

Copyright Litigation

The first edition of this publication aimed to provide practical guidance to anyone involved in multi-jurisdictional copyright litigation. This second edition has been updated to include more topical issues such as liability of internet service providers and protection of computer software.

Laws and procedures regarding copyright are so different worldwide, that endless opportunities for forum shopping exist both when bringing a claim for infringement or when countering a third party's claim. This book is intended as an easy reference guide to the differing regimes in some of the world's most important jurisdictions.

After the great success of our two previous books, *Patent Litigation* and *Trade Mark Litigation*, we were proud to be able to include a record number of top level contributors.



SECOND
EDITION
2015

Copyright Litigation

General Editors:
Thierry Calame, Lenz & Staehelin &
Massimo Sterpi, Studio Legale Jacobacci & Associati

THE EUROPEAN LAWYER
REFERENCE

Copyright Litigation

Jurisdictional comparisons

Second edition 2015

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Foreword

**Thierry Calame, Lenz & Staehelin
& Massimo Sterpi, Studio Legale Jacobacci & Associati**

COPYRIGHT IS THE NEW STEEL

In recent years, copyright has taken a central role in the global economy.

Creativity, once the elitist domain of artists, has become the bread and butter of daily life. Anyone posting a comment or a snapshot online can be an author for copyright purposes. In addition, virtually every digital start-up is based on copyrightable contents, such as graphic design, texts, images or music.

In the job market, what counts is no longer the physical energy of the worker, but rather his creativity. At the same time, trying to enlarge copyright protection for new forms of creations – such as programme formats, culinary recipes or fragrances – is a growing trend.

In such a scenario, copyright takes a fundamental role in protecting one's creativity, and often becomes the basis for one's success.

At the same time, another form of copyright protection becomes increasingly relevant, namely that afforded to databases. When data mining represents an essential prerequisite in decision-making processes, ownership of data becomes the new source of power.

However, circulation and distribution of content also raises serious and yet unresolved issues. Can an Internet Service Provider, who not only takes advantage of the circulation of content but is often actively involved in shaping such circulation, avail itself of exemptions of liability for underlying copyright infringements? Where should the limits be drawn between hosting, granting access to and transporting (infringing) content on the one hand and active participation in the content distribution on the other?

Finally, projects of massive appropriation and distribution of content (such as the scanning of entire libraries) increase the conflict between the public interest to access knowledge and the rights of the authors, originally created to enable authors to live off their creations.

A rising source of power, copyright is the steel of the current world economy.

Rome/Zurich, 29 October 2014

Thierry Calame Massimo Sterpi

Thailand

Tilleke & Gibbins Nandana Indananda,
Suebsiri Taweepon & Hassana Chira-Aphakul

1. SOURCES OF LAW

1.1 What are the principal sources of law and regulation relating to copyright and copyright litigation?

Thailand is a civil law jurisdiction. The principal legal sources are acts, statutes and regulations. The principal source of law relating to copyright is the Copyright Act B.E. 2537 (1994). As a civil law country, Thai courts will interpret and apply existing law according to the intent of the legislative drafters. Accordingly, the court is not bound to follow the reasoning used in precedents; however, they can be used as a reference on a case-by-case basis.

International agreements protecting copyright of which Thailand is also a member include the Berne Convention for the Protection of Literary and Artistic Works and the TRIPS Agreement. Thailand, thus, is bound to protect copyright works of member countries of both international agreements. However, Thailand is not a signatory to the Rome Convention of 1961 or the Universal Copyright Convention. Therefore, only persons with unpublished works who are nationals, subjects or residents of a country party to the Berne Convention, and those whose works were first published in such a member country may claim copyright protection in Thailand, provided certain conditions are met.

1.2 What is the order of priority of the relevant sources, ie which takes precedence in the event of a conflict?

The Thai system of jurisprudence is dualistic. The fact that Thailand has entered into a treaty or convention with a foreign country does not automatically give the provisions of that treaty or convention the force of law within Thailand. Treaties are not law in Thailand until they are made law by legislative enactment, such as an act, royal decree or ministerial regulation. In accordance with principles set out in the Act on Conflict of Laws, foreign law may serve as the law governing a particular case. It must, however, be proved to the satisfaction of the court that the foreign law is not contrary to public order or good morals; otherwise the court will apply Thai law.

2. COURT AND ADMINISTRATIVE SYSTEM

2.1 In which courts are copyrights enforced? Are they specialised copyrights courts? If not, what level of expertise can a copyright holder expect from the courts?

Copyrights are first tried in the Intellectual Property and International Trade (IP and IT) court. The Act for the Establishment of and Procedures for Intellectual Property and International Trade Court B.E. 2539 (1996) provides

the IP and IT court with jurisdiction over all civil and criminal cases with respect to intellectual property. The IP and IT court was established in 1997 as an additional court of first instance, to consider intellectual property and international trade disputes. All cases appealed from the IP and IT court will be appealed directly to the Supreme Court.

2.2 Is there any administrative body (eg a copyright office)? If so, does it have any jurisdiction in copyright litigation?

The Department of Intellectual Property (DIP) was established in 1992. It assumed responsibility for the administration of intellectual property from the Department of Commercial Registration. The DIP does not have jurisdiction in copyright litigation; however, it provides mediation and settlement services for intellectual property disputes which can be filed before bringing cases to the courts.

2.3 To what extent are courts willing to consider, or are bound by, the opinions of other national or foreign courts that have handed down decisions in similar cases?

