

A joint petition of the

Association of American Publishers, Inc. (AAP)
AFMA
Interactive Digital Software Association (IDSA)
Motion Picture Association of America, Inc. (MPAA)
National Music Publishers' Association, Inc. (NMPA)
Recording Industry Association of America, Inc. (RIAA)

June 13, 2001

GSP Subcommittee
Trade Policy Staff Committee
Office of the U.S. Trade Representative
1724 F Street NW, Room F220
Washington, DC 20508

Re: Request for Review of the Intellectual
Property Rights Practices of Thailand in the
2001 GSP Annual Country Eligibility
Practices Review, 66 Fed. Reg. 19278 (April
13, 2001)

To the Subcommittee:

The Trade Policy Staff Committee (TPSC) of the Office of the United States Trade Representative (USTR) published in the April 13, 2001 Federal Register a notice announcing the 2001 Generalized System of Preferences (GSP) Annual Country Eligibility Practices Review. USTR indicated that “[I]nterested parties may submit petitions to have the GSP status of any eligible beneficiary developing country revised with respect to any of the designation criteria listed in subsections 502(b) or 502(c) of the Trade Act (19 U.S.C. 2462(b) and (c)).” See 66 Fed. Reg. 19279.

Six associations--Association of American Publishers, Inc. (AAP), AFMA, Interactive Digital Software Association (IDSA), Motion Picture Association of America, Inc. (MPAA), National Music Publishers' Association, Inc. (NMPA), and Recording Industry Association of America, Inc. (RIAA) – jointly submit this request that the eligibility of Thailand as a GSP beneficiary developing country be reviewed, and that its GSP benefits be suspended or withdrawn, in whole or in part, if requisite improvements are not made by Thailand to remedy the deficiencies (outlined below) which adversely affect U.S. copyright owners. In 2000, Thailand exported goods valued at \$2.2 billion to the U.S. which received preferential duty-free

treatment under the GSP Program, which represented approximately 13.5% of its total exports to the U.S., according to U.S. government statistics.

Petitioners and Their Interest

The Association of American Publishers (AAP), AFMA (formerly the American Film Marketing Association), the Interactive Digital Software Association (IDSA), the Motion Picture Association of America (MPAA), the National Music Publishers' Association (NMPA) and the Recording Industry Association of America (RIAA) each represent the interests of their member companies in copyright-related matters around the world. In sum, these six associations represent approximately 1,450 U.S. companies producing and distributing works protected by copyright laws throughout the world -- motion pictures, television programs, home videocassettes and DVDs; music, records, CDs and audiocassettes; and textbooks, tradebooks, reference and professional publications and journals (in both electronic and print media); and all types of entertainment software (such as videogame DVDs, CD-ROMs and cartridges, personal computer DVDs, CD-ROMs and multimedia products).

Action Requested by Petitioners

Pursuant to the Trade Act of 1974, as amended (19 U.S.C. 2461 *et seq.*), petitioners hereby request the President to review the eligibility of Thailand as a GSP beneficiary developing country, and if requisite improvements are not made by Thailand, then they request the President to suspend or withdraw GSP benefits of Thailand, in whole or in part, for its failure to provide adequate and effective copyright protection for U.S. copyright owners.

Legal Authority for this Petition and Discussion of the IPR Criteria in the GSP Statute

A full discussion of the legal authority for this petition, and the specific IPR provisions and legislative history of the GSP programs is found in Appendix A. To summarize, in the GSP Renewal Act of 1984, Congress specified conditions that GSP beneficiary countries must meet in order to gain and maintain their preferential trading status. In particular, one of these express conditions (which Congress also delineated as one "purpose" of the GSP Program) was to encourage developing countries "to provide effective means under which foreign nationals may secure, exercise, and enforce exclusive intellectual property rights."¹ The legislation required the President to apply mandatory and discretionary criteria with respect to IPR protection as a condition to a country achieving "beneficiary" status under the GSP Program. When the GSP Program was reauthorized in August 1996, the language of the IPR discretionary criterion for GSP eligibility in Section 502(c)(5) was simplified slightly and now requires the President to "take into account the extent to which such country is providing adequate and effective protection of intellectual property rights."²

¹ See Section 501(b)(9)(B) of the GSP Renewal Act of 1984.

² GSP Renewal Act of 1996, Title I, Subtitle J, of the Small Business Job Protection Act of 1996, Pub. L. No. 104-188 (codified at 19 U.S.C. 2462(c)(5)).

Thailand has been subject to a prior GSP IPR review. In January 1989, President Reagan revoked some of Thailand's GSP trade benefits for its failure to provide adequate and effective copyright protection and enforcement. After Thailand made progress in adopting a new copyright law and creating a specialized IPR court, GSP benefits were partially restored in August 1995. In June 1998, the U.S. restored virtually all of Thailand's GSP benefits as the Thai government committed to an ambitious action plan for better enforcement against piracy.

Thailand Again Fails to Provide "Adequate and Effective Protection" of U.S. Copyrights

To the best of petitioners' knowledge, much of the information describing the recent deficiencies in Thailand's legal and enforcement regime has been presented previously to members of various U.S. governmental interagency groups, including the Special 301 interagency group, several members of the GSP Subcommittee, as well as the Trade Policy Staff Committee, in the context of USTR's Annual Special 301 Review. On February 16, 2001, the six petitioners and the Business Software Alliance (BSA), which is not a petitioner in this proceeding, as members of the International Intellectual Property Alliance (IIPA), submitted a Special 301 submission to Assistant USTR for Services, Investment and Intellectual Property Joseph Papovich; this submission was widely distributed among the interagency for its internal consideration in the 2001 Special 301 Annual Review.³

USTR has highlighted legal reform and enforcement issues in Thailand over the years. Most recently, Ambassador Robert Zoellick, in his April 30, 2001 2000 Special 301 announcement, made the following observations about Thailand:

Despite the passage of significant intellectual property rights legislation, substantial improvements in the courts system, and a good working relationship between foreign business entities and Thai enforcement authorities, copyright piracy rates continue to be high.... We remain concerned over the increasing in the illicit use of business software and rate of optical media piracy. In particular, we look to the new Thai Government to move draft optical media legislation forward that will have the authority and capabilities of the police to act against the unauthorized producers of optical media products.

