



March 19, 2004

Via electronic mail (FR0415@ustr.gov; FR0416@ustr.gov)

Ms. Gloria Blue
Executive Secretary
Trade Policy Staff Committee (TPSC)
Office of the United States Trade Representative
1724 F Street, N.W.
Washington, D.C. 20508

Re: Notice of Intent to Testify at a Public Hearing Concerning the Proposed United States-Thailand Free Trade Agreement (69 Fed. Reg. 9419, Feb. 27, 2004)

To the Trade Policy Staff Committee:

This written notification responds to the TPSC's Request for Comments and Testimony Concerning Proposed United State-Thailand Free Trade Agreement. The request requires persons wishing to testify orally at a hearing that will be held in Washington, D.C. on Tuesday, March 30, 2004, to provide written notification of their intention, as well as a copy of their testimony.

Notice of Request to Testify

We hereby notify you that the following person wishes to testify orally at this hearing on behalf of the International Intellectual Property Alliance (IIPA):

Mr. Michael Schlesinger
Vice President and Associate General Counsel
International Intellectual Property Alliance
1747 Pennsylvania Ave. NW, Suite 825
Washington, DC 20006
Tel: 202.833.4198, Fax: 202.872.0546

Summary of Testimony

The following represents a short summary of the IIPA testimony, as required by the Federal Register notice. IIPA's full testimony follows this summary.

The International Intellectual Property Alliance (IIPA) supports the commencement of Free Trade Agreement negotiations with Thailand. Our testimony highlights some important trade-related intellectual property issues, specifically, serious copyright piracy and the need for effective enforcement in Thailand. A U.S.-Thailand FTA IPR Chapter that contains high levels of copyright protection and enforcement will benefit both U.S. and Thai creative industries. Such an endeavor will continue to set precedents in Southeast Asia, building on work already done in the FTA IPR chapter with Singapore.

Before entering into the negotiating phase of the U.S.-Thailand FTA, we wish to express our deep concern about an issue in Thailand which has remained unresolved for some time – copyright piracy, and particularly, optical disc piracy. Optical disc pirate production for export and domestic consumption has caused great economic losses to our economy, our creative community, and our copyright industries,

which now make up well over 5 percent of the U.S. Gross Domestic Product. Even though the Royal Thai Government moved toward passage of an optical disc regulation in 2003, that regulation is flawed in fundamental ways (many of which, though, could be fixed in implementing regulations), and in the meantime, Thai authorities have not, despite promises made, taken concrete steps to curtail the production, distribution and sale of pirate optical discs. The Thai Government must recognize the seriousness of this problem and to take concrete steps to address it, and cannot wait to resolve this issue while the FTA is being negotiated and concluded. Such delay would cause still greater losses to our U.S. copyright industries. Other piracy problems abound, including pirate photocopying of U.S. publishers' books, the manufacture (and export) of infringing cartridge-based entertainment software products, and cable piracy (signal theft). These and other problems must be addressed.

The substantive copyright obligations in the FTA IPR chapter will assist in elevating copyright standards in the digital era.¹ An FTA with Thailand would require the Royal Thai Government to modernize protection for computer programs and databases, to provide clear rental rights, to provide a TRIPS-compatible term for computer programs, to provide the full scope of exclusive rights for record producers and right holders of all other works, in particular rights of public communication and a "making available" right, so critical in the online world of e-commerce. The copyright enforcement obligations in the FTA IPR chapter are similarly comprehensive and will obligate Thailand to ensure that right holders can seek civil, administrative and criminal remedies in Thailand against copyright infringement/piracy. For example, presumptions would be added and broadened to speed up copyright infringement proceedings. Civil damages would need to be available that are adequate to compensate right holders for injury caused, as well as lost profits, the provision of pre-established damages, costs and attorney's fees. Judicial authorities could effectuate seizures of infringing goods and materials, including final disposition of items seized, in civil cases, and could grant *ex parte* search orders when copyright infringement is imminent. Border measures would be strengthened. Criminal remedies would need to be strengthened to provide deterrent penalties in piracy cases. Enforcement measures would also be strengthened to cope with online infringement, including the creation of clear standards of secondary liability for online service providers accompanied by certain limitations on infringement remedies that would ensure cooperation between service providers and right holders. A strong and expeditious notice and takedown system would be a key feature of this system. Criminal and civil remedies would be available against the unlawful circumvention of technological protection measures and alteration/removal of rights management information – key WIPO treaties obligations. Full TRIPS-required protection for pre-existing works would be afforded.

We thank the TPSC for permitting us to testify on this important initiative.

Respectfully submitted,



Michael Schlesinger
Vice President and Associate General Counsel, IIPA

Attachments: 1 – IIPA Testimony on the U.S.-Thailand FTA IPR Chapter
2 – IIPA 2004 Special 301 country report on Thailand

¹ Thailand's 1995 copyright law is in need of updating. Thailand proposed amendments to its copyright law in 2002 that would make some important improvements to copyright protection, but would have left some ambiguities and would have weakened protection in some ways (e.g., by lowering some criminal penalties). The draft included some attempts to implement requirements of the WIPO "digital" treaties, the WCT and WPPT.

**TESTIMONY OF
MICHAEL SCHLESINGER
VICE PRESIDENT AND ASSOCIATE GENERAL COUNSEL,
INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE**

**PUBLIC HEARING CONCERNING
PROPOSED UNITED STATES-THAILAND
FREE TRADE AGREEMENT
TUESDAY, MARCH 30, 2004
BEFORE THE TRADE POLICY STAFF COMMITTEE IN
WASHINGTON, D.C.**

Introduction:

My name is Michael Schlesinger, and I am Vice President and Associate General Counsel of the International Intellectual Property Alliance (IIPA). I am pleased to have this opportunity to share with you the perspectives of the U.S. copyright industries on the promise of the U.S.-Thailand Free Trade Agreement.

About IIPA:

The IIPA is a coalition of six trade associations,² representing the copyright industries, which contribute well over 5% of the gross domestic product to the total U.S. economy.³ IIPA's members produce the nation's books, recorded music, films, videos and TV programming, business software and entertainment software. Since 1984, this diverse range of industries has worked together, individually and under the IIPA umbrella, to strengthen the copyright laws and enforcement regimes in over 100 countries around the world. IIPA has also represented the copyright-based industries in the negotiation of key bilateral and multilateral agreements (including the WTO TRIPS Agreement and the WIPO "digital" Treaties, the WCT and WPPT) to raise international minimum standards of copyright protection and, of increasing importance, enforcement. IIPA and its members have been particularly active in working with the U.S. government on the various FTA IPR negotiations already completed (Jordan, Singapore, Chile, Australia, Central America, Morocco, and the Dominican Republic) and those in-process or about to commence (Thailand, Bahrain, Panama, Andean countries - Peru, Ecuador, Colombia and Bolivia - and the Southern African Customs Union).

IIPA Supports a Thailand FTA with High Standards of Copyright Protection and Enforcement

The U.S. and Thailand entered into a Trade and Investment Framework Agreement in October 2002, creating a foundation for a comprehensive dialogue on the full range of bilateral and other trade issues, including intellectual property rights, and more specifically, copyright protection and enforcement. A logical next step in U.S.-Thailand trade relations is the negotiation of a Free Trade Agreement which puts into place all those aspects of a strong trading relationship, including high standards of copyright (and other IPR) protection and enforcement. Thailand is a very important

² IIPA's members represent over 1,350 companies, from the following associations: Association of American Publishers (AAP), AFMA, Business Software Alliance (BSA), the Entertainment Software Association (ESA), Motion Picture Association of America (MPAA), and Recording Industry Association of America (RIAA).

³ Economists Inc., *Copyright Industries in the U.S. Economy: the 2002 Report* (2002); the text of this report is posted on IIPA's website at http://www.iipa.com/pdf/2002_SIWEK_FULLL.pdf.

trading partner for the United States, and an FTA as a significant step toward implementing the Enterprise for ASEAN Initiative, which aims to establish a network of bilateral FTAs that will link the ASEAN and U. S. economies more closely together.

A U.S.-Thailand FTA that contains high levels of copyright protection and enforcement will benefit U.S. industries and continue to set precedents throughout the region, following the work already done with the FTA IPR chapter with Singapore.

