

EMERGING IP ISSUES FOR POLICY MAKERS IN THE APEC ECONOMIES

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Introduction

The emerging issues for this paper will be classified into two groups of issues. The first group involves issues that have emerged or remained in existence for some time but remain unresolved such as inefficient and ineffective promotion, protection, and enforcement of intellectual property rights. The other group is new in the sense that there is no internationally accepted standard as far as international legal protection is concerned such as the issue of traditional knowledge, expressions of folklore, and genetic resources. Some could be tackled or resolved domestically but some will have to be solved through international cooperation, not domestic efforts alone. As far as Thailand is concerned, we seem to be running around in circle in trying to lessen negative impacts and make positive gains from the emerging issues. The reason for this inability is not due to the lack of actions of the authorities concerned but seems to be due to some inherent flaws and defects in our social, economic, political, and cultural setup. They could be solved with clear and unbiased consideration and understanding of the issues and courage to tackle the bull by its horns rather than by adopting the measures that are piecemeal, sporadic, and incoherent.

A. LONG - EMERGING AND UNRESOLVED ISSUES

1. Apathy and Prejudices Concerning Intellectual Property Rights

Thailand is not new to intellectual property rights. However, knowledge seems to be focused on the enforcement aspect of intellectual property rights through news of pressure of the major trading partners for stricter enforcement efforts and headlines about seizures of pirated CDs as well as the bio-piracy of Thai medicinal herbs. So it is natural that the public has grown to look at intellectual property rights as a kind of trade-off necessary in Thailand's trade with other countries. There was a flurry of activities to prepare Thailand for accession to the WTO especially the revision of the existing laws and enactment of the new ones¹. The laws on copyright, trademark, and patent were quickly revised to comply with obligations in the TRIPS Agreement of the WTO. New laws on the protection of the layout design of integrated circuits, geographical indications, plant varieties, and trade secret were enacted. Thailand also set up the specialized police unit, public prosecution office, and the Central Intellectual Property and International Trade Court² to enhance enforcement of intellectual property rights, evidently exceeding the minimum

¹ See the English texts of the Thai laws on intellectual property rights at www.ipthailand.org.

² See <http://www.cipitc.or.th>.

international obligations in the TRIPS Agreement itself³. Much public education was done with the help of major trading partners and international organizations with emphasis on the TRIPS Agreement and the enforcement issue which is explicitly detailed in an international agreement on intellectual property for the first time. Unfortunately, this has not tackled the long-emerging issue of public apathy to intellectual property. The public apathy has been perpetrated by a deep-rooted belief that intellectual property rights do not benefit developing countries since they are the tools of the more developed countries to preserve and promote their economic interests in the face of drastic reduction of import tariffs brought about by the global trade liberalization of the WTO process. Strangely enough, this seems to be the same conclusion arrived by the UK IPR Commission on its empirical study on IPRs and development⁴. It is not too pessimistic because it simply says that developing countries are ill-equipped to take advantage of intellectual property rights, merely a statement of fact. In the case of Thailand in particular, the sense of apathy is all the more surprising considering that it could have been otherwise. The following poignant cases in Thailand show how things could have been otherwise:

- The first patent law was drafted even before the First World War but was enacted only in 1979. From that time of enactment to the present day, the number of Thai applications for invention patent never exceed 1,000 per year in spite of the recent promotion by the governmental authorities. There has never been a tradition or practice of using patent information in the basic or advanced education, or even in the industry itself. It is only in the past few years that major Thai conglomerates like the Siam Cement Group has seriously and actively promoted innovation and the use of the patent system to increase its productivity and competitiveness through the introduction of the Power of Innovation awards⁵. It seems that the populace has never heard of the fundamental *raison d'être* for the protection of invention stipulated a long time ago in the Statute of Monopolies of 1624 that invention is supposed to improve the well-being of mankind. Patent is simply a matter of regulating how knowledge could be commercialized with the benefits to both the inventor and the public. Of course, there is no conclusive proof that it is the strength of the patent system that has brought about the industrial and business strength or vice versa. It is, however, very clear that the level of technological progress nowadays seems to match the level of the use of patent in the economy. So the problem in Thailand is non-awareness of how to make maximum benefits from the patent system. It is not a matter of encouraging the public to submit more applications just to increase the number of granted patents but a matter of making use of patent information in the education system from childhood to adulthood. It is a matter of how to make the

³ Article 41(5) of Part III Enforcement of Intellectual Property Rights of the TRIPS Agreement: "It is understood that this Part does not create any obligation to put in place a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of law in general, nor does it affect the capacity of members to enforce their law in general. Nothing in this Part creates any obligation with respect to the distribution of resources as between enforcement of intellectual property rights and the enforcement of law in general."

⁴ See the full report of the IPR Commission at www.iprcommission.org.

