

Parallel Importation and Intellectual Property Law in Thailand

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Abstract

Parallel importation normally occurs when goods produced under the protection of intellectual property (IP) laws are placed in one country, and then imported into another country without authorization of the IP owners. The unclear laws and the lack of harmonization on laws related to parallel importation in ASEAN countries make it possible for right holders to rely on their IP rights to prohibit parallel importation of IP products. This can be an obstacle in achieving the objective of the ASEAN Economic Community (AEC) which is to create ASEAN single market with the core element of promoting free movement of goods. Such unclear laws can be seen in the Thai Trademark Act 1991 which does not contain any provision relating to parallel importation and exhaustion doctrine. Likewise, although the Thai Patent Act 1979 and Copyright Act 1994 contain the exhaustion provisions which can be applied to parallel importation, such provisions are unclear as to whether they should be applied as national exhaustion or international exhaustion. Hence, this research proposes that these laws should be reformed in order to make them clear and certain. Also, the harmonization of laws relating to parallel importation among ASEAN countries is necessary in order to promote free movement of goods within the Southeast Asia region. This research also contends that the regional exhaustion approach should be the appropriate approach for Thailand and ASEAN, and this regional exhaustion approach should be applied in all areas of IP laws in order to ensure the consistency of these laws.

Keywords: Parallel importation, exhaustion of intellectual property rights, Thai intellectual property law, ASEAN Economic Community

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Introduction

The parallel importation is the importation of a product legally manufactured under the protection of intellectual property (IP) laws from one country into another country for sale without the authorization of IP owner. In some circumstances, the IP owners may rely on their exclusive rights provided under the IP laws to prevent parallel importation of goods protected under the IP laws from other countries. This seems to be inconsistent with the objective of the ASEAN Economic Community (hereinafter called AEC), which is to promote the single market and the free movement of goods within the Southeast Asia region (Association of Southeast Asian Nations, 2018). This objective of the AEC is based on Article 1(5) of the Charter of the Association of Southeast Asian Nations, which stipulates that the purpose of ASEAN is to create a single market which is stable, prosperous, highly competitive and economically integrated with effective facilitation for trade and investment in which there is free flow of goods (Supasiripongchai, 2017). Further, Article 41 of the ASEAN Trade in Goods Agreement (ATIGA) provides that each Member State must not adopt or maintain any prohibition or quantitative restriction on the importation of any goods of the other Member States (Supasiripongchai, 2017). These provisions of ASEAN promote the single market and free movement of goods among the ASEAN countries for the public interest. In contrast, the national intellectual property laws emphasize on the protection of IP rights for the economic interest of IP owners. By taking into account of different interests on both sides, this research proposed that the appropriate approach for Thailand and other ASEAN countries should be able to maintain a balance between the promotion of the free movement of goods for the public interest and the protection of the IP rights for the economic interest of IP owners. Such approach should take into account the objective of ASEAN Framework Agreement on Intellectual Property Cooperation (AFAIPC), which is to develop and harmonise the IP systems and promote the protection of IP rights in the ASEAN countries (European Commission, 2008).

This main objective of this research is to identify the problems relating to parallel importation of goods produced under the protection of IP laws such as copyright law, patent law and trademark law in Thailand and then make the recommendations on how Thailand should develop its IP laws and the legal approach on parallel importation in accordance with the objective of the AEC. The scope of this research is limited to the study and research on parallel importation of goods protected under the Thai IP laws in three areas: copyright law, patent law, and trademark law. The research methodology largely involved studying and researching all relevant laws, documents, and other materials related to parallel importation and IP laws of Thailand, ASEAN, European Union and United States of America. Then, it discussed and analyzed the idea, concepts, arguments, and current legal approaches from these laws, documents and materials in order to formulate the appropriate legal approach for Thailand and ASEAN in the light of the AEC.

