



October 30, 2002

**BY ELECTRONIC MAIL ([FR0037@USTR.GOV](mailto:FR0037@USTR.GOV))**

Ms. Kira Alvarez  
Director for Intellectual Property  
Section 301 Committee  
Office of the U.S. Trade Representative  
600 17<sup>th</sup> Street, NW  
Washington, DC 20508  
Attn: Ms. Sybia Harrison  
Special Assistant to the Section 301 Committee

Re: Thailand: Request for public comments  
concerning identification of countries  
under Section 182 of the Trade Act of  
1974, 67 Fed. Reg. 63186 (October 10,  
2002)

To the Committee:

The Section 301 Committee published a notice requesting public comments concerning the identification of countries under Section 182 of the Trade Act of 1974. The Committee is seeking information regarding "Out-of-Cycle Reviews" (OCR) in the 2002 Special 301 annual review, and Thailand is included in this exercise. In February 2002, the International Intellectual Property Alliance (IIPA) submitted its annual Special 301 filing on Thailand, recommending that Thailand be placed on the Watch List with an Out-of-Cycle Review.<sup>1</sup> In agreeing with IIPA's recommendation, USTR had this to say about the situation in Thailand in its announcement on April 30, 2002 (in pertinent part):

[Thailand] has made incremental progress on IPR issues. Pirate optical media production, distribution and export is a significant and growing problem facing

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<sup>1</sup> The IIPA is a private sector coalition formed in 1984 to represent the U.S. copyright-based industries in bilateral and multilateral efforts to improve international protection of copyrighted materials. IIPA's February 15, 2002, IIPA recommended that Thailand be placed on the Watch List with and Out-of-Cycle Review. That submission, and the Thailand country report, are posted on the IIPA's website ([www.iipa.com](http://www.iipa.com)), specifically at <http://www.iipa.com/pdf/2002SPEC301INTROLTR.pdf> and <http://www.iipa.com/rbc/2002/2002SPEC301THAILAND.pdf>, respectively.

U.S. copyright industries. Industry estimates a 300 percent increase in pirate optical disk plants operating in Thailand from 1999. Industry asserts that Thailand has become a primary destination for criminal organizations seeking new bases of operation as controls on illicit wares tighten around the region. Further complicating the protection of IPR in Thailand is the fact that end-user piracy of business software is endemic, perhaps as high as 76 percent, according to industry estimates. Thailand's Central Intellectual Property Court remains a bright spot in the country's efforts to safeguard IPR. The Court's overall effectiveness, however, is hampered by judicial delays, limited resources, and a lack of deterrent sentencing. Key high level Thai Government officials have recently demonstrated a troubling lack of support for the officers of the court and especially the relevant law enforcement agencies. . . . [The] significant and growing problems of optical media production and end-user piracy of business software remain largely unaddressed. For these reasons, the United States will re-evaluate Thailand's IPR situation during an out-of-cycle Review to be conducted in the Fall. The OCR will focus on Thailand's progress in passing and implementing a satisfactory optical media bill . . . and most importantly, in launching a sustained enforcement drive against trademark counterfeiting and copyright piracy, including optical media and illegal end use of business software. The U.S. Government recognizes the important role played by law enforcement officials in this process, and encourages Thailand to provide enforcement authorities the resources and political backing necessary to ensure the successful implementation of a long-term aggressive enforcement policy.

Since IIPA's report and USTR's announcement, the Business Software Alliance has received good cooperation from the Thai government in its education and marketing campaigns and on enforcement against unauthorized use of business software in a commercial setting, so-called 'end-user piracy' of business software, for which the Thai government should be commended.

### **IIPA Recommendation for Thailand: Elevation to the Priority Watch List**

IIPA recommends that Thailand be elevated to the Priority Watch List as a result of this Out-of-Cycle Review. The chief reasons for this recommended change are:

- **Failure to Pass and Implement an Effective Law to Curtail Optical Disc Piracy.** In early 2002, a draft optical disc law was reportedly under consideration by the State Council of Ministers. The Juridical Council has reportedly been instrumental in re-drafting the proposal, stating that it was too strong and could be unconstitutional. This intervention has resulted in a much weaker proposal (which we have not seen at the time of this filing). Furthermore, there is little prospect that even the weakened proposal will become law soon.<sup>2</sup> We note that

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<sup>2</sup> IIPA notes reports of a Ministerial Regulation regarding the approval of the importation of equipment potentially to be used to infringe copyright. This Regulation that was promulgated by the Minister of Commerce, was published

even if a proposal emerges from the Cabinet, there exist pressure groups in the National Assembly who remain opposed to passage of a law to effectively eradicate optical disc piracy.

- **Failure to Pass Copyright Law Amendments.** In early 2002, the Thai government indicated that it was likely to embark on amendments to the copyright law, importantly including amendments intended to comply with the WIPO “Internet” treaties, the WCT and WPPT. On March 4, 2002, the Thai government convened a “public consultation” on proposed amendments to the copyright law, including the Intellectual Property & International Trade Court, copyright owners (local and foreign), academics and members of the Intellectual Property Association of Thailand (IPAT). Subsequent to this consultation, the Department of Intellectual Property (DIP) reportedly prepared minor draft copyright amendments (which IIPA has not seen), and thereafter the Juridical Council prepared a more comprehensive draft based on the DIP draft. Public consultations were reportedly scheduled for late 2002, but have not to our knowledge materialized. While these reported developments are positive, the process has been less than transparent, and we look forward to the opportunity to provide input from the perspective of the copyright community on this important legislation.
- **Failure to Make Sufficient Progress in Combating Optical Disc Piracy and Other Forms of Copyright Piracy.** In IIPA’s 2002 Special 301 report, we highlighted several steps for which progress should be measured in conducting an Out-of-Cycle Review regarding Thailand. Unfortunately, we have not seen the political will demonstrated from the top levels of the Thai government, nor have we seen the enforcement results to back it up. As a result, piracy at all levels – manufacturing, distribution, wholesale, retail outlets – has worsened, and while the number of potential raid targets has increased, the number of targets successfully raided has decreased.<sup>3</sup> We have not seen “a directive from the Prime Minister to all relevant IPR enforcement agencies to prioritize IPR enforcement in Thailand.”<sup>4</sup> The establishment of 12 specialized enforcement task forces in July 2001 was hopeful, but these task forces have remained dormant since the Cabinet was reshuffled in February 2002, which set back enforcement efforts in Thailand for several months. IIPA called for the Thai government to conduct “proactive raiding and prosecutions against optical media factories” and to successfully raid “at least 200 large-scale distributors or warehouses, and retail infringers, per

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on January 17, 2002, and came into force on March 17, 2002. This Regulation appears to be a positive development, and could potentially be used as a stop-gap means to control the importation of optical disc production equipment; however, we have not heard since that it is being employed in this way.

<sup>3</sup> For example, the motion picture industry reports that sales in 2001 were off by a whopping 24% over the previous year, and reports that for the first three quarters, the piracy situation in Thailand has worsened further.

The publishing industry continues to suffer from blatant photocopying of textbooks, including at Chulalongkorn University, the most prestigious university in Thailand, and from print piracy of entire textbooks. As interest in English-language textbooks grows in Thailand, these problems have become ever more serious.

<sup>4</sup> In August 2002, at a public gathering, Prime Minister Thaksin mentioned to the public that the government had the policy to combat piracy from time to time, but this did not amount to a directive to IPR agencies to prioritize copyright enforcement in Thailand.

month.” Unfortunately, raiding and seizures are down significantly since 2001.<sup>5</sup> One industry reports that *ex officio* raids have ceased, since enforcement officials will no longer raid based on probable cause, but state they must wait for search warrants to be issued by the courts, causing delays and loss of evidence.<sup>6</sup> Thailand’s Central Intellectual Property Court remains a bright spot in the country’s efforts to protect copyright, but the Court’s overall effectiveness is hampered by judicial delays, limited resources, and non-deterrent sentencing. Meanwhile, Thailand has seen exponential growth in its capacity for production of optical media (CDs and other media that can be read by an optical device such as a laser), and is nearing production levels not seen except in places like China, Taiwan and Hong Kong in terms of high concentration of CD plants. Pirated optical media (including VCDs and DVDs) also continues to be imported into Thailand. Domestic piracy rates remain high for all industry sectors, for example, over 90% of all entertainment software is pirated. Retail piracy has been a growing phenomenon in Thailand, for example, in the in Klong Tom area alone, where there are now more than 200 stalls, up from 90 in 2001. The government has failed to tackle retail piracy by providing greater resources to the police and training to prosecutors and judges.

