levels around the country.<sup>2</sup> The district officers who attend to the central government functions are appointment by the Ministry of Interior.<sup>3</sup>

The Organization of the States Administration Act<sup>4</sup> declares that the state of Thailand is organized in: 1) central administration represented by the Office of the Prime Minister, ministries, and subministries; 2) provincial administration represented by the Governors and “Chang-wat” committees; and 3) local administration represented by the municipalities and provincial administrative organizations.<sup>5</sup> These government organizations are all under the supervision of the central government. In fact, the function of provincial administration is to implement policies

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**[Section 34:10]**

<sup>1</sup>Constitution of the Kingdom of Thailand 1997, Art.1.

<sup>2</sup>B.E. 2534 (1991).

<sup>3</sup>B.E. 2534.

<sup>4</sup>Organization of the States Administration Act. B.E. 2534 (1991).

<sup>5</sup>B.E. 2534, §§ 4, 53, and 69.

and orders taken from the Prime Minister in his capacity as head of the Government.<sup>6</sup>

### C. DEFAMATION

#### § 34:11 Main sources of law

Defamation claims may be based on both the Thai Penal Code and the Civil and Commercial Code (CCC). Under Thai defamation law, the free speech of both businesses and individuals can be impacted. For instance, carelessly drafted e-mails, demand letters, or even negative restaurant reviews could lead to defamation actions, even if the writers reasonably believed in the truth of their statements. A party accused of defamation can be subject to criminal and/or civil liability. An important distinction between civil and criminal defamation is that a person cannot be punished for criminal defamation for negligently publishing statements about another, even if false.<sup>1</sup> However, civil liability can extend to a party making negligent statements.

Criminal liability for defamation is covered in sections 326 to 333 of the Thai Penal Code. In addition to defamation of a living person,<sup>2</sup> the Penal Code provides that any imputation made upon a deceased person to a third party, which is calculated to impair the reputation of his or her father, mother, spouse, or child, or to expose the deceased to hatred or contempt, is a criminal offense.<sup>3</sup> Furthermore, the Penal Code recognizes an offense called “insult,” which is not as serious as defamation. In particular, the Penal Code provides criminal liability for any person who insults another person in his or her presence or by publication.<sup>4</sup>

Civil liability for defamation is governed by the CCC, which states that any person who, contrary to the truth, asserts or circulates as a fact that is injurious to the reputation or credit of another, or his or her earnings or prosperity in any manner, should compensate the injured party for any

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<sup>6</sup>B.E. 2534, § 54.

[Section 34:11]

<sup>1</sup>Penal Code, S.59.

<sup>2</sup>Penal Code, S.326.

<sup>3</sup>Penal Code, S.327.

<sup>4</sup>Penal Code, S.393.

resulting damage.<sup>5</sup> Being unaware that a statement is false does not constitute a defense if a reasonable person should have known that it was false.

### § 34:12 Definition and significant subdivisions

Defamation refers to a category of claims based upon intentionally harmful or false statements “published” in spoken or written form to third parties. Thai law generally makes no distinction between libel and slander.

Under section 326 of the Penal Code, defamation includes any imputations made on another person to a third party that are likely to impair the reputation of that person or expose him or her to hatred or contempt.

Under section 423 of the CCC, defamation is a statement made contrary to the truth, which is asserted or circulated as a fact, with resulting injury to the reputation, credit, earnings, or prosperity of an individual.

### § 34:13 Main factors or elements of claim

In a criminal defamation action, the alleged defamation must involve publication to third parties and must lower the plaintiff in the eyes of right-thinking members of society, such as to impair his or her reputation or expose him to hatred or contempt.<sup>1</sup> An insult, on the other hand, does not have such an effect and need not take place before any person other than the plaintiff.<sup>2</sup>

As for a civil action, the statement asserted or circulated must be false and injurious to the reputation or credit of another, or to his or her earnings or prosperity in any manner.<sup>3</sup>

It should be noted, however, that the practical burden of proving falsity does not lie on the plaintiff. Rather, the defendant must try to prove that his or her statement was true to avoid liability.<sup>4</sup> This can be very difficult to achieve, and the practical result is that many people decline to make even truthful statements if they are concerned about their ability to prove the statements later in court.

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<sup>5</sup>Civil and Commercial Code, S.423.

#### [Section 34:13]

<sup>1</sup>Penal Code, S.326.

<sup>2</sup>Penal Code, S.393.

<sup>3</sup>Civil and Commercial Code, S.423.

<sup>4</sup>Penal Code, S.330.

**§ 34:14 Types of relief available**

A person who feels that he or she has been defamed, may bring criminal charges by either filing a complaint with the police or filing the criminal action directly with the criminal court. If a complaint is filed with the police, the police will question the accuser and the accused, and will ultimately make a recommendation to the public prosecutor for or against prosecution. If the matter goes to trial, the accuser may join as a coplaintiff. If the complaint is filed in court, the court will schedule preliminary hearings to determine whether the facts support trying the case.

The criminal offense of defamation is punishable by imprisonment not exceeding one year and/or a fine not exceeding Baht 20,000.<sup>1</sup> However, if the defamation is committed by means of publication of a document, drawing, painting, cinematograph, picture, letters made visible by any means, gramophone record, or any other recording or broadcast, the offense is punishable by imprisonment not exceeding two years and a fine not exceeding Baht 200,000.<sup>2</sup> The Penal Code also provides that the court may order both destruction of defamatory matter and publication of the court's judgment in one or more newspapers once or multiple times at the expense of the guilty party.<sup>3</sup>

The offense of "insult" is punishable by imprisonment not exceeding one month and/or a fine not exceeding Baht 1,000.<sup>4</sup> Insult may also be used as grounds for divorce.

In addition to a criminal action, an injured person may bring a civil action to recover damages under the Civil and Commercial Code.<sup>5</sup> Moreover, the Civil and Commercial Code gives the court a right, upon application of the aggrieved party, to order other measures, either instead of or in addition to payment of damages, for the rehabilitation of the injured party's reputation.<sup>6</sup>

For the purpose of achieving faster results, criminal actions are filed much more frequently than civil suits. While

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**[Section 34:14]**

<sup>1</sup>Penal Code, S.326.

<sup>2</sup>Penal Code, S.328.

<sup>3</sup>Penal Code, S.332.

<sup>4</sup>Penal Code, S.393.

<sup>5</sup>Civil and Commercial Code, S.423.

<sup>6</sup>Civil and Commercial Code, S.447.



damages awarded in defamation cases are minimal, the time and expense consumed in prosecuting or defending these actions can be massive.

### § 34:15 Defenses available

There are three defenses to a charge of criminal defamation, as follows:<sup>1</sup>

- The statement is true, unless the defamatory imputation is of a personal nature and would not be of benefit to the public;
- A fair comment was made in good faith, either by way of self justification or defense, or for the protection of a legitimate interest, upon the status of an official in the exercise of his or her duties, by way of fair comment on a person normally subject to public criticism, or by way of fair report of open proceedings; or
- The opinions or statements expressed during proceedings which were made by the parties involved, their lawyers, or their witnesses.

Justification, whereby the defendant had a valid reason for publishing a true statement, and privileged communication, whereby a person makes a communication in good faith to another person who has a rightful interest in that communication, is a defense to a civil charge of defamation.<sup>2</sup>

It is important to note that truth is not an absolute defense.<sup>3</sup> Particularly, there is considerable argument about what personal matters are “in the public interest,” especially as pertains to public persons.<sup>4</sup> Thus, it is possible that true accounts of people could be published but still be subject to defamation claims. Additionally, the law limits situations where fair comment is allowed, and there are situations where an opinion, however reasonable, will not fall within the defense.

With regard to newspapers, the Thai Press Act provides that a newspaper may avoid civil and criminal liability if it

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#### [Section 34:15]

<sup>1</sup>Penal Code, S.329-331.

<sup>2</sup>Dika (Supreme) Court Case No. 938/2519.

<sup>3</sup>Penal Code, S.330 and Civil and Commercial Code, S.423.

<sup>4</sup>Penal Code, S.330 and Civil and Commercial Code, S.423.

publishes a public retraction immediately following a request made by the injured party.<sup>5</sup>

Additionally, a person wrongly accused of defamation could file their own criminal action for false charges.

#### § 34:16 Time period for asserting claim

Civil defamation claims for damages are barred after one year from the date the wrongful act and the person responsible became known to the injured person, or 10 years from the day when the wrongful act was committed.<sup>1</sup> If, however, the damages claimed arose from a wrongful act that is also punishable under criminal law for which a longer period is prescribed, then such period also applies to the civil action.

In general, the statute of limitations for a criminal defamation action is five years from the date on which the offense was committed.<sup>2</sup> However, because defamation offenses are compoundable,<sup>3</sup> if the injured person does not make a complaint within three months from the date on which the offense and the offender became known to him or her, the prosecution will be precluded by prescription.<sup>4</sup>

### D. INVASION OF PRIVACY

#### § 34:17 Main sources of law

A new Constitution, adopted by a referendum on August 18, 2007, has entered into force in Thailand since August 24, 2007. This new Constitution includes some changes compared to the previous 1997 Constitution, and the notion of personal data protection has been explicitly cited.<sup>1</sup> Indeed, Section 35, which deals with the same subject matter as Section 34 of the 1997 Constitution, states that “it is prohibited to spread or publicize news or images by any means to the general public, which violates or infringes a person’s rights

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<sup>5</sup>Press Act, S.41.

#### [Section 34:16]

<sup>1</sup>Civil and Commercial Code, S.448.

<sup>2</sup>Penal Code, S.326, 327 and 95.

<sup>3</sup>Penal Code, S.333.

<sup>4</sup>Penal Code, S.96.

#### [Section 34:17]

<sup>1</sup>Constitution of the Kingdom of Thailand B.E. 2550—see the draft for the English version: <http://library2.parliament.go.th/giventake/thaicons.html>.

(. . .) including disclosure of personal information without the owner's consent, except in public interest."<sup>2</sup> As explained below, a draft regarding personal data information is in process. By this reference, the new Constitution recognizes that personal information will be protected, and the protection will extend beyond the Official Information Act, which deals only with public institutions. Thus, consent is fundamental before any disclosure. However, the exception relating to the disclosure for public interest remains.

Regarding the effect of the Constitution, there is no specific constitutional provision offering direct protection for privacy rights, although there are other laws that would allow relief.

Thailand has enacted the Official Information Act (OIA) which has as its objectives both providing mechanisms for the free flow of information between the people and public administration, and providing a mechanism to protect the privacy of people related to the information that state agencies and enterprises control.<sup>3</sup> The basic provisions of this Act provide that only necessary and relevant personal information will be kept, that this information will be protected, and that the consent of the person is necessary before any release of this information to another agency will be allowed. Additionally, a person has the right to access information kept by the government about him or her. The principles of access to information and privacy protection relate only to public sector information.

In 2001, the Thai government released a draft of the Personal Data Protection Bill, which is designed to protect the personal data of individuals and prevent the misuse of that data.<sup>4</sup> According to the draft, personal data is defined as any fact that relates to a person, either living or dead, by which that person can be identified, either directly or indirectly. The bill would give protection to the collection, storage, and protection of personal data, as well as establish a Personal Data Protection Board. As of November 2013, this bill is under consideration by the Ad Hoc Committee of the House of Representatives, after having passed the first reading of the House of Representatives.