⁵ See www.siamcement.com.

whole society more innovative and creative. It should be the approach that focuses on quality rather than quantity. Many years have been lost already. Many more years will be lost if we do not do something about it. The society that does not value innovation will not benefit from innovation. However, economic prosperity will not be possible if the underlying financial and banking system or environment is not favourable to allow the start-up business which is rich in ideas but poor in any other assets. In any case, to reduce apathy requires knowledge and acceptance of such knowledge. So it is clear that this involves a change of mindset that will be carried out only by the genuine efforts of both the private and public sectors. It is not a job for IP authorities alone⁶. There are examples of several countries declaring the national agenda on IP, a really noble attempt. That will not ensure the success in making the economy more productive and competitive, but at least it is a good beginning. The declaration of IP as part of the national agenda at least could be seen as the acknowledgment at the highest governmental level of the importance of innovation and creativity. However, a very big question will always remain whether there will be sustainable actions to match the rhetoric. That will be the only test that matters.

- In the case of copyright, the attention of the public seems to be excessively focused on the enforcement aspect rather than on the actual utilization of copyright. The ordinary people on the street are aware of only the reproduction right and recently aware of the right of communication of the copyright work to the public through a series of police raid on small restaurants and karaoke places for having performed both the musical works and sound recordings⁷ without prior authorization of the copyright holders. From time to time owners or operators of such establishments protested against the raids which they deemed as actions done to force settlements through cash payment of damages directly to the right holders. It is odd that Thailand has been a member of the Berne Union by acceding to the Berlin Act even before the Second World War without the main beneficiaries of the right of public performance (which is now the right of communication of the work to the public under the latest Thai copyright law) aware of this right until recently during the preparation of Thailand's accession to the WTO and the increased popularity of karaoke. This recent awareness has caused opposition from the main users, namely, broadcasting organizations in Thailand to the extent that most copyright holders of Thai musical works and sound recordings waived their right of communication of the copyright work to the public. Perhaps this is the classic case of why users should pay for something that they have used for years for free⁸. It seems that even in the world of mortar and bricks the Thai holders of musical works and sound recordings have enough problems with the unauthorized communication of the works to the public

⁶ See the actions taken by the Thai Department of Intellectual Property in promoting the conversion of intellectual assets into capital assets at www.ipthailand.org.

⁷ The Thai Copyright Act of 1994 in Article 7 treats sound recordings as copyright works.

⁸ Mr. Jacques Attali, French economist, author and former advisor to president Francois Mitterrand, said at the MidemNet conference in Cannes on 21 January 2007 that "You can't ask people to pay (for music) when they've been getting it for free". That is in the context of the users who download music from the Internet.

so they are even more powerless in the cyber space. In short, the people do not have enough knowledge of the substance and finer points of the copyright regime. Even if they do, they are often frustrated in the attempt to promote, protect, and enforce their rights. Unequal economic bargaining power seems to have a decisive say in the relationship between big users and right holders resulting in the distortion of the copyright system to the extent that as far as the right of communication of the musical works and sound recordings to the public is concerned, the big right holders prefer to tackle small users, while leaving big users untouched. This unsatisfactory state of affairs has to be tackled not only by the reform of the copyright law, but also by the effective use of laws concerning the prevention of unfair trade practices and monopolies.

- It is crucial to convince the public that the IP system is fair. This could be clearly demonstrated by the practices concerning the Thai trademark law. Many trademark infringement cases that are brought before the Central Intellectual Property and International Trade Court of Thailand concern counterfeiting. But there has been an increase in the trademark cases concerning the judgment of trademark examiners and the appeal decisions of the Trademark Appeal Board. The central issue is the interpretation of the concept of "confusion to the public". More appeal decisions are now challenged in the Court as the trademark applicants or the registered trademark owners feel that the decisions are not fair and do not follow the perceived pattern of prior decisions in similar cases. In short, there has been increasing doubt as to the consistency of the decisions. This has forced the Court to do the job of deciding if any mark is confusingly similar or identical to the already registered marks or well-known marks. At the same time uncertainty is prolonged because it will take a few years for the Court to decide such cases. There is an urgent need to convince the public that the decisions on appeal by the Trademark Appeal Committee are consistent. This could be done by making the decisions easily accessible by the public. Or else misgivings and doubt will intensify.

Here are some of the measures that could be adopted in an integrated manner within a definite time frame in order to eliminate apathy and prejudices while encouraging positive thinking and actions about IP:

- To make IP relevant to every level of the society.
- To incorporate IP into the education at every level.
- To ensure that fairness is integrated into the IP system and that such integration is perceived by the public.
- To ensure that IPRs are protected and enforced in an ethical manner.
- To ensure that the financial environment is favourable to the commercial exploitation of intellectual assets or IP works.
- To encourage people to think of "our rights" not merely "their rights" in order to ensure that IP really the people.