Thailand Must Take Concrete Steps to Eradicate Optical Disc Piracy

Thailand's optical disc piracy problem has grown out of control in recent years, with Thailand now home to at least 39 optical disc production plants containing 126 lines, and capable of producing an astonishing 441 million discs per year. Thailand has no comprehensive approach to tackle this massive capacity for over-production of optical discs for domestic consumption and export. While a bill to regulate production of optical disc production passed its first reading in Parliament in September 2003, the proposed bill fails to meet the basic requirements of an effective optical disc law. Some of the weaknesses in the bill could be fixed through implementing regulations. Among the weaknesses are the following:

- The government must have the authority to approve or reject any plant engaging in or wishing to engage in production of optical discs. Effective laws to regulate optical disc production establish a "license" system for plants wishing to engage in OD production (so that plants failing to meet certain criteria can be denied the ability to produce). The Thai proposal appears to require only "notification," not approval. There also appears to be no renewal, i.e., one notification serves the factory forever. Finally, there do not appear to be any grounds for "revoking" a plant's ability to engage in production. A change in the bill to require "approval" (i.e., plants must "notify and obtain approval" to engage in OD production), followed by appropriate implementing regulations setting forth the requirements to obtain an approval (including, e.g., demonstrating that the plant has rights in any work it intends to replicate), may resolve this deficiency.
- The draft contains no coverage of production of blank, recordable media. Coverage of production of blank media is essential for an effective OD law, since otherwise, pirates can use this loophole to avoid filing with the government (i.e., they will claim they only produce blanks). Regulations released simultaneously with the law could expand the definition of optical disc products to include blank and blank recordable media.

- The draft apparently defines “stampers” and “masters,” which are the essential tools used to produce optical discs, as machines, but imposes no strict regime on their importation/exportation, nor does it require plants to use identification codes on stampers or masters, nor that equipment to produce discs or stampers/masters to be adapted to use such codes.
- The government does not have timely authority to monitor the export of optical discs and import/export of machinery, equipment (including stampers and masters) and raw materials. The Thai bill contains after-the-fact “notification” requirements (with lengthy grace periods of 30 days for purchase of and 7 days for sale of a “machine,” and 30 days for reporting acquisition of raw materials), and there is no provision for monitoring dealing in stampers/masters. Prompt and transparent (automatic) approvals are essential to effectively enforce against unauthorized production and to track the movement of machinery and raw materials, key ingredients of optical disc piracy. The notification requirements in the current draft could be altered to allow for pre-notification and approval.
- The draft fails to, but should, allow for inspections of plants without notice and at any time and for the possibility of the use of justifiable force to enter a plant in cases in which a plant obstructs entry to authorized officials. The phrase “from the sunrise to the sunset or during the production hours of such Business Operation Place” could be interpreted in regulations to include nighttime inspections (i.e., during “the production hours”).
- The draft fails to, but should, provide expressly for swift seizure, forfeiture, and/or destruction of discs, stampers/masters, or machinery found as a result of an inspection to be in violation of the statute (including discs or stampers/masters that have forged identification code or have had the identification code removed, gouged, or altered) or found to be infringing copyright or trademark. Regulations released simultaneously with the law could provide for this.
- The criminal provisions in the draft are inadequate with no mandatory minimum fines and no mandatory imprisonment, and no provision strengthening penalties against recidivists. Most offenses, like failing to affix an identification code, result only in the imposition of non-deterrent fines (in that case, the fine is a non-deterrent US\$2,500, with no express possibility of revocation authority or plant closure). The penalties should be raised to deterrent levels.

The Royal Thai Government must recognize the severity of the optical disc piracy problem and its responsibility to eradicate optical disc piracy. It is unfortunately ironic

that in October 2003, the leaders of the 21 member economies of APEC⁴ gathered in Bangkok, Thailand, where they all agreed to “stop optical disk piracy,” and Ministers agreed upon a strong set of “Effective Practices” that governments dealing with over-capacity for optical disc production and/or piracy of optical discs for export should adopt.⁵ It is truly unfortunate that the Royal Thai Government, subsequent to that meeting, has not seen fit to enact a law that comes close to meeting the standards of the “Effective Practices” document.

The Current Copyright Protection and Enforcement System in Thailand

The copyright industries have been hampered by consistently high piracy levels in Thailand over the past 10 years – well over 50% for nearly every industry. As noted, Thailand’s optical disc piracy problem has grown severe in recent years, harming the domestic market and leading to massive exports of pirated materials to neighboring countries as well as far-away markets. Other forms of piracy abound. Book piracy is rampant in Thailand, mainly in the form of illegal photocopies of textbooks, but also involving print piracy of entire books, illegal translations, and adaptations, particularly around university campuses. Pirate production of cartridge-based videogames being manufactured or transshipped through Thailand to surrounding countries and to Europe has become a serious problem in 2003. Thailand has one of the highest “end-user” piracy rates for business software in Southeast Asia. The phenomenon of direct-download piracy from the Internet has grown in Thailand, which now boasts 3.5 million Internet users, 1.5 million of whom are estimated to have engaged in piracy of copyrighted materials in the digital environment. Cable piracy, which consists of unlicensed cable operators retransmitting signals without paying licensing fees, as well as commercial multi-dwelling units at which one subscription is paid for but that signal is retransmitted to the entire building. Cable piracy costs U.S. copyright holders over US\$120 million annually.

The Royal Thai Government has failed to address any of these problems in a comprehensive way, although an enforcement campaign from May to October 2003 did succeed in curtailing piracy levels in the retail and underground piracy markets domestically for a time. Little has been accomplished to eradicate optical disc pirate production for domestic consumption or export, book piracy, cartridge-based videogame

⁴ Australia, Brunei Darussalam, Canada, Chile, People's Republic of China, Hong Kong, China, Indonesia, Japan, Republic of Korea, Malaysia, Mexico, New Zealand, Papua New Guinea, Peru, Philippines, Russia, Singapore, Chinese Taipei (Taiwan), Thailand, the United States of America, and Vietnam.

⁵ “Effective Practices for Regulations Related to Optical Disc Production,” as referred to in Agreement to Fight Disc Piracy: Focus of Regulatory Strengthening, Bangkok, Thailand, October 17, 2003, at http://www.apec.org/apec/news__media/2003_media_releases/181003_fightdiskpiracy.html.

pirate production or consumption, “end-user” piracy of business software, or Internet piracy.

The copyright law in Thailand (last amended in 1995) is one tool that can be used to stop piracy, as can some ancillary laws, including laws relating to the importation and exportation of equipment used to produce piracy, and laws requiring business permits and/or requiring vendors to operate in fixed locations. Unfortunately, these laws have not successfully been carried out to reduce piracy levels in Thailand, nor have other laws, such as anti-money laundering laws been adapted to fight piracy. The 1995 copyright law also contains some gaps in protection, for example, it does not expressly provide that copyshops that make pirate copies of published materials or ‘hand over’ pirate materials to customers can be held liable for copyright infringement; copyshops were therefore successful in arguing that they could not be held liable for copyright infringement since they merely provide a service to customers. The Thai proposed draft amendments in 2003 would close this loophole by prohibiting the “handing over” of infringing copies, such as in the copyshop context. Some other problems in the existing law (such as an educational exception in Section 32 that has been pointed to justify unauthorized copying of entire textbooks in an educational context) would not be fixed by the proposed amendments, and would leave Thailand’s law short of full compliance with its current obligations under the TRIPS Agreement.

These deficiencies and any others will need to be corrected under an FTA regime, and in addition, many new modernizing changes, particularly dealing with e-commerce and the Internet, will need to be made as well, providing significant benefits to Thailand and to the U.S. copyright community.

Key Elements of a Strong Copyright and Enforcement Text in an FTA

SUBSTANTIVE COPYRIGHT PROVISIONS: It is critical that, with respect to copyright, the U.S.-Thailand Copyright Chapter include, on a technologically neutral basis, the obligations in both WIPO “digital” Treaties, the WCT and WPPT, other substantive improvements such as copyright duration, as well as modern and effective enforcement provisions that respond to today’s digital and Internet piracy realities. Below, we highlight those key improvements.

