



**PROBLEMS OF CONSUMER PROTECTION RELATING
TO TRADEMARK LAW: A CASE STUDY IN REGARD
TO USAGE OF UNFAIR METHOD TO CAUSE
CONFUSION ON AUTHENTICITY OF TRADEMARK
OWNERSHIP**

BY

MR. KAMOL TECHAVITTAYAPAKORN

**A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF
THE REQUIREMENTS FOR THE DEGREE OF MASTER OF
LAWS IN BUSINESS LAWS (ENGLISH PROGRAM)**

FACULTY OF LAW

THAMMASAT UNIVERSITY

ACADEMIC YEAR 2015

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THESIS

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ENTITLED

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LAW: A CASE STUDY IN REGARD TO USAGE OF UNFAIR METHOD TO
CAUSE CONFUSION ON AUTHENTICITY OF TRADEMARK OWNERSHIP

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Thesis Title	PROBLEMS OF CONSUMER PROTECTION RELATING TO TRADEMARK LAW: A CASE STUDY IN REGARD TO USAGE OF UNFAIR METHOD TO CAUSE CONFUSION ON AUTHENTICITY OF TRADEMARK OWNERSHIP
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ABSTRACT

At present, some business operators use dishonest methods to run their businesses. For example, they imitate trademarks or packaging of other businesses in order to use well-known trademarks and confuse the consumer. In some cases, trademark law may not give sufficient protection of the consumer's interests. Some business operators have registered or changed the juristic person's name by using the trademark of others without the permission of the trademark owner, or have used part of another's trademark as their own. This causes confusion to the consumer who may think that the trademark owner and such juristic person are the same or an affiliated company. The consumer may buy products or receive services from the juristic person who is using another's trademark because they rely on the quality of the real trademark owner. This causes damage to the consumer who does not receive the products or services from the real trademark owner, and the product or service from the business operator who is not the real trademark owner may not have been of an equal quality to the product or service from the real trademark owner.

Under Thai law, there are many laws which are intended to protect the consumer. However, in the case that the business operator has registered or changed its juristic person's name by using the trademark of others or part of it without permission and causes confusion to the consumer, the consumer does not receive proper protection under Thai law.

Under international law, there is an unfair competition principle in the Paris Convention. Any act of competition contrary to honest practices such as causing confusion, discrediting competitors and misleading the public is prohibited under international law. The act of some business operators above can be considered as unfair competition.

Since the present Thai law may not apply to protect the consumer who confused on authenticity of trademark ownership, in order to resolve this problem, the thesis proposes that the legislature should enact a new special statute covering unfair competition.

The unfair competition law should set out the acts that will be considered as unfair competition and include the acts which causes the consumers to confuse on authenticity of trademark owner for giving the protection to the consumer.

Keywords: Unfair Competition, Consumer Protection, Trademark, Passing off

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CHAPTER 1

INTRODUCTION

1.1 Background and Problems

At present, people have to buy products or receive services from a manufacturer or business operator. In an age where science and industry have become more developed, trade, products and services have also changed and become more complicated. The manufacturing process has changed and now uses complicated materials which are beyond the understanding of consumers. Buyers as consumers cannot use their knowledge to choose quality products or services. Therefore, the 'caveat emptor' or 'let the buyer beware' principle does not offer justice to society. This means the government has to apply the law to protect consumers and business operators.

Under Thai law, there are many laws which have the purpose of protecting consumers. The important Thai laws which have such a purpose are the Thai Consumer Protection Act B.E. 2522 and the Thai Trademark Act B.E. 2534. However, the consumer protection system in Thailand has a somewhat paternalistic nature which means that consumers may not be able to exercise their rights directly or take legal action by themselves. Sometimes, consumers may need to depend on government organisations which have limited budgets and personnel. This causes problems for consumers as it means they do not receive proper protection.

Trademark is an intellectual property right which is important for the economy and trade because its purpose is to enable the consumer to distinguish source, brand, quality, owner and reliability of products. A trademark is also a tool for trademark owners, with it they can advertise and improve their products. However, this may cause legal issues if others attempt to falsify or imitate the trademark. Therefore, it is important to have trademark law in order to protect the interest of trademark owners or business operators and consumers.

The main purpose of trademark law is to protect the interests of trademark owners and consumers.¹ Therefore, trademark law is the legal device to balance the interests of trademark owners and the interests of consumers. Trademark law protects the consumer by helping them to distinguish between the products from each manufacturer. The consumer can choose and buy quality products from the owners or manufacturers who are reliable. On the other hand, the consumer can avoid products which are of poor quality from unreliable owners or manufacturers.

Nowadays, some business operators use dishonest methods to run their businesses; for example, they imitate trademarks or packages of others in order to use well-known trademarks and confuse the consumer. In some cases, trademark law may not give sufficient protection to consumers, trademark owners or business operators. Some business operators have registered or changed the juristic person's name by using the trademark of others without permission from the trademark owner, or have used part of another's trademark as their trademark. This confuses the consumer, who may think that the trademark owner and such a juristic person are the same or an affiliated company. The consumer may buy products or receive services from the juristic person who is using the other's trademark because they rely on the quality of the real trademark owner. It causes damage to the trademark owner, who loses a consumer and the chance to make a profit. Moreover, it also causes damage to the consumer who does not receive products or services from the real trademark owner, and the product or service from the business operator who is not the real trademark owner may not have been of an equal quality to the product or service from the real trademark owner.

The author would like to propose an example of the problem mentioned above in the case of *CFG Service Ltd v Srisawad Power Ltd et al.* (hereinafter the *Example Case*). In 2007, the plaintiff CFG Service took over the business of Srisawad International (1991) Ltd and also bought the service mark named Srisawad Ngerntidlor from it. At that time the third and fourth defendants were executives of

¹ รัชชัย สุภผลศิริ, **คำอธิบายกฎหมาย เครื่องหมายการค้า** (กรุงเทพฯ: สำนักพิมพ์นิติธรรม, 2536), 7. (Tatchai Supaponsiri, **Textbook on Trademark Law** (Bangkok: Nititham Publishing House, 1993), 7).

Srisawad International (1991) Ltd. Thereafter, Srisawad International (1991) Ltd changed its juristic person's name to Srisamarn International Ltd.

In 2008, the first defendant was founded under the name of Power 99 Ltd and the second defendant was the authorised director at that time. The major shareholders of the first defendant were the relatives of the third defendant. The first defendant engaged in the same business as the plaintiff and opened a branch office near or adjacent to the plaintiff's branch office.

In 2009, the first defendant changed its juristic person's name from Power 99 Ltd to Srisawad Power Ltd. The first defendant advertised its business by using the word 'Srisawad', which was the word in the service mark sold by Srisawad International (1991) Ltd to the plaintiff. This caused consumers to be confused that the plaintiff and the first defendant were the same juristic person or an affiliated company. In the same year, the plaintiff filed a criminal charge against the defendants with the Central Intellectual Property and International Trade Court.

In 2010, the Central Intellectual Property and International Trade Court rendered the judgment in favour of the plaintiff. The court decided that the first and third defendants were guilty according to section 272(1) of the Criminal Code² and fined each defendant the amount of Baht 2,000. Moreover, the court ordered that the defendants were prohibited from using an artificial mark of the word 'Srisawad' like the service mark of the plaintiff, in the operation, advertisement or publication of the first defendant's business. The court also ordered them to take off, remove, delete or

² **Section 272** Whoever:

1. Uses a name, figure, artificial mark or any wording in the carrying on trade of the other person, or causes the same to appear on a goods, packing, coverings, advertisements, price lists, business letters or the like in order to make the public to believe that it is the goods or trade of such other person;
2. Imitates a signboard or the like so that the public are likely to believe that his trading premises are those of another person situated nearby;
3. Circulates or propagates the false statement in order to bring discredit to the trading premises, goods, industry or commerce of any person with a view to obtaining benefit for his trade, shall be punished with imprisonment not exceeding one year or fined not exceeding two thousand Baht, or both.

The offence under this Section is a compoundable offence.

demolish all things which were used to advertise or publicise the business of the first defendant which bore the plaintiff's mark. The defendants filed an appeal with the Supreme Court.

In 2013, the first defendant applied to be listed in the stock exchange using the old service mark. In 2015, the case was still under the consideration of the Supreme Court.

According to the facts of the *Example Case*, some consumers were confused that the plaintiff and the first defendant were the same juristic person. Some newspapers published a suggestion that the first defendant was the same entity as the plaintiff company. In addition, some debt collectors used improper methods, and such acts caused confusion to consumers and defamed the plaintiff. This caused damage to the plaintiff, who was the owner of the service mark, because it lost its customers and reputation, and the chance to make a profit. It also caused damage to consumers because they did not receive the service from the company they wished, and the service from the first defendant may not have a quality equal to the service from the plaintiff.

In this case, the Court of First Instance held that the first, second and third defendants were guilty of an offence pursuant to section 272 and fined each defendant the amount of 2,000 Baht. However, the court dismissed the charge of imitation of the service mark because the court opined that the service mark of the plaintiff and the defendant were different in many points.

In this issue, we have to consider the principle of consumer protection, especially the unfair competition principle in foreign countries, in order to analyse the Thai Trademark Act B.E. 2543, the Thai Consumer Protection Act B.E. 2522 and related laws to ascertain whether they can protect consumers in this case or not.

This thesis will therefore study the principle of consumer protection, especially the unfair competition principle and the passing off principle in the selected foreign countries in order to analyse Thai laws. It proposes amendments to the law by adding or adjusting the provisions or enacts new special statute in order to resolve the problem that Thai laws do not protect the interests of the consumers and trademark owners mentioned above.

The example of the confusion of the consumer between the service mark of the plaintiff and the defendants in the *Example Case*

1. The defendants opened its branch office adjacent to or near the plaintiff's branch office. Consumers were confused whether the two offices were the same company. In this picture the plaintiff's branch office is in the left hand side of the picture and the defendant's branch's office is in the right hand side of the picture.



English Translation

Srisawad Ngerntidlor
Easily approved, receive money
quickly
For all kinds of cars, all
provinces
(Cars Picture)
Tel. 038-799-757
Supported by Krungsri Ayuttaya
Bank

Have house, car
Quick cash
Srisawad Power Ltd.
038-799-163

2. Billboards of the plaintiff and the defendants used the same colour (blue colour for the background of billboard) and the defendant used the word ‘Srisawad Group’ which is the word in the plaintiff’s service mark. It caused consumers confusion that two billboards may belong to the same company.

The billboard of the plaintiff



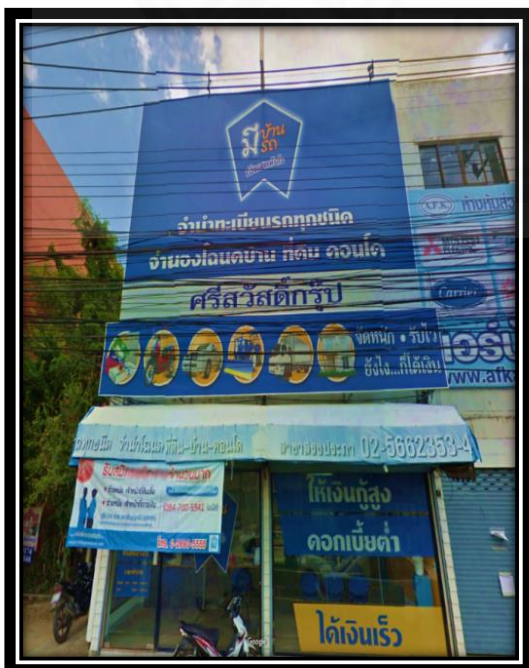
Srisawad
Ngerntidlor
 For all kinds of car, all provinces

 (Woman Picture)

 Easily approved, receive money quickly

Srisawad Ngerntidlor

The billboard of the defendants



**Have house, car
 Quick cash**

 Pawn all kinds of car registrations
 Mortgage house land condominium title deeds

Srisawad Group

3. Font and colour of letters (red colour) of the plaintiff and defendant's billboard is similar. It caused consumers confusion that the two billboards may belong to the same company.

The billboard of the plaintiff



Srisawad

Ngerntidlor

For all kinds of car, all provinces

Tel. 088-088-0880

The billboard of the defendant



Loan

For all kinds of car registrations,
tractor, house land title deeds

Srisawad Power 1979

1.2 Hypothesis

The existing Thai Trademark Act B.E. 2543, the Thai Consumer Protection Act B.E. 2522 and related laws, which are intended to protect the interests of the consumer, does not protect them in some cases. This causes damage to the consumer who does not receive products or services from the real trademark owner. The consumer could not take legal action against the person who used the unfair methods causing their confusion about the authenticity of trademark ownership and could not claim for compensation. Therefore, in order to solve this problem Thai law should be amended under appropriate legal conditions.

1.3 Objection of the Study

(1) To study and analyse the principle of consumer protection under international law and laws of selected foreign countries.

(2) To study and analyse the principle of consumer protection under Thai law.

(3) To compare the principle of consumer protection between the law of selected foreign countries and Thai law.

(4) To propose a solution or amendment of Thai law that enables the protection of consumers' interest.

1.4 Scope of the Study

This thesis mainly focuses on the principle of consumer protection, especially the unfair competition principle and the passing off principle under the law of selected foreign countries and Thai law. The study will investigate and analyse Thai laws in order to provide appropriate recommendations to protect consumers and analyse whether Thai law should be amended or increased.

1.5 Methodology

The method mainly used in this thesis is based on documentary research which includes Thai and foreign textbooks, articles, journals, theses, statutory laws and internet data as well as Thai Supreme Court precedents and decisions of the courts in foreign countries relating to the unfair competition principle and the passing off principle.

1.6 Expected Results

(1) To thoroughly understand the principle of consumer protection under Thai law relating to the unfair competition principle and the passing off principle;

(2) To thoroughly understand the principle of consumer protection under international law and the law of selected foreign countries especially unfair competition principle and the passing off principle; and

(3) To recognise the existing problem relating to consumer protection under Thai law and to propose the adoption of appropriate legislative measures to solve such problem.

CHAPTER 2

THE PRINCIPLE OF CONSUMER PROTECTION UNDER INTERNATIONAL LAW AND THE LAW OF FOREIGN COUNTRIES

2.1 The Concept of Consumer Protection

In an age when world trade and economics were limited to one area or city, products and services were not complicated, because the manufacturing process was simple. The market was in the form of barter. There was no need for the government to provide the tools or special legal measures to protect the consumer. The influence of democracy is that people in society were equal and free to live. The equality in the democratic system causes the free trade market and people in society assumed that they had the equal ability to decide upon and choose products or services. The government would not interfere with the freedom of individuals to make agreements. One of the legal principles at the time was ‘caveat emptor’ or let the buyer beware. It means that in the case where the goods had a defect, such a defect is the responsibility of the buyer.³

At present, science and industry have developed and the economy, trade and services have also changed and become more complicated. The manufacturing process has changed and uses complicated materials which are beyond the normal knowledge of the consumer. Manufacturers have tried to reduce costs and make as much profit as possible. Sometimes this makes the quality of goods decrease. The trade area has also expanded, from trade in one city to trade between cities and between countries. Products have spread and there are more kinds and types. The buyers, as consumers, could not adjust and did not know how to choose quality products. The caveat emptor or let the buyer beware principle did not provide justice to society. Therefore, governments had to consider how to protect the interests of the

³ สุขุม ศุภนิติย์, คำอธิบายกฎหมายคุ้มครองผู้บริโภค, พิมพ์ครั้งที่ 9 (กรุงเทพฯ: สำนักพิมพ์แห่งจุฬาลงกรณ์มหาวิทยาลัย, 2557), 1-2. (Susom Supphanit, **Textbook on Consumer Protection Law**, 9th ed. (Bangkok: Chulalongkorn University Publishing House, 2014), 1-2.

consumer. European countries enacted consumer protection law in order to protect the rights of the consumer.⁴

2.2 The Principle of Consumer Protection under International Law

2.2.1 The Unfair Competition Protection under the Paris Convention

In the case where society lets the business operators or business competitors have free trade or competition in the market, some business operators may use unfair methods in the competition to destroy other business operators. If there is no business competitor there will be a monopoly market and the business operator may exploit the consumer. Therefore, society should have an unfair competition principle to protect other business operators. When the law imposes a duty on a business operator to only use fair competition methods, the market will have competition. Consequently, no business operator can use the monopoly market to exploit the consumer. So, it can be said that the unfair competition principle is also one of the important principles to protect the interests of consumers.

The main source of unfair competition law at international law level can be found in the Paris Convention for the Protection of Industrial Property (hereinafter the Paris Convention). It has the objective to protect industrial intellectual property. The word industrial property is defined in article 1(2) of the Paris Convention as consisting of patents, utility models, industrial designs, trademarks, service marks, trade names, indications of source or appellations of origin, and the repression of unfair competition. Some intellectual properties in the definition of the word industrial property are not industrial property by nature, but are industrial property by negotiation during the drafting of the Paris Convention.⁵

⁴ *Id*

⁵ G.H.C. Bodenhausen, **Guild to the Application of the Paris Convention for the protection of industrial property as revised at Stockholm in 1967**, (Geneva: WIPO, 1997), 23.

The unfair competition principle in the Paris Convention was adopted by the Revision Conference of Brussels in 1900; it was specified in article 10 *bis*:

Article 10 *bis*

- (1) The countries of the Union are bound to assure to nationals of such countries effective protection against unfair competition.
- (2) Any act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition.
- (3) The following in particular shall be prohibited:
 - (i) all acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor;
 - (ii) false allegations in the course of trade of such a nature as to discredit the establishment, the goods, or the industrial or commercial activities, of a competitor;
 - (iii) indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods.

According to article 10 *bis* (1) of the Paris Convention, the countries who are party to the convention are bound to efficiently prevent unfair competition in the country. However, the provision does not specify the means, method of protection or nature of measures. Therefore, the parties are free to choose the method of protection. For example, the countries which use a civil law system may use tort law to protect against unfair competition or legislate special statutes. Countries which use a common law system may apply the court's judgment to prevent against unfair competition.⁶

According to article 10 *bis* (2) of the Paris Convention, unfair competition consists of 'any act of competition contrary to honest practices'. There is

⁶ นลินธร ชาตศิริ, “การกระทำอันเป็นการแข่งขันอันไม่เป็นธรรมทางการค้าและสภาพบังคับตามกฎหมาย : ศึกษากรณีเฉพาะทรัพย์สินอุตสาหกรรม”, วิทยานิพนธ์มหาบัณฑิต คณะนิติศาสตร์ จุฬาลงกรณ์มหาวิทยาลัย, 2539, 15-16. (Nalinthorn Chartsiri. “Unfair Competition and Legal Sanctions: A Case Study of Industrial Property”, Master of Law’s Thesis. Chulalongkorn University, 1996, 15-16).

no clear definition of the words ‘honest practices’ in the convention. It will be the duty of the court or legislation process in each country to apply the word honest practices in their country. This is because the meaning of honest practices is flexible. The criteria of ‘fairness’ or ‘honesty’ in competition depend on the reflection of the sociological, economic, moral and ethical concepts of a society. This will be different in each country and sometimes even within one country. The criteria of honest practices change with time. Moreover, there are always new acts of unfair competition occurring, because there is apparently no limit to inventiveness in the field of competition.⁷

According to article 10 *bis* (3) of the Paris Convention, there are examples of the acts which are considered to be unfair competition. There are three types: causing confusion, discrediting competitors and misleading the public. The common aspect of these important examples of unfair competition is the attempt by the business operator to succeed in business without using his own achievements in terms of price and the quality of his products, but by taking undue advantage of the work of another or by influencing consumer demand with false or misleading statements.⁸

The examples of unfair competition in article 10 *bis* (3) contain common legislation for all parties of the Paris Convention. The parties have to either enact this as part of their domestic legislation, or it must be directly applied by their judicial or administrative authorities. The examples of acts of unfair competition are not limited and constitute only a minimum.⁹

The first example of acts which are considered to be unfair competition is causing confusion. This comprises acts of such a nature as to create confusion by any means whatsoever with the establishment, the goods, or the industrial or commercial activities, of a competitor. It does not depend on whether those acts are committed in good faith or not. Even though the person acts in good faith, the sanction may still be applied. The confusion may be created by the use of a

⁷ WIPO, “*Protection against Unfair Competition Analysis of the Present World situation*,” (Geneva, 1994), 23.

⁸ *Id.*, at 24.

⁹ Bodenhausen, *supra* note 5, at 145.

similar trademark. There are other means of confusion; for example, references to the seat, and titles of publicity or the form of packages.¹⁰

The second example of acts which are considered to be unfair competition is discrediting the competitor. This is an act using untrue allegations to discredit the establishment, goods, services, business or the industrial or commercial activities, of a competitor. Discrediting a competitor by untrue allegations can occur even without injurious intent on the part of the person who makes the allegations. In relation to truth, it will depend on the domestic legislation or case law of each country to decide whether, and under what circumstances, discrediting allegations which are not strictly untrue may also constitute acts of unfair competition.¹¹

The last example of acts which are considered to be unfair competition is acts which are misleading. This does not relate to the goods of a competitor but concerns the goods of the person who makes the allegations. Misleading applies to all implications or allegations in the course of trade which mislead the public or are confusing in the nature, manufacturing process, characteristics, and suitability for their purpose, or the quantity of the goods concerned. Misleading does not relate to similar indications or allegations as to the origin or source of the goods or the identity of the producer, his establishment or his industrial or commercial activities. Such acts are not covered by article 10 of the Paris Convention. It will depend on the domestic legislation or case law to determine whether such acts are contrary to honest practices in industrial or commercial matters and considered to be the acts of unfair competition or not.¹²

According to article 10 *bis* of the Paris Convention, any act of competition contrary to honest practices will be considered as unfair competition. Such provision is very broad and can cover the protection of industrial properties by special statute. However, it will depend on the domestic laws or case law of each country to determine, interpret and apply such articles to prevent unfair competition in each country.

¹⁰ *Id*

¹¹ *Id*

¹² *Id*, at 146.

2.2.2 The Unfair Competition Protection under the TRIPs Agreement

Intellectual property is an important factor of the developed countries' economies because intellectual property affects comparative advantage in the world trade market. The developing countries, which are behind in science and technology, always use technology and intellectual property from developed countries without permission and pay compensation. This causes damage to the developed countries who demand strict protection of intellectual property from developing countries. In 1994, at the end of the Uruguay Round of General Agreement on Tariffs and Trade (GATT), the members of the World Trade Organization (WTO) agreed to enact the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs).¹³

According to article 1, TRIPs is the international agreement which sets down minimum standards for the protection of intellectual property for the WTO members.

Article 1 Nature and Scope of Obligations:

Members shall give effect to the provisions of this Agreement. Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement. Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice.

According to the TRIPs agreement, there are seven types of intellectual property: copyright and related rights, trademarks, geographical indications, industrial designs, patents, layout-designs (topographies) of integrated circuits, and protection of undisclosed information. With regard to protection against unfair competition, according to article 2 part 1,¹⁴ TRIPs provides that the members

¹³ จักรกฤษณ์ ควรวพจน์, กฎหมายระหว่างประเทศว่าด้วยลิขสิทธิ์ สิทธิบัตร และเครื่องหมายการค้า, พิมพ์ครั้งที่ 5 (กรุงเทพฯ: สำนักพิมพ์นิติธรรม, 2555), 22-23. (Jakkrit Kuanpoth, **International Law of Copy Right Patent and Trademark**, 5th ed. (Bangkok: Nititham Publishing House, 2012), 22-23).

¹⁴ “Article 2 Intellectual Property Conventions

must comply with articles 1 to 12 and article 19 of the Paris Convention (1967). This means that the members of the TRIPs agreement must apply article 10 *bis* of the Paris Convention, which relates to unfair competition, to intellectual property, i.e. industrial properties within the meaning of article 1 of the Paris Convention.¹⁵ Therefore, the intellectual properties under TRIPs agreement which must be protected under article 10 *bis* are patents, utility models, industrial designs, trademarks, service marks, trade names, indications of source or appellations of origin, and the repression of unfair competition. Such intellectual properties must be protected by members from unfair competition in the event that TRIPs does not provide particular special measures.¹⁶

2.3 The Principle of Consumer Protection under the Laws of Foreign Countries

2.3.1 The Concept of Unfair Competition

In the wake of recent political developments, many countries are in the process of adopting the systems of a market economy. This allows free competition between industrial and commercial enterprises within limits provided by law. Free competition between business operators is considered the best means of satisfying supply and demand in the economy and of serving the interest of consumers and the economy as a whole. However, where there is competition, acts of unfair competition are liable to occur. This phenomenon has been discernible in all countries

1. In respect of Parts II, III and IV of this Agreement, Members shall comply with Articles 1 through 12, and Article 19, of the Paris Convention (1967).

2. Nothing in Parts I to IV of this Agreement shall derogate from existing obligations that Members may have to each other under the Paris Convention, the Berne Convention, the Rome Convention and the Treaty on Intellectual Property in Respect of Integrated Circuits.”

¹⁵ **“Article 1 Establishment of the Union; Scope of Industrial Property**

(1) The countries to which this Convention applies constitute a Union for the protection of industrial property.

(2) The protection of industrial property has as its object patents, utility models, industrial designs, trademarks, service marks, trade names, indications of source or appellations of origin, and the repression of unfair competition.”

¹⁶ นลินทอร์ (Nalinthorn) , *supra* note 6, at 24.

and at all times, regardless of prevailing political or social systems. Economic competition may be compared to sport competition. Violations of the basic rules of economic competition can take various forms, ranging from illegal but harmless acts (which can be committed by the most honest and careful entrepreneur) to malicious fouls, intended to harm competitors or mislead consumers. They may consist of a direct attack on an individual competitor or in a surreptitious deception of the referee, who in economic competition, typically, is the consumer. Whatever forms such violations may take, it is in the interest of the honest entrepreneur, the consumer and the public at large that they should be prevented as early and as effectively as possible.¹⁷

However, fair play in the marketplace cannot be ensured only by the protection of industrial property rights. A wide range of unfair acts, such as misleading advertising and the violation of trade secrets, are usually not dealt with by the specific laws on industrial property. Unfair competition law is therefore necessary either to supplement the laws on industrial property or to grant a type of protection that no such law can provide. In order to fulfil this function, unfair competition law must be flexible, and protection thereunder must be independent of any formality such as registration. In particular, unfair competition law must be able to adapt to all new forms of market behaviour. Such flexibility does not necessarily entail a lack of predictability. Of course, unfair competition law can never be as specific as patent law or trademark law; yet, experience in many countries has shown that it is possible to develop an efficient and flexible system of unfair competition law and at the same time to ensure sufficient predictability.¹⁸

Unfair competition law includes all rules and regulations which govern commercial practices predominantly in the pre-contractual area, for example in marketing and advertising. The aim is to establish adequate conditions for all market participants. Firstly, a level playing field for enterprises, which is endangered by impediment, free-riding or disparagement, and confusing or deceptive practices by

¹⁷ WIPO, *supra* note 7, at 11.