The Computer Crime Act also contains restrictions against the unlawful access of a user's data. Section 9 makes it a

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<sup>2</sup>Constitution of the Kingdom of Thailand B.E. 2550, S.35.

<sup>3</sup>B.E. 2540.

<sup>4</sup>Draft Personal Data Protection.

crime, punishable by up to 5 years in jail, to damage, destroy, alter, or add to a third's party's computer data. However, such provisions are geared primarily towards third party hacking.

Additional protection for privacy right may also be found under a broadly worded and broadly interpreted catch-all tort provision of the Civil and Commercial Code, which states generally that any willful, negligent, or unlawful act done by another person which injures the "life, body, health, liberty, property or any other right" of another person is subject to civil sanctions.<sup>5</sup>

Invasion of privacy is also covered by the Thai Penal Code according to which a person cannot disclose private secrets<sup>6</sup> or even defame someone by divulging personal information without his or her consent.<sup>7</sup>

### § 34:18 Definition and significant subdivisions

Although the right of privacy was implicitly recognized prior to the 1997 Constitution, it was not considered as a subjective right, but as a way to limit the freedom of expression. The right of privacy was assimilated to the right to protect one's name<sup>1</sup> and was therefore considered as a part of a personality right. The right to privacy was recognized for the first time in Section 35 of the 1997 Constitution. However, Section 35 of the 2007 Constitution does not define the right to privacy. In fact, it does not even use the word "privacy." Nevertheless, the citation of "personal information" and "private life" implicitly refers to privacy.

Similarly, the Civil and Commercial Code fails to properly define the notion of privacy. Indeed, section 420 refers to the outrage to "any right of a person." Moreover, section 18 considers that punishment will be rendered against the person who, by the utilization of the name of a person without his or her consent, injures this entitled person. The name may be considered as a part of a privacy right.

The Penal Code deals with the content of the privacy right without defining it directly, such as by referring to the infor-

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<sup>5</sup>Civil and Commercial Code, S.420.

<sup>6</sup>Penal Code, S.322 and 323.

<sup>7</sup>Penal Code, S.326–329.

#### [Section 34:18]

<sup>1</sup>Civil and Commercial Code, S.18.

mation contained in a closed letter, a telegram, or any document that can injure the owner of these documents or private secrets obtained by reason of a function or profession.<sup>2</sup> In 1977, the Supreme Court decided that a defendant who has received a letter addressed to someone else, opened it, and disclosed the contents thereof, has caused damages to the holder of this letter.<sup>3</sup> Contrary to some circumstances for defamation, the information revealed by the third party must be true in case of right of privacy. Moreover, contrary to the civil offense, as for defamation, the criminal offense only concerns the conscious violation of privacy.<sup>4</sup>

The expression “personal information” was defined in 1997 by the adoption of the OIA.<sup>5</sup> The privacy right encompasses the notion of “personal information.” Therefore, any disclosure of this information without the consent of the interested person may be considered as an invasion of privacy. The OIA states that “personal information means information concerning the personal matters of a person such as education, financial status, health record, criminal record or working record, which contain the name of such person or contain a numeric reference, code or such other indications identifying that person and shall also include information concerning personal matters of the deceased.”<sup>6</sup> Therefore, personal information is information specific to each person that must be protected.

### § 34:19 Main factors or elements of claim

The Civil Procedure Code states that the burden of proof rests with the person who considers his or her privacy rights to have been violated.<sup>1</sup> The alleged injured person has to establish the facts, prove what the defendant said or publicized, and finally demonstrate that he or she has sustained damages.<sup>2</sup>

According to the Penal Code, in a criminal action, the al-

<sup>2</sup>Penal Code, S.322 and 323.

<sup>3</sup>Supreme Court No. 253/2520 District Attorney of Ratchburi Province v. Pichai Srisopa.

<sup>4</sup>Penal Code, S.322 and 323.

<sup>5</sup>Official Information Act, B.E. 2540.

<sup>6</sup>OIA B.E 2540, S.4 § 5 “personal information.”

#### [Section 34:19]

<sup>1</sup>Civil Procedure Code, S.84.

<sup>2</sup>Civil Procedure Code, S.84.

leged attempt has to involve the disclosure of private information without the authorization of the person holding this information and must cause injury to any person.<sup>3</sup> The methods in which the personal information may be disclosed seem open to broad interpretation.

On the other hand, the OIA states that in order to disclose information to other state agencies or other persons, a state agency must obtain the written consent of the concerned person.<sup>4</sup> However, state agencies may disclose certain information relating to the concerned person without approval, such as “the disclosure for studies and research without mentioning the name, or part revealing the identity, of the person to whom the person information is related.”<sup>5</sup> Therefore, the alleged injured person has to establish that the personal information disclosed by the state agencies is not covered by the exception provided by section 24 or, alternatively, he or she has to prove that the disclosed information is sufficient to allow for his or her identification.

### § 34:20 Types of relief available

In a civil action, in principle, the allegedly injured person may demand compensation. In the context of use of his or her name without his or her approval, the entitled person may demand an abatement from the injury or even an injunction if the injury continues.

As indicated above regarding defamation, if the alleged injured person considers that the defendant has invaded his or her privacy, this person may bring criminal charges either by filing a complaint with the police within three months from the date the plaintiff discovers the injury, or by filing a criminal action to the court.<sup>1</sup> The amount of monetary damage and the imprisonment duration depend on the injury committed. In cases of disclosure of private secrets by making away with a closed letter, telegram, or any other document, or the disclosure by another person by reason of his or her function or profession, the punishment must not exceed

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<sup>3</sup>Penal Code, S.322 and 323.

<sup>4</sup>OIA B.E. 2540 S.24.

<sup>5</sup>OIA B.E. 2540 S.24.

#### [Section 34:20]

<sup>1</sup>Penal Code, S.96.

a fine of Baht 1,000 and/or imprisonment of six months.<sup>2</sup> If the disclosure is done by any official, the punishment is stronger. For example, an official having the duty in the post, telegraph, or telephone service, will be punished with imprisonment not exceeding five years and/or a fine not exceeding Baht 10,000.<sup>3</sup>

### § 34:21 Defenses available

Under the 2007 Constitution, even if Sections 36 and 55 address the notion of freedom of expression, an exception has been integrated. This freedom is bounded by the respect of other persons' privacy.<sup>1</sup> Nevertheless, the 2007 Constitution authorizes an invasion of privacy in the public interest.<sup>2</sup> In Thailand, freedom of information and privacy protection are difficult to combine. A controversy regarding the balance between these two constitutional rights exists.

For example, the parents of a pupil who failed the entrance examination of a demonstration school of a famous state university requested the school to disclose the examination results of their daughter and the other students who passed the examination.<sup>3</sup> After the refusal of the school, the parents submitted an appeal to the Official Information Commission. The commission required the school to disclose the results on the basis that the parents have the right to access this information because it results from a public competition.<sup>4</sup> The school refused to apply the decision. The commission therefore enforced the disclosure. The parents of the other successful children considered that the disclosure was an invasion of privacy and brought a suit against the commission's ruling to the civil court.<sup>5</sup> The civil court stated that the information was not personal information and therefore should be disclosed. The decision was confirmed in an appeal

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<sup>2</sup>B.E. 2540. *See also* § 34:14, discussing penalties for defamation.

<sup>3</sup>Penal Code, S.163 and 164.

#### [Section 34:21]

<sup>1</sup>Constitution of the Kingdom of Thailand B.E. 2550, Art. 45.

<sup>2</sup>Constitution of the Kingdom of Thailand B.E., 2550 Art. 35.

<sup>3</sup>Disclosure Tribunal on Social and Administrative issues, Decision 17/2542 (1998).

<sup>4</sup>Disclosure Tribunal on Social and Administrative issues, Decision 17/2542 (1998).

<sup>5</sup>Disclosure Tribunal on Social and Administrative issues, Decision 17/2542 (1998).

and before the Supreme Court.<sup>6</sup> This decision, which is based on the OIA, demonstrates that the idea of freedom of information and invasion of privacy can be interpreted broadly and depends on the interpretation made by the judge.

Under a civil claim, the defendant may oppose that the outrage has been perpetrated in order to defend himself or herself, or may argue that he or she acted under a lawful command.<sup>7</sup>

The Penal Code also deals with some available defenses. In particular, the defendant will not be considered to have committed a compoundable offense if he or she can prove any of the following:

- that there is no injury by the disclosure of the private secrets;<sup>8</sup>
- that he or she was expressing his or her opinion or statement in good faith, by way of fair comment on any person who is subject to public criticism;<sup>9</sup> or
- that the party expressed his or her opinions or statements defaming the alleged victim during the proceedings of a Court.

#### § 34:22 Time period for asserting claim

According to the Civil and Commercial Code, a civil claim will be prescribed within 10 years from the day the wrongful act was committed.<sup>1</sup> However, should the injured person have discovered the wrongful act and the offender, then the injured person must file his or her claim within one year from the day the wrongful act was committed.<sup>2</sup>

In a criminal case, the prescription will be five years from the date of commission, in cases of opening a private correspondence that injured the owner in order to ascertain or disclose the correspondence, of acquiring a private secret by reason of the acquirer's function and disclosing the private

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<sup>6</sup>Prof. Dr. Kittisak Prokati (Thammasat University), Information Access and Privacy Protection, Conference on Freedom of Information and Civil Society in Asia, Japan, 13–14 April 2001.

<sup>7</sup>Civil and Commercial Code, S.449.

<sup>8</sup>Penal Code, S.322 and 323 a contrario.

<sup>9</sup>Penal Code, S.329.

#### [Section 34:22]

<sup>1</sup>Civil and Commercial Code, S.193/30.

<sup>2</sup>Civil and Commercial Code, S.448.



secret, or of outrage to the offended person's reputation.<sup>3</sup> Nevertheless, if this outrage has been published, the prescription will be 10 years.<sup>4</sup>

### E. RIGHT OF PUBLICITY

#### § 34:23 Main sources of law

The main source of law that recognizes the right of publicity in Thailand is the Civil and Commercial Code. Section 18 refers to the utilization of the name of a person that injures that person.<sup>1</sup> Section 420 is related to the failure to respect the rights of a person.<sup>2</sup> Thus, the broad designation of the phrase "any right of another person" includes the right of publicity.<sup>3</sup> Section 423 concerns the intent of defamation by using the rights of a person.<sup>4</sup> The defamation may, for example, harm a person's name, photograph, or signature.<sup>5</sup> The aim is to defame the holder of this right. Violations under sections 420 and 423 are considered to be wrongful acts.

The violation of the right of publicity in Thailand has almost never been invoked in litigation. Only limited case law exists in handling this problem, such as cases relating to the use of the image of an actress for magazines, internet, and television for the promotion of a company,<sup>6</sup> or the images of two fashion models that have been used without their consent for the promotion of a trademark.<sup>7</sup>

Another legal source that deals indirectly with the right of publicity is the Trademark Act of 1991.<sup>8</sup> According to section 7, in order to obtain registration of a trademark that incorporates the image or the signature of someone, consent

<sup>3</sup>Penal Code, S.95(4).

<sup>4</sup>Penal Code, S.95.

#### [Section 34:23]

<sup>1</sup>Civil and Commercial Code, S.18.

<sup>2</sup>Civil and Commercial Code, S.420.

<sup>3</sup>Civil and Commercial Code, S.420.

<sup>4</sup>Civil and Commercial Code, S.423.