- **Right of reproduction and protection for temporary copies:** The right of reproduction, for all works, including performances and sound recordings, must include a specific and express reference to the right including both permanent and temporary copies in line with the Berne Convention, TRIPS and both WIPO “digital” Treaties. It is

important that clear language indicating that that temporary and transient copies (such as those made in the Random Access Memory (RAM) of a computer) are “copies” and are fully subject to the reproduction right.

- Right of communication to the public and the “making available” right: Copyright holders must have the exclusive right to authorize or prohibit the communication to the public of their works, including performances and phonograms, by wire or wireless means, including their “making available” to the public in such a way that members of the public may access them from a place and at a time individually chosen by them. An “interactive” exclusive right is critical.
- Right of distribution: Copyright holders must have the exclusive right to authorize the distribution to the public of the original and copies of their works, including performances and phonograms, through sale or other transfer of ownership, as provided in the WIPO “digital” Treaties, WCT Article 6 and WPPT Article 8. Furthermore, Thailand must also fully implement their rental rights obligations under TRIPS Article 11.
- Right of importation: Copyright holders must have the right to authorize or prohibit the importation of both piratical and legal copies imported without the consent of the right holder.
- “Anti-Bootlegging” provisions - unfixed performances: Performers must have the right to authorize or prohibit (a) the broadcasting and communication to the public of their unfixed performances except where the performance is already a broadcast performance, and (b) the fixation of their unfixed performances.
- “Simultaneous” publication with respect to performers and producers of phonograms: A performance or phonogram should be considered first published when it is published within 30 days of its original publication.
- No formalities for all works including for performers and producers of phonograms: The enjoyment and exercise of all rights provided for in the Free Trade Agreement should not be subject to any formality.
- Term of protection: Given developments in communications media that are effectively making cross-border transmissions the norm, it is essential that all countries further harmonize the term of protection on a global basis. Where the term of protection of a work is calculated on the basis of the life of a natural person, the term shall be not less than the life of the author and 70 years after the author’s death.

Where the term is calculated on a basis other than the life of a natural person, (such as with performances and phonograms), the term should be not less than 95 years from the end of the calendar year of the first authorized publication of the work, performance or phonogram.

- Technological protection measures (TPMs): This is one of the key obligations in the WIPO treaties. Provisions must be included which implement these obligations on making illegal the act of circumvention of technological protection measures that effectively control access to copyrighted materials or materials, and the circumvention of TPMs that effectively control the exercise of exclusive rights. Furthermore, devices, services, and components thereof, that facilitate the defeat of measures that right holders use to protect their works (whether or not the act involved is infringing and such devices etc. that directly protect against infringement must be covered. Furthermore, any exceptions to these requirements must be carefully and narrowly crafted to preserve the adequacy and effectiveness of the anti-circumvention prohibitions as the treaties require. Violations must be independent of infringement and subject to both civil and criminal remedies.
- Protection of rights management information: Adequate and effective legal remedies must be afforded to protect rights management information from unauthorized alteration and removal, consistent with the WIPO “digital” Treaties. Such provisions on rights management information (RMI) systems are critical to providing opportunities for licensed access and use of protected materials.
- Protection for encrypted program-carrying satellite signals: Criminal and civil liability must be afforded for encrypted program-carrying satellite signals which have been decoded without the authorization of the lawful distributor of the signal.
- National treatment: The principle of full national treatment, without exception or derogation, must be the norm in this FTA.
- Contractual rights: Any person acquiring or holding any economic rights must be able to freely and separately transfer such rights by contract. Any person acquiring or holding any such economic rights by virtue of a contract, including contracts of employment underlying the creation of works and phonograms, must be able to exercise those rights in its own name and enjoy fully the benefits derived from those rights. All rights, including rights of communication, must not be subject to mandatory collective administration.

- Narrow exceptions to protection: Limitations or exceptions to exclusive rights must be expressly limited to certain special cases which do not conflict with a normal exploitation of the work, performance or phonogram, and do not unreasonably prejudice the legitimate interests of the right holder, as provided in Berne, TRIPS and the WIPO treaties.
- Retroactivity provisions: The provisions of Article 18 of the Berne Convention (and Articles 9.1 and 14.6 of the TRIPS Agreement) should be applied strictly to the subject matter, rights and obligations provided for in the FTA.
- Government legalization of software (and more), plus protection against use of public computers and networks for copyright infringement: The FTA must contain an obligation of Thailand to issue appropriate administrative or executive decrees, laws, orders or regulations mandating that all government agencies use and procure only properly licensed computer software; such instruments must actively regulate the acquisition and management of software for such government use. Furthermore, this obligation should be extended to other works as well such as textbooks. Finally, these order and decrees must obligate Thailand to adopt provisions ensuring that its government agencies and other institutions containing publicly-controlled computers, computer systems or networks are not used in ways that infringe, or facilitate the infringement of, all copyrighted materials.

ENFORCEMENT: Effective copyright enforcement must remain a high priority and be a key element of the FTA. These FTA proposals illustrate the kind of measures which will, once implemented at the national level, simplify and expedite anti-piracy legal actions, reduce the costs of enforcement, and provide more effective and deterrent remedies.

- Provide deterrent levels of criminal penalties and remedies (including copyright infringements as “serious” offenses and as predicate offenses under organized crime provisions): The FTA must include provisions requiring imprisonment and monetary fines for copyright piracy “on a commercial scale” and that includes infringements causing commercial harm even if not done for-profit., as is the case with many infringements on the Internet. To be “deterrent,” copyright offenses should be treated as serious offenses, and penalties should be consistent with those accorded to other serious crimes. Furthermore, the FTA text must encourage Thailand to treat copyright offenses as predicate offenses under organized crime provisions of penal codes, for example, under its “money laundering” statute.

- Provide deterrent levels of civil damages for copyright infringement, including pre-established (statutory) damages: The FTA chapter should provide that damages actually imposed act as a deterrent and remove any gain to the infringer. To ensure deterrent civil damages, a system of pre-established damages (also known as statutory damages) must be adopted.
- Ensure *ex officio* authority for customs officials: Customs authorities must be primarily responsible for preventing infringing products from entering or exiting Thailand's territory. They must be able to initiate border measures *ex officio*, without the need for a formal complaint by a private party or association or the right holder. Border measures must be applicable to goods in transit and to goods destined for export.
- Civil *ex parte* search orders must be granted in an expeditious manner and without unnecessary costs: Thailand must strictly implement its TRIPS Article 50 obligations. In civil cases, searches and seizures conducted *inaudita altera parte* must be statutorily implemented and requests should be acted upon and executed within a short period of time. Any security or bonding obligations must not result in unreasonably deterring recourse to these procedures.
- Extend civil and criminal remedies to cover violations of the technological protection measures and rights management information obligations: All available remedies and enforcement procedures applicable to copyright infringement must apply to the obligations dealing with the circumvention of technological protection measures (TPMs) and with rights management information (RMI). Further negotiations are needed to clarify the relationship between the TPM and RMI obligations and their corresponding enforcement provisions.
- Award fees/costs and require information: Awarding legal fees and costs to the injured party is also critical to the deterrence that is a TRIPS requirement. Thailand must be able to order the infringer to provide any information regarding other persons involved in the infringement and the suspected distribution channels.
- Provide presumptions of ownership and subsistence: To speed up the civil justice system by making it easier for right holders and judges to bring cases to conclusion, the physical person or legal entity whose name is indicated as the author, producer, performer or publisher of the work (including a performance or phonogram) in the usual manner must, in the absence of proof to the contrary, must be presumed to be such designated right holder as such. It must also be presumed that the copyright

subsists in such subject matter, in the absence of proof to the contrary. Such presumptions should also pertain in criminal cases.