- **Dissolution of the Economic Crimes Investigation Division, and Resulting Uncertainty.** IIPA had become increasingly concerned about the return of rampant retail piracy to outlets and malls, including notorious pirate locations such as Pantip Plaza. While Gen. Pol. Noppadol Soomboonsupt had successfully weeded out piracy from many markets before the February 2002 Cabinet reshuffling of the year, by mid-2002, most of the piratical activities had returned full-force. In October 2002, in what IIPA hopes will be a positive development, the Cabinet was reshuffled again, with Mr. Purachai Piemsoomboon being named as Minister of Justice, and with the establishment of a new unit called “Department of Special Investigation” (also called “FBI-Thai”), responsible for special crimes as well as economic crimes, including intellectual property infringement. Gen. Noppadol will reportedly head this new Department. In the process, the Economic Crimes Investigation Division has been dissolved. It appears that the reshuffling of the Cabinet, with the reinstatement of General Noppadol to head the new “FBI-Thai,” will be a positive development for copyright enforcement, since the new Department will be entitled to resources and manpower necessary to carry out effective anti-piracy activities. Nonetheless, the reshuffle has left a lot of uncertainty, and it is too early to tell whether the new unit will be effective in eradicating piracy in Thailand.

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<sup>5</sup> For example, the recording industry reports that, whereas there were 1,567 raids in 2001, yielding almost that many arrests, and seizures of over 200,000 items, in the first nine months of 2002, only 365 raids were carried out, resulting in less than 50,000 items seized. As of September 2002, the motion picture industry had been involved in raids on three pirate DVD factories and one pirate VCD factory, and since the emergence of the optical media piracy problem in Thailand, the industry reports being involved in raids against 53 pirate factories. One positive development is that reportedly the police have finally agreed to consider removing seized equipment rather than leaving it sealed at the facility raided, and in 2002, the police have removed two replication lines and equipment from the two DVD factory raids.

<sup>6</sup> For example, the recording industry reports that since January 2002, only seven optical disc factories and four warehouses were raided, while only 40 retail raids are being carried out per month, a decrease compared to 2001.

## **Description of the Copyright Piracy and Enforcement Situation in Thailand**

For a description of the copyright piracy and enforcement situation in Thailand, we refer to our 2002 Special 301 report on Thailand, which is attached as an appendix to this letter and which can be found at <http://www.iipa.com/rbc/2002/2002SPEC301THAILAND.pdf>.

As noted above, the Business Software Alliance reports good results in fighting end-user piracy of business software, a form of piracy unique to the copyright industries, the solutions for which are somewhat *sui generis*. BSA has received good support of the enforcement authorities throughout 2002 in conducting end user raids against corporate end-user piracy. Specifically, the Economic Crimes Investigative Division (ECID), prior to its dissolution in October 2002, had been very helpful to BSA in conducting raids in 2002 against pirated and unlicensed software. For example, the ECID section and the police supported BSA by raiding an Internet pirate in Bangkok, possessing the necessary expertise to collect the forensic evidence from the computers seized during the raid.<sup>7</sup>

The positive progress in fighting business software piracy stands in sharp contrast to the dismal record in other areas, most notably, optical disc piracy, but demonstrates that when the Thai government makes a decision to combat piracy, it can be successful. We hope this political will can be extended to the fight against other forms of piracy and lead to actual deterrent results in the coming months.

## **Recommended Action Steps on Copyright Enforcement**

There are several initial action items that the government of Thailand must take to curtail piracy and to demonstrate that it is committed to a modern copyright regime. Here is an illustrative (non-exhaustive) list of several particularly key actions:

- **Passage and Date Certain for Implementation of an Effective Law to Curtail Optical Disc Piracy**
- **Passage of Copyright Law Amendments that Fully Implement the WIPO Treaties.**
- **Issuance of a Directive by the Prime Minister to All Relevant IPR Enforcement Agencies to Prioritize IPR Enforcement in Thailand**
- **Maintain Task Forces Established in August 2001 and Ensure that New Department of Special Investigation (DSI) Under Ministry of Justice Receives Adequate Resources and Manpower to Effectively Reduce or Eradicate Piracy in Thailand**

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<sup>7</sup> By contrast, BSA reports that industry is left on its own to initiate such raids, taxing its expertise, resources and manpower to deal with institutional end-user piracy. Additionally, a significant contributing factor to continuing institutional piracy is the lack of deterrent sentencing.

- **More Raids Against Optical Disc Plants (Preferably Under a New Optical Disc Law**
- **Successful Raiding of At Least 200 Large-Scale Distributors or Warehouses, and Retail Infringers, Per Month**

The first chart below is our compilation of copyright anti-piracy actions taken during the First Three Quarters of 2002 in Thailand, as reported by IIPA member associations.

**THAILAND COPYRIGHT ENFORCEMENT STATISTICS THROUGH Q3 2002**

<b>CRIMINAL</b>		
<b>ACTIONS</b>	<b>MOTION PICTURES</b>	<b>SOUND RECORDINGS</b>
Number of raids conducted	261	365*
Number of cases commenced	66	161*
Number of defendants convicted (including guilty pleas)	66	30**
Acquittals and dismissals	-	02**
Number of cases Pending	2	3**
Total number of cases resulting in jail time	66	25**
Suspended prison terms		
Maximum 6 months	39	20**
Over 6 months	20	05**
Over 1 year	6	00**
Total suspended prison terms	65	25**
Prison terms served (not suspended)		
Maximum 6 months	1	00**
Over 6 months	-	00**
Over 1 year	-	00**
Total prison terms served (not suspended)	1	00**
Number of cases resulting in criminal fines		
Up to \$1,000	-	12**
\$1,000 to \$5,000	-	13**
Over \$5,000	-	01**
Total amount of fines levied (in US\$)	-	56,590.51**
Pirate copies seized	281,078	48,766*
Other materials seized (itemized)	136,940	

- \* Raid statistics for the year 2002
- \*\* Statistics from verdicts arising from actions taken prior to 2002
- \*\*\* Acquittals and dismissals also include cases compromised, cases with no infringers.

The chart below reflects the industries' 6-year tally of estimated piracy losses and levels, and includes final 2001 statistics on business software.<sup>8</sup>

<sup>8</sup> The methodology used by the IIPA member associations to calculate these estimated piracy levels and losses in Thailand is the same as that reported in our 2002 Special 301 submission, and is available on the IIPA website ([www.iipa.com](http://www.iipa.com)) specifically at <http://www.iipa.com/pdf/2002SPEC301METHODOLOGY.pdf>.


**THAILAND: ESTIMATED TRADE LOSSES DUE TO PIRACY**  
*(in millions of U.S. dollars)*  
**and LEVELS OF PIRACY: 1996 – 2001**

INDUSTRY	2001		2000		1999		1998		1997		1996	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	24.0	65%	24.0	60%	21.0	55%	19.0	50%	19.0	50%	19.0	65%
Sound Recordings / Musical Compositions <sup>9</sup>	16.6	45%	15.6	45%	6.0	40%	9.1	35%	15.0	40%	10.0	40%
Business Software Applications <sup>10</sup>	32.6	77%	42.7	79%	66.5	81%	39.4	82%	75.5	84%	153.8	82%
Entertainment Software <sup>11</sup>	29.1	93%	130.5	98%	116.3	95%	93.5	92%	86.4	85%	75.0	82%
Books	28.0	NA	33.0	NA	33.0	NA	28.0	NA	32.0	NA	32.0	NA
<b>TOTALS<sup>12</sup></b>	<b>130.3</b>		<b>245.8</b>		<b>242.8</b>		<b>189.0</b>		<b>227.9</b>		<b>289.8</b>	

**Conclusion**

IIPA appreciates this opportunity to comment on the Special 301 out-of-cycle review of Thailand.