<sup>5</sup>Trademark Act B.E. 2534, S.7.

<sup>6</sup>Supreme Court, No. 6355/2548 (2005), *Butsakorn Pornwansiriwech v. Suprederm International Ltd.*

<sup>7</sup>Court of First Instance No. 47/2549 (2006), *Kingprayorn and Lane v. Dapper General Appraisal Ltd., Sirichai Sripaisarn and Pamornthip Sripaisarn.*

<sup>8</sup>B.E. 2534.

of that person is required. Section 8 forbids the utilization of any royal names, photographs, portraits or names that refer to the King or the royal family for the registration of a trademark in Thailand.

Finally, the Copyright Act deals with the right of publicity, but it is especially provided for performers, and protects the use of their performance by requiring that their approval must be sought.<sup>9</sup> The Thai Copyright Act has a very broad interpretation of the notion of “performer.” Indeed, a performer is a person who performs such as a musician, a singer, or a dancer, but also “any person who acts, sings, recites, dubs or acts in composition or in other forms.”<sup>10</sup> However, the law does not explicitly specify to what extent the “act of a performer” would qualify as a protected performance. The Supreme Court recently rendered a judgment that the use of an image of two fashion models on a catwalk for publicity did not infringe the performers’ rights.<sup>11</sup> Rather, the Court clarified that the performance of the performer must fall within the works eligible for protection under the Copyright Act, such as the performance of music, performance in a dramatic arrangement, and performance with respect to a screenplay or script, etc.

#### § 34:24 Protection of right of publicity after death

If someone uses the image of a deceased person for filing a trademark application, the Thai Trademark Act states that the applicant has to obtain the consent of the deceased person’s ascendants, descendants, or spouse.<sup>1</sup> However, regarding the use of the signature of a predecessor for a trademark application, it seems that if the predecessor gives his or her authorization, this consent should still be valid after his or her death.<sup>2</sup>

As discussed previously in this chapter in the context of defamation, the heirs may also base their arguments on the Civil and Commercial Code if any wrongful act injures the

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<sup>9</sup>B.E. 2537, S.44.

<sup>10</sup>B.E. 2537, S.4.

<sup>11</sup>Supreme Court No. 3332/2555 (2012), Kingprayorn and Lane v. Dapper General Appraisal Ltd., Sirichai Sripaisarn and Pamornthip Sripaisarn.

#### [Section 34:24]

<sup>1</sup>B.E. 2534, S.7.

<sup>2</sup>B.E. 2534, S.7.

reputation of a deceased person by using any publicity rights of the deceased person.<sup>3</sup> The Penal Code also states that any imputation to a deceased person that can impair the reputation of the deceased person's relatives is considered to be defamation.<sup>4</sup>

### § 34:25 Main factors or elements of claim

The burden of proof rests with the allegedly injured person. First, the claimant must establish what the defendant said or publicized.<sup>1</sup> Second, the claimant must prove the fact and, finally, the damage caused by the violation of his or her rights of publicity.<sup>2</sup> Therefore, it is very important that the injured person proves that he or she has not given his consent, or at least not for this utilization of his or her image. However, the injured person "is not required to prove facts which are generally known or are admitted by the opposing party, in the opinion of the Court."<sup>3</sup>

Two cases in Thailand have handled the right of publicity and the scope of the consent given by the injured person. In one case, the images of two fashion models during a fashion show were used in magazines for the promotion of the products that the models were wearing during the show. The models, however, never consented to the use of these photos in any context other than for the fashion show. The court of first instance considered that the right of publicity of these fashion models had been injured and that they should therefore be compensated.<sup>4</sup> However, in another case, an actress allowed a defendant to take images and motion pictures of her. The same pictures were used and published for the promotion of the defendant's products in magazines, on television, and on the Internet. According to the plaintiff, the defendant did not respect the scope of her consent. Therefore, the utilization of the image and motion pictures was broader than expected. Nevertheless, the Supreme Court

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<sup>3</sup>See §§ 34:11 to 34:16 for discussion of defamation.

<sup>4</sup>Penal Code, S.327.

#### [Section 34:25]

<sup>1</sup>Civil Procedure Code, S.84.

<sup>2</sup>Civil Procedure Code, S.84.

<sup>3</sup>Civil Procedure Code, S.84.

<sup>4</sup>Court of First Instance No. 47/2549 (2006), Kingprayorn and Lane v. Dapper General Appraisal Ltd., Sirichai Sripaisarn and Pamornthip Sripaisarn.

considered that the evidence brought by the plaintiff was insufficient, and thus rejected the request.<sup>5</sup> Consequently, the court will determine the scope of consent on a case-by-case basis.

### § 34:26 Types of relief available

In cases of violation of the right of publicity, the Civil and Commercial Code states that the injured person may require an abatement of injury if any consent has been given.<sup>1</sup> In cases where the injury continues, the claimant may apply for an injunction.<sup>2</sup> If the violation is considered to be a wrongful act, the injured person may request compensation such as monetary damages.<sup>3</sup> The court is entitled to determine how to compensate for the damage and, in cases of injury to reputation, the court may therefore propose that proper measures be taken for the rehabilitation of the injured party's reputation<sup>4</sup> and/or order payment for damages.

### § 34:27 Defenses available

The main defense of the defendant is, of course, to establish the scope of the consent given by the allegedly injured person. The 2007 Constitution refers implicitly to one main exception that provides a defense—the public interest. Indeed, the 2007 Constitution in Section 35 § 2 states that “publicity and dissemination of words or pictures to the public which infringe upon or adversely affect the right of a person to family, honor, reputation or privacy are allowed in case they are done in the public interest.”<sup>1</sup> Therefore, if this publicity is done for a purely commercial interest, such as the use of the information for a newspaper, the allegedly injured person may argue the absence of a public interest in order to defeat the defense. Nevertheless, to date in Thailand, there have been no cases where the court based its decision on the exception of public interest regarding publicity rights.

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<sup>5</sup>Supreme Court, No. 6355/2548 (2005) Butsakorn Pornwansiriwech v. Suprederm International Ltd.

#### [Section 34:26]

<sup>1</sup>Civil and Commercial Code, S.18.

<sup>2</sup>Civil and Commercial Code, S.18.

<sup>3</sup>Civil and Commercial Code, S.420 and 423.

<sup>4</sup>Civil and Commercial Code, S.438 and 448.

#### [Section 34:27]

<sup>1</sup>Constitution of the Kingdom of Thailand B.E. 2550, Section 35 § 2.

The Civil and Commercial Code also provides defenses available in cases of violation of the publicity right. Indeed, if the violation is considered to be a wrongful act, but the defendant is acting in lawful defense or under lawful command, even if there is injury, then the defendant is not liable for damages.<sup>2</sup> However, the allegedly injured person may claim compensation from the person against whom the lawful defense was directed, or from the person who wrongfully gave the command.<sup>3</sup>

The Penal Code also deals with some defenses for the defendant in cases of violation of the right of publicity. The defendant will not be considered to have committed a compoundable offense if any of the following applies:

- the defendant can prove that he or she was expressing his or her opinion or statement in good faith, by way of fair comment on any person who is subject to public criticism;<sup>4</sup>
- the imputation is accurate in cases of defamation,<sup>5</sup> but if the imputation relates to personal matters, the defendant is not entitled to defame this person or his or her right of publicity;<sup>6</sup> or
- the opinion that defames someone is expressed during the proceedings of the court.<sup>7</sup>

### § 34:28 Time period for asserting claim

According to the Civil and Commercial Code, the period of prescription is normally 10 years.<sup>1</sup> However, the prescription will be one year from the day “when the wrongful act and the person bound to make the compensation became known to the injured person, or 10 years from the day the wrongful act was committed.”<sup>2</sup>

Regarding criminal cases, the prescription will be five years from the date of commission of the offense in case of

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<sup>2</sup>Civil and Commercial Code, S.449.

<sup>3</sup>Civil and Commercial Code, S.449.

<sup>4</sup>Penal Code, S.329.

<sup>5</sup>See § 34:15, discussing defenses to defamation claims.

<sup>6</sup>Penal Code, S.330.

<sup>7</sup>Penal Code, S.331.

#### [Section 34:28]

<sup>1</sup>Civil and Commercial Code, S.193/30.

<sup>2</sup>Civil and Commercial Code, S.448.

outrage to the reputation of someone. However, if this outrage has been published, the prescription will be 10 years.<sup>3</sup>

In case of a compoundable offense, the complaint must be filed with the police within three months from the date on which the compoundable offense and the person who committed the offense became known to the injured person.<sup>4</sup>

## II. ADVERTISING LAW

### A. SOURCES OF ADVERTISING LAW

#### § 34:29 Basic principles

In Thailand, advertising is regulated either directly or indirectly by several pieces of legislation. Some legislation is applicable generally, such as the Consumer Protection Act (CPA),<sup>1</sup> while others only target specific categories of advertising. For instance, the Food Act,<sup>2</sup> the Drug Act,<sup>3</sup> the Cosmetics Act,<sup>4</sup> and the Alcoholic Beverage Control Act<sup>5</sup> regulate the advertising and labeling of food, drugs, cosmetics, and alcoholic beverages respectively, and are not applicable to other types of advertisements. The CPA, however, sets out the basic principles of advertising laws ensuring truth in advertising and full disclosure by labeling.<sup>6</sup> The CPA applies to all types of advertising, except for matters that are specifically controlled by other laws, to which the Act is applicable, but only to the extent that it is not in repetition of or inconsistent with the relevant specific legislation.<sup>7</sup>

While most advertisements are not subject to prior government approval, advertising of certain products must be reviewed and approved by a responsible authority prior to launching, such as advertising of food, drugs, and medical

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<sup>3</sup>Penal Code, S.95.

<sup>4</sup>Penal Code, S.96.

[Section 34:29]

<sup>1</sup>B.E. 2522.

<sup>2</sup>B.E. 2522.

<sup>3</sup>B.E. 2510.

<sup>4</sup>B.E. 2535.

<sup>5</sup>B.E. 2551.

<sup>6</sup>Consumer Protection Act, Chapter 2.

<sup>7</sup>Consumer Protection Act, S.21.

devices.<sup>8</sup> The government mainly supervises advertising in Thailand through three official bodies. The Office of the Consumer Protection Board monitors all forms of advertising and labels, and looks for violations of the CPA. The Directing Board for Broadcast Division controls and examines radio and TV advertisements. The Food and Drug Administration oversees and approves food, drug, and cosmetic advertisements. Alcoholic beverage advertisements are approved by the Office of Alcoholic Beverage Control at the Department of Disease Control, Ministry of Public Health.

### § 34:30 Constitutional sources

The 2007 Constitution guarantees freedom of expression and provides a basis for advertising rights.<sup>1</sup> Article 45 of the 2007 Constitution states that “a person shall enjoy the liberty to express his or her opinion, make speeches, write, print, publicize, and make expression by other means.” The government cannot restrict such freedom, except by virtue of the provisions of the law specifically enacted for the purpose of maintaining the security of the state, public order or morality, protecting the rights, liberties, dignity, reputation, family, or privacy rights of other person, or safeguarding public health,<sup>2</sup> and in any event only to the extent of necessity, and such restrictions must not affect the essential substances of the guaranteed rights and liberties.<sup>3</sup> Like all other types of speech, commercial speech is fully protected by the constitution, though it may be subject to restrictions imposed by specific legislation to the extent permitted by the constitution.