- Provide domain name registrant contact data: Unrestricted public access to current and accurate contact information about domain name registrations is a key ingredient for effectively enforcing against copyright piracy in the online environment. The FTA must require Thailand to take steps to ensure that the country code domain registries under its control provide this public access, such as by bringing its registration policies into compliance with the WIPO ccTLD Best Practices for the Prevention and Resolution of Intellectual Property Disputes.
- Provide for effective liability in cases of secondary infringement generally and, particularly for Internet service providers: It is critical that Internet service providers, other intermediaries, and anyone who aids and abets in infringements carry appropriate liability. This is particularly important in the case of infringements being carried out over the electronic networks of service providers. Limitations on remedies available against service providers who promptly take down infringing material must be narrowly crafted and ensure that cooperation between service providers and right holders is preserved. Notice and takedown procedures must be spelled out, be simple and expeditious and exist without the need for judicial intervention.

* * * *

IIPA greatly appreciates the opportunity to appear before the TPSC to testify on the proposed U.S.-Thailand Free Trade Agreement and the importance of ensuring that strong levels of copyright protection and major steps toward the eradication of piracy in Thailand result from this FTA.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2004 SPECIAL 301 REPORT

THAILAND

EXECUTIVE SUMMARY

Special 301 Recommendation: Thailand should be elevated to the Priority Watch List.

Overview of Key Achievements/Problems: 2003 was an eventful year in Thailand, culminating with the announcement in October by USTR that the U.S. would enter into negotiations with Thailand to conclude a Free Trade Agreement (the USTR subsequently formally notified Congress of its intent to enter into negotiations with Thailand on February 12, 2004). IIPA has urged that those negotiations should not commence until the Thai recognize the severity of the optical disc piracy problem and take substantial steps toward addressing it, starting with adopting an effective regulation on optical disc production. While an OD Bill passed its first reading in Parliament in September, the proposed Bill fails to meet the basic requirements of an effective optical disc law. Meanwhile, throughout 2003, optical disc pirate production remained rampant in the country. While the Thai government undertook several months of stepped-up enforcement efforts that resulted in some impressive progress toward cleaning up key pirate retail markets prior to the APEC Ministerial in October, since then, enforcement efforts have dropped off and the pirates have returned.

Actions to be taken in the first quarter of 2004

- Take swift action against several pirate optical disc factories, confiscate pirate materials and equipment used, and arrest owners/managers of pirate operations (and investigate organized crime); follow the pledge by APEC Leaders to take concrete steps to “stop optical disk piracy.”
- Clean up street markets and malls and keep them clean, with raids and seizures followed by arrests and prosecutions, and where warranted, shop closures. Upstream suppliers should also be targeted and strict border enforcement undertaken to intercept the flow of pirate products into, out of, and transshipped through Thailand (e.g., from Cambodia).
- Pass an effective optical disc law and implementing regulations that make changes to the 2002 Bill needed to make it effective. The law should comport with the set of “effective practices” for optical disc regulations that were endorsed by Thailand’s Ministers at the APEC Ministerial.

Assuming that negotiations do commence with Thailand toward conclusion of a Free Trade Agreement in 2004, the IPR chapter of that Agreement must: (a) be TRIPS-plus; (b) include in specific terms obligations which would meet the requirements of implementing the WIPO “Internet” treaties, the WCT and WPPT; (c) include modern and effective enforcement provisions, including those to respond to the threats of digital and Internet piracy (as well as traditional forms of piracy, including book piracy);¹ and (d) contain specific commitments with

¹ For example, for book publishers, a regulation or order is needed to stop the wholesale copying of printed materials for educational purposes and to clarify the nature of fair use as to educational materials; then commercial copysshops

regard to combating optical disc piracy through regulations on production and strict enforcement. A Free Trade Agreement with Thailand could be an effective tool for promoting greater foreign direct investment in Thailand from the copyright industries,² but if rampant piracy is not addressed first, such benefits cannot possibly accrue to Thailand's economy.

For more details on Thailand's Special 301 history, see IIPA's "History" Appendix to this filing,³ as well as the previous years' country reports.⁴

THAILAND
ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1999 – 2003⁵

INDUSTRY	2003		2002		2001		2000		1999	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	28.0	60%	26.0	70%	24.0	65%	24.0	60%	21.0	55%
Records & Music	26.8	41%	30.0	42%	16.6	45%	15.6	45%	6.0	40%
Business Software ⁶	NA	NA	57.3	77%	32.6	77%	42.7	79%	66.5	81%
Entertainment Software ⁷	NA	82%	47.3	86%	29.1	93%	130.5	98%	116.3	95%
Books	28.0	NA	28.0	NA	28.0	NA	33.0	NA	33.0	NA
TOTALS⁸	NA		188.6		130.3		245.8		242.8	

COPYRIGHT PIRACY IN AND FROM THAILAND

Optical Disc Piracy Remains Major Problem in Thailand

The most serious problem the U.S. copyright industries face in Thailand remains piratical optical disc piracy (audio compact disc, video compact disc (VCD), Digital Versatile Disc (DVD),

must cease wholesale copying of published materials.

² For example, motion picture companies based overseas currently maintain local offices and employ local staff to market and distribute filmed entertainment. These offices use Thai film laboratories for replication of theatrical prints, Thai production facilities for manufacture of videocassettes and VCDs, and local advertising agencies that spend billions of Thai Baht to promote films. In addition, increasingly, movies are being filmed partially or entirely in Thailand, with location production revenues from foreign studios alone providing the government with more than one billion baht (approximately US\$25.7 million) annually. See Bamrung Amnatcharoenrit, *Foreign Movie Makers Set to Increase Spending*, Bangkok Post, January 8, 2003. The director of the Thai Film Board, Sidichai Jayant, expects revenues from foreign film shoots in Thailand to top five billion baht (approximately US\$128.4 million) by 2006. Nine hundred foreign film units used Thailand as a location in 2001 and 2002.

³ <http://www.iipa.com/pdf/2004SPEC301HISTORICALSUMMARY.pdf>.

⁴ <http://www.iipa.com/countryreports.html>.

⁵ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2004 Special 301 submission at <http://www.iipa.com/pdf/2004spec301methodology.pdf>.

⁶ BSA's 2003 piracy statistics were not available as of February 13, 2004, and will be made available in the near future and posted on the IIPA website at <http://www.iipa.com/>. BSA's statistics for 2003 will then be finalized in mid-2004 and also posted on the IIPA website. BSA's trade loss estimates reported here represent losses due to piracy which affect only U.S. computer software publishers in this country, and differ from BSA's trade loss numbers released separately in its annual global piracy study which reflect losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.

⁷ ESA reports that the increase in the value of pirated videogame products in Thailand in 2002 (which is carried over into 2003) is primarily due to methodological refinements which allowed it to more comprehensively evaluate the levels of piracy in the personal computer (PC) market.

⁸ In IIPA's 2003 Special 301 submission, IIPA estimated that total losses to the U.S. copyright-based industries in Thailand in 2002 were \$160.0 million. IIPA's revised figures are reflected above.

and CD-ROMs, as well as DVD-Rs). Product manufactured in or imported into Thailand of copyrighted materials, including entertainment software and videogame products, audiovisual works, recorded music, and literary materials, continues to harm the local markets. Notwithstanding several raids on pirate optical disc factories in 2002 and 2003,⁹ Thailand continues to experience a rise in production capacity for optical discs. There are currently 39 registered optical disc plants in Thailand, with another two-line facility having come on line in early February. Currently there are a total of 126 replication lines (116 operational) with a potential annual capacity of 441 million discs,¹⁰ while legitimate domestic demand, excluding CD-R, is estimated to be at least 60 million discs.¹¹ Many of these plants operate in or near Bangkok, while others operate in more remote areas, particularly near the frontiers with Laos, Cambodia, and Burma which is an increasing concern. The plants can produce any format, including audio CD, VCD, or DVD, by employing kits to change formats (even from a blank CD-R or DVD-R line).¹² Disturbingly, optical disc pirates in Thailand now regularly engage in “disc gouging,” namely, scratching off or tampering with codes which must be present on optical discs to identify the source of production of a disc (disc gouging must be prohibited under the Thai OD law). CD-R “burning” of entertainment software also remains a serious problem.

