**Chapter Ten**

**Intellectual Property**

**Suggested answers to the review questions and case problems**

**1. Define the meaning of copyright.**

**Answer:** Copyright is a form of protection provided by the law for an original and creative work of an individual or a juristic person. According to Section 6 of the Copyright Act, it includes literary, dramatic, artistic, musical, audio-visual, cinematographic, sound recording, and sound and video broadcasting work. This listing is only illustrative, not exhaustive, as the Copyright Act extends the protection to any other work in the literary, scientific, or artistic domain whatever may be the mode or form of its expression.

**2. Discuss what copyright protects and how copyright may be infringed.**

**Answer:** Copyright protection arises automatically at the time of creation of eligible work and registration is not necessary. It confers two separate rights: the moral right of the author and the economic right in the work. The protection of moral rights is based on the ground that an original work is the expression of the author’s personality. Under Section 18, the author of the copyright work is entitled to identify himself as the author (“right of paternity”) and to object to any distortion, mutilation, adaptation, or other modification of the work which would be prejudicial to his honor or reputation (“right of integrity”).

The protection of the economic right of an author is intended to allow the author or its holder to profit financially from his creation in order to compensate his creativity. Thus, copyright confers an exclusive right to the author of the work to reproduce, adapt, communicate to the public, and license the rights to other persons with respect to the work created by the author. These rights are exclusive in the sense that they belong only to the author who has right to preclude others from the use of the work.

**3. How long does the copyright protection last for juristic persons?**

**Answer:** If the author is a juristic person, the copyright subsists for 50 years from the creation (Section 19, Copyright Act). In the case the work is published during such period, the copyright continues to subsist for fifty years as from the first publication. Once a copyright expires, anyone may use the material without permission and without paying a copyright fee.

**4. Suppose Ampan buys a CD and then copies it onto his iPod. Discuss whether it is legal to give the CD to his friend Kanchana.**

**Answer:** Under Section 28 of the Copyright Act reproduction, adaptation, communication to public, letting of the creative work without permission of the author constitute copyright infringement. In this case, Ampan’s conduct does not fall under Section 27 and would not be considered as copyright infringement. As a matter of fact, Ampan does not reproduce, adapt, communicate to the public or lets the CD to his friend Kanchana. He simply gives Kanchana the original CD as a gift.

**5. Discuss some of the reasons why the law protects patents.**

**Answer:** Patent protection in Thailand is relatively recent as the first law dates back to 1979. Until that date, Thailand did not provide any legal protection for inventions and product designs. The Patent Act B.E. 2522 (1979) confers a temporary monopoly to the inventor for the exclusive use of an invention or a design. The primary purpose of patents is to reward the inventor for the creative efforts involved in the invention and to preclude others, during the validity of the patent, from making, using, or selling the invention without permission. Such protection is necessary to the conduct of business. Natural and juristic persons would not invest significant resources in research and development if the resulting inventions were not protected by the law.

**6. Explain the reasons why some inventions are not patented.**

**Answer:** According to Section 5 of the Thai Patent Act B.E. 2522 (1979), certain items cannot be patented because they are non-patentable subject matter. Plants, animals including microorganisms, and extracts from plants and animals cannot be registered to an owner. For example, a genetically engineered bacterium capable of breaking down crude oil in order to clean up oil spills is not eligible for a patent because it is considered as a genetically altered living organism. In the same vein, scientific and mathematical theories cannot be patented. This exclusion confirms a general principle in patent law according to which principles and rules are not patentable in themselves due to a lack of industrial applicability. For instance, Pythagoras could not patent his theorem, nor could Einstein have patented his famous equation *E= mc2*. However, the practical application of such concepts is patentable. Although the law of magnetism cannot be patented, a magnetic door lock can be patented. Computer programs are not eligible for a patent because they constitute algorithms, but they are covered by copyright as the expression of an underlying idea. Also falling into this category are methods of diagnosis and the treatment or cure of human and animal diseases. Lastly, inventions contrary to public order, morality, health, and welfare cannot be patented. Thus, methods for reproductive human cloning, use of human embryos for commercial or industrial purposes, or processes that cause severe damage to the environment cannot be patented as they are contrary to public order and morality.