- 1. The problem of optical media piracy in Thailand is growing, and is threatening to eliminate entire market sectors for legitimate copyright products. While there was some enforcement response by Thai authorities in 2000, the level of enforcement against optical media piracy has been dropping.**

The most serious piracy problem in Thailand, and the one that most seriously afflicts the sectors of the economy served by the petitioners, is optical media piracy: the unauthorized mastering, production, distribution and export of copies of copyrighted materials in formats such as audio compact disc, video compact disc (VCD), Digital Versatile Disc (DVD), and CD-

³ IIPA's Thailand country reports are available on its website, at <http://www.iipa.com/countryreports.html>. IIPA's entire 2001 Special 301 report can be accessed at <http://www.iipa.com/special301.html>.

ROMs, which are used to carry entertainment and videogame products, audiovisual works, recorded music and literary material.

Since last count, 16 months ago, the number of documented factories and lines producing pirated optical discs in Thailand has nearly doubled. Industry sources conservatively estimate that currently there are at least an estimated 37 factories and 78 lines operating throughout Thailand. Sixteen months ago, there were only 20 factories and 43 lines of production. These numbers do not include the countless covert lines that are up and running or those planned for imminent import. The recording industry estimates the total number of lines to be from 100 up to a possible 150 at this time.

Pirate optical media production within Thailand, a rarity just a couple of years ago, is now firmly entrenched, and, as noted above, growing very rapidly. Some plants are in or near Bangkok, while others are in more remote areas, particularly near the frontiers with Indochina and Burma. One pirate plant is located directly opposite a major Defense Ministry office in Muangthong Thani, Nonthaburi province. Many factories have more than one production line, and estimates of their total annual production capacity run as high as 200-300 million units (more than a doubling from last year's estimates). In a country whose market can absorb an estimated 15 to 20 million units per year of legitimate copies in these formats, it is obvious that Thai pirate production, besides completely dominating the domestic market, also fuels a thriving export trade.

The impact of pirate optical media syndicates in Thailand transcends the boundaries between different market segments. The motion picture industry estimates that 70 percent of the video CDs within the Thai market are pirate, and in recent months pirate DVDs are appearing at the retail level in increasing numbers. Pirate market share for recorded music also continues to rise, to an estimated 45% for 2000. There can be virtually no legitimate market for videogames in optical media formats in Thailand, since a glut of pirate product on the market – nearly all of it locally produced – has driven street prices down to the level of US\$0.75 per piece for CD-ROMs for use in Sony PlayStation® consoles, for instance.

Pirate optical media products are readily available for retail throughout Thailand. Pirate music CDs, for example, can be found in markets in Bangkok, in other cities, and in tourist areas. While pirate audiocassettes are widely sold as well, this format occupies a shrinking share of the market; while the number of pirate cassettes seized in 1998 outnumbered CD seizures by more than six to one, for 2000 the local recording industry reports that more CDs than cassettes were seized. The glut of pirate CDs of international repertoire on the market has driven the street price down to about Bt 150 (US\$3.50). Overall, RIAA estimates that 45% of international recorded music product in the Thai market is pirate, up from 40% in 1999 and 35% in 1998, and according to even more recent reports that level continues to escalate.

Thailand was slower than some of its neighbors to migrate from the videocassette format to VCD for home video products, but by now the VCD format predominates in the pirate market. In the major cities, pirate DVDs are starting to appear in increasing numbers. In all, nearly 850,000 pirate optical discs of audiovisual product were seized in 2000, but in the first quarter of 2001 there has been a marked reduction in seizures with only 99,874 pirate discs seized. MPA

estimates that about 60% of all audiovisual product in Thailand is pirate, up from 50% in 1998; estimated losses due to piracy have also increased, from \$19 million in 1998 to \$21 million in 1999 to \$24 million in 2000. These losses include damage to the theatrical box office caused by the widespread availability of pirate VCD and DVD versions of films that have not yet been released in Thai cinemas. The damage is increased by the fact that 90% of pirate VCDs now have a soundtrack in the Thai language. Pirate product in both VCD, DVD, and videocassette formats can readily be found in major shopping areas in Bangkok such as Panthip Plaza, Tawanna, Seri Center, Secon Square, Future Park Rangsit, and others. Street vendors do a brisk business in both VHS and optical disc formats in night markets, selling from catalogs and photo spreads and keeping their inventory in a separate location to frustrate enforcement efforts.⁴ Conditions are similar in other major cities and tourist centers. The going price for pirate VCDs is about US\$2-3 and US\$4-10, respectively.

Pirate versions of entertainment software applications may be found at a number of stores in Bangkok. There is a persistent problem of sales of illegally copied games on CD through Internet Websites based in Thailand. Over 213,000 pirate CD-ROMs of videogames in the PlayStation format were seized in Thailand in 2000.

Thai optical media piracy is an international, not just a domestic, concern. Both the volume and the scope of export of pirated optical media products from Thailand are nearly unmatched. During 2000, some three million pirate music CDs originating from Thailand were seized in Paraguay alone; another million were intercepted in Germany during the year. A single shipment of Thai-produced pirated PlayStation videogames seized in Frankfurt amounted to 116,000 units in 11 crates, weighing two and one-half tons and valued at over US\$5 million; it was en route to Mexico.⁵ Countries as far flung as Sweden and South Africa report that Thailand is the major source of pirated interactive entertainment software seized by their customs officials.