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<sup>8</sup>*See, e.g.*, Food Act B.E. 2522, Drug Act B.E. 2510, and Medical Instrument Act B.E. 2551.

#### [Section 34:30]

<sup>1</sup>B.E. 2550.

<sup>2</sup>Constitution of the Kingdom of Thailand B.E. 2550, Art. 45.

<sup>3</sup>Constitution of the Kingdom of Thailand B.E. 2550, Art. 29.

**§ 34:31 Codified sources**

A number of pieces of legislation apply to advertising, including the Consumer Protection Act,<sup>1</sup> the Civil and Commercial Code, the Penal Code, the Trademark Act, and the Copyright Act. Specific laws that regulate advertising of particular products include the Food Act,<sup>2</sup> the Drug Act,<sup>3</sup> the Medical Instrument Act,<sup>4</sup> the Cosmetics Act,<sup>5</sup> the Psychotropic Substances Act,<sup>6</sup> the Hazardous Substance Act,<sup>7</sup> Tobacco Products Control Act,<sup>8</sup> the Narcotic Act,<sup>9</sup> and the Alcoholic Beverage Control Act.<sup>10</sup>

The Consumer Protection Act, as amended by the Consumer Protection Act (No. 2), sets forth the general standards for advertising and labeling.<sup>11</sup> The Act deals with the publication and use of unfair and misleading advertisements, including the use of false statements in advertisements. It prohibits use of statements that are unfair to consumers or statements that may cause damages to the society in advertisements, whether such statements relate to the origin, conditions, quality, quantity, characteristics, delivery, acquisition, or usage of the goods or services.<sup>12</sup> Statements that are deemed unfair to the consumers and/or detrimental to society include statements that are false or exaggerated, misleading in the material part concerning the goods or services, encouraging illegal or immoral acts or leading to deterioration of the Thai culture, or reducing public unity.<sup>13</sup> Several ministerial regulations were adopted under the CPA that deemed certain advertisements in violation of the Act, such as those that refer to H.M. the King, H.M. the Queen,

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**[Section 34:31]**

<sup>1</sup>B.E. 2522.

<sup>2</sup>B.E. 2522.

<sup>3</sup>B.E. 2510.

<sup>4</sup>B.E. 2551.

<sup>5</sup>B.E. 2535.

<sup>6</sup>B.E. 2518.

<sup>7</sup>B.E. 2535.

<sup>8</sup>B.E. 2535.

<sup>9</sup>B.E. 2522.

<sup>10</sup>B.E. 2551.

<sup>11</sup>Consumer Protection Act, S.22–35.

<sup>12</sup>Consumer Protection Act B.E. 2522, S.22.

<sup>13</sup>Consumer Protection Act B.E. 2522, S.22.



or the Heir to the Throne without permission.<sup>14</sup> Furthermore, the CPA limits acceptable means of advertising to those that are not detrimental to the health, body or mind, or not likely to create a nuisance for the consumers.<sup>15</sup>

The CPA establishes the Consumer Protection Board entrusted with the duty to implement the provisions of the Act. Additionally, a specific committee is created to oversee the regulation of advertisements in particular (Advertising Committee). The Advertising Committee has the authority to order various corrective measures or bar any advertising that is in violation of the CPA.<sup>16</sup>

In addition to the CPA, which sets out the standards with which all advertisement must comply in general, several other pieces of legislation govern specific types of advertisements. As stated above, advertising of food, drugs, and medical devices, for instance, are subject to the Food Act, the Drug Act, and the Medical Instrument Act, respectively, all of which require government approval before an advertisement can be launched publicly. On the other hand, advertising of tobacco, psychotropic, and narcotic substances is generally prohibited according to the Tobacco Products Control Act, the Psychotropic Substances Act, and the Narcotic Act, respectively, although limited exceptions apply.

The Tobacco Products Control Act effectively prohibits all forms of advertising of tobacco in Thailand through almost any form of communication.<sup>17</sup> The Act forbids not only the advertisement of the product itself, but also the presentation of either the name or the mark of the tobacco product in most media forms. An exception is made for advertisements that are transmitted into the country from abroad by either radio or television when those advertisements were not aimed specifically at Thailand.<sup>18</sup> The law also prevents the advertisement of anything that appears to be tobacco or is an imitation of tobacco, as well as sponsorship.

With respect to advertisements for alcoholic beverages, these are overseen and approved by the Office of Alcoholic Beverage Control at the Department of Disease Control,

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<sup>14</sup>Ministerial Regulations No. 3 B.E. 2526.

<sup>15</sup>Ministerial Regulations No. 3 B.E. 2526.

<sup>16</sup>Ministerial Regulations No. 3 B.E. 2526.

<sup>17</sup>Tobacco Products Control Act, S.8.

<sup>18</sup>Tobacco Products Control Act, S.8.

Ministry of Public Health, under Section 32 the Alcoholic Beverage Control Act.<sup>19</sup> This section states:

No person shall advertise or display names or trademarks of alcoholic beverages which are deemed to exaggerate their qualifications, or which induce people to drink such alcoholic beverages, either directly or indirectly.

Any advertisements or public relations which are made by the manufacturers of alcoholic beverages of all kinds, may be conducted only for the purpose of giving information or creative knowledge, without displaying pictures of the products or packages, except for the display of the symbol relating to such alcoholic beverage, or the symbol of the company which manufactures the alcoholic beverage. In this regard, it shall be in accordance with the Ministerial Regulations.

The provisions of paragraph one and paragraph two shall not apply to advertisements which originate from outside the Kingdom.

Therefore, advertising of alcoholic beverages is still permitted, but only for the purpose of giving information or creative knowledge, without displaying pictures of the products or packages, except with regard to the displaying of the symbol of such alcoholic beverage, or the symbol of the company that manufactures the alcoholic beverage in Thailand.<sup>20</sup> Such advertising remains subject to the Alcoholic Beverage Control Act, which requires an advertiser who wishes to launch an advertisement by means of radio or television broadcasts, films, newspapers, or other printed matter, to submit the sound, pictures, films, or text of the advertisement to the Alcoholic Beverage Control Committee and obtain Alcoholic Beverage Control Committee approval before launching it publicly.<sup>21</sup>

In addition to food products, the FDA also oversees advertising of medicines. The Thai Drug Act requires FDA approval for drug advertisements that are provided through radio broadcasting, sound amplifiers, broadcast television, slide projecting or movies, or printed material.<sup>22</sup> The text, sound, and pictures used in the advertisement must be

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<sup>19</sup>B.E. 2551.

<sup>20</sup>Ministerial Regulation, Criteria and display signs for advertising or promotion of alcoholic beverages, B.E. 2551.

<sup>21</sup>Section 16 of the Alcoholic Beverage Control Act, B.E. 2551.

<sup>22</sup>Drug Act, S.88bis.

approved.<sup>23</sup> The Act limits approval, and specifically forbids, among other things, drug advertisements from making “miraculous” claims of cures, making “false or exaggerated claims,” or giving misleading information regarding the drug’s properties (particularly regarding the ingredients and effects of the drug).<sup>24</sup>

The provisions of the law that apply to protection of consumers fall under the terms of the Consumer Protection Act (CPA). In this respect, the part pertaining to advertisements shall be applied *mutatis mutandis* to all cosmetic advertisements, with the Minister exercising the authority of the Consumer Protection Board and the Committee exercising the authority of the Advertisement Committee.<sup>25</sup> For this reason, the Consumer Protection Board must approve cosmetic advertisements under the CPA.

Advertising Law can also run into the confines and protections of trademark law, which allows trademark owners to exercise control over usage of the mark, including use in advertising. In Thailand, both registered and unregistered marks are protected by law, although registered marks receive significantly broader and stronger protection under the Trademark Act than unregistered rights (such as those giving rise to passing off claims), which receive very thin protection and are based on very onerous evidentiary requirements.<sup>26</sup>

### § 34:32 Case law sources

Thailand is a code country that follows civil law. The doctrine of strict compliance with judicial proceedings does not apply and there is no jury system in Thailand. Nevertheless, most courts will take into account the decision of other courts, especially appellate courts, in interpreting statutes.

Advertising cases do not usually reach the court because the Consumer Protection Act empowers the Advertising Committee to supervise advertisements in Thailand, and impose restrictions and/or order the advertiser to take corrective measures when a violation of the CPA is found. Thus, most problematic advertisements are reviewed and evaluated by the Advertising Committee rather than courts.

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<sup>23</sup>Drug Act, S.88bis.

<sup>24</sup>Drug Act, S.88.

<sup>25</sup>Section 37 of Cosmetic Act, B.E. 2535.

<sup>26</sup>Trademark Act, S.44, 46.

Specific laws, such as the Food Act,<sup>1</sup> the Drug Act,<sup>2</sup> and the Alcoholic Beverage Control Act,<sup>3</sup> only regulate the advertising and labeling of food, drugs, and alcoholic beverages respectively, and each product has its own committee and regulations for overseeing and approving advertisements, before they are launched to the public. The most problematic advertisements are also reviewed and evaluated by their own Committee, for example the Advertising Committee of the CPA, rather than the Courts.

### B. FALSE ADVERTISING

#### § 34:33 Main sources of law

The foremost applicable legislation with regard to false and misleading advertising is the Consumer Protection Act.<sup>1</sup> The CPA was passed to protect consumers by requiring truth in advertising and full disclosure in labeling. The CPA mandates that an advertisement must not contain a statement that is unfair to consumers or that may cause damage to the society, such as a false or exaggerated statements, or a statement that is likely to mislead consumers as to the material part of the goods or services, whether by using or referring to academic papers, statistics, or other sources that are untrue or exaggerated.<sup>2</sup> Additionally, the CPA states that it is illegal to intentionally cause the public to be misled about the origin, condition, quality, quantity, or other material part of the goods or services of others or of one's own goods or services.<sup>3</sup> The CPA empowers concerned authorities to take corrective measures against unscrupulous business operators, such as to prescribe that such advertising be carried out with a direction or warning as to the usage or dangers, to restrict the use of advertising media, or to prohibit the advertising in question.<sup>4</sup>

An advertisement that uses false designation of origin or

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[Section 34:32]

<sup>1</sup>B.E. 2522.

<sup>2</sup>B.E. 2510.

<sup>3</sup>B.E. 2551.

[Section 34:33]

<sup>1</sup>B.E. 2522.

<sup>2</sup>See § 34:31 for further discussion of the CPA.

<sup>3</sup>Consumer Protection Act, S.47.

<sup>4</sup>Consumer Protection Act, S.24.

misrepresents the nature, characteristics, or source of origin of a good or service may be subject to liability under the Trademark Act and/or Civil and Commercial Code and the Penal Code. The Penal Code prohibits “fraudulent or deceitful means” in selling goods so as to deceive a buyer as to the source of origin, nature, quality, or quantity of such goods.<sup>5</sup> The Penal Code further proscribes use of a name, figure, artificial mark, or any wording used in connection with the trade or business of another person in order to make the public believe that the goods or services belong to such other person.<sup>6</sup> The same provision also forbids the dissemination of false statements in order to discredit other persons’ products or business with intent to benefit one’s own business. In addition, a civil passing off or unfair competition claim may be formulated under section 420 of the CCC, which is a basic torts provision in Thai law. It states that “[a] person who, willfully or negligently, unlawfully injures the life, body, health, liberty, property, or any right of another person, is said to commit a wrongful act and is bound to make compensation therefore.”<sup>7</sup> The provision has been interpreted very broadly by the Thai judiciary and could be used as a basis for potential reputation-related or passing off claims. However, these types of claims are usually subject to very heavy evidentiary requirements.

