

Thailand: Non-Traditional TMs - Registering Sound/Smell Marks

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Businesses should be aware of a significant development in Thai trademark law. The latest draft of the Thai Trademark Act contains a number of interesting amendments, including one that introduces the ability to register sound and smell marks. The draft bill ("the Bill") was recently approved by the Cabinet and will now be submitted to Parliament and the Senate for final approval.

Trademarks are marketing tools that enable customers to recognize the products or services of a particular company. Traditionally, trademarks have been represented visually, such as by photographs, designs, names, combinations of colors, shapes or configurations of objects, or a combination of one or more of these things. The Bill extends the meaning of "mark" to include non-visual trademarks such as sounds and smells. This development will bring trademark law in Thailand closer into conformity with international standards.

Sound marks

To successfully register a sound mark, the sound will need to be "distinctive," defined in the Bill as "a sound which is not directly descriptive of the character or quality of the goods, a natural sound of the products/services, or sound arising from the functionality of the products/services." Like all other forms of marks, sound marks must be capable of distinguishing the products and services with which they are used from those of others.

By requiring the sound mark not be a natural sound of the product, the Bill instantly renders a large number of sounds unregistrable. For example, the distinctive sound of bubbles rising in a bottle of soda water in Singha Corporation's soda water commercial or the sound of meat being minced in the Thai President Foods' advertisement for minced pork MAMA noodles, though both widely recognizable, would be unregistrable. Other examples of unregistrable sounds include the well-known jingles of Thai Channel 3 and 7, because they include descriptive lyrics.

It is noteworthy that many registered sound marks appear in the advertising for products rather than with the products themselves. For example, a manufacturer of denim jeans may register a particular jingle used in its advertisements but the mark is never applied directly to the actual jeans. (Who would wear jingle-emitting jeans anyway?) The reality is trademark owners register both traditional marks, which are applied to the actual goods, and sound marks, which are used in the product's advertising.

The United States was the first country to provide registration of sound marks, the first being for NBC's chime during its radio broadcast services. The sound was represented by a description of the sound rather than a sound recording. Other examples of successfully registered sound marks in the United States include MGM's lion's roar, Homer Simpson's shout of exasperation, the Looney Tunes theme song, and the 20th Century Fox introduction jingle.

If the Bill passes into law, a number of Thai companies may wish to take advantage of the protection it affords their valuable sound marks, such as Total Access Communication's DTAC jingle, Betterway Thailand's Mistine tagline, and Easy Buy's Umay Plus tagline.

Smell marks

According to the Bill, smell marks will need to meet similar requirements as sound marks to be successfully registered. “Distinctiveness” of a smell mark is defined in the Bill as “scent which is not directly descriptive of the character or quality of the goods, a natural scent, or scent of goods.” Due to the nature of smell, these requirements could prove quite challenging to meet.

Registering smell marks is difficult because they can neither be perceived visually nor adequately represented graphically like traditional marks or sounds marks. Furthermore, smells may be perceived differently due to factors such as concentration, quality, temperature, carrier material, as well as subjective factors such as memory.

The United States was the first country to provide registration of smell marks, the first being for sewing thread and yarn. The smell of the yarn was described as a “high-impact, fresh floral fragrance reminiscent of plumeria blossoms.” As the smell was not a natural feature of the thread and yarn, it was capable of distinguishing the product from those of others.

If the Bill passes into law, a number of Thai companies may take advantage of the protection it will afford for their valuable smell marks. Smell is a powerful and effective advertising tool and the benefits of protecting your unique smell should not be overlooked.

These developments will be most beneficial to businesses who employ non-visual trademarks in their advertising and marketing. However, while trademark law will allow registration of such marks in the near future, the actual process of registration and the scope of protection remains to be seen. The Thai trademark office should set down clear criteria for the handling of applications and establish suitable databases for storing copies of such marks.

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