

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2005 SPECIAL 301 REPORT

### THAILAND

***Special Statement of Condolence Regarding Recent Events in Thailand:*** The copyright industries collectively express our deep sadness over recent events surrounding the devastating *tsunami*, and the enormous loss of life, and extend our condolences to the families of those in Thailand who have lost loved ones, and sympathies to those who have been displaced or have otherwise suffered as a result.

## **EXECUTIVE SUMMARY**

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

**Overview of Key Achievements/Problems:** Thailand is in the midst of negotiations with the U.S. for a Free Trade Agreement, while continuing to face serious copyright piracy challenges. The number of optical disc plants and lines continued to grow in 2004. As of February 2005, the Royal Thai Government still had not passed an optical disc regulation, and the legislation being considered contains numerous deficiencies. Book piracy in Thailand thrives, as neither the Royal Thai Government nor the universities will take a stand and ensure use of legitimate textbooks; in addition, recent court cases confirm that Thailand's exceptions to protection dealing with educational uses of works violate international norms. Other piracy problems abound, including cartridge-based videogame piracy (including participation in organized rings from China and Taiwan, assembling pirate cartridge-based videogames for export); business software end-user piracy (Thailand holds the dubious distinction of making the top twenty pirating countries in 2003, at an 80% piracy rate); cable piracy; and Internet piracy, including 1.5 million Internet subscribers apparently engaged in peer-to-peer (P2P) downloading of copyrighted content. In addition to ongoing plant overproduction of pirated optical discs, organized "burning" of pirate content onto CD-Rs has become a major issue, and unauthorized public performances of motion pictures and television programs can be found virtually anywhere in Thailand.

Notwithstanding the rather bleak piracy picture, the Thai authorities, with significant fanfare and cooperation from right holders, began making some strides in enforcement toward the end of 2004. Several large raids in November and December 2004, as part of a new campaign called "Operation Eradicate" yielded seizures of pirated discs in the millions, as well as significant amounts of optical disc production equipment. Whether action of this nature will be sustained over a much longer term and whether these raid results will translate into deterrent sentences against the owners of the plants remains unknown. For example, in the past, in the retail markets, the Thai Police shut down most stalls in notorious pirate malls like Panhip Plaza and elsewhere in late June 2004 (apparently to coincide with the commencement of FTA negotiations with the U.S. on June 28); however, the stalls were permitted to reopen in full force just one month later in July. The Royal Thai Government created lists of "red spot" targets and "yellow spot" targets in an effort to prioritize retail enforcement—a positive step if these are eventually targeted and piracy is eliminated. Meanwhile, however, Thailand remains without an

effective optical disc law. Nine cases arising from factory raids (some dating back over six years) remain pending.<sup>1</sup> The optical disc law must give the courts adequate legal tools to effectively drive pirate optical disc production out of Thailand. Finally, it is imperative that the Royal Thai Government recognize the links between organized piracy and organized crime, and take steps to ensure that copyright piracy is a predicate offense in organized crime statutes (e.g., the draft amendments to the anti-money laundering statute).

## **Actions to be Taken in 2005**

- Continue optical disc factory raids throughout the country, prosecuting owners and seizing equipment, to drive pirate optical disc production out of Thailand.
- Initiate investigations into organized criminal syndicates involved in piracy operations.
- Clean up street markets and malls throughout the country and keep them clean, with raids and seizures followed by arrests, prosecutions, and shop closures.
- Strengthen border enforcement to intercept the flow of pirate products into, out of, and transshipped through Thailand (e.g., from Cambodia and Burma).
- Run campaign to visit target companies and other entities such as Internet cafés suspected of using unlicensed software.
- Amend the law to narrow the exception “loophole” as to published materials.
- Run educational and media campaigns on university campuses, emphasizing the vital need for policies ensuring use of legitimate materials by students and faculty.
- Fully enforce the new optical disc law (once in force) against piratical and unauthorized (e.g., unlicensed) activity; in addition, begin preparing amendments to further strengthen the regime.

The IPR chapter of any U.S.-Thai FTA Agreement should be TRIPS-plus, include obligations which would meet the requirements of implementing the WIPO Internet Treaties, the WCT and WPPT; include modern and effective enforcement provisions to eradicate all forms of piracy, including digital and Internet piracy, and contain specific commitments with regard to combating optical disc piracy through regulations on production and strict enforcement.

For more details on Thailand’s Special 301 history, see IIPA’s “History” Appendix to this filing,<sup>2</sup> as well as the previous years’ country reports.<sup>3</sup>

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<sup>1</sup> Most are pending at the Supreme Court. In some instances the defendant has fled and the courts have issued arrest warrants which remain outstanding.

<sup>2</sup> <http://www.iipa.com/pdf/2005SPEC301HISTORICALSUMMARY.pdf>.

<sup>3</sup> <http://www.iipa.com/countryreports.html>.

**THAILAND**  
**Estimated Trade Losses Due to Copyright Piracy**  
*(in millions of U.S. dollars)*  
**and Levels of Piracy: 2000-2004<sup>4</sup>**

INDUSTRY	2004		2003		2002		2001		2000	
	Loss	Level								
Motion Pictures	30.0	60%	28.0	60%	26.0	70%	24.0	65%	24.0	60%
Records & Music	24.9	45%	26.8	41%	30.0	42%	16.6	45%	15.6	45%
Business Software <sup>5</sup>	90.0	78%	84.0	80%	57.3	77%	32.6	77%	42.7	79%
Entertainment Software <sup>6</sup>	NA	76%	NA	82%	47.3	86%	29.1	93%	130.5	98%
Books	30.0	NA	28.0	NA	28.0	NA	28.0	NA	33.0	NA
<b>TOTALS</b>	<b>174.9</b>		<b>166.8</b>		<b>188.6</b>		<b>130.3</b>		<b>245.8</b>	

## COPYRIGHT PIRACY IN AND FROM THAILAND

### Optical Disc Pirate Production Increased in 2004; Some Imports Noted

Pirate production of optical discs in major plants (CDs, VCDs, DVDs, CD-ROMs) and home-grown “burning” of CD-Rs and DVD-Rs remains a major hurdle to the growth of legitimate copyright industries in Thailand.<sup>7</sup> There are now 40 known plants in Thailand, with upward of 157 optical disc production lines. The conservative estimated capacity for production stands at 549.5 million discs per year in the plants alone, greatly exceeding any rational legitimate domestic demand.<sup>8</sup> 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.<sup>9</sup> The plants can generally produce any format, including audio CD, VCD, or

<sup>4</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA’s 2005 Special 301 submission at [www.iipa.com/pdf/2005spec301methodology.pdf](http://www.iipa.com/pdf/2005spec301methodology.pdf).