Additionally, various specific pieces of legislation including the Food Act, Drug Act, Cosmetic Act, Alcoholic Beverage Control Act, and Medical Instrument Act, prohibit false, misleading, exaggerated or deceptive advertising of certain products such as food, drinks, food supplements, medicines, cosmetics, alcoholic beverages, and medical devices.<sup>8</sup>

### § 34:34 Definition and significant subdivisions

In most applicable legislation, “false” or “unfair” advertising is defined broadly to include all untruthful, misleading, exaggerated, or otherwise deceptive advertisements.<sup>1</sup> Under the Consumer Protection Act, which is the primary legislation in this area, “unfair” advertising includes, but is not

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<sup>5</sup>Penal Code, S.271.

<sup>6</sup>Penal Code, S.272.

<sup>7</sup>Civil and Commercial Code, S.420.

<sup>8</sup>See also § 34:31 for further discussion of these Acts.

#### [Section 34:34]

<sup>1</sup>See, e.g., Consumer Protection Act S.22, Drug Act S.88.

limited to, untruthful and exaggerated statements, statements that are likely to mislead the consumers as to the material part of the goods or services (whether by using or referring to academic papers, statistics, or other sources that are false or exaggerated), statements that encourage illegal or immoral acts or lead to the deterioration of the Thai culture, and statements that would decrease public unity.<sup>2</sup>

### § 34:35 Main factors or elements of claim

The elements of claim for false advertising differ depending on the legislation invoked as a basis for the action. In general, at least the following three elements would be considered:

- (1) there must be a communication to the public or consumers (that amounts to advertising);
- (2) such communication includes some inaccuracies or omissions that render the statement false, misleading, exaggerated, deceptive, or otherwise unfair to consumers; and
- (3) such communication causes harm or is likely to cause harm.

### § 34:36 Examples of claims found false or misleading and claims found not false or misleading

The Advertising Committee established under the CPA is the foremost agency for monitoring advertising in Thailand. Each year, the Committee declares a number of advertisements false or misleading, and hence unfair to consumers. Examples of such advertisements include a car advertisement that claims to save the most gasoline and is “number one” in terms of quality and also sales volumes. The Committee concluded that such statements were false and/or misleading, because the claim to be “number one” in terms of quality comes from satisfaction of such services relating to quality or performance, while the claim that the car saves the most gasoline was not based on real everyday use, but rather on the results in a test drive, whereby the speed of the vehicle was limited and there was no luggage being carried by the car. Therefore, the real facts relating to the car’s

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<sup>2</sup>Consumer Protection Act, S.22.

performance could not possibly meet the claims that were detailed in the advertisement.<sup>1</sup>

The advertisement of alcoholic beverages are monitored by the Alcoholic Beverage Control Committee under the Alcoholic Beverage Control Act. This law was announced in February 6, 2008,<sup>2</sup> while the committees were formed by an implementing announcement from the Prime Minister's Office on November 14, 2008. Because of the limited time that the committee has been active, there have not been many disputed issues or example cases for such advertisements available from this committee.

### § 34:37 Types of relief available

The relief available for false advertising depends on the legislation that is invoked as the basis of the claim. Generally, civil remedies include injunctions and damages; whereas criminal penalties consist of imprisonment (which is very unlikely) and fines.

However, the Consumer Protection Act does not provide consumers with a direct right of redress. Rather, complaints must be brought before the Consumer Protection Board, which is conferred with various enforcement powers, including the authority to restrict or bar any advertising that is in violation of the CPA, to order corrective measures, and to bring civil and criminal actions.<sup>1</sup>

### § 34:38 Defenses available

Although several statutes are applicable to false advertising, in most cases, if not all, truthfulness of the statement is a defense to any false advertising claim.<sup>1</sup> Thus, the advertiser must establish that the advertisement is true and that it does not create misunderstanding or confusion among consumers.

Under the Consumer Protection Act, an advertiser will be

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#### [Section 34:36]

<sup>1</sup>Advertising Committee Order No. 2/2554.

<sup>2</sup>B.E. 2551.

#### [Section 34:37]

<sup>1</sup>Consumer Protection Act, S.39.

#### [Section 34:38]

<sup>1</sup>See, e.g., Consumer Protection Act, S.28.

given the opportunity to prove that the advertisement is not false or otherwise misleading.<sup>2</sup> When there is a suspicion that a statement in an advertisement is falsified or exaggerated, the CPA empowers the Advertising Committee to order the advertiser to prove the truth of the statement.<sup>3</sup>

**§ 34:39 Evidence required to support advertising claims based on tests**

If a claim or statement in an advertisement is based on research, a scientific test, or a survey, an advertiser is generally required to substantiate such claim by evidence demonstrating that the study referred to is reliable, accurate, and broad enough to justify the statement made in the advertisement.<sup>1</sup> In the context of drugs, medical equipment, and other regulated substances or devices, specific requirements may apply with respect to the type, procedure, and scope of tests or studies that may be used to support an advertising claim.

**§ 34:40 Time period for asserting claim**

The statute of limitations for a false advertising action depends on the type of claim asserted. The Consumer Protection Act does not provide standing for consumers to bring an action directly in court. Instead, consumers must submit complaints to the Consumer Protection Board, which is empowered by the Act to instigate civil and criminal actions based on consumers' complaints.

For civil tort actions based on section 420 of the Civil and Commercial Code,<sup>1</sup> the claim for damages will be barred after one year from the date on which the false advertising and the identity of the person bound to make compensation became known to the injured party, or 10 years from the date when the false advertising was made.<sup>2</sup>

Criminal actions based on sections 271 and 272 of the

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<sup>2</sup>Consumer Protection Act, S.28.

<sup>3</sup>Consumer Protection Act, S.28.

**[Section 34:39]**

<sup>1</sup>See Office of the Consumer Protection Board Manual B.E. 2549.

**[Section 34:40]**

<sup>1</sup>See § 34:33 for further discussion of these provisions of the Civil and Commercial Code.

<sup>2</sup>Civil and Commercial Code, S.448.



Penal Code<sup>3</sup> must be brought within 10 years and five years, respectively.<sup>4</sup>

**C. THIRD PARTY TRADEMARKS AND  
COPYRIGHTS IN ADVERTISING**

**§ 34:41 Permissibility of using another party's  
trademark in advertising without that party's  
authorization**

In Thailand, trademarks are primarily protected under the Trademark Act.<sup>1</sup> The Act provide protection for registered trademarks, service marks, certification marks and collective marks, and well-known marks. Under Thai law, registered trademarks receive considerably broader and stronger protection than unregistered marks. The owner of an unregistered mark cannot commence a criminal action against an infringer under the Trademark Act. However, the trademark owner may be entitled to initiate a civil action based on the claim of passing-off goods as being under the IP owner's trademark, in order to prevent the use of such mark and/or to recover actual proven damages.

The Trademark Act grants an owner of a registered mark the exclusive right to use the mark in connection with the goods or services registered.<sup>2</sup> The Act broadly states that "when a trademark is registered, the person registered as the proprietor of that trademark shall have the exclusive right to its use for the goods in respect of which registration has been granted."<sup>3</sup> Any unauthorized use of a trademark in connection with the goods or services for which it has been registered constitutes a violation of the trademark owner's exclusive rights. Therefore, when a registered mark appears in an advertisement or promotional material without authorization, even in a referential manner, this may be a basis for a civil action against the unauthorized user.

The exemption from infringement liability provided under the Act only excludes bona fide use of a person's own name,

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<sup>3</sup>See § 34:33 for further discussion of these provisions of the Penal Code.

<sup>4</sup>Penal Code, S.95.

**[Section 34:41]**

<sup>1</sup>Trademark Act B.E. 2534 (A.D. 1991), as amended by the Trademark Act (No. 2) B.E. 2543 (A.D. 2000).

<sup>2</sup>Trademark Act, S.44.

<sup>3</sup>Trademark Act, S.44.

name of his or her business (or those of his or her predecessors in business), and use of bona fide descriptions of the character or quality of his or her goods.<sup>4</sup>

As for unregistered marks, unauthorized use in advertising may be subject to liability for passing off. A passing off action would be based on the CCC, which imposes liability on any person who, willfully or negligently, unlawfully injures the life, body, health, liberty, property, or any right of another person.<sup>5</sup> In addition to the civil passing off claim, the Penal Code provides a basis for criminal actions. Forgery, passing off, and various commercial dealings in forged or imitated marks, which have been registered anywhere in the world, are considered criminal offenses.<sup>6</sup>

**§ 34:42 Permissibility of using another party's copyrighted work in advertising without that party's authorization**

In Thailand, copyrighted works are protected under the Copyright Act.<sup>1</sup> Categories of works protected under Thai copyright law include literary creations (including computer programs), dramatic creations, artistic creations, musical creations, audiovisual creations, cinematographic works, sound and video broadcasting works, and other works of a literary, scientific, or artistic nature that are created as expression.<sup>2</sup> As in other countries, copyright protection under Thai law is automatic. A copyright is valid for the life of the author plus an additional period of 50 years after his or her death.<sup>3</sup> If the author is a legal entity, the copyright exists for a period of 50 years after the work is first published or, if unpublished, after its creation.<sup>4</sup>

The owner of copyright holds exclusive rights to utilize the copyrighted work, which includes reproduction, adaptation and public dissemination of the work, renting of an original or copy of a computer program, audio-visual work, cinemato-

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<sup>4</sup>Trademark Act, S.47.

<sup>5</sup>Civil and Commercial Code, S.420.

<sup>6</sup>Penal Code, S.273–275.

**[Section 34:42]**

<sup>1</sup>B.E. 2537 (1994).

<sup>2</sup>Copyright Act, S.6.

<sup>3</sup>Copyright Act, S.19.

<sup>4</sup>Copyright Act, S.19.

graphic work, and sound recording, grant of benefits accruing from the copyright to other persons, and grant of licenses to other persons to utilize the work.<sup>5</sup> Persons other than the copyright owner may not exercise these exclusive rights without authorization of the copyright owner.

Unauthorized use of copyrighted work of others in advertising constitutes a copyright infringement except where such unauthorized activity falls within one of the statutory safe harbors under the Copyright Act. Sections 32–43 of the Copyright Act prescribe statutory exemptions from copyright infringement in Thailand.<sup>6</sup> These extensive provisions serve to ensure that sufficient safeguards are in place to allow the public to utilize copyrighted work for legitimate purposes. Primarily, the statutory exemptions cover activities that would normally be regarded as “fair use” of a copyrighted work, and other activities that are deemed necessary to encourage further creation and allow advancement in arts and sciences. In particular, the Act exempts from infringement liability all personal use; research and educational use; use in news reporting; and comment, criticism, or review of the copyrighted work, provided that these activities do not conflict with the normal exploitation of the work or unreasonably prejudice the rights of the copyright owner.<sup>7</sup> In addition, a reasonable recitation, quotation, or reference to a copyrighted work with an acknowledgement of the ownership of copyright would not constitute an infringement, so long as it is noncommercial in nature.<sup>8</sup>

Although the Copyright Act provides rather broad exemptions from copyright infringement, most of the exemptions are conditioned upon the unauthorized use being not-for-profit or noncommercial in nature. Since use of copyrighted work in advertising is likely to be for commercial use, the scope of permissible unauthorized use is in fact very narrow.