1) Background to the exhaustion doctrine

Many countries rely on the exhaustion doctrine to solve the problem of parallel importation of goods protected under the IP laws, but there are three different approaches on the exhaustion of IP rights: national exhaustion approach, international exhaustion approach and regional exhaustion approach. Firstly, the national

exhaustion approach allows the IP owners to rely on their IP rights to prevent parallel importation of goods protected under the IP laws from other countries, but it prohibits the IP owners from preventing the sale and resale of goods that the purchasers brought from a domestic market within a country. Under this approach, the IP rights are exhausted only after the goods are placed or sold in the domestic market within the country by the IP owners or with their consent. Secondly, the international exhaustion approach ensures that the IP rights are exhausted and the IP owners cannot prevent parallel importation of goods protected under the IP laws once the goods have been sold or placed on the market anywhere in the world by the IP owners or with their consent. This means that the rights are exhausted irrespective of the place where the goods are first put for sale. Finally, the regional exhaustion approach, which is also known as a community-wide exhaustion approach in the European Union, ensures that once the goods are placed or sold in any country within the specified region by the IP owners or with their consent, the IP rights are exhausted and the IP owners cannot prevent parallel importation of goods protected under the IP laws from the countries within such specified region. But, this approach still allows the IP owners to prevent parallel importation of goods from the countries outside the specified region. The research contends that the regional exhaustion approach is more appropriate for Thailand and other ASEAN countries in achieving the AEC objective of promoting the free movement of goods than both the international and national exhaustion approaches. This issue will be discussed in section 4.

2) Recognizing the problems in Thailand

There are very few laws and regulations relating to parallel importation and exhaustion of IP rights in Thailand, but such laws and regulations are often unclear and can be interpreted in a way to prevent the free flow of the goods. In the area of trademark law, the Trademark Act 1991 (the TMA 1991) does not contain any provision relating to parallel importation and exhaustion doctrine. The lack of such provisions makes it difficult to determine whether parallel importation of genuine goods protected under the TMA 1991 can be done. Most provisions in the TMA 1991 only emphasize on the prohibition of the sale, importation, or distribution of the goods bearing a counterfeited trademark or an imitated trademark, but they do not mention about parallel importation of genuine goods legally produced under the trademark law. Previously, the Thai Supreme Court made clear that parallel importation of genuine goods bearing the trademark registered in Thailand cannot be done under the TMA 1991. This approach can be seen in several decisions of the Supreme Court such as the Decision No. 657/2499; Decision No. 1271-1273/2508; Decision No. 1669-1672/2523; Decision No. 4603/2533 and so on. However, the Supreme Court had later changed its approach in the Decision No. 2817/2543 by allowing parallel importation of genuine goods protected under the TMA 1991. In this decision, the hair clipper bearing a trademark 'WAHL' had been registered in Thailand, but the defendant imported hair clipper 'WAHL' from Singapore, where the products were placed and sold by the trademark owner (Supreme Court Decision No. 2817/2543, 2000). The Supreme Court referred to section 44, which stipulates that a person who is registered as an owner of a trademark has the exclusive right to use it for the goods for which it is registered and then held that parallel importation of such genuine products should be allowed when such products were placed on the market with the consent of the trademark owner (Supreme Court Decision No. 2817/2543, 2000). It found that there was no infringement of trademark since parallel importation of hair

clipper 'WAHL' by the parallel importer or the distributor was not illegal (Supreme Court Decision No. 2817/2543, 2000). This approach relied on exhaustion doctrine to allow the parallel importer or distributor to import the products that had been legally marketed in another country and then resell them in Thailand even without the consent of the owner of trademark registered in Thailand. The Supreme Court in the Decision No. 297/2546 had also adopted this same approach. (Supreme Court Decision No. 297/2546, 2003). Nevertheless, even if the Supreme Court allowed parallel importation of genuine products under its current approach, there is a possibility that the Court may change its approach again since Thailand used a civil law system, so the Court is not formally bound by its previous decisions, but can interpret the provision at their discretion. With the nature of civil law system and the lack of trademark exhaustion provision, it is still uncertain whether parallel importation of genuine products bearing the trademark registered in Thailand will be allowed in every circumstance. In order to make it more certain, the introduction of a clear provision on exhaustion of trademark right seems to be unavoidable.