Respectfully submitted,



Eric H. Smith  
 President, International Intellectual Property Alliance

<sup>9</sup> In IIPA's February 2001 Special 301 submission, the recording industry's loss figure was \$16.0 million, but this was adjusted later to \$15.6 million.

<sup>10</sup> In IIPA's February 2002 Special 301 submission, BSA's loss and level figures for Thailand of \$38.6 million and 76%, respectively, were reported as preliminary. These figures were finalized in mid-2002 as reflected above.

<sup>11</sup> IDSA's loss number for 2001 does not include production for export but only in-country consumption of pirated entertainment software. The loss number for 2000 included both production for export as well as in-country consumption of pirated entertainment software.

<sup>12</sup> In IIPA's 2002 Special 301 submission, IIPA estimated that total losses to the U.S. copyright-based industries in Thailand were \$136.3 million in 2001. Because of the adjustment to reflect BSA's final 2001 statistics (*see* footnote 11), the estimated total losses to the U.S. copyright-based industries in Thailand in 2001 are adjusted to \$130.3 million.

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2002 SPECIAL 301 REPORT

# THAILAND

### EXECUTIVE SUMMARY<sup>1</sup>

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IIPA recommends that Thailand remain on the Watch List, and that an out-of-cycle review be conducted later this year to determine the government's progress on:

- passage and date certain for implementation of an effective optical media law;
- a directive from the Prime Minister to all relevant IPR enforcement agencies to prioritize IPR enforcement in Thailand;
- maintenance of the 12 Special Task Forces Established in August 2001 for IPR Enforcement;
- continuing to conduct proactive raiding and prosecutions against optical media factories; and
- successful raiding of at least 200 large-scale distributors or warehouses, and retail infringers, per month.

Thailand has seen exponential growth in its capacity for production of optical media (CDs and other media that can be read by an optical device such as a laser), and is nearing levels not seen except in places like China, Taiwan and Hong Kong in terms of high concentration of CD plants.<sup>2</sup> In addition to escalating optical media piracy, which decimates the domestic markets and provides pirated product for export, pirated optical media (including VCDs and DVDs) continues to be imported into Thailand. Domestic piracy rates remain high for all industry sectors, for example, 76% of all applications software in Thailand is pirated, giving Thailand the fifth highest piracy rate in the Asia-Pacific region for that sector.<sup>3</sup> Unauthorized use of software applications in business settings (so called "end-user" software piracy) runs rampant in Thailand, with little government assistance in addressing the problem. Piracy in Thailand is also linked with foreign criminal organizations in Asia.

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<sup>1</sup> For more details on Thailand's Special 301 history, see IIPA's "History" Appendix to this filing.

<sup>2</sup> Cf. George Ripley, *Bleak House: Thailand's Faltering CD Industry*, Oto-Online, at <http://www.oto-online.com/mar01/thai.html> ("[d]uring the South East Asian Economic Miracle, Thailand was one of the region's leaders for optical disc technology. Today paints a different picture, with piracy ripping the guts out of Thailand's CD industry. Despite concerted government action, falling revenues are now driving content holders to consider the alternatives.")

<sup>3</sup> Even weeks before the launch date of the operating system Windows XP in Thailand, pirate copies were being sold in the thousands at Bangkok's Pantip Plaza and elsewhere, for as little as US\$2.70, as the vendors had found ways to circumvent the new security features. *Thai Pirates Crack Microsoft's New Windows System*, New York Times Online, [www.nytimes.com](http://www.nytimes.com), November 12, 2001.



While the enforcement authorities in Thailand generally have been responsive in facing the challenge of fighting retail piracy, and have cooperated well in acting against small-time pirates, these efforts fall short of what is required to lower piracy to acceptable levels. There were even some raids and cases brought in 2001 against some of the most egregious pirate optical media plants. In addition, the specialized Intellectual Property and International Trade Court continues to mete out convictions, and 2001 saw the first case of a defendant serving time in jail for copyright piracy in Thailand. Unfortunately, piracy rates have not decreased significantly, and Thailand's production of pirate optical media has increased.

In 2002, IIPA looks to the government of Thailand to develop an integrated National Plan that will go toward allocating resources and taking decisive action to improve the piracy situation in Thailand. The government must take decisive steps immediately to tackle devastating optical media piracy. Passage of the draft optical media law, with minor changes necessary to make it world-class legislation, should proceed quickly, followed by swift implementation. Establishment of a specialized IPR investigation unit (directly under the control of the Prime Minister or other designated Minister) or the promotion of the Copyright Unit in the Economic Crimes Investigation Division (ECID) to a department (which would give it greater manpower to raid sources of production of piracy, including *ex officio* raids, as well as catching and bringing to justice the kingpins of the pirate trade), will be crucial to the government's success. Customs must work to locate and identify optical disc or other production factory owners and machinery used for producing infringing materials. The Department of Revenue should investigate the financial status of each entity investigated and determine, for example, the taxes paid by those identified producers. A sustained public relations campaign should be waged, declaring a war on piracy, and explaining how buying pirated products helps criminals and hurts Thailand. The Department of Education should take a lead in sending a strong message that the use of pirated copyrighted goods (including pirated software) in educational institutions is wrong.

Thailand enjoys benefits under the Generalized System of Preferences (GSP) program, a U.S. trade program which affords duty-free entry to many of a country's imported goods, subject to the requirement that it provide "adequate and effective" copyright protection. In June 2001, six copyright-based 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) – submitted a request that the eligibility of Thailand as a GSP beneficiary country be reviewed, and that its benefits be suspended or withdrawn if Thailand fails to remedy the deficiencies which adversely affect U.S. copyright owners.<sup>4</sup>

Estimated trade losses due to piracy in Thailand were more than \$136.3 million in 2001.

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<sup>4</sup> Those deficiencies include: the growing optical media piracy problem in Thailand; the lack of effective optical media legislation and cable regulatory controls/broadcast legislation; the failure to aggressively pursue criminal prosecutions in the copyright area; the failure to impose more deterrent sentencing by the courts; and the failure to pay adequate attention to Internet piracy trends in Thailand.

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<b>TOTALS<sup>8</sup></b>	<b>136.3</b>		<b>245.8</b>		<b>242.8</b>		<b>189.0</b>		<b>227.9</b>		<b>289.8</b>	

## COPYRIGHT PIRACY IN THAILAND

### Optical Media Pirate Production for Domestic Consumption and Export Has Rapidly Proliferated in 2001

The most serious piracy problem in Thailand today, and the one that most seriously afflicts the copyright industries, 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-ROMs, which are used to carry entertainment and videogame products, audiovisual works, recorded music and literary material. The number of plants and production lines has rapidly proliferated in 2001. For example, where there was only one DVD plant as of April 2000, there were as of April 2001 at least nine known DVD production facilities. Regarding overall optical media operations, industry sources indicate that there are at least 100 known plants in operation, with well over 200 optical media production lines (both manufacturing lines and mastering machines), with an annual capacity of over 1 billion

<sup>5</sup> In IIPA's February 2001 Special 301 submission, the recording industry's loss figure was \$16.0 million, but this was adjusted later to \$15.6 million.

<sup>6</sup> BSA loss numbers for 2001 are preliminary. In IIPA's February 2001 Special 301 submission, BSA's 2000 loss figure of \$47.0 million and levels figure of 78% were also reported as preliminary. These numbers were finalized in mid-2001, and are reflected above.

<sup>7</sup> IDSA's loss number for 2001 does not include production for export but only in-country consumption of pirated entertainment software. The loss number for 2000 included both production for export as well as in-country consumption of pirated entertainment software.

<sup>8</sup> In IIPA's 2001 Special 301 submission, IIPA estimated that total losses to the U.S. copyright-based industries in Thailand were \$250.5 million in 2000. Because of the adjustment to reflect BSA's final 2000 statistics (see footnote 6), and because of the adjustment to the recording industry's loss estimates (see footnote 5), the estimated total losses to the U.S. copyright-based industries in Thailand in 2000 are adjusted to \$245.8 million.

discs per year.<sup>9</sup> Meanwhile, the legitimate domestic demand is only an estimated 60 million units per year.<sup>10</sup> 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.