### **§ 34:43 Time period for asserting claim of trademark infringement or copyright infringement**

Both trademark and copyright infringement are criminal offenses pursuant to the Trademark Act and the Copyright Act, respectively. The statute of limitations for a criminal

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<sup>5</sup>Copyright Act, S.15.

<sup>6</sup>Copyright Act, S.32–43.

<sup>7</sup>Copyright Act, S.32.

<sup>8</sup>Copyright Act, S.33.

trademark infringement action is 10 years from the date on which the infringement was committed.<sup>1</sup>

The statute of limitations for copyright infringement under the Copyright Act is three years from the date when the copyright owner becomes aware of the infringement and the identity of the infringer.<sup>2</sup> In any event, an action for infringement of copyright must be initiated no later than 10 years from the date of infringement.<sup>3</sup> Nevertheless, because copyright infringement is a compoundable offense,<sup>4</sup> a complaint must be made within three months from the date on which the offense and the offender became known to the copyright owner.<sup>5</sup> Otherwise, the prosecution will be precluded by prescription.

In addition to criminal actions, copyright and trademark owners may pursue civil actions based on section 420 of the Civil and Commercial Code, which is a basic tort provision under Thai law.<sup>6</sup> In this case, the claim for damages will be barred by prescription after one year from the date on which the infringement and the identity of the person bound to make compensation became known to the trademark or copyright owner, or 10 years from the date when the infringement was committed.<sup>7</sup>

### III. ENTERTAINMENT LAW

#### A. SOURCES

#### § 34:44 Basic principles

In Thailand, broadly, Entertainment Law is comprised of several pieces of legislation. The basic principles of Entertainment Law mainly stem from broadcasting laws and the

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[Section 34:43]

<sup>1</sup>Penal Code, S.95.

<sup>2</sup>B.E. 2537, S.63.

<sup>3</sup>B.E. 2537, S.63.

<sup>4</sup>B.E. 2537, S.66.

<sup>5</sup>Penal Code, S.96.

<sup>6</sup>Civil and Commercial Code, S.420.

<sup>7</sup>Civil and Commercial Code, S.448.

Film and Video Act.<sup>1</sup> The Copyright Act governs the rights of producers and performers, while the relationship and compensation regimens are governed under the principle of contract. Furthermore, the CD Product Manufacturing Act provides stringent requirements for optical disc production and importation of the raw material and equipment.<sup>2</sup> The Computer-Related Crime Act prohibits several acts of information distribution through computers.<sup>3</sup> For instance, transmissions of information into computers or Web sites that are related to offenses of national security, terrorism, and defamation are prohibited.<sup>4</sup> Furthermore, both the old and new constitutions recognize freedom of expression.

### § 34:45 Constitutional sources

Article 37 of the former Constitution provided the freedom of persons to communicate with one another by lawful means.<sup>1</sup> In the present Constitution, freedom of communication is provided under Article 36.<sup>2</sup> Furthermore, the Constitution prohibits checking, restraining, or disclosing communications between, or among, persons, including such other acts that are aimed at gaining advance knowledge of the contents of such communications.<sup>3</sup> Exceptions are available, specifically for the purpose of protecting national security, or to maintain peace and order or the good morals of the people.

### § 34:46 Codified sources

There is no unified statutory source of Entertainment Law, and each aspect of legal issues involving Entertainment Law is instead regulated separately. For instance, the Broadcasting Act, the Film and Video Act, the CD Product Manufacturing Act, the Computer Related-Crime Act, the Control of

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#### [Section 34:44]

<sup>1</sup>Act Relating to the Conducting of Broadcasting and Television Business B.E. 2551; and Film and Video Act, B.E. 2551.

<sup>2</sup>CD Product Manufacturing Act B.E. 2548, S.5, 16, 17, and 18.

<sup>3</sup>Computer-Related Crime Act, B.E. 2550.

<sup>4</sup>Computer-Related Crime Act, B.E. 2550, S.14 (2) and (3).

#### [Section 34:45]

<sup>1</sup>Constitution of the Kingdom of Thailand B.E. 2540, Article 37.

<sup>2</sup>Constitution of the Kingdom of Thailand B.E. 2550, Article 36.

<sup>3</sup>Constitution of the Kingdom of Thailand B.E. 2550, Article 36.

Video Tape and Business Act, and the Intellectual Property Act all provide certain levels of regulation of the entertainment industry. Each sector also has its own regulating agency.

Under the Film and Video Act, theater owners and broadcasters are required to submit films to the Board of Censors.<sup>1</sup> The Board may cut portions of a film, or may ban it completely for violations of social and cultural norms or for disturbing the public order and national security.<sup>2</sup> Thus, theater owners and broadcasters often engage in some self-censorship before submitting a film to the Board.<sup>3</sup> The foregoing rules does not apply to the 1) news, 2) films made for personal use, 3) films made for promoting government agencies, 4) films to be shown during film festivals described by the Board, 5) films which have been approved by way of the Broadcasting Act, and 6) other films as described under the Ministry Announcement.<sup>4</sup>

After more than 77 years under the previous legislation, a new Film and Video Act replacing its predecessor finally entered into force in Thailand on June 2, 2008. The new Act has considerable consequences for foreign producers shooting films in the Kingdom as well as for foreign films intended to be screened in the country. Thailand is also unfortunately well known for the large number of pirated videos being sold on its streets. This new Act thus integrates certain provisions which may provide useful new options for sanctioning those selling such counterfeit products. While the need for the new Act was widely recognized, some concerns over its adoption remain

The significant development of the new law is the role played by the Board of Film and Video Censors and/or screened. The Board has been empowered to control movies shot in Thailand as well as films screened here. Board members are appointed by the Minister of Tourism and Sports and the Minister of Culture based on proposals from the National Film and Video Board, which itself is composed

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**[Section 34:46]**

<sup>1</sup>State Dept., Country Reports on Human Rights Practices: Thailand (2000), available at: <http://www.state.gov/g/drl/rls/hrrpt/2000/eap/776.htm>.

<sup>2</sup>Section 25 of the Film and Video Act B.E. 2551.

<sup>3</sup>State Dept., Country Reports on Human Rights Practices: Thailand (2000), available at: <http://www.state.gov/g/drl/rls/hrrpt/2000/eap/776.htm>.

<sup>4</sup>Section 27 of the Film and Video Act B.E. 2551.

of representatives of various ministries including the Office of the Prime Minister.<sup>5</sup> Under the new Act, the Board will be made up of seven members representing both the public and private sector from industries including motion picture, video, television, cultural arts, and consumer protection.

The Board is responsible for a host of duties including inspecting and rating movies to be screened, rented, exchanged, or sold in Thailand, permitting the projection, exchange, rental, or sale of movies and videos, authorizing the advertisements of motion pictures, and approving their exportation outside Thailand.<sup>6</sup> Because of its ability to engage in censorship, the Board has broad powers in determining the content of viewable films, which should be counterbalanced by the new rating system.<sup>7</sup>

The new Act establishes for the first time in Thailand a rating system for films and videos. Ratings are used in many countries in order to set up and demarcate a movie's thematic and content suitability for viewers. Similar to Australia, Thailand has opted for the participation of the government in determining a film's rating. The Act creates seven categories:

- General Audience (no age restriction)
- 13 year olds and above
- 15 year olds and above
- 18 year olds and above
- 20 year olds and above
- Banned films (a category also applied in Australia and Sweden)
- Educational films<sup>8</sup>

The Ministerial Regulations on Classifications of Categories of Film B.E. 2552 was issued in 2009. These Regulations consider that films which do not contain sex scenes, strong language, or violence may obtain the rating "general audience." Films authorized for viewers who are 20 years old and above may include sexual activity, but still cannot include any explicit scenes, any scenes where a person is committing a crime, or any scenes involving drug use.

It is mandatory to file an application for inspection by the

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<sup>5</sup>Section 10 of the Film and Video Act B.E. 2551.

<sup>6</sup>Section 18 of the Film and Video Act B.E. 2551.

<sup>7</sup>Section 26 of the Film and Video Act B.E. 2551.

<sup>8</sup>Section 26 (1) to (7) of the Film and Video Act B.E. 2551.

Board in order to obtain the necessary approval for screening, renting, and selling movies in Thailand. The criteria, procedures, and conditions of the application and approval will be determined by the Board and published in the Government Gazette. However, foreign movies which are screened in a film festival in Thailand may not be required to obtain the approval from the Board.

With respect to the CD Product Manufacturing Act, the framework established by the law is premised on notification systems under which manufacturers must notify the authorities of their intention to manufacture discs.<sup>9</sup> The government authority responsible for notification systems is the Department of Intellectual Property. Copyright owners wishing to obtain disc production services must similarly notify officials of their intention to obtain such services.

Drafted by the National Electronics and Computer Technology Center (NECTEC), and enforced by the Ministry of Information and Communications Technology, the Computer-Related Crime Act came into effect in July 2007.<sup>10</sup> The Act subjects those circulating pornographic material or libelous content through e-mails to heavy fines. The Act also requires internet service providers (ISPs) to keep log files of bandwidth consumption and internet traffic and records of individual users for 90 days. Although the Act is intended to encourage electronic transactions, security on the internet, and electronic commerce in Thailand, while discouraging anti-authoritarian people from carrying out illegal activities on the network, the law will inevitably impact the online entertainment industry.

The Control of Video Tape and Business Act B.E. 2530 (1987) has been replaced by the Film and Video Act B.E. 2551 (2008). The repealed Control of Video Tape and Business Act pertained to a person operating a business enterprise to rent out, exchange, and/or sell tapes or TV materials for remuneration in the form of service fees or other compensation. The Film and Video Act now regulates this aspect.<sup>11</sup> Any such person needs to obtain a business license. Furthermore, the person in business must submit the tape or TV, or CD-ROM materials to the Film and Video Committee for inspection and approval.

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<sup>9</sup>CD Product Manufacturing Act B.E. 2548, S.16, 17, and 18.

<sup>10</sup>*New Law Takes Aim at Cyber-Criminal*, The Nation, July 18, 2007.

<sup>11</sup>Film and Video Act.B.E. 2551.



Copyright in Thailand is protected and governed by the Copyright Act B.E. 2537 (A.D. 1994), Ministerial Regulations B.E. 2540 (A.D. 1997), and the Notification of the Ministry of Commerce Re List of Member Countries to the Convention Governing Protection of Copyrights or the Convention Governing Protection of Performers' Rights. The Copyright Act protects an owner of copyrighted works from infringement by giving the owner the power to file a civil and/or criminal complaint to enforce his or her copyright.<sup>12</sup> The following categories of entertainment works are protected under Thai copyright law: a) literary creations, including computer programs; b) dramatic creations; c) artistic creations; d) musical creations; e) audio-visual creations; f) cinematographic works; and g) sound and video broadcasting works.<sup>13</sup> The owner of the copyright holds exclusive rights to utilize the copyrighted work, which include reproduction, adaptation, and public dissemination of the work, renting of an original or copy of a computer program, audio-visual work, cinematographic work, sound recording, grant of benefits accruing from the copyright to other persons, and grant of licenses to other persons to utilize the work.<sup>14</sup> As in other countries, copyright protection under Thai law is automatic. No registration is required, although the Department of Intellectual Property does provide a recordation system. As elsewhere, copyright is valid for the life of the author plus an additional period of 50 years after his or her death.<sup>15</sup> If the author is a legal entity, the copyright exists for a period of 50 years after the work is first published or, if unpublished, after its creation.<sup>16</sup>

### § 34:47 Case law sources

Thailand has a rich legal history and system of civil law and justice, which functions relatively smoothly. The doctrine of strict compliance with judicial precedence is not required. For the most part, courts remain open to previous interpretations that have been made, particularly with regard to higher courts.