The source of the optical media piracy that is distorting markets both within Thailand and around the world is a well-organized, well-financed group of syndicates with strong international connections. Nationals from Taiwan, Macau, Malaysia and China have been detained in connection with the operation of factories that have been raided in Thailand. Initially financed from abroad, the syndicates develop strong political ties with local and national figures in Thailand, and their plants are often well protected, both politically and (increasingly) in terms of armaments. The syndicates have developed extensive distribution networks, both for the Thai retail market and for export. Their retail operations, especially for pirate CDs, rely increasingly upon children under the age of 15 to staff stalls and other outlets, since they know that restrictions on the prosecution of juveniles make enforcement more complicated.

⁴ Despite the advent of the VCD, VHS videocassette piracy remains a serious problem, particularly in the provinces and small towns. Pirates use VCDs, laser discs, promotional cassettes, and cassettes recorded from the screen in U.S. theaters as masters for pirate VHS versions, which are often available before the title in question has been released for theatrical exhibition in Thailand. While ongoing enforcement against retailers of pirate videocassettes is essential, the main enforcement thrust should be directed against duplication facilities for these products and against the major distributors who supply retailers. Competing pirate organizations supply videocassettes to their respective outlets, with separate distribution systems for the rental and sales markets. Masters are duplicated in facilities that often produce legitimate product part of the time, sometimes employing high-speed duplicating equipment. More sustained enforcement efforts against duplicators and distributors are needed to move videocassette piracy levels downward.

⁵ "PS Software Seizure," *Game Week*, April 3, 2000.

The continued rapid growth rates of optical media piracy in Thailand are due in part to the efforts of authorities in neighboring countries to crack down on this illegal trade. The growth in Thailand is especially remarkable because it has occurred despite, for a time at least, one of the more aggressive enforcement efforts seen in any country in the region. Thai officials, who began to conduct raids on pirate optical media plants in July 1999, carried out at least 16 such raids during 2000. One of the most productive series of raids took place in the Bangkok area on May 2-3, 2000, and turned up a full pirate stamper replication service. Records seized at the Mercury Bay facility during this campaign indicated that the plant was turning out some 900 stampers per month – master copies of titles such as “Star Wars Episode I” and “The Matrix,” from each of which some 100,000 pirate VCDs could be produced. Significantly, seven Malaysian nationals and one Thai were arrested at the scene.

In 2000, many of these raids have been followed up with prosecutions and with action by Thailand’s specialized Intellectual Property and International Trade Court. As of February 2001, some fifteen people arrested in connection with the factory raids have been sentenced to jail terms of up to one year, and the trial court (the Central Intellectual Property and International Trade court) did not suspend any of the sentences. However, all the sentences were appealed, and no jail time has yet been served by any of the pirates. Since that time, requests for search warrants have begun to be leaked to the pirates and successful CD plant raids have become more difficult to achieve. While these convictions are most welcome, the petitioners are very concerned that a fall-off in enforcement will result in a return of the absence of deterrence that existed in Thailand before 1998.

That the pirate optical media problem in Thailand has continued to grow so rapidly in the face of the unprecedented level of enforcement, prosecution and sentencing in 2000 testifies to the enormous profits to be made in the piracy business, and to the tenacity of the criminal syndicates determined to reap those profits. Now it is becoming clearer that the syndicates are winning the war with pirate production on the increase and the previous aggressive enforcement waning. Clearly, enforcement efforts will have to be intensified, given more resources, and sustained over a considerable period of time before Thailand can hope to reverse the trend and it is to achieve this goal that petitioners have resorted to this GSP petition. What is needed is more secure raiding and tougher and more consistent sentencing of individuals involved in optical media piracy, including major distributors and exporters as well as manufacturers. It is to achieve this goal that petitioners have resorted to this GSP petition. At the present moment, however, there appears to be a growing lack of interest in combating piracy, in light of other apparent priorities.

2. Effective optical media legislation is urgently needed to begin to address the optical media piracy problem.

As we know from experience in other countries, Thailand will not be able to keep up with this growing threat unless it emulates some of its neighbors by adopting a comprehensive regulatory regime governing the production of optical media products -- including the operation of optical media production facilities and the importation of the equipment and raw materials needed to make pirate optical media products. Long reluctant to embark on such a step, the Thai

government's position changed almost overnight in late 1999 in the wake of a scandal over the involvement of the Prime Minister's driver in piracy (the so-called "PM scandal"). Since then, Thai officials from a number of agencies have been working with private sector advisors and others to draft comprehensive legislation.

Petitioners understand that initial drafting is now complete. Reportedly, the draft bill builds on the recently enacted legislation in Hong Kong and Malaysia, and covers both equipment and raw materials and requires the use of Source Identification (SID) codes on all optical media products produced in Thailand. However, there appear to be some unresolved problems with the draft, especially its transitional provisions, which some believe amount to a virtual amnesty for current optical media pirates who wish to apply for licenses to engage in optical media production. Furthermore, more than a year and a half after work began on the new legislation, it has only recently been presented to the Minister of Commerce, and has not been formally approved by him, much less by the full Cabinet. Even more disturbing is a recent report that this draft may even be sidetracked in favor of possible amendments to a very weak existing licensing law. Presentation to the Thai parliament appears to lie even further in the future.

While we applaud the Thai government's apparent recognition that a comprehensive regulatory regime is needed, the extremely slow progress toward putting that regime in place must change. This issue must take a top priority on Thailand's legislative agenda. The Thai legislative process is normally quite protracted; strong pressure from the responsible departments will be needed if the new legislation is to come into effect quickly enough to be of maximum usefulness against the growing threat of optical media piracy. Prompt enactment and implementation of proper legislation should give enforcement authorities a powerful new tool to wield against the optical media piracy syndicates. It could also lessen the attractiveness of Thailand as a site for locating future pirate facilities.