Under the Thai judicial system, the courts are not bound by prior court rulings when deciding an issue under the Copyright Act or any other Thai law for that matter. Every case brought before a Thai court is subject to the judge's discretion of the plain meaning of the applicable laws. However, published Supreme Court decisions are an important part of the legal development of Thailand and are frequently used as secondary authority. Likewise, a foreign court's decision may be submitted merely as one piece of evidence in a certain case. The Thai court still has discretion regarding whether to consider such foreign decision.

2.4 Who can represent parties before the courts handling copyright litigation?

Only an attorney-at-law who has acquired an attorney's licence and has registered with the Lawyers Council of Thailand can represent parties before the courts handling copyright litigation.

2.5 What is the language of the proceedings? Is there a choice of language?

The proceeding must be conducted in Thai. However, for copyright cases, if the documents submitted to the IP and IT court are in English and the parties agree that all or any part of such documents need not be translated into Thai, the court may permit the parties to submit such documents as evidence in the case without translation. However, this is contingent on the court's determining that such documents are not evidence on the main issues of the case.

3. SUBSTANTIVE LAW

3.1 What types of works are copyrightable under your law? Does your national law provide for a closed list of copyrightable works or for an open list?

Under the Copyright Act B.E. 2537 (1994), there are nine categories of works of authorship which are copyrightable:

- literary works (including computer programs);
- dramatic works;
- artistic works;
- musical works;
- audiovisual works;
- cinematographic works;
- sound recordings;
- sound and video broadcasting; and
- other works in the literary, scientific or artistic domain.

A work is also required to meet four elements as follows: expression of idea; expression in a recognised work; originality and non-illegality. The copyright protection for some works may also overlap with the protection granted by other fields of intellectual property law such as trade mark and design patent. Nevertheless, copyright protection does not extend to ideas, procedures, processes, systems, methods of use, operations, concepts, principles, discoveries, or scientific or mathematical theories.

In light of the above, the Copyright Act generally provides a closed list of copyrightable works.

3.2 Is software considered copyrightable under your law?

Computer software is copyrightable as a literary work under the Thai Copyright Act B.E. 2537 (1994).

3.3 Does the author of a work have to be a national of your country for the work to qualify as copyrightable or does a work qualify for copyright protection irrespective of the nationality of the author?

Thailand, with its accession to the Berne Convention, Paris Act (1971), adopts the Act's criteria for both domestic and international protection of copyright. Section 8 of the Thai Copyright Act B.E. 2537 (1994) states the requirements regarding nationality as follows:

'The creator shall be entitled to copyright protection in the work he has created under the following conditions:

i. For unpublished work, the creator must be a Thai national or a resident of Thailand, or a national or resident of a member country of an international convention on the protection of copyrights of which Thailand is also a member, during the entire time or most of the time of the creation of the work;

ii. Where the work has been published and the initial publication was made in Thailand or a member country of an international convention on the protection of copyrights of which Thailand is also a member, or where the initial publication was made outside Thailand in a non-member country of an international convention on the protection of copyrights of which Thailand is a member, if the publication in Thailand or in a member country of an international convention on the protection of copyrights of which Thailand is a member occurs within 30 days of the initial publication or if the creator has the characteristics specified in (i) at the time of the initial publication. Where Thai nationality is a requirement and the creator is a juristic person, such juristic person must be incorporated under the laws of Thailand.'

The term ‘an international convention on the protection of copyrights of which Thailand is also a member’ in this provision includes the Berne Convention and TRIPS Agreement. Moreover, as per sub-section (ii), the actual first publication may be made outside Thailand, including in a country that is a member of the Berne Convention or TRIPS. It is deemed to be the first publication if the subsequent publication agreements – Berne Convention or TRIPS – are made within 30 days from the actual first publication.

3.4 What types of rights are covered by copyright? To what extent are moral rights covered by copyright?

Copyright consists of a set of exclusive rights. Generally, these are the rights solely given to the copyright owner to exclude others from doing the same acts which the copyright owner is entitled to do, stated as follows:

- (i) reproduction or adaptation;
- (ii) communication to public;
- (iii) letting of the original or the copies of a computer program, an audiovisual work, a cinematographic work and sound recordings;
- (iv) giving benefits accruing from the copyright to other persons;
- (v) licensing the rights mentioned in (i), (ii) or (iii) with or without conditions with the provision that the said conditions shall not unfairly restrict the competition.

The rights to reproduction, adaptation and communication to the public are conventional rights within the concept of copyright. Letting of the original or copies of a computer program, an audiovisual work, a cinematographic work, or a sound recording is a new right recently proposed in TRIPS and adopted by the 1994 Act.

The present Copyright Act recognises moral rights covering the right of paternity and the right of integrity. The author of the copyright work is entitled to identify himself as the author and to prohibit the assignee or any person from distorting, shortening, adapting, or doing anything against the work to the extent that such act would cause damage to the reputation or dignity of the author. When the author has died, the heir of the author is entitled to litigation for the enforcement of their right through the term of copyright protection unless otherwise agreed in writing, as stated in the Copyright Act. The moral rights particularly protect the author’s fame or dignity when they are no longer the copyright owner.

3.5 What defences are available to an alleged infringer? To what extent can ‘fair use’ or ‘fair dealing’ be used as a defence? If these doctrines do not exist, are there any comparable limitations?

An alleged infringer shall not be deemed to infringe if the act does not conflict with a normal exploitation of the copyright work by the owner of the copyright and does not unreasonably prejudice the legitimate right of the owner of the copyright. Thailand has no direct legislation on doctrine or defences of ‘fair use’ or ‘fair dealing’.