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<sup>12</sup>Copyright Act, B.E. 2537, S. 15, 69, 70; and Civil and Commercial Code, S.420.

<sup>13</sup>Copyright Act, B.E. 2537, S. 4.

<sup>14</sup>Copyright Act, B.E. 2537, S. 15.

<sup>15</sup>Copyright Act, B.E. 2537, S. 19.

<sup>16</sup>Copyright Act, B.E. 2537, S. 23.

A situation putting the law into force occurred in early 2007. Thailand's censorship policies and the current regime's handling of censorship came under international scrutiny when the Royal Thai police blocked the YouTube Web site when a video appeared that some interpreted as offensive to the King.<sup>1</sup> Although the regime justified the blockage under the country's "lese majesty law," which is incorporated into the constitution, this action triggered numerous criticisms against the current regime, which has often used "lese majesty" as a means of censoring criticism against the regime.<sup>2</sup> The continued presence of self-censorship within print media, outdated laws regulating television and radio broadcasting, and blocking of Web sites (an estimated 46,000 Web sites were blocked in Thailand, either by the police or by the Information and Communications Technology Department),<sup>3</sup> as well as the fact that film and other mass media forms are not defined under the Constitution and thus are not granted freedom of communication protection from censorship,<sup>4</sup> indicate that censorship within Thailand still exists to some degree.

## B. TYPES

### § 34:48 Legal matters characterized as entertainment law

The most significant legal issue impacting the entertainment industry is piracy. According to one study, Thailand costs the movie industry almost US\$150 million in lost revenue each year.<sup>1</sup> While such numbers vary from study to study, the impact of online piracy and counterfeiting is just as conceivable. A statement from the Institute of Policy Innovation says that "piracy and counterfeiting also cause significant and measurable harm to the overall economy, directly affecting upstream suppliers and downstream

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#### [Section 34:47]

<sup>1</sup>YouTube to Help Block Web access to Pages insulting King, Bangkok Post, April 7, 2007.

<sup>2</sup>YouTube to Help Block Web access to Pages insulting King, Bangkok Post, April 7, 2007.

<sup>3</sup>Censorship Must not be Arbitrary, Bangkok Post, April 6, 2007.

<sup>4</sup>Kamol Sukin, Censorship in the Spotlight, The Nation, April 22, 2007 at 1A.

#### [Section 34:48]

<sup>1</sup><http://www.uoregon.edu/~bruceb/Movie%20Exports%20Project.pdf>.

purchasers, with a cascading effect that includes lost output, lost earnings, lost jobs, and lost tax.”<sup>2</sup>

Another type of legal dispute in the entertainment industry arises from lack of clarity in chain of title and licensing. This has a particularly significant impact on the local music industry and Thai artists due to the lack of knowledge and understanding of copyright concepts. This often leads to disputes between rights management associations as to who is the actual rightful owner of the works.

## V. ART LAW

### A. SOURCES

#### § 34:49 Main sources of law relating to sale of artworks

The sale of artworks is not specifically regulated in Thailand. General principles of commercial contracts under the Civil and Commercial Code would apply to the sale of artworks. However, some artworks considered to be “antiques” or “objects of art” may be prohibited from being traded under the Act on Ancient Monuments, Antiques, Objects of Art, and National Museums B.E. 2504 (A.D. 1961).<sup>1</sup> Section 4 of the Act provides that “antique” means an archaic movable property, whether produced by man or by nature, or being any part of an ancient monument, human skeleton, or animal carcass, which, by its age or characteristics of production or historical evidence, is useful in the field of art, history, or archaeology.<sup>2</sup> “Object of art” is defined as a thing skillfully produced by craftsmanship that is highly valuable in the field of art.<sup>3</sup>

The Act on Ancient Monuments, Antiques, Objects of Art, and National Museums B.E. 2504 (A.D. 1961) also empowers the Director-General (DG) of the Department of Fine Arts (DFA) to register any antique or object of art not being in the possession of the DFA, should the DG deem that any

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<sup>2</sup><http://www.uoregon.edu/~bruceb/Movie%20Exports%20Project.pdf>.

#### [Section 34:49]

<sup>1</sup>As last amended by the Act on Ancient Monuments, Antiques, Objects of Art, and National Museums (No. 2) B.E. 2535.

<sup>2</sup>As last amended by the Act on Ancient Monuments, Antiques, Objects of Art, and National Museums (No. 2) B.E. 2535, S.4.

<sup>3</sup>As last amended by the Act on Ancient Monuments, Antiques, Objects of Art, and National Museums (No. 2) B.E. 2535, S.4.

antique or object of art is useful or has a special value in the field of art, history, or archaeology. However, in the event that the DG deems that any antique, whether it is registered or not, or any object of art should be conserved as a national property, the DG will have the power to prevent such an antique or object of art from being traded, by means of notification in the Government Gazette. The Director-General will have the power to purchase such an antique or object of art.<sup>4</sup>

Other antiques and objects of art that are not prohibited from trade under this Act can be sold. However, any person wishing to engage in trading antiques and objects of art must obtain a license from the DG of the DFA.<sup>5</sup> The license has to be displayed in a conspicuous place of the business premises. Also, the traders (licensees) must make a list of the antiques or objects of art, or duplicate antiques or duplicate objects of art, that are in their possession and must keep the list within the business premises.<sup>6</sup> The license is valid until December 31 of the year of its issuance.<sup>7</sup> The renewal of license has to be filed with the DG before the expiration thereof.<sup>8</sup>

#### § 34:50 Sources of law for artists' rights

The law relating to artists' right or "Droit de Suite" is not established specifically in Thailand.<sup>1</sup> Artists' rights are currently protected, as are authors' rights or the right of the copyright owner in general, by the Copyright Act B.E. 2537 (A.D. 1994). The law recognizes artistic works, including drawings and paintings, sculptural works, lithographic

<sup>4</sup>As last amended by the Act on Ancient Monuments, Antiques, Objects of Art, and National Museums (No. 2) B.E. 2535, S.14.

<sup>5</sup>As last amended by the Act on Ancient Monuments, Antiques, Objects of Art, and National Museums (No. 2) B.E. 2535, S.19.

<sup>6</sup>As last amended by the Act on Ancient Monuments, Antiques, Objects of Art, and National Museums (No. 2) B.E. 2535, S.20.

<sup>7</sup>As last amended by the Act on Ancient Monuments, Antiques, Objects of Art, and National Museums (No. 2) B.E. 2535, S.19ter.

<sup>8</sup>As last amended by the Act on Ancient Monuments, Antiques, Objects of Art, and National Museums (No. 2) B.E. 2535, S.19.

#### [Section 34:50]

<sup>1</sup>Chaiyod Hemaratchata. *Copyright Law*. Bangkok: Nititham, 2002. p. 153.

works, architectural works, photographic works, illustrations, and applied arts, as protected works.<sup>2</sup>

Under the Copyright Act B.E. 2537 (A.D. 1994), copyright owners have exclusive right to do each of the following:<sup>3</sup>

- (1) reproduce or adapt the work;
- (2) disseminate the work to the public;
- (3) rent the original or a copy of a computer program, audio-visual work, cinematographic work, and sound recording;
- (4) grant benefits accruing from the copyright to other persons; and
- (5) grant licenses to other persons to exercise the rights under (1), (2), or (3), with or without imposing any conditions, so long as any imposed conditions do not restrict fair competition.

The foregoing rights are often referred to as “economic rights.”

Furthermore, the creator of a copyrighted work under the Copyright Act B.E. 2537 (A.D. 1994), is entitled to (1) identify himself or herself as the creator of the work; and (2) prohibit the assignee of the copyright or any other person from distorting, abridging, adapting, or doing anything to the work so as to cause damage to the creator’s reputation or prestige.<sup>4</sup> Also, upon the creator’s death, the creator’s heirs are entitled to lodge a suit for the enforcement of such rights during the term of the copyright protection unless otherwise agreed in writing.<sup>5</sup> These rights are often referred to as “Droit Moral” or “moral rights.”

Excluding the duration of protection of applied art, which is for a period of 25 years from the date of its creation,<sup>6</sup> the duration of protection of a copyrighted work generally exists for the lifetime of the creator and continues to exist for a period of 50 years after his or her death.<sup>7</sup>

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<sup>2</sup>B.E. 2537, S.4.

<sup>3</sup>B.E. 2537, S.15.

<sup>4</sup>B.E. 2537, S.18.

<sup>5</sup>B.E. 2537, S.18.

<sup>6</sup>B.E. 2537, S.22.

<sup>7</sup>B.E. 2537, S.19.

In addition, Thailand is a state party to the Berne Convention for the Protection of Literary and Artistic Works<sup>8</sup> and the TRIPS Agreement, each of which offers international protection of authors' and artists' rights. Thailand has adhered to the Berne Convention since 1931 and TRIPS since January 1, 1995. Copyrighted works of a creator from a member country of either the Berne Convention or TRIPS will enjoy protection under the Thai Copyright Act of 1994. The Copyright Act also protects foreign performers' rights of member countries of TRIPS.<sup>9</sup>

## B. RELATIONSHIPS

### § 34:51 Relationship between dealer and artist

Generally, the rights and duties arising out of the relationship of the artist and dealer are defined by reference to an express or implied contract existing between the parties under the Civil and Commercial Code (e.g., buyer-seller, commission agency-principal, broker, etc.). In one form of the relationship, the dealer buys the artwork directly from the artist and resells it to the purchaser. In light of this, the ownership of the sold artwork is transferred to the buyer from the moment when the contract of sale is entered into.<sup>1</sup>

Another type of relationship between a dealer and an artist would include the artist giving the dealer the artwork for exhibition and sale for a fee. In this case, the relationship is generally a commercial relationship in accordance with the theory of commission agency under the law of agency, as provided by the Civil and Commercial Code. In this relationship, the dealer will act as the artist's agent with authority to sell the goods or to consign the goods for the purposes of sale. The appointment of the artist's agent as the commission agent need not be made in writing.<sup>2</sup> Any transaction conducted by the commission agent is deemed as the act of

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<sup>8</sup>Berne Convention for the Protection of Literary and Artistic Works, ratified by the Royal Decree on Prescribing Conditions for Protection of International Copyright B.E. 2536.

<sup>9</sup>B.E. 2537, S.18; Royal Decree on Prescribing Conditions for Protection of International Copyright B.E. 2536, S.4.

#### [Section 34:51]

<sup>1</sup>Civil and Commercial Code, S.458.