<sup>5</sup> BSA’s final 2003 figures represent the U.S. software publisher’s share of software piracy losses in Thailand, as compiled in October 2004 (based on a BSA/IDC July 2004 worldwide study, found at <http://www.bsa.org/globalstudy/>). In prior years, the “global” figures did not include certain computer applications such as operating systems, or consumer applications such as PC gaming, personal finance, and reference software. These software applications are now included in the estimated 2003 losses resulting in a significantly higher loss estimate (\$141 million) that was reported in prior years. The preliminary 2003 losses which had appeared in previously released IIPA charts were based on the older methodology, which is why they differ from the 2003 numbers in this report.

<sup>6</sup> ESA’s reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry “losses.”

<sup>7</sup> Piracy has had a devastating effect on local Thai entertainment companies in addition to foreign right holders. For example, the second largest entertainment company, R.S. Promotion PCL had to cut its revenue estimates in mid-2004 by 50% in part due to piracy. See *Thai music firm R.S. to cut '04 revenues estimate*, Reuters News English, July 13, 2004. As another example of the potential of local industry due to copyright, motion picture companies have long maintained Thai offices and employed Thai 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 Thai 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 annually. All of these positive economic benefits are jeopardized by piracy. See Bamrung Amnatcharoenrit, *Foreign Movie Makers Set to Increase Spending*, Bangkok Post, January 8, 2003.

<sup>8</sup> These numbers are up from 39 registered plants, 126 replication lines (116 operational) with a potential annual capacity of 441 million discs reported in IIPA’s 2004 Special 301 report. In that report, IIPA estimated legitimate domestic demand to be at least 60 million discs. Industry groups also believe there may be underground plants located in the country.

<sup>9</sup> See, e.g., Subin Khuenkaew, *Plant Churns Out Sex Films*, Bangkok Post, January 30, 2005, at [http://www.bangkokpost.com/300105\\_News/30Jan2005\\_news16.php](http://www.bangkokpost.com/300105_News/30Jan2005_news16.php) (reporting that, according to a Thai official, a large factory making pirated CDs, VCDs and DVDs with U.S. copyrighted films, music and other content, in addition

DVD, by employing kits to change formats (even from a blank CD-R or DVD-R line).<sup>10</sup> 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). Pirated optical discs manufactured in Thailand have shown up in Italy, Germany, Sweden, South Africa, the United Kingdom, Belgium, and the United States. In addition to plant production there is increasing evidence of a massive cottage industry of “burning” all kinds of copyrighted content onto recordable discs. Finally, IIPA has information in 2004 of pirate imports coming into Thailand from places like Malaysia.<sup>11</sup> These problems will necessitate Royal Thai Customs becoming far more active in the area of enforcement at the borders.<sup>12</sup>

## Retail Piracy in Thailand

Piracy hotspots in Thailand were categorized by the government and industry in mid-2004 into “Red Spot” targets (Klongtom, Panthip Plaza, Khao San Road, Patpong, Silom Road, Sukhimvit Road (3-19), Night Bazaar Area, Patong Beach, Chaweng Beach, Pattaya Beach, Santisuk Market, Kinyong Market) and “Yellow Spot” targets (Sapanlek, Baanbor, Mahboonklong, Nomchit Mall, Pata Pinklao, Fortune Tower, Donmuang, Je Leng Plaza, Tawana Plaza, Zeer Rangsit, Kata Beach, Karon Beach, Computer Plaza, Icon, Rincom Market, Yongdee Market, BKS Market, Big C Bangyai, Tantawan Plaza, Bangsrimuang, Hua Hin).<sup>13</sup> Many of these were subject to a government crackdown on piratical activities beginning on May 1, 2003, and lasting through the APEC Ministerial in Bangkok in October 2003. That 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 were, as of early 2004, once again replete with pirated product. As noted below, an enforcement campaign in late 2004 appeared to be working to eradicate retail piracy, particularly around Bangkok.

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to Asian pornography along the Thai-Burmese border, opposite Chiang Rai's Mae Sai district, is run by Hong Pang Co., which is owned by drug baron Wei Hseuh-kang).

<sup>10</sup> 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	2004
DVD FACTORIES	NA	NA	0	1	9	13	8	7
DVD LINES	NA	NA	0	1	14	16	11	20
TOTAL FACTORIES	NA	NA	20	43	46	51	38	41
TOTAL LINES	NA	NA	36	56	78	102	124	157
RENTAL AND RETAIL SHOPS	2300	2200	2100	1900	1708 (EST)	1586 (EST)	1350 (EST)	NA

<sup>11</sup> For example, on November 12, 2004, Thai Highway Police stopped a truck in Chumporn Province and arrested two Thai men, seizing approximately 15,000 pirate optical discs coming from Malaysia in boxes camouflaged by baskets of fruit. The haul included 5,000 pirate copies of U.S. motion pictures on DVD.

<sup>12</sup> On September 9-10, 2004, the World Customs Organization Intellectual Property Rights Strategic Group (WCO-IPR) and Thailand's Customs Department held a joint workshop on Counterfeiting and Border Measures. The main objective of the workshop was to improve Thai Customs officers' Intellectual Property Rights law enforcement capabilities at Thailand's borders. The two-day program covered legal and procedural issues and included counterfeit product identification sessions administered by copyright holders.

<sup>13</sup> Other Bangkok malls where pirated products are readily available include: Future Randi, Seacon, Seri, Future and Gankee. In addition, there are also a number of malls in other cities and/or provinces where pirated merchandise is available, including Teok Com-Sriracha, Teok Com-Pattaya, Teok Com-Khonkean, Pantip-Chiang Mai, CM Building and Chiang Mai.

Among the pirate retailers, who sell in night markets as well as in notorious shopping malls like Panthip Plaza and Klongtom, the stark trend is away from older (and often lower quality) formats. For example, regarding piracy of motion pictures, the shift has almost entirely been toward pirate DVDs and away from pirate VCDs.<sup>14</sup>

## Book Piracy

Illegal photocopying of entire textbooks, illegal offset print piracy of entire books, and illegal translations, adaptations and compilations, involving both entire books and substantial portions of books, devastate U.S. publishers in Thailand. Such piracy is rampant around university campuses,<sup>15</sup> where university presidents, professors, and students exhibit blatant disregard for the law and the rights of copyright owners. The Royal Thai Government has generally disregarded publishers' calls to intervene and demand copyright compliance by university employees and students.<sup>16</sup> Action needs to be taken to ensure use of legitimate materials on campuses and stamp out the demand for illegal photocopying.