Nevertheless, in accordance with the Berne Convention and the TRIPS

Agreement, the Copyright Act provides the similar fair use defences as the implied three-step test. Therefore an act shall not be considered as copyright infringement when it consists of the following three principles:

- any certain acts as stated in the Copyright Act section 32 paragraph 2, subsections (1) to (8);
- any acts which do not conflict with normal exploitation of the copyright work by the owner; or
- any acts which do not unreasonably prejudice the legitimate right of the owner.

Generally, section 32 provides for the three-step test doctrine by separating the first step from the second and third steps. This leaves room for the second and third steps, without the first, to be used as a general provision on fair use. To date, there is no court case directly confronting the matter.

3.6 Are compulsory licences available? If so, under which circumstances?

Compulsory licences are not available under the Thai Copyright Act B.E. 2537 (1994). However, the Act grants the Director-General of the Department of Intellectual Property the right to permit the use of a copyrighted work which has already been disseminated to the public in print or other similar form to any Thai national for use in study, teaching or research, which are for non-profit purposes. The petitioner must make a request to the Director-General and show evidence that he or she has requested permission from the copyright owner to use the copyrighted work for translating into Thai or for reproducing a copy of the work previously translated and printed into Thai, but was refused or an agreement could not be reached within a reasonable period of time. Upon receipt of the request, the Director-General will have both parties reach an agreement on the matters of compensation and conditions for use of the copyright.

3.7 Is there a requirement of copyright registration? Is copyright registration required to enforce a copyright, ie to obtain damages or other relief? Is a copyright deposit required? Is a copyright notice required? What are the consequences, if any, for failure to make a copyright deposit or to display a copyright notice?

There is no requirement of copyright registration. The work shall have automatic protection if it is copyrightable under the Copyright Act. The copyright can be enforced without the prerequisite registration. There is also no requirement for deposit or notice of copyright work.

3.8 How long does copyright protection last?

In general, the protection runs throughout the life of the author and for 50 years after the author's death. In the case of a work of joint authorship, copyright runs throughout the joint authors' lives and continues to subsist for 50 years from the death of the last surviving joint author. If the author or all joint authors die prior to the publication of the work, copyright subsists for 50 years from the first publication of the work.

If the author is a juristic person, copyright subsists for 50 years from the authorship, with the provision that if the work is published during such period, the copyright continues to subsist for 50 years from the first publication. A copyright work which is created by a pseudonymous or anonymous author subsists for 50 years from authorship, with the provision that if the work is published during such period, copyright subsists for 50 years from first publication. If the identity of the author becomes known, the general rule will apply.

Copyright in a photographic work, audiovisual work, cinematographic work, sound recording, or audio and video broadcasting work subsists for 50 years from authorship, with the provision that if the work is published during such period, copyright subsists for 50 years from first publication. Copyright in a work applied art subsists for 25 years from authorship, with the provision that if the work is published during such period, copyright subsists for 50 years from first publication.

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

3.9 How is copyright infringement assessed? Is actual copying to be proved or is substantial similarity sufficient to establish infringement?

Since the Copyright Act does not provide a presumption of infringement, the fact that a restricted act is committed and consequently constitutes infringement must be considered in each and every case. Although it is widely accepted that liability for direct infringement is determined without regard to the intent of the infringer, Thai courts have never held that copyright infringement is a strict liability.

In proving the infringement, a copyright owner must establish proof of copying either by direct or by indirect evidence. Direct evidence of copying includes an admission by an infringer, while indirect evidence includes the evidence showing access to the original work or the similarity between the original and the allegedly infringing work. The question of similarity is less debated in litigation in which the infringing work is identical in whole to the copyright work. However, in litigation in which the infringing work is similar only in part, the question of level of similarity may be raised.

In Thailand, the Copyright Act does not provide any provisions addressing the issue of substantial similarity. However, since the theory of substantial similarity of copyright infringement exists as a general principle recognised by various countries, the courts of Thailand have adopted this theory as a general principle of intellectual property law to determine the infringement of copyright.

3.10 Are there any particularities for assessing copyright infringement for specific types of works (eg software)?

Copyright infringement arises from a deliberate act in respect of all or part of a copyrighted work of another without permission, either directly or indirectly. Direct infringement consists of copying, modifying, reproduction, adaptation, communication to the public, renting out an original or a

copy (audio-visual, cinematographic, sound recording, computer program), or publication by a person who is not the copyright owner or licensee. Computer programs are infringed if the infringement involves the reproduction or adaptation of a substantial part the original work without creating a new work. The infringement of computer programs also includes disseminating to the public, or letting the original or copy of the work.

Moreover, indirect infringement also constitutes infringement. If any person is aware or should have been aware that a particular work infringes copyright and that person then engages in certain specified activities for the purpose of seeking profits, this act is deemed to be indirect infringement. The specified activities include various forms of distribution of the work to the public, such as sale, rental, or import or export.

3.11 Can a copyright be enforced against a trade mark, a domain name, a trade name, a pseudonym or other distinctive signs?

Since a trade mark includes marks or symbols related to copyright work such as photographs, drawings, devices, combinations of colours, shapes, or configurations of an object, a copyright work is therefore able to be enforced against a trade mark or other distinctive sign, provided that the copyright owner qualifies as the original creator of the disputed mark. However, the nature of a domain name, a trade name, or a pseudonym is not copyrightable, and thus copyright cannot be enforced against them.