Domestic hotspots for piracy¹³ were subject to a government crackdown on piratical activities beginning on May 1, 2003, and lasting through the APEC Ministerial in Bangkok in October. This crackdown largely succeeded in eradicating the most blatant and open retail piracy. Unfortunately, once the APEC leaders filed out of the city, the pirates were permitted to return, and the stalls are once again replete with pirated product.¹⁴ Exports of pirate optical discs from Thailand remain a concern for the copyright industries.¹⁵ Pirated optical discs have shown up all over the world, including in Italy, Germany, Sweden, South Africa, the United Kingdom (where Thailand-sourced optical discs ranked 5th in the world in numbers in 2003), Belgium, and the United States. IIPA notes, as Thai government officials have acknowledged, the involvement of organized criminal syndicates relocating to Thailand following crackdowns in other regional jurisdictions. Foreign investment from known pirate groups is well documented, including investment from Taiwan, Macau, Hong Kong, China, and Malaysia.¹⁶

⁹ For example, the motion picture industry reports that from 2002 to July 2003, it was involved in raids on a total of four DVD factories and five VCD factories; since 1997, the industry reports a total of 58 pirate factory raids.

¹⁰ The production capacity is derived by multiplying the number of lines by 3.5 million; this is by all accounts a conservative estimate.

¹¹ Legitimate domestic demand for audio only is at least 19 million discs. One reason demand may be up in 2003 is the decreased cost of VCD and DVD machines.

¹² The Motion Picture Association has compiled the following chart regarding number of production facilities in Thailand, which also breaks down the list by factories and lines capable of producing DVDs:

Number of Production Plants and Audiovisual Rental and Retail Shops in Thailand							
	1997	1998	1999	2000	2001	2002	2003
DVD Factories	NA	NA	0	1	9	13	8
DVD Lines	NA	NA	0	1	14	16	11
Total Factories	NA	NA	20	43	46	51	38
Total Lines	NA	NA	36	56	78	102	124
Rental and Retail shops	2300	2200	2100	1900	1708 (est.)	1586 (est.)	1350 (est.)

¹³ Domestic piracy locales include Bangkok, Chiang Mai, Phuket, and Pattaya, in markets such as the notorious Pantip Plaza, Fortune Town, Tawana Plaza, Mahboonkrang, Seacon Square, Zeer Rangsit, Patpong Road, Sukhumvit Road, Klongtom, Banmore, Nondhaburi Pier, Bangkapi, World Trade Centre, Pata Tiklao, and IT Zeer.

¹⁴ For example, pirated entertainment software is everywhere, including console-based entertainment software mostly imported from Malaysia, Cambodia, or domestically produced.

¹⁵ Customs statistics from the European Union indicate that in 2003, Thailand ranked second behind Malaysia in the world for seizures of pirated “CD (audio, games, software) DVD, cassettes,” with 22% of the 24.6 million pirated products seized, or 5.4 million discs, being seized. More discs were seized from Thailand than from China, Taiwan, or Pakistan.

¹⁶ There appears to be increasing involvement of organized crime in piracy in Thailand. On September 6, 2003, the

Cartridge-Based Entertainment Software Piracy

Cartridge-based entertainment software is also being heavily pirated in Thailand. In the last year, the country has seen a dramatic increase in the number of infringing cartridge-based video game products either being manufactured or transshipped through Thailand to the surrounding countries and to Europe. While the majority of pirate and counterfeit cartridge-based products are manufactured in China, there also appear to be significant assembly facilities in Thailand.¹⁷

Book Piracy

Piracy of published materials, mainly in the form of illegal photocopies of textbooks, but also involving print piracy of entire books, illegal translations, and adaptations, harms the market for U.S. published materials. Such piracy is rampant around university campuses.¹⁸ The Thai government has been extraordinarily reluctant to intervene and to demand copyright compliance by university employees and officials, citing security-related concerns as an excuse for inaction.¹⁹ Photocopying and print piracy is rampant in primary and secondary schools as well. Illegal photocopying is tacitly, and sometimes actively, supported by lecturers, and reflects a broad misinterpretation about the scope of permissible copying by teachers under the current copyright law.²⁰ This law must be clarified to ensure that it does not conflict with international standards regarding permissible uses of a work.

Plagiarism and unauthorized translations on the part of the lecturers is an increasing problem, due in part to the Thai government's urging of lecturers to develop their own materials but failing to equip them to do so.²¹ Furthermore, commercial copyshops providing illegal texts to customers have made the bogus argument that they are not engaged in illegal copying but, rather, simply provide a "service" to customers and are not responsible for resulting infringement.²² These shops have also learned to avoid stockpiling of infringing goods by moving to a "made to order" system, in which requested copies are made and immediately distributed. The publishing industry needs the Thai government's help in bringing these infringers to justice even when large stockpiles are not found.

motion picture industry's representatives raided a warehouse and found approximately 400,000 pirate optical discs, 1 million covers, and 300 stampers. The police arrested 4 Thai and 1 Singaporean national. Several Malaysian nationals have been arrested trying to transport pirate optical discs from Malaysia to Thailand.

¹⁷ One member of the Entertainment Software Association conducted a raid in Taiwan against an infringer of its product, resulting in the seizure of documents indicating that the same company was operating a manufacturing plant in Thailand.

¹⁸ The Association of American Publishers members would like to see increased Thai government involvement in 2004 in educational efforts regarding copyright, and the scope of fair use and educational exemptions, targeting the general public, grade schools, and universities.

¹⁹ University campuses where piracy of published materials is prevalent include Chulalongkorn University, Assumption University, Sripatum University, and Mahanakorn University.

²⁰ Article 32(6) of the Copyright Law – a narrow educational exemption – is very poorly defined and has been completely misinterpreted by teachers and universities in Thailand.

²¹ Lecturers routinely include significant excerpts from English-language books in their own materials without giving proper credit. In addition, unauthorized translation of educational materials by lecturers is rampant, as lecturers market direct translations of foreign publishers' works as their own.

²² It appears that a proposed amendment to the copyright law will close this loophole.

Business Software End-User Piracy

Thailand has one of the highest end-user piracy rates in Asia. The raids conducted in 2003 all found flagrant evidence of the use of pirated software in corporations. The majority of educational institutions still use pirated software or software without licenses.

Internet Piracy

Thailand witnessed substantial growth in Internet usage in 2003, which unfortunately has been accompanied by the growth of Internet-based piracy (including direct downloads of copyrighted materials as well as Internet orders for pirate CDs, CD-ROMs and VCDs). It is now estimated that more than 3.5 million Thais use the Internet, and that nearly 1.5 million users engage in the downloading of music from the Internet.²³ The industries have been successful in certain cases involving direct-download piracy.²⁴ Piracy at Internet cafés, however, continues to be a significant problem. Only a small fraction of the thousands of Internet cafes in business use licensed or legitimate entertainment software products in their establishments and Internet orders for pirate software.

Cable Piracy and Unauthorized Public Performances of Audiovisual Materials

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. Public performance piracy also thrives in Thailand, as many hotels outside Bangkok still transmit unauthorized videos over in-house movie systems, most bars in tourist areas openly exhibit videos without authorization, and a growing number of bars and restaurants have also added “private” rooms to illegally screen U.S. motion pictures. The cable piracy rate remained unchanged in 2003 at an estimated 35%.

²³ *Piracy on Internet Seen as Latest Threat*, Bangkok Post, February 21, 2003, at 10. In 2003, National Electronics and Computer Technology Centre estimated that more than 3.5 million people used the Internet in Thailand, of whom 42% (1.47 million) downloaded music.

²⁴ The record industry was successful in 2003 in working with ISPs to close down 24 web sites that were providing free downloading of music. The business software industry group, BSA, in conjunction with the police, was able to successfully raid one Internet pirate in 2003.