On top of a climate already rife with commercial photocopying and other forms of book piracy, some decisions by the Thai courts seem to endorse the outright copying — even by commercial enterprises — of complete books or substantial portions thereof under a faulty interpretation of the Thai fair use provision.<sup>17</sup> If Thai law continues to permit what these judges say it does, Thailand will remain in violation of its international obligations under the Berne Convention and the TRIPS Agreement. This deficiency must be corrected through amendments, and/or through the Free Trade Agreement process.

Research conducted by the publishing industry in July 2004 illustrates the extent of the problem at universities in Thailand. Upon visiting a photocopy shop inside the Medical Faculty at

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<sup>14</sup> Statistics indicate that Seacon Square moved from 60% DVD in April 2003 to 80% DVD in April 2004. The ratio of DVDs sold at Panthip Plaza was even starker, from 60% in April 2003 to 90% in April 2004. Zeer Rangsit went from 30% DVD (and 70% VCD) in April 2003, to 60% DVD and 40% VCD in April 2004. The overall percentages went from 58% DVD and 42% VCD in April 2003 to 92% DVD and only 8% VCD in April 2004.

<sup>15</sup> Photocopying and print piracy is rampant in primary and secondary schools as well.

<sup>16</sup> University campuses where piracy of published materials is particularly prevalent include Chulalongkorn University, Assumption University, Sripatum University, and Mahanakorn University.

<sup>17</sup> See, e.g., *Prentice Hall Inc. v. Kanokchai Petchdawong*, Black Case No. Or. 326/2542, Red Case No. Or. 784/2542 (Cent. Int. Prop. Int. Trade Court, July 23, 1999) (unofficial translation) (on file with IIPA) (plaintiff claimed copyright infringement by a copy shop owner who was copying entire textbooks; court indicated strongly that receipts showing copies made on behalf of students would likely entitle defendant to avail himself of fair use defense under Article 32, setting no limit on scope of permissible copying under the Thai interpretation of the Berne three-part test. Article 32(6) of the Copyright Law provides, in relevant part:

An act against a copyright work under this Act of another person which does not conflict with normal exploitation of the copyright work by the owner of copyright and does not unreasonably prejudice the legitimate rights of the owner of copyright shall not be deemed an infringement of copyright. Subject to the provision in the first paragraph, the following acts in relation to a copyright work shall not be deemed an infringement of copyright

(1) research or study of the work which is not for commercial profit;

...

(6) reproduction, adaptation, exhibition or display by an instructor for the benefit of own instruction which is not for commercial profit;

(7) reproduction, partial adaptation of work, abridgement or making a summary by an instructor or an academic institution for the purpose of distributing or selling to the attendants in the class or in the institution which is not for commercial profit;

(8) use of the work in questioning and answering in an examination.

Courts have interpreted these provisions broadly and misapplied the Berne test for limitations such that Thailand is grossly out of step with its neighbors and with international norms, greatly hindering publishers' efforts to protect their copyrights under the law.

the famous Chulalongkorn University in Bangkok, an industry investigator received a list of fourteen popular medical titles available for made-to-order sale in photocopied form, complete with prices of each.<sup>18</sup> The astonishing statistics arising out of the industry study indicate that around 60% of all students obtain illegally photocopied versions of their books for school. Most obtain them from commercial photocopy centers just like the center at Chulalongkorn. These commercial establishments often follow the above-described practice of making copies only after orders are received, hindering industry research and enforcement efforts. Others simply have infringing material in stock. Furthermore, there seems to be no fear of enforcement by authorities. Investigators found that photocopy shops will copy any entire book upon demand, and that 60% of copyshops visited were found with pre-copied books.

Studies indicate that instructors often play a role in this activity as well. Lecturers often have works copied for their students using university facilities. They also frequently provide their adoption lists to copyshops so that those shops can anticipate demand, in some cases even placing the orders for the students' copies themselves and sending someone to collect them. Over two-thirds of students surveyed at Chulalongkorn received photocopied texts from their teachers. It is imperative that universities and schools take a proactive role to fight the scourge of photocopying on their campuses.

Finally, unauthorized translations abound. This problem, excruciatingly difficult to detect, arises because the Thai government demands development of course materials by its professors and instructors without providing adequate resources for the development of these materials. Instructors therefore use translations of books originally marketed in English as their "Thai" original texts, with no permission from the original publisher. Compilations are the norm as well—some professors will take a chapter from each of several different English books on the same topic, translate the chapters and compile them into a new set of course materials for marketing and distribution to students. The Royal Thai Government should provide the necessary resources for development of legitimate Thai materials and mandate that those wishing to translate English-language materials obtain the appropriate licenses for such production.

Finally, print piracy continues to plague publishers of professional textbooks and reference books, especially medical publishers. These volumes are often of high quality, the result of highly sophisticated piracy involving a number of different printers in the Kingdom.

Conservative estimates indicate that in 2004, the industry lost potentially 180,000-270,000 genuine book sales in Bangkok alone due to the above-described problems. Action is past due.

## **Cartridge-Based Entertainment Software Piracy**

Cartridge-based entertainment software is also being heavily pirated in Thailand. In 2004, 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 pirated and counterfeit cartridge-based products are manufactured in China, there also appear to be significant assembly facilities in Thailand. Thailand remains a major transshipment point for pirated Nintendo video game products, especially to Europe. For instance, of over 1,000 seizures in Belgium during 2004, 80% were exports from Thailand. These were primarily small shipments, many to individual consumers

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<sup>18</sup> Books included primarily titles from Elsevier, W.B. Saunders Co. and Lippincott, Williams & Wilkins.

who had apparently purchased the counterfeit video games on the Internet. Larger shipments are still generally sourced from China. A substantial number of shipments from Thailand were also seized in Denmark, Germany and the United Kingdom.