¹⁸ *Id.*, at 12.

competitors. Secondly, undistorted commercial choice for consumers which is endangered by commercial deception and manipulation.¹⁹

In most countries, unfair competition law developed from tort law. However, it was in relationship to intellectual property, especially trademark law, which in some countries is considered as part of unfair competition law. The issue of the likelihood of confusion, dealt with both under competition law and under trademark law, raises the question of the demarcation between unfair competition law and intellectual property rights. For the relationship to antitrust law, in some countries, the authority who handles consumer protection against unfair competition and deals with antitrust matters is the same authority, although the different aspects are emphasised – for unfair competition law, the fairness of competition. Antitrust law is freedom of competition. The common feature of both laws is competition. Unfair competition can only function properly if it is both free and undisturbed by distortion resulting not only from restrictions, but also from unfair market practices. Antitrust law cannot achieve fair competition on its own; additional regulations to prevent distortion of competition particularly through unfairness are indispensable.²⁰

In the relationship between unfair competition law and consumer protection law, consumer protection has become one of the objectives of some national and European unfair competition laws. However, the aspect of ‘consumer affectedness’ is both too broad and too narrow to define unfair competition law. It is too broad since not everything which serves to protect consumers is also part of unfair competition law. For example, contract law concerns consumers and was adopted to protect consumers. It has its own rules. It deals with the specific relationship of parties so that, for example, advertising, one of the subject matters of unfair competition law, is only relevant in so far as the misleading statement influences the conclusion of a specific contract. On the other hand, the consumer perspective is too narrow since the interest of enterprises in fair competition are blended out or regarded as of secondary

¹⁹ Frauke Henning-Bodewig, **International Handbook on Unfair Competition** (Munich: C.H. Beck, 2013), 26.

²⁰ *Id.*, at 6.

importance, which neither does justice to the roots of unfair competition law, nor to the paramount interest of business in fair competition, also at the vertical level.²¹

Therefore, it can be said that unfair competition law has a relationship to tort law and also intellectual property law, especially trademark law, which is considered as part of unfair competition law. Moreover, unfair competition law has a relationship to antitrust law, because they have a common purpose of efficient and undistorted competition. Finally, unfair competition law has a relationship to consumer protection law, because it directly or indirectly protects consumers against unfair market practices.

The nature of law against unfair competition in each country is different. This is because the nature and form of unfair competition occurring in each country is different. Therefore, the international treaty does not give a clear definition of the word unfair competition and lets each country give its own definition and legal process, according to the situation and nature of unfair competition in that country.

The protection against unfair competition in each country can be divided in three groups as follows.²²

1. The protection against unfair competition by special statutes

In some countries, the legislature has enacted a special statute to prevent unfair competition, such as Japan, Korea, Denmark, Bulgaria, Canada, Sweden and Switzerland. Some countries will apply a special statute or special law together with general law in order to prevent unfair competition. General law will have general provisions which relate to the protection against unfair competition and have a means of law enforcement, especially civil enforcement. The special statute will provide the detail of general law.

For an example of law in this group, the author would like to propose the example of Japanese law. The legislative activities of Japan have been affected by Western countries since 1868. Japan was transformed into a modern state by Western standards. Japan enacted the Patent Monopoly Act 1878, thus demonstrating Japan's interest in the promotion of technical progress. In the years before Japan acceded to

²¹ *Id.*, at 6-7.

²² นลินทธร (Nalinthorn) , *supra* note 6, at 49-50.

the Paris Convention, thereby fulfilling one of the requirements for the revision of the ‘Unequal Treaties’, Japan enacted and amended laws for the protection of patents, trademarks, designs and copyrights.²³

The first draft of an act of Japanese law to prevent unfair competition was published by the Ministry for Agriculture and Trade in 1911. Such Act provides a limited number of prohibited acts instead of a general clause. In 1934, the Unfair Competition Prevention Act was enacted. Instead of general clauses, it still clearly prohibited acts as follows:

- (a) Use of a renowned sign which might lead to confusion
- (b) Use of a trademark which might lead to confusion
- (c) Libellous or defamatory behaviour
- (d) Use of official symbols, flags, etc. as a trademark

As the prohibited act of unfair competition was limited, the Unfair Competition Prevention Act was amended many times to expand the scope of protection. Despite this, the legislature has not yet adopted a general clause against all acts of unfair competition in compliance with article 10 *bis* (2) of the Paris Convention. In view of the lack of a general clause, it is necessary to consider other law to serve the protection of fair competition, especially the general clauses concerning tort in section 709 of the Civil Code.²⁴

2. The protection against unfair competition by tort law and/or the passing off principle and the trade secret principle

Countries which use a civil law system will prevent unfair competition by tort law and countries which use a common law system will use the passing off principle and the trade secret principle developed by court judgments. Examples of the countries which use tort law to prevent unfair competition are France, Italy and the Netherlands. In contrast, the English legal system uses the passing off and trade secret principles to prevent unfair competition.

For an example of the law in this group, the author proposes the French law. This is because France is a model of the classic civil law country with a

²³ Henning-Bodewig, *supra* note 19, at 343.

²⁴ Henning-Bodewig, *supra* note 19, at 344-345.

sophisticated statutory law system. Jurisprudence quickly and flexibly developed the *action en concurrence deloyale*, which granted generous protection to competitors against the risk of confusion, imitation, disparagement, betrayal of secrets, parasitic competition, etc. Other civil law countries, such as the Netherlands and Italy, which also have a Civil Code in force, followed the path taken by France.²⁵

There are few French laws concerning unfair competition. Examples are the freedom of trade and business anchored in revolution acts of 1791 and the general tort of liability provisions in articles 1382²⁶ and 1383²⁷ of the Civil Code. Case law is at the core of French unfair competition law. Unfair competition law traditionally did not protect a consumer's interest, but this received specific protection for the first time in the *Code de la consommation* or Consumption Code in 1993. However, most provisions on unfair competition and commercial practices in such a code protect the fairness of the business, i.e. protect the interests of both consumers and traders.²⁸

The main requirement for liability concerning unfair competition and commercial practices is the confusion which causes a consumer to act in a way he would not have done if he had been properly informed. According to articles 1382 and 1383 of the Civil Code, the elements of an offence are the fault, a loss and causal link between fault and loss. The advantage of such articles is that private persons can enforce their rights without any dependency on the administrative authority and independent of any contractual relations. Criteria for offences under the *Code de la consommation* depend on the legal wording unlike unfair competition criteria stemming from general tort law.²⁹

An example of a country which uses passing off and the trade secret principle to prevent unfair competition is parts of the United Kingdom, in particular

²⁵ *Id* at 1-2.

²⁶ **Article 1382** Civil Code “Any act of man which causes damage to another person obliges the one, by whose fault this damage has been caused, to compensate the other.

²⁷ **Article 1383** Civil Code “Everyone is liable for damage which he causes not only by his own act, but also by negligence or imprudence.”

²⁸ Henning-Bodewig, *supra* note 19, at 208,209.

²⁹ *Id* at 216-217.

England and Wales. In English law there is no general clause against unfair competition or misappropriation of trade values. However, the courts have developed the passing off principle to prevent unfair competition since the beginning of the industrial age. The passing off principle was used as the protection against unfair competition before the system of trademark registration was used. The first reason that English law has no general clause against unfair competition is the politics, history and attitude of English courts. Filing a complaint in the English courts has to be done according to forms of action. If there is no form of action, the court will not accept the case for consideration. Although such a principle would be repealed according to the Judicature Act 1873, an English lawyer still follows such principles. The second reason is the court's concerns that it would have a lot of commercial cases filed with the court, and in the High Court, there is a limited number of judges. If a new form of action relating to unfair competition was allowed to develop, it would result in the filing of many comparative advertising cases. The last reason relates to the parliamentary system; creating a new legal principle should be the duty of the legislature rather than the judiciary.³⁰

3. The protection against unfair competition by special statutes together with tort law and/or the passing off principle and trade secret principle

Some countries prevent unfair competition by using their Civil Code, court judgments and special statutes. In a country which uses a federal state system, the segregation of federal law and state law causes a difference in protection against unfair competition and makes it more complicated. Federal law against unfair competition will not apply in a case which is under the jurisdiction of the state court. The protection against unfair competition in each state may be more complicated and more developed than federal law. An example of a country which uses this system is the United States of America.

³⁰ วิชัย อริยานันตกะ, “ข้อสังเกตบางประการเกี่ยวกับกฎหมายเครื่องหมายการค้าและการป้องกันการแข่งขันที่ไม่เป็นธรรม (2)”, *บทบัญญัติ (เนติบัณฑิตยสภา)* 58, (2545): 129. (Vichai Ariyanuntaka, “Some Notices relating to Trademark Law and the Protection against Unfair Competition (2),” **Bot Budit (Thai Barrister)** 58, (2002): 129).

In the United States, the legal basis of unfair competition and consumer protection law contains a variety of federal and state statutes, common law doctrines, and the judicial decisions that interpret those statutes and doctrines. Unfair competition in the United States is related to intellectual property doctrines such as trademarks and trade secrets. It is also related to torts. An infringement of an intellectual property right is considered to be a tort. There is no general clause against unfair competition, as unfair competition law in the United States includes many doctrines from common law and statutes of many jurisdictions.³¹

In 1918, the case of *International News Service v Associated Press*³² was heard. The Supreme Court by a majority decision laid down the misappropriation doctrine or unfair competition under United States law. The facts of this case were that in World War I the French government prohibited the defendant receiving news concerning the war in Europe. The defendants then copied news concerning the war in Europe from Associated Press newspapers which were published in eastern France and telegraphed it to the defendant's press in western France. The defendant published news without citing the source. The Supreme Court did not judge this case under copyright law, but used the tort doctrine of unfair competition. Justice Pitney recognised that the information found in the Associated Press newspapers was not copyrightable because the information respecting current events contained in a literary production is not the creation of a writer, but is the history of the day. Justice Pitney approached the issue from the perspective of unfair competition. He found that news had an economic value. The defendant took advantage by copying the plaintiff's news which the plaintiff had put money and effort into. The defendant received benefit which was considered to be unfair competition, because the defendant had not incurred any costs or effort to receive the information.³³

³¹ Henning-Bodewig, *supra* note 19, at 622-623.

³² *International News Service V. Associated Press*. 248 U.S. 215 (1918).

³³ วิชัย (Vichai), *supra* note 30, at 130.

2.3.2 The Concept of Passing Off

It is clear that trademark law has to achieve a balance between various potentially competing interests. The trader who seeks to protect the image and reputation of his or her goods and the interest of the consumer, because the consumer associates the product or service and its quality with its associated brand name or logo, and does not wish to be confused by similar names or logos placed on products.³⁴

Passing off is the legal principle in a common law system which was developed for protection against unfair competition in a free trade market. There is evidence of the concept in English court judgments since the 17th century. In English law, there is no unfair competition law, however, it is claimed that the passing off law principle has the same effect of protection as the unfair competition law.³⁵

The general rule governing passing off is that no trader may conduct his business so as to lead customers to mistake his goods, or his business, for the goods or business of someone else.³⁶ Therefore, it can be said that the passing off in trademark law means one trader uses the trademark of another on his products, in order to sell them by causing confusion to consumers who think that such products belong to the trademark owner. The passing off principle has the same foundation as trademark law, which is considered to be one of a wrongful act. The important thing which the law relating to the passing off protects is the ‘goodwill’ in a business. The owner of goodwill in a business should receive protection from the law.³⁷ The main point about passing off is that goodwill has been established by one trader and another

³⁴ Paul Torremans, **Holyoak & Torremans Intellectual Property Law**, 7thed. (Oxford: Oxford University Press, 2013), 432-433.

³⁵ วิชัย อริยานันตกะ, “ข้อสังเกตบางประการเกี่ยวกับกฎหมายเครื่องหมายการค้าและการป้องกันการแข่งขันที่ไม่เป็นธรรม (1),” **บทบัญญัติ (เนติบัณฑิตยสภา)**, เล่มที่ 58, (2545): 133. (Vichai Ariyanuntaka, “Some Notices relating to Trademark Law and the Protection against Unfair Competition (1),” **Bot Bundit (Thai Barrister)**, no. 58, (2002): 133).

³⁶ Robin Jacob, and Barrister Alexander Daniel, **A Guidebook to Intellectual Property: Patents, Trade Marks, Copyright, and Designs**, 4th ed. (London: Sweet & Maxwell, 1993), 107.

³⁷ พงษ์เดช วานิชกิตติคุณ, “ปัญหาบางประการเกี่ยวกับการลวงขาย,” **บทบัญญัติ (เนติบัณฑิตยสภา)**, เล่มที่ 56, (2543): 94 (Pongdeat Wanitkittikhun, “Some Problem Issues Relating to Passing Off,” **Bot Bundit (Thai Barrister)**, no. 56, (2000): 94).

trader tries to take advantage of that goodwill, to exploit it to the detriment of the first trader.³⁸

An important case is the House of Lord's decision in *Erven Warnink Besloten Vennootschap v J Townend & Sons (Hull) Ltd* which summarises the basic requirements for success in a passing off action.³⁹ The plaintiff was the manufacturer of a liqueur called Advocaat. It was a high quality liqueur made from egg yolks and sugar. The liqueur of the plaintiff was well known and sold in large quantities. The defendant was also a liqueur manufacturer, and produced liqueur from Cyprus sherry and dried egg called 'Keeling's Old English Advocaat'. The defendant's liqueur captured a large part of the plaintiff's market. However, the consumers were not confused between the plaintiff's product and the defendant's product. Nevertheless, the court ordered an injunction to prohibit the defendant from using the name Advocaat. The court held that the reputation of the plaintiff's product should be protected from deceptive use of its name by competitors even though several traders shared the goodwill. The court opined that a misrepresentation was made by the defendant.⁴⁰

Lord Diplock who was the judge in this case laid down the requirements for the passing off action as follows:⁴¹

- (a) a misrepresentation
- (b) made by a trader in course of trade
- (c) to prospective customers of his or ultimate consumers of goods or services supplied by him
- (d) which is calculated to injure the business or goodwill of another trader (in the sense that this is a reasonably foreseeable consequence) and

³⁸ David I. Bainbridge, *Intellectual Property*, 6th ed. (Harlow England: Person Longman, 2007), 726.

³⁹ *Erven Warnink B.V. v. J. Townend & Sons (Hull) Ltd.*, [1979] AC 731, [1980] R.P.C. 31.

⁴⁰ Bainbridge, *supra* note 38, at 728.

⁴¹ *Id*

- (e) which causes actual damage to a business or goodwill of the trader by whom the action is brought or (in a *quia timet* action) will probably do so.

According to the elements of the passing off action which Lord Diplock laid down in the court's decision, a passing off action will occur in a case where the defendant makes a misrepresentation to the consumer by using the reputation of the plaintiff which injures the goodwill of the plaintiff. In this case the defendant misrepresented to the consumer by using the word Advocaat with the liqueur which had different ingredients from the liqueur of the plaintiff. The court opined that this caused damage to the business or goodwill of the plaintiff.

In 1990, there was the case of *Reckitt & Colman Ltd v Borden Inc*⁴² also known as the *Jiff Lemon Case*. This case is a leading decision of the House of Lords on the tort of passing off. The facts in the case were that the plaintiff sold lemon juice in a yellow plastic bottle which had the colour and shape of an actual lemon. The defendant produced lemon juice contained in a plastic bottle like the plaintiff's, but the defendant's bottle was larger than the plaintiff's and had a flattened side. It made the consumers confused that the products of the defendant were the products of the plaintiff. The defendant therefore was prohibited from using such a plastic bottle. The court held that the defendant was guilty of passing off.

Lord Oliver laid down the essentials for a passing off action, derived from this case as follows:⁴³

- (a) the existence of the claimant's goodwill
- (b) a misrepresentation as to the goods or services offered by the defendant
- (c) damage (or likely damage) to the claimant's goodwill as a result of the defendant's misrepresentation.

According to the elements of the passing off action which Lord Oliver laid down in the court's decision, the plaintiff has to establish the reputation or goodwill of its goods or services with the court. The goods or services of the plaintiff must be recognised by the consumer as distinctive and specifically the plaintiff's

⁴² *Reckitt & Colman Ltd v Borden Inc* [1990] 1 All E.R. 873.

⁴³ Bainbridge, *supra* note 38, at 728.

goods or services. Moreover, the plaintiff must establish a misrepresentation by the defendant. The plaintiff must prove that the defendant led the consumer to believe that the goods or services offered by the defendant were the goods or services offered by the plaintiff. Finally, the plaintiff has to establish that he has suffered or is likely to suffer damage from the erroneous belief of the consumer engendered by the defendant's misrepresentation.

In most cases of passing off in English law, the defendants will have the intention to use a trademark, name or design to capture part of the plaintiff's business. However, a fraudulent motive is not essential to the tort. The defendant may be guilty although the passing off is innocent. It depends mainly on whether the goodwill and the plaintiff's business is harmed because the nature or origin of the defendant's goods or services is misrepresented and the buying public or ultimate consumers are taken in by that misrepresentation.⁴⁴

⁴⁴ *Id.*, at 729.

CHAPTER 3

THE PRINCIPLE OF CONSUMER PROTECTION UNDER THAI LAW

In this chapter the author will summarise the concept of consumer protection under Thai laws which protect the consumer's interests, and also summarise the rights of the consumer under contract law and tort law.

3.1 The Concept of Consumer Protection under the Thai Civil and Commercial Code

The general civil law of Thailand is provided under the Civil and Commercial code. There are some provisions which can be considered as provisions having the purpose of protecting the business name owner or business operator in the use of its name. If the name owner or business operator receives the protection of the right to use its name from the law, the confusion of the consumer between the business operators who use the same or similar name will be eliminated. Therefore, it can be said that such provision also gives protection to the consumer.

3.1.1 Consumer Protection under Section 18

According to section 18 of the Thai Civil and Commercial Code, the law protects the right to use a name by a person.

Section 18

If the right to use of a name by a person entitled to it is disputed by another, or if the interest of the person entitled is injured by the fact that another uses the same name without authority, then the person entitled may demand from the other abatement of the injury. If a continuance of the injury is to be apprehended, he may apply for an injunction.

The protection of the right to use of a name under section 18 is not only limited to the right to use of the name, middle name or surname, but also

includes the protection of the use of a trade name⁴⁵ and a juristic person's name.⁴⁶ However, section 18 does not protect a trademark. A trade name is the name which has the purpose of indicating the person or business operator, but a trademark is the mark which has the purpose of indicating the quality, source and manufacturer. Trademarks will be protected under trademark law; therefore, using a name as a trademark shall be not be considered to be a dispute about using a name.⁴⁷

The trade name which is protected under section 18 may not be the juristic person's name. Moreover, the trade name will be protected in the case of the use of the trade name in the ordinary business of a person or juristic person. For example, the first company uses the trade name 'Sheraton' for a hotel business, and the second company uses the trade name 'Sheraton Jewellery' for a jewellery business. The business of the second company does not involve the business of the first company, therefore, the public do not confuse the two companies. The first company cannot prohibit the second company from using such a trade name. It can be said that Sheraton is not the specific name of any person, but in the case that the first company used it for its business and the public recognised it, such a trade name will be protected only in the area of ordinary business of the first company.⁴⁸

The protection of the trademark owner's right from people who infringe the trademark also creates the protection of the consumer's rights. This is because when the trademark owner is able to take legal action against the people who infringe his trademark, the confusion of the consumer about the products from

⁴⁵ ประเวณีวัชร อิศรางกูร ณ อยุธยา, คำอธิบายหลักกฎหมายแพ่งและพาณิชย์ 1: ว่าด้วย บุคคล ทรัพย์ นิติกรรม สัญญา หนังสือ ละเมิด, พิมพ์ครั้งที่ 2 (กรุงเทพฯ: สำนักพิมพ์สุตราไพศาล, 2543), 9. (Praweenwat Aitsaranggul Na Ayutthaya, **Textbook on Civil and Commercial law 1: Persons, Property, Juristic Act, Contract, Debt, Wrongful Act**, 2nd ed. (Bangkok: Sutpaisarn Publishing House, 1999), 9).

⁴⁶ รัฐสิทธิ์ี๋ คุรุสุวรรณ, กฎหมายแพ่ง : หลักทั่วไป, พิมพ์ครั้งที่ 3 (กรุงเทพฯ: สำนักพิมพ์นิติธรรม, 2555), 179. (Rattasit Kurusuwan, **Civil Law: General Principles**, 3rd ed. (Bangkok: Nititham Publishing House, 2012), 179).

⁴⁷ กิตติศักดิ์ ปรกิติ, หลักกฎหมายบุคคล, พิมพ์ครั้งที่ 6 (กรุงเทพฯ: สำนักพิมพ์วิญญูชน, 2556), 42. (Kittisak Prokkati, **Principles of laws Persons**, 6th ed. (Bangkok: Winyuchon Publishing House, 2013), 42).

⁴⁸ *Id.*, at 40.

different sources which use the same trademark will be eliminated.⁴⁹ Therefore, it can be said that when the seller or service provider's trade name or juristic person's name are protected by the law and the name owner can take legal action against a person who uses its name without authority, consumer confusion about the different products will be eliminated and the consumer will also be protected under this section.

The protection of the right to use a name under section 18 arises in two situations as follows:⁵⁰

A: When another person disputes the right to use a name of the name owner

The dispute may arise if the other person does not certify the rights of the name owner, either explicitly or implicitly. For example, the other person intentionally uses the wrong name. The intention to cause damage is not required for the act to constitute a dispute over the right to use a name.⁵¹

B: When the interest of the name owner is injured by the other's use of the same name without authority

The injured person who has the authority to use the name will suffer damage if the other person uses the same name without authority. The interest in this section may not be limited to the property benefit. The use of the same name by another person which causes confusion to the public will also be considered as the loss of benefit in this section.⁵² The loss of benefit under section 18 means damage. The damage in this section is not limited to the pecuniary loss, but also includes damage to reputation or honour.⁵³

Use of the same name without authority means one person uses the name of another causing confusion to the public. Such person will use the name as if

⁴⁹ ทัชชัย (Tatchai), *supra* note 1, at 6.

⁵⁰ นเรศ เกษะประกร, *หลักกฎหมายบุคคล*, พิมพ์ครั้งที่ 2 (กรุงเทพฯ: สำนักพิมพ์วิญญูชน, 2540), 60. (Nares Kesapakorn, **Principles of Law Persons**, 2nd ed. (Bangkok: Winyuchon Publishing House, 1997), 60).

⁵¹ กิตติศักดิ์ (Kittisak), *supra* note 47, at 49.

⁵² *Id*

⁵³ ประวีณวัชร (Praweenwat) *supra* note 45.

they are the owner, such as signing the owner's name in a letter, using the owner's name on a card or on a label. Although the offender does not use all the characters of the name of the name owner, using part of the name or a homonym causing confusion to the public may also be considered as use of the name. Using the same name without authority also includes using the owner's name without the owner's authority to designate another person who is not the name owner; for example, the husband introduces someone who is not his wife to others by using his legal wife's name.⁵⁴

The rights claimed by the name owner⁵⁵

A: The name owner may demand abatement of the injury

Where the infringing person disputes the right to use a name of the name owner, the name owner can claim for revocation of the dispute or claim for certification of the right to use the name from the person concerned. In the case of using the same name without authority, the name owner can request that the offender stop using the name and remove the use of the name in documents or other things. If there is a continuance of the injury, the name owner may apply for an injunction to prohibit the other person using the name in the future. Although the person using the name without authority by misunderstanding or using it with good faith may not be considered to have done a wrongful act, the name owner still has the right according to section 18 to prohibit such person from using the name. The name owner may also request that the person who uses the name without authority publicises the truth in a newspaper to abate the injury.⁵⁶

B: The name owner may demand damages

The right to use of a name is a right other than life, body, health, liberty or property which is protected according to section 420 of the Thai Civil and Commercial Code. In the case where a person violates such right and causes damage

⁵⁴ กิตติศักดิ์ (Kittisak), *supra* note 47, at 50-51.

⁵⁵ *Id.*, at 53.

⁵⁶ รัฐสิทธิ (Rattasit), *Supra* note 46.

to the name owner, the name owner can claim damages. This right arises according to section 420 of the Thai Civil and Commercial Code.⁵⁷

3.1.2 Consumer Protection under Section 1115

The law provides for the protection of the juristic person's name under section 1115 of the Thai Civil and Commercial Code in addition to the protection under section 18. The juristic person's name is important because it will stay with the juristic person although the promoters of the company, shareholders or the directors may change. The juristic person can promote or advertise its name as a trade name so that customers can recognise it, therefore if other people benefit from it this will be unfair for the name owner.

Section 1115

If the name inserted in a memorandum is identical with the name of an existing registered company or with the name inserted in a registered memorandum, or so nearly resembling the same as to be likely to deceive the public, any interested person can enter a claim for compensation against the promoters of the company and can ask for an order from the Court that the name be changed.

Upon such order being made, the new name must be registered in the place of the former name and the certificate of registration must be altered accordingly.

This section has the elements of the offence as follows:⁵⁸

A. The promoter of the company inserting the name of the company in a memorandum is identical with the name of an existing registered company or with the name inserted in a registered memorandum, or so nearly resembling the same. Be identical means both homograph and homophone. The

⁵⁷ นเรศร์ (Nares), *Supra* note 50.

⁵⁸ ทิพย์ชนกร รัตโนสถ, *คำอธิบายเรียงมาตรา กฎหมายลักษณะหุ้นส่วนและบริษัท*, พิมพ์ครั้งที่ 6 (กรุงเทพฯ: โครงการตำราและเอกสารประกอบการสอน คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์, 2556), 278. (Thipchanok Rattanosot, **Textbook on Partnership and Companies Law**, 6th ed. (Bangkok: Textbook and Teaching Document Project Faculty of Law Thammasat University, 2013), 278).

provision also prohibits the name which is so nearly resembling the name of an existing registered company or with the name inserted in a registered memorandum. This section provides the right to the interested person to file a complaint against the promoter of the company only because the promoters of the company are the initial people who create the company's name.⁵⁹

B. The public are likely to be deceived that new company is the same company or an affiliated company of the registered company or the company which registered the memorandum.

C. The registered company or the company which registered the memorandum incurred damage because customers buy the products or receive services from the other companies by misunderstanding.

In the case where the company suffers damage, the interested person can claim compensation against the promoters of the company and can ask for an order from the Court to change the defendant's name. The interested person should mean the director or the promoter of the company which is the name owner.⁶⁰ The interested person does not need to immediately file the complaint against the defendant at the time the person who imitates the company's name registered the memorandum. Although the interested person filed the complaint after the defendant registered the memorandum and publicised it in the government gazette, the right to file the complaint still exists and is not considered as exercising the right in bad faith.⁶¹

The Thai Supreme Court laid down the legal principles under section 1115 in Thai Supreme Court judgment no. 4767/2539. They held that the

⁵⁹ ภาสกร ชุณหอุไร, คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์เรียงมาตราว่าด้วยหุ้นส่วนและบริษัท, (กรุงเทพฯ: โรงพิมพ์เดือนตุลา, 2553), 218. (Passakorn Chunha-Urai, **Textbook on Civil and Commercial Code Partnership and Companies Law**, (Bangkok: Deuoen Tula Publishing House, 2010), 218).

⁶⁰ ทิพย์ชนก (Thipchanok), *supra* note 58.