Prompt enactment of any necessary legislation, issuance of regulations, and aggressive implementation could make a major contribution to the fight against optical media piracy, but it must be done now before the situation swings entirely out of control. Such a system should be comprehensive, including a combination of legal or regulatory measures to provide strict border controls on the importation or exportation of equipment or raw materials⁶; licensing requirements for optical media production facilities; and vigorous enforcement, including surprise inspections and the revocation of licenses of plants used for infringing purposes. There should be no transition period (illegal production is already a crime) and certainly no amnesty.

3. Enactment of cable regulatory controls and broadcast legislation is long overdue and is necessary to afford protection for the broadcast, transmission and retransmission of copyrighted programming.

The most urgent and threatening problem in Thailand is the geometric growth and profitability of optical media piracy. However, there are other piracy issues in Thailand that must be given enhanced attention. Enactment of cable regulatory controls in Thailand is long

⁶The draft law would not appear to cover the export of equipment or raw materials. This must be added or clarified.

overdue. Although the copyright law can be used against cable pirates, a regulatory system would make it easier to control cable piracy by conditioning the issuance and retention of cable licenses on compliance with copyright as in other countries. Legislation passed in January 2000 — the Frequencies Management Act — creates a National Broadcasting Commission, but selection of its members has been delayed to March 2001 at the earliest. Petitioners do not have an update on the status of these appointments, but if not already in place, this commission should be appointed promptly and given the power to fight cable piracy. Cable piracy — the unauthorized transmission of U.S. programming over cable television systems— is widespread in Thailand, especially in rural areas. Illegal decoder boxes and smart cards are widely available. Cable piracy undermines the markets for theatrical exhibition, home video, and licensing for broadcast of U.S. motion pictures. Most of the offending cable operators have strong connections with local politicians, and it is difficult to obtain enforcement. The cable piracy rate is estimated at 35%. Also rampant is unauthorized public performance of U.S. audiovisual works, in many small hotels outside Bangkok that use in-house movie systems. Most bars in tourist areas also exhibit videos without authorization, often in “private rooms.” MPA estimates that 35% of all public performances of their member company titles in Thailand are unauthorized.

Thailand is also considering broadcast legislation that includes provisions on signal theft and on the production or distribution of signal theft-related devices. The penalties proposed for these offenses in the draft legislation are too weak, topping out at one year's imprisonment and a fine of Bt 2 million (US\$47,000). Stronger penalties are needed if this law is to be effective.

4. While there has been some success in running police raids against copyright pirates, Thailand must improve its efforts to pursue criminal prosecutions.

Historically, anti-piracy enforcement in Thailand has been plagued by a lack of cooperation among enforcement agencies. As noted above, this began to change in 1999, and the process accelerated toward the end of that year, when, in the wake of the “PM scandal,” the Department of Intellectual Property (DIP), carrying out a directive of a new Deputy Minister of Commerce, set up nine task forces to carry out ongoing investigations and raids in different parts of Thailand. All police units in Bangkok and in tourist areas throughout the country were empowered to enforce the copyright law and ordered to give such enforcement a high priority. All seized pirate product was ordered destroyed on a quarterly basis, a response to the aggravating practice of returning pirate inventory to retailers upon payment of a nominal fine, a policy that clearly violated Thailand’s obligations under the WTO TRIPS Agreement.⁷ Under the new setup, the tempo of enforcement activity increased dramatically, as different agencies competed to carry out raids and to distance themselves from any hint of complicity with pirates. This system must be reinvented.

Also during this period, a key coordinating body established by the government in 1998 - the Infringement of Intellectual Property Suppression Center -- continued to meet with industry representatives and helped to focus enforcement efforts. In addition, a special task force created in the wake of the PM scandal was empowered to carry out anti-piracy IP enforcement activities

⁷ This remains a problem with respect to seized product not specifically identified by right holders as infringing. Thai authorities should be encouraged to destroy seized product more consistently and on a more frequent schedule.

around the country, and has been an effective participant in the anti-piracy effort. These bodies should be made permanent. But much more needs to be done before the Thai enforcement and prosecution apparatus can be considered truly effective.

Coordination should be improved still further through the adoption and implementation of a nationwide anti-piracy plan. More enforcement manpower is needed to tackle what is essentially a nationwide problem, and anti-piracy enforcement must be given a higher priority throughout the government, including at the provincial level. The Department of Intellectual Property should be given the authority to carry out enforcement actions, not just to coordinate them; this would assist the existing enforcement agencies, like the Economic Crimes Investigation Division (ECID) of the National Police, which need more resources. Customs, foreign trade, domestic trade, revenue and consumer protection agencies need to be more fully integrated into the overall enforcement effort. Thai enforcement authorities should also be strongly encouraged to improve on their performance on several issues identified in the Thai-U.S. IPR Action Plan of 1998, including improved border controls; more effective use of tax, fraud and other laws against pirate organizations; and devoting sufficient resources to enforcement across the board.

Thailand's success in converting raids into successful prosecutions, while it improved in 1999 and 2000 now seems to be waning. On the plus side in 2000, besides the aggressive prosecution of optical media factory operatives summarized above, a total of 89 prosecutions against distributors and retailers of pirate VCDs were initiated in that year. Recently jail terms and fines have increasingly been suspended. Thailand must devote the resources needed to ensure that all serious cases of copyright infringement are brought to court promptly and penalties actually imposed at deterrent levels.

5. Deterrent Sentencing Must Improve in the Thai Intellectual Property and International Trade Court (IP & IT Court) and cases must be closely monitored to ensure consistency in deterrent sentencing.