<sup>2</sup>Civil and Commercial Code, S.798.

the principal artist.<sup>3</sup> The artist's agent is entitled to a usual rate of remuneration on every transaction conducted by him or her<sup>4</sup> and, thus, has to report his or her activities to the principal upon execution, without delay.<sup>5</sup> Also, where the artworks have been entrusted to a commission agent (e.g., art gallery, exhibition), the provision of the Civil and Commercial Code concerning deposit applies *mutatis mutandis*.<sup>6</sup>

Another type of relationship between a dealer and an artist would include the artist agreeing to pay remuneration to a dealer for indicating the opportunity for the sale of artwork. In this case, the relationship is generally a commercial relationship, similar to a brokerage, where the dealer earns a percentage fee based on the sale price of the artwork upon earlier agreement between the broker and artist. However, if the amount of the remuneration is not fixed, the usual remuneration is deemed to have been agreed upon.<sup>7</sup> A broker is presumed to have no authority to receive, on behalf of the artist, payments or other performances due under the contract.<sup>8</sup>

In addition, other types of contracts between the dealer and the artist may be established upon the agreement between the parties. Thus, general principle of contract law under the Civil and Commercial Code will be applied.

### § 34:52 Relationship between purchaser and dealer

The relationship between the purchaser and the dealer can be structured in several ways. If the dealer bought the artwork directly from the artist and resold it to the customer/purchaser, the relationship between purchaser and dealer is ruled by the principles of the sale of goods under the Civil and Commercial Code. In this situation, the dealer is bound to deliver the artwork to the purchaser<sup>1</sup> and is liable for (1) any defect in the sold artwork that impairs either its value or its fitness for ordinary purposes, or purposes of the con-

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<sup>3</sup>Civil and Commercial Code, S.844.

<sup>4</sup>Civil and Commercial Code, S.833.

<sup>5</sup>Civil and Commercial Code, S.841.

<sup>6</sup>Civil and Commercial Code, S.842.

<sup>7</sup>Civil and Commercial Code, S.846.

<sup>8</sup>Civil and Commercial Code, S.849.

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<sup>1</sup>Civil and Commercial Code, S.461.

tract;<sup>2</sup> and (2) the consequences of any disturbance to the peaceful possession of the purchaser caused by another claim to the right over the artwork that existed at the time of sale or by the fault of the dealer.<sup>3</sup> The foregoing liabilities will be applied notwithstanding whether or not the dealer knew of the existence of the defect.<sup>4</sup> However, if the purchaser knew of the defect or disturbance cause at the time of sale, the dealer is not liable for such effects.<sup>5</sup>

As for the dealer who acts as the commission agent of the artist, the commission agent, by a sale or purchase or any transaction made on account of the artist, acquires rights against the other party to such transaction and becomes bound to him or her.<sup>6</sup> As for the broker, a broker is not personally liable for the performance of the contracts entered into through his or her mediation, unless he or she has not communicated the name of the artist/party to the other party.<sup>7</sup>

In addition, the Consumer Protection Act B.E. 2522 (A.D. 1979) will also be applied against any contract or relationship between purchaser and dealer as the general law principle. This law covers the sale of goods, the advertisement, labels, and term of the contracts between the dealer and purchaser.<sup>8</sup>

### C. ART AUCTIONS

#### § 34:53 Laws relating to auctions and auction houses

An auction is regarded as sale by auction under the Civil and Commercial Code. The Civil and Commercial Code provides general regulations regarding auctions. Under the Civil and Commercial Code, an auction is completed when the auctioneer announces its completion by the fall of the hammer or by any other customary manner.<sup>1</sup> Until such an-

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<sup>2</sup>Civil and Commercial Code, S.472.

<sup>3</sup>Civil and Commercial Code, S.475.

<sup>4</sup>Civil and Commercial Code, S.472.

<sup>5</sup>Civil and Commercial Code, S.473 and S.476.

<sup>6</sup>Civil and Commercial Code, S.837.

<sup>7</sup>Civil and Commercial Code, S.848.

<sup>8</sup>*See, e.g.*, § 34:31 for further discussion of the Consumer Protection Act.

#### [Section 34:53]

<sup>1</sup>Civil and Commercial Code, S.509.



nouncement is made, any bidder may retract his or her bid.<sup>2</sup> Alternatively, the auctioneer can withdraw property from the auction whenever he or she thinks that the highest bid is insufficient.<sup>3</sup> The auctioneer and the seller are prohibited from bidding or employing any person to bid at an auction.<sup>4</sup> However, this provision will be waived for the seller if the seller expresses his or her intention in the advertisement of the auction to reserve such rights.<sup>5</sup> A bidder ceases to be bound by his or her bid as soon as a higher bid is made,<sup>6</sup> and the highest bidder must pay the price on the completion of the sale, or at the time fixed by the advertisement.<sup>7</sup> In the event that the highest bidder fails to pay the price, the auctioneer must resell the property. If the net proceeds of such sale do not cover the previous price, then the original bidder is liable for the difference.<sup>8</sup>

The Act in Control of Auctions and Antiques Sales B.E. 2474 (A.D. 1931)<sup>9</sup> provides the rules for the auction houses and auctioneers in Thailand. This Act provides for the licensing and the conduct of business by auctioneers, and prohibits an unlicensed person from carrying on the business of auctioneering.<sup>10</sup> The license will be requested from and granted by the Minister of Interior under the form specified by the Ministry Regulations.<sup>11</sup> The person who is entitled to request a license to be an auctioneer must (1) be 20 years old; (2) know the Thai language well enough to be able to read and write; and (3) not have been sentenced to imprisonment under the Penal Code.<sup>12</sup> The license issued cannot be transferred and will be valid until December 31 for each year.<sup>13</sup> Any unlicensed auctioneers will be punished with imprisonment not exceeding six months and/or with a fine

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<sup>2</sup>Civil and Commercial Code, S.509.

<sup>3</sup>Civil and Commercial Code, S.513.

<sup>4</sup>Civil and Commercial Code, S.511 and S.512.

<sup>5</sup>Civil and Commercial Code, S.512.

<sup>6</sup>Civil and Commercial Code, S.514.

<sup>7</sup>Civil and Commercial Code, S.515.

<sup>8</sup>Civil and Commercial Code, S.516.

<sup>9</sup>As amended by Act B.E. 2481 (1938), Act B.E. 2484 (1941), Act B.E. 2495 (1952), and latest amended by Act B.E. 2535 (1992).

<sup>10</sup>B.E. 2474, S.4(1).

<sup>11</sup>B.E. 2474, at S.5.

<sup>12</sup>B.E. 2474, S.6.

<sup>13</sup>B.E. 2474, S.11.

not exceeding Baht 5,000.<sup>14</sup> Any auctioneers using an expired license to carry on the business will be punished with a fine not exceeding Baht 2,000.<sup>15</sup> To engage in the business, an auctioneer must (1) always clearly display the sale information at the place of sale; (2) be present at the place of sale while having the sale and be ready to show the license to the Auction Inspector when required; (3) keep an account of each sale and make complete entries therein of such sale; (4) notify the date and place of sale to the Auction Inspector at least three days in advance; and (5) display his or her name accompanied by the word “auctioneer” above the outer door and at the office.<sup>16</sup>

The Act in Control of Auctions and Antiques Sales also provides the authority to the Auction Inspector to request a list of essential matters relating to the sale of goods by auction<sup>17</sup> and inspect the license, books and accounts, and any property in any auction houses at any time, and the auctioneer has the duty to cooperate.<sup>18</sup> Failure to comply with the aforesaid duties will result in the punishment of the auctioneer with a fine not exceeding Baht 2,000.<sup>19</sup> The law also provides punishment for the managing director, manager, or representative of the legal entity of the auctioneers as well, unless it is proven that such a person did not participate in or agree with the punishable act.<sup>20</sup>

#### D. “STOLEN” ARTWORKS

##### § 34:54 Legal issues regarding “stolen” artworks

The Penal Code provides the general principle of the offenses of the receiving stolen property. Section 357 of the Penal Code states the following:

whoever assists in concealing, disposing of, making away with, purchasing, receiving in pledge or otherwise any property obtained through the commission of an offence, and such offence being theft, snatching, extortion, blackmail, robbery, gang-robbery, cheating and fraud, misappropriation or misappropriation by an official, is said to receive stolen property,

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<sup>14</sup>B.E. 2474, S.12.

<sup>15</sup>B.E. 2474, S.12bis.

<sup>16</sup>B.E. 2474, S.7§ 1.

<sup>17</sup>B.E. 2474, S.7§ 2.

<sup>18</sup>B.E. 2474, S.13.

<sup>19</sup>B.E. 2474, S.12bis.

<sup>20</sup>B.E. 2474, S.12quarter.

and shall be punished with imprisonment not exceeding five years or fine not exceeding THB10,000, or both.

If the offence of receiving stolen property is committed for profit or against the property obtained by theft under section 335(10), robbery or gang-robbery, the offender shall be punished with imprisonment of six months to 10 years and fine of THB1,000 to THB20,000.

If such offense of receiving stolen property is committed against the property obtained by theft according to section 335 bis, by the robbery according to section 339bis, or by the gang-robbery according to section 340bis, the offender shall be punished with imprisonment of five to 15 years and fine of THB10,000 to THB30,000.<sup>1</sup>

Based on the above-mentioned provision, if the purchaser can prove that he or she had a bona fide intent in buying the goods, the purchaser will not be punished.<sup>2</sup> Also, the plaintiff has to prove that the defendant knowingly purchased the stolen goods.<sup>3</sup> In addition, if the purchaser purchases the stolen goods with the bona fide intent to return the goods to their owner or the person from whom the goods were stolen, the penalty will not be applied.<sup>4</sup> Given this fact, the purchaser is entitled to be reimbursed by the buyer under the law on commercial contract under the Civil and Commercial Code.<sup>5</sup>

The Act on Ancient Monuments, Antiques, Objects of Arts and National Museum B.E. 2504 (A.D. 1961) provides a specific punishment for the person who is in wrongful possession of any antique or object of art. Under section 31, any person who finds any antique or object of art that is buried in, concealed, or abandoned at any place under such circumstances that no person could claim to be its owner, and converts the same to himself or herself or to another person, will be liable to imprisonment for a maximum of seven years and/or a maximum fine of Baht 700,000.<sup>6</sup> Also, any person

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**[Section 34:54]**

<sup>1</sup>Penal Code, S.357.

<sup>2</sup>Supreme Court Case No.9401/2538, No.21/2539.

<sup>3</sup>Supreme Court Case No.129/2535.

<sup>4</sup>Thaveekieat Meenakanit. *Penal Code*. Bangkok: Winyuchon, 2006. p. 556; Supreme Court Case No.2611/2527, No.1958/2517.

<sup>5</sup>Civil and Commercial Code, S.475.

<sup>6</sup>B.E. 2504, S.31.

who conceals, disposes, makes away with or purchases, receives in pledge or otherwise, any antique or object of art obtained through the commission of an offense under section 31, will be liable to imprisonment for a term of a maximum of five years and/or a maximum fine of Baht 500,000.<sup>7</sup>

Also, an auctioneer who does not immediately report to the police or the inspector whenever there is a reason to suspect that any property offered for sale or sold to him or her has been criminally acquired will be punished with imprisonment of one to three years or a fine of Baht 10,000 to Baht 30,000.<sup>8</sup> In addition, if the commission of the offense is an act relating to the property of any ancient place or any object of art under the Act on Ancient Monuments, Antiques, Objects of Arts and National Museum, the offender will be punished with imprisonment of five to 15 years, or a fine of Baht 50,000 to Baht 150,000.<sup>9</sup>

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<sup>7</sup>B.E. 2504, S.31bis.

<sup>8</sup>B.E. 2474, S.12ter.

<sup>9</sup>B.E. 2474, S.12ter.