**7. Distinguish between the different categories of trade symbols.**

**Answer:** Trade symbol protection in Thailand is provided by the Trademark Act B.E. 2534 (1991) as amended by the Trademark Act (No. 2) B.E. 2543 (2000). Trade symbols include trademark, service mark, certification mark and collective marks. A trademark is defined under the Trademark Act as a sign that distinguishes the goods of one person (i.e., natural or juristic person) from those of others in the marketplace. A service mark serves the same purpose as a trademark but it is used to identify a service (rather than a product) of one person from those of another. Acertification mark is a sign used by a person other than its owner to certify that specific products satisfy prescribed standards. These standards may apply to the origin, materials, methods of production, quality, and other characteristics of goods or services. Collective marks are essentially trademarks or service marks used either by companies or enterprises of the same group or by members of an association, cooperative, trade union, confederation, group of persons, or other organizations. Therefore, the owner of collective marks is not the producer of the goods and services itself but the group of which the producer is a member.

**8. Outline what trade secrets protect and the remedies for infringement.**

**Answer:** Business professionals may develop innovations that are not, or cannot be, copyrighted, patented, or trademarked. As long as these innovations are not known to the public and give the business practicing them an advantage in their trade, they will receive protection under the Trade Secret Act B.E. 2545 (2002). A trade secret can be information or a compilation of information; it also includes formulae, patterns, programs, methods, techniques, and processes that provide the right holder a competitive advantage over competitors.

If there is clear evidence that an infringement of trade secrets has been committed or is imminent, the affected or imminently to be affected controller of trade secrets is entitled to present a petition to the court for an interim injunction and temporarily stop the infringement of trade secrets. Also, Section 8 of the Trade Secret Act entitles the controller to file an action in the court for a permanent injunction in order to permanently stop the infringement of trade secrets and claim damages from the wrongdoer.

**9. In his free time, Somchai likes to write songs. He self-records his first CD in 2005 with music and lyrics. The songs are played only as a simple hobby, thus they are neither published nor registered as copyright. Later Somchai gives a copy of the CD to his friend Eak as a present. Eak is really impressed by the quality of the songs. In occasion of his daughter’s wedding in 2012, Eak decides to distribute 400 copies of the CD as a welcome gift to all his friends. Has Eak infringed Somchai’s copyright?**

**Answer:** Registration is not a condition for protection of copyright in Thailand. Thus, Mr Somchai may bring an action against Mr Eak for violation of his copyright even without registering the work. Nevertheless, it would be beneficial for Mr Somchai to deposit his work with the Department of Intellectual Property’s Copyright Office for evidentiary purposes.

According to the Copyright Act B.E. 2537 (1994) the song is still protected by copyright: “the owner of copyright has the exclusive rights of reproduction or adaptation” (Section 15) “for fifty years as from the authorship” (Section 21).

After these preliminary considerations, it is necessary to analyse if the behaviour of Mr Eak constitutes an acceptable use of the copyright by virtue of Section 32, paragraph 1 and paragraph 2, which protects acts that:

1. Do not conflict with the normal exploitation of the copyright work and

2. Do not unreasonably prejudice the legitimate interests of the rights holder;

3. Subject to items above, are deemed to be certain special cases (in particular: “use for personal benefit or for the benefit of himself and other family members or close relatives”).

In the light of these criteria, Mr Eak’s decision to distribute 400 copies of the CD to *all his friends* constitutes a copyright infringement.

**10. Starbucks Coffee Company is a well-known retailer, roaster, and brand of specialty coffee. Starbung is a coffee street vendor in Bangkok. The Starbucks Coffee Company brings a trademark infringement action against Starbung. Specifically, Starbucks Coffee Company claims unfair competition within the coffee business due to Starbung’s imitation of the famous green logo and name. Explain whether and under what conditions Starbucks will prevail in its action.**

**Answer:** Under Section 44 of the Trademark Act, the holder of a registered trademark has the exclusive right to its use for the goods in respect of which registration has been granted. This means that the registered trademark protects the right holder against any use of the product that may cause prejudice to him. In the case above, the use of substantially indistinguishable marks (“Starbung”) may constitute trademark infringement because it is likely to cause confusion, to cause mistakes, or to deceive Starbucks’ customers.