3.12 On what grounds can a copyright be declared invalid?

Thai copyright law does not require registration in order to bring a lawsuit against an alleged infringer. Thus, there is no mechanism for invalidation of copyright under Thai copyright law. The works, once qualified under section 6 of the Copyright Act, can be protected automatically without registration. Nevertheless, a copyright work might be considered as invalidated or as a non-copyright work if it is later deemed contrary to the public order or morality.

3.13 To what extent can enforcement of a copyright expose the copyright holder to liability for an antitrust violation?

Thailand's antitrust laws prohibit unfair trade practices and abuse of a dominant position as prescribed in the Thai Trade Competition Act B.E. 2542 (1999). Thus, if a copyright owner is qualified as holding a dominant position under the law, the copyright owner may be liable for antitrust violation. Nevertheless, to date, the courts have yet to see a case brought against a copyright owner on this particular issue.

3.14 Are there any grounds on which an otherwise valid copyright can be deemed unenforceable, owing to misconduct by the copyright holder, or for some other reason? Is there a time limit for bringing an infringement action?

The Copyright Act does not have any provisions regarding unenforceable valid copyright works. Nevertheless, the owner of the copyright cannot exercise a right that would cause injury to another person, in accordance with

the Civil and Commercial Code.

The Copyright Act prescribes the statute of limitation in a copyright infringement case differently from the general statute of limitation for tort as stated in the Civil and Commercial Code. The Copyright Act makes it three years from the day the copyright owner becomes aware of the infringement as well as the identity of the infringer, with the provision that the action shall be filed no later than 10 years from the day the infringement of copyright takes place.

For criminal litigation, the Copyright Act does not provide any statute of limitation for criminal proceedings. The issue, therefore, is subject to the Penal Code, which is the basic law for criminal offences. The Penal Code requires that the injured person notify the police of the offence or file the action with the competent court within three months from knowledge of the offence and the offender; otherwise, the proceedings shall be barred by statute of limitations and, by consequence, the injured person shall not be able to apply criminal legal proceedings against the offender.

3.15 Can a copyright holder bring a lawsuit claiming both copyright infringement and unfair competition for the same set of facts?

There is no direct legislation which provides for prosecution of unfair competition under Thai intellectual property laws. Thus, a copyright holder is able to bring a lawsuit only against an infringer as civil litigation and/or criminal litigation based on copyright infringement.

4. PARTIES TO LITIGATION

4.1 Who can sue for copyright infringement (copyright holder, exclusive licensee, non-exclusive licensee, distributor)? Does a licensee need to be registered to be eligible to sue?

In civil litigation, only the owner of copyright holds the right to file an action against the infringer. The ownership of copyright may derive from the authorship, the assignment of copyright through juristic act, or legal provisions. Additionally, the exclusive licensee also can sue for copyright infringement.

4.2 Can copyright collecting societies sue for copyright infringement to enforce their members' rights? If so, can copyright holders sue in parallel with the collecting societies or do collecting societies have an exclusive right to sue for certain types of infringement?

The copyright collecting societies cannot sue for copyright infringement to enforce their members' rights unless the copyright holders grant the exclusive rights to them to do so. Although the copyright collecting societies have already sued for copyright infringement, the copyright holder(s) still has the right to sue for copyright infringement itself.

4.3 Under what conditions, if any, can an alleged infringer bring a lawsuit to obtain a declaratory judgment on non-infringement?

Under the Thai legal system, the action of obtaining a declaratory judgment on non-infringement is not allowed.

4.4 Who can be sued for copyright infringement? Can the company directors be sued personally? Under what conditions, if any, can someone be sued for inducing or contributing to copyright infringement by someone else?

Any person who commits unauthorised use of material covered by the Copyright Act in a manner that violates one of the copyright owner's exclusive rights can be sued for copyright infringement. Also, a company's directors can be sued personally if a juristic person commits an offence under the Copyright Act unless they can prove that the juristic person has committed the offence without their knowledge or consent. Under the Copyright Act, no person can be sued for inducing or contributing to copyright infringement by someone else.

4.5 How is the liability of Internet Service Providers (ISPs) treated? Under which conditions may they be considered jointly liable with the copyright infringer?

The liability of ISPs is not regulated by the Copyright Act B.E. 2537. However, if the ISPs are involved in the copyright violation, they can be jointly liable for such violation.

4.6 Is it possible to add or subtract parties during litigation?

In both civil and criminal litigation, parties are not allowed to be added during litigation. On the other hand, a plaintiff may voluntarily dismiss a lawsuit against any defendants at any time before the defendant files his answer. The withdrawal of a plaint annuls the effect of the entry of such plaint and of all other proceedings subsequent and replaces the parties to the same position as if no plaint had been entered

5. ENFORCEMENT OPTIONS

5.1 What options are open to a copyright holder when seeking to enforce its rights in your country?

The Copyright Act provides the right holder with a mechanism of enforcement of copyright by pursuing both a criminal action and a civil action. The right holder may institute a civil action to seek available remedies. Criminal prosecution is always an effective mechanism of enforcement in the Thai intellectual property system. Measures at the border are adopted to stop the outflow or inflow of infringing materials or copies.

5.2 Are criminal proceedings available? If so, what are the sanctions?

The infringement of copyright not only brings about civil liability but also criminal sanctions. In other words, the law regards the infringement of copyright as a criminal offence. The right holder may file a criminal action in the competent court himself or file a complaint with the police regarding the illegal act so that the police can investigate and submit the case to the public prosecutor and then to the court for a decision.