COPYRIGHT ENFORCEMENT IN THAILAND

THAILAND CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS FOR 2003

ACTIONS	MOTION PICTURES	BUSINESS SOFTWARE (End User)	BUSINESS SOFTWARE (Retail)	SOUND RECORDINGS
Number of raids conducted	275	5 ²⁵		350
Number of VCDs seized	215,392	-	-	28,533
Number of DVDs seized	616,494	-	-	-
Number of CD-Rs seized	1,940	-	-	14,769
Number of investigations	407	-	-	-
Number of VCD lab/factory raids	4	-	-	2
Number of cases commenced	66	-	-	129
Number of Indictments	66	-	-	129
Number of defendants convicted (incl. guilty pleas)	72	1 ²⁶	-	377
Acquittals and dismissals		0	-	4
Number of cases Pending		0	19 ²⁷	111
Number of factory cases pending	10	0		2
Total number of cases resulting in jail time		0	4	24 ²⁸
Suspended prison terms		0	4	12
Maximum 6 months	46	0	1	10
Over 6 months	15	0	3	2
Over 1 year	2	0	0	-
Total suspended prison terms	63	0	2 yrs 9 months	4 yrs 7 months
Prison terms served (not suspended)		0	0	-
Maximum 6 months	2	0	0	-
Over 6 months	1	0	0	-
Over 1 year		0	0	-
Total prison terms served (not suspended)	3	0	0	-
Number of cases resulting in criminal fines		1	5	7
Up to \$1,000	4	0	4	-
\$1,000 to \$5,000	50	1	0	5 ²⁹
Over \$5,000	16	0	0	2 ³⁰
Total amount of fines levied (in US\$)	US\$ 257,821	US\$ 1,905	US\$10,075	US\$245,075 ³¹

May 2003 Crackdown Cleans Pirate Markets – Temporarily

The Thai government enforcement campaign against piracy, starting on May 1, 2003, featured some significant raiding against retail establishments in some of the most notorious pirate retail markets.³² It is estimated that for a time, retail piracy had dropped by upwards of 70 percent in the most notorious markets and malls. The unfortunate fact, however, is that the

²⁵ Four of these cases were settled successfully in 2003. The fifth case is very recent and has not been filed in court yet.

²⁶ Resulted from a 2001 raid against an end-user called Well-Established Co., Ltd. and its authorized director. The fine shown is the amount the IP&IT Court rendered after it reduced the total fines by half (the defendant pled guilty).

²⁷ Nineteen retail cases from 2000 and 2001 are still pending prosecution: no offenders were arrested or absconded. These cases are unlikely to proceed to trial.

²⁸ Supreme Court Judgments in 2003 for prosecution of retail infringers, cases commenced in 2000 & 2001.

²⁹ Fines resulting after commuting prisoners' sentences

³⁰ Id.

³¹ Id.

³² The campaign in 2003 is by no means unprecedented. For example, the following chart demonstrates raiding activity carried out on behalf of the motion picture industry through 2003:

	1997	1998	1999	2000	2001	2002	2003
Investigations	1237	541	499	308	318	630	407
Raids	311	286	289	216	277	343	275
VCDs seized	16,906	119,783	431,065	846,639	493,059	299,234	215,392
DVDs seized	0	0	0	40	24,031	37,070	616,494
Legal Actions Initiated	89	183	136	89	79	79	66

enforcement campaign was not sustained, and as a result, piracy returned after the October APEC Ministerial. Indeed, in recent raids since the conclusion of the Ministerial, the police are reportedly seizing only token quantities of pirated CDs.³³ Such raids have no deterrent effect. In order to follow through on promises made to “clean up CD piracy in three months,” 38 then-existing optical disc factories were visited (during regular business hours only) by teams comprised of officials from the Department of Intellectual Property, the Thai Police, and copyright owner representatives.³⁴ In some plant visits where piratical production was discovered, equipment was seized, which has been stored in government warehouses pending the outcomes of trials.³⁵ Unfortunately, the “visitors” are not empowered to ascertain production, such as collecting exemplars, determining amounts of polycarbonate, or verifying copyright licenses, so the plants generally view such visits as nothing more than a nuisance.

Efforts Toward Enforcement Coordination Remain Elusive

IIPA has consistently reported a lack of overall enforcement coordination, and the sporadic nature of enforcement campaigns, in Thailand. For example, we noted that in late 2001, General Pol. Noppadol Soomboonsupt, former head of the “Special Investigation Department” (SID), had successfully curtailed piracy from retail markets, but with a cabinet reshuffle in February 2002, piracy had returned in full force.³⁶ The Cabinet just approved General Sombat Amornvivat (previously a Deputy Commissioner-General) to be the Director of SID to replace General Noppadol. Unfortunately, at present, we understand that while SID has a building and a skeletal staff, enabling legislation has not been passed by Parliament, preventing SID from acting against piracy. To make matters worse, the Thai Economic Crimes Divisions (ECID) now reportedly has stopped conducting anti-piracy raids and has informed right holders that this responsibility will be transferred back to SID. This creates a “Catch 22” situation for right holders.

On December 20, 2002, the Ministry of Commerce (MOC) organized a signing ceremony for a “Memorandum of Understanding on the Cooperation of the Relevant Government Agencies on the Enforcement of Intellectual Property Rights (IPRs),” including 13 government departments.³⁷ While the government met in April 2003 to reinforce the goals of the MOU,³⁸ it

³³ For example, recently the police seized 14 CDs at a stall that had 400 to 500 pirate CDs for sale. At another stall only 70 CDs were seized. A warehouse was raided containing thousands of CDs and only 300-400 were seized. In the first week of February, DIP decided to run some new raids, upon complaints by copyright owners that not enough was being done to reduce piracy once again in the markets.

³⁴ The factories visited are registered with the Ministry of Industry under the Thai Factory Act, under which optical disc plants apply for a business license to produce; the Ministry of Commerce issued a Regulation requiring all CD plants to report the quantity of raw material consumed and the number of CDs produced on monthly basis.

³⁵ See Phusadee Arunmas, *Two CD-Stamping Machines Snatched: Licensed producer exceeds output limit*, Bangkok Post, May 20, 2003 (in which the government seized two stamping machines from a factory in Nonthaburi worth about 30 million baht, or approximately US\$770,400).

³⁶ From October 2002 until early 2004, General Noppadol headed SID but without funding and staff, so it was impossible for him to act. General Noppadol was removed from SID in early 2004 and is now Legal Advisor of the Office of Legal Advisory Lawyers of the Thai Police.

³⁷ The departments participating in the signing of the MOU included the Royal Thai Police, the Office of the Consumer Protection Board, the Customs Department, the Revenue Department, the Excise Department, the Department of Industrial Works, the Department of Foreign Trade, the Department of Internal Trade, the Department of Business Development, the Department of Intellectual Property, the Special Investigation Department, the Metropolitan Electricity Authority, and the Provincial Electricity Authority.

³⁸ The “IP Summit,” chaired by Deputy Minister of Commerce Watana, set out the following goals for 2004-2007:

- Educating the public on IP issues to increase competition in the world market.
- Developing better IPR protection systems in Thailand, by increasing capabilities of the relevant personnel, and by fostering greater cooperation (networking) between government agencies and the private sector.
- Suppressing IPR infringements by creating efficient enforcement mechanisms and expanding target areas.

was not until September 12, 2003 that further Memoranda of Understanding on “Cooperation for the Prevention and Suppression of Pirated/Counterfeit Products” and “Border Control” were signed.³⁹ Initially, there were many enforcement activities launched under these two MOUs; however, efforts dropped off significantly after the first month. Industry is generally supportive of Minister Watana Muangsook who initiated the two MOUs, and we look to his leadership to demonstrate that the Thai government can make progress in reducing piracy levels.⁴⁰ Also, the MOU on Border Control will be far more effective if it is used to monitor both imports and exports and to crack down on false documentation. To date, there is little sign of any improvement with respect to border measures.

In addition to the MOUs, in 2003, the Thai government also launched a reward scheme in conjunction with copyright owners to combat pirate manufacturers. The scheme rewards enforcement officers for significant seizures: 1,000,000 Baht, or US\$25,700 per machine, up to a maximum of 2,000,000 Baht, or US\$51,400; and three Baht (US\$0.08) per disc provided that the amount of discs seized exceed 300 and consist of titles no more than one year old.

Steps Taken Against Institutional End-User Piracy

In 2003, the business software industry continued to pursue cases against the unauthorized use of business software in a commercial setting, so-called “end-user piracy” of business software. BSA and business software companies conducted several raids against institutions making multiple unauthorized copies of business software for their internal operations. Each raid was successful, finding that the vast majority used pirated software or unlicensed software; in one case, the value of illegal software use by one company amounted to nearly US\$1 million. With respect to enforcement against pirate end users of business software, *ex parte* searches and seizure orders are being granted in criminal cases (under the Criminal Procedure Code), and while no *ex parte* search and seizure order exists for civil cases, under the Rules of the Establishment of the IP&IT Court, the court can seize or attach, and examine evidence if any party fears that evidence of the case might be lost or become difficult to obtain in the future. The business software industry has found the existing law to be effective in supporting enforcement actions in Thailand. To address the use of pirated or unlicensed software by the majority of educational institutions, the Department of Education should take a lead in sending a strong message for those educational institutions to legalize software usage.