⁶¹ สมชัย ทีฆาอุตมากร, ประมวลกฎหมายแพ่งและพาณิชย์ บรรพ 3 เอกเทศสัญญา ตอน 3 บัญชีเดินสะพัด ประกันภัย ตัวเงิน หุ้นส่วนและบริษัท, (กรุงเทพฯ: สำนักพิมพ์ พลสยาม พรินต์ติ้ง (ประเทศไทย), 2557), 515. (Somchai Teekauttamakorn, **Civil and Commercial Code Book 3 Specific Contracts Chapter 3 Current Account, Insurance, Bill, Partnership and Companies**, (Bangkok: Ponsiam Printing (Thailand) Publishing House, 2014), 515).

compensation which the interested person can claim from the promoter of the company under section 1115 was limited to the compensation for damage during the period the promoter of the company which imitated the other company's name registered the memorandum to the time such company was registered. After the company was registered, the company would have the status of a legal person and have its own liability. If there is damage after the company was registered, the interested persons have to file the complaint against the company not the promoter of the company, according to sections 18 and 420 of the Thai Civil and Commercial Code.

At present, in practice, before the promoter of a company registers the memorandum he has to reserve the company's name with the Department of Business Development. An officer will examine the company's name in order to prevent the registration of an identical or similar name to previously registered names. If there is an identical or similar name, the officer will not allow the promoter of the company to register such a name.⁶²

3.2 The Concept of Consumer Protection under the Thai Civil Procedure Code (Class Action)

The purpose of the class action provided under the Civil and Commercial Code is to give protection to the injured, because a class action is the measure which can protect multiple injured people in one legal procedure. It can provide justice to the injured who cannot take legal action by themselves or the injured who incur insignificant damage, such as consumers in consumer cases. Therefore, a class action is a measure to strengthen the people who are disadvantaged in society by saving time

⁶² สหชน รัตนไพจิตร, กฎหมายลักษณะห้างหุ้นส่วนบริษัท, พิมพ์ครั้งที่ 2 (กรุงเทพฯ: สำนักพิมพ์วิญญูชน, 2558), 252. (Sahathon Rattanaphaichit, **Partnership and Companies Law**, 2nd ed. (Bangkok: Winyuchon Publishing House, 2015), 252).

and the expense of taking legal action and decreasing the overlap of court cases and judgments.⁶³

A class action means civil proceedings in a case where there are many injured people who have incurred damage from the same type of law or fact. Class action proceedings must have a class representative who will be the plaintiff to protect his interest and that of the other injured people in the class. In particular, there may be other injured people who have not become parties in the case and have not given power to the plaintiff, but the judgment will bind all injured people in that class. Therefore, a class action will have the advantage for the injured person who lacks money or has insignificant damage.⁶⁴

The main principles of a class action are as follows:⁶⁵

1. Common facts and law of the plaintiff and members of the class.

The people who can instigate legal proceedings by a class action must incur damage from the same facts or act and law.

2. The judgment will bind all members of the class even those who may not attend the case. However, the members will be aware of the progress of the case and their rights by either notice or announcement.

3. The resignation of the membership. The members of the class have the right to resign from the membership. Then, such person will not be bound by the court's judgment and can take legal action by himself.

4. The qualification of the plaintiff and the plaintiff's lawyer. For the class action case, the plaintiff and the plaintiff's lawyer must have the qualifications to protect the interests of the members sufficiently and fairly. The court will choose the plaintiff and plaintiff's lawyer carefully.

⁶³ นนทวัชร นวตระกูลพิสุทธิ์, “การดำเนินคดีแบบกลุ่ม: ข้อเสนอแนะบางประการเกี่ยวกับร่างพระราชบัญญัติว่าด้วยการดำเนินคดีแบบกลุ่มของไทยและบทบาทใหม่ของศาล”, วารสารนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์, ปีที่ 40, ฉบับที่ 2, (2554): 292. (Nonthawat Nawatrakunphisut, “Class Action: Some Notices relating to Thai Class Action Procedure Bill and New Role of Court,” **Thammasat University Law Journal**, Year 40, Volume 2, (2011): 292).

⁶⁴ อริยพร โพธิ์ใส, “หลักเกณฑ์ในการดำเนินคดีแบบกลุ่มตามประมวลกฎหมายวิธีพิจารณาความแพ่ง”, วารสาร จุลนิติ, ปีที่ 12, ฉบับที่ 5, (2558): 159. (Ariyaporn Pollsai, “Class Action Principle under Civil Procedure Code”, **Julaniti Journal**, Year 12, Volume 5, (2015): 159).

⁶⁵ *Id.*, at 161.

The main points of the class action law can be divided into two parts: rules in terms of form and rules in terms of content.⁶⁶

3.2.1 Rules in Terms of Form

A class action is civil proceedings by one person for the interests in common of many people who have all incurred damage from the same action. All injured parties are combined as a ‘class’ and appoint one or more people to be the plaintiff to take legal action against the person who has caused the damage. The judgment of the court in a class action case will bind all injured persons who receive damages from the same action. A class action will be the proceeding in a case if the plaintiff is allowed by the court.

3.2.1.1 Rules Regarding Requesting the Court for a Class Action Case

The plaintiff will be able to proceed with the class action case if the court allows him to do so. According to section 222/3, the courts, which have the jurisdiction to hear civil cases according to the law for the organisation of the courts of justice except the district court, will have jurisdiction for class action cases.⁶⁷

3.2.1.2 Rules Regarding Class and Members of Class

All injured persons will be combined as a group of injured persons or a class for the purpose of the class action proceedings. Therefore, the court will allow the plaintiff to take legal proceedings as a class action when there is the condition of basic form, i.e. in terms of quantity or there are a lot of injured persons.⁶⁸

3.2.2 Rules in Terms of Content

3.2.2.1 Class Action Permission

⁶⁶ นนทวัชร (Nonthawat), *supra* note 63 at 293.

⁶⁷ *Id.*, at 294.

⁶⁸ *Id.*, at 295.

According to Thai class action law, the process of a class action requires permission to use the system as in the United States law. Therefore, a class action will be under the content rules as follows.

(1) Basic Condition of Class Action Proceedings

The interested person in class action proceedings. A class action is the proceedings to protect the rights or interests in common of injured persons who incurred damage from the same facts. Therefore, the basic condition of a class action is a group of injured people or a class which is composed of members of a group who incurred damage from the same facts. The class or members of the class will not be the person who takes the legal proceedings themselves, but one or more people who are members of the class will be appointed to be the representatives of the class as the plaintiff.⁶⁹

The members of a class who have combined must have common characteristics. The first characteristic is having same right from the same facts or law. The other characteristic is to have the common of specific character of a class. Although there may be a difference in damage, i.e. different amounts of damage, different kinds of damage, the fact which gives rise to the legal right is the same fact, law and ground.⁷⁰

Not all members of the class act as the plaintiff in a class action case. The members appoint the plaintiff or representatives to organise the class action proceedings for the common benefit of the class. Therefore, the plaintiff must have the ability to protect the benefit of the class sufficiently and fairly. The plaintiff has to establish with the court that he is a member of the class, has an interest and can protect the rights of the class. The plaintiff has to have the qualifications. The first requirement is that the claim of the plaintiff as the representative must be the same as

⁶⁹ *Id.*, at 296.

⁷⁰ สุพิศ ปรานีพลกรัง, คำอธิบายพระราชบัญญัติแก้ไขเพิ่มเติม ประมวลกฎหมายวิธีพิจารณาความแพ่ง (ฉบับที่ 26) การดำเนินคดีแบบกลุ่ม (ส่วนที่แก้ไขใหม่ 2558), พิมพ์ครั้งที่ 1 (กรุงเทพฯ: สำนักพิมพ์นิติธรรม, 2558), 26. (Suphit Pranitphonkrang, **Textbook on Civil and Commercial Bill (issue 26) Class Action (Adjusted Part B.E.2558)**, 1st ed. (Bangkok: Nititham Publishing House, 2015), 26).

the claim of the class (typicality). The second is that the plaintiff has the ability to protect the interests of the class sufficiently and fairly (adequacy of representation). The plaintiff has to establish his suitability to protect his own and the class right, trustworthiness and has sufficient ability.⁷¹

The boundary of application of a class action to a type of act or charge which the court can be requested to allow legal proceedings by class action is provided under section 222/8.

Section 222/8

In the case which has a lot of members as follows, the plaintiff who is a class member, may request for the class action proceedings:

- (1) torts;
- (2) breaches of contract; and
- (3) any other claims of legal rights under other laws such as laws with respect to environment, consumer protection, labour, securities and stock exchange, and trade competition.

(2) Additional Conditions of Class Action Proceedings

If the court allows the plaintiff to progress the case by class action, besides proving the existence of class, members of the class and sufficient reason, the plaintiff has to establish the conditions according to section 222/12 as follows:

1. Condition of claim, the relief applied and allegations on which such claimed are based.
2. The plaintiff establishes the specific common characteristics of class clearly and sufficiently which can indicate the class.
3. The class has many members. If the case is processed by ordinary proceedings, it will be complicated and inconvenient.
4. Class action proceedings will be fair and more efficient than ordinary proceedings.

⁷¹ *Id.*, at 53.

5. The plaintiff must prove that he is a member of the class and has the interest qualification, including the plaintiff and plaintiff's lawyer can take legal proceedings to protect the rights of the class sufficiently and fairly.⁷²

3.2.2.2 Class Action Proceedings

(1) The Consideration of Permission to Take Class Action Proceedings

If the court does not permit the use of class action proceedings, the case will be dealt with under ordinary proceedings according to section 222/12 paragraph five. This means that the plaintiff files the complaint for his own benefit only, not concerning the class or members of the class. If the court permits the use of class action proceedings, the law concerning class actions will be applied.⁷³

(2) The Court Proceedings

After the court permits the application of class action proceedings, the court will fix a preliminary date for the conciliation or arbitration. In the case where the conciliation is not a success, the court will apply class action proceedings. The court can inquire into the facts, hear witnesses or additional evidence that the parties establish with the court according to section 222/23.

(3) The Court's Judgment in a Class Action Case

After the court proceedings finish, the court will make the judgment or order according to the case.

3.2.2.3 The Result of Class Action Proceedings

The most important legal result of the class action is that the plaintiff and members of the class are bound to the judgment or order of the court, according to section 222/35. The court's judgment which applies to the plaintiff in a class action can have both advantages and disadvantages. It will bind all members of the class except those who have resigned from the membership.⁷⁴ The plaintiff and the plaintiff's lawyer will have the authority for the execution or enforcement of the

⁷² นนทวัชร (Nonthawat), *supra* note 63 at 298.

⁷³ *Id.*, at 299.

⁷⁴ *Id.*, at 301.

judgment in a class action case instead of the plaintiff or members of the class. The members of the class have no authority to execution of the judgment but have the right to request the payment of debts.⁷⁵

3.3 The Concept of Consumer Protection under the Thai Trademark Act B.E.

2534

In general, trademarks have four functions as follows.⁷⁶

(a) **Indication of origin function.** A trademark has the function to tell the consumer the origin of the product.

(b) **Product differentiation function.** A trademark has the function to tell the consumer the difference between the product under one trademark and another.

(c) **Guarantee function.** A trademark has the function to guarantee that the quality of the products under the same trademark have the same quality. However, the trademark does not guarantee that the product under one trademark is better than others.

(d) **Advertising function.** A trademark assists the consumer to know and recognise the products.

The first trademark law of Thailand was the Law on Trade Marks and Trade Names B.E. 2457. In 1931, Thailand became a member of the Berne Convention and passed the Trademark Act B.E. 2474. This Act provided a protection to trademarks only but did not protect other marks, such as service marks, certification marks and did not provide trademark infringement as a criminal action. Therefore, trademark protection as a criminal action was provided under the criminal code instead. Nowadays, Thailand has the Trademark Act B.E. 2534 which has replaced the Trademark Act B.E. 2474. The present Trademark Act includes an article

⁷⁵ สุพิศ (Suphit), *supra* note 70 at 120.

⁷⁶ วัศ ดิงสมิตร, คำอธิบายกฎหมายเครื่องหมายการค้า, พิมพ์ครั้งที่ 3 (กรุงเทพฯ: สำนักพิมพ์นิติธรรม, 2545), 3. (Wat Tingsamit, **Textbook on Trademark Law**, 3rded. (Bangkok: Nititham Publishing House, 2002), 3).

relating to service marks, certification marks, collective marks and licensing contracts. Moreover, the Act also specifies a criminal penalty for infringement.⁷⁷

3.3.1 The Relationship between Trademark Law and Consumer Protection Law

Trademark has two main purposes; the first purpose is to protect business reputation and goodwill by considering that a registered trademark is a property. The second purpose is to protect consumers from deception, and to prevent consumers from buying inferior products or services by mistaken belief that they originate from or are provided by another business operator.⁷⁸ The consumer also has an interest from trademark law. They associate the products or services and their quality with the associated brand name or logo and will not wish to be confused by similar names or logos placed on different products. The protection under trademark law on the origin of products also gives the benefit to consumer interests. It can guide consumers in the exercise of choice.⁷⁹

Therefore, it can be said that trademark law is important, not only for trademark owners, but also for consumers, because from the function of trademark, consumers can distinguish the products or services of one business operator from others. Consumers can depend that products under the same trademark come from the same origin or manufacturer. Moreover, products under same trademark should have same quality. It helps consumers to choose the product having quality and to avoid others. It provides protection to consumers to receive products and services from the manufacturers which they rely on.

The Thai Trademark Act B.E. 2534 had many objectives which the legislature noted. The important objective of the Act is to protect trademark owners and give them the exclusive right for registered trademarks. It also protects trademark owners for unregistered trademarks. In addition, there are the objectives which relate to consumer protection. The first is to protect the interests of consumers by preventing

⁷⁷ *Id.*, at 2.

⁷⁸ Bainbridge, *supra* note 38, at 585.

⁷⁹ Torremans, *supra* note 34, at 433.

consumers from the confusion of trademarks by the illegal use of trademarks. The second is to protect consumers by requiring the registration of trademark licensing agreements to enable the authorities to control and examine the ability of licensors to control the quality of products.⁸⁰ It is clear that the objectives of the Thai Trademark Act are not only to protect trademark owners, but also to protect consumers.

The protection of the trademark owner's right from people who infringe the trademark also protects the consumer's right. This is because when the trademark owner can take legal action against people who infringe the trademark, the confusion of the consumer about products from different sources which use the same trademark will be eliminated. Therefore, the clear main purpose of trademark law is to protect the interests of trademark owners and consumers in one product market.⁸¹

Therefore, if trademark law is enforced efficiently, consumer protection will also be efficient. In particular, this will affect the consumers' right to receive correct and sufficient information as to the quality of goods or services and the right to expect safety in the use of goods and services. It can be said that the provision under the Thai Trademark Act B.E. 2543 which was specified to protect the rights of the trademark owner should also be considered as the provision to protect the rights of the consumer.

3.3.2 The Protection of Registered Trademarks under the Thai Trademark Act B.E. 2534

The registered trademark owner will have rights under the Thai Trademark Act as follows.⁸²

⁸⁰ รัชชัย สุภผลศิริ, ระบบทรัพย์สินทางปัญญาของประเทศไทย, พิมพ์ครั้งที่ 1 (กรุงเทพฯ: กรมทรัพย์สินทางปัญญา, 2544), 81-82. (Tatchai Supaponsiri, **Intellectual Properties System of Thailand**, 1sted. (Bangkok: Department of Intellectual Properties, 2001), 81-82).

⁸¹ รัชชัย (Tatchai), *supra* note 1, at 6-7.

⁸² ไชยยศ เหมะรัชตะ, ลักษณะของกฎหมายทรัพย์สินทางปัญญา: พื้นฐานความรู้ทั่วไป, พิมพ์ครั้งที่ 10 (กรุงเทพฯ: สำนักพิมพ์นิติธรรม, 2559), 337. (Chaiyos Hemarajata, **The Characteristic of Intellectual Property Law: Basic General Knowledge**, 10th ed. (Bangkok: Nititham Publishing House, 2016), 337).

3.3.2.1 Right to Use the Trademark

The registered trademark owner will have the right to use the registered trademark. Such right is provided in section 44.

Section 44

Subject to Sections 27 and 68, a person who is registered as the owner of a trademark shall have the exclusive right to use it for the goods for which it is registered.

According to the Thai Trademark Act there is no detail or definition of the word ‘use’ in section 44. Therefore, lawyers and courts have to interpret the extent of the word use. Normally, affixation of the trademark on the packaging of goods is considered as use of a trademark. However, in the case where the defendant has specified that his product can be used with a product under the plaintiff’s trademark, it is not considered as use of a trademark.⁸³

According to section 44, the exclusive right to use the registered trademark which the trademark owner has is limited only to the product which is registered. It does not include the product which is not registered. However, Thai courts have interpreted the law to extend the protection to the use of trademarks with goods which have a different classification but have the same character.⁸⁴

3.3.2.2 Right to License the Trademark

The registered trademark owner will have the right to license others to use his trademark. The trademark owner may receive compensation in return for licensing his trademark. The licensing right is provided in section 68.

Section 68

The owner of a registered trademark may license another person to use the trademark for all or some of the goods for which the trademark is registered.

Trademark license agreements under the first paragraph shall be in writing and registered with the Registrar.

⁸³ วัณ (Wat), *supra* note 76, at 84-85.

⁸⁴ *Id.*, at 86.

Applications to register a license agreement under paragraph two shall comply with the rules and procedures prescribed in the Ministerial Regulations and shall show at least the following particulars:

- (1) conditions or terms between the trademark owner and licensee to insure effective control by the registered owner of the trademark over the quality of the goods of the licensee;
- (2) the goods for which the trademark is to be used.

The trademark owner can control the quality of the licensee's goods. The quality control right of the trademark owner is an important thing for the consumer because the consumer may not know the ingredients or details of goods which they buy and may not know that goods do not come from the original trademark owner but are produced by the licensee. Therefore, in the case where the trademark owner does not control the quality of the licensee's product, the consumer may be misrepresented in the quality or origin of the product.⁸⁵ Therefore, it could be said that the right to control the quality of the licensee's product was provided to protect the interests of the consumer as well.

3.3.2.3 Right to Assign the Trademark

The registered trademark owner will have the right to assign or transfer the trademark by secession as provided in section 49.

Section 49

The right to registered trademark may be assigned or transferred by succession with or without the business concerned in the goods for which the trademark is registered.

3.3.2.4 Right to Take Criminal Action on the Ground of Counterfeit Trademark

The registered trademark owner will have the right to take criminal action against the person who counterfeits a registered trademark as provided in section 108.

⁸⁵ *Id.*, at 88.

Section 108

Any person who counterfeits a trademark, service mark, certification mark or collective mark registered in the Kingdom by another person shall be liable to imprisonment not exceeding four years or a fine of not exceeding four hundred thousand baht or both.

The essential element of the crime in this section is the counterfeit. There is no definition of the word ‘counterfeit’ in this Act. However, the counterfeit should mean making a trademark similar to the original trademark although they are not the same. If the character resembles the original trademark, it will be considered as counterfeit.⁸⁶ The trademark owner will receive the protection under this section only in the case where the trademark was registered in Thailand.

3.3.2.5 Right to Take Criminal Action on the Ground of Imitating Trademark

The registered trademark owner will have the right to take criminal action against the person who imitates a registered trademark as provided in section 109.

Section 109

Any person who imitates a trademark, service mark, certification mark or collective mark registered in the Kingdom by another person in order to mislead the public into believing that it is the trademark, service mark, certification mark or collective mark of such other person shall be liable to imprisonment not exceeding two years or a fine of not exceeding two hundred thousand baht or both.

The essential element of crime in this section is the imitation. There is no definition of the word ‘imitation’ in this Act. However, the imitation should mean making the trademark resemble the original trademark but not the same as the original trademark. However, the difference between the imitation trademark

⁸⁶ จิตติ ดิงศภัทย์, กฎหมายอาญา ภาค 2 ตอน 1, พิมพ์ครั้งที่ 8 (กรุงเทพฯ: เนติบัณฑิตยสภา, 2548), 1945. (Jitti Tingsapat, **Criminal Law Part 2 Section 1**, 8th ed. (Bangkok: Thai barrister, 2005), 1945).

and the original trademark will make the consumer misunderstand that the imitation trademark was the original trademark.⁸⁷ In this section the defendant must have the special intention to mislead people to believe that the imitation trademark is the original trademark.

3.3.3 The Protection of Unregistered Trademarks under the Thai Trademark Act B.E. 2534

3.3.3.1 Passing Off

Normally, the unregistered trademark owner will not have the right to take legal action against a person who infringes the trademark and claim for damages per specified in section 46 paragraph one.

Section 46 paragraph one: No person shall be entitled to bring legal proceedings to prevent or to recover damages for the infringement of an unregistered trademark.

According to section 46 paragraph one, the unregistered trademark owner will not receive the protection as follows.⁸⁸

- (a) The unregistered trademark owner cannot claim damages from the person who infringes its trademark.
- (b) The unregistered trademark owner cannot force the person who infringes its trademark to recall the infringed products from the market.
- (c) The unregistered trademark owner cannot ask the court to order the person who infringes its trademark to stop using the trademark.

However, in the case of passing off, the unregistered trademark owner will receive the protection according to section 46 paragraph two.

⁸⁷ *Id* at 1947.

⁸⁸ ทัชชัย (Tatchai), *supra* note 1, at 103-104.

Section 46 paragraph two: The provisions of this Section shall not affect the right of the owner of an unregistered trademark to bring legal proceedings against any person for passing off goods as those of the owner of the trademark.

According to the Thai Trademark Act, there is no definition of the word ‘passing off’. However, in the trademark law area, passing off should mean the action that one person uses the another’s trademark with his or her products and distributes such products to the public by confusing the public that the product belongs to the original trademark owner.⁸⁹ Passing off is an action in which the defendant misrepresents to the public that the product of the defendant is involved with the plaintiff. It must cause a connection in the mind of the public or make the public believe that the plaintiff will be liable for the products.⁹⁰

According to the text in section 46, passing off is actionable in the case of the unregistered trademark, but Thai lawyers have the opinion that the registered trademark owner also has the right to take legal action on the ground of passing off. However, the plaintiff has to establish with the court the right in trademark, reputation, goodwill and the actual damage. In the case where the registered trademark owner takes legal action on the ground of passing off, the protection will cover all products and is not only limited to the classification which is registered.⁹¹

The important Thai Supreme Court judgment which laid down the passing off principle in Thailand was the Supreme Court judgment no 343/2530. The plaintiff registered the trademark ‘FAB’ for a washing powder product. The defendant used such trademark with a toothpick. The court laid down the passing off principle, stating that passing off was not limited to the product which the plaintiff registered, but also covered the case where the defendant misrepresented to people that the defendant’s product was the plaintiff’s product. Passing off was not limited to the confusion of product, but also included the confusion of the owner.

⁸⁹ *Id.*, at 107.

⁹⁰ วัณ (Wat), *supra* note 76, at 107.

⁹¹ *Id.*, at 108.

Although the plaintiff may have registered the trademark with one or many classifications in Thailand, if the defendant used the trademark of the plaintiff with a product in a classification which the plaintiff did not register, the defendant still has a liability to the plaintiff in cases where the plaintiff can establish the passing off elements.⁹²

The nature of passing off is to misrepresent to the consumer that the product of the defendant is the product of the real trademark owner. Passing off causes the consumer to believe that the product belongs to real trademark owner. Therefore, the trademark of the plaintiff must have a reputation in Thailand. However, the trademark does not need to be a well-known mark.⁹³

3.3.3.2 The Difference between the Passing off Principle under Thai Law and English Law

(1) The Extent of the Protection under the Passing off Principle

The first difference in the passing off principle under Thai law and English law is the extent of the protection. Under Thai law, the protection under the passing off principle will be limited to the definition of the word trademark in section 4 of the Thai Trademark Act B.E. 2534.⁹⁴ Other things besides trademarks will not receive protection under the passing off principle. The Thai Supreme Court laid down this concept in the Supreme Court judgment no 7037/2534. The defendant bought the name of the plaintiff attached to the defendant's registered trademark and sold the products. The court had the opinion that the name of the plaintiff and the

⁹² ทัชชัย (Tatchai), *supra* note 1, at 109.

⁹³ วัด (Wat), *supra* note 76, 109.

⁹⁴ **Section 4** In this Act:-

"mark" is defined as a brand, name, word, letter, photograph, drawing, device, manual, signature, combinations of colors, shape or configuration of an object or any one or combination thereof;

"trademark" is defined as a mark used or proposed to be used on or in connection with goods to distinguish those trademarked goods from other trademarked goods;

trademark were different issues. The plaintiff could not ask the court to order the defendant stop using the plaintiff's name.⁹⁵

Under English law, the injured person in the passing off is not limited to the trademark owner as in Thai law. The protection under passing off in English law covers all things which are distinctive and from which the owner receives goodwill, such as containers, shape, appearance or telephone number.⁹⁶ In this issue, Thai law has less protection than English law because Thai law's purpose is to protect the trademark more than the goodwill of the product.

(2) The Intention of the Person who made the Passing off

The second difference in passing off principle under Thai law and English law is the intention of the person who commits the passing off. Under English law, in most cases of passing off the defendants will have the intention to use the trademark, name or design to capture part of the plaintiff's business. However, a fraudulent motive is not essential to the passing off. The defendant may be guilty although the passing off is innocent. It depends mainly on whether the goodwill and the plaintiff's business are harmed because the nature or origin of the defendant's goods or services is misrepresented, and the buying public or ultimate consumers are taken in by that misrepresentation.⁹⁷

In the case of passing off it is not necessary to consider whether the advertisement or statement of the defendant is true or untrue, because it can be passing off although the advertisement is true or untrue. The important thing to consider is whether or not the defendant misrepresented to the consumer and made them believe that the defendant's product was the plaintiff's product.⁹⁸

Under Thai law, when we consider the wording in section 46 paragraph two of the Thai Trademark Act B.E. 2534, we find that the intention of defendant is the important element of passing off. The wording in section 46

⁹⁵ พงษ์เดช (Pongdeat) *supra* note 37, at 99.

⁹⁶ *Id*

⁹⁷ Bainbridge, *supra* note 38, at 728.

⁹⁸ มานะ พิทยาภรณ์, "การลวงขาย," บทบัญญัติ (เนติบัญญัติยสภา), เล่มที่ 48 (2535): 59. (Mana Pittayaporn, "Passing Off," **Bot Bandit (Thai Barrister)**, no. 48 (1992): 59).

paragraph two is: ‘to bring legal proceedings against any person for passing off goods as those of the owner of the trademark’. The defendant has to know that there is a person who uses the trademark, but the defendant still confuses the consumer into believing the defendant’s product belongs to the plaintiff. The Thai Supreme Court precedent no. 155/2539 confirms that the defendant in a passing off case must have this intention. The plaintiff registered as the trademark owner of ‘ORAL-B’. The defendant used the trademark ‘DENTAL-C’. The court opined that the trademarks of the plaintiff and the defendant were different, both in letter and pronunciation. The consumer would choose the products from the brand by considering the brand name. The trademark of the plaintiff was already popular and more expensive than the defendant’s. The defendant had advertised its brand on both radio and television. Therefore, the defendant did not have the intention to misrepresent the consumer and make the passing off.⁹⁹

(3) The Damages Claimed from Passing off

The third difference in the passing off principle under Thai law and English law is the right to claim the damages from the passing off case. According to article 14(2) and article 2 of the Trade Marks Act 1994, the statute provides the right of the registered trademark owner and unregistered trademark owner to claim compensation for the infringement of the trademark and passing off.