Apart from general criminal enforcement such as fine or imprisonment, the Copyright Act B.E. 2537 (1994) provides the following sanctions:

- the plaintiff may ask the court to impose double the punishment prescribed for the offence if the defendant has committed an offence and has been punished by virtue of the Copyright Act and subsequently commits an offence under the Act within five years of being discharged from the punishment;
- the court is empowered to order that all materials made or imported into the country and the making or the importation of such materials constitutes an infringement of copyright, and where the ownership of the copyright still belongs to the offender, it shall be vested upon the copyright owner;
- the court is empowered to order the confiscation of things used for committing the offence; or
- the plaintiff may ask the court to disburse half of the fine paid by the defendant in accordance with the judgment to the plaintiff.

5.3 Are border measures available?

According to the Customs Act (No. 12) B.E. 2497 (1954), customs officers have the power to search without a warrant within the Customs Control Zone. The exercise of this authority must be based on reasonable cause, and not only property/goods may be searched, but persons as well. Customs laws grant customs officials the power to open and examine packages while the packages are passing through customs. The same law allows officials to board and search vessels within the Kingdom's boundaries. Customs officials also

Under customs department rules and regulations, the import and export of pirated products alleged to infringe trade marks and copyright comes within the ambit of customs regulations issued pursuant to section 5 of the Export and Import Act B.E. 2522 (1979). These regulations permit an intellectual property owner to lodge a petition with the customs authorities to prevent the release of the suspected goods from the customs officials' control. Suspected copyright and trade mark infringement claims are handled with slightly different methods.

If a copyright owner has cause to suspect that goods are reproductions or modifications of a copyrighted work (ie, a 'pirated work'), the owner may pursue remedial action in a variety of different ways. The regulations that apply include:

- Notification of the Ministry of Commerce Governing the Exportation and Importation of Goods (No. 94) B.E. 2536 (1993) ('Notification No. 94');
- Notification of the Ministry of Commerce Governing the Exportation and Importation of Goods (No. 95) B.E. 2536 (1993) ('Notification No. 95');
- and
- Notification of the Customs Department providing the procedural guidelines for goods infringing copyrights owned by others (No. 28) B.E. 2536 (1993).

Customs officials have the authority to seize pirated goods under Notification No. 94. Notification No. 95 authorises officials to halt shipment of products believed to be reproduced or adapted from the copyrighted work of another person. A copyright owner or licensee may

make petition pursuant to Notification No. 95 to the customs department for inspection of the products before they are released to the importer, but there must first exist reasonable cause to believe that the works were reproduced or adapted from a copyrighted or licensed work. In matters involving suspected infringement of copyrighted works, upon reasonable cause, the rights owner or its legally authorised representative may petition a customs official for ‘suspension of the goods’ before they are released to the importer or exporter. This has the practical effect of a ‘stop shipment order.’

5.4 Are proceedings for fast removal of infringing content from the internet available?

In order to immediately remove the infringing content from the internet, the copyright owner is entitled to file an application for a preliminary injunction, either prior to or in between court proceedings, to stop further infringement on a copyright. The preliminary injunction is available under section 65 of the Copyright Act, which states as follows: *‘In case there is an explicit evidence that a person is doing or about to do any act which is an infringement of copyright or performer’s rights, the owner of copyright or performer’s rights may seek a judicial injunction to order the person to cease or refrain from such act.’*

5.5 Are ‘graduated response’-type sanctions (such as bandwidth reduction or temporary suspension of internet access) available against infringers online? If so, which authorities (administrative bodies or courts) are competent? How long does the procedure typically last?

Graduated response (or ‘three strikes’) sanctions are not available under the current Thai legal system.

5.6 Is it compulsory to send a cease and desist letter to an alleged infringer before commencing copyright infringement proceedings? What are the consequences, if any, for making unjustified threats of copyright infringement?

To initiate copyright infringement proceedings, the Copyright Act does not require the rights owner to send a cease and desist letter to an alleged infringer. Practically, the administration of intellectual property in Thailand is very reliant on police authority. The infringement or violation of intellectual property rights is normally a criminal act. Accordingly, the right holder may choose to pursue a criminal process. Initially, the rights holder usually notifies the police authority of the offence. The police then investigate to gather evidence regarding the infringement activity including raiding the infringer’s premises to arrest the infringer and seize infringing goods as evidence before forwarding it to the public prosecutor and the court respectively. Unsettled disputes with respect to intellectual property are always tried at the specialised IP and IT court. For unjustified threats, the alleged infringer is able to bring a tort action against the alleged under the Civil and Commercial Code.

5.7 To what extent are courts willing to grant cross-border or extra-territorial injunctions?

According to the information disclosed to the public, the IP and IT court has never ordered a worldwide injunction.

5.8 To what extent do courts recognise the blocking effect of ‘torpedo’ actions abroad?

Under the Thai legal system, ‘torpedo’ actions are not available. The court therefore has never determined the blocking effect of such actions.

5.9 To what extent are alternative dispute resolution (ADR) methods (such as arbitration or mediation) available to resolve copyright disputes? How widespread are ADR methods and in which sectors?

Copyright owners who wish to seek a quick solution to a problem may consider alternative mediation methods to settle the dispute before going to trial.

Recently, the DIP’s Office of Settlement and Dispute Prevention of Intellectual Property (the Office) has been emphasising the availability and effectiveness of its mediation procedure, which provides a feasible remedy for dealing with intellectual property issues including infringement of copyright. The DIP’s mediation procedure is very simple. The entire process usually takes only two or three months and there is no fee for the DIP. If the parties are able to reach an agreement, the Office will prepare a settlement agreement, the contents of which have been agreed to by both parties. After execution of the agreement, it will be binding upon both parties. Some global rights owners have successfully exploited this method to stop infringements in Thailand. According to DIP data, the vast majority of disputes (79 per cent) that have been brought before the Office in recent years have involved copyright.