## **Business Software End-User Piracy**

Thailand continues to have one of the highest end-user piracy rates in Asia. The raids conducted in 2004 all found flagrant evidence of the use of pirated software in corporations. Nevertheless, the Business Software Alliance has received good support from the Royal Thai Government in its IP awareness campaigns and in its software asset management seminars. In addition, cooperation from the Thai enforcement authorities on BSA retail and end user cases remains very good. Police manpower is always available when requested, raids are conducted effectively, cases are accepted by enquiry officers and public prosecutors, and convictions in retail cases are obtained.

## **Internet Piracy**

Thailand witnessed substantial growth in Internet usage in 2003 and again in 2004, 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). The Business Software Alliance noted that between January and September 2003 there were 141 instances of software being made available for download by persons using Thailand based ISPs. This figure rose an astonishing 400% to 741 such instances in the same period in 2004. 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. The industries have been successful in certain cases involving direct-download piracy.<sup>19</sup> There are also online vendors of pirated products which use the Internet as an advertising medium for burned copies of pirated video game products.

IIPA is deeply concerned about the potential growth of Internet piracy in Thailand, particularly direct P2P downloading of copyrighted content. At the same time, IIPA recognizes the vast opportunities that the Internet presents in terms of developing new markets. Internet cafés present one such possibility. While Internet cafés generally remain unlicensed in Thailand, in 2004, Thailand's Information and Communications Technology (ICT) Ministry has been working with industry on a project called "GoodNet." This project will include some rules and regulations to be followed by more than 300 participating Internet cafés in Thailand. The rules would, significantly, include the caveat that cafés must use only legal software.<sup>20</sup> One rather puzzling requirement was that only online games would be permitted in Internet cafés, purportedly because the Royal Thai Government has already gone through the content reviews of games it would allow "online" and was afraid that allowing discs to be brought in would not facilitate control of the content. The double-edged sword for the videogame industry is that allowing discs into Internet cafés could give foster sale of pirated product, but also could open the market to more legitimate product. Whatever ensues regarding the development of "GoodNet," the Royal Thai Government must ensure that all Internet cafés allow use of only legal software, and that this rule is adequately enforced.

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<sup>19</sup> The record industry was successful in 2003 in working with ISPs to close down 24 websites 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.

<sup>20</sup> There would also be other rules aimed at morals regulation, including curfews, prohibitions on smoking and drinking, and requirements that children of certain ages be accompanied by parents.

## 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 2004, at an estimated 35%.

## COPYRIGHT ENFORCEMENT IN THAILAND

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS FOR 2004 THAILAND			
ACTIONS	MOTION PICTURES	BUSINESS SOFTWARE	SOUND RECORDINGS
NUMBER OF RAIDS CONDUCTED	1,070	15*	279
NUMBER OF AUDIO CDS SEIZED	NA		154,271
NUMBER OF CD-ROMS SEIZED	NA		NA
NUMBER OF VCDs SEIZED	957,227		9,108
NUMBER OF DVDs SEIZED	714,993		28,351
NUMBER OF CD-Rs SEIZED	822	1976	43,385
NUMBER OF INVESTIGATIONS	1,163	11	
NUMBER OF VCD LAB/FACTORY RAIDS	5		1
NUMBER OF CASES COMMENCED BY POLICE	153	11	266
NUMBER OF INDICTMENTS	153		266
NUMBER OF DEFENDANTS CONVICTED (INCLUDING GUILTY PLEAS)	155	6	290
ACQUITTALS AND DISMISSALS	0		-
NUMBER OF CASES PENDING	0	5	187
NUMBER OF FACTORY CASES PENDING	9		-
TOTAL NUMBER OF CASES RESULTING IN JAIL TIME	145		73*
SUSPENDED PRISON TERMS			73
MAXIMUM 6 MONTHS	141	5	72
OVER 6 MONTHS	1		1
OVER 1 YEAR	2		-
TOTAL SUSPENDED PRISON TERMS	144	5	-
PRISON TERMS SERVED (NOT SUSPENDED)		0	-
MAXIMUM 6 MONTHS	1		-
OVER 6 MONTHS	0		-
OVER 1 YEAR	0		-
TOTAL PRISON TERMS SERVED (NOT SUSPENDED)	1		-
NUMBER OF CASES RESULTING IN CRIMINAL FINES			-
UP TO \$1,000	4	4	66**
\$1,000 TO \$5,000	146	1	10
OVER \$5,000	3	0	-
TOTAL AMOUNT OF FINES LEVIED (IN US\$)	US\$254,522	US\$3,846	US\$56,657
* In 6 other cases, the result was a criminal fine only, but no jail sentence.			
** In 3 other cases, the result was “re-correction” (i.e., no fine and no jail time).			

While the Royal Thai Government had made some past attempts to coordinate enforcement, it was only in late 2004 that several elements came together to achieve considerable results in copyright enforcement for most sectors.<sup>21</sup> One of the last steps prior to commencement of the latest enforcement campaign occurred on September 22, when the Justice Department announced the formation of a new Department of Suppression Investigation (DSI), responsible for investigating crimes affecting national security and involving organized crime and money laundering.<sup>22</sup> The new unit comprises over 1,000 officers, of whom 179 are assigned to the Intellectual Property Case Office, responsible for investigating complex intellectual property cases and intellectual property cases involving organized criminal gangs. The Intellectual Property Case Office is also responsible for investigating illegal optical disc plants. Unfortunately, a large percentage of these 1,000 officers are untrained in copyright matters.

## **“Operation Eradicate” Leads to Factory Raids in Late 2004**

Some dramatic enforcement against optical disc production plants in late 2004 kicked off a new campaign called “Operation Eradicate.”<sup>23</sup> This set of raids, which targeted optical disc plants, but also went heavily after the retail chains resulted in all pirated shops and stalls around Bangkok closing down around the New Year, an astonishing result. Part of the reason for the success of these raids is that the police are apparently competing with one another.<sup>24</sup> One very positive development is the return of Pol. General Noppadol Soomboonsupt, who orchestrated the eradication of retail piracy from the market back in 2001. In his new role as Deputy Commissioner General of Royal Thai Police, General Noppadol apparently orchestrated the first raid against a DVD plant in October 2004.<sup>25</sup> Other raids on optical disc plants and loci of

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<sup>21</sup> IIPA recognizes the enormous raiding activity that occurred in 2001, and again in 2003 in advance of the APEC Ministerial in Bangkok, but believes that the combination of the formation of the Department of Suppression Investigation, the MOU between government and industry, the return of General Noppadol and others committed to eradicate piracy, and the campaign, “Operation Eradicate,” which has so heavily focused on optical disc plants, resulted in huge gains in the fight against piracy in late 2004.