In the area of patent law, the Patent Act 1979 (hereinafter called the PA 1979) contains the provision on exhaustion of patent right, but such provision is unclear. In this instance, paragraph 1 of section 36 of the PA 1979 guarantees that where the subject matter of a patent is a product, the patent owner has the right to produce, use, sell, have in the possession for sale, offer for sale or import the patented product into Thailand (Supasiripongchai, 2017). However, this patent right is subject to the patent exhaustion provision in subsection 7 of paragraph 2 of section 36 of the Thai PA 1979 (hereinafter called section 36(7)), which provides that the patent right will not apply to the use, sale, having in possession for sale, offering for sale or importation of a patented product into Thailand when it has been produced or sold with the authorization or consent of the patent owner (Supasiripongchai, 2017). It is unclear as to whether this provision should be interpreted to mean the authorization by the Thai patent owner for the sale of the patented products in Thailand or it should be extended to cover the authorization by the foreign patent owner for the sale of the products in other countries (Supasiripongchai, 2017). In other words, the scope of patent exhaustion provision in section 36(7) is clear as to whether it should be applied as national exhaustion or international exhaustion (Supasiripongchai, 2017). Kuanpoth argued that the provision in section 36(7) should be interpreted in the light of international exhaustion approach to allow parallel importation of patented goods into Thailand and in such case the patent right is exhausted once the patented goods are placed on the market anywhere in the world by the patent owner or with his consent (Kuanpoth, 2012). However, this argument seems to be inconsistent with the wording of section 36(7) and some relevant definitions in section 3 of the PA 1979 which seem to be in favour of national exhaustion approach. In this vein, the definition of the term 'patent' is defined by section 3 as a document issued to grant protection for an invention or a design under the provisions in Chapter 2 and Chapter 3 of the Thai PA 1979 (Supasiripongchai, 2017). This definition ensures that the term 'patent' is only limited to the patent issued in Thailand under the PA 1979 and such meaning does not extend to the patents granted by foreign laws in other countries (Supasiripongchai, 2017). The wording of section 36(7) clearly requires the consent of patent owner before the patent exhaustion provision can be applied and also section 3 of the Thai PA 1979 defines the term 'patent owner' to include the transferee of patent (Supasiripongchai, 2017). This means that if the patent owner or transferee of patent who holds patent right in Thailand does not give his consent to the importation of

patented products from other countries for sale in Thailand, then such importation of patented products cannot be done under section 36(7) (Supasiripongchai, 2017).

This problem can be seen clearly in case of parallel patent. The difficulty might arise when one specific product has two different patent owners in different countries (Supasiripongchai, 2017). For example, a Japanese inventor may create a new product and apply for patent protection for such product in Japan and Thailand. After obtaining such patent protection, he becomes the patent owner in both Japan and Thailand. If he assigns or transfers his patent right in Thailand to a Thai transferee, then such transferee is also considered as a patent owner in Thailand under section 3 of the PA 1979. The problem occurs when the Japanese patent owner sell his patented products in Japan, but such product are imported by the third party into Thailand where the transferee of patent hold patent right over such products. In such case, the PA 1979 requires the patent owner or transferee of patent in Thailand to give their consent before parallel importation of such products can be done under section 36(7). This seems to favour national exhaustion approach, so the application of international or regional exhaustion approaches might be inconsistent with the relevant definitions and wording of section 36(7) (Supasiripongchai, 2017). If Thailand is going to apply regional exhaustion approach, such provisions need to be reformed in order to limit the scope of these provisions to regional level (Supasiripongchai, 2017).