6. PROCEDURE IN CIVIL COURTS

6.1 What is the format of copyright infringement proceedings?

A plaintiff files a suit to the IP and IT court. The defendant has 15 days (or 30 days if received by a substitute service) to file an answer in writing with the court. After the plaint, answer, and answer to the counterclaim, if any, have been filed, the court notifies the parties of the day fixed for settlement of the issues. Both parties are required to appear before the court. The court will settle the issues in dispute for trial and then set the date for taking evidence and hearing witnesses.

A list of witnesses and a description of the evidence to be introduced must be filed at least seven days before the date fixed for taking evidence, together with a sufficient number of copies for other parties to the case to collect from the court officer. Either of the parties may introduce new evidence after the deadline for filing the list of witnesses if the party can show reasonable grounds, and if the new evidence has bearing on a material point at issue.

After both parties have rested, the court will allow each party to submit their closing statement within 30 days from the last day of the hearing. This is an optional session. When the hearing of witnesses is completed, the court will schedule the hearing of the judgment, normally about one or two

month(s) later.

An appeal against any judgment of the IP and IT court can be submitted directly to the Supreme Court within one month from the date of the pronouncement of the judgment.

6.2 Are disputed issues decided by a judge or a jury?

The jury system does not exist in Thailand; the judges alone hear all the arguments and evidence. An intellectual property case trial is adjudicated by at least two career judges and one lay judge. The necessary technical and subject matter expertise is present to render a just and equitable outcome irrespective of the technical complexity of the issues. As the career judges have special training in intellectual property or international trade, the jurisprudence being developed by the court is quite advanced and in line with international norms of intellectual property rights protection. The lay judges also have expertise in particular areas of intellectual property and international trade.

6.3 To what extent are documents, affidavits, witnesses and/or (court-appointed or private) experts used? Is it possible to cross-examine witnesses?

Documents, affidavits, and witnesses make up the diversity of evidence presented to the court in copyright litigation. Regarding how experts are used, in general the parties ask private experts for affidavits; nevertheless, the court may designate experts if it is determined to be a necessity. It is possible to cross-examine witnesses in copyright litigation according to the Civil Procedure Code.

6.4 To what extent is survey evidence used (eg to prove substantial similarity)? What is its relevance in proceedings (eg party allegation, evidence)? Who decides which consumers are questioned in the survey (eg the court, court expert)? What level of cost should one expect to incur to carry out a survey? Are these costs recoverable from the losing party?

In copyright litigation there is no prohibition on using survey evidence. However, presenting survey evidence has not been seen. The costs would not be recoverable from the losing party; the party who conducts the survey has to cover the costs by themselves.

6.5 Is evidence obtained from criminal proceedings admissible in civil proceedings, and vice versa?

The evidence obtained from criminal proceedings can be presented in civil proceedings, and vice versa.

6.6 To what extent is pre-trial discovery permitted? If it is permitted, how is discovery conducted? If it is not permitted, what other, if any, mechanisms are available for obtaining evidence from an adverse party or from third parties?

Pre-trial discovery is not recognised in Thailand. The mechanism to obtain evidence is pre-trial conference on the day of settlement of the issues. All

parties shall appear in court to present details of witnesses, depositions to be submitted in lieu of oral testimony, or expert witnesses, documentary evidence, and any other evidence. The court shall settle points in dispute and direct any party to adduce evidence first or afterwards on any point in issue.

6.7 What level of proof is required for establishing infringement or invalidity?

In civil copyright litigation, it is not necessary to prove beyond reasonable doubt as it is in criminal law; preponderance of evidence will be enough. In other words, the standard is satisfied if there is more than a 50 per cent chance that the proposition is true.

6.8 How long do copyright infringement proceedings typically last? Is it possible to expedite this process?

Copyright infringement proceedings usually take 14 to 18 months. In limited circumstances, approval from the court may be granted in order to expedite the process.

6.9 What options, if any, are available to a defendant seeking to delay the proceedings? Under what conditions, if any, can proceedings be stayed? How can a plaintiff counter delaying tactics of a defendant?

In order to delay the proceedings, there must be necessary grounds to apply for an adjournment order either on or before a given day. Any party is entitled to apply for such order. The order will only be granted once, except in case of unavoidable necessity. If the same parties are conducting both civil and criminal cases, the civil case will usually be stayed until the final judgment of the criminal case is rendered.

7. FINAL REMEDIES

7.1 What remedies are available against a copyright infringer (final injunction, delivery up or destruction of infringing goods, publication of the decision, recall-order, monetary remedies, etc)?

The court has authority to render a permanent injunction and order the infringer to compensate the owner of the copyright for damages in the amount which the court considers appropriate taking into account the seriousness of injury including the loss of benefits and expenses necessary for the enforcement of the rights by the owner of the copyright under the Copyright Act. Moreover, all counterfeit goods will become the property of the owner of the copyright and all articles used for committing a violation will be forfeited. Destruction of infringing goods, publication of the decision, and recall-orders are not available remedies under the Copyright Act.

7.2 To the extent it is possible to obtain a final injunction against future infringement, is it effective against the infringer's suppliers or customers?

Only the parties to the case are bound by the judgment. Thus, a final injunction cannot be enforced against the infringer's supplier or customers.

7.3 What monetary remedies are available against a copyright infringer (reasonable royalty, lost profits, account of profits, or some other basis)? Are punitive damages available? If so, under what conditions? Are liability and quantum of monetary remedies assessed at the same time by the court or is the quantum assessed at a separate, later stage from liability?