<sup>22</sup> Cf. Somporn Thapanachai, *Thailand's Intellectual Property Investigative Unit Gets More Power*, Bangkok Post, March 18, 2004 (in which the Intellectual Property Department's Director General Kanissorn Navanugraha announced measures to improve the efficiency of the Justice Ministry's Special Investigation Unit, including expanded powers to investigate infringement of intellectual property rights, particularly copyright. Kanissorn admitted that past raids had rounded up mainly small-time dealers, not the large-scale producers who churn out fakes using the same distribution methods as organized criminal gangs. Mr. Kanissorn also stated that the special unit would assist in forensic testing to identify the original manufacturer of pirated optical disks, noting that every CD stamper used in mass-copying operations leaves its own unique imprint on the finished product, just like a human fingerprint. Comparing the tell-tale patterns left on fake CDs with those of registered machines will allow the authorities to determine their source, he said. The department has reportedly cooperated with copyright owners in collecting 90 percent of the molding patterns of registered machines in the country. Mr. Kanissorn also said he would work with international copyright owners in setting up a database of molding patterns from machines in various countries in the region. "If we cannot find a local match for the molding patterns, we will compare them with those of neighboring countries to see where the fakes came from," Mr. Kanissorn said.)

<sup>23</sup> On November 24, 2004, new Deputy Commissioner of the Metropolitan Police Bureau Major General Jaraumporn Suramaneer called a meeting of copyright holders and senior police officers in charge of the piracy hotspots to announce a crackdown on illegal products, to begin before the New Year. The metropolitan police assigned 222 people to the operation, and instructed 88 police stations to pay close attention on IPR matters.

<sup>24</sup> The government launched a reward scheme to combat pirate manufacturers. In particular, the scheme rewards enforcement officers for significant seizures: one million baht (US\$26,000) per machine up to a maximum of two million baht, plus three baht (US\$.78) per disc provided that the amount of discs seized exceed 300 and consists of titles no more than one year old.

<sup>25</sup> On October 4, 2004, Noppadol instructed officers of the Crime Suppression Division to raid an illegal DVD plant in the Eastern Seaboard Industrial Estate in the Rayong province. The raid took place only three days after Noppadol's appointment, and resulted in five arrests at the “Solid Gold Discs” plant—two Taiwanese, two Burmese, and one Thai—and seizure of approximately 6,000 pirate DVDs infringing *The Day After Tomorrow*. The officers impounded one DVD production line, one screening machine, 322 stampers and one printing machine.

“burning” operations (in which burners were used to imprint pirate copyrighted content onto CD-R or DVD-R) ensued, resulting in seizures of literally millions of discs, as well as at least nine optical disc production lines, 106 high-speed CD-R burners, and five printing machines.<sup>26</sup>

## Retail Raid Activity Sporadic But Picked Up in Late 2004

Retail enforcement also underwent a dramatic rise in November and December 2004 as a result of “Operation Eradicate,” resulting in seizures of millions of discs and related materials (e.g., labels).<sup>27</sup> Prior to that, raids carried out generally focused on small shops. Indeed, while

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<sup>26</sup> For example:

- On November 30, 2004, the “Special Police Squad” raided a CD factory called Big Giant in Bang-Bau-Thong, Nonthaburi Province and seized two replicating lines and three printing machines.
- On November 30, 2004, the “Special Police Squad” inspected three factories in the Sai Noi and Bangbuathong districts of Nonthaburi province and found two optical disc production factories that had imported equipment without authorization, resulting in seizure of four production lines.
- On December 9, 2004, border patrol policemen and Customs officers examined a VCD plant in Petchkasem Road, Bangkok, found two unusual VCD replication machines and determined they had been illegally imported; the illegal machinery was seized.
- On December 9, 2004, part of the “Special Police Squad” raided Sear Rungsit, Seri Center, and Nomjit Plaza with a seizure of around 1 million CDs. The team also stopped in a CD plant at Pechtkasem 88 and seized one replicating line and two printing machines that were churning out the movie “Alexander.”
- On December 13, 2004, Gen. Noppadol’s team conducted a raid in two houses in Krisadanakorn River Side Village in Nakorn Patom Province and seized 100 CD-R burners with a capacity of burning 8,000 CD-Rs per day along with 5,000 bundled CDs infringing U.S. motion pictures and sound recordings.
- On December 17, 2004, one squad of police raided ten retail shops in the Fortune IT Mall in Bangkok, arresting one man and seizing six CD burners, 300 pirated optical discs, nine pornographic CDs and 2,000 covers.
- On December 17, 2004, another police team inspecting a factory in Chachengsao Province found shredded discs indicating an illegal operation. The officers seized the shredded discs and sealed equipment. Motion Picture Association investigators physically pieced together the shredded discs and filed a complaint with police for copyright infringements; the case is still pending with the police.

<sup>27</sup> For example:

- On October 4, 2004, in conjunction with the raid on the “Solid Gold Discs” optical disc plant, police raided a warehouse in Bangkok, seizing approximately 100,000 optical discs, 34 crates of smuggled wine and 147 crates of smuggled liquor. Around 28,600 pirate discs infringed U.S. motion picture titles. One suspect was arrested at the warehouse.
- On November 20, 2004, around 200 border patrol policemen conducted a raid in the Klongtom and Baanmor areas and seized over one million pirated optical discs. On the same day, police raided premises in Rachaburi province and seized about 300,000 optical discs. Most of the product was pornography.
- On November 28, 2004, the Metro police went to raid the Night Market at King Rama I Bridge. The pirate, together with a gang of about 30 persons, surrounded and attacked the police, some of whom were injured. The police and right holder are planning follow-up action against these pirates.
- On December 9, 2004, around 200 border patrol policemen seized around 100,000 pirated optical discs in shopping malls in the Sukhumvit area of Bangkok. The same team also closed down Panthip Plaza, and found no pirate product, possibly because of a leak; reportedly, by February 2005, the pirates were back in business. Industry reports that vendors come and go but that more importantly, stock is no longer kept on location, but that buyers are instead solicited by underlings displaying inlay cards. Runners are then sent to “warehouses” in surrounding areas to fill orders as and when needed. Sourcing the warehouses, which also change location so as to avoid detection, is what is really needed, but requires a tremendous amount of investigation.
- On December 13, 2004, Central Investigation Police officers stopped a suspicious vehicle leaving a residence in Nakornpathom province. A search yielded over 2,000 pirated music CDs and enabled officers to obtain a warrant to search the residence and an adjacent building, where around 30,000 “burned” CD-Rs, 102 CD-R burners and 12,000 blank CD-Rs were discovered and seized.
- On December 17, 2004, nearly 200 police officers from the Border Patrol Police Bureau, the Metropolitan Police Bureau, Crime Suppression Division and the Customs Department raided two warehouses and a retail shop in Bangkok, seizing 5,068 pirate DVDs, 932 pirate music CDs and 2,648 covers. Simultaneously, police from the Economic Crime Investigation Bureau raided a warehouse in Bangkok’s Dindaeng district, seizing 47,160 pirate DVDs, of which 27,190 discs were infringing U.S. motion pictures.