Another problem with the patent exhaustion provision in section 36(7) is that it cannot apply to the design patent since section 65 of the Thai PA 1979 stipulates that the provisions of sections 10, 11, 12, 13, 14, 15, 16, 19, 20, 21, 22, 27, 28, 29, 31, 32, 33, 34, 37, 38, 39, 40, 41, 42, 43, 44, and 53 in Chapter 2 concerning patents for inventions shall apply, *mutatis mutandis*, to patents for designs in Chapter 3 (Hemaratchata, 2010; Supasiripongchai, 2017). Section 65 does not allow section 36 including the patent exhaustion provision in section 36(7) to apply to the design patent since section 36 is not included in the list of provisions which can apply, *mutatis mutandis*, to the design patent (Hemaratchata, 2010; Supasiripongchai, 2017). At present, the petty patent or the patent for invention might be subject to the patent exhaustion provision in section 36(7), while the design patent is not, so the design patent owner is the only one who has the right to prevent parallel importation of the products embodying the registered design from other countries into Thailand (Supasiripongchai, 2017).

In the area of copyright law, the Copyright Act 1994 (hereinafter called the CA 1994) contains the copyright exhaustion provision in section 32/1, but such provision is also unclear. Section 32/1 limits the exclusive right of the copyright owner by allowing the individual to sell his legally purchased copyright works to other persons since it stipulates that any distribution of an original copyright work or a copy of copyright work by a person who has lawfully obtained ownership of the original copyright work or the copy of such copyright work shall not be deemed an infringement of copyright (Supasiripongchai, 2016). In other words, when a material object in which a copyright work is embodied is lawfully sold and the ownership of such material object is transferred to a purchaser who buys it, the exclusive right of copyright owner in such material object is exhausted under section 32/1 and such purchaser can resell it to another person (Supasiripongchai, 2016). However, the scope of copyright exhaustion provision in section 32/1 is unclear as to whether it should be applied as national exhaustion or international exhaustion. Netayasupha and Arreewittayalerd explained

that such ambiguity arises from the question of whether section 32 should be applied to the sale of copyright work in Thailand only or it should be extended to cover the sale of copyright works in other countries and importation of such works from other countries into Thailand (Netayasupha and Arreewittayalerd, 2015). They were of the view that this issue needs to be clarified by the Thai Court in the future in order to make it easier to enforce copyright law (Netayasupha and Arreewittayalerd, 2015). Another problem is that there is no requirement of consent of the copyright owner for the distribution of copyright works in the copyright exhaustion provision of section 32/1, and therefore it is difficult to ensure that this provision will be applied to exhaust the exclusive right only when the copyright work has been distributed or sold with the authorization or consent of the copyright owner.

3) Recommendations on the appropriate approach for Thailand

This research recommends that the regional exhaustion approach like the community-wide exhaustion approach of the European Union should be more appropriate for Thailand and other ASEAN countries than national and international exhaustion approaches. In this instance, this research contends that the national exhaustion approach is not suitable for Thailand and other ASEAN countries since it does not support the AEC objective of promoting the free movement of goods within the Southeast Asia region. This is because it allows the IP owners to prevent parallel importation of goods protected under the IP laws from other ASEAN countries and therefore the AEC objective of promoting the free movement of goods cannot be achieved under this approach. This research also contends that international exhaustion approach is not appropriate for Thailand and other ASEAN countries because the application of such approach would lead to less investment in research and development of new products and less expansion into new market (International Trademark Association, 2007; European Commission, 2000). Importantly, the application of international exhaustion approach would make it more difficult to enforce the safety standard of products and the product-based environmental standards, while at the same time it reduces the competitive ability of the IP owners and the ability of the consumers in determining the quality of such products (National Economic Research Associates, 1999; International Association for the Protection of Intellectual Property, 1999). Further, the application of international exhaustion approach which allows parallel importation of goods protected under the IP laws from every country or anywhere in the world without any limitation, would make it more difficult to prevent importation of infringing products into Thailand since such infringing products are often mixed with parallel imported products (Hemaratchata, 2010; International Trademark Association, 2007). Under international exhaustion approach, it would be necessary for the IP owners to prove that the parallel imported products are the infringing goods in order to prevent such importation. This is different from the regional exhaustion approach which allows the IP owners to prevent parallel importation of products from the countries outside specified region without the need to prove that the imported products are the infringing products. The absence of barrier to parallel importations under international exhaustion approach would reduce the ability to detect and prevent the importation of infringing products into Thailand and other ASEAN countries (International Trademark Association, 2007; National Economic Research Associates, 1999). This could potentially undermine the efforts to stop counterfeits and piracy of Thailand and other ASEAN countries.