For years, interminable delays, convoluted procedures, and purely nominal sentencing practices rendered the Thai court system dysfunctional in the fight against copyright piracy. The inauguration of the Central Intellectual Property and International Trade Court (IP & IT Court) in December 1997 fulfilled a longstanding commitment of the Thai government, and offered the potential to make a real difference and to serve as a model for the region. The new court's personnel have received specialized training; streamlined procedures have been adopted; and the court's jurisdiction is broad. Almost since its inception, it has processed cases expeditiously, thus addressing one of the main shortcomings of the old system. In 2000, the court disposed of 4059 IPR criminal cases, while a total of 4719 such cases were received; this indicates that backlogs were quite minimal. MPA reports that criminal convictions were obtained in 87 of the 89 criminal cases which it initiated during 2000, and that the other two were resolved in January 2001; by the end of March 2001, criminal convictions were obtained in a further 21 cases.

A major challenge facing the new court was whether it could break with the traditional inability or unwillingness of judges to impose deterrent penalties, including jail terms, upon convicted pirates in serious cases. In this regard, 2000 seemed to be a breakthrough year for the

court, as exemplified by the fifteen unsuspended jail sentences it imposed on operatives of pirate optical media factories during the year. It also sentenced a total of six defendants to jail in two cases involving pirate warehouses and distribution centers, and imposed prison terms in three retail piracy cases as well, all without suspending the custodial sentences. All defendants appealed to the Supreme Court, however, and none has yet served any jail time; the three retail pirates received suspended sentences for the Supreme Court, while all the distribution and factory cases remain pending. The U.S. government should closely monitor the appeals in these cases, to ensure that this important step toward deterrent criminal sentencing in piracy cases has a real impact. The court must continue firm sentencing practices particularly as more operatives from pirate optical media plants are brought to justice. It should also continue its practice of ordering the forfeiture of optical media production equipment used to make pirate product, and should extend that forfeiture policy to other cases as well.

Another appeal that should be closely monitored involves a defendant named Yothin Krutpong, a shop owner who sold pirate optical media products—VCDs, music CDs and other optical media product—from his store in Panthip Plaza. In May 1999, the IPR court imposed on him the toughest sentence ever handed down for copyright piracy in Thailand: 28 months in jail, and fines totaling Bt 840,000 (US\$22,400). If the sentence is upheld on appeal to the Thai Supreme Court, where it is still pending, this defendant could be the first Thai copyright pirate ever to go to prison as a result of a criminal conviction for copyright infringement.

In the period ahead, the court must be encouraged to continue this trend toward tougher sentencing, since a consistent pattern of such sentencing must be established in order to achieve a deterrent effect, particularly against optical media production facilities and larger distributors. It is worth reiterating that it falls largely upon the Central Intellectual Property and International Trade Court to fulfill Thailand's international obligation under Articles 41 and 61 of the TRIPS Agreement to impose deterrent criminal penalties on commercial copyright pirates. This internationally recognized minimum standard became fully applicable to Thailand on January 1, 2000. It is imperative that Thailand provide for, and actually impose, criminal remedies which are "sufficient to provide a deterrent" (TRIPS Articles 41 and 61), and that it provide the full panoply of criminal, civil and administrative procedures and remedies. The IP & IT Court is fully able, with the appropriate will, to advance many of these goals in the months ahead.

The most significant Thai court decisions of 2000 on substantive copyright law and enforcement issues were rendered, not by the IP&IT Court, but by the country's Supreme Court, hearing appeals from the specialized tribunal. The results sent decidedly mixed signals regarding Thailand's commitment to fulfill its international obligations regarding the fight against copyright piracy.

Two of the cases involved book piracy, a chronic problem in Thailand. The problem is centered around commercial photocopying operations that set up shop near college or university campuses and do a booming business in unauthorized copies of textbooks. Police raids against photocopying establishments in the fall of 1998 marked the first enforcement actions taken against this growing form of commercial copyright piracy. Unfortunately, in the first two of the resulting cases to be decided by the IPR Court in September 1999, the results were unsatisfactory. The IPR Court concluded that wholesale unauthorized photocopying carried out

by commercial photocopying shops at the direction of students fell entirely within the exception to copyright protection for nonprofit “research and study” purposes under section 32(2)(1) of the Thai copyright law. Consequently, one case was dismissed while the other, in which the defendant had apparently stockpiled photocopies in anticipation of future requests from students, was concluded with a nominal fine. The court also refused to allow the forfeiture of the photocopying machines used to make the unauthorized copies.

Thailand’s Supreme Court rendered more satisfactory judgments in both these cases. In the case against Somsak Thanasarnsenee, the Supreme Court upheld the fine imposed by the lower court and also ordered the forfeiture of the photocopying machines used to commit the offense.⁸ In the second case, handed down in September, the Supreme Court reversed the acquittal of the defendant (Konakchai Petchdawongse) ordered by the IP & IT Court, imposed a fine of BT 100,500 (US\$2400)⁹, and ordered the forfeiture of the equipment. However, reportedly the Supreme Court decision was based on a narrow finding that the defendant had failed to demonstrate that the unauthorized copies seized had been made at the specific request of students. The decision appears to leave open the possibility that if such prior requests were documented, a for-profit commercial photocopying operation, engaged in high-volume unauthorized copying, would be able to claim the benefit of the statutory exception for copying for nonprofit “research and study” purposes.¹⁰ If this reading is correct, it is regrettable that the Supreme Court missed this opportunity to specifically disapprove the lower court’s reading of the law, which appears not only to tolerate but even to encourage commercial copyright piracy of textbooks. Such an interpretation would raise serious questions about the ability of Thailand to fulfill its obligations under the TRIPS Agreement.

An even more disturbing Supreme Court decision involved Atec Computer and its director, who in 1999 had been fined a total of Bt 1,050,000 (US\$28,000 at then-prevailing exchange rates) for loading unauthorized copies of Microsoft® business software programs on the hard disks of computers they were selling.¹¹ This was a welcome change from the light sentences imposed by the IPR court in its earlier software piracy cases, and sent a strong signal that this common form of software piracy was not acceptable in Thailand. Unfortunately, on October 16, 2000, the Supreme Court released a decision overturning the conviction, on the grounds that, because a Microsoft investigator had ordered the computer, Microsoft therefore could not have been the injured party, and indeed had “facilitated” the offense.¹² To the extent that this decision casts doubt on the legal validity of “trap purchases,” one of the most commonly employed techniques in investigating all kinds of piracy cases, it threatens to undermine the ability of the petitioners to conduct an effective fight against piracy.