It is obvious that Thai pirate production, besides completely dominating the domestic market, also now fuels a thriving export trade. For example, in 2001, the recording industry reports that Italian customs authorities seized 66,000 pirated music discs originated from Thailand. Another 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.<sup>11</sup> 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 rapid growth of optical media production capacity in Thailand (including the surge in DVD capability) indicates that Thailand is becoming a major center of optical media production and distribution in the Asia-Pacific region. In fact, it is becoming increasingly clear that foreign criminal organizations are targeting Thailand as the next hub of pirate optical media production for export. Foreign investment from known pirate groups is well documented, including investment from Taiwan, Macau, Hong Kong, China and Malaysia. It is an inescapable conclusion that Thailand has been targeted for major investment by foreign pirate syndicates and that they intend to develop this market as a priority project in 2002. Initially financed from abroad, these 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.<sup>12</sup>

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<sup>9</sup> In addition to the over 100 known plants today are "underground" plants," including at least two to three plants set up on the border of Thailand and Myanmar, one on the border of Thailand and Cambodia, and one on the border of Thailand and Laos, as well as two plants in Haad-Yai, one in Phuket, and some 15 others hiding in the industrial areas, on the outskirts of Bangkok and neighboring provinces, like Nakorn Pratom, Samut-Prakarn, Patumthani, Nonthaburi, Cha-seang-sao, and Samut-Songkram. Industry has recently learned that 80 optical disc "quality control systems" have been purchased recently in Thailand. Usually, one plant will own one quality control system. Capacity is calculated by some basic assumptions, including that a plant only operates 26 days each month, with the aggregate production capacity being 500,000 discs per month.

<sup>10</sup> In 1998, by contrast, there were about 10 optical media plants in Thailand with 15 - 20 manufacturing machines with a capacity of 40 million discs per year. In 1999, there were 20 plants with 30 - 40 machines, capable of producing 80 - 120 million discs per year. In 2000, there were approximately 50 plants with 100 replicating machines, capable of producing nearly 200 - 300 million discs per year (legitimate consumption and export in Thailand ran at 15 - 20 million discs per year).

<sup>11</sup> *PS Software Seizure*, Game Week, April 3, 2001.

<sup>12</sup> The criminal organizations increasingly rely on children and students as retailers, since persons under 15, according to the law, cannot be investigated unless both a police officer and a public prosecutor participate. Some have even opined that while in the process of investigation of a juvenile, there must be a video recording of the whole process, an extra burden that makes these investigations almost impossible to carry out. More recently, regular office personnel engage in the distribution of pirated copies to their co-workers in the workplace.

## Retail (and Other) Piracy Decimates the Domestic Market in Thailand

Piracy in all forms decimates the domestic market in Thailand. Most of the sales spots are well-known to authorities, and despite constant raiding, continue operations, such as in Mahboonkrong, Tawanna, Pantip Plaza, Klontom, Banmore, Nondhaburi Pier, Tawanna, Bang-kapi and Klontom. The following are some examples of the cornucopia of pirated goods/services available in Thailand:

- **Pirate Optical Media.** Pirate DVDs now make up 40% of the available pirate movie product in Thailand, and heavy enforcement of VCD source piracy in 2001 did little to affect the movement of DVD into the country.<sup>13</sup> The motion picture industry also estimates that 70% of the video CDs (VCDs) within the Thai market are pirate.<sup>14</sup> Such piracy destroys the theatrical market in Thailand, since DVDs and VCDs of films that have not yet been released in Thai cinemas are readily available. The going price for pirate VCDs and DVDs is about US\$2-3 and US\$4-10, respectively. Pirate market share for recorded music in optical media formats also continued to fill an estimated 45% of the total market for 2001. Where pirated CDs were once sold only in inner-city areas in Bangkok, in 2001, vendors of such goods appeared in outlying areas such as Sri Nakharin Road, Rangsit and Bang Khae. Infringing music discs also appeared in traditional markets upcountry such as Phitsanulok, Sukhothai, Chiang Mai, Chiang Rai, Buri Ram and Surin. In 2001, many traders whose businesses had failed due to the economic downturn switched to selling pirated CDs. Piracy of music has also become an increasingly organized business. For the entertainment software industry, 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. One positive development is that reportedly the vendors in Mahboonkrong who used to sell copied PlayStation® and Sega Dreamcast® games have stopped dealing in this contraband.
- **Analog Piracy.** Pirate videocassette and audiocassette formats can also 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 (as well as optical disc formats) in night markets, selling from catalogs and photo spreads and keeping their inventory in a separate location to frustrate enforcement efforts.<sup>15</sup>

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<sup>13</sup> There has been a recent growth in the number and titles of DVDs available in the local market. Of the 112 sample retail outlets visited recently, all carried pirate discs, and approximately 40% of the total number of discs available were pirate DVDs. The current title array of high quality DVDs found elsewhere in the region (Malaysia and Thailand) are available in Bangkok.

<sup>14</sup> The damage to the theatrical market is further increased by the fact that 90% of pirate VCDs now have a soundtrack in the Thai language.

<sup>15</sup> 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. 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.

- **Corporate End-User Piracy.** Institutional end-user piracy, in which companies or other institutions make multiple unauthorized copies of business software for their internal operations, also occurs at unacceptably high levels in Thailand. Many small and medium-sized businesses, as well as the vast majority of educational institutions, use pirated software or software without licenses.
- **Internet Piracy.** 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 websites that take orders for pirate CDs, CD-ROMs and VCDs. The problem of sales of illegally copied games on CD-ROM through websites based in Thailand is on the increase. Gamers and “hackers” are increasingly putting together websites offering free downloads of newly released games. As Internet usage grows in Thailand (there are now 15 Internet service providers and an estimated one million Internet users in Thailand), Internet piracy will increase. The recording industry reports that the number of infringing sites containing unauthorized MP3 files is still smaller than those in some neighboring countries, but is on the increase. Nine cease-and-desist letters were sent out in 2001, with positive responses received for only two letters.
- **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 45%, a sharp increase over 2000 (35%).
- **Public Performance Piracy.** Unauthorized public performances of motion pictures remains unchecked, as, for example, hotels outside Bangkok still transmit unauthorized videos over in-house movie systems. Most bars in tourist areas openly exhibit videos without authorization. A growing number of bars and restaurants have also added “private” rooms to illegally screen MPA member company product. Half of all public performances of major motion pictures in Thailand are now unauthorized, a sharp increase over 2000 levels (35%).

# COPYRIGHT ENFORCEMENT IN THAILAND

## CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS FOR 2000

ACTIONS	BUSINESS APPLICATIONS SOFTWARE	SOUND RECORDINGS <sup>16</sup>
Number of Raids conducted	52	479
Number of cases commenced <sup>17</sup>	50	280
Number of defendants convicted (including guilty pleas)	49	280
Acquittals and Dismissals	1	199
Number of Cases Pending <sup>18</sup>	19	210
Total number of cases resulting in jail time	31	35
Suspended Prison Terms		
Maximum 6 months	-	32
Over 6 months	3	1
Over 1 year	28	1
Total Suspended Prison Terms	31	34
Prison Terms Served (not suspended)		
Maximum 6 months	-	1
Over 6 months	-	-
Over 1 year	-	-
Total Prison Terms Served (not suspended)	-	1
Number of cases resulting in criminal fines	31	35
Up to \$1,000	3	24
\$1,000 to \$5,000	27	9
Over \$5,000	1	2
Total amount of fines levied <sup>19</sup>	\$119,086 (Bt 5,358,900)	-

<sup>16</sup> These statistics are estimates only, as the data was gathered from manual searches of court files.

<sup>17</sup> This figure includes 10 cases in which the alleged offenders fled the scene of the raid. These 10 cases may be dropped at a later time if the alleged offenders are not located.

<sup>18</sup> This figure does not include cases that have been sent on for appeal.

<sup>19</sup> This figure reflects all fines levied by the court against the defendants in these cases. These fines include those for both Copyright Act infringement as well as all other offences.

## CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS FOR 2001

ACTIONS	BUSINESS APPLICATIONS SOFTWARE	SOUND RECORDINGS
Number of Raids conducted	16	1,549
Number of cases commenced <sup>20</sup>	16	668
Number of defendants convicted (including guilty pleas)	13	1,410
Acquittals and Dismissals	-	881
Number of Cases Pending	5	-
Total number of cases resulting in jail time	11	55
Suspended Prison Terms		
Maximum 6 months	-	47
Over 6 months	-	-
Over 1 year	11	6
Total Suspended Prison Terms	11	53
Prison Terms Served (not suspended)		
Maximum 6 months	-	2
Over 6 months	-	-
Over 1 year	-	-
Total Prison Terms Served (not suspended)	-	2
Number of cases resulting in criminal fines	11	55
Up to \$1,000	-	29
\$1,000 to \$5,000	11	25
Over \$5,000	-	1
Total amount of fines levied	\$48,166 (Bt 2,167,500)	-

### Strong Response to the Challenge of Optical Media Piracy

The continued astronomical 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 one of the more aggressive enforcement efforts seen in any country in the region. Notwithstanding those vigilant enforcement efforts, lowering piracy levels have not resulted, since the magnitude of the problem has grown at a disproportional rate to the level of enforcement activity, and since powerful criminal forces have hindered effective enforcement.<sup>21</sup>

<sup>20</sup> This figure includes four cases in which the alleged offenders fled scene of the raid. These four cases may be dropped at a later time if the alleged offenders are not located.

<sup>21</sup> Several anecdotes indicate the difficulty of the Thai authorities' task, while demonstrating the seriousness of their efforts to tackle piracy in Thailand. IIPA learned in July 2001 that a Thai national was sentenced to a period of one year and 15 days in prison in relation to a warehouse case (involving the seizure of 150,605 VCDs); unlike many other cases, the sentence in this case was not suspended by the court, and the defendant is serving time in prison. This sentence is a positive sign of increasingly deterrent penalties. In another recent case, on October 30, 2001, the Royal Thai Police (with assistance from motion picture industry representatives) raided a clandestine illegal optical disc factory operating out of a house in Nondhaburi province (approximately 15 miles from Bangkok), seizing a DVD line used to make pirate DVDs of recent U.S. film titles. This marked the first seizure of an illegal DVD line in Thailand. During the raid, police found a secret door leading to a tunnel that connected the illegal factory to the kitchen of a nearby house. Police discovered that a rail inside the one-meter-wide tunnel was used to carry the printed optical discs from the factory to the house for packaging and distribution. Police arrested five persons, including one who was hiding inside the tunnel. The sheer number of plants and amount of pirated product being produced in Thailand, and the sophistication of the pirates' operations, present enormous challenges to Thai authorities over the coming months.

The Thai authorities have responded with some actions against optical media piracy in 2001, conducting successful raids against 17 separate factories (including six VCD factories) between January and July 2001.<sup>22</sup> Only four optical media plants were raided during the whole year to address music piracy. Numerous raids planned by the record industry against CD plants were compromised due to information leaks, normally after a search warrant had been issued. However, even the level of raiding contemplated before the leaks is nowhere near enough to have a deterrent effect. 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 of optical media pirate production. Tougher and more consistent sentencing of individuals involved in optical media piracy, including major distributors and exporters as well as manufacturers, will also be required. That the pirate optical media problem in Thailand has grown so rapidly in the face of such unprecedented levels of enforcement, prosecution and sentencing demonstrates the enormous profits to be made in the piracy business, and the tenacity of the criminal syndicates determined to reap those profits.

## **Raiding Reaps Seizures, But Few Cases Achieve Deterrent Results**

Raiding on other establishments dealing in piracy, mainly pirate retailers, has also reaped huge seizures and led to many criminal prosecutions in 2001. For example, the motion picture industry reports that from July 2000 to October 2001, 1,078 raids were run involving 1,000 individual offenders, resulting in the seizure of 336,584 pieces.<sup>23</sup> Over 626 cases arose from those raids, leading to hundreds of convictions for copyright piracy. In a recent public demonstration, Thai authorities on December 18, 2001, steamrolled 303,231 units (worth Bt 90 million, or approximately US\$2 million) of pirated VCDs and other pirated products.<sup>24</sup>

The situation has been less promising with respect to retail business software (applications) piracy. For example, the business software industry conducted 16 raids with police at Pantip Plaza between October and December 2001, seizing close to 12,000 pirated discs. However, these and other raids carried out in 2001 have had only a negligible impact on reducing the number of outlets engaging in software piracy, due to lenient sentencing (with suspended prison sentences and low, nondeterrent fines) and increasingly cunning nature of the pirates.<sup>25</sup> Of the approximately 30 cases

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<sup>22</sup> In 2000, there were 16 optical disc factory raids with 846,639 pirated discs seized. In the first quarter of 2001 there was a marked reduction in seizures, with only 99,874 pirate discs seized. As of September 2001, MPA has been involved in raids on 10 pirate factories.

<sup>23</sup> Other industries report fairly consistent numbers. For example, the recording industry reports an average of 156 raids per month against sound recording piracy in the first half of 2001 (mainly at the retail level), with the number of raids dropping off precipitously in the last quarter of 2001 (with as few as 66 raids in November 2001). Government statistics from the Department of Intellectual Property (DIP) indicate that in 2001, they were handling a total of 2,515 copyright cases, including over 1 million discs seized (although it appears that these statistics include actions commenced previous to 2001).

<sup>24</sup> *Copyright – Crackdown Crushes B90M in Fake Goods*, Bangkok Post, Dec. 18, 2001, at 10.

<sup>25</sup> When vendors suspect that a customer is working for copyright owners and is conducting a pre-raid check, they will sell that customer a blank CD (so that it won't be used as evidence against the Economic Crimes Investigation Division). The pirate distributors have been known to follow customers until the vendor is sure they are not informants, then switch the blank with the correct CD. In addition, in response to increased and regular raids, some vendors now accept orders at shops in retail centers, but will only deliver the actual CDs by mail the day after the purchase. During some raids, pirates simply abandon their shops before the police arrive, leaving a meager seizure but avoiding arrest and the subsequent fine.



that were resolved by the courts in 2001, not one prison sentence was served; all were suspended. Fines averaged US\$3,200, simply a cost of doing business, and not seen as a deterrent.

The troubling reality is that Thai authorities fail time and again to go after the big-time pirates implicated in the raids. When an arrest is made as the result of a raid, regardless of whether the defendant is merely an employee (or “lackey”) of the head of the piratical operation, the investigation ceases. The masterminds behind massive retail piracy rings in Thailand are left untouched despite the fact that their shops have been raided numerous times. Other problems abound, including leaks prior to raids on small pirates near the Cambodian border, inappropriate pressure and threats on right holders if cases are not discharged, and lack of sustained enforcement action.<sup>26</sup>

## **Steps Taken Against Institutional End-User Piracy**

The problem of institutional unauthorized use of software applications in businesses and educational institutions in Thailand continues to be responsible for severe revenue losses to the business software industry, and the reduction of such is a key priority. The industry hosted several software asset management seminars in Thailand in 2001 to educate local businesses on licensing issues. To their credit, government authorities (the Department of Intellectual Property, and the Economic Crimes Investigation Division) co-sponsored these seminars, which helped send a stronger message to participants. Nevertheless, government authorities do not proactively secure compliance by taking sustained steps to eradicate corporate end-user software piracy. Government will and public awareness campaigns to change attitudes toward intellectual property rights will go a long way toward changing the current situation. Clearly, without strong backing from government agencies for such educational efforts to promote respect for intellectual property rights, end-user piracy in Thailand, like retail piracy, will remain at unacceptably high levels, so this effort should be stepped up in 2002. The other abiding problem is that most enforcement officers in the judicial system (police, prosecutors and judges) lack good knowledge of computers and related complex technical issues, resulting in discomfort with handling such cases. In the case of prosecutors, this problem is largely due to the fact that prosecutors assigned to IP courts are transferred in and out periodically. Longer postings would assist in alleviating this problem.