Article 14 (2) In an action for infringement all such relief by way of damages, injunctions, accounts or otherwise is available to him as is available in respect of the infringement of any other property right.

Article 2 (1) A registered trade mark is a property right obtained by the registration of the trade mark under this Act and the proprietor of a registered trade mark has the rights and remedies provided by this Act.

(2) No proceedings lie to prevent or recover damages for the infringement of an unregistered trade mark as such; but nothing in this Act affect the law relating to passing off.

⁹⁹ พงษ์เดชา (Pongdeat) *supra* note 37, at 101.

According to the articles above, in the case of passing off, the unregistered trademark owner could claim for damages from the person who infringed the trademark as follows.

Damages

Normally, damages are the actual loss which the plaintiff suffers from the infringement and the plaintiff has a burden of proof. The damages may be the market loss or goodwill loss which can be calculated.¹⁰⁰ However, in some cases, damages may be calculated on a royalty basis. This is based on the amount that would have been payable by the defendant if he had sought a license to use the trademark from the defendant.¹⁰¹ For damages in the case of passing off, the defendant cannot defend the case on the basis that he infringed innocently. The plaintiff has a right to damages regardless of the defendant's state of mind, and that is so regardless of whether the cause of action is infringement or passing off.¹⁰²

Account of Profits

Normally, an account of profit will be made by the defendant for selling the goods using the infringed trademark according to the court's order. Damages will be available against the defendant who innocently commits passing off. However, the account of profits will be calculated only for the period of time that the defendant intended to commit the passing off.¹⁰³ However, in an infringement of trademark case, the plaintiff has an option to claim either damages or profit. The plaintiff cannot have both. Damages are a matter of right and an account of profit is an equitable remedy. The court has discretion whether or not to grant it.¹⁰⁴

¹⁰⁰ บรรเทิง สุธรรมพร, “การนำสืบพิสูจน์ค่าเสียหายในคดีละเมิดสิทธิในเครื่องหมายการค้า”, วิทยานิพนธ์ มหาวิทยาลัย จุฬาลงกรณ์มหาวิทยาลัย, 2544, 77-78. (Bantherng Suthamporn, “Proof of Damages in Trademark Infringement Case” Master of Law’s Thesis Chulalongkorn University, 2001,77-78).

¹⁰¹ Bainbridge, *supra* note 38, at 768-769.

¹⁰² Duncan Mackenzie Kerly and Davis Kitchin, **Kerly’s Law of Trade Marks and Trade Names**, 14th ed. (London: Sweet & Maxwell, 2005), 674.

¹⁰³ Bainbridge, *supra* note 38, at 769.

¹⁰⁴ Kerly, and Kitchin, *supra* note 102, at 675.

Punitive Damages

The English court may award punitive damages to the plaintiff in the case where the defendant clearly had the intention to commit the passing off. The court may award the plaintiff more damages than the actual damage in order to punish the defendant.¹⁰⁵

Costs

The costs which the parties pay in the litigation are at the discretion of the court and the court has full power to determine whom and to what extent such costs shall be paid. In general, the court will order the unsuccessful party to pay the costs of the litigation.¹⁰⁶

For passing off under Thai law, there is no provision in the Thai Trademark Act B.E. 2534 specifying a claim for damages in a passing off case. Therefore, in the case of awarding damages, the Thai Court will apply section 438 of the Thai Civil and Commercial code.

Section 438

The Court shall determine the manner and the extent of the compensation according to the circumstances and the gravity of the wrongful act.

Compensation may include restitution of the property of which the injured person has been wrongfully deprived or its value as well as damages for any injury caused.

According to section 438 paragraph one, the court will use its discretion to award the damages according to the circumstances and the gravity of the wrongful act. The plaintiff has an obligation to prove his damage. However, in the case where the plaintiff cannot prove damage, the court can still use its discretion according to the circumstances and gravity of the wrongful act and the facts in the case to award damages to the plaintiff. Nevertheless, if the plaintiff cannot prove that the damage was caused by the action of the defendant, the court cannot award

¹⁰⁵ บัณฑิต (Bantherng), *supra* note 100, at 79.

¹⁰⁶ Kerly, and Kitchin, *supra* note 102, at 677.

damages to the plaintiff.¹⁰⁷ Therefore, English trademark law has clearer provisions relating to the claim for damages in a case passing off than Thai trademark law which applies the general provisions of wrongful acts.

3.4 The Concept of Consumer Protection under the Thai Consumer Protection Act B.E. 2522

According to Thai law, there are approximately fifty laws which have the objective of protecting the consumer, although some Acts protect the consumer indirectly. In such Acts, the government or administrative section will be the person who exercises the right and the private individual will not be the directly injured person. However, at present there is the Thai Consumer Protection Act B.E. 2522 which protects the consumer directly.¹⁰⁸

According to section 4 of the Thai Consumer Protection Act, the consumer has five rights of protection as follows:

- (1) The right to receive correct and sufficient information and description as to the quality of goods or services
- (2) The right to enjoy freedom in the choice of goods or services
- (3) The right to expect safety in the use of goods or services
- (4) The right to receive a fair contract
- (5) The right to have the injury considered and compensated in accordance with the laws on such matters or with the provision of the Consumer Protection Act

The consumer protection which relates to the *Example Case* is consumer protection covering advertising. Therefore, in this thesis, the author will mention only the consumer protection covering advertising under the Thai Consumer Protection Act B.E. 2522.

Advertisement is a means to promote products to the public and enable the public to recognise the manufacturer's products. If the seller or manufacturer uses

¹⁰⁷ บรรณกิจ (Bantherng), *supra* note 100, at 128.

¹⁰⁸ สุขุม (Susom), *supra* note 3, at 145.

facts which are untrue to advertise, it may cause damage to the consumer. The control of advertisements is not only to protect the consumer but also to protect other business competitors. An advertisement which causes damage to other business competitors will also cause damage to the consumer. Therefore, it will be considered as unfair practice and will carry a penalty.¹⁰⁹

According to section 3 of the Thai Consumer Protection Act, the definition of the words ‘advertisement’ and ‘statement’ are as follows:

“Advertisement” includes any act which, by whatever means, causes the statement to be seen or known by an ordinary person for trading purposes

“Statement” includes an act expressed in the form of letters, pictures, cinematographic film, light, sound, sign, or any act enabling the public to understand its meaning

The consumer protection covering advertisements was provided under section 22.

Section 22

An advertisement may not contain a statement which is unfair to consumers or which may cause adverse effects to the society as a whole; that is, notwithstanding such statement concerns with the origin, condition, quality or description of goods or services as well as the delivery, procurement or use of goods or services.

The following statements shall be regarded as those which are unfair to consumers or may cause adverse effect to the society as a whole:

- (1) Statement which is false or exaggerated;
- (2) Statement which will cause misunderstanding in the essential elements concerning goods or services, notwithstanding it is based on or refers to any technical report, statistics or anything which is false or exaggerated;
- (3) Statement which is directly or indirectly encouraging the commission of an unlawful or immoral act, or which adversely affects the national culture;
- (4) Statement which will cause disunity or adversely affects the unity among the public;

¹⁰⁹ *Id*, at 170-171.

(5) Other statements as prescribed in the Ministerial Regulation.

A statement used in the advertisement which an ordinary person knows that it is not possible to be true is not prohibited for use in the advertisement under (1).

According to section 22 paragraph one, the statement (notwithstanding such statement concerns with the origin, condition, quality or description of goods or services as well as the delivery, procurement or use of goods or services) of advertisement shall not contain:

- (a) a statement which is unfair to consumers, or
- (b) a statement which may cause an adverse effect to the society as a whole;

Section 22 paragraph two provides examples of the statements which are unfair to consumers or may cause adverse effects to the society as a whole.

The subsection which may be applied with the *Example Case* is subsection 2, which covers the statement that will cause misunderstanding in the essential elements concerning goods or services. The statements prohibited under section 22(2) may not be untrue as in section 22(1) but cause misunderstanding to the consumer. For example, the company refers to the statistics that its product continuously received an award for five years but in fact the company received the award five times every two years. If the business operator cannot prove that its claim or advertisement is accurate, it will be deemed as a violation of section 22 and the Committee on Advertisement has the power to issue an order according to section 27.¹¹⁰

According to section 27, if the Committee on Advertisement opines that any advertisement violates section 22, it shall have the power to issue one or several orders as follows:

- (1) to rectify the statement of method of advertisement
- (2) to prohibit the use of certain statements that appeared in the advertisement

¹¹⁰ *Id.*, at 180-182.

- (3) to prohibit the advertisement or the use of such method for advertisement
- (4) to correct by advertisement the possible misunderstanding of the consumers in accordance with the rules and procedure prescribed by the Committee on Advertisement

3.5 The Concept of Consumer Protection under the Thai Consumer Case Procedure Act B.E. 2551

The Consumer Case Procedure Act was enacted in order to give protection to the consumer because consumers had problems applying civil procedure law, which is the general procedure law. It caused delays in the cases, more expenses and imposed a burden of proof which was out of the knowledge of the consumer.¹¹¹

The Consumer Case Procedure Act was designed for systematising the procedure of consumer cases. The important objectives of the Act are as follows:¹¹²

1. To support the consumer to receive the justice
2. To systematise the fact searching process to be efficient and fair
3. To improve the procedure rapidly and increase the rules assisting the remedy of the consumer
4. To increase the morality standard of business operations and prohibit the business operator who acts in bad faith

According to the Consumer Case Procedure Act, there are many sections of substantive law which are provided to protect the interest of the consumer. The important sections related to the *Example Case* are as follows.

¹¹¹ เอื้อน ขุนแก้ว, คำอธิบายกฎหมายวิธีพิจารณาความผู้บริโภค, พิมพ์ครั้งที่ 2 (กรุงเทพฯ: สำนักพิมพ์กรุงสยาม, 2559), 2. (Auen Kunkeaw, **Textbook on Consumer Case Procedure Law**, 2nd ed. (Bangkok: Krungsiam Publishing House, 2016), 2).

¹¹² ชาญณรงค์ ปราณีจิตต์, คำอธิบายพระราชบัญญัติวิธีพิจารณาความผู้บริโภค พ.ศ.2551, (กรุงเทพฯ: สำนักงานศาลยุติธรรม, 2552), 2. (Channarong Praneejit, **Textbook on Consumer Case Procedure Act B.E. 2551**, (Bangkok: Court of Justice Office, 2009), 2).

3.5.1 Punitive Damages

Punitive damages or exemplary damages means money which the court awards to the injured person in a civil case other than the compensatory damages. The court will estimate punitive damages from the bad behaviour of the defendant. Punitive damages has two main purposes, i.e. to punish the defendant who is a business operator exhibiting bad behaviour and to deter a business operator with similar misbehaviour from continuing, in order to protect the public.¹¹³

According to the general principle for fixing damages under the Civil and Commercial Code, the court will award damages to the injured person of not more than the actual damages. However, the provision under the Consumer Case Procedure Act changed such principle and gave power to the court to award punitive damages. Punitive damages have a source in the Common law system and their purpose is different from compensatory damages which are to remedy the injured person and not award them more than the actual damage. However, punitive damages are intended to punish the business operator who exhibits bad behaviour. The objective is like the criminal law which has the purpose of preventing bad behaviour, therefore, some lawyers may call punitive damages exemplary damages.¹¹⁴

The punitive damages under the Consumer Case Procedure Act are provided in section 42 as follows:

Section 42

If the act upon which the complaint is based arises from the business operator's intentional act to unfairly take advantage of the consumer or wilfully to cause damage to the consumer or, with gross negligence, indifference to damage to be caused to the consumer, or act in breach of responsibility as a professional or businessman who is usually trusted by the public, when the court adjudicates that the business operator pay damages to the consumer, the court shall have the power to order the business operator to pay damages as punishment in addition to the amount of the actual damages fixed by the court as may be deemed appropriate, taking into account such circumstances as damage suffered by the plaintiff, benefit received by the

¹¹³ เอื้อน (Auen), *supra* note 111, at 97.

¹¹⁴ ชาญณรงค์ (Channarong), *supra* note 112, at 131-132.

business operator, financial condition of the business operator, relief by the business operator from the damage, and the consumer's contribution to the damage.

In fixing damages for punishment under paragraph one, the court shall have the power to fix the damages by not more than two times the actual damages fixed by the court. However, if the actual damages fixed by the court is not more than Baht 50,000, the court shall have the power to fix the damages for punishment by not more than five times the actual damages fixed by the court.

According to section 42, the conditions in which the court shall have the power to award punitive damages are as follows:¹¹⁵

1. If the act upon which the complaint is based arises from the business operator

- a) Intentionally acting to unfairly take advantage of the consumer
- b) Wilfully causing damage to the consumer
- c) Exercising gross negligence or indifference to damage being caused to the consumer
- d) Acting in breach of responsibility as a professional or businessman who is usually trusted by the public

2. When the court adjudicates that the business operator pays damages to the consumer

If the business operator breaches the conditions above, the court shall have the power to order the business operator to pay punitive damages in addition to the amount of the actual damages fixed by the court as may be deemed appropriate under the rules as follows.

¹¹⁵ ธานิศ เกศวพิทักษ์, คำอธิบายกฎหมายวิธีพิจารณาคดีผู้บริโภค, พิมพ์ครั้งที่ 2 (กรุงเทพฯ: สำนักพิมพ์โพธิ์ธรรม, 2551), 165. (Tanis Kesawapitak, **Textbook on Consumer Case Procedure Law**, 2nd ed. (Bangkok: Pholsiam Publishing House, 2008), 165).

1. The court has to consider the circumstances such as

- a) Damage suffered by the plaintiff
- b) Benefit received by the business operator
- c) Financial condition of the business operator
- d) Relief by the business operator from the damage
- e) The consumer's contribution to the damage

2. The court shall have the power to fix the damages by not more than two times the actual damages fixed by the court. However, if the actual damages fixed by the court are not more than Baht 50,000, the court shall have the power to fix the damages for punishment by not more than five times the actual damages fixed by the court.

According to the conditions of this section, the act of a business operator is a fault which should receive a civil punishment affecting its property. The intention is not to benefit the consumer, but the purpose is that the business operator will develop or improve its business operation which will in turn result in benefit to the public. Without the conditions, the court cannot order an award of punitive damages. These damages are additional damages awarded by the power of the court, the consumer cannot ask or claim for such damages because their purpose is not to remedy the consumer. Therefore, the court shall be able to award the punitive damages in the case where the court awards compensatory damages. If there is no compensatory damages, the court cannot order an award of punitive damages.¹¹⁶

3.5.2 Piercing the Corporate Veil

Normally, when the partnership or company is registered, it will continue the juristic person's status distinct from the partners or shareholders

¹¹⁶ ไพโรจน์ วายุภาพ, คำอธิบายกฎหมายวิธีพิจารณาคดีผู้บริโภค, (กรุงเทพฯ: ร้านสวัสดิการหนังสือปณรัชช, 2552), 160. (Phairot Wayuphap, **Textbook on Consumer Case Procedure Law**, (Bangkok: Panalat Book Shop, 2009), 160).

according to section 1015¹¹⁷ of the Civil and Commercial Code. If the partnership or company incurs a debt, the creditor cannot claim such debt from the partner, director or shareholder. This causes a problem to a consumer who wins a case but cannot execute the judgment debt because the business operator formed the juristic person in bad faith and with the purpose of defrauding the consumer or removing or transferring the assets of the juristic person to others. Piercing the corporate veil or disregarding the principle of corporation is applied in many countries including England, the US and Germany. It is the principle preventing the use of the juristic person in bad faith. According to such principle, if the juristic person is used as a tool of fraud or to cause unfairness or avoid liability, the court shall not consider the juristic person status as distinct from the partner or shareholder. The court deems the partner, shareholder and juristic person as the same person who is liable for the debt which each has made.¹¹⁸

In the *Example Case*, if the defendant used the company as a tool to defraud the consumer who was consequently confused between the trademark owner and the defendant, the consumer can exercise the right according to the piercing the corporate veil principle to call for the director or related person to be jointly liable with the company. This principle gives more protection to the consumer who was defrauded by the defendant, because in the case that the defendant company defrauded many consumers and caused considerable damage, the assets of the company may not be sufficient to cover the debt.

Moreover, if the director or the related people are called to be jointly liable for the debts of the company according to the principle of piercing the corporate veil, this will deter other business operators who planned similar misbehaviour from continuing. It will give the consumer more protection.

Piercing the corporate veil principle is provided in section 44 of the Consumer Case Procedure Act.

¹¹⁷ **Section 1015** A partnership or company, upon registration being made according to the provisions of this Title, continues a juristic person distinct from the partners or shareholders of whom it is composed.

¹¹⁸ ชาญณรงค์ (Channarong), *supra* note 112, at 141-142.

Section 44

In a case in which the business operator who is sued is a juristic person, if the facts appear that such juristic person was formed or has acted in bad faith or is involved with fraud and deception of the consumer, or has removed or transferred assets of the juristic person to the benefit of any person, and those assets are not sufficient to pay debt according to the complaint, the court shall, upon request by the party or upon the court deeming it appropriate, have the power to call the partner, shareholder, person controlling the operation of the juristic person or person receiving assets from the juristic person to become co-defendant, and shall have the power to adjudicate such person to be jointly liable for the debt owed by the juristic person to the consumer, unless such person can prove that he has no knowledge of such act. In case of the person receiving those assets from the juristic person, he must prove that he has received the assets in good faith and with consideration.

The person receiving assets from the juristic person under paragraph one shall be jointly liable for not more than the assets received by such person from the juristic person.

The conditions in which the court shall order any person to be liable for the debt of a juristic person are as follows:¹¹⁹

1. It must be a consumer case in which the defendant is the juristic person. The juristic person under this section can be a registered partnership, limited partnership or company. The debt claimed can be a contractual debt or wrongful act.

2. There is the fact that such juristic person

- a) was formed or has acted in bad faith or
- b) is involved with fraud and deception of the consumer or
- c) has removed or transferred assets of the juristic person for the benefit of any person

3. The assets of a juristic person are not sufficient to pay the debt according to the complaint. However, Prof Auen Kunkeaw is of the opinion that the

¹¹⁹ *Id*, at 143-144.

law imposes liability on the person and prohibits such a person from claiming the separate legal entity of the juristic person in this section, because they have used the juristic person as a tool for seeking benefit. Therefore, if the facts show that the juristic person has acted in bad faith or defrauded the consumer, although the assets of the juristic person are sufficient, the court can order such person to be jointly liable.¹²⁰ On the other hand, Prof Channarong Praneejit is of the opinion that the court shall have the power to order any person to be jointly liable for the debts of a juristic person under this section if the assets of a juristic person are not sufficient. If the juristic person acts in bad faith but has enough assets to pay the debt, the court cannot order any person to be jointly liable.¹²¹

The author agrees with the opinion of Prof Channarong Praneejit because if the assets of the juristic person are sufficient there is no need to call on the other person to be liable for the debt of the juristic person.

4. Upon request by the party or upon the court deeming it appropriate, the court shall have the power to call the persons as follows to become co-defendant and shall have the power to adjudicate such person to be jointly liable for the debt owed by the juristic person to the consumer

- a) The partner
- b) Shareholder
- c) A person controlling the operation of the juristic person such as the manager of the company or limited partnership or registered partnership
- d) A person receiving assets from the juristic person

The person liable under this section must be the person who receives assets which transfers the ownership, not only the possession. A third party who has received the transfer of ownership of the asset from the person receiving that asset from the juristic person will be not considered as the person receiving assets from the

¹²⁰ เอื้อน (Auen), *supra* note 111, at 109.

¹²¹ ชาญณรงค์ (Channarong), *supra* note 112, at 145.

juristic person under section 44. Moreover, a person who has received a transfer of a share of the company from a shareholder will not be considered as a person receiving assets from the juristic person because shares are not assets of the company.¹²²

A person who is jointly liable for the debts of a juristic person can be a natural person or a juristic person. The court does not consider the substantive law regarding the liability of such person. This provision provides a new liability; however, such person has to have the person status while claimed.¹²³

5. The person who is called to be co-defendant shall not jointly be liable in the case where:

- a) Such person can prove that he has no knowledge of such act. (In the case where the person is partner, shareholder or person controlling the operation of the juristic person.)
- b) Such person can prove that he has received the assets in good faith and with consideration. (In the case of the person receiving assets from the juristic person.)

3.6 The Concept of Consumer Protection under the Thai Competition Act B.E.

2542

Competition law or monopoly law is the law which the government uses to resolve monopoly problems. Monopoly is the situation where there is one business operator or group that has market power and can control the market of one product or service. Such business operators will have free power to specify the price or quantity of the product without any pressure from the market. In this situation such business operator can seek as much profit as they wish. Therefore, legal measures to protect against restriction of competition are necessary for those countries which use the free

¹²² ไพโรจน์ (Phairot), *supra* note 116, at 168-169.

¹²³ *Id.*, at 168.

trade or market system. Any product or service market which is a monopoly will have bad effects on the economy and consumers.¹²⁴

3.6.1 The Relationship between Competition Law and Consumer Protection Law

Both competition law and consumer protection law deal with distortions in the marketplace, which is supposed to be driven by the interaction between supply and demand. Antitrust offences, like price fixing or exclusionary practices, distort the supply side because they restrict supply and elevate prices. Consumer protection offences, like deceptive advertising, distort the demand side because they create the impression that a product or service is worth more than it really is. In other words, both sets of offences can be analysed in economic terms, and appreciation of this nexus will help to resolve some apparent tensions.¹²⁵

In Thai law, in 1979 the legislature enacted antimonopoly law and consumer protection law. The consumer protection law has the purpose of ensuring the consumer receives the correct information about products and services. It enables consumers to choose the product and service correctly. Consumers will not be deceived or misunderstand the type or quality of a product or service by an advertisement or the business operator's label. Under such law, there is also a measure to control the products which may harm consumers. The main intention of this law is to protect consumers in a market economy. This is the economic system in which information in the market is important for communicating between consumers and manufacturers. Although consumer protection law will have the main purpose of protecting consumers' interests, it clearly also affects the competition in the economic system. It can control business operators and deter them from using information to destroy other business operators who are competitors in the market, which may cause

¹²⁴ สุธีร์ สุภณิตย์ และ กมลวรรณ จิรวินิชย์, หลักการและกฎเกณฑ์แห่งพระราชบัญญัติการแข่งขันทางการค้า พ.ศ.2542 (กรุงเทพฯ: สำนักพิมพ์มหาวิทยาลัยธรรมศาสตร์, 2555), 1-2. (Suthi Supphanit & Kamolwan Chirawisit, **Principles and rules of the Competition Act of 1999**, (Bangkok: Thammasat University Publishing House, 2012), 1-2).

¹²⁵ Thomas B. Leary, "Competition Law and Consumer Protection Law: Two Wings of the Same House", **Antitrust Law Journal**, Volume 72, (2005): 1147-1148.

unfair competition between competitors. It may be said that measures in the Consumer Protection Act B.E. 2522 are additional measures to prevent the monopoly market.¹²⁶

It is clearly accepted that if there is competition in the product and service market, it will cause an efficient economy, stability and industry expansion. The business operator will allocate resources efficiently to respond to the demands of society. The production process will be efficient. The business operator will develop new technology to reduce costs and drive innovation. Consumers will receive benefits from a market which has competition, i.e. consumers can buy products or receive services at a cheaper price and have more choices to buy products and receive services. The most important issue is that consumers will receive quality products and services. Such a situation will not arise if there is a monopoly market. Therefore, the purpose of the Competition Act is to maintain competition in the market in order to achieve economic targets, i.e. the country has an efficient economy and consumers receive protection.¹²⁷

Therefore, it can be said that competition law or monopoly law, which has the objective to promote or maintain competition in the marketplace according to the policy of each country, relates to consumer protection law. If the competition in the market is maintained and no single business operator can control the market solely, the markets will be open and free. It will result in products and services at cheaper prices, higher quality, more choices, and improved rates of innovation. The business operator will not be able to exploit the consumer and the interests of consumers will be protected under competition law, also.

¹²⁶ ศักดา ธนิตกุล, *คำอธิบายและกรณีศึกษาพระราชบัญญัติการแข่งขันทางการค้า พ.ศ.2542*, พิมพ์ครั้งที่ 2 (กรุงเทพฯ: สำนักพิมพ์วิญญูชน, 2553), 23. (Sakda Thanitkun, **Textbook on Trade Competition Act 1999**, 2nd ed. (Bangkok: Winyuchon Publishing House, 2010), 23).

¹²⁷ สุธีร์ และ กมลวรรณ (Suthi & Kamolwan), *supra* note 124, at 3.

3.6.2 The Protection under Section 29

The control of business operators which relates to the *Example Case* is the requirement for the market to be free for fair competition. Therefore, in this thesis, the author will mention only the obligation of business operators to comply with free and fair competition under the Thai Competition Act B.E. 2542.

Section 29

A business operator shall not carry out any act which is not free and fair competition and has the effect of destroying, impairing, obstructing, impeding or restricting business operation of other business operators or preventing other persons from carrying out business or causing their cessation of business.

Section 29 of the Thai Competition Act B.E. 2542 was provided to prohibit the business operator carrying out any act which is not free and fair competition and has the effect of destroying, impairing, obstructing, impeding or restricting the business operation of other business operators or preventing other persons from carrying out business or causing their cessation of business. Such provision is very broad and has the nature of a catch-all provision. If any act does not apply to other sections under the Competition Act (sections 25–28), it will apply to section 29. If any act does not also comply with section 29, such act will not be considered as a violation under the Thai Competition Act.¹²⁸

The objective of section 29 is to control four behaviours of vertical competition as follows.¹²⁹

- a) Resale price maintenance
- b) Customer and territorial restraints
- c) Exclusive dealing
- d) Tying arrangement

Section 29 has two elements of violation as follows:¹³⁰

¹²⁸ *Id*, at 195.

¹²⁹ *Id*

a) A business operator which carries out any act that is not free and fair competition

According to section 3 of the Thai Competition Act, a business operation is defined as that of a distributor, manufacturer for distribution, buyer or importer into the Kingdom for distribution or a purchaser for manufacture or redistribution of goods or a person engaging in the business of service provision. However, Thai lawyers were of the opinion that the word business operator in this section means business operator with market domination and the business operator who has 10% of market share, or the first three market business operators in the market.

The acts which are considered not to be free and fair competition are resale price maintenance, customer and territorial restraints, exclusive dealing and tying arrangements.

b) Such act has the effect of destroying, impairing, obstructing, impeding or restricting the business operation of other business operators or preventing other persons from carrying out business or causing their cessation of business

The acts in a) must actually destroy or impair other business operators or affect their business so that they cannot attend the market or make other business operators go out of business and exit from the market. The burden of proof of the result of the act rests with the Trade Competition Commission.¹³¹

3.7 The Right of Consumers to Revoke Contracts Made Between the Defendant and Consumers

3.7.1 Mistake

According to the facts of the *Example Case*, some consumers were confused as to whether the plaintiff and the first defendant were the same juristic

¹³⁰ *Id*

¹³¹ *Id*

person. Some newspapers published that the first defendant was the same entity as the plaintiff company. Some consumers entered into contracts with the defendant by confusing that the defendant was the plaintiff company. This caused damage to the plaintiff who was the owner of the service mark because it lost its customers and reputation and the chance to make a profit.