right holders noted a significant drop in the number of pirate stalls in the last week of June 2004, this was due not to raiding activity but to an order from the police to stall owners in some of the more notorious pirate hot spots; however, the police apparently gave the “all-clear” signal two weeks later. It is not a coincidence that these stores were told to “shut down” for two weeks during the FTA negotiations with the United States and were told they could reopen again after the two-week shutdown.<sup>28</sup>

Prior to the commencement of “Operation Eradicate,” the Royal Thai Government’s raiding activity included over 400 raids that resulted in over 200,000 total discs seized.<sup>29</sup> However, these raids did not result in deterrence in the market. On June 26, the Royal Thai Police and the Department of Intellectual Property and local copyright representatives executed a Memorandum of Understanding regarding heightened enforcement in 36 designated target spots throughout the country (so-called “red spot” targets and “yellow spot” targets already mentioned).

IIPA is heartened by the extensive raiding activity, especially surrounding “Operation Eradicate.” It is hoped that this is a taste of what is to come, and that the Thai authorities will not cease these actions until piracy is truly eradicated from Thailand. Nonetheless, it is also vital that the enforcement authorities begin to target the upstream sources of pirated products, i.e., those who control the production and distribution networks.

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- On December 17, 2004, the police raided a major mafia group and seized about 300,000 optical discs.

<sup>28</sup> Both the record industry and the motion picture industry noted this precipitous drop in the number of pirate stalls on or around June 25, 2004, not coincidentally, IIPA believes, just four days before commencement of the FTA negotiations with the United States. The motion picture industry’s market survey showed a marked decline in the number of pirate retail outlets operating in the Bangkok metropolitan area, from a high of 133 stalls on April 29, 2003, down to 29 stalls on June 25, 2004; the vendors that remained were mainly selling pornography. Record industry observers noted that in Panthip Plaza, the police had closed down all the pirate stalls, and they were “shuttered up,” although they note that cautious and surreptitious sales continued.

<sup>29</sup> For example:

- Between February 27 and March 3, 2004, the Central Investigation Bureau, Economic Crime Investigation Division of the Thai Police, and local police conducted a major operation aimed at pirate syndicates in the tourist areas of Southern Thailand including Samui Island, Ao Nang in the Krabi Province, and Patong beach in Phuket. Over 60 street vendors and retail shops as well as three warehouses were raided resulting in the seizure of over 100,000 pirate optical discs. Many pirate copies of U.S. motion pictures were part of the seizures.
- On June 24, 2004, the Economic Crime Investigation Division (ECID) of the Thai police conducted a raid at the Hua Lumpong Railway Station in Bangkok and arrested two Thai nationals. Agents seized 2,400 DVDs (including about 1,000 U.S. titles), 2,000 DVD covers and two cars. The pirated products were packed into two parcels that had been shipped from Malaysia via train.
- On August 20, 2004, officers from Thailand’s Excise Department raided a house and vehicle in Bangkok and seized around 50,000 pirate movie and music optical discs and around 50,000 packs of untaxed cigarettes. Around 10,000 of the seized optical discs were infringing U.S. motion pictures. The discs had been imported from China and two Thai nationals were arrested. The suspects were charged under the Excise Act, the Copyright Act and the Money Laundering Act (smuggling goods). This case is highly significant in that it is the first known case in which Excise officers enforced the law against pirate products.
- On September 3, 2004, officers from the Registration Division (Central Investigation Bureau) of the Bangkok police raided an illegal warehouse located in Bangkok’s Dindaeng district. As a result of the operation, approximately 70,000 pirated optical discs were seized, of which 6,330 DVDs and 19,110 VCDs were infringing more than 100 U.S. motion pictures. The warehouse was suspected to be a distribution hub for pirate products in the Klongtom neighborhood and surrounding area. There was no one on the premises during the raid.

## **Government Must Get Involved to Legalize Use of Copyrighted Materials in Businesses, Universities**

The Royal Thai Government must, as it did in the area of optical disc and retail piracy in late 2004, take a public stand against the unauthorized use of business software, published materials, and other copyrighted works, in businesses, universities and government agencies. In particular, IIPA urges the Department of Education to take the lead in sending strong messages to educational institutions to ensure use of legitimate materials, including textbooks and business software. For the entertainment software industry, piracy at Internet cafés is a significant problem. Of the 7,000 Internet cafés in the country, less than 5% are licensed. The government, however, has taken no enforcement actions against these cafés.

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

The Thai Intellectual Property and International Trade (IP&IT) Court has long stood as a shining example of how a country, through specializing its judiciary to the particularities of copyright infringement and piracy, could effectively improve the functioning of its courts and deal with a difficult legal problem at the same time. Over the years, the IP&IT court has sped up dockets and done away with myriad other judicial woes that long plagued right holders. In 2004, the court continued to work well for some industries and could provide a good model for other territories. In 2004, the motion picture industries had 153 actions initiated and decided (up from 66 in 2003) and the number of actions pending was reduced from 20 cases in 2003 to 9 cases in 2004. The court officers (both prosecutors and judges) were very competent and professional in these cases. The entertainment software industry reports, on the other hand, that the Thai courts sometimes render very meager sentences; jail terms are often suspended and only minimum fines are imposed with offenders commonly being given community service.

## **COPYRIGHT LAW AND RELATED ISSUES**

### **Government on Verge of Passage of Optical Disc Law, But Law Contains Deficiencies**

In October 2004, the optical disc bill approved by the Cabinet in 2002 and by the Parliament in May, 2004 received Senate approval and was forwarded to the King for Royal Assent.<sup>30</sup> However, certain provisions of the law were the subject of a last-minute challenge, prompting a court review for confirmation of the law's constitutionality. Specifically, one Senator petitioned that Article 38 was inconsistent with Thailand's "Supremacy Law." Article 38 provided that it would be a criminal offense for an optical disc plant owner to fail to report to the authorities the relocation or transfer of ownership of replicating machines. Moreover, failure to report would subject such equipment to forfeiture.