With respect to management of software practices within the Thai government, very little progress was made in 2001. In 1998, the Thai government reissued an Executive Order requiring all government agencies to use legitimate and licensed software. In 1999, the industry held a series of seminars for government officials in Bangkok, co-hosted by the Ministry of Science and Technology and the National Electronics and Computer Technology Center (NECTEC). The seminars were well received, and NECTEC announced its intention to be the first agency to implement software asset management (SAM) procedures and adopt good licensing practices. However, nothing happened in 2000-2001. The Thai government needs to revitalize its efforts to implement the Executive Order in 2002.

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<sup>26</sup> For example, recently, five or six ECID officers were deployed to investigate Pantip Plaza every day in order to help suppress the sale of illegal CDs. This tactic was used in 1999 when police officers, copyright owners and Department of Intellectual Property officers constantly surveyed Pantip Plaza. However, as with the 1999 surveillance program, the recent action to monitor a known pirate hot-spot will not succeed unless it results in a sustained enforcement effort.

## Beginnings of a Coordinated National Enforcement Plan

The Thai government began to coordinate its IPR enforcement activities in 1999 when, in the wake of the "PM scandal," the Department of Intellectual Property (DIP) 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. Those early moves toward enforcement coordination were positive, but now, Thailand needs to reinvigorate enforcement. In large part this is due to the changing nature of piracy in Thailand (both in terms of scope and in terms of the organized and criminal nature of the pirate enterprises involved). In 2002, IIPA looks to the government of Thailand to develop an integrated National Plan on enforcement of copyright.

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. Establishment of specialized IPR investigation units throughout Thailand, and the promotion of the Copyright Unit in the Economic Crimes Investigation Division (ECID) to a department would be steps in the right direction.<sup>27</sup> Even the ECID at present lacks the necessary resources to wage a nationwide fight against piracy, since it only has roughly 50 officers to conduct enforcement, in no way sufficient to tackle the piracy problem on a large scale. Customs and Foreign Trade Departments (which should control, for example, the importation of CD machinery), Domestic Trade, Revenue and Consumer Protection agencies need to be more fully integrated into the overall enforcement effort (to implement the Copyright Law, Customs Law, Tax Law, Consumer Protection Law and the Sticker Price Law to stamp out piracy). Ad hoc programs will not work.<sup>28</sup> 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.

A National Plan on enforcement of copyright must contain the following key elements:

- Swift passage and immediate implementation of the draft optical media law, with minor changes necessary to make it world-class legislation.
- Establishment of a specialized IPR investigation unit (directly under the control of the Prime Minister or other designated Minister) or the promotion of the Copyright Unit in ECID to the status of a Department, which is larger than a Division. There are unofficial reports that the Thai government is proposing the transfer of the ECID to the Ministry of Justice, which would

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<sup>27</sup> The Department of Intellectual Property (DIP) has openly stated that it has no role in taking enforcement actions, asserting that its role in protection of copyright is merely as a coordinator between the enforcement agencies. The Law on Governmental Administration stipulates that the DIP is mainly responsible for IPR promotion and registration. Thus, the DIP interprets this to mean that it has no direct responsibility over suppression activity. This position is ultimately unhelpful to the establishment of national coordination, and thus, a department that does have the ability to address operational concerns, like resource allocation, training, effectiveness, etc. should be established in Thailand.

<sup>28</sup> For example, IIPA understands that in June 2001, DIP announced that it would issue a new logo to be used by approved brand-name products. The logo would be owned by the department, and brand owners would apply to use it for a fee. The mark is intended as one of "authentication." This project is now reportedly on hold due to the changes in the DIP, and no further progress has been reported.

purportedly give it greater manpower to raid sources of production of piracy (including *ex officio* raids).<sup>29</sup>

- Increased authority for Customs to take steps to locate and identify optical disc or other production factory owners and machinery used for producing infringing materials, taking raids and seizing equipment and the products of piracy.
- Increased authority in the Department of Revenue to investigate the financial status of each entity investigated and determine, for example, the taxes paid by those identified producers.
- Commencement of a continuous public relations campaign, explaining how buying pirated products helps criminals and hurts Thailand.
- Movement by the government and the Department of Education to ensure the legalized use of copyrighted goods (including business software) in business settings, educational institutions, and government entities.
- Linkage of anti-piracy campaigns with anti-corruption and anti-drug campaigns (recognizing that the proceeds of piracy are used in both of the latter activities, to the detriment of Thai society).
- Better training to understand and deal with Internet-based piracy, perhaps by designating a specialized cybercrime and Internet piracy unit.<sup>30</sup>

## Procedural/Systemic Hurdles in Enforcement

There are many procedural and systemic hurdles that right holders face in seeking adequate enforcement in Thailand, both in raids and in court proceedings. The following are just some illustrative examples:

- **Lengthy Process to Obtain Search Warrant and Unavailability of Nighttime Searches:** Normally, the process of obtaining a search warrant in Thailand takes about half a day, which is

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<sup>29</sup> The centralized body established should examine and fix resource allocation problems. For example, in 2001, Assistant Commissioner-General of the Royal Thai Police, Pol. Lt.-Gen. Nopadol Somboonsub, was quoted as saying his agency lacks adequate budget and staff for effective enforcement. At present, his division has only 60 to 70 full time investigative staff. For 2002, the division has requested 11 million baht (approximately US\$251,400) to buy equipment and increase payments to staff in order to improve morale and efficiency. Such resource re-allocations, which IIPA believes are warranted, should be overseen by the Thai government in an overall strategy, so there is no waste or duplication of efforts and resources. Several IP-related units have been established within the past year. On August 9, 2001, the Prime Minister issued Order No. 249/2544, setting up a "Prevention and Suppression of Intellectual Property Infringement Committee" to deal with piracy problems directly for the first time. Two other bodies, the "Joint Committee for Suppression of Intellectual Property Violations," and the "Intellectual Property Suppression Unit," were established. There is some question, however, as to the permanence of these units, and it remains the case that these units are drastically under-resourced.

<sup>30</sup> Such an enforcement arm should also promote public awareness of the need to respect intellectual property rights in cyberspace, and in particular, the Department of Intellectual Property should work with Internet Service Providers (ISPs) to develop best practices and regulations that will encourage ISPs to cooperate with copyright owners to detect and deal with infringements taking place online.

very lengthy, especially when particularly egregious activities are occurring. More serious is the fact that courts are extremely reluctant (unless there is an emergency and the court strongly believes that the crime is being committed at that time) to issue warrants for nighttime searches, notwithstanding that most perpetrators commit piracy at night.

- **Destruction or Loss of Evidence in (or After) Raids:** Even when search warrants are obtained, infringers engage in evasive techniques, and destroy evidence before the search can actually be run (e.g., by refusing entry). Delaying the authorities for 10 minutes gives pirates enough time to destroy all exhibits and evidence, through grinding machines which are specially designed to destroy CDs. Other high-tech devices such as hidden cameras help warn the pirates and prolong delays to raids. Another technique used by infringers is to keep few illegal items on the premises, and keep some legitimate copies of copyrighted works around to show the authorities that they are “clean.” After the raid, it is difficult for copyright owner to access seized materials for further investigation or review of copyright titles. Another problem faced is administrative: Documentation supplied to investigators after a raid, and in preparation for prosecution, has sometimes gone missing, thereby creating duplication of work and further delays.<sup>31</sup>
- **Leaks to Defendants:** Much more serious problems, particularly as they reflect poorly on the Thai authorities, are leaks to defendants and, in some cases, destruction of evidence. For example, often when an address for a raid is shown on the search warrant request, the raid fails due to leaks. Interestingly, the larger the raid, the more likely it is that there will be a damaging leak. In addition, it is reported that sometimes, evidence seized in raids is “lost” or otherwise altered after a raid.
- **Evasive Techniques of Defendants:** Another disturbing problem involves the attempt to catch the key players in a criminal pirate enterprise, and resistance among enforcement officials in Thailand to aggressively pursue such defendants. Evasive techniques used by pirates (fake names and addresses) lead enforcement authorities to settle for catching a “lackey,” while the key pirates always manage to remain free. In some cases, it is reported that Thai authorities prefer to close a case when one person has been arrested, regardless of whether the key perpetrator has been caught. This phenomenon must not be allowed to occur when it comes to enforcing against optical media piracy, since it is absolutely essential that the directors, owners, and financiers of such operations be brought to justice.
- **Burdensome Requirements with Respect to Presumptions of Subsistence of Copyright and Copyright Ownership:** Once past the raid, copyright owners are being asked to provide all information on the works seized, including all proof of subsistence of copyright as well as proof of ownership, including certificate of incorporation, and powers of attorney translated into Thai. The lack of presumptions (of subsistence and ownership) in the law should be remedied.
- **Identification Card Requirement:** A new administrative requirement for copyright owners, announced in November 2001, stipulates that any representative of a right holder must register with and obtain an identification card from the DIP. Since November, enforcement agencies have refused to take raiding actions for some right holders whose representative did not

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<sup>31</sup> In late 2001, ECID officers admitted mislaying documentation for ten cases from raids done in 1999, requesting fresh sets of documents.

produce the ID card. The Thai government should ensure that this new requirement does not become overly burdensome to right holders.