The act of the consumer who entered into a contract with the defendant could be considered as a mistake according to section 156 of the Thai Civil and Commercial Code.

Section 156

A declaration of intention is void if made under a mistake as to an essential element of the juristic act.

The mistake as to an essential element of the juristic act under paragraph one are for instance a mistake as to a character of the juristic act, a mistake as to a person to be a partner of the juristic act and a mistake as to a property being an object of the juristic act.

The mistake as to an essential element of the juristic act can be considered as the juristic act without the intention therefore such declaration will be void.¹³² Section 156 paragraph two provides three examples of a mistake as to an essential element of the juristic act: a mistake of a character of the juristic act, a mistake of a person who is a partner of the juristic act and a mistake of property which is an object of the juristic act. In the *Example Case*, consumers were confused between the plaintiff and the defendant, therefore, this will be a mistake as to a person who is a partner of the juristic act.

In the case of a mistake of a person who is a partner of the juristic act which causes the juristic act be void, the partner of the juristic act must be the important issue for such juristic act. There are some juristic acts in which the partner of the juristic act is not the important issue, in such juristic acts there is no need to

¹³² จี๊ด เศรษฐบุตร, *หลักกฎหมายแพ่งลักษณะนิติกรรมและสัญญา*, พิมพ์ครั้งที่ 7 (กรุงเทพฯ: โครงการตำราและเอกสารประกอบการสอน คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์, 2556), 104. (Chit Setthabut, **Civil Law Principles: Juristic Act and Contract**, 7th ed. (Bangkok: Textbook and Teaching Document Project Faculty of Law Thammasat University, 2013), 104).

make the juristic act with the specific partner. For example, the buyer would like to buy a shirt and has a style of shirt in mind. In this case the buyer does not wish to buy a shirt from a specific shop or person and is concerned only with the price of the product. The buyer cannot claim that shirt sale contract is void although there is a mistake as to a seller.¹³³ An example of a juristic act in which the partner of the juristic act is an important issue is a loan agreement, partnership agreement, hiring agreement or gift.¹³⁴ In an agreement to sell for cash, the seller only wants the cash and the buyer only wants the product. When the offer and the acceptance is matched, the contract will be made without consideration of the person who is the party. Therefore, the seller or the buyer cannot claim there was a mistake as to a person being a partner of the juristic person.¹³⁵

The mistake as to a person being a partner of the juristic act also includes the case that the party misunderstands that other party is still alive but in fact the other party has already passed away. For example, Mr A offered to enter into a life insurance agreement with company B. During company B's consideration of the offer Mr A passed away. Company B subsequently accepted the offer. This case will be considered to be a mistake as to a person being a partner of the juristic act.¹³⁶

However, according to section 158, in the case where there is a mistake as to a person being a partner of the juristic act that was due to the gross negligence of the person making such declaration, such person cannot avail himself of such invalidity.

¹³³ *Id*, at 107.

¹³⁴ สนั่นทกรณ โสคติพันธุ์, **คำอธิบายนิติกรรม-สัญญา**, พิมพ์ครั้งที่ 19 (กรุงเทพฯ: สำนักพิมพ์วิญญูชน, 2558), 126. (Sanankon Sotthiphan, **Textbook on Juristic Act and Contract**, 19th ed. (Bangkok: Winyuchon Publishing House, 2015), 126).

¹³⁵ ศักดิ์ สนองชาติ, **คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ นิติกรรม สัญญา**, พิมพ์ครั้งที่ 11 (กรุงเทพฯ: สำนักพิมพ์นิติบรรณการ, 2557), 173. (Sak Sanongchart, **Textbook on Civil and Commercial Code Juristic Act and Contract**, 11th ed. (Bangkok: Nitibannakarn Publishing House, 2014), 173).

¹³⁶ จิต (Chit), *supra* note 132, at 107-108.

Section 158

If the mistake under Section 156 or Section 157 was due to the gross negligence of the person making such declaration, he cannot avail himself of such invalidity.

Gross negligence means that the person who makes the declaration is not careful; for instance, the party does not read the contract before signing. Where the mistake is due to gross negligence it may be deemed that the person intended to make a mistake, therefore such person cannot avail himself of such invalidity.¹³⁷

The last issue to consider is whether a consumer can revoke the contract with the defendant or not. The court has to consider the sex, age, position health, temperament of the consumer and all other circumstances and environment which may relate to that act according to section 167 of the Thai Civil and Commercial Code.

Section 167

In determining a case of mistake, fraud or duress, the sex, age, position health, temperament of the person made the intention and all other circumstances and environment which may relate to that act shall be taken into consideration.

3.7.2 Fraud

According to the facts of the *Example Case*, the defendant changed its juristic person's name from Power 99 Ltd to Srisawad Power Ltd. The first defendant advertised its business by using the word Srisawad, which was the word in the service mark sold by Srisawad International (1991) Ltd to the plaintiff. This confused consumers who thought that the plaintiff and the first defendant were the same juristic person or an affiliated company. Some consumers entered into contracts with the defendant by confusing that the defendant was the plaintiff company. The defendant's act which used the word Srisawad to advertise may be considered as fraud and the contract may be voidable according to section 159 of the Thai Civil and Commercial Code.

¹³⁷ ศันันท์กรณ (Sanankon), *supra* note 134, at 127.

Section 159 A declaration of intention produced by fraud is voidable.

An act under paragraph one is voidable on account of fraud only when it is such that without which such juristic act would not have been made.

When a party has made a declaration of intention owing to a fraud committed by a third person, the act is voidable only if the other party knew or ought to have known of the fraud.

Fraud means deception which causes another person misunderstanding. In other words, fraud is the mistake caused by another person's deception. There are two legal issues regarding fraud to be considered. The first issue is that the person who deceives must have done so in bad faith. In a case where the person who deceives does not know the facts or has also made a mistake about the facts and gives the facts which are untrue to the other party with good faith, it is not considered as fraud. The second issue is that the person who deceives must do an act or expression such as telling, writing or acting. However, there is an exception in section 162 that in bilateral juristic acts or contracts, if one of the parties intends to be silent in respect of a fact, the quality of which the other party did not know, such juristic acts or contracts will be fraud and voidable if the other party can prove that without such silence the act would not have been made.¹³⁸

Section 162

In bilateral juristic acts, the intentional silence of one of the parties in respect to a fact or quality of which the other party is ignorant, is deemed to be a fraud if it is proved that, without it, the act would not have been made.

Fraud makes the intention voidable because the person who declares the intention was mistaken. Such mistake will always be an important issue because it is caused by fraud. Therefore, although the mistake is only the motivation to enter into the contract, it is deemed that on account of fraud the contract will be voidable.¹³⁹

According to section 159 paragraph two of the Thai Civil and Commercial Code, the juristic act is voidable on account of fraud only when without the fraud such juristic act would not have been made. It can be said that the fact which

¹³⁸ จี๊ด (Chit), *supra* note 132, at 113-114.

¹³⁹ ศนันท์กรณี (Sanankon), *supra* note 134, at 136.

is fraudulent is the important issue of the juristic act and is the variable in the occurrence of the contact. It means that if there is no fraud and the juristic act still occurs, such juristic act will not be voidable.

Fraud which causes the juristic act will be voidable; the person who is defrauded has to be naive. If the person who is defrauded already knows the truth of the fact which is fraud, but still made the juristic act, such juristic act will not be voidable. For example, Mr A offers to sell a fake gem to Mr B by deceiving him that it is a genuine gem. Mr B is a gem specialist and knows that Mr A's gem is a fake gem. However, Mr B still buys the gem from Mr A. Such a contract will not be voidable because Mr B was not naive.¹⁴⁰

In the case where the facts can be applied to both a mistake as to a person being a partner of the juristic act which causes the juristic act to be void and a fraud which causes the juristic act to be voidable, Professor Doctor Chit was of the opinion that such juristic act should be considered as void, because it has a worse legal effect than an act which is voidable.¹⁴¹

According to section 159 paragraph three, in the case where a third party commits fraud against a party who makes a declaration of intention, the act is voidable only if the other party knew or ought to have known of the fraud. If the party who does not declare the intention does not know or ought to know of the fraud by the third party, the juristic act will not be voidable, because the person is not liable for the act of the other person which does not concern him.¹⁴²

The final issue to consider is whether a consumer can revoke the contract with the defendant or not. The court has to consider the sex, age, position, health, temperament of the consumer and all other circumstances and the environment which may relate to that act according to section 167 of the Thai Civil and Commercial Code.

¹⁴⁰ *Id.*, at 138.

¹⁴¹ ชิต (Chit), *supra* note 132, at 118.

¹⁴² สักดิ์ (Sak), *supra* note 135, at 192.

Section 167

In determining a case of mistake, fraud or duress, the sex, age, position health, temperament of the person made the intention and all other circumstances and environment which may relate to that act shall be taken into consideration.

3.8 The Right of Consumers to Claim for Compensation under Thai Tort Law

Many lawyers have tried to give a definition of the word ‘Tort’. The proper definition of the word Tort was given by Winfield who said that, ‘Tortious liability arises from the breach of a duty primarily fixed by law; such duty towards persons generally and its breach is redressible by an action for unliquidated damages’. For the definition under the Thai Civil and Commercial Code, tort means (1) the unlawful, wilful or negligent act (2) which causes the damage to other person and (3) injures the life, body, health, liberty, property or any right of another person although such damage could be certainly calculated or may be non-pecuniary loss.¹⁴³

Section 420 of the Thai Civil and Commercial Code is the main provision of the liability of a person for his own action. It means that a person who has liability must wilfully or negligently injure another person. Any person who commits the elements under this section law will be deemed to have committed a wrongful act.¹⁴⁴

Section 420

A person who, wilfully or negligently, unlawfully injures the life, body, health, liberty, property or any right of another person, is said to commit a wrongful act and is bound to make compensation therefore.

¹⁴³ วารี นาสกุล, คำอธิบายกฎหมายแพ่งและพาณิชย์ ลักษณะละเมิด จัดการงานนอกสั่ง ลากมิควรได้, พิมพ์ครั้งที่ 3 (กรุงเทพฯ: สำนักพิมพ์กรุงสยาม, 2557), 5-6. (Waree Nasakul, **Textbook on Civil and Commercial Law: Tort, Management of Affairs without Mandate and Undue Enrichment**, 3th ed. (Bangkok: Krung Siam Publishing House, 2014), 5-6).

¹⁴⁴ ไพจิตร ปุญญพันธุ์, คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ ลักษณะละเมิด, พิมพ์ครั้งที่ 14 (กรุงเทพฯ: สำนักพิมพ์นิติบรรณาการ, 2558), 5. (Paichit Punyapan, **Textbook on Civil and Commercial Code: Tort**, 14th ed. (Bangkok: Nitibannakarn Publishing House, 2015), 5).

According to section 420 of the Thai Civil and Commercial Code, the legal elements of this provision can be divided as follows.¹⁴⁵

A. There is the Act of One Person to Another Person

The first element is the act of one person to another person. The person can be a natural person or a juristic person. A natural person who does an act consciously, although such person may be a minor, of unsound mind, or incapacitated, can commit a wrongful act or cause damage to another person. Those who are conscious of their act have the duty to refrain and not cause damage to another person, as do the majority of normal people. This principle was provided in section 429 which states that ‘A person, even though incapacitated, on account of minority or unsoundness of mind is liable for the consequences of his wrongful act...’¹⁴⁶

The decisions of a juristic person are made by the representatives according to section 70¹⁴⁷ of the Civil and Commercial Code. Therefore, the act of representatives is within the scope of the juristic person’s object, if such act is considered as a wrongful act, it will be deemed that the representative directly did the wrongful act and the juristic person will be liable for the act of the representative, according to section 76¹⁴⁸ of the Civil and Commercial Code. However, if the act of

¹⁴⁵ ศนันท์กรณ โสคติพันธ์, คำอธิบายกฎหมายลักษณะ ละเมิด จัดการงานนอกสั่ง ลากมิควรรได้, พิมพ์ครั้งที่ 6 (กรุงเทพฯ: สำนักพิมพ์วิญญูชน, 2558), 62-102. (Sanankon Sotthiphan, **Textbook on: Tort, Management of Affairs without Mandate and Undue Enrichment**, 6th ed. (Bangkok: Winyuchon Publishing House, 2015), 62-102).

¹⁴⁶ *Id.*, at 62.

¹⁴⁷ **Section 70.** A juristic person must have one or several representatives as prescribed by the law, regulations or its constitutive act, decisions as to the affairs of juristic persons are made by a majority of the representatives.

¹⁴⁸ **Section 76.** A juristic person is bound to make compensation for any damage done to other persons by its representatives or the person empowered to act on behalf of the juristic person in the exercise of their functions, saving its right of recourse against the causers of the damage.

If damage is done to other persons by an act which is not within the scope of the object or power and duties of the juristic person, all the persons as mentioned in paragraph one who agreed such act or executed it, are jointly liable to make compensation.

the representatives of the juristic person is not within the scope of the object of the juristic person, the representative will be liable personally.¹⁴⁹

The person who makes the wrongful act must have a commission. The word ‘commission’ means showing the thinking in the mind of the person to the other by moving the body in any way, such as a body part, words or writing. Moreover, the person has to do such act consciously. For example, Mr A hits Mr B. Hitting is the commission because Mr A consciously moves his body. However, if Mr A daydreams hitting Mr B, it will not be deemed as the commission because Mr A did not do such an act consciously.¹⁵⁰

An omission is not normally considered to be a wrongful act. However, in the case where the person has a duty to do something but such person omits to carry it out, it will be deemed as commission. There are many types of duties to act such as legal duty, contractual duty, professional duty, duty according to the previous relations and a duty according the rules and regulations.¹⁵¹

The omission of the duty will be considered as the commission, therefore, if it causes damage to another person. The person who omits to carry out his duty has to be liable for such damage. There is the supporting legal issue under the Criminal Code, according to section 59 paragraph five; an act shall also include any consequence brought about by the omission to do an act which must be done in order to prevent such consequence. Professor Doctor Warea was of the opinion that this criminal principle can be applied to a tort case.¹⁵²

The commission which causes damage must be the commission to the other person. It will be considered as the wrongful act. In the case where the commission which causes the damage is the commission to oneself, it will not be

¹⁴⁹ เฟ็ง เฟ็งนิตติ, คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ ว่าด้วยละเมิด, พิมพ์ครั้งที่ 9 (กรุงเทพฯ: ม.ป.พ., 2558), 9. (Pheng Phengniti, **Textbook on Civil and Commercial Code: Tort**, 9th ed. (Bangkok, 2015), 9).

¹⁵⁰ วารี (Warea), *supra* note 143, at 24-25.

¹⁵¹ สักดิ์ สนองชาติ, คำอธิบายโดยย่อประมวลกฎหมายแพ่งและพาณิชย์ ว่าด้วยละเมิด และความรับผิดทางละเมิด, พิมพ์ครั้งที่ 9 (กรุงเทพฯ: สำนักพิมพ์นิติบรรณการ, 2556), 7-8. (Sak Sanongchart, **Textbook on Civil and Commercial Code: Tort and Tortious Liability**, 9th ed. (Bangkok: Nitibannakarn Publishing House, 2013), 7-8).

¹⁵² วารี (Warea), *supra* note 143, at 26.

considered as a wrongful act because humans have the right and freedom to their life, body, health and property. However, if the commission causes damage to another person, such commission may be considered as a wrongful act. The other person may be a natural person or a juristic person. However, such other person must be identified.¹⁵³

B. Wilful or Negligent Act

The second legal element of the wrongful act is that the person who makes the wrongful act has to act wilfully or negligently whilst doing the wrongful act.

The word ‘wilful act’ means the person who commits the wrongful act aims to cause damage to the other person by his act. Therefore, it may be said that wilfulness has two meanings. The first meaning is that the person who commits the wrongful act intentionally causes the other person damage. The second meaning is that the person who commits the wrongful act may not intend to damage the other person but knows that such an act will cause the damage to another person and still does it. The degree of damage is not an important issue. In the case where the person wilfully intends to kill another person but the other person is only injured, it still is considered as wilfulness.¹⁵⁴

The word wilful act in a civil case has a definition wider than the definition of the word ‘intentional act’ in criminal law, because for an intentional act the person has to desire or could have foreseen the effect of such act. For example, Mr A hits Mr B with the intention to injure his body but Mr B dies. Mr A did not have the intention or desire to kill Mr B, therefore Mr A only committed the crime of killing without intention. However, the act of Mr A is considered to be a wilful act causing Mr B to die because Mr A consciously acted with the knowledge that his act would cause damage to Mr B, although he did not know the degree of the damage.

¹⁵³ *Id*, at 57.

¹⁵⁴ ศันันท์กรณ (Sanankon), *supra* note 145, at 71-72.

Therefore, an intentional act shall be a wilful act in all cases, but a wilful act is not always considered to be an intentional act.¹⁵⁵

The Thai Civil and Commercial Code does not provide the definition of the word ‘negligent act’. However, there is a definition of the word negligence in section 59¹⁵⁶ paragraph four of the Criminal Code. Therefore, it may be possible to apply this definition to the words ‘negligent act’ in the Civil and Commercial Code. On this basis, the negligent act should mean to commit an offence without wilfulness but without exercising such care as might be expected from a person under such conditions and circumstances, and the doer could exercise such care but did not do so sufficiently. The legal elements of the definition of the word negligent act can be divided as follows.

- (a) **Negligent act will not be the wilful act** because the law has provided the liability of a wilful act separate from the negligent act.
- (b) **Negligent must be an act without exercising the care** as might be expected from a person under such conditions and circumstances.
- (c) **The doer could exercise such care but did not do so sufficiently.** It means that the person can exercise care in such conditions and circumstances but does not do so sufficiently.¹⁵⁷

C. Unlawful Act

The third element of the wrongful act is that such act must be an unlawful act. Unlawful act means an act causing damage to the interest which the law protects or gives precedence. The meaning of the word unlawful act may include the cases as follows.¹⁵⁸

(a) **There is a specific statute which provides that such act is an offence such as the criminal law**, therefore committing such offence will be

¹⁵⁵ ศักดิ์ (Sak), *supra* note 151, at 19-20.

¹⁵⁶ **Section 59** Paragraph four provides that to commit an act by negligence is to commit an offence unintentionally but without exercising such care as might be expected from a person under such condition and circumstances, and the doer could exercise such care but did not do so sufficiently.

¹⁵⁷ วารี (Waree), *supra* note 143, at 39-44.

¹⁵⁸ สนันท์กรณ์ (Sanankon) , *supra* note 145, at 80-84.

considered as an unlawful act. For example, killing, stealing or causing damage to the property of another person, will be considered as an unlawful act because there are specific laws clearly prohibiting these things.

(b) There is no specific statute which clearly provides that such act is an unlawful act but such act causes damage to the absolute right which is provided in section 420, i.e. damage to life, body, health, liberty, property or any right of another person.

(c) The exercise of a right which can only have the purpose of causing injury to another person according to section 421

Section 421

The exercise of a right which can only have the purpose of causing injury to another person is unlawful.

The exercise of a right which can only have the purpose of causing injury to another person according to section 421 will have the legal elements as follows.¹⁵⁹

1. The person who consciously acts must have the right which means the interest which the law accepts and protects.
2. The person who has the right exercises his own right.
3. The person who exercises the right intends to cause the damage to another person by exercising his own right which may be
 - (a) the person who exercises the right does not receive any benefit from exercising the right.
 - (b) the person who exercises the right receives some benefit but makes the damage to other person more than expected.

If the person meets all three legal elements above, such exercising of the right will be considered as an unlawful act according to section 421 which can be considered as the unlawful act element of section 420. If such an act of the person also meets all the legal elements in section 420, the person who exercises

¹⁵⁹ *Id*, at 87-88.

the right with the purpose of causing the damage to another person will be considered as the person who does a wrongful act according to section 420 and he has the obligation to be liable for the damage.

An unlawful act is an act which the person has no right or power to do. In the case where the person has the right or power to legally do something, such act will not be considered an unlawful act. There are four types of power to legally act: (1) the law directly gives the power, (2) contractual power, (3) power from the court's judgment, and (4) power from consent.¹⁶⁰

D. The Act Causes the Damage

The fourth element of the wrongful act is that such act must cause damage to the other person. Although the act is an unlawful act, it may not always cause damage. If there is no damage, it will not be considered as a wrongful act. The damage must be the actual damage which has occurred when filing the case with the court, not the potential damage which may or may not occur. Potential future damage will not be considered as damage under section 420.¹⁶¹ This is because the purpose of tort law is to remedy the injured person, not to punish the person who did the wrongful act, like the criminal law. Therefore, if there is no damage, it will not be considered as a wrongful act. It will be different from criminal law which has the purpose of punishing the offender and although there is no damage, the offender may be guilty.¹⁶²

Normally, damage means an effect on property from an event which violates the interest protected by law. The damage may be categorised into two types as follows.¹⁶³

- (a) **Property Damage** or pecuniary loss is the damage affecting the economic interest of the injured person which can be financially calculated. For example, the expenses for medical

¹⁶⁰ เฟื่อง (Pheng), *supra* note 149, at 52.

¹⁶¹ ไพจิตร (Paichit), *supra* note 144, at 29.

¹⁶² เฟื่อง (Pheng), *supra* note 149, at 91.

¹⁶³ สนั่นทกรณ (Sanankon), *supra* note 145, at 93.

treatment or the damages for the loss of earnings on account of disability to work.

- (b) **Mental Damage** or non-pecuniary loss is the damage affecting the mind causing suffering, pain or shamefulness which cannot be financially calculated.

The damage for which the person who did the wrongful act has to pay the compensation must have the following legal elements.¹⁶⁴

- (a) The damage must be certain. This means that at the time of filing the case with the court, the injured person has already suffered damage clearly caused by the act and not damage which is remote from the cause.
- (b) The damage must be legal damage. It means that the law accepts such damage. It may be able to be financially calculated or not. If the injured person consented that the other person could cause the damage, although the damage has actually occurred, there is no damage in the legal sense, because there is the legal principle that consent does not cause the wrongful act (*volenti fit injuria*). Damage which is outside of the boundaries of rights protected by law, although there is actual damage, are not be deemed to be legal damage and the person who causes the damage is not be liable.
- (c) The damage may be the current damage or damage in the future. However, it must not be damage that occurred before the wrongful act.
- (d) The damage must be concerned with life, body, health, liberty, property or any right of another person:
 -Damage to life means the act causes death. The person who makes the wrongful act has to pay compensation to a third party.

¹⁶⁴ วรรณะ (Wanee), *supra* note 143, at 92-95.

-Damage to body means the act causes the body of the other person pain or the loss of an organ or part of the body, including the nerves which are part of the body.

-Damage to health means the act causes the health of another person to regress including mental health.

-Damage to liberty means the liberty of moving the body but does not include the other type of liberty, such as liberty to speak or to believe in religions.

-Damage to property means the damage to things as well as incorporeal objects, capable of having a value and of being appropriated. The act causes the property to be useless for the ordinary purpose.

E. The Damage and the Act must be Related According to the Causation Principle

The last legal element of the wrongful act is the causation element. When the damage has occurred, we have to consider the difference between the actual damage and the damage which the law accepts to remedy. The damage which the law accepts to remedy will depend on the principle that such damage is the result of the wrongful act. It does not mean that the person who does a wrongful act is liable for all the results from the wrongful act. Therefore, we have to consider the causation principle.

Causation means the relationship between two events; one event is caused from the other event. The result and act have to be related.¹⁶⁵

A German lawyer specified the two principles of causation as follows.¹⁶⁶

(a) The equity of causes principle or condition principle. For this principle, the result may have occurred from many causes or one cause may make many results. If the act of the defendant is one of the causes which makes the result,

¹⁶⁵ สนั่นทกรณ (Sanankon), *supra* note 145, at 103.

¹⁶⁶ วารี (Waree), *supra* note 143, at 113.

the defendant has to be liable for such result. It can be said that the act of the defendant is the condition of the result occurring. If there is no act of the defendant, the result will not have occurred. It means that the result has been caused by the act of the defendant, therefore the defendant has to be liable. This principle holds to the natural principle which gives the most justice to the injured person.

For example, Mr A throws a rock at the window of Mr B's house causing the window to break. The rock also broke a jar in Mr B's house. Mr C steps on a shard of the jar and is injured. Mr C's cut becomes infected and he dies. According to the example, if Mr A had not thrown the rock, the jar in Mr B's house would not be broken and Mr C would not step on the shard of the jar. If Mr C did not step on the shard of jar, he would not be injured and die. Therefore, the death of Mr C arises from the act of Mr A. According to this principle, Mr A has to be liable for the death of Mr C. The advantage of this principle is that it complies with a natural principle and is easy to apply. The disadvantage of this principle is that the defendant has to be liable for all results arising from his act, although such results may be out of the expectations of the ordinary person. The defendant has to be liable more than he should be.

(b) The suitable cause principle. According to this principle, although there are many causes that make one result, the cause which is liable is the cause that can normally achieve such a result. It means that we have to consider the cause and the result simultaneously. Normally, a particular cause can either make a result or not. In the example above, normally throwing a rock at a window does not cause another person die. Therefore, Mr A would not be liable for the death of Mr C. The advantage of this principle is that it conforms to the negligent consideration principle. The disadvantage of this principle is that it limits the liability of the defendant to only the result which the defendant can expect, which may be unfair to the injured person.

According to the Thai Supreme Court's precedent, the Thai court exercises the condition principle at the beginning of its consideration and exercises the suitable cause principle at the end of consideration. The court will consider whether or not the result is the direct result occurring from the act of defendant by applying the condition principle. After that, the court will consider whether there is

any event that has intervened in the main event or not. If there is an intervening event and such event is an event which ordinary people can expect in such conditions and circumstances, it will be deemed to be the result of the act, as it is the normal result which is caused by such act. Therefore, the person who does the wrongful act has to be liable for such result. If the intervening event is not an event which an ordinary person can expect in such conditions and circumstances, it will be deemed that the result occurring is not the ordinary result caused by the act of the defendant and the defendant will not be liable. However, the defendant is still liable for the results occurring before the intervening event.¹⁶⁷

For example, Mr A injures Mr B's head. Mr B is admitted to the hospital. Mr B's wound becomes infected causing Mr B to die. According to the example, the infection is the event which intervenes after Mr A did a wrongful act to Mr B and it is the type of event the ordinary person can expect. Therefore, it will be deemed that the death of Mr B is the normal result of Mr A's act. Mr A has to be liable for the death of Mr B. However, if Mr C kills Mr B whilst he is being treated in the hospital, although Mr A caused Mr B to be in the hospital, the event that kills Mr B is the action of Mr C. This is an event which an ordinary person cannot foresee. It will not be deemed as the ordinary result from Mr A's act and therefore Mr A is not liable for the death of Mr B.