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<sup>30</sup> Prior to the passage of a comprehensive optical disc law, the only legislation related to optical disc production in Thailand was 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. Another stop-gap measure was 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, but has not led to a single criminal conviction.

Unfortunately, the Constitutional Court ruled in early February 2005 in favor of this petition, the result being that Article 38 will be deleted from the bill. Separately, a large group of copyright owners representing various industries, have filed a petition directly to the King, asserting that Articles 5 (paragraph 2), 23, 12 and 27 are contrary to the Thai Constitutional Law, the Berne Convention and TRIPS. (These articles subject copyright owners to criminal charges and fines if they do not notify authorities prior to beginning optical disc production or if they fail to apply for a Mastering Code). This group of right holders has requested that the King send the bill back to Parliament for reconsideration.

If the proposed law is signed by the King, the next step would be statutory publication in the official gazette. The law would take effect 90 days thereafter. The implementing regulations which provide further detail for the legislation are still undergoing preparation and have not yet been completed. In addition to the problems described immediately above, the law on the verge of final assent still fails to meet the basic requirements of an effective optical disc law. The major weaknesses in the latest draft Bill IIPA reviewed included the following:

- **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 required only “notification,” not approval, for a plant to begin producing optical discs. There also was no provision governing renewal (which would allow the government to approve or refuse the plant’s continued operations). The law should require “approval” (i.e., plants should be obligated to “notify and 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 obtained the necessary authority or license to replicate the copyrighted work).
- **No Identification Code Requirement for Stampers/Masters:** The Thai Bill defined stampers and masters as machines, which means there was 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. However, we understand that the Department of Intellectual Property has agreed to redefine “stampers and masters” as optical disc products.
- **No Timely Monitoring of Export of ODs and Imports/Exports of Machines, Stampers/Masters and Raw Materials:** The Thai Bill contained after-the-fact “notification” requirements (with lengthy grace periods), and there was no provision for monitoring transfers of 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 should 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 failed to 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” is not helpful, and regulations 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 failed to 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 could provide for this.
- **Inadequate Criminal Penalties:** The Thai Bill contained 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, would result only in the imposition of non-deterrent fines (US\$2,500, with no express possibility of revocation or plant closure). Penalties should be deterrent, including mandatory imprisonment and deterrent fines, to be doubled for recidivists.
- **“Mastering Code” May Inadvertently Create Burden on Right Holders:**<sup>31</sup> The definition of “Mastering Code” inadvertently would create burdens on the ability of legitimate copyright owners to do business in Thailand, and also likely violates Thailand’s international obligations. The definition of Mastering Code and other provisions provide that copyright owners must apply for and affix to any legitimate discs a “mastering code” to all discs. This requirement creates a formality that probably runs afoul of Thailand’s international obligations, and also runs counter to the purpose of an optical disc legislation, which is to control the production of optical discs by requiring optical disc plants to apply for and affix mastering code to all discs to trace the content back to a particular plant where a disc was produced.

## Thai Parliament Should Modernize the Copyright Law

IIPA recognizes that one element of the FTA negotiations with the United States revolves around substantive copyright protection, and that, in light of this, consideration of a draft set of copyright amendments released by the government in May 2003 may have slowed somewhat. Nonetheless, IIPA understands that the previous draft may still be undergoing revision and consideration. IIPA believes that passage of a strong copyright law which is consistent with an FTA with the United States would be a welcome development. While not intending to provide an exhaustive list of possible FTA requirements, IIPA notes below where that 2003 draft text stood with respect to many important substantive and enforcement concepts. The draft amendments which IIPA reviewed would have made the following positive changes:

- Strengthen civil remedies by allowing courts to award compensatory and punitive damages and lost profits.
- Possibly make it an offense for a photocopy shop to provide infringing copies of works (i.e., the handing over of infringing copies of a work for gain).

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<sup>31</sup> IIPA understands that the situation with the issuance of “mastering code” to copyright owners may well be in the process of clarification. IIPA hopes that in the final version of the law, or in implementing regulations at the latest, that this issue will be resolved, and that in fact, right holders will not be required to affix their own copyright codes to legitimate CDs distributed in Thailand.

- Clarify that temporary copies are covered as reproductions under the Thai Act.
- Distinguish between “disposal” (sale or other transfer), rental, and “communication to the public.”
- Attempt to deal with the WIPO Treaties’ requirements, including to prohibit the circumvention of technological protection measures (TPMs), and to prohibit the unlawful tampering with rights management information (RMI).
- Strengthen criminal provisions in certain respects.
- Establish voluntary collective management of copyright and safeguarding against overzealous collection of royalties on behalf of performers (or the unlawful collection on behalf of other copyright owners).

At the same time, there were certain areas which remained ambiguous and the government needed to clarify:

- Whether the exclusive “communication to the public” right includes coverage of “any communication, whether by wire or wireless means.”
- Whether the addition of draft Section 70/2 covers a photocopy shop that may not make, but hands over, the infringing copy.
- Whether competent officials have the ability to carry out inspections *ex officio* or upon the request of a right holder, whether they may carry out inspections “at any time of day or night,” and whether they may seize infringing or suspected infringing goods, documents, tools, and implements used in commission of the infringement/offense.
- Whether right holders may participate in inspections of premises and obtain samples of infringing copies and material and have access to equipment and documents seized.
- Whether the remedies of forfeiture or destruction of infringing goods/documents/tools/implements is available.
- Whether leaking information regarding a surprise inspection or entry into a premise is a criminal offense.
- Whether the exception to temporary copy protection is explicitly subject to the Berne three-part test, is made not applicable to computer programs, and otherwise, is sufficiently narrow to satisfy Thailand’s international obligations.
- Whether 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.
- Whether landlords (e.g., of the pirate markets) are liable for infringing activities of their tenants.

- Whether the exception in Section 43 is interpreted in Thailand to permit unauthorized reproductions of computer programs as well as other works, which would be a violation of Thailand's international standards.
- Whether provisions on presumptions of subsistence of copyright and copyright ownership are made subject to burdensome proof requirements that are TRIPS-incompatible in practice.

