

Access to Medicines and Patent in Thailand

Jumpol Pinyosinwat¹

Introduction

In response to the concern of enforcing patent in most developing countries more efficiently, multinational enterprises ensure their monopoly privileges through the channel of various trade agreements. Thailand, for instance, has been pressured to extend patent protection beyond TRIPS' requirements. Several adjustments include scope and term of patent protection, data exclusivity, custom measures.

Unlike those in developed countries, the enforcement of patent and other intellectual property rights in developing countries have a wide range of differences, causing more difficult to find a common answer. In this regard, particular issues of access to medicines and patent in Thailand are financial factor, monopoly of patent and balance, and differences of enforcing patent which are examined below.

Financial Factor

There are several factors limit access to medicines in Thailand; for examples, limit R&D, procurement of medicines, financial factor. Nevertheless, financial factor plays a crucial role in blocking medical access. The household socio-economic survey 2011 shows that Thai household nationwide spent on average US \$ 576 per month. By this amount, 33.6 percent was mainly spent on food and beverages, followed by housing and appliances 20.4 percent, vehicles and transportation 18.9 percent, whilst the expenditure of medical and health care is only 1.5 percent (approximately US \$ 8.6 per month per household).² This number also reveals that most Thais could not afford most expensive medicines if they need to. The insufficient financing for medical and health care leads to “self care” in case of minor illnesses. Since majority Thais could not have enough money for costly medicines, it is common for them to order and buy medicine at countless drug stores nearby. Accordingly, affordability is the preliminary barrier to access.

Particularly, the gap of different pricing between patented medicine and generic medicine in Thailand is very wide, yielding other difficulty for most people. For instance, the Government

¹ Dr.Jumpol Pinyosinwat is currently served in the Central Court of Appeal, Thailand. He is also the Editorial Board's member of the International Journal of Private Law (IJPL) and the Journal of International Commercial Law and Technology (JICLT).

² See National Statistical Office, *Household Socio-Economic Survey*, <http://service.nso.go.th/nso/nsopublish/themes/theme_2-7-3.html> (Thai).

Pharmaceutical Organization successfully manufactured ARV cocktail (so called “GPO-vir”)—fixed-dose combination of ARV treatment for HIV patients—which costs US \$ 31 per month per patient, compared to US \$ 490 per month for imported patent drug.³ However, the price of ARV cocktail for one patient is still much higher than the average medical expenditure of a household per month and excludes most patients. It is estimated that less than 5 percent of HIV-infected persons in Thailand could access to medicine.⁴

Monopoly of Patent and Balance

The monopoly of Intellectual property right is not justified to be absolute or perpetual. Essentially, intellectual property right is more likely a form of privilege, balancing with certain duties. Two most important features of intellectual property characteristics are the monopoly nature and the need to balance between the monopoly rights and the public interests. Without the decent system of balancing, the power resides in these intangible forms and monopoly natures combining with multinational enterprises and political connections will always prevail.

Patent has been used to sustain the monopoly power of pharmaceutical industry both in developed and developing countries. Unavoidable, most multinational enterprises apply new patents in several countries as much as they could. Several techniques have been used to broaden and renew such patents, while government authorities in most developing countries move much leisurely. Thai Department of Intellectual Property (DIP), for example, unintentionally made mistakes at particular complicated patent applications. Bristol-Myers Squibb (BMS) amended its patent application of Didanosine (ddI, DDI) tablets patent by removing the dosage range of 5-100 mg amounted in order to broaden the scope to an extension of scope. Thai DIP inconsiderately granted such amendment. IN 2001, group of HIV patients filed the lawsuit to invalidate the amendment. The court finally held that although the Director-General of DIP could authorize amendments after publication, he had no authority to approve amendments extending the scope of the invention. The patent amendment in this case would allow BMS to prohibit anyone from producing ddI tablets of any dosage range, rather than only between 5-100 mg. Therefore, DIP could not provide such amendment.

In practice, the balance between multinational enterprises’ monopoly and most developing countries depends primarily on the impartial information. Fair researches and neutrally technical support is needed to create decent system of balancing.

³ See Rapeepun Chalongsuk, *Access to Medicines in Thailand*, 108 (June 16, 2012) <<http://www.journal.su.ac.th/index.php/suij/article/viewFile/30/29>>

⁴ See Jakkrit Kuanpoth, *Patents and Access to Medicines in Thailand: The ddI case and Beyond*, Thailand Journal of Law and Policy, (2008).

Differences of Enforcing Patent

Additionally, different approaches of enforcing patent and other intellectual property rights have caused difficulties to harmonize the comprehensive system for both developing and developed countries. Briefly, most developed countries trend to applied efficient civil remedies whereas developing countries have applied criminal prosecution as a main tool to threaten possible infringers.

In the United States, for instance, has utilized various civil alternatives to enforce patent and other intellectual property rights, such as, interim injunction, final injunction. The ratio of civil litigation of intellectual property matters is over 98%.⁵ In the opposite, most developing countries, particularly Thailand, have actively promoted criminal approach to enforce intellectual property rights more than 10 years, including patent infringement. In 2010, the statistics from the Central Intellectual Property and International Court shows all intellectual property cases filed in Thailand is 5,285 which 5,147 are criminal cases.⁶ Accordingly, there are only 2 % of exceptionally civil cases. Unquestionably, monopoly right equipped by criminal instruments give the right holders much more powerful right than that in most developed countries. As a minimum, there is no room for arguing intellectual property justification in criminal procedure. Decent balance of monopoly right and public interest is practically hard to attain.

Presently, patent holders can practically claim and seek protection worldwide. For that reason, harmonizing laws and practices is not only a crucial condition to give fair and just procedures, but also a precondition for global protection scheme.

According to diverse practices and difficulties to access medicines and enforce patent in developing countries, new regime of research and development to access the medicines and focus on diseases that primarily affect developing countries is unquestionably needed.

⁵ See Jumpol Pinyosinwat, *Model for Specialized Intellectual Property Court in Developing Countries*, 58-60 (LAP LAMBERT Academic Publishing: Saarbrücken) (2012).

From 2001 to 2005, the ratio of civil cases filed was 98.2% (8,314 cases), 98.44% (8,254 cases), 98.22% (8,934 cases), 98.67% (9,590 cases), and 98.63% (12,184 cases) respectively.

⁶ See The Central Intellectual Property and International Trade Court, *Statistics* (June 15, 2012) <<http://www.ipitc.coj.go.th/info.php?cid=16>>