The determination of the compensation for a wrongful act

The determination of the compensation in a wrongful act case is provided according to section 438 of the Civil and Commercial Code. This section is the general section for the determination of the compensation. However, there is a specific section for the determination of compensation in sections 439–447. If the case applies to the specific sections, these sections take priority. If the specific sections do not apply, then we have to apply section 438.¹⁶⁸

¹⁶⁷ สนันท์กรณ (Sanankon), *supra* note 145, at 103.

¹⁶⁸ ไพจิตร (Paichit), *supra* note 144, at 149.

Section 438

The Court shall determine the manner and the extent of the compensation according to the circumstances and the gravity of the wrongful act.

Compensation may include restitution of the property of which the injured person has been wrongfully deprived or its value as well as damages for any injury caused.

According to section 438, the Court shall determine the manner and the extent of the compensation according to the circumstances and the gravity of the wrongful act.

(a) Manner means the method by which the court will order the defendant to pay the compensation; for example, returning the property, paying the damages, advertising the correct information, changing the name, stopping the imitation, vacating the land or house of another person or demolishing the building on another person's land.¹⁶⁹

(b) Extent means the amount; the court will determine the amount of the compensation.

(c) Circumstance means the facts which have happened; for example, bringing the other person's property, doing damage to other property, causing the other person to die, causing the other person injury.

(d) Gravity of the wrongful act means to consider if there was wilfulness or negligence, whether or not both parties have been negligent, whether the injured person was partially at fault or not, because in the case of wilfulness, the compensation may be a higher amount than in negligence, or in the case where the injured person also has partial fault, the compensation may be less than the case in which the injured person has no fault.¹⁷⁰

¹⁶⁹ สำนักรัตน (Sanankon), *supra* note 145, at 319.

¹⁷⁰ *Id.*, at 320.

CHAPTER 4

ANALYSIS OF THE LEGAL PROBLEMS OF THE EXAMPLE CASE UNDER THAI LAWS

The Legal Problems of the *Example Case* under Thai Laws

In this chapter the author will analyse the problems arising from the *Example Case* in the light of Thai law.

4.1 The Legal Problem of the Right to File the Complaint against the Offender by Consumers

According to the facts of the *Example Case*, some consumers were confused that the plaintiff and the first defendant were the same juristic person. Some consumers entered into a contract with the defendant on a misunderstanding. It caused damage to the consumers because they did not receive the service from the company they wished, and the service from the first defendant may not have been of an equal quality to the service from the plaintiff.

If we consider the application of contract law to the *Example Case*, it may be considered that the consumer has mistook a person who was a partner of the contract and could file a complaint against the defendant requesting the court to revoke the contract on the ground of mistake, according to section 156 of the Thai Civil and Commercial Code.¹⁷¹ However, if we consider the contract between the defendant and the consumer, it is a loan credit agreement in which the defendant wishes to receive interest from the consumer and the consumer wishes to obtain money from the defendant. The consumer's only concern is the amount of money which they will receive from the contract, and they may not be concerned about the

¹⁷¹ **Section 156.** A declaration of intention is void if made under a mistake as to an essential element of the juristic act.

The mistake as to an essential element of the juristic act under paragraph one are for instance a mistake as to a character of the juristic act, a mistake as to a person to be a partner of the juristic act and a mistake as to a property being an object of the juristic act.

specific person who is the party to the contract. Therefore, the agreement between the defendant and the plaintiff may be considered as a contract in which the identity of the partners is not the important issue and the consumer cannot claim that they have made a mistake.

Moreover, according to the Court of First Instance's judgment, the court dismissed the charge of imitation of the service mark because the court opined that the service mark of the plaintiff and the defendant were different in many points. Furthermore, before the consumer entered into the contract with the defendant, they had the chance to read the contract and the name of the contractual party. Therefore, if the consumer had wanted to enter into a contract with the plaintiff but entered into a contract with the defendant instead, it may be considered that the consumer was grossly negligent and could not avail themselves of the invalidity of the contract, according to section 158 of the Thai Civil and Commercial Code.¹⁷²

According to the facts of the *Example Case*, the first defendant changed its juristic person's name from Power 99 Ltd to Srisawad Power Ltd. The first defendant advertised its business by using the word Srisawad, which is the word in the service mark of the plaintiff. This made consumers confused that the plaintiff and the first defendant were the same juristic person or an affiliated company. Therefore, it may be considered that the consumers have made a mistake due to the fraud of the defendant and the contract will be voidable.

If we apply contract law to the *Example Case*, it may be considered that the defendant defrauded the consumer and the consumer could file a complaint against the defendant requesting the court to revoke the contract on the ground of fraud, according to section 159 of the Thai Civil and Commercial Code.¹⁷³ However,

¹⁷² **Section 158** If the mistake under Section 156 or Section 157 was due to the gross negligence of the person making such declaration, he cannot avail himself of such invalidity.

¹⁷³ **Section 159** A declaration of intention produced by fraud is voidable.

An act under paragraph one is voidable on account of fraud only when it is such that without which such juristic act would not have been made.

When a party has made a declaration of intention owing to a fraud committed by a third person, the act is voidable only if the other party knew or ought to have known of the fraud.

according to the Court of First Instance's judgment, the court dismissed the charge of imitation of the service mark of the plaintiff, because the court opined that the service mark of the plaintiff and the defendant were different in many points. Therefore, it may be considered that there was no fraud committed by the defendant because the service mark of the defendant and the plaintiff were different. Moreover, before the consumer entered into the contract with the defendant, they had a chance to read the contract and the name of the contractual party. Therefore, the consumer already knew the terms and conditions of the contract, including the name of the other party before they signed the contract. It may be deemed that the consumer was not defrauded by the defendant.

Where consumers exercise a right according to section 18 of the Thai Civil and Commercial Code,¹⁷⁴ a problem exists under this section. The purpose of the law is to protect the interests of the name owner and give them the right to file a lawsuit against a person who takes advantage of their name. However, the consumer does not receive protection directly from this section. Therefore, a consumer who is confused between the product or service of the name owner and the person who takes advantage of this name cannot directly instigate a lawsuit under section 18.

In the case where consumers exercise their rights according to section 1115 of the Thai Civil and Commercial Code,¹⁷⁵ this section protects the interest of the name owner and gives the right to the name owner to file a lawsuit against the person who takes advantage from another's name. Therefore, the wording 'the interest

¹⁷⁴ **Section 18** If the right to use of a name by a person entitled to it is disputed by another, or if the interest of the person entitled is injured by the fact that another uses the same name without authority, then the person entitled may demand from the other abatement of the injury. If a continuance of the injury is to be apprehended, he may apply for an injunction.

¹⁷⁵ **Section 1115** If the name inserted in a memorandum is identical with the name of an existing registered company or with the name inserted in a registered memorandum, or so nearly resembling the same as to be likely to deceive the public, any interested person can enter a claim for compensation against the promoters of the company and can ask for an order from the Court that the name be changed.

Upon such order being made, the new name must be registered in the place of the former name and the certificate of registration must be altered accordingly.

person' in this section should mean the director of the company who has imitated the juristic person's name. The consumer does not receive protection directly from this section and therefore the consumer who confuses the product or service of the name owner and the person who takes advantage from the other's name cannot directly instigate a lawsuit under section 1115.

In relation to the rights of consumers under the Thai Consumer Protection Act B.E. 2522, according to the facts of the *Example Case*, the acts of the defendant which advertised or publicised its service by using billboards or other methods can be considered to be advertisement according to the definition of the word advertisement in section 3 of the Consumer Protection Act B.E. 2522.¹⁷⁶ Therefore, the consumer's protection which relates to the *Example Case* is consumer protection against advertising.

According to section 22 of the Consumer Protection Act B.E. 2522,¹⁷⁷ the act of the defendants may be considered as an advertisement which contains a statement which is unfair to consumers. Using the word Srisawad like the service mark of the plaintiff, the same colour billboard or similar letter fonts by the defendants may be considered to be a statement causing misunderstanding of the essential elements concerning services, because the consumer may confuse the service of the defendant with the service of the plaintiff. However, the Committee on Advertisement may consider that section 22(2) does not apply to the defendant's

¹⁷⁶ **Section 3** ... "Advertisement" includes any act which, by whatever means, causes the statement to be seen or known by an ordinary person for trading purposes...

¹⁷⁷ **Section 22.** An advertisement may not contain a statement which is unfair to consumers or which may cause adverse effect to the society as a whole; that is, notwithstanding such statement concerns with the origin, condition, quality or description of goods or services as well as the delivery, procurement or use of goods or services.

The following statements shall be regarded as those which are unfair to consumers or may cause adverse effect to the society as a whole:

(1) Statement which is false or exaggerated;

(2) Statement which will cause misunderstanding in the essential elements concerning goods or services, notwithstanding it is based on or refers to any technical report, statistics or anything which is false or exaggerated;...

advertisement because the defendant uses the word Srisawad as its juristic person's name which may not be considered to be an unfair method.

Moreover, in practice, when consumers entered into contracts or received services from the first defendant, they received information from the first defendant's officer before entering into the contracts. Therefore, it may be considered that the consumers had already received the protection (true and fair information from the defendant) before receiving the services and had not suffered any damage from the contract, service or advertisement of the defendants.

If the Committee on Advertisement opines that the defendant's advertisement violates section 22, the Committee shall have the power to issue one or several orders as per section 27.¹⁷⁸ Pursuant to section 27(4), in order to resolve the problem, the Committee on Advertisement may issue an order to correct consumers' misunderstanding by ordering the defendants to advertise that their service or business does not concern or relate to the plaintiff. However, the problem of this section is that the issuance of an order must be in accordance with the rules and procedure prescribed by the Committee on Advertisement, however, at present it has not yet issued such rules and procedure. Therefore, at present the Committee on Advertisement cannot exercise the power under section 27(4).

Moreover, where the Committee on Advertisement has already issued the rules and procedure of issuance of the order according to section 27(4), in practice, a problem may occur as to whether the Committee would exercise such power to order

¹⁷⁸ **Section 27** In the case where the Committee on Advertisement is of the opinion that any advertisement violates section 22, section 23, section 24 (1) or section 25, the Committee on Advertisement shall have the power to issue one or several of the following orders:

- (1) to rectify the statement of method of advertisement;
- (2) to prohibit the use of certain statements as appeared in the advertisement;
- (3) to prohibit the advertisement or the use of such method for advertisement
- (4) to correct by advertisement the possible misunderstanding of the consumers in accordance with the rules and procedure prescribed by the Committee on Advertisement.

In issuing an order under (4), the Committee on Advertisement shall prescribe the rules and procedure by having regard to the interest of the consumers and to the bona fide act of the advertiser.

the defendant to correct misunderstanding by advertisement or not, as by imposing such an order to the defendant, which is the most severe penalty under section 27, means that the defendant has to accept that its advertisement is incorrect. In addition, issuance of such an order according to section 27(4) may result in civil, criminal or administrative liability to the Committee on Advertisement.

With regard to the rights of the consumer under trademark law, the law protects the interest of the trademark owner and provides them with a right to file a lawsuit against a person who infringes their trademark. However, the consumer does not receive protection directly from this law. Therefore, consumers who were confused between the service of the plaintiff and the defendant cannot directly issue a lawsuit against the person who infringes the trademark under the Thai Trademark Act.

With regard to criminal cases, under section 272(1) of the Thai Criminal Code¹⁷⁹ the law only provides the right to the name or artificial mark owner to file the lawsuit against the person who takes the benefit from the name or mark of others. However, the consumer does not receive protection directly from this section, therefore, consumers who were confused between the service of the plaintiff and the defendant cannot directly issue a lawsuit against the person who breaches this section.

4.2 The Legal Problem of the Right to Claim for Compensation against the Offender by Consumers

If we apply Thai tort law to the *Example Case*, it may be considered that the defendant committed a wrongful act and consumers could file a complaint against the defendant and claim compensation according to section 420 of the Thai Civil and

¹⁷⁹ **Section 272** Whoever:

(1) Uses a name, figure, artificial mark or any wording in the carrying on trade of the other person, or causes the same to appear on a goods, packing, coverings, advertisements, price lists, business letters or the like in order to make the public to believe that it is the goods or trade of such other person;... shall be punished with imprisonment not exceeding one year or fined not exceeding two thousand Baht, or both.

Commercial Code.¹⁸⁰ However, consumers shall only have the power to claim compensation according to section 420 in a case where the defendant commits the five legal elements of a wrongful act. According to the facts of the *Example Case*, some consumers entered into contracts with the defendant by confusing the defendant with the plaintiff company. If we consider the legal elements of section 420, the important legal element is that the wrongful act must cause damage to the injured person. However, the act of the defendant may not be considered as a wrongful act because the defendant did not cause any damage to consumers. In practice, when a consumer enters into a contract or receives a service from the defendant, they will receive details and information from the defendant's officer before entering into the contract. It may be considered that consumers who have already received these details and information have agreed with the terms and conditions of the contract. Therefore, if the consumer has received the products or services according to the contract, it will be considered that the act of the defendant which advertised its business using the word in the trademark of another person is not considered to be a wrongful act.

Moreover, if we consider the contract between the defendant and the consumer, it is a loan credit agreement in which the defendant wishes to receive interest from the consumer and the consumer wishes to obtain money from the defendant. The consumer may only be concerned about the amount of money which they will receive from the contract. If they have already received money from the defendant, as specified in the contract, it may be deemed that they have not suffered any damage from the act of the defendant and cannot claim any compensation.

The court may take the view that the consumer incurred damage from the act of the defendant, because they did not receive the service from the company they wished and the service from the first defendant may not be of an equal quality to the service from the plaintiff. In practice, however, if a consumer has received the service or product according to the contract, it is difficult for them to prove the amount of compensation in the court.

¹⁸⁰ **Section 420** A person who, willfully or negligently, unlawfully injures the life, body, health, liberty, property or any right of another person, is said to commit a wrongful act and is bound to make compensation therefore.

4.3 The Legal Problem of the Consumer Applying Special Procedure Law

Thai class action law will be applied to the proceedings in a case if the plaintiff requests this with the court and the conditions required by law can be established. Therefore, the legal problem of the consumer applying for a class action is that if the plaintiff cannot establish the necessary requirements, the court will not allow the application of the class action law in the case.

The types of act or charge which the plaintiff can request the court to agree to legal proceedings by class action are provided under section 222/8¹⁸¹ of the Thai Civil Procedure Code which are as follows:

- (1) torts;
- (2) breaches of contract; and
- (3) any other claims of legal rights under other laws such as laws with respect to the environment, consumer protection, labour, securities and stock exchange, and trade competition.

Therefore, if the facts or acts of the defendant do not comply with the details under section 222/8, the court cannot allow the consumer to take legal proceedings by class action. According to the reasons in clause 4.2 above, an act of the defendant may not be considered as wrongful act or a breach of contract, and if the plaintiff cannot establish the requirements for a class action, the court shall not allow the plaintiff to proceed on this basis.

Moreover, to process the case by class action, the plaintiff also has to prove the existence of a class, members of the class and a sufficient reason. The plaintiff has to establish the conditions according to section 222/12 as follows:

¹⁸¹ **Section 222/8** In the case which has a lot of members as follows, the plaintiff who is a class member, may request for the class action proceeding:

- (1) torts;
- (2) breaches of contract; and
- (3) any other claims of legal rights under other laws such as laws with respect to environment, consumer protection, labor, securities and stock exchange, and trade competition.

1. Conditions of claim, the relief applied and allegations on which such claims are based
2. The plaintiff establishes the specific common characteristic of the class clearly and sufficiently, which can indicate the class.
3. The class has many members. If the case is processed by ordinary proceedings, it will be complicated and inconvenient.
4. Class action proceedings will be fair and more efficient than ordinary proceedings.

Therefore, if the plaintiff cannot prove the requirements according to the law, the court shall not allow the plaintiff to use the class action proceeding. At present, there is no Thai Supreme court precedent that lays down the criteria of the requirements, therefore it is still doubtful that the consumer, as the plaintiff, can use class action proceedings in this case.

With regard to the Consumer Case Procedure Act B.E. 2551, according to section 42 of this Act,¹⁸² the court shall have the power to award punitive damages to the consumer if the business operator:

1. Intentionally and unfairly takes advantage of the consumer or
2. Wilfully causes damage to the consumer or

¹⁸² **Section 42** If the act upon which the complaint is based arises from the business operator's intentional act to unfairly take advantage of the consumer or willful to cause damage to the consumer or, with gross negligence, indifference to damage to be caused to the consumer, or act in breach of responsibility as a professional or businessman who is usually trusted by the public, when the court adjudicates that the business operator pay damages to the consumer, the court shall have the power to order the business operator to pay damages as punishment in addition to the amount of the actual damages fixed by the court as may be deemed appropriate, taking into account such circumstances as damage suffered by the plaintiff, benefit received by the business operator, financial condition of the business operator, relief by the business operator from the damage, and the consumer's contribution to the damage.

In fixing damages for punishment under paragraph one, the court shall have the power to fix the damages by not more than two times the actual damages fixed by the court. However, if the actual damages fixed by the court is not more than Baht 50,000, the court shall have the power to fix the damages for punishment by not more than five times the actual damages fixed by the court.

3. There is gross negligence or indifference that damage may be caused to the consumer or

4. The act is in breach of responsibility as a professional or businessman who is usually trusted by the public.

The court shall have the power to award additional punitive damages where it orders the business operator to pay compensatory damages to the consumer. This means that the business operator must commit a wrongful act against the consumer or breach the contract and the court orders the business operator to pay damages. However, for the reasons in clause 4.2 above, the court may consider that the defendant did not commit a wrongful act or breach the contract by the reason that, in practice, when the consumer made a contract or received services from the first defendant the consumer received details and information from the first defendant's officer before entering into the contract. Therefore, it may be considered that the consumer has already received details and information from the defendant and agreed with it and has suffered no damage from the contract, service or advertisement of the defendants. If the court opines that the consumer has suffered no damage and does not award any compensatory damages to the consumer, the court shall not have the power to award punitive damages to the consumer.

Moreover, the court may consider that the act of the defendant did not comply with section 42 because the defendant use the word Srisawad as its juristic person's name. This may be considered to be fair use and not be considered as intentionally or unfairly taking advantage of the consumer.

The principle of piercing the corporate veil is established under section 44¹⁸³ of the Consumer Case Procedure Act. The court shall have the power to call

¹⁸³ **Section 44** In a case in which the business operator who is sued is a juristic person, if the facts appear that such juristic person was formed or has acted in bad faith or is involved with fraud and deception of the consumer, or has removed or transferred assets of the juristic person to the benefit of any person, and those assets are not sufficient to pay debt according to the complaint, the court shall, upon request by the party or upon the court deeming it appropriate, have the power to call the partner, shareholder, person controlling the operation of the juristic person or person receiving assets from the juristic person to become co-defendant, and shall have the power to adjudicate such person to be jointly liable

partners, shareholders, persons controlling the operation of the juristic person or persons receiving assets from the juristic person to become co-defendants in cases where the facts appear that such a juristic person was formed or has acted in bad faith, or is involved with fraud and deception of the consumer, or has removed or transferred assets of the juristic person to the benefit of any person, and those assets are not sufficient to pay the debt according to the complaint. The problem of this section is that another person will be liable under this section if the consumer can prove that there is damage and the court orders the juristic person to pay damages. However, according to the reasons above, the court may consider that the defendant did not commit a wrongful act or breach the contract and there is no damage. If the court opines that the consumer has not suffered any damage and does not order the juristic person to pay damages to the consumer, the court shall not have the power to call the other persons to be jointly liable to the consumer.

Moreover, if the consumer can prove that they have incurred damage from the act of the business operator, who is a juristic person, in practice, the problem of this section is the burden of proof. The facts which the consumer has to prove under section 44 are usually not within the knowledge of the consumer and are difficult for the consumer to prove. The consumer has to prove that the assets of the juristic person are not sufficient to pay the debt according to the complaint, and such juristic person was formed or has acted in bad faith or is involved with fraud and deception of the consumer, or has removed or transferred assets of the juristic person to the benefit of any person. Such facts are the data which is difficult for a consumer

for the debt owed by the juristic person to the consumer, unless such person can prove that he has no knowledge of such act. In case of the person receiving those assets from the juristic person, he must prove that he has received the assets in good faith and with consideration.

The person receiving assets from the juristic person under paragraph one shall be jointly liable for not more than the assets received by such person from the juristic person.

to obtain as they are in a lower position than business operators and have no legal or accounting knowledge or money to hire the specialists in such an area to assist.¹⁸⁴

4.4 The Legal Problem of the Right to File the Complaint against the Offender by Trademark Owner

In the case where the trademark owner files the complaint according to section 18¹⁸⁵ of the Thai Civil and Commercial Code, the section protects the right to use of a name by a person. The protection under this section includes the right to use a juristic person's name but does not include trademarks. Therefore, a problem will occur when the juristic person does not use its juristic person's name as a trade name or trademark and another person takes advantage of such trade name or trademark. It will not be protected under section 18. For example, in the Thai Supreme Court judgment no. 7335/2538 the plaintiff had the juristic person's name 'Construction Materials and Products Limited' and had the trademark 'CPAC'. The plaintiff did not use or register the word CPAC as its name. The defendant registered its juristic person's name 'SEAPAC Co Ltd'. The court decided that the plaintiff was the trademark owner of the name CPAC but did not use the word CPAC as its juristic person's name. Therefore, in this case the defendant did not use the same name as the plaintiff without authority, because CPAC was not the plaintiff's name. The defendant's name was also different from the plaintiff's trademark. Moreover, there was no evidence that using the defendant's name caused damage to the plaintiff. The

¹⁸⁴ สมชาย ภูษาชีวะ, “ปัญหาและข้อขัดข้องในการนำหลักการเจาะม่านนิติบุคคลมาใช้ในพระราชบัญญัติวิธีพิจารณาคดีผู้บริโภค พ.ศ. 2551”, วิทยานิพนธ์มหาบัณฑิต คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์, 2557, 79. (Somchai Bhusacheewa. “Problem and Obstacles of the Application of Piercing the Corporate Veil Doctrine in the Consumer Case Procedure Act B.E. 2551”, Master of Law's Thesis. Thammasat University, 2014, 79).

¹⁸⁵ **Section 18** If the right to use of a name by a person entitled to it is disputed by another, or if the interest of the person entitled is injured by the fact that another uses the same name without authority, then the person entitled may demand from the other abatement of the injury. If a continuance of the injury is to be apprehended, he may apply for an injunction.

defendants did not use the plaintiff's trademark as their trademark. There was no reason to prohibit the defendant from using its name.

Another example is the Thai Supreme Court judgment no. 639/2538. The plaintiff had the juristic person's name 'Chumsin Rohakarn Ltd' and registered its trademark name 'Zebra Brand' and 'Zebra Head Brand'. The defendant registered its name 'Zebra Brand Ltd.' which was the same name as the plaintiff's trademark. The court rendered the judgment that the name and trademark name were different issues. The issue in this case was the right to use of a name under section 18. The word Zebra Brand Ltd, which was the defendant's name, was not the same word as the plaintiff's name Chumsin Rohakarn Ltd, although the defendant's name was the same word as the plaintiff's trademark name. This was not considered to be a dispute of the right to use the name of the plaintiff under section 18.

Moreover, to exercise the right according to section 18, the plaintiff has to prove that they have been injured or incurred damage from the defendant's use of the name. The Thai Supreme Court laid down this principle in Supreme Court judgment no. 949/2545. The plaintiff operated a hotel business and had the trade name 'Ramada Inn'. The defendant engaged in the same business as the plaintiff in Thailand and had as its trade name 'Ramada Hotel'. The court decided that to exercise the right under section 18, the plaintiff had to prove that they had been injured or incurred damage. The word Ramada was Mexican language meaning hotel, not an artificial word and the plaintiff did not operate the business in Thailand. Therefore, the defendant's hotel business in Thailand did not affect the plaintiff's interest. The plaintiff could not exercise the right according to section 18 to prohibit the defendant using its trade name.

In the *Example Case*, the plaintiff's name is CFG Service Ltd. The plaintiff took over the business of the defendant and bought the service mark Srisawad Ngerntidlor. Therefore, the plaintiff was the owner of the registered service mark. The defendant's name was Srisawad Power Ltd, so the defendant's name included the word Srisawad like the word in the plaintiff's service mark name. However, the plaintiff and the defendant's name were not the same word. Therefore, if the plaintiff filed a lawsuit against the defendant under section 18, the court may dismiss the case by reason that the plaintiff's and defendant's names were different,

and section 18 concerns the issue regarding a name or trade name not a trademark or service mark.

However, if the plaintiff can establish evidence that the word Srisawad is its trade name and people can recognise it, consumers may be confused between the service of the plaintiff and the defendant. The plaintiff may then exercise the right, according to section 18, requesting the court to order the defendant to stop using the word Srisawad to operate their business.

The Thai Supreme Court laid down a principle in Supreme Court judgment no. 8433/2547 and 4432/2553 that section 18 gives the plaintiff the right to ask the court to issue an order to prohibit the defendant using the plaintiff's name, but it does not give the plaintiff the right to ask the court to order the defendant to change its juristic person's name. If the court ordered the defendant to register changing its juristic person's name, it would be deemed that the court ordered the defendant to create a new juristic person name instead of its old name, which is not provided for under section 18. To order the defendant to stop using the plaintiff's name for its business was deemed to be the abatement of the plaintiff's injury. There was no need to order the defendant to register changing its juristic person's name.

If the trademark owner who is the name owner as the interested person files a complaint according to section 1115 of the Thai Civil and Commercial Code,¹⁸⁶ the problem of this section is that the law provides the right to the interested person to file the complaint against the promoters of the company only because the promoters of the company are the initial person who created the company's name. Therefore, if the directors of the company have changed the juristic person's name to resemble the

¹⁸⁶ **Section 1115** If the name inserted in a memorandum is identical with the name of an existing registered company or with the name inserted in a registered memorandum, or so nearly resembling the same as to be likely to deceive the public, any interested person can enter a claim for compensation against the promoters of the company and can ask for an order from the Court that the name be changed.

Upon such order being made, the new name must be registered in the place of the former name and the certificate of registration must be altered accordingly.

name of an existing registered company, this company cannot exercise the right under this section.

Moreover, the Thai Supreme Court laid down the legal principles under section 1115 in Thai Supreme Court judgment no. 4767/2539. It was held that the compensation which the interested person can claim from the promoter of the company under section 1115 was limited to the compensation arising from the damage during the period the defendant registered the memorandum to the time such company was registered. After the company was registered, the company would have the status of person and have its own liability. If there is damage after the company was registered, the interested persons have to file the complaint against the company or its directors, not the promoter of the company, according to sections 18 and 420 of the Thai Civil and Commercial Code. Therefore, if there is any damage occurring after the company which imitates another person's name is registered, the name owner cannot exercise the right under section 1115.

In the *Example Case*, there was the fact that in 2008, the first defendant was founded under the name of Power 99 Ltd. In 2009, the first defendant changed its juristic person's name from Power 99 Ltd to Srisawad Power Ltd. The first defendant advertised its business using the word Srisawad, which is the word in the service mark sold by Srisawad International (1991) Ltd to the plaintiff. This caused confusion for consumers who thought that the plaintiff and the first defendant were the same. From this fact, the defendant changed its name to Srisawad Power Ltd after registering the company, therefore, the plaintiff could not take legal action against the defendant according to section 1115.