Post-Raid Problems and Procedural Hurdles at the IP&IT Court Lead to Delays and Non-Deterrent Results

IIPA has long noted post-raid enforcement difficulties that cause delays, loss of evidence, and overall lack of effective follow-through after a successful raid. Problems include leaks to potential raid targets (who then destroy or dispose of pirated materials and equipment/tools), destruction or loss of evidence in or after a raid, and failure to follow piracy to the key perpetrators (such as the owner or director of an establishment). As cases advance toward the courts, IIPA notes the lack of adequate training and retention of prosecutors handling copyright cases before the IP&IT Court. Some prosecutors have been found to be unfamiliar

³⁹ The MOU on piracy was carried out through Thai Police and industry representative presence in pirate malls, and the MOU on Border Control was carried out through the establishment a special task force of Customs officials and copyright owner representatives to monitor high-risk shipments and customs houses.

⁴⁰ The new Minister of Commerce, Watana Muangsook, issued a public call earlier in 2003 for copyright owners to assist the government in combating piracy. An entertainment software company offered training for law enforcement, and provided specific information regarding known or suspected exporters of pirate product. The Thai government has never responded back, despite repeated follow-up by the company.

with copyright law, and by the time they become familiar, they are often transferred to other posts.

Even in the IP&IT Court, which in general, remains one of the true success stories in the entire region, some procedural hurdles have emerged which should be addressed through judicial training and reform. For example, the process of obtaining a search warrant in Thailand can take more than a half day, which is unusually lengthy, especially when egregious piracy occurs, and there is a lack of consistency among judges. Courts have also been extremely reluctant to issue warrants for nighttime searches, notwithstanding that most perpetrators commit piracy at night. The Court also continues to impose burdensome requirements with respect to presumptions of subsistence of copyright and copyright ownership, which may place Thailand in violation of its international commitments. The Court imposes other documentary requirements, such as notarization and “legalization,” which are extremely burdensome; notarization and legalization are still being required of all documents executed outside of Thailand.⁴¹

Finally, while many copyright cases continue to result in convictions in Thailand in the IP&IT Court, this does not ensure that cases still on appeal will result in lower courts’ imposition of prison sentences that have a deterrent effect. The Court must continue firm sentencing practices, particularly as more operatives from pirate optical disc plants are brought to justice. It should also continue its practice of ordering forfeiture of optical disc production equipment used to make pirate product, and should extend that forfeiture policy to other cases.

COPYRIGHT LAW AND RELATED ISSUES

Government Must Pass and Swiftly Implement an Effective Optical Disc Law

On September 17, 2003, the Royal Thai government presented a “Draft Act on Production of CD Products” to the Parliament, which overwhelmingly passed its first reading. Unfortunately, as it stands, this Bill fails to meet the basic requirements of an effective optical disc law.⁴² IIPA understands that there may be further drafts, including draft implementing regulations, which resolve some difficulties, but essentially, the major weaknesses remaining in the draft are:

- **No License Regime:** Effective OD laws establish a “license” system for plants wishing to engage in OD production (so that plants failing to meet certain criteria can be denied the ability to produce). The Thai Bill requires only “notification,” not approval, for a plant to begin producing optical discs. There also appears to be no provision governing renewal (which would allow the government to approve or refuse the plant’s continued operations). The Bill should be amended to require “approval” (i.e., plants should be obligated to “notify and

⁴¹ 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.

⁴² Other stop-gap measures and statutes cannot substitute for a comprehensive optical disc law. For example, IIPA understands that some enforcement against optical disc piracy has occurred under the Prices of Goods and Services Act B.E. 2542 (A.D. 1999) (in which products like “compact discs” and “computer-program software” are placed on a Thai government “controlled-products” list, subjecting those products to regulation and enforcement against anyone dealing in them without government authorization), which has resulted in seizure of pirate product and optical disc inlay sleeves. We also understand that on November 22, 2001 the Minister of Commerce issued a Ministerial Regulation (Royal Gazette, Gen. Iss. Vol. 119, Sec. 61, January 17, 2002, in force March 17, 2002), regulating the importation of equipment that could potentially be used to infringe copyright.

obtain approval” to engage in OD production), and/or the implementing regulations should set forth that “notification” involves an approval process. Implementing regulations should also set forth the requirements to obtain an approval (including, e.g., demonstrating that the plant has rights in any work it intends to replicate).

- **No Identification Code Requirement for Stampers/Masters:** The Thai Bill defines stampers and masters as machines, which means there is no requirement that an identification code be applied to stampers/masters, or that equipment to produce discs or stampers/masters to be adapted to use such codes.
- **No Timely Monitoring of Export of ODs and Imports/Exports of Machines, Stampers/Masters and Raw Materials:** The Thai Bill contains after-the-fact “notification” requirements (with lengthy grace periods), and there is no provision for monitoring dealing in stampers/masters. Prompt and transparent automatic approvals are essential to effectively enforce against unauthorized production and to track the movement of machinery and raw materials, key ingredients of optical disc piracy. The notification requirements in the current draft must be altered to allow for pre-notification and should also provide for automatic approvals.
- **No Inspection Without Notice at Any Time and Possible Forcible Entry:** The Thai Bill fails to, but must, allow for inspections of plants without notice and at any time and for forcible entry in cases in which a plant obstructs entry to authorized officials. The phrase “from the sunrise to the sunset or during the Production hours of such Business Operation Place” should be deleted, and regulations released simultaneously with the law should confirm that inspection authority includes those occurring without notice and that forcible entry is possible when those associated with a plant obstruct entry.
- **No Express Seizure, Forfeiture, and/or Destruction of ODs, Stampers/Masters, and Machinery:** The Thai Bill fails to, but must, provide expressly for seizure, forfeiture, and/or destruction of discs, stampers/masters, or machinery found as a result of an inspection to be in violation of the statute or found to be infringing copyright or trademark. Regulations released simultaneously with the law could provide for this.
- **Inadequate Criminal Penalties:** The Thai Bill contains inadequate criminal penalties with no mandatory minimum fines and no mandatory imprisonment, and no provision strengthening penalties against recidivists. Most offenses, like failing to affix an identification code, result only in the imposition of non-deterrent fines (in that case, the fine is a non-deterrent US\$2,500, with no express possibility of revocation or plant closure). Penalties in the Bill must be raised to deterrent levels.

The new DIP Director General Kanissorn Navanugraha appears to recognize that there is a large production overcapacity for optical discs, and recognizes the value of having an effective optical disc law as an additional tool to fight optical disc piracy in Thailand. DG Kanissorn has also pointed out the tools presently available to the Thai government to address OD piracy (aside of course from criminal penalties for copyright infringement), including the requirements that an entity: (1) obtain an import license for the machinery; (2) notify DIP of any change in the ownership of the machinery; (3) obtain a copyright certificate (one time) from DIP by demonstrating a legitimate use of the machinery; and (4) report the actual production on a monthly basis. Unfortunately, as noted, these measures do not provide the type of robust system that is required to curtail unauthorized production of optical discs. It would be helpful if the Thai government could immediately (and until a new optical disc law is put in place) use its current administrative authority to start, on a monthly basis, cross checking production accounts with polycarbonate supply, and to ask the plants to supply records and samples of each of the products they manufacture.