⁸ “Appellant fails to overturn copyright conviction,” IP Asia, July/August 2000, at 7.

⁹ Reportedly this fine was subsequently reduced to Bt 67,000 (US\$1600).

¹⁰ Periera, “Supreme Court sets out what’s allowed in reproduction of copyrighted text,” IP Asia December 2000/January 2001, at 41.

¹¹ “IPR Court Continues Hard Line on Pirates,” *Bangkok Post*, July 7, 1999

¹² “Thai Supreme Court Rules against Microsoft,” *The Nation* (via Newsbytes News Network), Nov. 6, 2000.

While Thailand has come a long way toward meeting its substantive obligations under the copyright portions of the World Trade Organization (WTO) TRIPS Agreement, it is not yet fully in compliance, especially with the critical enforcement obligations found in Part III of TRIPS. As discussed above, the IPR court is the Thai government institution most clearly responsible for fulfillment of these international obligations, but legislative changes could be needed as well, to clarify some ambiguities in the copyright act.

6. The Thai government must also heighten attention to Internet piracy enforcement.

In recent years, the Internet has been used more often for the marketing of pirate product in Thailand. It appears that an increasing number of international pirate organizations are establishing a presence in Thailand through which orders taken over the Internet for pirate CDs, CD-ROMs and VCDs can be fulfilled. As Internet use grows in Thailand (there are now an estimated one million Internet users in the country), Internet piracy can also be expected to increase. Thai law and enforcement practices need to be adapted to this new environment.

Accordingly, it is past time for Thailand, which participated actively in the negotiations that led to the adoption of the World Intellectual Property Organization treaties (the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty), to move promptly to ratify and implement those treaties. By updating its copyright and neighboring rights laws for the digital age, Thailand would position itself as a leader within the ASEAN community in the adoption and implementation of modern intellectual property regimes.

On the enforcement level, Thai enforcement officials need better training to understand and to be able to deal with Internet-based piracy. Designating a specialized cybercrime and Internet piracy unit could facilitate the training process. Enforcement agencies should also intensify their efforts to combat the growing problem of pirate CD-Recordable compilations of unauthorized copies of musical recordings. The Thai government also should move, in cooperation with industry, to promote public awareness of the need to respect intellectual property rights in cyberspace. In particular, the Department of Intellectual Property should work with Internet Service Providers to develop best practices and regulations that will encourage ISPs to cooperate with copyright owners to detect and deal with infringements taking place online.

7. Because of the high levels of copyright piracy, as well as the need to improve legislation (especially regarding optical media and cable) in Thailand, U.S. copyright owners suffer grave economic harm.

Below is a chart detailing the estimated trade losses and piracy levels for the industries represented by the six petitioners, demonstrating as well the increase in losses and in piracy levels for most sectors. It is believed that the situation has worsened in 2001 giving rise to petitioners' decision to file this petition.

THAILAND: ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1995 – 2000

INDUSTRY	2000		1999		1998		1997		1996		1995	
	Loss	Level										
Motion Pictures	24.0	60%	21.0	55%	19.0	50%	19.0	50%	19.0	65%	29.0	65%
Sound Recordings / Musical Compositions	16.0	45%	6.0	40%	9.1	35%	15.0	40%	10.0	40%	5.0	13%
Entertainment Software ¹³	130.5	98%	116.3	95%	93.5	92%	86.4	85%	75.0	82%	73.3	80%
Books	33.0	NA	33.0	NA	28.0	NA	32.0	NA	32.0	NA	32.0	NA
TOTALS	203.5		176.3		149.6		152.4		136.0		139.3	

CONCLUSION

For the reasons stated in this submission, we request that the GSP Subcommittee initiate a review of the GSP country eligibility of Thailand for its failure to provide adequate and effective copyright protection for U.S. copyright owners. If requisite improvements are not made in Thailand to remedy these deficiencies in the near future, then petitioners request that the U.S. suspend its eligibility or withdraw GSP benefits of Thailand, in whole or in part.

Respectfully submitted,

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Association of American Publishers, Inc. (AAP)
AFMA
Interactive Digital Software Association (IDSA)
Motion Picture Association of America, Inc. (MPAA)
National Music Publishers' Association, Inc. (NMPA)
Recording Industry Association of America, Inc. (RIAA)

¹³ IDSA estimates for 2000 are preliminary.

APPENDIX A

Statutory Basis for the Country Eligibility Practice Review of the Intellectual Property Rights Practices of THAILAND under the Criteria of the Generalized System of Preferences (GSP) Program

The Generalized System of Preferences (GSP) program of the United States provides unilateral, non-reciprocal, preferential duty-free entry for over 4,650 articles from approximately 140 countries and territories designated beneficiary countries and territories for the purpose of aiding their economic development through preferential market access. The GSP program was instituted on January 1, 1976, and authorized under Title V of the Trade Act of 1974 (19 U.S.C. 2461 et seq.) for a 10-year period. Since 1997, an additional 1,770 items are eligible for GSP treatment for specified least developing beneficiary developing countries.

The GSP program has been renewed several times since its establishment. Most recently, in 1999 Congress reauthorized the GSP program through September 30, 2001.¹⁴ What was unique about this extension was that, for the first time in several years, Congress extended the GSP Program for more than a single year. Petitioners have supported a multi-year extension of this program to support the use of the GSP program as a tool to protect the interests of U.S. copyright owners around the world.