Under the Copyright Act, the court has authority to order the infringer to compensate the copyright owner for damages in the amount which the court considers appropriate taking into account the seriousness of the injury including the loss of benefits and expenses necessary for the enforcement of the rights by the copyright owner. Punitive damages are not available in Thailand. The court usually assesses infringement liability and monetary remedies at the same time.

8. PRELIMINARY RELIEF

8.1 Is preliminary relief available? If so, what preliminary measures are available (eg preliminary injunction) and under what conditions? Is urgency a condition for the court to grant preliminary relief? If so, how is it determined?

The court shall order a preliminary injunction if there is explicit evidence that a person is doing or about to do any act which is an infringement of copyright. The owner of copyright may seek the injunction to order the person to stop or refrain from such act. The copyright owner shall state the facts giving rise to the cause of action in the case and the reasons sufficient for the court to believe that it is appropriate to grant such order. The owner shall also include a statement of a person who witnessed the cause of action confirming the facts giving rise to the application in order to substantiate the cause of action.

The court shall grant preliminary relief if the owner has reasonable grounds. Such reasonable grounds exist if the nature of damage incurred by the owner cannot be restituted by monetary measures or any other form of indemnity, or the prospective defendant is not in a position to compensate the owner for his damage, or if it might be difficult to enforce the judgment against the prospective defendant afterwards. Urgent preliminary relief is available and shall be granted if the preliminary relief application satisfies the judge with the statement of the plaintiff or the evidence adduced by him or called by the court itself proves that the case is an emergency and that the application is well-grounded.

8.2 Is ex parte relief available, where defendant is given no notice at all? If so, under what conditions?

Ex parte relief is available only in case of emergency as stated above.

Moreover, the defendant may immediately file an application requesting the court to repeal the order or warrant. Such application may be made *ex parte* by permission of the court. If upon that application the court issues an order of repeal, such order shall be final.

8.3 Is it possible to file a protective writ, ie a letter setting out possible defences by a potential defendant, at the court at which an *ex parte* application may be filed against that defendant? If so, is the protective writ communicated to the plaintiff and what effect does it have on the preliminary injunction proceedings? For how long does the court take the protective writ into consideration? Can the protective writ be renewed?

Protective writs are not allowed in *ex parte* proceedings in Thailand.

8.4 Is the plaintiff entitled to ask for an order that the defendant's premises are searched and a description of the infringing goods (and the accounting data relating thereto) is made in order to establish proof of infringement? If not, what other mechanisms, if any, are available for seizing and preserving evidence for trial?

The plaintiff is entitled to ask for an order to search for a description of the infringing goods in the defendant's premises when the plaintiff has reasonable grounds to suspect that the evidence it may have in the future will be lost or become difficult to produce when the case is filed, or that a party on whom it intends to rely will be lost before it can adduce the party in court or will become difficult to adduce at a later stage. The plaintiff shall file the application to the court. The court shall decide on the application as it deems it appropriate. If the application is granted, the evidence shall be taken as prescribed by law.

8.5 Can the defendant put the validity of a copyright at issue in preliminary injunction proceedings?

The defendant can put the validity of a copyright at issue. There is no law prohibiting such act.

8.6 What is the format of preliminary injunction proceedings?

The owner of the copyright work may file an application for preliminary injunction at the IP and IT court. The plaintiff is able to file an application before or after filing the case. Before filing the case, the plaintiff is able to file an application stating the facts giving rise to the cause of action in the case and the reasons sufficient for the court to believe that it is appropriate to grant such order. The application shall include an affidavit of a person who witnessed the cause of action in order to substantiate the cause of action. The court shall grant the application if it is satisfied that:

- there are reasonable grounds for the application for the court to grant such application; and
- the nature of the damage incurred by the applicant is damage which cannot be restituted by monetary or any other form of indemnity or the prospective defendant is not in a position to compensate the applicant for his damage, or it might be difficult to enforce the judgment against the prospective defendant afterwards.

After filing the case, the plaintiff is entitled to file with the court, together with the plaint or at any time before judgment, an *ex parte* application

requesting the court to order the following injunction:

- the seizure or attachment before judgment of the whole or part of the property in dispute or the defendant's property; or
- a temporary injunction restraining the defendant from repeating or continuing any wrongful act, or an order stopping or preventing the wasting or damaging of such property until the case becomes final or until the court has otherwise ordered.

In an emergency, together with an application, the plaintiff may file a motion requesting the court to issue without delay the order or warrant requested. If satisfied with the statement of the plaintiff or the evidence adduced by them or called by the court itself that the case is one of emergency and that the application is well-grounded, the court shall immediately issue the order or warrant applied for to such extent and under such conditions as it thinks necessary. If the court dismisses the application, such order shall be final. The defendant may immediately file an application requesting the court to repeal the order or warrant. Such application may be made *ex parte* by permission of the court.

8.7 If a preliminary injunction is granted and the main infringement action is finally lost, can the defendant claim damages for the unjustified preliminary injunction? If so, how are the damages calculated? Must the plaintiff provide some form of bond/guarantee to compensate the defendant in the event that the preliminary injunction is later held to have been wrongly imposed?

The defendant shall be able to claim damages for the unjustified preliminary injunction by filing an application requesting the court to repeal or modify the provisional measure. In addition, the defendant may make a request in the application to repeal or modify that within 30 days from the date on which the court issues an order directing the person requesting such measures to compensate them for damages. If the court finds that the measure was granted due to the court's misunderstanding or sufficient reason to grant such measures was caused by the fault or negligence of the person requesting the measures, the court may order them to compensate the defendant in the amount the court deems appropriate.

