

The Dawn of Digital Pirates

The role of pirates has evolved throughout the ages. Once upon time pirates were considered to be heroes of nations, with some even being knighted for plundering great cities. As the world began to commercialize, pirates were condemned as criminals as their activities threatened the economy. Whether being knighted or hung from the gallows, pirates have looted and plundered for over 500 years. Today, a new breed of pirates exists, the digital buccaneers.

These digital buccaneers exist all over the planet; Thailand is no different. Coming into contact with piracy is part of the daily routine for those living in Thailand, but what about online Thai pirates? How big of an issue is online piracy in Thailand? How are instances of online piracy dealt with by the government? These are just some of the questions we aim to answer.

Under the Thai legal system, owners of intellectual property which is being infringed online are able to find limited recourse under the Copyright Act B.E. 2537 (1994) (the "Copyright Act"), the Computer Crimes Act B.E. 2550 (2007) (the "Computer Crimes Act") and the Civil Procedure Code of Thailand (the "CPCT"). These acts are often criticized as falling short in providing intellectual property right holders with adequate methods to enforce their rights in the digital world.

Digital piracy is most prevalent on the internet; many of us have been guilty of having downloaded popular music on the internet, or streaming the latest T.V. shows mere minutes after their broadcast. Websites such as the Pirate Bay have taken the internet by storm by providing the public with a means of accessing and owning, without charge and with only a single click of the mouse, the latest movies, TV shows, music and software. Another rampant form of online counterfeiting activities include the purchase of counterfeit goods over the internet using various e-commerce websites. Both examples of online piracy are rampant in Thailand. Local blogs and websites often sell knock-off handbags, pharmaceutical products and apparel at a much lower price than their original counterparts.

Today's pirates can be found everywhere, they are no longer bearded giants with a peg leg and a parrot sitting on their shoulder. One could be sitting next to you and you would not even know it. By today's definition my 5-year old nephew is considered to be a pirate as he is able to download the latest cartoons on his own by using a method which is now condemned for breaching intellectual property rights. It is often argued that piracy in the digital age threatens today's economy in the same way as the Caribbean pirates threatened international commerce.

To take a stand against piracy, countries such as Singapore have recently passed a law which allows copyright owners to force internet service providers to block websites that "flagrantly infringe" copyrights by providing consumers with access to content which is in breach of copyright law. There seems to be a trend occurring in ASEAN in regards to addressing online piracy; originally it was the Philippines government which enacted a law which imposed punishment in the form of imprisonment between 6 to 20

years with the imposition of a maximum fine of USD 11,000, for any person convicted of buying or downloading pirated content. Will Thailand follow suite?

Thailand is often considered to be a hub for digital and traditional piracy. So much so that for the last 20 consecutive years, Thailand has been placed on the United States' Office of the Trade Representative's ("USTR") priority watch list. The USTR often cites Thailand as lacking a coordinated governmental approach to deal with infringements occurring on digital platforms. Other reasons include the lack to a dedicated taskforce to enforce laws, the lack of staff with adequate technical and internet knowledge and lack of investigative action in general.

Due to these limitations, Thailand does not see mass raids and coordinated police actions to the standards of the U.S. consider for example the 2012 raid on the private residence of MegaUpload's owner Kim Dotcom whose website was allowing consumers to access copyright infringing material. The raid involved a coordinated effort between US agencies and the New Zealand Police Department which involved 76 officers and two helicopters. The difficulty under the current Thai Copyright Act is that the police have the authority to raid premises where they suspect copyright infringing goods are stored; the problem with the e-commerce generation is that online traders of counterfeit material often do not store their merchandise on the premises in which they operate, making it very difficult for authorities to seize their goods. Similarly, the raid actions provided for under the Trademark Act B.E. 2534 (1991) and the Patent Act B.E. 2522 (1979) have the same limitations placed on them. Furthermore, neither the current version of the Copyright Act nor the existing legal framework in Thailand deals with copyright infringements occurring via digital streaming.

Under the current legal framework, IP owners are able to take action against online sellers of counterfeits by utilizing the raid action as defined above. In addition, the Computer Crimes Act provides another mechanism for IP owners to combat IP infringements online. In a 2011 Criminal Court decision (Red Case Sor. 33/2554) Section 14(1) of the Computer Crimes Act was used to enjoin a distributor from distributing counterfeit food, medicine, and medical equipment which was deceptively advertised on his e-commerce website. This decision shows that the Court has the authority to halt any distribution of "forged computer data", if the Court finds that such content may be in contravention of public order and good morals.

Furthermore, the Section 4 injunction contained in the Civil Procedure Code of Thailand is permitted to be used in conjunction with any potential breach of the Copyright Act, and thus provides for use of an injunction to prevent further activity which breaches intellectual property rights. Though this remedy is commonly available, it is unknown whether it can be utilized by intellectual property right owners to prevent online counterfeiting/piracy of their registered intellectual property. If used correctly, an injunction can be issued by the court to prohibit the violator from transferring, moving, selling or disposing of the infringing property before the matter is heard in court. Interestingly, to date no opinion has been lodged on this issue by the Thai Supreme Court.

In response to international criticism in regard to its current intellectual property laws, Thailand has proposed several amendments to its Copyright Act. The draft Copyright Act will enable copyright owners to file a motion requesting the court to order a service provider to suspend any alleged infringing act or temporarily remove the work allegedly made by copyright infringement from the system of the service provider. Therefore, if copyright holders are aware that a service provider is hosting/making available content on their servers which is infringing the copyrights of an intellectual property owner, they can file an application restraining the service provider from providing access to the infringing website.

Even if the proposed amendments to the Copyright are implemented successfully it is this author's opinion that it will not sufficiently curb access to websites blocked by the internet service provider, as consumers still have the possibility of accessing the blocked websites using a virtual private network or VPN.

In regards to digital streaming over the internet or downloading "torrents" which contain copyright infringing material in Thailand, service providers have taken their own actions to curb the intellectual property right infringements taking place on the internet by beginning to limiting the bandwidth to consumers who download torrents. If your current internet service provider is aware of your high downloading activities they may have already placed certain restrictions on your bandwidth which would retard your access to the internet.

From the above it is possible to see that Thailand in recent years has given increasing attention to providing owners of intellectual property rights a form of protection offered at an international standard against infringements. Thai law however lacks the means to efficiently address copyright infringements happening on the internet and fails to provide IPR owners with a defined provision allowing them to protect their assets online. Only time will tell when the proposed amendments to the copyright act will come about; nevertheless in the interim it is still advisable (and ethical) to pay for media on the internet.

Authors:

Kunal Bir Singh Sachdev – Legal Adviser (kunal@dfd.com)

Thunyaporn Chartisathian – Legal Adviser (Thunyaporn@dfd.com)