Provisions tying intellectual property protection to trade benefits were first added to the Trade and Tariff Act of 1984 [hereinafter "TTA 1984"]. Title V of the TTA 1984, known as the GSP Renewal Act of 1984,¹⁵ renewed the GSP Program and specifically required the President to consider intellectual property protection in determining whether to designate a developing country as eligible for GSP benefits. While there has been a minor change in the statutory language between the GSP Renewal Act of 1984 and the GSP Renewal Act of 1996, the GSP provisions as related to IPR remain essentially the same as in 1984. The legislative history of the 1984 Renewal Act is particularly instructive on the important link between GSP benefits and strong IPR protection.

The GSP Renewal Act of 1984

In the GSP Renewal Act of 1984, Congress specified conditions that GSP beneficiary countries must meet in order to gain and maintain their preferential trading status. In particular, one of these express conditions (which Congress also delineated as one "purpose" of the GSP Program) was to encourage developing countries "to provide effective means under which foreign nationals may secure, exercise, and enforce exclusive intellectual property rights."¹⁶

¹⁴ See Extension of Duty-Free Treatment under Generalized System of Preferences, Section 508 of the Ticket to Work and Work Incentives Improvement Act of 1999, Pub. L. No. 106-170 (codified at 19 U.S.C. 2465).

¹⁵ See the Generalized System of Preferences Renewal Act of 1984, Title V, Pub. L. No. 98-573 (1984) (codified at 19 U.S.C. 2461-2465).

¹⁶ See Section 501(b)(9)(B) of the GSP Renewal Act of 1984.

The legislation required the President to apply mandatory and discretionary criteria with respect to IPR protection as a condition to a country achieving “beneficiary” status under the GSP Program. The mandatory criterion prohibited the designation of a country from becoming a “beneficiary developing country” if, for example, “such country has nationalized, expropriated, or otherwise seized ownership or control of property, including patents, trademarks, or copyrights, owned by a United States citizen or by a corporation, partnership, or association which is 50 percent or more beneficially owned by United States citizens.” See Section 503(b)(4) of the GSP Renewal Act of 1984, now codified at 19 U.S.C. 2462(b)(2)(D).

The GSP Renewal Act of 1984 added as a discretionary criterion, in determining whether to designate a developing country as eligible to receive GSP duty-free trade treatment, that

the President shall take into account ... the extent to which [each] country is providing adequate and effective means under its laws for foreign nations to secure, to exercise, and to enforce exclusive rights in intellectual property, including patents, trademarks, and copyrights.

Section 503(c)(5) of the GSP Renewal Act of 1984, codified at 19 U.S.C. 2462(c)(5). The Senate Finance Committee Report explained that:

To determine whether a country provides “adequate and effective means,” the President should consider the extent of statutory protection for intellectual property (including the scope and duration of such protection), the remedies available to aggrieved parties, the willingness and ability of the government to enforce intellectual property rights on behalf of foreign nationals, the ability of foreign nationals effectively to enforce their intellectual property rights on their own behalf and whether the country’s system of law imposes formalities or similar requirements that, in practice, are an obstacle to meaningful protection.

S. Rep. No.98-485, 98th Cong., 2d Sess. At 11 (1984). The Senate Report also noted:

In delegating this discretionary authority to the President, it is the intent of the Committee that the President will vigorously exercise the authority to withdraw, to suspend or to limit GSP eligibility for non-complying countries

Where valid and reasonable complaints are raised by U.S. firms concerning a beneficiary country’s market access policy or protection of intellectual property rights, for example, it is expected that such interests will be given prominent attention by the President in deciding whether to modify duty-free treatment for that country.

Id. at 12-13 (emphasis added). The House Ways and Means Committee stated that “countries wishing to reap the benefits of preferential duty-free access to the U.S. market must fulfill international responsibilities” in the intellectual property area. House Rep. No. 98-1090, 98th Cong., 2d Sess. at 12 (1984).

The IPR criteria are a condition, not only for obtaining GSP benefits in the first place, but also for retaining them. The 1984 Act authorized the President to “withdraw, suspend, or limit the application of the duty-free treatment accorded under Section 501 of this title with respect to any article or any country” and requires the President, when taking any such action, to “consider the factors set forth in Sections 501 and 502(c).” TTA 1984 Section 505(a)(1); TA 1974 Section 504(a)(1), as amended; 19 U.S.C. 2464(a)(1) (emphasis added). The Act also created a system of “general reviews” to ensure that these statutory criteria are met. TTA 1984 Section 505(b); TA 1974 Section 504(c)(2)(A), as amended; 19 U.S.C. 2464(c)(2)(A); see also 15 C.F.R. 2007.3.

Petitioners request that this GSP Subcommittee follow the explicit intent of Congress, and advise the President to “vigorously exercise” his authority to withdraw, suspend or limit GSP eligibility of Thailand for its non-compliance with the statutory criterion on IPR in the GSP Program.

The GSP Renewal Act of 1996

When the GSP Program was reauthorized in August 1996, the language of the IPR discretionary criterion for GSP eligibility in Section 502(c)(5) was simplified slightly and now requires the President to “take into account the extent to which such country is providing adequate and effective protection of intellectual property rights.”¹⁷ The expired law specified (as discussed above) that each beneficiary country provide “adequate and effective means under its laws for foreign nationals to secure, to exercise and to enforce exclusive rights in intellectual property, including patents, trademarks, and copyrights.” Otherwise, the GSP Renewal Act contains identical IPR provisions, including “mandatory” criteria denying GSP status to countries that directly or indirectly expropriate U.S. property (including intellectual property), and authorizing the President to withdraw, suspend or limit GSP privileges based on failure to meet the IPR criteria.

¹⁷ GSP Renewal Act of 1996, Title I, Subtitle J, of the Small Business Job Protection Act of 1996, Pub. L. No. 104-188 (codified at 19 U.S.C. 2462(c)(5)).