In contrast, regional exhaustion approach allows parallel importation of goods protected under the IP laws once such goods are placed on the markets in other ASEAN countries, so it can promote the single market and free movement of goods within the Southeast Asia region. Importantly, the AEC objective of promoting the free movement of goods can be achieved under regional exhaustion approach with little impact on investment and economic interest of the IP owners. Therefore, there is no need for Thailand and other ASEAN countries to apply international exhaustion approach which might have more severe impacts on investment in research and development of new products and existing local products. Further, the regional exhaustion approach is better than international exhaustion approach in term of compromising the different positions among ASEAN countries since it is a combination between international and national exhaustion approaches, so it can be applied in the ASEAN countries that still adhere to either international exhaustion or national exhaustion with fewer changes needed (Fink and Maskus, 2005; Veron, 2011). It is also better in term of maintaining a balance between the promotion of free movement of goods for the public interest and the protection of the IP rights for the economic interest of the IP owners. By allowing parallel importation of goods from other ASEAN countries, regional exhaustion approach can increase the availability of goods for the benefit of consumers in Thailand. At the same time, it still provides better protection for the economic interest of the IP owner by allowing the IP owners in Thailand and other ASEAN countries to prevent parallel importation of goods from the countries outside the Southeast Asia region and this provides better incentives for creativity than international exhaustion approach.

The research proposes that the same exhaustion approach should be applied in the area of trademark law, patent law and copyright law. This means that if Thailand is going to apply regional exhaustion approach, then the application of such approach should be carried out in all these areas of the IP laws. This is because the application of regional exhaustion approach in one area of the IP laws would not be very effective since many products are not only protected by one law, but they are often protected by multiple sets of the IP laws such as trademark law, patent law and copyright law. For instance, the introduction of regional exhaustion approach in the area of trademark law alone would still allow the manufacturers of such products, which are often protected by several IP laws, to rely on other IP laws such copyright law and patent law to prevent parallel importation of such products into Thailand.

In the area of trademark law, this research contends that the application of regional exhaustion approach is not contrary to the current approach of the Thai Supreme Court in the Decision No. 2817/2543 and Decision No. 297/2546. Although this current approach allowed parallel importation of genuine goods protected under the trademark law from other ASEAN countries and seem to favour international exhaustion approach, it does not prevent the application of regional exhaustion approach. However, at present there is no provision on exhaustion of trademark right in the Thai TMA 1991 and without such provision, the Thai Court can change its approach back to the previous approach which favoured national exhaustion approach in the future since the Thai legal system is civil law system where the previous cases are not binding on later Courts, so the insertion of the trademark exhaustion provision is necessary. Therefore, this research recommends that the trademark exhaustion provision with the clear scope of application should be inserted into the Thai TMA

1991. Especially, if Thailand is going to apply regional exhaustion approach, it is important to ensure that the proposed trademark exhaustion provision should be regulated in according to regional exhaustion approach which can guarantee that parallel importation of genuine goods from other ASEAN countries can be done and the trademark owner is allowed to prevent parallel importation of goods from the countries outside the Southeast Asia region or the AEC. Further, this research suggests that the proposed trademark exhaustion provision should contain the requirement of consent of trademark owner in order to ensure that such consent of trademark owner in Thailand should be obtained before parallel importation of goods protected under the trademark law from other countries into Thailand for resale can take place. The proposed provision which contains the requirement of consent should indicate that the burden of proof on the issue of whether trademark owner in Thailand has given his consent for parallel importation of such goods into Thailand should be on the defendant or parallel importer.