Thai Parliament Should Modernize the Copyright Law

In May 2003, Thailand's Intellectual Property Department released for public comment draft amendments to the Copyright Act, B.E. 2537 (A.D. 1994) (last revised in 1995). These draft amendments would make some important improvements to copyright protection in Thailand.⁴³ At the same time, there are certain areas which may be ambiguous or in need of clarification,⁴⁴ and other areas in which the draft may actually weaken protection already provided in the current law (most notably, the draft weakens criminal penalties in several significant ways, including by removing mandatory statutory minimum fines and imprisonment, and by lowering maximum fines). There are yet other areas in which we urge the Thai government to follow international trends, such as extending term of protection to life of the author plus 70 years (Section 19, paras. 1 and 2), or where applicable, 95 years from publication (e.g., Sections 19, para. 4, 20, 21, 23). Finally, we note that the draft attempts to implement important protections needed to provide an adequate legal framework for electronic commerce, and in particular, to implement the provisions of two WIPO "Internet" treaties, the WCT and WPPT; however, the draft implementation falls short of meeting the requirements of key aspects of these important treaties.⁴⁵ In particular, the draft provisions to prohibit the circumvention of technological protection measures (TPMs) must be tightened further to fully implement this crucial requirement of the WIPO treaties, by:

⁴³ The positive changes include:

- Strengthening civil remedies by allowing courts to award compensatory and punitive damages and lost profits.
- Making it an offense for a photocopy shop to provide infringing copies of works.
- Clarifying that temporary copies are covered as reproductions under the Thai Act
- Distinguishing between "disposal" (sale or other transfer), rental, and "communication to the public."
- Attempting to deal with the WIPO treaties' requirements to prohibit the circumvention of technological protection measures (TPMs), and to prohibit the unlawful tampering with rights management information (RMI).
- Strengthening criminal provisions in certain respects.
- Establishing voluntary collective management of copyright and safeguarding against over-zealous collection of royalties on behalf of performers (or the unlawful collection on behalf of other copyright owners).

⁴⁴ The drafters should clarify or further amend the law to ensure that:

- The exclusive "communication to the public" right includes coverage of "any communication, whether by wire or wireless means."
- The addition of Section 70/2 covers a photocopy shop that may not make but hands over the infringing copy.
- Competent officials have the ability to carry out inspections *ex officio* or upon the request of a right holder, may carry out inspections "at any time of day or night," and may seize infringing or suspected infringing goods, documents, tools, and implements used in commission of the infringement/offense.
- Right holders may participate in inspections of premises and obtain samples of infringing copies and material and have access to equipment and documents seized.
- Forfeiture or destruction of infringing goods/documents/tools/implements is available.
- Leaking information regarding a surprise inspection or entry into a premise is a criminal offense.
- The exception to temporary copy protection is (preferably explicitly) subject to the Berne three-part test, and is made sufficiently narrow to satisfy Thailand's international obligations.
- The prohibition on importation includes the ability to authorize or prohibit the importation of piratical copies of works as well as copies of works without the authorization of the right owner.
- Landlords (e.g., of the pirate markets) are liable for infringing activities of their tenants.
- Educational exceptions, particularly Section 32, are not read incorrectly to permit the wholesale copying of entire textbooks, which would be TRIPS-incompatible.
- The exception in Section 43 is not interpreted in Thailand to permit unauthorized reproductions of computer programs as well as other works.
- Provisions on presumptions of subsistence of copyright and copyright ownership are upheld and not made subject to burdensome proof requirements that are TRIPS-incompatible in practice.

⁴⁵ For example, the provisions on rights management information contains two key offenses needed to make these provisions effective, but should also punish criminally one who 'distributes or imports for distributing, broadcasting, or communicating to the public, rights management information knowing that electronic rights management data has been deleted or changed without authority.' In addition, the draft should include provision for civil or administrative remedies, and most importantly, injunctive relief, is sufficient.

- Fully covering “copy controls” (i.e., controls on the exercise of all rights under copyright) as well as “access controls.”
- Prohibiting the act of circumvention (as well as the business of manufacturing), and extending the prohibition to those who ‘offer to the public or provide’ circumvention services.
- Covering component parts of circumvention devices, circumvention software and code.
- Covering devices/parts etc. whose “primary” purpose is to circumvent (the draft test is whether the device is “specifically designed or adapted” to circumvent).⁴⁶
- Providing for civil, provisional, and administrative remedies, including injunctive relief (in addition to criminal remedies) for circumventing, and provide for at least the same level of criminal penalties for circumventing TPMs as for copyright offenses.

By updating its copyright regime for the digital age and joining the WIPO treaties, Thailand can position itself as a leader within the APEC and ASEAN communities.⁴⁷

One important legal question involves the extent to which Internet service providers can be held liable for infringing activities occurring over their services. A law dealing with ISPs in Thailand has been enacted,⁴⁸ and went into force in early 2000, but the National Telecommunication Business Commission (NTBC), responsible for implementing the provisions of that law, still has not been established after four years. Currently, ISPs operate their business under agreements made with the Communications Authority of Thailand (CAT). ISPs must comply with contractual agreements with CAT, requiring the ISPs to control, verify, or warn their customers not to use their services in ways that contradict any laws. It does not appear that ISPs are at present obligated to immediately remove or take down an infringing website, but police and copyright owners may request an ISP to remove an infringing website from its system when there is evidence of infringement. The police may also request ISPs to provide information regarding the identity of the persons operating a website when such information is required for investigation or when there is evidence of infringement.

Government Should Address Organized Crime

Thai government officials have acknowledged the involvement of organized criminal syndicates relocating to Thailand following crackdowns in other regional jurisdictions. Foreign investment from known pirate groups is well documented, including investment from Taiwan, Macau, Hong Kong, China, and Malaysia. The Thai government must begin to address organized criminal syndicate involvement in and control of piracy operations in the country. To begin effectively addressing the gravity of this problem, Thailand is urged to look towards adopting an organized crime statute (cf. Hong Kong’s Organized and Serious Crimes Ordinance [OSCO]), which would include intellectual property rights violations as a predicate offense.

⁴⁶ The draft provision also leaves unclear whether other indirect proof, such as whether the circumvention device/part/software is marketed for the purpose of circumvention, or whether the circumvention device/part/software has only limited commercially significant uses other than to circumvent.

⁴⁷ APEC Leaders have agreed to “ratify and fully implement the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty as soon as possible....For any Economy in the process of reviewing accession or implementation, it will commit to completing that review as soon as possible.”

⁴⁸ Act on Organizations Allocating Frequency Waves and Supervising Radio/Television Broadcasting and Telecommunication Business B.E. 2543 (2000).

Cable Regulation and Broadcast Legislation Still Not Enacted

Enactment of cable regulatory controls and broadcast legislation 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 will 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 government agency that issues and renews cable TV licenses, the Public Relations Department, currently does not enforce copyright compliance as a licensing condition, but has stated that it would like to get illegal operators to go legitimate through a regrouping under the auspices of Channel 11 (a state-run TV channel).⁴⁹

The draft broadcast legislation 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 2 million Thai Baht (US\$51,250). Stronger penalties are needed if this law is to be effective. Unfortunately, the Bill remains pending. Other legislation passed in January 2000 – the Frequencies Management Act – created a National Broadcasting Commission, but selection of its members has been unduly delayed. The cable Bill is unlikely to make any forward progress until the National Broadcasting Commission is formed. This commission should be appointed promptly and given the authority to fight cable piracy, and to guide policies on commercial issues including foreign investment and advertising restrictions. Foreign investment in pay television is presently capped at 25% and should be increased. In addition, the ban on advertising on pay television should be removed.

Generalized System of Preferences

Thailand currently enjoys enormous 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 (in the first 11 months of 2003, \$2.46 billion in duty-free goods entered the U.S. from Thailand duty free under the GSP Program – approximately 17.9% of its total exports to the U.S.). Enjoying the benefit is subject to the requirement that Thailand provide "adequate and effective" copyright protection. Thailand's enforcement system fails to meet the GSP criteria, much less the higher standards of an FTA. Thailand's current performance bodes poorly for its ability to meet the obligations of an FTA. We urge the Government of Thailand to move forward without delay in addressing the critical shortcomings in its legislative and enforcement regime through proper regulation of its optical disc facilities, and by implementing a zero tolerance policy as regards the public sale of piratical materials.

⁴⁹ Under the plan, broadcasters would be allocated a certain amount of channels, some of which would require mandatory carriage of programming, while others would be free for allocation at the discretion of the cable provider following negotiations with content providers. PRD has apparently further offered to act as an intermediary between local operators and content providers.

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