In trademark law, when the trademark owner as the plaintiff filed a lawsuit against the defendants in charge of imitating their service mark according to section 109 of the Thai Trademark Act B.E. 2534,¹⁸⁷ the court dismissed the action, giving the reason that the service mark of the plaintiff and the defendant were

¹⁸⁷ **Section 109** Any person who imitates a trademark, service mark, certification mark or collective mark registered in the Kingdom by another person in order to mislead the public into believing that it is the trademark, service mark, certification mark or collective mark of such other person shall be liable to imprisonment not exceeding two years or a fine of not exceeding two hundred thousand baht or both.

different in many points. The service mark of the defendants did not mislead the public into believing that it was the service mark of the plaintiff. Therefore, the problem under trademark law is that the trademark or service mark owner has to establish with the court that his trademark and the trademark of the defendant are similar and that the defendant's trademark misleads the public. It will depend on the discretion of each judge to opine in this issue.

In the case of passing off, although section 46 paragraph two of the Trademark Act B.E. 2534¹⁸⁸ will provide rights regarding unregistered trademarks or service marks, a Thai lawyer is of the opinion that the registered trademark owner also has the right to take legal action on the ground of passing off. Passing off is an action in which the defendant misrepresents to the public that their products or services involve or belong to the plaintiff. Therefore, the consumer must believe that the service mark of the defendant belongs to the plaintiff. According to the court's judgment, the service mark of the defendants did not mislead the public to believe that it is the service mark of the plaintiff. So, the defendant may not be guilty of passing off.

The right of the trademark owner under the Thai Competition Act B.E. 2542, section 29¹⁸⁹ was provided to prohibit business operators from carrying out any act which is not free and fair competition. Such provision is very broad and some lawyers may consider that the act of the defendants is not free and fair competition. However, according to the guideline for applying section 29 provided by the Office of Thai Trade Competition Commission on its website, the elements of this section are as follows.¹⁹⁰

¹⁸⁸ **Section 46** paragraph two the provisions of this Section shall not affect the right of the owner of an unregistered trademark to bring legal proceedings against any person for passing off goods as those of the owner of the trademark.

¹⁸⁹ **Section 29** A business operators shall not carry out any act which is not free and fair competition and has the effect of destroying, impairing, obstructing, impeding or restricting business operation of other business operators or preventing other persons from carrying out business or causing their cessation of business.

¹⁹⁰ <http://otcc.dit.go.th/wp-content/uploads/2015/07/Guidelines-under-Section-26.pdf> (last visit Jan, 9,2016)

- 1) The act considered as not free and fair must be the act between business operators only. It means that the business operators shall have some mutual relation. For example, company A has no relation with company B, but only designs a trademark or product packaging similar to the product of company B. The facts under this example will not apply to section 29 as company A and company B have no relationship.
- 2) The act has a nature of not being free and fair competition.
- 3) Such act must cause the effect of destroying, impairing, obstructing, impeding or restricting the business operations of other business operators or preventing other persons from carrying out business or causing their cessation of business.

When we apply the facts of the *Example Case* to section 29, we will find that the act of the defendants is the act between the defendants and consumers, not an act between business operators, since there is no transaction or relation between the plaintiff and the defendants. An example of an act between business operators is where a manufacturer entered into a contract with a retail shop, in such a case, if the contract is unfair, section 29 will be applied. By virtue of the reasons provided above, section 29 will not apply to the *Example Case* and the plaintiff, as the trademark owner, cannot exercise the right under this section to file a complaint against the defendant.

4.5 The Legal Problem of the Right to Claim for Compensation against the Offender by Trademark Owner

According to the facts of the *Example Case*, some consumers were confused that the plaintiff and the first defendant were the same juristic person. Some newspapers published that the first defendant was the same entity as the plaintiff company. In addition, there were some groups of people who collected debts using improper methods, and such acts caused confusion to consumers and defamed the plaintiff. It caused damage to the plaintiff who was the owner of the service mark because it lost its customers and reputation and the chance to make a profit. The act of

the defendant may be considered as a wrongful act because the Court of First Instance decided that the first, second and third defendants were guilty according to section 272(1) of the Thai Criminal Code. This means that the defendant's act was illegal and caused damage to the plaintiff. However, the problem of the plaintiff is filing the lawsuit against the defendant and claiming for compensation on the ground of a wrongful act. The plaintiff has to prove to the court they have suffered damage. In practice, it is very difficult to prove the amount of consumers who were confused that the plaintiff and the first defendant were the same juristic person when they entered into contracts with the defendant. If the plaintiff cannot establish the number of confused consumers, the court may not be able to award the plaintiff compensation.

In the case where the plaintiff can prove that the defendant's act defames the reputation of the plaintiff, the plaintiff may claim for compensation and request the court to order proper measures to be taken for the rehabilitation of the plaintiff's reputation. For example, the plaintiff may request the court advertises that the plaintiff and the defendant is not the same company or an affiliated company.

In the criminal case, the plaintiff filed a lawsuit against the defendant on the ground of using a name, figure, or artificial mark carrying the trade of the plaintiff, or caused the same to appear on advertisements in order to make the public believe that it provides the service of the plaintiff, according to section 272(1) of the Thai Criminal Code.¹⁹¹ The court found the first, second and third defendants were guilty of offences pursuant to section 272 and fined each defendant the amount of 2,000 Baht. Moreover, the court ordered that they were prohibited from using an artificial mark of the word Srisawad like the service mark of the plaintiff, in the operation, advertisement or publication of their business. The court also ordered the defendants to take off, remove, delete or demolish all things bearing this mark which were used to advertise or publicise the first defendant's business.

¹⁹¹ **Section 272** Whoever:

(1) Uses a name, figure, artificial mark or any wording in the carrying on trade of the other person, or causes the same to appear on a goods, packing, coverings, advertisements, price lists, business letters or the like in order to make the public to believe that it is the goods or trade of such other person;... shall be punished with imprisonment not exceeding one year or fined not exceeding two thousand Baht, or both.

Although the court held that the first, second and third defendants were guilty according to section 272(1) of the Criminal Code, the court fined each defendant only 2,000 Baht. The problem is that the penalty which was imposed by the court does not balance with the costs and loss of benefit which the plaintiff had actually suffered in this case. Moreover, although the court ordered the defendants not to use the artificial mark bearing the word Srisawad to operate, advertise, or publicise their business, they continued to use the word as the juristic person's name which may cause confusion to the public.



CHAPTER 5

CONCLUSIONS AND RECOMMENDATIONS

5.1 Conclusions

According to the facts of the *Example Case* and the analysis in chapter 4, the first defendant changed the juristic person's name from Power 99 Ltd to Srisawad Power Ltd and advertised its business by using the word 'Srisawad' which is the word in the service mark sold by Srisawad International (1991) Ltd to the plaintiff. This caused confusion to consumers who thought that the plaintiff and the first defendant were the same juristic person or an affiliated company. Some newspapers published that the first defendant was the same entity as the plaintiff company.

These events caused damage to the plaintiff, who was the owner of the service mark, because it lost its customers and reputation and the chance to make a profit. It also caused damage to consumers because they did not receive the service from the company they wished and the service from the first defendant may not have been of a quality equal to the service from the plaintiff.

The plaintiff filed a criminal case against the defendants with the Intellectual Property and International Trade Court. The Court of First Instance held that the first, second and third defendants were guilty of an offence pursuant to section 272 and fined each defendant the amount of 2,000 Baht. Moreover, the court ordered that the defendants were prohibited from using the artificial mark of the word 'Srisawad' like the service mark of the plaintiff, in the operation, advertisement or publication of the first defendant's business. The court also ordered the first, second and third defendants to take off, remove, delete or demolish all things which were used to advertise or publicise the business of the first defendant that was similar to the plaintiff's mark. However, the court dismissed the charge of imitation of the service mark because the court opined that the service mark of the plaintiff and the defendant were different in many points.

The problem is that the penalty which was imposed by the court does not balance with the costs and loss of benefit which the plaintiff had actually suffered in

this case. Moreover, the consumers who suffered damage could not take legal action against the defendants under Thai law.

Under the Thai Civil and Commercial Code, the problem that occurs when a juristic person does not use its name as a trade name or trademark and another person takes advantage from such trade name or trademark, is that the juristic person may not be able to file a lawsuit against such person under section 18. Moreover, to exercise the right according to section 18, the plaintiff has to prove that he has been injured or incurred losses from the use of the name by the defendant. The last problem is that the consumer does not receive protection directly from this section, because it gives protection to the name owner. Therefore, consumers who were confused about the product or service, and confused the name owner and the person who takes advantage, cannot directly instigate a lawsuit under section 18.

For section 1115 of the Civil and Commercial Code, the problem is that the law provides the right to the interested person to file the complaint against the promoters of the company only. Therefore, in the case where the director of a company changes the juristic person's name to resemble the name of an existing registered company, the existing registered company cannot exercise the right under this section. Moreover, the Thai Supreme Court laid down the legal principles under section 1115 that the compensation which the interested person can claim from the promoter of the company under section 1115 was limited to the compensation for the damage occurring during the period the defendant registered the memorandum to the time such company was registered. If there is damage after the company was registered, the interested persons have to file the complaint against the company or its director, not the promoter of the company according to section 18 and 420 of the Thai Civil and Commercial Code. The final problem of section 1115 is that the purpose of the law is to protect the interests of the name owner and give the right to the name owner to file a lawsuit against the person who takes advantage from the name of others. Therefore, the word 'the interested person' should mean the director of the company who has imitated the juristic person's name. The consumer does not receive protection directly from this section. Therefore, the consumer who confused the product or service of the name owner and the person who takes advantage of the name of others cannot directly instigate a lawsuit under section 1115.

In the law of tort, if we considered the legal elements of section 420, the act of the defendant may not be considered as a wrongful act because the consumer may not sustain any damage. This is because when the consumer made a contract or received the service from the first defendant, the consumer would receive details and information from the first defendant's officer before entering into the contract. Therefore, it may be considered that the consumer has already received information from the defendant and agreed with it, and has not suffered any damage from the contract, service or advertisement of the defendants. Moreover, if we consider the contract between the defendant and the consumer, if it is a loan credit agreement upon which the defendant wishes to charge interest from the consumer and the consumer wishes to obtain cash from the defendant, the consumer may only be concerned about the cash which they will receive from the contract and may not be concerned about the specific person who will be the partner of the contract. If the consumer has already received cash from the defendant as specified in the contract, it may be deemed that the consumer has not suffered any damage from the act of the defendant and cannot claim for any compensation.

Under the Thai Trademark Act, the law protects only the trademark owner; therefore, the consumer who suffers damage from the infringement of the trademark cannot take legal action against the person who infringes the trademark of others.

Under the Thai Criminal Code, section 272 protects only the owner of a name, figure, artificial mark, or wording. Therefore, the consumer who suffers damage from the infringement of the name, figure artificial mark or wording cannot take legal action against the person who infringes it.

Under the Thai Consumer Protection Act, the consumer who suffers damage from the defendant's advertisement may not be able to take legal action against the defendants for the following reasons. First, the Committee on Advertisement may consider that the defendants used the word 'Srisawad' as its juristic person's name; therefore, it may not consider this to be an unfair method and the advertisement of the defendants may not breach section 22. Second, in practice, when a consumer makes a contract or receives a service from the first defendant, the consumer will receive information from the first defendant's officer before making the contract. Therefore, it

may be considered that the consumer has already received the protection (true and fair information from the defendant) before receiving the service, and has not incurred any loss from the contract, service or advertisement of the defendants.

The last reason is in the case where the Committee on Advertisement opines that the defendant's advertisement violates section 22. The Committee has the power to issue one or several orders according to section 27. However, according to section 27(4), the problem of this section is that the issuance of the order must be in accordance with the rules and procedure prescribed by the Committee on Advertisement, but at present the Committee has not issued such rules and procedure. Therefore, at present the Committee cannot use such power.

Moreover, in the case where the consumer takes legal action against the defendant, the consumer has to prove the damage was due to the act of the defendant. The consumer's loss may be mental injury or damages for lost time which is hard to establish. The damage which the consumer can prove may be less than the costs and expenses which he has to pay for the legal procedure. Therefore, the consumer may choose not to take legal action against the defendants in this case.

Under the Thai Competition Act, the law prohibits a business operator from carrying out any act which is not free and fair competition. However, this law does not give the power to a consumer to take legal action against a business operator who breaches this law. Moreover, according to the guidelines for applying section 29 provided by the Office of Thai Trade Competition Commission, the act which is committed in this section will be the act between business operators only, but the act of the defendants in this case is the act between defendants and consumers. Therefore, section 29 will not apply in the *Example Case*.

5.2 Recommendations

According to the problems in the *Example Case*, the consumer does not receive the proper protection under Thai law. The author would like to propose some recommendations as follows.

5.2.1 Proposing the Enactment of a New Special Statute

Although many Thai laws are intended to protect the interests of the consumer, i.e. the Thai Trademark Act B.E. 2534, the Thai Competition Act B.E. 2542, or the Thai Criminal Code, under such laws the consumer has no right to directly file a court case by themselves against the person who used the unfair method to cause confusion on the authenticity of trademark ownership. In addition, although the Thai Civil and Commercial Code provided the provisions giving protection to the name owner, according to sections 18 and 1115, the consumer who was confused about the authenticity of trademark ownership is not the name owner. Therefore, they do not receive protection directly from such sections and are not able to file a complaint. Moreover, the consumer has a legal problem claiming for compensation from the business operator under Tort law because the consumer may not have suffered any damage.

At present, Thai law may not protect the consumer and provide a fair remedy. The consumer cannot file a complaint by themselves. The author is of the opinion that to adjust the existing law within some section of each act to give consumers the right to file a complaint may distort or affect the main purpose of the whole Act. For example, the main purpose of the Trademark Act is to give protection to the trademark owner. The protection of the consumer under trademark law is the effect from the protection of the trademark owner only. Therefore, if we adjust or add some sections to give more rights to the consumer it will affect other sections and the main purpose of the whole Act.

Moreover, in the case where the legislature enacts a new special statute to resolve the problem, it will be easy for the lawyer to apply and interpret the law because the new special law will have as its main purpose to prevent unfair methods. In the future, if there are other acts which cause a similar problem, it will be easy for the legislature to amend or adjust the law.

Therefore, the author proposes the enactment of a new special statute covering unfair competition. This is because the act of the defendant in the *Example*

Case is considered to be causing confusion to the public. Causing confusion is an example of unfair competition under article 10 *bis* (3)(iii) of the Paris Convention.¹⁹²

Some existing Thai laws do not give a consumer the right to file a complaint against a business operator who has caused confusion to the public. The author is of the opinion that Thai unfair competition law should give this right to a consumer who suffers damage from an act of unfair competition. Consumers would have direct protection if they were able to file a lawsuit with the court themselves.

Thai unfair competition law should provide a general provision which relates to the protection against unfair competition and is enforceable like article 10 *bis* (2) of the Paris Convention. The author considers that the words provided in the general provision should be flexible, because the act of unfair competition will change with time. In the future, new acts of unfair competition may occur. Therefore, a flexible wording in the general provisions of unfair competition law will provide the opportunity for the court to use its discretion to interpret the acts that should be considered as unfair competition.

Moreover, the author's view is that Thai unfair competition law should specify examples of some acts which are considered to be unfair competition like article 10 *bis* (3) of the Paris Convention. Examples will clearly indicate what type of act will be considered as unfair competition. It will help the court to apply the law and interpret whether some act will be considered as unfair competition or not. It

¹⁹² “Article 10bis (1) The countries of the Union are bound to assure to nationals of such countries effective protection against unfair competition.

(2) Any act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition.

(3) The following in particular shall be prohibited:

(i) all acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor;

(ii) false allegations in the course of trade of such a nature as to discredit the establishment, the goods, or the industrial or commercial activities, of a competitor;

(iii) indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods.”

will also clearly warn all business operators not to commit the prohibited acts. The examples of unfair competition should include those acts by a manufacturer or business operator which cause confusion on authenticity of trademark ownership.

Since the existing Thai law cannot give a fair remedy to the consumer or trademark owner, the author's opinion is that Thai unfair competition law rectifies this omission. The law should provide a fair remedy to a plaintiff or business operator who suffers damage from unfair competition by giving power to the court to use its discretion to award the plaintiff punitive damages.

Moreover, in order to prevent an act of unfair competition, competition law should contain a criminal penalty for the person who commits the act. According to the facts of the *Example Case*, the Court of First Instance held that the first, second and third defendants were guilty of offences pursuant to section 272 of the Thai Criminal Code and fined each defendant the amount of Baht 2,000. The criminal penalty in section 272 provides to fine the person who breaches this section not more than Baht 2,000. Such an amount is not in proportion with the benefit which the trademark owner and the consumer may have lost. Therefore, the author is of the opinion that the fine or penalty in Thai unfair competition law should balance with the benefit the defendant receives from his act, in order to prevent business operators breaching unfair competition law.

5.2.2 Proposing the Establishment of New Organization

Unfair competition law and consumer protection relates to many laws, i.e. intellectual property law, consumer protection law and competition law. However, according to the present Thai law, the government authority or commissions who control or use the power of each law are separate. Under trademark law, the authority is the Department of Intellectual Property. Under consumer protection law, the authority is the Office of the Consumer Protection Board, and under competition law, the authority is the Office of the Thai Trade Competition Commission. Therefore, the author considers that to improve the prevention of unfair competition effectively, the authority of each law should be coordinated. The author proposes the establishment of one organisation which has the authority to control and

exercise the powers relating to every law in order to protect and balance the interests of business operators and consumers. An example of such an organisation is the Federal Trade Commission (FTC) of the United States of America, which has the authority to control and exercise the powers under intellectual property law, competition law and consumer protection law. The FTC's main mission is to protect consumers and promote competition in the market. If there is an organisation which has the power to take care of all aspects related to consumer protection, the consumer protection under Thai law will be more effective.

5.2.3 Proposing to Promote and Assist Consumers to Take Legal Action by Class Action Law

In the case where a consumer takes legal action against the person who breaches unfair competition law, the damages which the consumer can prove may be less than the costs and expenses which the consumer pays for the legal procedure, and the consumer may decide not to take legal action. Therefore, the author is of the opinion that the organisation which has the authority should promote and assist consumers to take legal action by class actions in consumer cases, according to the Thai Civil Procedure code section 222/8.¹⁹³ This may increase the amount claimed in the case and decrease costs and expenses for the consumer. Moreover, the court should lay down the criteria by using its discretion to award punitive damages to the injured person, in order to punish business operators who intend to exploit or cause damage to the consumer. This may persuade the consumer to take legal action.

¹⁹³ Section 222/8 In the case which has a lot of member as follows, the plaintiff who is the member of the group may request for the case action

- (1) torts ;
- (2) breach of contract; and
- (3) cases regarding to the laws such as laws respecting the environment, consumer protection, labor, securities and stock exchange, and trade competition.

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APPENDIX

APPENDIX A

**THE SUMMARY OF ACADEMIC SEMINAR TOPIC: “PASSING
OFF PROBLEM, UNFAIR COMPETITION PROBLEM AND
CONSUMER PROTECTION COURSE UNDER TRADEMARK
LAW”**

**Academic Seminar Topic: “Passing off Problem, Unfair Competition
Problem and Consumer Protection Course
under Trademark Law”**

On 18 December 2015 at Thammasat University*

The Objectives of Seminar

1. To provide knowledge and understanding in regard to subjects of passing off, unfair competition and consumer protection course under trademark law; and
2. To present and demonstrate the related questions of fact in an actual case at present
- Srisawad Ngerntidlor service mark case

The Speakers

1. Assistant Professor Dr. Bhumindr Buth-Indr (Background of the case and Trademark Problem)
2. Dr. Siranat Wittayatamatat (Consumer Protection Law)
3. Dr. Sutatip Yuthayotin (Consumer Case in Practice)
4. Prof. Suphawatchara Malanond (Comparative Law)

* Summarized by Mr. Nutthakarn Phongphunpunya and Ms. Hataipat Thongpadungrojana.
Translated into English Language by Mr. Kamol Techavittayapakorn.

Assistant Professor Dr. Bhumindr Buth-Indr

In principle, unfair competition and passing off are the same topic. However, it depends on which legal principle each country uses to apply to the subject matter in their own country. The purposes of trademark law are to protect trademark owner and prevent other business operators to seize or take advantage from the well known of the trademark of the others. Another important purpose of the trademark law is to prevent the consumer from confusion in the owner of each product or service. However, at present, in practice the consumers may not receive such protection and may not be able to exercise their right to claim for the damages from the business operator who causes the confusion. The Supreme Court precedents for the past decade have not changed because the law was clearly interpreted. Therefore the litigation strategies of the lawyer and judgment approach of the court have not changed including in Srisawad Ngerntidlor service mark case.

The Background of Srisawad Ngerntidlor service mark case

1. In 2007, **AIG** took over the business of **Srisawad International (1991) Ltd.** and also bought the service mark named “**Srisawad Ngerntidlor**” from it. At the time AIG took over Srisawad International (1991) Ltd., the 3rd and 4th defendants were the executive of Srisawad International (1991) Ltd., thereafter Srisawad International (1991) Ltd. changed its juristic person’s name to **Srisamarn International Ltd.**

2. In 2008, the 1st defendant was founded under the name of **Power 99 Ltd.** and the 2nd defendant was the authorized director at that time. The major shareholders of the 1st defendant were the relatives of the 3rd defendant. The 1st defendant engaged in the same business as the plaintiff and opened branch office near or adjacent to the plaintiff’s branch office.

3. In 2009, the 1st defendant changed its juristic person’s name from **Power 99 Ltd.** to **Srisawad Power Ltd.** The 1st defendant advertised its business by using the word “Srisawad” which is the word in the service mark sold by Srisawad International (1991) Ltd. to the plaintiff, which caused the consumers to be confused that the plaintiff and the 1st defendant were the same juristic person or the

affiliated company. In the same year the plaintiff filed the criminal charge against the defendants with the Central Intellectual Property and International Trade Court.

4. In 2010, the Central Intellectual Property and International Trade Court rendered the judgment in favor of the plaintiff. The court decided that the 1st-3rd defendants were found guilty according to section 272(1) of the Criminal Code¹ and fined each defendant in the amount of 2,000 Baht. Moreover, the court ordered that the 1st-3rd defendants are prohibited from using artificial mark of the word “Srisawad” like the service mark of the plaintiff, in the operation, advertisement or publication of the 1st defendant’s business. The court also ordered the 1st-3rd defendants to take off, remove, delete or demolish all things which were used to advertise or publicize the business of the 1st defendant that have the artificial mark of the word “Srisawad” like the service mark of the plaintiff. The defendants filed the appeal with the Supreme Court.

5. In 2011, the 1st defendant changed the format and font of the word “Srisawad” to advertise the business and transferred its asset to the other juristic person for several times.

6. In 2013, the 1st defendant entered to be listed in the stock exchange by using the old service mark.

7. In 2015, the case is still under the consideration of the Supreme Court.

¹ **Section 272** Whoever:

1. Uses a name, figure, artificial mark or any wording in the carrying on trade of the other person, or causes the same to appear on a goods, packing, coverings, advertisements, price lists, business letters or the like in order to make the public to believe that it is the goods or trade of such other person;
 2. Imitates a signboard or the like so that the public are likely to believe that his trading premises are those of another person situated nearby;
 3. Circulates or propagates the false statement in order to bring discredit to the trading premises, goods, industry or commerce of any person with a view to obtaining benefit for his trade, shall be punished with imprisonment not exceeding one year or fined not exceeding two thousand Baht, or both.
- The offence under this Section is a compoundable offence.

According to the fact in this case, there were some consumers whom were confused that the plaintiff and the 1st defendant were the same juristic person. Some newspapers published that the 1st defendant was the same entity as the plaintiff company. In addition, there were some groups of people who collected debts from the debtors by using improper method, such acts caused confusion to the consumers and defamed the plaintiff.

Normally, for civil case, in case of infringement of registered trademark, the trademark owner will take a legal action according to section 44 and in case of passing off, the trademark owner will take a legal action according to section 46. As for criminal case, the trademark owner will exercise his right according to section 108 and section 109. In case of counterfeit or imitation of service mark, the provisions of criminal code in sections 272-275 shall apply. Under section 272 of the Criminal Code, the law prohibits the actions which may cause confusion in general, such section is connected with section 18 and section 115 of Civil and Commercial Code in case of using of name in bad faith.

In Srisawad Ngerntidlor case, the Court of First Instance held that the 1st-3rd defendants were guilty of offence pursuant to section 272 and fined each defendant in the amount of 2,000 Baht. Moreover, the court ordered that the 1st-3rd defendants are prohibited from using artificial mark of the word “Srisawad” like the service mark of the plaintiff, in the operation, advertisement or publication of the 1st defendant’s business. The court also ordered the 1st-3rd defendant to take off, remove, delete or demolish all things which were used to advertise or publicize the business of the 1st defendant that have the artificial mark of the word “Srisawad” like the service mark of the plaintiff. However, the court dismissed the charge of imitation of the service mark because the court opined that the service mark of the plaintiff and the defendant were different in many points. The problem is that the penalty which was imposed by the court does not balance with the costs and loss of benefit in which the plaintiff had actually suffered in this case. Moreover, there were many consumers whom were confused between the plaintiff and the 1st defendant.

Firstly, we should take the provision of international convention i.e. Paris Convention into consideration. Under article 10bis (3) of the Paris Convention, there are examples of the acts which are considered as unfair competition, categorized into

3 types i.e. causing confusion, discrediting competitors and misleading to the public. The country party shall enact its domestic law in accordance with the international convention to which it is the party to. Thailand is the party to the TRIPs agreement which applies the same principle in regard to unfair competition as those under Paris Convention.

Moreover, there are other acts which are considered as unfair competition, for examples, trade secret, free riding or unfair comparative advertisement etc.

For the Srisawad Ngerntidlor case, it is deemed unfair competition by creating confusion or causing confusion. Under Thai laws, the provisions of Trademark Act section 46, 8(11) or section 13², Criminal Code section 272-275 and Civil and Commercial Code section 18³, apply.

The difference between discrediting competitor and misleading public is that discrediting competitor will be active action while misleading the public will be passive action. For the case of discrediting competitor, the business operator with dishonest intention, will act or damage the products or reputation of the competitor, while the act of misleading is not concerned with the goods of a competitor, but rather concerns with the goods of the person who makes the allegation. Under Thai law, discrediting may apply with section 423⁴ of Civil and Commercial Code and section

² **Section 13** Subject to Section 27, where the Registrar finds that the trademark for which on application for registration is filed:

(1) is identical with a trademark already registered by another person; or

(2) is so similar to a registered trademark of another person that the public might be confused or misled as to the owner or origin of the goods, and such application is for goods of the same class or for goods of a different class found by the Registrar to be of the same character, he shall not register such trademark

³**Section 18** If the right to use of a name by a person entitled to it is disputed by another, or if the interest of the person entitled is injured by the fact that another uses the same name without authority, then the person entitled may demand from the other abatement of the injury. If a continuance of the injury is to be apprehended, he may apply for an injunction.

