

INTELLECTUAL PROPERTY AND THAILAND'S TRADE COMPETITION ACT: CAN AN OWNER REFUSE TO IMPORT OR REFUSE TO SELL AT A LOWER PRICE?

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There has been much discussion recently concerning the compulsory licensing by Thailand of certain patented drugs under Article 31 of the WTO TRIPS Agreement. Thailand has granted a license to generic manufacturers to produce a cheaper version of certain drugs over the objection of the drugs' patent owners. Now at least one of these patent owners may choose not to import its other patented drugs into Thailand.

While many focus on the issue of compulsory licensing under TRIPS, a broader question is being discussed in the background. Does IP ownership constitute a monopoly? If so, does refusal to import licensed goods or do high prices of IP constitute a violation of Thailand's Trade Competition Act (TCA)?

By virtue of the protection of the IP law, someone who owns a patent in a particular product has the exclusive right to produce or sell such patented product. This applies to other IP as well, e.g., music and films. But how far does that exclusive right go? For example, does the owner of a song have the right to license that song at whatever price they wish, or even to refuse to publish the song within Thailand? Should a patented pharmaceutical be entitled to the same treatment?

In the past, even legal monopolies granted by the Thai government have been held subject to the TCA and charged with violations for unfair conduct thereunder. UBC, which held a legal monopoly in the cable TV market, was charged with unfairly refusing to provide service to certain customers. Surathip Group, which held a legal monopoly in the alcoholic beverages market, was charged with unfair product tie-ins intended to restrict competition.

It is equally possible for a patent or IP owner to use its exclusive legal rights to effect anti-competitive behavior, behavior which is expressly prohibited by the TCA. For example, a patent owner cannot tie-in sales of its patented product with its other products. It similarly cannot require that its licensees use their products exclusively. In sum, IP ownership is not excluded from the application of the TCA. However, the TCA restrictions are specific and not uniformly applicable.

It is important to note at the outset that the TCA is directed solely at the conduct of Thai entities, excluding from its coverage any misconduct by foreign entities which do not maintain any presence in Thailand. This is in keeping with Thailand's historical interpretation of law to apply only within Thailand (which contrasts with the extraterritorial effect applied to the interpretation of US laws, for example).

Furthermore, there are different types of restricted conduct depending on the applicable TCA section for each kind of circumstance. Thailand's TCA restrictions on unfair trade apply in three distinct circumstances: (1) when two or more companies work together in restricting fair trade; (2) when one market-dominant company acts to limit fair trade; or (3) when a Thai

distributor acts together with a foreign supplier to require Thai purchasers to buy exclusively from the Thai distributor.

Market dominance also has a specific meaning. By ministerial regulation issued January 18, 2007, "market dominance" is defined as either being one operator with 50% or more of market share and total sales in the past year equal to or exceeding THB 1 Billion; or the top three operators having a market share of at least 75% and total sales in the prior year of over THB 1 Billion.

Section 25 of the TCA prescribes that a market-dominant player cannot set or maintain price levels which are "either unsuitable or unfair". It also prohibits a market-dominant player from reducing import of its products without justifiable reason in order to reduce the amount to less than market demand. However, the same express restrictions do not appear in Section 27 as relates to two or more co-conspirators nor to any single operator who is not a market-dominant player.

It can, therefore, be argued that (1) foreign manufacturers without a presence in Thailand, and/or (2) non market-dominant players, are not restricted by the TCA from either (a) setting unfair prices for their products or IP; or (b) limiting/restricting the quantity of such products that are imported to Thailand.

Section 29 of the TCA also offers a general catch-all set of restrictions which applies to all business operators. This Section which applies to all entities (with a Thai presence) prohibits conduct which limits "the engagement in business of another business operator" by either preventing the other operator from engaging in such business or forcing them to go out of business. However, it is unlikely that the restriction of imports or unfair pricing would be deemed affected by this Section 29 which seeks to address more direct interference with business by unfair competitors.

While the primary purpose of the TCA is to avoid anti-competitive behavior, only certain kinds of behavior are restricted and even these are separately defined according to the kind of party perpetrating same under what circumstances. With respect to IP owners, they too are subject to the TCA. However, this does not mean that in every circumstance they are prohibited from charging whatever price they wish for their IP licenses, nor that they are prohibited in all cases from even refraining to grant such licenses or import such licensed goods.

Each case and each circumstance must be reviewed as against the TCA to determine if the particular conduct is prohibited or not. Some limiting factors include whether the party has a Thai presence, or whether they are a market-dominant player. In sum, there is no blanket application of all TCA restrictions to all IP owners of whatever size, origin or type. ♦