2. Enforcement of Intellectual Property Rights

It is clear that the letters and spirit of all the laws on intellectual property are meaningless if the rights could not be enforced. No enforcement is equal to no rights. However, the problem with enforcement of IPRs in Thailand has persisted in spite of the tough penalties in terms of both fines and imprisonment against the infringers. This would lead to one question. What should be the effective deterrence against infringement? Copyright piracy in Thailand carries the fine of 100,000 Baht- 400,000 Baht and the imprisonment of six months to four years. This has not deterred infringers. Some major right holders especially of films have voiced their demand that the penalty should be increased. The same thing could be said about well-known brands. Counterfeiting of well-known and prestigious trademarks has continued even in the face of heavy fines and imprisonment. Some right holders have even suggested legal actions against the buyers of the pirated and counterfeited products, using a similar approach to that against illicit drug users. Such move would be a radical change to the underlying concept of copyright and trademark. In any case, it is not a viable approach considering the number of consumers or users involved.

In order to tackle the problem of inefficient and ineffective enforcement of IPRs, one has to look into the way the general public thinks of the infringement. It is commonly recognized that the severity of criminal punishment depends on the degree of moral outrage. One could not equate pickpocket with murder. In the society like Thailand, among the general public and even enforcement officials, there is no moral outrage concerning infringement of IPRs especially as far as the consumers are concerned. The right holders are, of course, outraged if they know that their rights are infringed. There is no moral guilt attached to infringement of IPRs like in other criminal cases such as assault, robbery, or murder. Has this been influenced by the fact that in the Thai laws on intellectual property particularly the copyright law does not impose different penalties on infringement of different rights? In the Thai copyright law, infringement of any right for profits entails the same punishment. So a person doing unauthorized translation of a literary work will be subject to the same punishment as that faced by a person infringing the right of production by producing hundreds of thousands of DVDs of films without authorization of the right holders. There is no moral distinction between different kinds of offenses. Even a person infringing the performer's rights is subjected to the same punishment. The basic concept of the criminal law that severity of punishment should match the degree of public outrage seems to be ignored in the Thai copyright law. Indiscriminate use of criminal penalties has undoubtedly backfired. Even in the Thai patent law, infringement of an invention patent is a criminal offense.

The moral of the above is that criminal punishment has to be used selectively. Certain offenses should be decriminalized. Some offenses have to be more severely punished. However, the public should be educated why certain offenses are seriously damaging to the country and their own interests in the long run. There should be better public understanding of the issue of why certain offenses such as copyright piracy should be more severely punished. There should be the education of the public that economic crimes are as bad,

if not worse, as the physical crimes like robbery and assault because they could weaken or even destroy the economy and society.

B. RECENT EMERGING AND UNSOLVED ISSUES

Traditional knowledge, Genetic Resources, and Expressions of Folklore

The issues of the legal protection of traditional knowledge, genetic resources, and expressions of folklore did surface on and off in the past. But they seem to come to stay this time ever since the reference to these emerging issues was made at the Doha Ministerial Conference in 2001 and the ongoing works in the WIPO⁹. Traditional knowledge, genetic resources, and expressions of folklore have been with us for a long time, even long before the establishment of the modern patent system in the Paris Convention in 1883. They are emerging again because of the demand that the communities holding traditional knowledge, genetic resources, and expressions of folklore should be recognized and share in the benefits derived from the commercial exploitation of traditional knowledge, genetic resources, and folklore. This will lead to the inevitable question of how traditional knowledge and genetic resources will interact with the patent system. It is obvious that the more developed countries would not want anything to undermine or negatively affect the well-established but overloaded patent system. At the same time, developing countries have to put their houses in order by compiling the data on their own traditional knowledge and genetic resources. The same goes for the expressions of folklore on which a lot of works have been done already in the context of cooperation with UNESCO.

As regional countries are somehow connected through history, customs and tradition, art and cultural exchanges, and racial ties. This raises the question of how we would tackle the traditional knowledge, genetic resources, and expressions of folklore that are not confined within the boundary of any one country. It is hoped that this would lead to the concept of benefit sharing among the regional countries rather than becoming an insurmountable problem preventing the establishment of a special regime for the international legal protection of these issues.

These emerging issues have to be tackled in a spirit of compromise in order to achieve the common denominators acceptable to developed and developing countries alike. The situation will mirror that of the conventional IP system in the sense that the right holders and the users have to balance their interests. This is the ongoing process. Even the new emerging issues will have to go through this process. It is the spirit of international cooperation that will play a crucial role in the establishment of international legal protection of traditional knowledge, genetic resources, and folklore.

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⁹ See the works of the WIPO on these issues at www.wipo.int.