- **Other Documentary Burdens:** Other documentary requirements in the Thai court system simply add to the burdens of right holders in Thailand. The requirement that documents be notarized and legalized is extremely burdensome. Thailand is not party to the Hague Convention Abolishing the Requirement of Legalization of Foreign Public Documents, and should be encouraged to take steps to become a member.

## **Continued Progress Toward Deterrent Sentences by the Intellectual Property and International Trade Court**

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, the IP&IT Court has processed cases expeditiously, thus addressing one of the main shortcomings of the old system.<sup>32</sup> Not only are defendants starting to serve actual jail time as compared to previous suspended sentences, but fines have also been increased. In addition, manufacturing equipment used in pirate production is also being forfeited. The IP&IT Court is one of the true success stories in the entire region. IIPA and the industries continue to be interested in the development of this Court as a model for the region, and look to devise strategies for further enhancing its effectiveness.<sup>33</sup>

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 and 2001 have been breakthrough years for the court, as exemplified by the 15 unsuspended jail sentences it imposed on operatives of pirate optical media factories during 2000. It also sentenced a total of seven defendants to jail in three cases (one of them in March 2001) involving pirate warehouses and distribution centers, and imposed prison terms in three retail piracy cases as well, all without suspending the custodial sentences (however, the three retail pirates received suspended sentences from the Supreme Court, and six of the seven other defendants' cases still await decision by the Supreme Court).<sup>34</sup> The U.S. government should closely monitor the cases still on appeal to ensure that the lower courts'

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<sup>32</sup> For example, in 2000, the court disposed of 4,059 IPR criminal cases (out of a total of 4,719 cases received); this indicates that backlogs were quite minimal. The motion picture industry reports criminal convictions in 87 of the 89 criminal cases it initiated during 2000, and two other cases successfully resolved in January 2001; by the end of March 2001, criminal convictions had been obtained in a further 21 cases. The business software industry did not have such positive results, as 20 of 51 cases commenced in 2000 still remain unresolved.

<sup>33</sup> For example, in April 2001, the motion picture industry participated in the "1st Intellectual Property Summit on Administration of Justice in IP Cases" in Thailand. Thirteen judges for the IP&IT court and seven judges from the Supreme Court participated in the event. One of the key ideas that came out of that event was the development of a database of defendants to identify recidivists in the future.

<sup>34</sup> On March 14, 2001, the Central IP&IT Court sentenced Mr. Prapas Sangun-Nam, the defendant in a warehouse case involving total seizures of 150,605 pirate VCDs (40,105 pirate VCDs of U.S. major motion pictures). The defendant was initially sentenced to two years and one month imprisonment, but the court reduced the punishment by half due to his guilty plea. No appeal was lodged by the defendant against the sentence, and he is currently serving his sentence.

imposition of prison sentences has a deterrent effect. 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.

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 mixed signals regarding Thailand's commitment to fulfill its international obligations regarding the fight against copyright piracy.<sup>35</sup> It is worth reiterating that it falls largely upon the IP&IT 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,<sup>36</sup> civil, and administrative procedures and remedies.

## **COPYRIGHT LAW AND RELATED ISSUES**

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### **Priority Must Be Placed on Passage of Good Optical Media Legislation**

The most urgent and threatening problem in Thailand is the exponential growth of optical media piracy. Legislation to control the production of optical media (including CDs and other media capable of being read by an optical reading device such as a laser) was drafted by the Department of Intellectual Property in the Ministry of Commerce in October 2000, and approved by the Thai Cabinet in late January 2002. The bill is now reportedly before the State Council for

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<sup>35</sup> Two of the cases involved book piracy, a chronic problem in Thailand. In one case, the Supreme Court upheld a fine imposed by the IP & IT Court on a shop (owned by Somsak Thanasarsenee) engaging in massive photocopying of textbooks, and ordered the forfeiture of the photocopying machines used to commit the offense. *Appellant fails to overturn copyright conviction*, IP Asia, July/August 2000, at 7. In a second case, the Supreme Court reversed the acquittal ordered by the IP & IT Court of the defendant (Konakchai Petchdawongse) shop owner who stockpiled photocopies of textbooks, and imposed a fine of Bt100,500 (approximately US\$2,400 at then prevailing exchange rates, although reportedly, this fine was subsequently reduced to BT67,000 (US\$1,600)), and ordered the forfeiture of the equipment. Periera, "Supreme Court sets out what's allowed in reproduction of copyrighted text," IP Asia December 2000/January 2001, at 41. To the contrary, the Supreme Court overturned a conviction against defendant Atec Computer and its director, who in 1999 had been fined a total of BT1,050,000 (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. "IPR Court Continues Hard Line on Pirates," Bangkok Post, July 7, 1999. The Court ruled, that because the Microsoft investigator had ordered the computer (with the illegal software), a "trap purchase," Microsoft could not have been an injured party, and indeed, had "facilitated" the offense. "Thai Supreme Court Rules against Microsoft," The Nation (via Newsbytes News Network), Nov. 6, 2000. 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 right holders to conduct an effective fight against piracy.

<sup>36</sup> For example, IIPA understands that, according to Thai copyright law, half of a fine upon conviction is supposed to be paid to the copyright owner as compensation. However, courts often delay payments, on the pretense that they need to ascertain the identity of the true copyright owner. They rarely ever hand over the compensation to the copyright owner's legal representative, even with a valid power of attorney. The strict interpretation by the courts means copyright owners, particularly foreign copyright owners, and their representatives, experience great difficulties in receiving compensation.

review.<sup>37</sup> This issue must take a top priority on Thailand's legislative agenda. Prompt enactment and implementation of this 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.<sup>38</sup>

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 Secure Identification (SID) codes on all optical media products produced in Thailand. IIPA has had a chance to review a draft from June 2001, but has not yet fully analyzed later drafts, including the draft that is before the State Council, which has some changes from the earlier draft. The key features of the June 2001 draft include a licensing requirement for manufacturers of CDs and other "optical disc products" (including CD-R and CD-RW),<sup>39</sup> the control of machinery and production of machinery for use in the manufacture of such products, source identification (SID) code requirements for all CDs and other "optical disc products," and search and seizure authority, including a warrantless search. Criminal penalties for production of optical media without a license are up to four years' imprisonment and/or a fine of up to Bt 800,000 (approximately US\$18,235). Failure to obtain a license to produce or import machinery is punishable by imprisonment of up to ten years and/or a fine of up to "five times the value of machinery imported and confiscation of the machinery," and lesser penalties are provided for various other offences.<sup>40</sup> IIPA understands that the latest Bill that is before the State Council resolved some of the known issues, but that some others still remain. Based on our reading of the earlier draft, we note the following as potential problem areas.

- **No Express License Requirement for Production of Masters/Stampers:** While a license is required to produce optical media under the proposed law, express coverage of production of masters and stampers is not currently provided. This shortcoming can be overcome through a generous interpretation of the definition of "compact disk product" or "machinery," or through express coverage in regulations. (The SID code requirement (Section 13) is expressly made applicable to moulds, original stampers, and compact discs produced.) It is extremely important that producers of stampers/masters be required to obtain a license to produce them, and that stampers and masters be covered under import requirements. Failure to cover stampers/masters in this way will result in an inadequate law with respect to optical media production.
- **Grounds for Rejection of Application for License:** Section 10 allows the Minister to "use his discretion" (alternatively translated as "exercise his consideration") to reject an application for a

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<sup>37</sup> If no amendments are requested by the State Council, the bill would then be forwarded for submission to the House of Representatives. The time frame for consideration by the State Council is believed to be approximately three months.