In the area of patent law, the patent exhaustion provision in section 36(7) of the Thai PA 1979 also needs to be reformed if Thailand is going to apply regional exhaustion approach. In this instance, the changes to the wording of section 36(7) and definition of the term 'patent owner' and term 'petty patent owner' in section 3 of the Thai PA 1979 should be made in order to ensure that the patent exhaustion provision is only applied as regional exhaustion. This means that the scope of the proposed patent exhaustion provision should be limited and interpreted in the context of regional base, while at the same time the scope of such proposed provision should be extended to cover the design patent. This is because at present the petty patent and the patent for invention are subject to the patent exhaustion provision in section 36(7), but the design patent is not subject to such provision. Consequently, the design patent owner has the right to prevent parallel importation of products embodying the design registered in Thailand even though such products were imported from other ASEAN countries. This can be an obstacle to achieve the AEC objective of promoting the free movement of goods within the Southeast Asia region, so the proposed patent exhaustion provision should be able to apply to design patent. Such change would make it consistent with the provisions of the petty patent and the patent for invention which have already been subject to the patent exhaustion provision, while at the same time such change would guarantee that parallel importation of goods embodying such registered design from other ASEAN countries can be done.

In the area of copyright law, changes should be made to the copyright exhaustion provision in section 32/1 of the Thai CA 1994 in order to make the scope of this provision clear and certain. At present, there is no judicial decision where the Thai Court has interpreted the copyright exhaustion provision in section 32/1, so the scope of such provision is still unclear as to whether it should be applied as national exhaustion or international exhaustion. If Thailand is going to apply the regional exhaustion approach, then changes should be made to the wording of the provision in section 32/1 in order to ensure that parallel importation of goods protected under copyright law from other ASEAN countries into Thailand can be done, while the proposed changes should allow the copyright owner to prevent parallel importation of goods from the countries outside the Southeast Asia region. In addition, the requirement of consent of the copyright owner should be inserted into the copyright exhaustion provision in section 32/1 in order to ensure that the consent of copyright owner should be obtained before distribution or parallel importation of goods

protected under copyright law can take place. The insertion of requirement of consent into section 32/1 would help to safeguard the economic interest of the copyright owner since it can guarantee that this provision would be applied to exhaust the exclusive right of copyright owner only when goods protected under copyright law have been distributed or imported by the copyright owner or with his consent. With this proposed change, if the copyright owner authorizes or gives his consent to the distribution, sale or importation of his goods in an ASEAN country, then such exclusive right is exhausted and the copyright owner cannot prevent parallel importation of such goods from that ASEAN country into Thailand for sale.

Conclusion

This research argues that the regional exhaustion approach like the community-wide exhaustion approach of the European Union is better than national exhaustion approach because it allows Thailand and other ASEAN countries to achieve the objective of creating single market and promoting the free movement within the Southeast Asia region. Such regional exhaustion approach is also better than international exhaustion approach since it provides the IP owners with the possibility to prevent parallel importation of goods protected under the IP laws from the countries outside of the Southeast Asia region, and also it has less impact on investment in research and development of new products than that of international exhaustion approach. However, if Thailand is going to apply regional exhaustion approach, this research proposes that such regional exhaustion approach should be applied in the area of trademark law, patent law and copyright law. In this instance, the wording in the exhaustion provisions of the PA 1979 and the CA 1994, as it currently stands, is not suitable for the application of regional exhaustion approach. Therefore, changes should be made to the copyright exhaustion provision in section 32/1 of the CA 1994 and the patent exhaustion provision in section 36(7) of the PA 1979 in order to ensure that these provisions would be applied as regional exhaustion. This is different from the TMA 1991 which contains no exhaustion provision at all, so this research proposes that the trademark exhaustion provision which is based on regional exhaustion approach should be inserted into the TMA 1991.

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