⁴ **Section 423** A person who, contrary to the truth, asserts or circulates as a fact that which injurious to the reputation or the credit of another or his earnings or prosperity in any other manner, shall compensate the other for any damage arising therefrom, even if he does not know of its untruth, provided he ought to know it.

272 of Criminal Code. Misleading is also found in other law such as Consumer Protection Act, under section 22⁵ or section 31.⁶ Free riding principle is also found in many acts enacted under Thai law.

A person who makes a communication the untruth of which is unknown to him, does not thereby render himself liable to make compensation, if he or the receiver of the communication has a rightful interest in it.

⁵ **Section 22** An advertisement may not contain a statement which is unfair to consumers or which may cause adverse effect to the society as a whole; that is, notwithstanding such statement concerns with the origin, condition, quality or description of goods or services as well as the delivery, procurement or use of goods or services.

The following statements shall be regarded as those which are unfair to consumers or may cause adverse effect to the society as a whole:

- (1) Statement which is false or exaggerated;
- (2) Statement which will cause misunderstanding in the essential elements concerning goods or services, notwithstanding it is based on or refers to any technical report, statistics or anything which is false or exaggerated;
- (3) Statement which is directly or indirectly encouraging the commission of an unlawful or immoral act, or which adversely affects the national culture;
- (4) Statement which will cause disunity or adversely affects the unity among the public;
- (5) Other statements as prescribed in the Ministerial Regulation.

A statement used in the advertisement which an ordinary person knows that it is not possible to be true is not prohibited for use in the advertisement under (1).

⁶ **Section 31** The label of a label-controlled goods shall be of the following descriptions:

- (1) it shall contain truthful statements and have no other statements which may include misunderstanding as to the material facts concerning such goods;
- (2) it shall contain the following statements;
 - the name or trade mark of the manufacturer or the importer for sale, as the case may be;
 - the place of manufacturing or the place of operating import business, as the case may be;
 - the statements which indicate what the goods are; in the case of imported goods, the name of the manufacturing country shall be specified;
- (3) it shall contain necessary statements such as price, quantity, usage, recommendation, caution and an expiry date in the case of goods which can be expired or in other cases to protect the consumer rights; provided that, such protection shall be made in accordance with the rules and conditions prescribed by the Committee on Labels by publishing in the Government Gazette.

For the passing off principle which is the same principle with unfair competition, Thai law received the concept from British law. In United State of America, there is passing off principle also but it will be different from British law. Under British law, during the period where the passing off principle was laid down by the court, there was not many judges in Britain, therefore the court would limit the case to be considered as passing off case in order to limit the amount of case to be filed with the court. However, British law also was provided other specific laws which controlled dishonest or unfair competition behavior. Under United State of America law, the court will interpret passing off principle more extensively than British law. In *International News Service V. Associated Press case*, the defendant used the news from the plaintiff for its commercial publication. The United State of America court did not apply this case with copyright law because normally news which only informs the facts were not deemed copyright work except for analysis news in which the author used his personalized skill. The United State of America court applied this case with unfair competition principle because the defendant seized news from the competitor for its benefit. This case was extended beyond the passing off principle under United State of America law.

Under French law, which is the model of civil law system, there is the unfair competition principle called “*La Concurrence deloyale*” as the specific law, and general law under the Civil Code i.e. tort chapter section 1382 and under Intellectual Properties Code section 713-5 and section 713-6. According to section 713-5, it uses the words “the action causing unfair exploitation” which is very broad. Therefore the court can use its discretion to interpret law to resolve the problem. The law also provides the exception of the action which shall not be considered as unfair competition such as using own last name with good faith because the last name may duplicate with business name. In case comparative advertisement, the comparative advertisement with bad faith will be considered as unfair competition. According to

The businessman who is the manufacturer or importer for sale of a label-controlled goods, as the case may be, shall prepare the label of such goods before the sale and such label shall contain statements in paragraph one. For this purpose, the statements in (2) and (3) of paragraph one shall be made in accordance with the rules and procedure prescribed by the Committee on Labels by publishing in the government Gazette.

French law, advertisement with good faith which is considered as fair competition must refer to the difference between the product which is being advertised and the product which is being compared to. In case the advertisement refers to the trademark of the other by advertising that such product can be used with another the product under the trademark of the other, such advertisement is not considered as unfair competition, for an example, to advertises that the razor blade can be used with shaver under Gillette brand, such advertisement will not be considered as unfair competition.

According to article 10 bis (2) of Paris Convention, unfair competition consists in "any act of competition contrary to honest practices." In the case where the business operator acts with honest practices, it will not be considered as unfair competition. However, the Paris Convention does not specify the definition of the word honest practice. Therefore, the problem may incur when applying the provision of this article to a case.

In United State of America, the court laid down the principle of Fair Use of Trademark for comparative advertisement, for an example, bank compares its credit card with the credit card of other bank; the court held that such comparative advertisement is the fair use of trademark. The said principle also exists in Europe Union and France. As Thai court, it applies the principle of Bona Fide Fair Use. In United State of America, the court laid down the Delusion principle to which advertisement which is considered to be delusion of other trademark will be considered as unfair competition.

Dr. Siranat Wittayatamatat

Topics of Speaker

1. Role of State to Control the Market
2. The Consumer Protection against Passing Off
3. Trade Competition and Passing Off
4. Passing Off under Economics' Perspective
5. Summary

The civil law occurred from the recognition of the concept of “person principle”, whereby, a person has the right to make the contract and agrees terms and conditions of the contract. The terms and conditions of the contract will depend on the intention of the parties. In case a person would like to buy a car, the seller offers the price and the buyer agrees to the satisfied offer. The state shall not intervene in the transaction unless the contract has the term which violates the law or good moral. In fact, market structure is complicated; the service provider determines the terms and conditions in the contract to be offered to the buyer without the negotiation. Therefore, state has to intervene in the contract to maintain the market and competition in the market or economic order. In case all car sellers in the market cooperate to fix the car selling price, such act will cause the buyers to pay the higher price than the reasonable price, hence, the state has to intervene in the contract to a certain extent, by using trade competition and consumer protection law to maintain free and fair trade. Such intervention will create fairness to the consumer which will gain the consumer's confidence and thus, drives the economy.

The limitation of trade competition law is that the consumer is the considered as factor to the consideration but not the subject of right under trade competition law. The limitation of the consumer protection law is that the other business operators are not considered under consumer protection law.

In case of Srisawad Ngertidlor, the consumer watched the advertisement of the defendant (Srisawad Power) and entered into the contract with the defendant under false impression that the defendant was the plaintiff (Srisawad Ngertidlor). When the consumers incur damages arising from the contract, the consumers may

confuse that the damages were caused by the plaintiff. The fact in this case presents the problem in the relationship between one business operator and consumer which affects another business operator.

Under consumer protection law, there are 3 protections i.e. the consumer protection against label, the consumer protection against advertisement and the consumer protection against contract. With regard to Srisawad Ngertidlor case, such case involves with the consumer protection against advertisement. According to section 3 of Thai Consumer Protection Act, the definition of the words “advertisement” will include any act which, by whatever means, causes the statement to be seen or known by an ordinary person for trading purposes. In this connection, the consumer protection against advertisement is provided under section 22.⁷

Paragraph one of section 22 prescribes the prohibitions of statement in advertisement, whereby, the advertisement shall not contain a statement which is unfair to consumers or a statement which may cause adverse effect to the society as a whole.

⁷ **Section 22** An advertisement may not contain a statement which is unfair to consumers or which may cause adverse effect to the society as a whole; that is, notwithstanding such statement concerns with the origin, condition, quality or description of goods or services as well as the delivery, procurement or use of goods or services.

The following statements shall be regarded as those which are unfair to consumers or may cause adverse effect to the society as a whole:

- (1) Statement which is false or exaggerated;
- (2) Statement which will cause misunderstanding in the essential elements concerning goods or services, notwithstanding it is based on or refers to any technical report, statistics or anything which is false or exaggerated;
- (3) Statement which is directly or indirectly encouraging the commission of an unlawful or immoral act, or which adversely affects the national culture;
- (4) Statement which will cause disunity or adversely affects the unity among the public;
- (5) Other statements as prescribed in the Ministerial Regulation.

A statement used in the advertisement which an ordinary person knows that it is not possible to be true is not prohibited for use in the advertisement under (1).

In addition, paragraph two of section 22, provides the examples of the statement which are unfair to consumers or may cause adverse effect to the society as a whole, as follows:

- (1) Statement which is false or exaggerated;
- (2) Statement which will cause misunderstanding in the essential elements concerning goods or services, notwithstanding it is based on or refers to any technical report, statistics or anything which is false or exaggerated;
- (3) Statement which is directly or indirectly encouraging the commission of an unlawful or immoral act, or which adversely affects the national culture; and
- (4) Statement which will cause disunity or adversely affects the unity among the public.

The subsection which may apply to Srisawad Ngerntidlor case is subsection 2, the statement which will cause misunderstanding in the essential elements concerning goods or services. An example of case applicable to section 22 (2) is the case where a shampoos company advertises that its product has the capacity to clean dandruff for 99%. As for Srisawad Ngerntidlor case, in academic sense, the defendant advertises its business to the public by using the billboard and the consumers therefore, has seen and understood such advertisement hence; this case will be applied with section 22(2).

In practice, for the case like Srisawad Ngerntidlor, statistically, there is no claim being filed by the consumers with the Office of the Consumer Protection Board. Due to the reason that the consumers is under the view that such confusion is not a serious matter. Generally, the consumers view that the buyer should be aware prior to the purchase of product. In principle, the consumers should have received such protection before making the decisions to buy products or receive the services. By receiving the correct information before buying the product, it would cause the consumer to be able to select or choose the product correctly. On the contrary, in case the consumer receives the wrong information, such will cause many problems in the future.

For the Srisawad Ngerntidlor case, the consumer who entered into the contract with Srisawad Power confused Srisawad Power as being the same company with Srisawad Ngerntidlor. However, prior to entering into the contract, the consumer had received the information, term and condition of the contract from the officer of Srisawad Power. If the consumer enters into the contract with Srisawad Power under the same term and condition and information which were given to the consumer prior to entering into the contract, the consumer may not incur any damage even though the consumer enters into the contract with Srisawad Power under the confusion that it is the same company as Srisawad Ngerntidlor. Such case is similar to the case where the consumers buy a snack, if the consumer read the label and receives the accurate data relating to the ingredient and nutrition, the consumer does not incur any damage.

In case the Committee on Advertisement opines that the advertisement of the defendant violates section 22, the Committee on Advertisement shall have the power to issue one or several orders as per section 27⁸. Pursuant to section 27(4), in order to resolve the problem, the Committee on Advertisement may issue the order to correct the misunderstanding of the consumers by ordering the defendants to advertise that the service or business of the defendants does not concern or relate to the plaintiff. However, the problem of this section is issuance of order must be in accordance with the rules and procedure prescribed by the Committee on Advertisement, however, at present Committee on Advertisement has not yet issued

⁸ **Section 27** In the case where the Committee on Advertisement is of the opinion that any advertisement violates section 22, section 23, section 24 (1) or section 25, the Committee on Advertisement shall have the power to issue one or several of the following orders :

- (1) to rectify the statement of method of advertisement;
- (2) to prohibit the use of certain statements as appeared in the advertisement;
- (3) to prohibit the advertisement or the use of such method for advertisement
- (4) to correct by advertisement the possible misunderstanding of the consumers in accordance with the rules and procedure prescribed by the Committee on Advertisement.

In issuing an order under (4), the Committee on Advertisement shall prescribe the rules and procedure by having regard to the interest of the consumers and to the bona fide act of the advertiser.

such rules and procedure. Therefore, at present the Committee on Advertisement cannot exercise the power under section 27(4).

Moreover, in case the Committee on Advertisement has already issued the rules and procedure of issuance the order according to section 27(4), the problem may incur as to whether the Committee on Advertisement would exercise such power to order the defendant to correct misunderstanding by advertisement or not, as by imposing such order to the defendant, which is the most severe penalty under section 27, means that the defendant has to accept that its advertisement is incorrect. In addition, issuance of such order according to section 27(4) may result in the civil, criminal or administrative liability to Committee on Advertisement.

Trade competition law is the law relates to the action which affects competition such as the joint restriction of competition, merging business and the wrongful act of the business operator with market domination. For the Srisawad Ngerntidlor case, there is no effect to the competition in the market. Secondly, another act in the trade competition law is the unfair act which does not affect to the market as such unfair act will cause the damage but such damage does not affect to the market. Section 29 of Thai Trade Competition Act B.E.2542⁹, prescribes that the business operator is prohibited from carrying out any act which is not free and fair competition and has the effect of destroying, impairing, obstructing, impeding or restricting business operation of other business operators or preventing other persons from carrying out business or causing their cessation of business. As such provision is quite broad, in case the business operator makes mark, packaging or presentation of the product similar to other business operator, it is doubtful whether such act will be considered as not free and unfair or not.

However, according to guideline of applying section 29 provided by the Office of Thai Trade Competition Commission on its website, the elements of this section are as follows.

⁹ **Section 29** A business operators shall not carry out any act which is not free and fair competition and has the effect of destroying, impairing, obstructing, impeding or restricting business operation of other business operators or preventing other persons from carrying out business or causing their cessation of business.

- 4) The act considered as not free and fair must be the act between business operators only. It means that the business operators shall have some mutual relation. For an example, company A has no relation with company B but only designs the trademark or product packaging similar to the product of company B. The fact under this example will not apply with section 29 as company A and company B has no relationship.
- 5) The act has a nature of not being free and fair competition.
- 6) Such act must cause the effect of destroying, impairing, obstructing, impeding or restricting business operation of other business operators or preventing other persons from carrying out business or causing their cessation of business.

When we apply the fact of Srisawad Ngerntidlor case to section 29, we will find that the act by the defendants is the act between the defendants and consumers not the act between business operators since there is no transaction or relation between the plaintiff and the defendants. An example of the act between business operators is where the manufacturer entered into the contract with retail shop, in such case, if the contract is unfair, section 29 will be applied. By virtue of the reasons provided above, section 29 will not apply to Srisawad Ngerntidlor case.

The third act under trade competition law is dishonest act affecting to trade. In French law, such act is called “La Concurrence Deloyale”.

The Comparison of Passing Off Case Proceeding between Thailand and France

1. The ground for filing the lawsuit

Under Thai law, lawyer will apply tort law according to section 420 of Civil and Commercial Code. Under French law, lawyer will apply section 1382 of Civil Code.

2. The legal point of view

Under Thai law, the lawyer will apply intellectual property law. Under French law, the lawyer will apply trade competition law.

3. The jurisdiction court

Under Thai law, the Intellectual Property and International Trade court will have the jurisdiction. Under French law, in the past, Tribunal would have the jurisdiction. At present, Tribunal de grande instance will have the jurisdiction. Such court is not special court and equal to the provincial court in Thailand.

The next subject is passing off under economics' perspective. The following is a case study for the said subject; the product is fried potato in the red package under the name Pringles. The other company also produces fried potato in the red package but uses its own brand name. Such act creates two issues to be considered. The first issue is whether such act is considered as passing off or not. The second issue is whether such act violates morality or not. Although such act will cause the confusion to consumer with respect to the product, however, each company uses its own trademark. Therefore, it may be considered that such act is not considered as passing off, nevertheless, it may violate the morality. The next question is if you were Pringles company, will you take a legal action against the other company or not. Under economics' perspective, this case may promote the trade competition because the original brand has to develop its product or promote the advantages of its product. It also creates more choices for the consumer in choosing the product in the market. The judge therefore should also consider the economic view point in deciding on the case. In fact, the imitation of the packaging affects to the original business operator whose product was imitated. However, the original business operator may not take any legal action because such imitation does not adversely affect its share in the market. Moreover, if the original business operator takes a legal action, the society may view that the original business operator persecutes small business operator. The imitation which the business operator should take a legal action is the imitation of trademark which causes the damage to the trademark owner. Furthermore, there are consumers who actually intend to buy the other product rather than the product of the original brand which creates more choices for the consumer in buying the product. As the judgment in this case will affect to the market, the court has to use its discretion to balance between the protection of right and freedom of economic. If the court extensively intervene the market, the market will not able to move forward. Therefore, those who practice law shall also have to take such matter into consideration.

Dr. Sutatip Yuthayotin

Topics of Speaker

1. The Relation between Trademark and Passing off
2. The Relation among Trademark, Passing off and Consumer Protection
3. The Relation among Trademark, Passing off and Unfair Competition
4. Comparison of Thai Law and Foreign Laws

The principle of trademark law is that the trademark owner has the right to use its trademark whether such trademark is registered or not. However, in case such trademark is not registered and there is an infringement, the trademark owner must file the legal action on the ground of passing off. For Srisawad Ngerntidlor case, it asides from trademark law and relates to consumer protection law. The basic rights of the consumer under consumer protection law are: 1) The consumer must receive correct and sufficient amount of information; 2) The consumer must have the right to select the product; and 3) The protection against unfair contract and right to be compensated for damage. The questions arise from Srisawad Ngerntidlor case are, whether the consumer had already received the correct and sufficient amount of information or not, and in case the consumer confused between the entity of the company, does it limit the right of consumer to select the product or not. In this regard, there is the economic theory that the consumer is the human who could make the decision to choose the product balancing to his or her fund. However, some business operators may employ certain course of actions, causing the consumer the inability to make the decision according to such economic theory. In case the business operator employs certain actions causing the consumer to make the wrong decision or causing monopoly to occur in the market, consequently, the consumer will not have the right to freely choose the product which results in violation of the consumer protection principle. This point is connecting to the passing off issue. Therefore, in considering the consumer protection under each law, both consumer and business operator should be considered.

Under intellectual property law, the injured person or the person who receives the protection is the trademark owner. Under consumer protection law, the

injured person or the person who receives the protection is the consumer. However, in some cases, both trademark owner and consumer suffer the damage. In case of the imitation of fired potato package, the consumer may receive the advantage because they have more products to select but the original business operator suffers the damage because it had incurred costs and expenses to design the package and advertise the product.

Another example for the imitation of package of the product is dishwashing liquid. There are 2 dishwashing liquids which have similar package, same color and were placed adjacent to each other in the shelf. There is a consumer who buys one of the dishwashing liquid under the confusion that it is another brand. This may be considered as passing off because it confuses the consumer. In the consumer protection area, the consumer receives the correct information because the seller specifies the information or ingredient clearly on the label and it use different trademark. The buyer also is not limited in the right to select the product because it is the buyer, by his or herself, acts carelessly in selecting the product. However, if we consider the placement of the products which are adjacent to each other on the shelf, as the information, the consumer will be considered as the injured person since the consumer receives the wrong information and buys the product they did not intend to buy. Furthermore, the other dishwashing liquid company also suffers damage because it loses its customer and along with the chance to make the profit.

Under consumer protection law, the Consumer Protection Board has the power and obligation to protect 5 basic consumer rights. The Consumer Protection Board will take a legal action in case the consumer suffers damage. In case of dishwashing liquid, if we strictly interpret the law, the consumer already received sufficient and correct information of the product from the label and the consumer also has the right to freely select the product, hence, the buyer is not limited in their right of the consumer to select the product. In this case, since the consumer does not suffer any damage, Consumer Protection Board will not give any protection.

In the trade competition law, the purpose of which is to prevent monopoly that would limits product in the market. There is a section in Thai trade competition law which protects the consumer by prohibiting the act which confuses

the origin of the product, the passing off may also apply to such section. However, the punishment prescribed in such section is only mild penalty.

Under Thai law, if there is no imitation of trademark, the case will not be applied with law on trademark and passing off. For the cases of dishwashing liquid or fired potato package, there is no imitation of trademark therefore passing off will not apply to those cases. Under the foreign laws, provisions of law which fill such gap are provided. Under British law, the distinctive mark principle has been developed. Distinctive mark is not limited to mark but also includes package or decoration, etc. In foreign country, the principle on passing off is very broad, in addition, misleading principle exists in the foreign country also fills the gap of the law. In foreign country, there is the rule of unfair commercial practice for those acts which devastate the operation of market or those acts which are unfair to the consumer. Unfair commercial practice principle is broader than passing off principle. For examples, a shop posts the sign announcing clearance sale because the shop will close its business, but in reality, such shop does not have the intention to close the business or in case the seller designs big package of product but the actual product in the package is very small. The law in regard to unfair commercial practice is enacted in Europe countries and Australia.

As Thai law falls behind those of foreign countries, therefore Thai law should be developed. In order to develop Thai law, intellectual property law may be developed by interpreting the passing off concept to not be limited to trademark only. Or under consumer protection law, Consumer Protection Board may employ more broad interpretation of the word “sufficient and correct information” which the consumer are entitled to receive, by including the information which shall not confuse the consumer. The consumer protection law may enact new section or adjust the definition of some words. Lastly, the trade competition law may add unfair commercial practice principle or enact new act with respect to the unfair commercial practice.

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Paris Convention was enacted in 1883 and was consecutively amended until 1979. Thailand became the party to the convention in May 2008 with effect in August 2008. Paris Convention provides for many issues including unfair competition. According to article 8¹⁰ of the Paris Convention, the country parties have to protect trade name without the obligation of registration. Thailand is the party of the convention but does not provide the special law relate to the protection of trade name without the obligation of registration. However, Thailand has Civil and Commercial Code section 18 to certify the right to use name. Such section was enacted before Thailand became the party to the Paris Convention.

In Paris Convention, it also provides provision in regard to unfair competition under article 10 *bis*. Unfair competition law and trade competition law has different purpose, unfair competition does not refer to the economic harms involving monopolies and antitrust legislation. Therefore unfair competition or unfair business practice has the purpose to protect the competitor against unfair act such as free riding. The reason is to protect the competitor who is the owner of trademark or who invests in their product or shop to be desirable, in order to maintain morale and motivation of the competitor. The example of desirable shop is the Apple Stores which are decorated in white tone; hence, the consumer can recognizes such decoration and immediately knows that they are Apple Stores without seeing any product.

Competition law or Anti-trust law has the purpose to protect competition process, thus, it emphasize in the protection of the process and maintaining fair competition process. Competition law does not have the purpose to protect the business operator or competitor.

In some countries such as Belgium, both unfair competition law and competition law are provided, when the act does not violate competition law it will also not violate unfair competition law.

¹⁰ **Article 8 Trade Names**

A trade name shall be protected in all the countries of the Union without the obligation of filing or registration, whether or not it forms part of a trademark.

World Intellectual Property Organization or WIPO collected and create comparative law of unfair competition act such as passing off, goodwill, geographic indication and trade secret. Geographic indication is considered as unfair competition act in case the seller misleads the buyer with respect to the source of production.

For Thai unfair competition law, Thailand has no specific act with respect to the subject however there is section 46 of Trademark act with the purpose to protect the competitor. For the competition law, in United State of America, this issue concerns with social welfare analysis which means that in case the competitor adopts fair competition process, although there may be some competitor who goes out of business but the economic as a whole grows up, such situation is valid under social welfare analysis. In Europe, it concerns with consumer welfare which means that the law will concern not only with the economic as a whole but also consumer's benefit.

For the protection of competition process in Thailand, there are sections 25 - 29 under the Trade Competition act. Section 29 is the broadest section in the act. There is legal opinion which finds that section 29 can be applied to unfair competition case. However, the speaker does not agree with such legal opinion because competition law has the purpose of protecting competition process but unfair competition law has the purpose of protecting competitor. The problem may occur when we apply the law which has the purpose to protect competition process to protect the competitor. In case Thailand will have the unfair competition law, Thailand may adopt Europe method by enacting special law which specifies that which acts are considered as unfair competition.

For Srisawad Ngerntidlor case, if the business operator in Lao imitates the service mark or decorates shop similar to the plaintiff and engages in the same business as the plaintiff, could we apply Thai law with this case or not, the answer is that we cannot apply Thai law with this case because we cannot use Thai law outside of Thai jurisdiction, which will result in extra territorial application of law. In case we would like to use the same law in ASEAN, we have to harmonize the law in ASEAN. When there is no the harmonization of ASEAN law, we have to apply rules on conflict of law to resolve the problem.

For consumer protection, Thailand is the paternalistic state. Sometimes the consumers have to depend on government organizations which have the limitation

both on budget and personnel. When the consumer's right is violated, the consumers have to wait for the assistance of the Consumer Protection Board. However, Thai consumer protection has developed more positively during recent years. Particularly, there is the provision with regard to class action in section 222/8¹¹ of Civil Procedure Code. Usually, in case the consumer takes a legal action against the business operator, the damages which the consumer can prove may be in the amount less than costs and expenses incurred the consumer on legal procedure which may cause the consumer to ignore the approach of taking a legal action. Therefore the government authority should promote class action practice, in order to increase claimed amount of the case and decrease costs and expenses incur to the consumer.

Under Consumer Case Procedure act, there is the provision in regard to punitive damages in section 42¹² and also the provision in regard to piercing of

¹¹ **Section 222/8** In the case which has a lot of members as follows, the plaintiff who is a class member, may request for the class action proceeding:

- (1) torts;
- (2) breaches of contract; and
- (3) any other claims of legal rights under other laws such as laws with respect to environment, consumer protection, labor, securities and stock exchange, and trade competition.

¹² **Section 42** If the act upon which the complaint is based arises from the business operator's intentional act to unfairly take advantage of the consumer or willful to cause damage to the consumer or, with gross negligence, indifference to damage to be caused to the consumer, or act in breach of responsibility as a professional or businessman who is usually trusted by the public, when the court adjudicates that the business operator pay damages to the consumer, the court shall have the power to order the business operator to pay damages as punishment in addition to the amount of the actual damages fixed by the court as may be deemed appropriate, taking into account such circumstances as damage suffered by the plaintiff, benefit received by the business operator, financial condition of the business operator, relief by the business operator from the damage, and the consumer's contribution to the damage.

In fixing damages for punishment under paragraph one, the court shall have the power to fix the damages by not more than two times the actual damages fixed by the court. However, if the actual damages fixed by the court is not more than Baht 50,000, the court shall have the power to fix the damages for punishment by not more than five times the actual damages fixed by the court.

corporate veil in section 44¹³ of the same act, which provides that the consumer can claim for damages from the director of the company. In the past, the consumer can claim from the company only because the liability of the juristic person and director is separated.

The speaker suggests that Thai law should be clear and the business operators and consumers should be aware of their own rights.

¹³ **Section 44** In a case in which the business operator who is sued is a juristic person, if the facts appear that such juristic person was formed or has acted in bad faith or is involved with fraud and deception of the consumer, or has removed or transferred assets of the juristic person to the benefit of any person, and those assets are not sufficient to pay debt according to the complaint, the court shall, upon request by the party or upon the court deeming it appropriate, have the power to call the partner, shareholder, person controlling the operation of the juristic person or person receiving assets from the juristic person to become co-defendant, and shall have the power to adjudicate such person to be jointly liable for the debt owed by the juristic person to the consumer, unless such person can prove that he has no knowledge of such act. In case of the person receiving those assets from the juristic person, he must prove that he has received the assets in good faith and with consideration.

The person receiving assets from the juristic person under paragraph one shall be jointly liable for not more than the assets received by such person from the juristic person.

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