<sup>38</sup> Indeed, one extremely positive development took place on August 10, 2001, when the Deputy Minister of Commerce ordered the Department of Foreign Trade to halt the import of machines for production of optical discs for 12 months, except where their import has been directly certified by a copyright owner. This step will hopefully ensure that there is no gap (with respect to control of imports of optical disc machinery) between now and the moment the optical media law goes into effect (under the current draft, six months from the date the law is published in the official gazette), assuming the law is passed soon.

<sup>39</sup> Section 8 provides that a separate license must be obtained for each of the premises that are to engage in manufacture.

<sup>40</sup> For example, production of optical media without SID code, or production of optical media in any place other than that specified in the license, is punishable by up to six months' imprisonment and/or a fine of up to Bt 400,000 (approximately US\$9,118).

license if: 1) the applicant or related persons have “received final court judgment as being the offender under this Act or the [copyright law]”; 2) the applicant knew or should have known he has committed a copyright law offence at the place specified in the application (regardless of whether anyone has been penalized for that offence); or 3) false statements were made on the application or other document. The grounds set forth should be sufficient for rejecting the application, and should not be subject to the discretion of the Director-General of the DIP.

- **Transfer of Production License:** Section 21 permits transfer of a license when made in writing and “registered with the Director-General” of the DIP (and additional conditions may be imposed on the transferee). IIPA asserts that licenses should be non-transferable, or at least should only be transferred upon the approval of the DIP. Section 21 of the draft should be revised to clearly express the need for prior approval of transfers
- **Grounds for License Revocation:** Section 22 provides that licenses shall be revoked if 1) the grounds for rejection of a license application are present (see discussion of Section 10 above); 2) the licensee ceases operations in Thailand; or 3) the licensee violates any other conditions imposed. Again, as with Section 10, the grounds set forth in Section 22 should be sufficient for revocation of the license, and should not be subject to the discretion of the Director-General of the DIP.
- **Reporting Requirement for and Definition of “Plastic Seeds”:** While failure to report “importation” of “raw materials” is a punishable offense in the latest draft, a separate provision calling for the mandatory reporting of 1) the type of, and volume of possession or import, including place of storage of, “plastic seeds,” and 2) the “distribution, disposal or transfer of plastic pellets,” is not subject to any penalty. Also, the term “plastic seeds” should be expanded to “raw materials,” that term should be defined to include “optical grade polycarbonate” or any other raw material whose physical properties make it suitable for the manufacture of optical discs.
- **Inspections and Seizures:** Sections 27-29 provide for inspections (including warrantless searches) and seizures of suspected violating items and documents, etc. They do not provide for forcible entry in case of resistance; this should be provided for.
- **Grandfathered Plants Not Subject to Grounds for Rejection of License:** Under Sections 58-61, plants already in existence or already having imported machinery can receive import licenses or licenses to continue producing simply by complying with certain formalities (and, seemingly, without regard to whether they have been or are engaged in piracy). For example, under Section 59, anyone in possession of machinery for use in producing “CD products” may submit an application within 90 days of the effective date of the law (or within 90 days of receiving an import license, which is also subject to a grandfather provision), and will receive a license to produce optical media without regard to whether that “grandfathered” applicant has been convicted of copyright piracy or is engaging in copyright piracy (since Section 10(1) and (2) do not apply to “grandfathered” plants). This provision, as to the 100 known optical media plants (and other “underground” plants), practically gives them a “free ride” even if they have previously been convicted of piracy or are currently engaged in piracy.
- **Penalties Should Be Doubled for Recidivists:** The penalty provisions (Sections 42-51) should include doubling of penalties for recidivists.



## Copyright Act Revisions/WIPO Treaties

An amended Copyright Act went into effect in Thailand on March 21, 1995. The Thai government ratified the Berne Convention on September 2, 1995, and its TRIPS obligations (substantive and enforcement) with respect to copyright went into full effect on January 1, 2000. However, the amended Copyright Act still does not fully meet the standards of the Berne Convention and TRIPS. We understand that a working committee, including the Department of Intellectual Property and Deputy Commerce Minister Suvran Valaisathien, was formed at the end of 2001 to consider amendments to the Copyright Act. The following issues are reportedly being considered:

- Whether penalties in the copyright law should be increased.
- Whether Section 66 of the current law, which stipulates that copyright cases may be settled, should be deleted. Regardless of whether this provision is deleted, it should always remain an option for a right holder and a defendant to enter into mutually agreed-upon terms to dispose of a case outside the courts.
- Whether the law should impose “landlord” liability, i.e., whether the lessors of premises where infringing activities take place should also be made responsible for the unlawful acts of their tenants.<sup>41</sup>

Thailand, which participated actively in the negotiations that led to the adoption of the World Intellectual Property Organization treaties (the WIPO Copyright Treaty, WCT, and the WIPO Performances and Phonograms Treaty, WPPT), should also move promptly to ratify and implement those treaties. The WIPO treaties provide copyright owners with the rights they need to protect their works in the digital environment, and also protect technological protection measures used by copyright owners to protect their works. The WCT will go into force on March 6, 2002, while the WPPT requires only two more deposits as of the date of this filing, deposits which are sure to come shortly. By updating its copyright regime 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. The drafting committee is apparently considering what changes would be needed in order to bring the law into compliance with the WIPO treaties, including amending some definitions, including terms like “communication to the public,” “distribution,” “public performance,” and adding a new definition for “making available to the public.”

## Enactment of Cable Regulatory Controls and Broadcast Legislation is Long Overdue

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. 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. The draft broadcast legislation

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<sup>41</sup> One initiative outside of legislation that is reportedly being considered by the enforcement authorities in Thailand would be to have the owners of the shopping centers terminate leases of pirate shops if they do not convert to selling legitimate product.

contains provisions prohibiting signal theft and the production or distribution of signal theft-related devices, punishable by up to one year imprisonment and a fine of up to Bt 2 million (US\$46,070). Stronger penalties are needed if this law is to be effective.

Other legislation passed in January 2000 – the Frequencies Management Act – creates a National Broadcasting Commission, but selection of its members has been delayed. IIPA does 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.

## Generalized System of Preferences

As noted, Thailand enjoys benefits under the Generalized System of Preferences (GSP) program, a U.S. trade program which affords duty-free entry to many of a country's imported goods, subject to the requirement that it provide "adequate and effective" copyright protection. In June 2001, six copyright-based 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) – submitted a request that the eligibility of Thailand as a GSP beneficiary country be reviewed, and that its benefits be suspended or withdrawn if Thailand fails to remedy the deficiencies which adversely affect U.S. copyright owners. Those deficiencies include: the growing optical media piracy problem in Thailand; the lack of effective optical media legislation and cable regulatory controls/broadcast legislation; the failure to aggressively pursue criminal prosecutions in the copyright area; the failure to impose more deterrent sentencing by the courts; and the failure to pay adequate attention to Internet piracy trends in Thailand.<sup>42</sup> In the first eleven months of 2001, \$2.1 billion in duty-free goods entered the U.S. from Thailand duty free under the GSP Program (approximately 15.1% of its total exports to the U.S.).<sup>43</sup> On July 4, 2001 it was widely reported in the Thai media that the Prime Minister had ordered the Commerce and Interior ministers to launch strict measures to stop the spread of pirated optical discs.

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.

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<sup>42</sup> In a recent visit to Bangkok by U.S. Assistant Secretary of Commerce, William Lash, the Assistant Secretary stressed that it would be difficult for Thailand to continue to 'enjoy further tariff breaks from the United States until the government stops the massive proliferation of intellectual property violations.' Natalie Suwanprakorn, *Thai-U.S. Trade - Piracy Crackdown Missing Link*, Bangkok Post, Jan. 23, 2002, at 1.

<sup>43</sup> In 2000, \$2.2 billion in duty-free goods entered the U.S. from Thailand under the GSP program (approximately 13.5% of its total exports to the U.S.).