APPENDIX B

Methodology Used to Estimate Trade Losses due to Copyright Piracy And Levels of Piracy

Estimated trade losses due to piracy are calculated by each association. Since it is impossible to gauge losses for every form of piracy, we believe that our reported estimates for 2001 actually underestimate the losses due to piracy experienced by the U.S. copyright-based industries.

Piracy levels are also estimated by each association and represent the share of a country's market that consists of pirate materials. Piracy levels together with losses provide a clearer picture of the piracy problem in different countries. Low levels of piracy are a good indication of the effectiveness of a country's copyright law and enforcement practices.

ENTERTAINMENT SOFTWARE

The Interactive Digital Software Association (IDSA) draws piracy rates from numerous estimates provided by member and non-member company representatives, distributors and enforcement personnel based on local market conditions. Separate estimates of piracy rate pertaining to console- and PC-based software are calculated, and then averaged into a single piracy rate based on the prevalence of each platform in the market.

Trade loss figures reported (in both the IIPA's February 2001 Special 301 Report and this GSP petition) are preliminary and are based only on partial data samples. These figures are likely to underestimate those to be reported upon completion of our review.

This year's dollar loss figures rely in part on estimates provided by member companies. These estimates are generated using proprietary methodologies that integrate market data of dedicated platform and PC entertainment software in both compact disc and cartridge formats and hardware shipments. These methodologies take into account market conditions including but not limited to the installed base of a given platform (console, PC-based, handheld, etc.) and actual distribution and sales figures.

Dollar loss figures also incorporate inferences from seizure statistics that result from border and other enforcement actions in the countries of production, export and import. These losses are attributed to the country of production where such is known. This aspect of the methodology relies on conservative estimates about the total number of piratical goods produced based on the numbers seized.

The methodology also assumes that piratical goods in the marketplace displace to some degree legitimate product sales. In these instances, displaced sales are multiplied by the wholesale price of legitimate articles rather than the retail price of the pirate goods.

MOTION PICTURES

Many factors affect the nature and effect of piracy in particular markets, including the level of development of various media in a particular market and the windows between release of a product into various media (theatrical, video, pay television, and free television). Piracy in one form can spill over and affect revenues in other media forms. Judgment based on in-depth knowledge of particular markets plays an important role in estimating losses country by country.

Video: As used in the document the term encompasses movies provided in video cassette as well as in all optical disc formats. Losses are estimated using one of the following methods:

1. For developed markets:
 - a. The number of stores that rent pirate videos and the number of shops and vendors that sell pirate videos are multiplied by the average number of pirate videos rented or sold per shop or vendor each year;
 - b. The resulting total number of pirate videos sold and rented each year in the country is then multiplied by the percent of those pirate videos that would have been sold or rented legitimately and adjusted to reflect the US producers' share of the market.
2. For partially developed markets:
 - a. The number of legitimate videos sold or rented in the country each year is subtracted from the estimated total number of videos sold or rented in the country annually to estimate the number of pirate videos sold or rented annually in the country;
 - b. The resulting total number of pirate videos sold and rented each year in the country is then multiplied by the percent of those pirate videos that would have been sold or rented legitimately and adjusted to reflect the US producers' share of the market.
3. For fully pirate markets:

The estimated number of pirate videos of U.S. motion pictures sold or rented in the country each year is adjusted to reflect the wholesale price of legitimate videos which equals losses due to video piracy.

TV, Cable and Satellite: Losses are estimated using the following method:

1. The number of TV and cable systems that transmit U.S. motion pictures without authorization is multiplied by the average number of U.S. motion pictures transmitted without authorization by each system each year;
2. The resulting total number of illegal transmissions is multiplied by the average number of viewers per transmission;
3. The number of viewers of these illegal transmissions is allocated among those who would have gone to a theatrical exhibition or who would have rented or purchased a legitimate video. The number of legitimate transmissions of the motion picture that would have been made is also estimated;
4. These figures are multiplied by the producers' share of the theatrical exhibition price, the wholesale share of the video cost or the license fee per legitimate transmission, as appropriate, to estimate the lost revenue from the illegal transmissions.

Public Performance: Losses are estimated using the following method:

1. The number of vehicles and hotels that exhibit videos without authorization is multiplied by the average number of viewers per illegal showing and the number of showings per year;
2. The resulting total number of viewers of unauthorized public performances is allocated among those who would have gone to a theatrical exhibition or who would have rented or purchased a legitimate video. The number of legitimate TV and cable transmissions that would have been made of the motion pictures is also estimated;
3. These figures are multiplied by the producers' share of the theatrical exhibition price, the wholesale share of the video cost or the license fee per legitimate TV, cable and satellite transmissions, as appropriate, to estimate the lost revenue from the illegal performances.

SOUND RECORDINGS AND MUSICAL COMPOSITIONS

RIAA generally bases its estimates on local surveys of the market conditions in each country. The numbers produced by the music industry generally reflect the value of sales of pirate product rather than industry losses, and therefore undervalue the real harm to the interests of record companies, music publishers, performers, musicians, songwriters and composers.

Where RIAA has sufficient information relating to known manufacture of pirate recordings that emanate from a third country, this loss data will be included in the loss number for the country of manufacture rather than the country of sale.

In certain instances where appropriate, RIAA employs economic data to project the likely import or sale of legitimate sound recordings, rather than merely reporting pirate sales. In these instances, projected unit displacement is multiplied by the wholesale price of legitimate articles in that market rather than the retail price of the pirate goods.

BOOKS

The book publishing industry relies on local representatives and consultants to determine losses. These experts base their estimates on the availability of pirate books, especially those found near educational institutions, book stores and outdoor book stalls. A limitation here is that experts can only gauge losses based on the pirated books that are sold; it is impossible to track losses for books which are pirated but not available for public purchase. The trade loss estimates are calculated at pirate prices which are generally (but not always) below the prices which would be charged for legitimate books. Also included are conservative estimates of losses due to unauthorized systematic photocopying of books.