8.8 To what extent are documents, affidavits, witnesses, survey evidence, and/or (court-appointed or private) experts used in preliminary injunction proceedings?

Where a preliminary injunction is sought, the application shall include an affidavit confirming the facts, from a witness to the cause of action, in order to substantiate the cause of action. Other supporting documents should be provided though they are not compulsory in this proceeding.

8.9 What level of proof is required for establishing infringement or invalidity in preliminary injunction proceedings?

The requesting person has a burden of proof requiring them to present prima facie evidence for all the essential facts in its case. If they cannot, the claim

may be dismissed without any need for a response by the defendant.

8.10 How long do preliminary injunction proceedings typically last?

In an emergency, the proceedings typically take one to three days. The *inter partes* proceedings, however, may take from three to six months.

8.11 Where a preliminary injunction is granted, is it necessary to start main proceedings to confirm the preliminary injunction? In the affirmative, what is the deadline?

After the court grants a preliminary injunction, a requesting person must file a case relating to the injunction within 15 days from the date on which the application was granted or within the period prescribed by the court. Otherwise, the measures shall lapse after 15 days or the period prescribed.

9. APPEAL PROCEDURE

9.1 What avenues of appeal are available for a defeated party in main proceedings or preliminary injunction proceedings? Under what conditions?

In main proceedings, an appeal against any judgment or order of the IP and IT court is submitted directly to the Supreme Court. Such appeal must be submitted within one month from the pronouncement date. The judgment of the IP and IT court may be appealed both on the question of fact and on the question of law under conditions provided by law. The ruling of the Supreme Court is final.

In preliminary injunction proceedings, the prospective defendant may file an application requesting the court to repeal or modify the provisional measures of protection. If the court finds that the order granting provisional measures of protection which has been repealed or modified was granted due to its misunderstanding that there were grounds for taking an action against the prospective defendant or sufficient reason to grant such provisional measures, and the misunderstanding was caused by the fault or negligence of the person requesting the measures, the court may order them to compensate the prospective defendant in the amount the court deems appropriate. The order of the court repealing or modifying the measures shall be final.

9.2 If an appeal is filed, is relief usually stayed pending the outcome of the appeal?

Under section 231 of the Civil Procedure Code B.E. 2477 (1934), the lodging of an appeal does not entail a stay of execution of the judgment or order of the IP and IT court, but the party lodging the appeal may at any time before the judgment of the Supreme Court, apply to that court for such stay of execution by motion setting forth reasonable grounds for the application.

9.3 How long do appeal proceedings typically last?

An appeal against any judgment of the IP and IT court can be submitted directly to the Supreme Court within one month from the date of the pronouncement of the judgment. An appeal against the judgment usually

takes 18 to 24 months before the case is heard by the Supreme Court, and an appeal against a preliminary injunction order takes about four to six months. The ruling of the Supreme Court is final.

10. LITIGATION COSTS

10.1 What level of cost should one expect to incur to take a case through to a first instance decision, preliminary injunction proceedings and/or appeal proceedings?

The cost of copyright litigation in Thailand may vary significantly, depending on the complexity of the case, the strategy of the litigants, and the type of proceeding such as a civil or criminal action.

In filing a lawsuit, the court requires the claimant to deposit a filing fee equal to 2 per cent of the anticipated claim amount upon filing of the complaint, subject to a maximum of Baht 200,000, for claims not exceeding Baht 50 million. In this regard, the attorney's fee in a specialised IP law firm for representing a client in an infringement civil action would be approximately \$20,000 upwards, while the attorney's fee for proceeding in a criminal action would be much lower.

10.2 Can attorneys' fees and costs be recovered by the winning party?

The ultimate liability for costs of the parties to a case is to be borne by the party losing the case; however, the court shall have the power, irrespective of the total or partial success of a party, to decide at its discretion (with due regard being paid to the reasonableness and good faith of the parties or the conduct of the case by the parties) that the costs are to be borne by the winning party or that each party shall bear their own costs or a proportion of the total of costs incurred by the parties.

11. FORTHCOMING LEGISLATION

11.1 What are the important developing and emerging trends in your country's copyright law?

Anton Piller orders and preventative injunctions are becoming widely used in copyright law. An Anton Piller order is a measure to seize evidence of infringement where the rights owner faces an immediate risk that the evidence will be destroyed, damaged, concealed or will otherwise disappear. A preventative injunction is the measure to stop further infringement of intellectual property rights.

11.2 To the extent it relates to copyright enforcement, please outline any major copyright legislation in the pipeline.

One legal change impacting copyright that is likely to be forthcoming in the near future involves the Customs Act. A new Customs Act is currently being drafted to replace the existing one, which has been in effect for more than 80 years. The definition portion of the bill, section 6, clearly states the meaning of 'intellectual property infringing goods' and no longer relies on the designation of 'prohibited goods,' as stated in the current legislation. Goods infringing copyright are specifically referenced in this section. This

will bring to an end any arguments regarding what type of goods can be seized under the Copyright Act by making it clear that copyright owners are entitled to take action at the borders to stop the import and export of infringing products. Section 161 of the bill states that the penalty for importing and exporting infringing goods is imprisonment for a period not exceeding 10 years, or a fine equal to five times the duty-paid value of the goods, or both.

12. USEFUL REFERENCES

12.1 Please identify any useful works of reference relating to copyright law and copyright litigation in your country, including useful websites.

www.ipthailand.org

www.itd.or.th/th/node/427

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