Finally, there are other areas in which the draft would have weakened protection provided in the current law (most notably, the draft would weaken criminal penalties in several significant ways, including by removing mandatory statutory minimum fines and imprisonment, and by lowering maximum fines). In addition, we urge the Thai government to follow the international trend of 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).

We note that the draft attempted 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 2003 draft fell somewhat short of meeting the requirements of key aspects of these important treaties.<sup>32</sup> In particular, the draft provisions to prohibit the circumvention of technological protection measures (TPMs) would have to be tightened further to fully implement this crucial requirement of the WIPO treaties, by:

- 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).<sup>33</sup>
- Providing for civil, provisional, and administrative remedies, including injunctive relief (in addition to criminal remedies) for circumventing, and providing for at least the same level of criminal penalties for circumventing TPMs as for copyright offenses.

In addition, Article 32 of the current law creates an overly-broad exception which has been interpreted by courts to allow photocopying of entire textbooks and other published materials, as long as the copy is made for "educational purposes." This Article, as interpreted,

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<sup>32</sup> 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.

<sup>33</sup> The draft provision also leaves unclear whether other indirect proof of improper purpose or use is sufficient, 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.

is entirely out of step with Thailand's international obligations. The Royal Thai Government must amend the law to ensure that exceptions or limitations in the law are not applied to permit students, teachers, or copyshops (or anyone else acting on their behalf) to make or distribute unauthorized reproductions or unauthorized translations of works, compilations, or substantial portions thereof, in a manner that impinges on the rights accorded to copyright owners under international law.

By updating its copyright regime for the digital age and joining the WIPO Treaties, Thailand can better position itself in the FTA negotiations with the U.S., and can emerge as a leader in the area of copyright protection in Southeast Asia.<sup>34</sup>

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,<sup>35</sup> 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 more than five 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.

## **Royal Thai Government Must Address Organized Crime**

It has long been known that piracy in Thailand is a highly organized criminal enterprise, and that the players in Thai piracy are often powerful, are often engaged in other criminal activities, and are often multi-national in scope. Even in the case of small-time pirates, one element commonly found in organized syndicate behavior—violence—is prevalent.<sup>36</sup> The fact is that organized crime is deeply involved in Thai piracy.<sup>37</sup> In addition, foreign investment from known pirate groups is well documented, including investment from Taiwan, Macau, Hong Kong, China, and Malaysia.<sup>38</sup> It is critical that the Royal Thai Government begin to address organized

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<sup>34</sup> IIPA notes, for example, that 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.”

<sup>35</sup> Act on Organizations Allocating Frequency Waves and Supervising Radio/Television Broadcasting and Telecommunication Business B.E. 2543 (2000).

<sup>36</sup> For example, on November 28, 2004 Bangkok Metropolitan Police officers raiding a night market at King Rama I Bridge were attacked by around 30 pirates and gang members. Some officers were injured in the incident.

<sup>37</sup> In 2004, a 40-year-old Thai man suspected of trying to run a piracy and protection racket in a Bangkok shopping mall was shot and killed as he sat outside his shop after closing hours in September 2004. Known as Lek Fortune, this individual had recently opened a pirate video shop in the Fortune Town IT Mall in Bangkok's Dindaeng district. According to the man's nephew and business partner, Fortune was shot twice in the head by a man who ran outside of the shopping complex to a waiting motorbike after the shooting. The police believe the murder resulted from conflicts the dead man had had with organized criminal gangs who control the piracy business in the Fortune Town mall, and in another mall where Mr. Fortune had previously operated a shop. Mr. Fortune is suspected of trying to break a gang's existing monopoly on providing “protection” to shop owners.

<sup>38</sup> There appears to be increasing involvement of organized crime in piracy in Thailand. On September 6, 2003, the 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 four Thai and one Singaporean national. Several Malaysian nationals have been arrested trying to transport pirate optical discs from Malaysia to Thailand.

criminal syndicate involvement in piracy, initiating investigations into and working toward the apprehension of those who control the piracy production and distribution networks. Prosecuting mere employees of these syndicates will not make a dent in the piracy problem

To directly confront the problem of organized crime and its relation to copyright piracy in Thailand, it is imperative that the Royal Thai Government (1) recognize the problem, and (2) take all necessary steps to address it. One way to ensure that organized criminals engaged in copyright piracy can be stopped is to include IP violations in various organized crime statutes, such as the Money Laundering Prevention and Suppression Act B.E 2542 (MLPSA).<sup>39</sup> IIPA believes that the AMLO (Anti-Money Laundering Office) officials must have copyright piracy included as one predicate offense in order to successfully tackle organized crime and copyright piracy in Thailand.<sup>40</sup> In addition to using existing tools and simply adding copyright piracy as a predicate offense, Thailand is also urged to look towards adopting a comprehensive organized crime statute (*cf.* Hong Kong's Organized and Serious Crimes Ordinance [OSCO]), which would include intellectual property rights violations as a predicate offense.

Unfortunately, as was reported in the press, while the government had intended to include copyright piracy as a predicate offense in a draft bill to amend the MLPSA, the Law Drafting Committee of the Council of State concluded that copyright should be removed as a predicate offense.<sup>41</sup> The decision remains up to the Cabinet, and IIPA in strongest terms urges the Cabinet not to delete copyright piracy as a predicate offense for the enforcement of the MLPSA.

## **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).<sup>42</sup>

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\$52,030). 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

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<sup>39</sup> Under this statute, generally, it is a crime to transfer, convert or receive the transfer of funds or property arising from certain criminal acts including hiding or concealing the source of funds. Violators are liable to imprisonment of a maximum of ten years and a fine of up to 200,000 baht (about US\$5,200).

<sup>40</sup> IIPA notes that it is inconsistent that Trademark and Patent infringements are considered predicate offenses for enforcement of such organized crime statutes, but that copyright offenses are left out.

<sup>41</sup> Nont Horayangura and Say Sujintaya, *Committee rejects IP offences on public interest grounds*, September 28 2004, at <http://www.worldcopyrightlawreport.com/Article/?r=435&c=3003050>.

<sup>42</sup> 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.

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 2003, \$2.7 billion in goods entered the U.S. from Thailand duty free under the GSP Program—approximately 17.9% of its total exports to the U.S. In the first eleven months of 2004, almost \$2.9 billion in goods entered the U.S. from Thailand duty free under the GSP Program—more than 18.1% of its total exports to the U.S. Enjoying the benefit is subject to the requirement that Thailand provide “adequate and effective” copyright protection.

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